No. 17-6161

IN THE SUPREME COURT OF THE UNITED STATES

ARNULFO DAVILA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

JOHN P. CRONAN
Acting Assistant Attorney General

MICHAEL A. ROTKER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a criminal defendant sentenced pursuant to a binding Federal Rule of Criminal Procedure 11(c)(1)(C) plea agreement that incorporates a statutory mandatory minimum sentence 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."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 8a-9a[1]) is not published in the Federal Reporter but is reprinted at 690 Fed. Appx. 234. The order of the district court (Pet. App. 1a-4a) is not published in the Federal Supplement but is available at 2016 WL 9450077.

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[1] The appendix as filed by petitioner does not include page numbers. The government has added page numbers for ease of reference.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 2017. A petition for rehearing was denied on July 7, 2017 (Pet. App. 6a-7a). 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 Northern District of Texas, petitioner was convicted of possession with intent to distribute methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (2000 & Supp. II 2002), and possession of a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). Judgment 1. He was sentenced to 240 months of imprisonment, to be followed by ten years of supervised release, on the drug charge, and 60 months of imprisonment, to be followed by five years of supervised released, on the firearm charge, with the prison sentences to run consecutively. Id. at 2-3. Petitioner subsequently moved for a sentence reduction under 18 U.S.C. 3582(c)(2). The court denied the motion. Pet. App. 1a-4a. The court of appeals affirmed. Id. at 8a-9a.

1. In January 2004, federal law enforcement agents learned from a confidential informant that petitioner had been selling methamphetamine, marijuana, and cocaine from a residence in

Dallas, Texas. Presentence Investigation Report (PSR) ¶ 16. The informant conducted multiple controlled buys of drugs from petitioner, including some in which petitioner exchanged drugs for firearms. PSR ¶¶ 18-27. In May 2004, federal agents arrested petitioner following one such controlled buy. PSR ¶ 27. Officers then executed a search warrant at petitioner's residence, where they discovered additional drugs and firearms. PSR ¶ 28.

A grand jury in the Northern District of Texas returned an 11-count indictment charging petitioner with numerous drug and firearms-related offenses. Indictment 1-12. Petitioner pleaded guilty on two counts: intent to distribute methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (2000 & Supp. II 2002), and possession of a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). PSR ¶ 33. Because petitioner had a prior felony drug conviction, he was subject to a mandatory minimum sentence of 20 years for the drug-trafficking charge, see 21 U.S.C. 841(b)(1)(A) (2000 & Supp. II 2002). PSR ¶¶ 44, 65. He was also subject to a mandatory consecutive sentence of at least five years for the firearm charge, see 18 U.S.C. 924(c)(1)(A)(i) and (D)(ii). PSR ¶ 65.

Petitioner entered a plea agreement pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), which 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 "the appropriate term of imprisonment" was 25 years, "followed by a mandatory term of supervised release of not less than ten" years. Plea Agreement ¶ 5. The agreement stated that "this provision is binding on the Court" if it "accepts this plea agreement," and that the district court "remains free" to consider the Sentencing Guidelines in determining aspects of the sentence "[o]ther than the agreed term of imprisonment." Ibid.

The district court accepted the Rule 11(c)(1)(C) agreement and sentenced petitioner to 25 years of imprisonment -- the mandatory minimum sentence of 20 years on the drug charge and the consecutive mandatory minimum sentence of five years on the firearm charge. Judgment 2. The court also imposed 10 years of supervised release on the drug charge and five years of supervised release on the firearm charge. Id. at 3. Petitioner's appeal was dismissed for want of prosecution. 01/30/06 Order (No. 05-11047).

2. a. In November 2014, the U.S. Sentencing Commission (Commission) adopted Amendment 782, which lowered the advisory Sentencing Guidelines ranges for most drug offenses. 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).

After Amendment 782 took effect, petitioner moved for a sentence reduction under 18 U.S.C. 3582(c)(2), which 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."

b. In Freeman v. United States, 564 U.S. 522 (2011), 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 generally will not be eligible for a sentence reduction under Section 3582(c)(2), because the defendant's sentence generally

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 denied petitioner's motion for a sentence reduction. The court observed that the plea agreement "made clear" that "the term of imprisonment applicable to" petitioner's conviction "'was not derived from the quantity of [drugs] involved in the offense under the Guidelines'" and thus not based on the sentencing range lowered by the Commission in Amendment 782. Pet. App. 3a (quoting United States v. Chopane, 603 Fed. Appx. 325, 326 (5th Cir.) (per curiam), cert. denied, 136 S. Ct. 268 (2015) (brackets in original)). The court stated that it could not reduce petitioner's "sentence under Freeman because the plea agreement did not expressly state that the sentence would

be determined pursuant to the * * * Guidelines, and the sentence specified by the agreement was not based on the applicable advisory guidelines range." Ibid. (quoting Chopane, 603 Fed. Appx. at 326).

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 8a-9a. The court observed that petitioner's plea agreement "did not call for him to be sentenced within a particular guidelines range, nor did it indicate that the basis for the specified term was a guidelines range applicable to his offense." Id. at 9a (citing Freeman, 564 U.S. at 534-540 (Sotomayor, J., concurring in the judgment), and United States v. Benitez, 822 F.3d 807, 809-812 (5th Cir. 2016) (per curiam)).[2] The court additionally observed that "the plea agreement did not explicitly employ a particular guidelines range to establish the term of imprisonment." Ibid. The court accordingly determined that petitioner "was not eligible for a sentence reduction because his sentence was not 'based on a sentencing range that has subsequently been lowered by the Sentencing Commission.'" Ibid. (quoting 18 U.S.C. 3582(c)(2)).

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[2] In Benitez, the Fifth Circuit "explicitly adopt[ed] Justice Sotomayor's concurring opinion in Freeman," and held that her opinion "establishes the criteria in this circuit for determining whether the sentence of a defendant who pleads guilty pursuant to a Rule 11(c)(1)(C) plea agreement is 'based on a sentencing range that has been lowered by the Sentencing Commission.'" 822 F.3d at 811 (quoting 18 U.S.C. 3582(c)(2)).

ARGUMENT

Petitioner contends (Pet. 4-7) that the courts below erred in finding him ineligible for a sentence reduction under 18 U.S.C. 3582(c)(2). That contention is mistaken. The decisions below correctly reflect that petitioner's sentence was not "based on a sentencing range that has subsequently been lowered by the Sentencing Commission," ibid., but instead on the mandatory minimum sentences incorporated by his binding Rule 11(c)(1)(C) agreement and unaffected by Amendment 782. See Sentencing Guidelines App. C Supp., Amend. 782 (Nov. 1, 2014). Petitioner is thus not eligible for a Section 3582(c)(2) sentence reduction under any of the approaches described in Freeman v. United States, 564 U.S. 522 (2011). There is accordingly no need to hold this petition for Hughes v. United States, cert. granted, No. 17-155 (Dec. 8, 2017), or to undertake any further review.

1. The district court correctly denied petitioner's motion for a sentence reduction under Section 3582(c)(2) on the ground that he is not eligible for such a reduction. Pet. App. 1a-4a. Section 3582(c)(2) provides in full:

> [I]n the case 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 pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is

> consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. 3582(c)(2).

Petitioner contends that the district court abused its discretion by denying his Section 3582(c)(2) motion "without considering arguments concerning the [Section] 3553(a) factors." Pet. 6 (citing United States v. Larry, 632 F.3d 933 (5th Cir. 2011)). But as the text of Section 3582(c)(2) indicates and the precedent cited by petitioner confirms, a "court first considers whether the sentence modification is authorized," and only then may consider "whether such modification is warranted" under the Section 3553(a) factors. Larry, 632 F.3d at 936 (citing Dillon v. United States, 560 U.S. 817, 826 (2010)). Here, the courts below correctly found that a sentence reduction was not "authorized" at the first step of that "two-step inquiry," Dillon, 560 U.S. at 826, because petitioner's sentence was not "based on a sentencing range that has subsequently been lowered by the Sentencing Commission," Pet. App. 9a (quoting 18 U.S.C. 3582(c)(2)). The courts accordingly did not abuse their discretion or otherwise err in declining to consider the Section 3553(a) factors relevant at the second step of the inquiry. See Dillon, 560 U.S. at 826; cf. Larry, 632 F.3d at 936 (finding that district court abused its discretion in failing to consider Section 3553(a) factors where the "district court implicitly found and the parties agree that a sentence modification was authorized") (emphasis added).

2. a. Petitioner also suggests that his sentence was "based on" a guidelines range subsequently lowered by the Commission -- and that he is accordingly eligible for a sentence reduction under Section 3582(c)(2) -- because "the Guidelines enter the sentencing process long before the district court imposes the sentence." Pet. 7. The Guidelines, however, played no role in determining petitioner's sentence. Petitioner was subject to mandatory minimum sentences fixed by statute, see 21 U.S.C. 841(b)(1)(A); 18 U.S.C. 924(c)(1)(A), and incorporated into a binding Rule 11(c)(1)(C) agreement. Indeed, the agreement expressly stated that "consideration of the Sentencing Guidelines" would be "appropriate" only for aspects of the sentence "[o]ther than the agreed term of imprisonment." Plea Agreement ¶ 5.[3]

Petitioner's sentence was the minimum permitted under the relevant statutes, and the Commission could not and did not lower any applicable sentencing range. See Neal v. United States, 516 U.S. 284, 295 (1996). The PSR calculated the guidelines range that would have applied in the absence of the mandatory minimum -- 87-108 months, PSR ¶ 66 -- and that range was subsequently lowered by the Commission in Amendment 782. But petitioner's sentence was not in any way "based on" that guidelines range. 18 U.S.C. 3582(c)(2). Indeed, that default guidelines range was

[3] For example, the guidelines would have been relevant to the district court's decision whether to impose a criminal fine. See PSR ¶ 77 (citing Sentencing Guidelines § 5E1.2) (2004)).

replaced by the mandatory minimum as petitioner's "guideline sentence" by operation of Sentencing Guidelines § 5G1.1(b), which the Sentencing Commission did not purport to amend in Amendment 782. And the Commission's policy statement governing Section 3582(c)(2) sentence reductions expressly states that a sentence reduction "is not authorized under 18 U.S.C. § 3582(c)(2)" if an amendment to the Guidelines "does not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment)." Sentencing Guidelines § 1B1.10, comment. (n.1(A)); see, e.g., United States v. Bogdan, 835 F.3d 805, 809 (8th Cir. 2016) (defendant sentenced pursuant to Rule 11(c)(1)(C) agreement that incorporated mandatory minimum sentence was not eligible for sentence reduction).

b. As noted above, the Fifth Circuit in United States v. Benitez, 822 F.3d 807 (2016) (per curiam), adopted Justice Sotomayor's Freeman concurrence as the controlling standard for determining when a defendant who pleads guilty under a Rule 11(c)(1)(C) agreement is eligible for a Section 3582(c)(2) sentence reduction. Id. at 811. The court of appeals relied on Benitez in finding petitioner ineligible for a sentence reduction. Pet. App. 9a. This Court recently granted certiorari in Hughes, supra, No. 17-155, which presents the question of which of the approaches outlined in Freeman is controlling. There is no need

to hold this case for Hughes, however, because petitioner would not be eligible for a Section 3582(c)(2) sentence reduction under any of the approaches outlined in Freeman.

Unlike the defendant in Freeman, petitioner was sentenced pursuant to a Rule 11(c)(1)(C) agreement that incorporated a statutory mandatory minimum sentence. Thus, the "sentencing range" subsequently lowered by the Commission, which corresponds to the quantity of drugs at issue in petitioner's offense, was not "a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement," and petitioner would not be eligible for a sentence reduction under the Freeman plurality position. 564 U.S. at 530 (opinion of Kennedy, J.). Likewise, the Rule 11(c)(1)(C) agreement did not "expressly use[] a Guidelines sentencing range" that was "subsequently lowered by the" Commission to "establish the term of imprisonment," so petitioner would not be eligible for a sentence reduction under Justice Sotomayor's Freeman concurrence. Id. at 534 (Sotomayor, J., concurring in the judgment); see Pet. App. 9a. And petitioner would not be eligible for a sentence reduction under the Freeman dissenters' approach, which treats his sentence as necessarily "based on" the Rule 11(c)(1)(C) agreement. 564 U.S. at 544-546 (Roberts, C.J., dissenting). The courts below were accordingly correct to find petitioner ineligible for a sentence reduction. Further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

JOHN P. CRONAN
Acting Assistant Attorney General

MICHAEL A. ROTKER
Attorney

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