

No. 17-5830

IN THE SUPREME COURT OF THE UNITED STATES

RICKY D. WEBSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a criminal defendant sentenced pursuant to a binding Federal Rule of Criminal Procedure 11(c)(1)(C) plea agreement is eligible for a sentence reduction under 18 U.S.C. 3582(c)(2), which authorizes a reduction only for a "defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission," where the amendment on which the defendant relies occurred before his sentence was imposed.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is not published in the Federal Reporter but is reprinted at 689 Fed. Appx. 616.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 2017. A petition for rehearing was denied on July 10, 2017 (Pet. App. B1). The petition for a writ of certiorari was filed on July 27, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Kansas, petitioner was convicted of conspiracy to manufacture, to possess with intent to distribute, and to distribute 50 grams or more of cocaine base (crack cocaine), in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(iii); and of possession of a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c). Pet. App. A2; Judgment 1. He was sentenced to 180 months of imprisonment, to be followed by five years of supervised release. Pet. App. A2. The district court subsequently dismissed petitioner's motion to reduce his sentence under 18 U.S.C. 3582(c)(2). See ibid. The court of appeals affirmed. Id. at A1-A3.

1. In June and July of 2010, petitioner was involved in drug trafficking out of his home in Kansas City, Kansas. Presentence Investigation Report (PSR) ¶¶ 25-33. On June 30, 2010, the Kansas City Police Department received a complaint that an individual, later identified as petitioner's co-defendant, had been observed "cooking" crack cocaine in petitioner's kitchen. PSR ¶ 26. Following the complaint, police used a confidential informant to make a series of controlled buys from residents of the home between June 30 and July 6. PSR ¶¶ 25-27. Two of the purchases occurred in a car parked in petitioner's driveway. PSR ¶¶ 26-27. Petitioner was in the car for one of those purchases. PSR ¶ 26.

Based on these events, Kansas City police officers applied for and received a warrant to search petitioner's residence. PSR ¶ 28. Officers searched the home on July 7, 2010, and recovered more than 100 grams of crack cocaine, as well as cocaine, marijuana, and items utilized to manufacture crack cocaine. PSR ¶ 29. Officers also recovered 18 firearms, ten of which had been previously reported as stolen. PSR ¶ 30.

2. In July 2010, a federal grand jury in the District of Kansas returned an eight-count indictment, charging petitioner with numerous drug- and firearms-related offenses. See Indictment 1-6. Eventually, petitioner pleaded guilty to two counts: conspiracy to manufacture, to possess with intent to distribute, and to distribute 50 grams or more of cocaine base (crack cocaine), in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(iii); and possession of a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c). Judgment 1.

In August 2010, before petitioner entered his plea, Congress passed the Fair Sentencing Act of 2010 (FSA), Pub. L. No. 111-220, 124 Stat. 2372, which raised the drug quantity necessary to trigger a ten-year mandatory minimum under 21 U.S.C. 841(b)(1)(A) from 50 grams of crack cocaine to 280 grams. FSA § 2, 124 Stat. 2372. The FSA also directed the United States Sentencing Commission to "make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve

consistency with * * * applicable law." Id. § 8(2), 124 Stat. 2374.

In October 2010, petitioner entered a plea agreement pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C). Rule 11(c)(1)(C) allows a defendant and the government to agree to "a specific sentence" that they consider "the appropriate disposition of the case" and that "binds the court once the court accepts the plea agreement." The Rule 11(c)(1)(C) agreement here stated that "an appropriate disposition of the case" was "180 months consisting of a sentence of 120 months in prison on Count 1 and 60 months consecutive on Count 6," Plea Agreement 7, reflecting the pre-FSA mandatory-minimum sentence for the drug-trafficking count and the mandatory-minimum sentence for the firearm count. See 21 U.S.C. 841(b)(1)(A) (2006); 18 U.S.C. 924(c). The plea agreement made clear that "because this proposed sentence is sought pursuant to Fed. R. Crim. P. 11(c)(1)(C), the parties are not requesting imposition of an advisory guideline sentence." Plea Agreement 8. As consideration for petitioner's guilty plea, the government agreed to dismiss the remaining counts and not to file a motion under 21 U.S.C. 851 to increase petitioner's minimum and maximum sentences based on his prior Kansas conviction for possession of cocaine. Plea Agreement 8-9.

The following month, pursuant to the FSA, the Sentencing Commission promulgated Amendment 748, which, among other things, lowered the offense levels for crack-cocaine offenses in

Sentencing Guidelines § 2D1.1(c)'s drug-quantity table and changed the marijuana equivalency for 1 gram of crack cocaine from 20 kilograms of marijuana to 3.751 kilograms of marijuana. Sentencing Guidelines App. C, Amend. 748 (Nov. 1, 2010). The Sentencing Commission subsequently made Amendment 748 permanent through Amendment 750, and made these changes to Section 2D1.1 retroactive through Amendment 759. See id. Amends. 750, 759 (Nov. 1, 2011).

3. Petitioner's sentencing hearing was held on February 8, 2011. See 2/8/11 Sent. Tr. 1-20. In January 2011, in advance of petitioner's sentencing, the Probation Office prepared a revised PSR that used the 2010 Sentencing Guidelines, as amended by Amendment 748. PSR ¶ 37. Applying the amended drug-quantity table and drug equivalencies, the PSR calculated a total offense level of 25 and a criminal history category of II, which would have resulted in an advisory sentencing range of 63 to 78 months on the drug-trafficking count. PSR ¶¶ 47, 57, 111. But the PSR observed that under the pre-FSA mandatory minimum, the sentencing range for that count was 120 months. Ibid.; see Sentencing Guidelines § 5G1.1(b). The PSR also recommended a consecutive 60-month sentence on the firearm count, the mandatory-minimum sentence under 18 U.S.C. 924(c). PSR ¶ 112.

At sentencing, the district court adopted the PSR and the proposed sentencing range, including its reliance on the pre-FSA mandatory minimum for the drug-trafficking count. 2/8/11 Sent. Tr. 10-11. After considering the advisory Guidelines range, the

sentencing factors identified in 18 U.S.C. 3553(a), and the plea agreement, the court accepted the Rule 11(c)(1)(C) agreement and sentenced petitioner to 180 months of imprisonment -- 120 months of imprisonment on the drug-trafficking count and 60 consecutive months of imprisonment on the firearm count -- followed by 5 years of supervised release. 2/8/11 Sent. Tr. 14-16.

4. a. In January 2012, petitioner filed a motion to reduce his sentence under 18 U.S.C. 3582(c)(2). Section 3582(c)(2) provides that a court "may reduce" the sentence of a "defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." Petitioner argued that the district court should reduce his sentence because the FSA "is retroactive to offenders whose criminal conduct occurred prior to the enactment of the Fair Sentencing Act, but who are sentenced after November 1, 2010." Mot. to Reduce Sent. 1 (Jan. 3, 2012). Relying on Tenth Circuit precedent holding that the FSA did not apply to offenses committed prior to its enactment, the district court denied petitioner's motion. Order 3-4 (May 1, 2012) (citing United States v. Lewis, 625 F.3d 1224, 1228 (2010), cert. denied, 563 U.S. 907 (2011), abrogated by Dorsey v. United States, 567 U.S. 260, 281 (2012)).

b. In July 2012, petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. Initially, petitioner argued only that his counsel had rendered ineffective

assistance in a number of ways, including by “fail[ing] to appeal the [f]act” that the FSA “was in effect during sentencing.” C.A. ROA 152. In his reply brief, however, petitioner requested resentencing directly under the FSA, asking the court to “retroactively apply the FSA” and “lower[] his mandatory minimum sentence.” Id. at 216-217 (citing Dorsey, supra). The district court declined to consider petitioner’s FSA argument because petitioner was “not permitted to raise new arguments in his reply brief.” Order 2 & n.2 (Apr. 18, 2013).¹

5. a. In February 2016, petitioner filed a second motion to reduce his sentence pursuant to 18 U.S.C. 3582(c)(2). Petitioner argued again that he should have been sentenced in accordance with the FSA’s lower mandatory minimums, and asked the court to “resentence him to a five-year mandatory [minimum] sentence, or the lower end of the Guidelines.” Mot. to Reduce Sentence 4 (Feb. 19, 2016). In response, the government argued, based on Freeman v. United States, 564 U.S. 522 (2011), that petitioner was not entitled to relief under Section 3582(c)(2) because petitioner’s sentence was based on the binding Rule 11(c)(1)(C) plea agreement and not on a sentencing range that had subsequently been lowered by the Sentencing Commission. U.S. Resp.

¹ After appointing counsel, the district court granted relief on an unrelated ineffective assistance of counsel claim. Order (May 5, 2014); see 5/5/14 Tr. 1-10. But the court of appeals reversed, see 809 F.3d 1158, 1171, and this Court denied certiorari, 136 S. Ct. 2420. The district court then reinstated petitioner’s original judgment. Order (Mar. 1, 2016).

to Mot. to Reduce Sentence 3-6 (May 31, 2016) (citing Freeman, 564 at 535-536 (Sotomayor, J., concurring in the judgment)).

b. In Freeman, supra, this Court considered whether a defendant who enters into a binding Rule 11(c)(1)(C) plea agreement is eligible for a sentence reduction under Section 3582(c)(2). Four Justices concluded that such a defendant's sentence is "based on" a sentencing range subsequently lowered by the Commission -- and thus that the defendant is eligible for a sentence reduction under Section 3582(c)(2) -- "to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement." 564 U.S. at 530 (opinion of Kennedy, J.). For example, where the sentencing transcript indicated that the district court had "expressed its independent judgment that the sentence was appropriate in light of" a subsequently lowered guidelines range, the defendant would be eligible for a sentence reduction. Id. at 531.

Concurring in the judgment, Justice Sotomayor concluded that a defendant who pleads guilty under a Rule 11(c)(1)(C) agreement typically will not be eligible for a sentence reduction under Section 3582(c)(2), because the defendant's sentence usually will be "based on" the Rule 11(c)(1)(C) agreement itself, not a sentencing range subsequently lowered by the Commission. Freeman, 564 U.S. at 535-536. Justice Sotomayor added, however, that a defendant would be eligible if the Rule 11(c)(1)(C) agreement

"expressly uses a Guidelines sentencing range applicable to the charged offense to establish the term of imprisonment, and that range is subsequently lowered by the" Commission. Id. at 534.

Four dissenting Justices concluded that a defendant who pleads guilty pursuant to a Rule 11(c)(1)(C) agreement is never eligible for a sentence reduction under Section 3582(c)(2) because such a defendant's sentence is always "based on" the binding plea agreement, not any sentencing range lowered by the Commission. Freeman, 564 U.S. at 544-546 (Roberts, C.J., dissenting).

c. The district court dismissed petitioner's second motion for a sentence reduction. Pet. App. C1-C7. Relying on Justice Sotomayor's concurrence, the court reasoned that "even if the FSA applies to [petitioner]," petitioner's sentence was based on a plea agreement and not "'on a sentencing range that has subsequently been lowered by the Sentencing Commission,' as required * * * under 18 U.S.C. § 3582(c)(2)." Id. at C4, C6. The court observed that petitioner's plea agreement "neither states [his] criminal history category nor discusses the applicable sentencing guidelines." Id. at C6. And in fact, the court noted, the agreement "contains express language disclaiming reliance on the Guidelines." Ibid.

6. The court of appeals affirmed. Pet. App. A1-A3. The court noted that, under circuit precedent, it was bound to follow Justice Sotomayor's concurrence in Freeman. Id. at A3. It therefore reasoned that, "when a [Rule 11(c)(1)(C)] plea agreement

'does not use or employ a Guideline sentencing range, the defendant is not entitled to the benefit of the amendment.'" Ibid. (citation omitted). The court observed that petitioner's "plea agreement does not reference the guidelines other than to expressly disclaim their use in imposing [petitioner's] sentence." Ibid. Accordingly, the court concluded that petitioner's sentence was "not based on the guidelines, and he is not entitled to a sentence reduction." Ibid.

ARGUMENT

Petitioner contends (Pet. 3-11) that the court of appeals erred in finding him ineligible for a sentence reduction under 18 U.S.C. 3582(c)(2). That contention is mistaken. The court of appeals' decision correctly determined that petitioner's sentence was not "based on a sentencing range that has subsequently been lowered by the Sentencing Commission," but on the Rule 11(c)(1)(C) plea agreement, which specifically disclaimed any reliance on the Guidelines. Pet. App. A3. Moreover, even if petitioner's sentence were "based on" a Guidelines range, petitioner would still be ineligible for relief because he has not identified any change to the Guidelines that "subsequently * * * lowered" his advisory sentencing range. 18 U.S.C. 3582(c)(2). The FSA was passed before petitioner's sentencing and the PSR applied the amended Guidelines when calculating petitioner's sentencing range. Petitioner is thus ineligible for a Section 3582(c)(2) sentence reduction under any of the approaches described in Freeman v. United States, 564

U.S. 522 (2011), and it is therefore unnecessary to hold this petition for this Court's resolution of Hughes v. United States, cert. granted, No. 17-155 (Dec. 8, 2017), or to undertake any further review.

1. Petitioner contends (Pet. 3-4) that he is eligible for a sentence reduction under the approach adopted by Justice Sotomayor's opinion in Freeman, supra. That is incorrect. In her concurring opinion, Justice Sotomayor concluded that defendants sentenced pursuant to Rule 11(c)(1)(C) agreements may be eligible for Section 3582(c)(2) relief only in cases where the agreement "call[s] for the defendant to be sentenced within a particular Guidelines sentencing range" or "make[s] clear that the basis for the specified [prison] term is a Guidelines sentencing range." 564 U.S. at 538-539. Petitioner's plea agreement does not satisfy either criterion.

Petitioner's agreement never mentioned the otherwise-applicable Guidelines range or indicated that the basis for the agreed-to sentence was a Guidelines range. To the contrary, the plea agreement explained that the parties proposed a binding 180-month sentence "as an appropriate disposition of the case because * * * the interests of justice [we]re served by the sentence." Plea Agreement 7-8. Rather than "call for the defendant to be sentenced within a particular Guidelines sentencing range," Freeman, 564 U.S. at 538, the plea agreement stated that "the parties [we]re not requesting imposition of an advisory guideline

sentence,” Plea Agreement 8 (emphasis added). The courts below therefore correctly concluded that, under the standard set forth in Justice Sotomayor’s concurrence, petitioner’s sentence was not “based on” a Guidelines range.

2. The Court has granted certiorari in Hughes to consider the proper application of the divided decision in Freeman and the proper application of Section 3582(c)(2) to Rule 11(c)(1)(C) plea agreements. Petitioner, however, has not contested that Justice Sotomayor’s concurrence in Freeman is the controlling opinion nor argued for a different approach to applying Section 3582(c) in the context of a Rule 11(c)(1)(C) agreement. And a hold for this Court’s disposition of Hughes is additionally unwarranted because, even if petitioner’s sentence were “based on” a Guidelines range, he would not be entitled to relief.

Section 3582(c)(2) allows for a sentence reduction only where the sentencing range on which the defendant’s sentence was based “has subsequently been lowered by the Sentencing Commission.” 18 U.S.C. 3582(c)(2). In petitioner’s case, the FSA was passed before petitioner’s sentence was imposed and the PSR applied the drug-quantity table and drug-equivalency guideline amended pursuant to the FSA in order to calculate petitioner’s sentencing range. PSR ¶¶ 37-38, 47, 57. Petitioner argues (Pet. 4) that “Amendment 750 lowered the sentencing range” for his offense, but

Amendment 750 merely made permanent the relevant changes promulgated by Amendment 748, which the PSR in his case applied.²

The sentencing range proposed by the PSR and adopted by the district court pursuant to the plea agreement ultimately matched the pre-FSA mandatory-minimum sentence for the drug-trafficking count. Under this Court's decision in Dorsey v. United States, 567 U.S. 260 (2012), the lower mandatory minimum was applicable. Even though petitioner was convicted of pre-FSA conduct, because he was sentenced post-FSA, petitioner was subject to a five-year mandatory minimum on the drug-trafficking count, rather than the ten-year mandatory minimum calculated by the PSR that was adopted by the district court. See id. at 281. But the district court's erroneous understanding of the applicability of the FSA is not cognizable on a motion under Section 3582(c)(2). That provision is not a vehicle for raising claims of sentencing error, but only for reducing sentences "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. 3582(c)(2). Because petitioner has not made such a showing, the

² In 2014, the Sentencing Commission adopted Amendment 782, which further lowered the base-offense levels associated with the drug quantities in Section 2D1.1(c). See Sentencing Guidelines App. C Supp., Amend. 782 (Nov. 1, 2014). The Commission made Amendment 782 retroactive, with the caveat that a court "shall not order a reduced term of imprisonment based on Amendment 782 unless the effective date of the court's order is November 1, 2015, or later." Id. Amend. 788 (Nov. 1, 2014). Petitioner has never argued that he is entitled to a reduced sentence based on Amendment 782.

court of appeals correctly declined to grant him relief under that section.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2018