

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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ERIK LINDSEY HUGHES, )  
 )  
 Petitioner, )  
 )  
 v. ) No. 17-155  
 )  
 UNITED STATES, )  
 )  
 Respondent. )  
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ERIK LINDSEY HUGHES, )  
Petitioner, )

v. ) No. 17-155

UNITED STATES, )  
Respondent. )

- - - - -

Washington, D.C.

Tuesday, March 27, 2018

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:10 a.m.

APPEARANCES:

ERIC SHUMSKY, ESQ., Washington, D.C.;  
on behalf of the Petitioner.

RACHEL P. KOVNER, Assistant to the Solicitor  
General, Department of Justice, Washington,  
D.C.; on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:10 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 first this morning Case 17-155, Hughes versus  
5 the United States.

6 Mr. Shumsky.

7 ORAL ARGUMENT OF ERIC SHUMSKY

8 ON BEHALF OF THE PETITIONER

9 MR. SHUMSKY: Mr. Chief Justice, and  
10 may it please the Court:

11 The plurality and the concurrence in  
12 Freeman recognized two ways that a sentence  
13 following a C-type agreement can be based on  
14 the guidelines. Both are correct.

15 Now those opinions differed in their  
16 reasoning, such that Freeman itself has no  
17 precedential effect under Marks, but the two  
18 approaches can be united under a common  
19 umbrella, namely, long-standing principles of  
20 proximate and multiple causation. And that's  
21 because each form of guidelines reliance bears  
22 a close connection to the sentence.

23 The first --

24 JUSTICE SOTOMAYOR: Mr. Shumsky, could  
25 you address one issue for me on this question?

1 In a C agreement, the government is giving up,  
2 often, certain things. Sometimes they dismiss  
3 additional charges. Sometimes, as here, they  
4 give up filing a persistent felony certificate.  
5 Sometimes they agree not to prosecute someone  
6 important to the defendant. There are many  
7 things that go into that bargain.

8 How is a district court judge to  
9 determine whether a departure from the  
10 guideline range is justified? In what  
11 circumstances is what the government given up  
12 valuable enough to keep the original deal and  
13 when is it not?

14 MR. SHUMSKY: Justice Sotomayor, let  
15 me answer the question in two parts if I can.

16 First of all, those conditions, the  
17 way Your Honor describes C-type agreements, are  
18 true also for B-type agreements and for the  
19 sort of C-type agreements that the government  
20 concedes open the door to eligibility for  
21 relief under 3582(c)(2). So this particular  
22 category of C-type agreement that the  
23 government is proposing to carve out is not  
24 different in that way than all of these other  
25 categories of agreements.

1                   JUSTICE SOTOMAYOR:  Except that --  
2     let's take -- dismissing charges, I think it  
3     could be seen as relatively easy.  How  
4     different were the charges and the exposure  
5     from what was kept and what was the strength of  
6     the government's evidence?  And the government  
7     could talk about that at sentencing on those  
8     charges.

9                   But the persistent felony offender  
10    certificate is a different judgment, which is  
11    I, the government, think that a sentence of X  
12    amount justifies giving up that certificate.  
13    How would a district court make up for the loss  
14    of that belief by the government?

15                  MR. SHUMSKY:  Well, Justice Sotomayor,  
16    let me push back a little bit still on the  
17    first part of my answer and then -- and then  
18    get to the second part.  Again, that's no  
19    different than in a C-type agreement in which  
20    there is a range defined by the guidelines, and  
21    the government agrees that those sentences are  
22    eligible for relief under 3582(c)(2).  The only  
23    difference there is that, rather than a number  
24    potentially moving a bit, a range will move a  
25    bit.  So, again, I don't think it's

1 categorically different in that way.

2 But to answer the second part of the  
3 question, the district court judge, exercising  
4 her or his discretion, will apply the 3553(a)  
5 factors just like they do in any other case  
6 where there's a request for discretionary  
7 relief under 3582(c)(2).

8 Remember that this is only a question  
9 of eligibility. It's not a guarantee of  
10 relief. It just enables the case ordinarily to  
11 go back to the very same district court judge  
12 who is the one who approved the agreement in  
13 the first place and determine whether under the  
14 circumstances -- again, the 3553(a)  
15 circumstances -- some adjustment is  
16 appropriate.

17 JUSTICE SOTOMAYOR: When wouldn't any  
18 -- what would disqualify a defendant from  
19 eligibility? The plurality said this  
20 determination has to be made on a case-by-case  
21 basis. But as I read your brief, I can't --  
22 what are the scenarios where you think someone  
23 would not be eligible?

24 MR. SHUMSKY: Let me answer again in  
25 two ways and again maybe in exactly the same

1 two ways. This is no different than any other  
2 sentencing determination in the sense that it  
3 is predicated on the 3553(a) factors. And  
4 so --

5 JUSTICE SOTOMAYOR: No, I'm saying we  
6 read the transcript. Government comes in under  
7 a C agreement where it says we're not  
8 recommending a guideline sentence. We want to  
9 deviate from it because we think he cooperated  
10 but not enough to be substantial. He has an  
11 ill child, whatever the reasons are, we think a  
12 lower sentence is appropriate, and this is the  
13 sentence we picked.

14 Would that defendant, under your  
15 reading, still be eligible to go back to the  
16 district court for reconsideration?

17 MR. SHUMSKY: Well, just to clarify,  
18 Your Honor, if it is a -- a sentence under  
19 1B1.10 cannot drop below the bottom of an  
20 amended guidelines range. So that there's a  
21 floor on -- on how much the movement can be.

22 But, again, it will simply be the  
23 district court considering all of 35 --

24 JUSTICE SOTOMAYOR: So are you  
25 conceding there's no -- you can't imagine a



1 scenario where someone wouldn't be eligible?

2 MR. SHUMSKY: No, Your Honor. I'm  
3 sorry. Perhaps I misunderstood the question.

4 In a circumstance, for instance, under  
5 which the district court says -- using the  
6 discretion that it has post-Booker under cases  
7 like Gall and Spears, the district court says  
8 I'm not applying the guidelines at all, I  
9 disagree with the guidelines as a policy  
10 matter; under those circumstances, it's very  
11 hard to see how in any ordinary meaning of the  
12 term a sentence is based on the guidelines.

13 But absent circumstances like those,  
14 ordinarily, a sentence will be based on the  
15 guidelines, and that only makes sense. This  
16 Court has said over and over and over  
17 post-Booker, in cases like Gall and Peugh and  
18 most recently in Molina-Martinez, that  
19 sentences are ordinarily based on the  
20 guidelines.

21 And so it won't be surprising if,  
22 indeed, a district court concludes that that's  
23 what occurs. Not only is a sentence bargained  
24 for in the shadow of the guidelines, as the  
25 concurrence in Freeman put it; that is where

1 the parties start.

2 The United States Attorneys' Manual  
3 directs prosecutors not just to charge but to  
4 make plea-bargaining determinations consistent  
5 with the guidelines. Defense attorneys do  
6 exactly the same thing when they sit down with  
7 their client for the first time, they look at  
8 the guidelines and say: Here's what you're  
9 looking at.

10 And so it shouldn't be surprising  
11 that, ordinarily, other than in the sort of  
12 relatively extreme circumstances I was alluding  
13 to a moment ago, sentences, indeed, will be  
14 based on the guidelines.

15 CHIEF JUSTICE ROBERTS: The first  
16 question we posed was how to apply Marks in  
17 this situation, and I wonder if I'm a court of  
18 appeals judge, it seems to me the most  
19 important thing in deciding the case is to make  
20 sure that I'm not reversed. And it seems to me  
21 the best way to do that is through the --  
22 whatever you want to call it, the walking  
23 through, sort of counting out what would happen  
24 if you count where the different votes are.

25 And it seems to me if you take any

1 other approach, you're -- you're subject to  
2 reversal because, by definition, a majority of  
3 the Court here would -- would reach a different  
4 result.

5 MR. SHUMSKY: I would say a couple of  
6 things about that, Mr. Chief Justice.

7 First of all, Marks focuses on the  
8 holding or the judgment of the Court. And so,  
9 under Marks, what we're trying to figure out is  
10 whether there is precedent. Ordinarily, only a  
11 court's holding qualifies as precedent, and a  
12 holding is the reasoning that's necessary to  
13 support the judgment.

14 The government's alternate approach,  
15 its run-the-facts-through-the-opinions  
16 approach, first of all, I'm not sure it even  
17 purports to be an application of Marks in that  
18 sense.

19 Second of all, it is predicated upon  
20 counting dissenting votes. And Marks itself  
21 says quite specifically that that's not what  
22 Marks is about.

23 Marks talks about the position taken  
24 by those members who concurred in the  
25 judgments. And O'Dell at page 160 speaks in

1 similar terms, votes necessary to the judgment.

2 CHIEF JUSTICE ROBERTS: But as a  
3 practical --

4 JUSTICE ALITO: Well, suppose we -- go  
5 ahead.

6 CHIEF JUSTICE ROBERTS: As a practical  
7 matter, though, in a particular case, that  
8 would have the court of appeals writing an  
9 opinion that would be subject to reversal.

10 MR. SHUMSKY: And that -- and that,  
11 Mr. Chief Justice, is the other thing I was  
12 going to say. I think that -- that the way you  
13 put it a moment ago -- a moment ago in asking  
14 the question, is that a lower court would be  
15 wise to look at what the opinions say.

16 And, of course, it would be. The same  
17 way that lower courts are wise to look at this  
18 Court's dicta, to look at concurring  
19 opinions --

20 JUSTICE GINSBURG: Then why should  
21 they -- why should they pretend that this court  
22 had an opinion that counts as precedent? They  
23 can say: All right, we see four Justices  
24 thought this, two Justices thought that, and  
25 we're going to read those opinions and then

1 give our best judgment of what the right answer  
2 is without being bound by a minority of the  
3 Justices.

4 MR. SHUMSKY: Justice Ginsburg, that  
5 -- we think that that is exactly correct. A  
6 lower court is wise to pay attention to the  
7 votes of Justices, but that is a very different  
8 question than whether there is binding  
9 precedent.

10 And, here, what the Eleventh Circuit  
11 concluded was simply that it had to follow the  
12 concurring opinion in Freeman, that it was the  
13 vote of one Justice was the law of the land,  
14 notwithstanding the fact that eight Justices  
15 had sharply disagreed with that reasoning.

16 And so, Justice Ginsburg, we think  
17 that that's not right. Now, to be clear, a  
18 lower court would say: I am going to count  
19 votes. I am going to predict what the Supreme  
20 Court might do.

21 But I think that a slightly different  
22 hypothetical points out the difficulty with  
23 this.

24 Mr. Chief Justice, if you imagine  
25 instead of a case that comes right back up to a

1 nearly identically constituted court on the  
2 exact same question, 15 years have passed or 20  
3 years have passed. It would be quite strange  
4 under those circumstances for a court to engage  
5 in that same kind of nose counting and say:  
6 Well, because that one Justice 20 years ago  
7 thought this thing, that is the only decision  
8 we can reach.

9 JUSTICE ALITO: Well, Marks has been  
10 the law for 40 years, and for better or worse,  
11 it has had a big effect, I think, on what we  
12 have understood to be the jurisprudence of this  
13 Court and what the lower courts have understood  
14 to be our precedents and on the way in which  
15 Justices of this Court go about doing their  
16 job.

17 And if we abandon anything like Marks,  
18 perhaps it requires -- it certainly could  
19 benefit from some clarification and maybe some  
20 refinement -- but if we abandon it completely,  
21 it could have pretty profound changes. Why  
22 should we do that?

23 MR. SHUMSKY: Justice Alito, our first  
24 argument, of course, is that the Court should  
25 refine Marks. And we think that the logical

1 subset test or, as this Court put it in  
2 Nichols, looking for a common denominator, is  
3 the most sensible way to do that, consistent  
4 with the norms about precedent and holdings  
5 that I was alluding to earlier. Let me --

6 JUSTICE ALITO: Well, you know,  
7 Professor -- Professor Re wrote an interesting  
8 amicus brief in this case arguing that the  
9 logical subset approach is illogical. And I  
10 think there might be something to that. Let me  
11 give you this example.

12 Let's say that nine people are  
13 deciding which movie to go and see, and four of  
14 them want to see a romantic comedy, and two of  
15 them want to see a romantic comedy in French,  
16 and four of them want to see a mystery.

17 Now is the -- are -- are the -- are  
18 the two who want to see the romantic comedy in  
19 French, is that a logical subset of those who  
20 want to see a romantic comedy?

21 MR. SHUMSKY: Justice Alito, the  
22 answer is it depends. And those people could  
23 say what their view about that is. And the  
24 just --

25 JUSTICE ALITO: Well, suppose we know

1 nothing more than that.

2 MR. SHUMSKY: Then it is a fair  
3 presumption, at least under certain  
4 circumstances, I can't speak to romantic  
5 comedies in French, but there are a couple of  
6 this Court's precedents under which, contrary  
7 to what Professor Re has said, logical subsets  
8 do, in fact, make a great sense -- a great deal  
9 of sense, if not all the time, then nearly all  
10 the time. So if you --

11 JUSTICE ALITO: I mean, if that's a  
12 logical subset, I think there's a serious  
13 problem with the argument because the four who  
14 want to see a romantic comedy might think I  
15 don't want to see anything in a foreign  
16 language, particularly in French. I'd rather  
17 go see a mystery or something else.

18 MR. SHUMSKY: So, Justice Alito, and I  
19 think this is the key to the -- the puzzle,  
20 anytime two people, be they Justices of this  
21 Court or people going to see a romantic comedy,  
22 can say here's how far I go, but I don't agree  
23 with that thing over there.

24 And so sometimes we see Justices  
25 saying I take an absolutist view and anything



1 less than that is legally wrong. And under  
2 those circumstances, we would know what those  
3 Justices think. And, of course, Justices would  
4 have, like they always have, the prerogative to  
5 articulate how far their view goes and whether  
6 something less makes sense. But at least as a  
7 way of understanding --

8 CHIEF JUSTICE ROBERTS: Well, I'm  
9 sorry, but that means that you would want them  
10 to engage in -- in dicta. In other words,  
11 you're saying, let's say someone has an  
12 absolute view of the First Amendment. You  
13 can't have any restraints at all.

14 And the concurring opinion says, well,  
15 I agree with that, except when it comes to, you  
16 know, Communists, then I think they shouldn't  
17 have the right to speak. And you don't know  
18 that the people who think there's an absolute  
19 right may say, well, it's absolute, but, if  
20 you're going to carve out anybody, you've got  
21 to carve out everybody.

22 And what you're suggesting is that to  
23 make things clearer for the courts of appeals  
24 down the road, those Justices should talk about  
25 these hypothetical cases, about how they would

1 apply the rule in the event, you know, that  
2 this or that happens.

3 And I wonder if that's more  
4 problematic than the difficulties you have with  
5 just sort of the counting -- counting-through  
6 approach.

7 MR. SHUMSKY: I don't think it is,  
8 Your Honor. The point is simply that Justices  
9 have the prerogative, like they always do, to  
10 articulate how far their rule goes. But I do  
11 want to make sure, Justice Alito, to get to at  
12 least a couple of examples that demonstrate  
13 that the logical subset, while it may be  
14 imperfect, like all of these rules are, at  
15 least has some significant utility, contrary to  
16 what Professor Re said.

17 So if you look like -- at a case like  
18 Ford, that was interpreted in Panetti, you have  
19 a plurality of Justices saying we require full  
20 competency proceedings with all of the  
21 hallmarks of a trial, and Justice Powell  
22 writing separately saying: Something less than  
23 that is enough. We don't need  
24 cross-examination. We don't need live  
25 witnesses.

1           There it's pretty fair to say that the  
2           lesser version is included within the broader  
3           version that the plurality would have wanted,  
4           or in a case like Caldwell --

5           JUSTICE SOTOMAYOR: That's covered by  
6           Marks automatically.

7           MR. SHUMSKY: I'm not sure what it  
8           means to say that something is covered --

9           JUSTICE SOTOMAYOR: Meaning Marks says  
10          what's the narrowest holding of a plurality in  
11          a concurrence. And under that interpretation,  
12          the literal interpretation of Marks, your  
13          situation's covered. We're talking about a  
14          situation where the reasoning doesn't  
15          necessarily overlap completely.

16          MR. SHUMSKY: Again, two points,  
17          Justice Sotomayor.

18          I think that -- that the language of  
19          narrowest in Marks is, frankly, part of the  
20          problem here. And that is the strength of --  
21          of what Professor Re has said. Whatever  
22          guidance Marks may have provided, it's probably  
23          caused more confusion than -- than guidance.

24          JUSTICE SOTOMAYOR: Why -- but is the  
25          confusion -- is the -- why is the confusion

1 necessarily so evil? Meaning the government  
2 makes a counterpoint which says you want  
3 something to -- to follow a split decision by  
4 the Court. You want some even-handed,  
5 predictable, and consistent development of the  
6 law at least on some level. And even if  
7 there's some confusion, there is some  
8 predictability that's going on.

9 Under the Re test, there isn't any.  
10 It's as if the decision was made and nothing  
11 has happened because we're still sending it  
12 back for the lower courts to be without real  
13 guidance.

14 MR. SHUMSKY: I think the strength of  
15 Professor Re's view, Justice Sotomayor, is that  
16 the current situation is not, in fact,  
17 providing much, if any, guidance. And at pages  
18 16 to 17 of his amicus brief and in the  
19 underlying paper, he lays out innumerable  
20 circuit splits that have resulted from efforts  
21 to attempt to apply the Marks rule. And so the  
22 idea would be --

23 JUSTICE KAGAN: Mr. Shumsky?

24 MR. SHUMSKY: -- simply that --

25 JUSTICE KAGAN: I'm sorry. Please

1 continue.

2 MR. SHUMSKY: Well, simply that --  
3 that to return to the -- the older historical  
4 norm of actual majority rule would provide  
5 clarity. And absent that, percolation could  
6 occur in the lower courts, which would aid this  
7 Court in its ultimate decision-making.

8 JUSTICE KAGAN: I mean, the question  
9 is, what is the second best? We're in a world  
10 in which the first-best option, which is five  
11 people agreeing on the reasoning, that doesn't  
12 exist. And so everything else is going to  
13 be -- is going to have some kind of problem  
14 attached to it, and we're really picking among  
15 problems.

16 I guess what I wonder is why you say  
17 the -- the solution that we should pick is just  
18 a solution in which this Court is giving no  
19 guidance and courts are out there on their own  
20 and doing their own thing and splitting with  
21 each other, dividing with each other, not  
22 having any way to resolve these cases, which  
23 sounds like chaos to me.

24 And the government -- what the  
25 government says is: Look, this isn't the best

1 approach, but it's the second best approach, is  
2 if you don't have common reasoning, just ask  
3 about results. And if you can look at a case  
4 and know that there are five justices on the  
5 Supreme Court who think X rather than Y, then  
6 you should go with X.

7 And we can talk about how that counts  
8 dissenting votes or, you know, give various  
9 theoretical objections to that, but in the end,  
10 we do try to get to five here. We know how to  
11 get to five in some of these cases, even if the  
12 five depend on different reasoning. Why isn't  
13 that just the second-best approach?

14 MR. SHUMSKY: So, just to clarify if I  
15 may, Justice Kagan, and then to turn to that,  
16 our position is not that there should be chaos,  
17 nor -- nor at least in the first instance, that  
18 the Re argument is the best one. Logical  
19 subset or common denominator, as the D.C.  
20 Circuit put it in King versus Palmer, is --

21 JUSTICE KAGAN: Well, you carve out a  
22 set of cases, and then, when it's not  
23 completely nested in the way that you want it  
24 to be, you vote for chaos. And I guess I'm  
25 asking, why vote for chaos in all of these

1 cases or even in some of these cases?

2 MR. SHUMSKY: So, to be clear, Justice  
3 Kagan -- and I don't want to quibble -- but, I  
4 mean, the idea is not that it's chaos; it's  
5 that the lower courts can then percolate the  
6 issue, as this Court often invites them to do.

7 JUSTICE BREYER: Well, why --

8 MR. SHUMSKY: But let me --

9 JUSTICE BREYER: Yeah, go ahead.

10 MR. SHUMSKY: Sorry, let me -- let me  
11 turn to the question about the -- the running  
12 the facts through the opinions approach. I  
13 mean, it is not just a secondary concern that  
14 that relies on dissents. That is, quite  
15 contrary to everything that this Court has said  
16 for not just decades but hundreds of years  
17 about how to identify precedents and holdings,  
18 if dicta is not precedent, it doesn't count as  
19 part of the holding of the Court, then surely  
20 the votes that aren't even necessary to the  
21 judgment --

22 JUSTICE KAGAN: Well, Mr. Shumsky, I  
23 think -- I think your approach relies on  
24 dissents sometimes too, because take one of  
25 these logical subset cases. You have a

1 concurrence that is a logical subset of the  
2 plurality. And you say, well, the concurrence  
3 controls. And that's true even as to times  
4 where the concurrence splits off with the  
5 plurality and joins with the dissent.

6 So you're counting dissents too, I  
7 think.

8 MR. SHUMSKY: To be very clear about  
9 this, Your Honor, that is not our position,  
10 that the concurring opinion would only be given  
11 force insofar as or to the extent that it is an  
12 opinion that is necessary to the judgment. But  
13 I -- I do want to --

14 JUSTICE KAGAN: It's necessary to the  
15 judgment, but the result of applying -- but,  
16 you know, the plurality would grant relief in  
17 this much -- this many cases. The concurrence  
18 would grant relief in many fewer cases and deny  
19 relief in lots of cases where the dissent would  
20 also deny relief. So, by privileging the  
21 concurrence, you're essentially saying that  
22 when the concurrence agrees with the dissent,  
23 the concurrence wins, which I take it is a way  
24 -- is -- is because the concurrence plus the  
25 dissent equals five.



1 MR. SHUMSKY: I -- I don't think so,  
2 Justice Kagan. And, Justice Sotomayor, I think  
3 this gets back to a question that you were  
4 asking earlier.

5 If the Venn diagrams overlap, if the  
6 Russian dolls don't fit, then, under those  
7 circumstances, it's not a logical subset.

8 JUSTICE KAGAN: I'm talking about a  
9 case in which it is completely nested, but the  
10 -- but -- it is completely nested, but the  
11 concurrence is sometimes granting the relief  
12 that the plurality would but sometimes,  
13 instead, reaching the result the dissent would.

14 And by saying the concurrence controls  
15 in those cases, you're giving effect to the  
16 times when the concurrence plus the dissent  
17 equals five.

18 MR. SHUMSKY: I think that for the  
19 same reasons I was indicating about reliance on  
20 -- about the importance of holdings, we would  
21 not say that it controls under those  
22 circumstances.

23 Now perhaps the next case might come  
24 up and there would be an opportunity to  
25 evaluate that, but, Justice Kagan, I want to

1 make sure to answer --

2 JUSTICE KAGAN: So, in those  
3 circumstances, there is no result?

4 MR. SHUMSKY: Well, there would be a  
5 bare result, certainly, but the concurrence  
6 would not be controlling as to cases in which  
7 it has to be paired with the dissent.

8 I want to make sure to answer directly  
9 your question, Justice Kagan, about what's  
10 wrong with the government's approach, and then  
11 I might try and -- and turn back to the -- the  
12 3582 question for a moment if I can.

13 What is wrong with the government's  
14 approach is not just that it is contrary to  
15 these pretty fundamental notions about  
16 precedent and holdings but because it would  
17 stunt the development of the law.

18 It would say at precisely the moment  
19 at which this Court is unable to reach a  
20 majority, the lower courts should stop trying  
21 to sort these issues out. We should stop  
22 hoping that we can get to an actual result,  
23 whether because of the coming together of the  
24 lower courts or because a justice changes their  
25 mind or a justice joins a --

1           JUSTICE SOTOMAYOR: I'm sorry. Why is  
2 the development of the law stunted completely?  
3 You tell us that there's confusion in a split,  
4 which suggests to me that the split is  
5 occasioned, likely in part, by the circuit's  
6 view of the persuasiveness of the split of some  
7 other side's argument on the split.

8           So it's not, I don't think,  
9 necessarily that it stifles discussion in any  
10 meaningful way. You're just -- you just don't  
11 -- you say this kind of confusion, I don't  
12 like.

13           MR. SHUMSKY: I think the point is a  
14 bit different, Justice Sotomayor, in the  
15 following way: The idea would be that once  
16 this Court splinters and when there is no  
17 middle ground, as the government puts it, at  
18 that point, all that is left for a lower court  
19 to do is run the facts through the opinions.

20           You don't think about the issue  
21 further. You don't attempt to resolve it on  
22 the merits. You just plug things into the  
23 vote-counting algorithm and get bare results in  
24 bare cases. If --

25           JUSTICE ALITO: And can I just ask you

1 this quick question? Suppose that there's a  
2 majority of the Court that -- that agrees that  
3 a particular party is entitled to relief, but  
4 there is no majority as to the provision of the  
5 Constitution that provides the relief.

6 What happens in that situation?

7 MR. SHUMSKY: I --

8 JUSTICE ALITO: So that's never a  
9 precedent unless one of the two -- and both of  
10 these groups feel very strongly that the other  
11 is wrong in identifying the constitutional  
12 provision. So one of them has to give way or  
13 else this issue is never going to be resolved?

14 MR. SHUMSKY: I think that -- let me  
15 answer your question, Justice Alito, and then  
16 -- and then reserve the balance of my time.

17 I think that that is the  
18 quintessential case in which there is not  
19 precedent. If we have less than a majority of  
20 this Court resolving a question of  
21 constitutional import on different grounds,  
22 then it would be very strange to think that the  
23 constitutional issue has been resolved for all  
24 time.

25 JUSTICE ALITO: So the lower courts

1 would then be free to deny relief in -- in all  
2 these cases?

3 MR. SHUMSKY: In a case just like the  
4 one that had been before the Court, surely --  
5 and this goes to my answer to the Chief  
6 Justice. Surely, the lower courts would be  
7 wise to pay very careful attention to all of  
8 the opinions of this Court, but if there is no  
9 majority on the question, then there is no  
10 precedent.

11 If I can reserve the balance of my  
12 time.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15 MR. SHUMSKY: Thank you.

16 CHIEF JUSTICE ROBERTS: Ms. Kovner.

17 ORAL ARGUMENT OF RACHEL P. KOVNER

18 ON BEHALF OF THE RESPONDENT

19 MS. KOVNER: Mr. Chief Justice, and  
20 may it please the Court:

21 The circuit split here concerns the  
22 interpretation of the Marks rule. And this  
23 Court should decide this case by rejecting the  
24 view of the two circuits that treat divided  
25 decisions of this Court as entitled to no

1 precedential effect unless the separate  
2 opinions of this Court share the same  
3 reasoning.

4           That approach is flatly contrary to  
5 what this Court said in Marks. It's contrary  
6 to how this Court has applied Marks. And it  
7 undercuts the principle of vertical stare  
8 decisis that generally requires lower courts to  
9 decide cases in the way that this Court would  
10 decide them.

11           Now take Petitioner raised two main  
12 objections to that. The first is an argument  
13 that Marks as this Court has developed it  
14 requires considering dissents.

15           I do want to make clear that's only  
16 true in a limited sense. When this Court  
17 applies the Marks doctrine, it's picking one of  
18 the opinions that led to the judgment in the  
19 case at hand and treating that judgment --  
20 treating that opinion as controlling.

21           So it's -- the Marks --

22           JUSTICE GINSBURG: Even though it's  
23 the opinion of only one. So let's take, I  
24 think, an illustration that's familiar.

25           For years, it was thought that Justice

1 Powell's opinion in Bakke was controlling.  
2 That was a 4-4-1. And he was in the middle.  
3 But none of the others took the position that  
4 he did. So a single Justice was thought to  
5 determine what this Court's precedent for the  
6 notes was.

7 MS. KOVNER: That's right, Your Honor.  
8 I think that this Court has consistently  
9 applied Marks in that way by picking an opinion  
10 that's not subscribed to by the members -- by  
11 all the members of the Court or by a majority  
12 and describing that as the controlling opinion.

13 And I think the reason, Justice  
14 Ginsburg, is that when the Court applies that  
15 opinion, it's not applying an opinion that  
16 leads to the result that's favored by only one  
17 member of the Court. It's applying an opinion  
18 that leads to the result that's favored by a  
19 majority of the Court. And in every  
20 application, the application of that opinion  
21 also is supported by the reasoning of a  
22 majority of members of this Court.

23 JUSTICE KAGAN: That might be true,  
24 but it might not be. I mean, there are middle  
25 ground positions that, in a 4-1-4 case, where

1 the four would say, well, if we can't get what  
2 we want, we'd rather have the middle ground  
3 position. But there are some cases where there  
4 are middle ground positions which seem utterly  
5 incoherent to anybody else, incoherent or maybe  
6 it's based on what you think is an  
7 impermissible criterion, or for some reason the  
8 middle ground is the worst of all possible  
9 worlds.

10 So how do you deal with those sorts of  
11 cases?

12 MS. KOVNER: So we think ordinarily  
13 that the opinions in the case itself will deal  
14 with that in the following sense: So, to take  
15 Freeman as an example, there's, I think, a sort  
16 of broad opinion, a in-between opinion, and a  
17 narrow opinion.

18 And it's true that some opinions in  
19 Freeman criticize the middle ground, but,  
20 nevertheless, the plurality in Freeman voted  
21 with the concurrence to create a common result.

22 I think if the plurality thought that  
23 it were intolerable to have that middle ground  
24 position control the day, the plurality could  
25 say, given that we can't have our rule, our



1 second choice is the categorical rule on the  
2 other side, and could join that opinion.

3 But we think the plurality indicated  
4 through its vote that that's not what it wanted  
5 to have happen. It wanted to join with the  
6 concurrence and have that control the day.

7 JUSTICE BREYER: So how -- look, I --  
8 I don't know what I'd write in this case. And  
9 the reason I would write, if we have to get to  
10 this issue, the reason I don't know is because  
11 I think law is part art and part science. And  
12 you learn in law school and thereafter how to  
13 read an opinion. There are no absolute rules.

14 Marbury versus Madison, two-thirds of  
15 it is not necessary to the conclusion. So  
16 should we pay no attention to it? Of course,  
17 we pay attention to it.

18 And then I can cite five, but I won't,  
19 where it may be that on this matter there was a  
20 unanimous court, but nobody believes it because  
21 it wasn't, you see. And they all go off.

22 And Powell, of course, is in part key  
23 because he had a sensible view. And the  
24 public, the lawyers, the clients, the other  
25 judges, are the ones who tell us that over

1 time.

2 So, if you ask me to write something  
3 better than Marks, I don't know what to say,  
4 except what I just said, which will help  
5 nobody.

6 (Laughter.)

7 MS. KOVNER: So I -- I think the  
8 question that lower courts are in need of  
9 guidance on in this case --

10 JUSTICE BREYER: Well, what guidance?  
11 I mean, what?

12 MS. KOVNER: Sure.

13 JUSTICE BREYER: You talk about the  
14 French movie. That was great -- I mean fine.

15 (Laughter.)

16 JUSTICE BREYER: There I say, you mean  
17 they really don't want to see The Philadelphia  
18 Story? They must be crazy. All right.

19 (Laughter.)

20 JUSTICE BREYER: But -- but -- but --  
21 but you see, if you have, of course, a real  
22 French comedy, fine. But suppose you have --  
23 to show off -- Mr. Hulot's Holiday, you know,  
24 it's a comedy, but is it romantic, you see.

25 (Laughter.)

1 JUSTICE BREYER: I mean, that's what  
2 law is about. And now suddenly you want us to  
3 write a rule. They -- they've done all right  
4 with Marks. Leave it alone.

5 MS. KOVNER: So --

6 JUSTICE BREYER: And say -- interpret  
7 it with common sense.

8 MS. KOVNER: So I agree with that, but  
9 I think there is one clarification that there's  
10 a circuit split on and it would be helpful for  
11 this Court to resolve.

12 There are two circuits that say,  
13 contrary to the views of other circuits, that  
14 you need to have not only shared results, which  
15 I think --

16 JUSTICE BREYER: You say they're  
17 wrong.

18 MS. KOVNER: That's right, Your Honor.

19 JUSTICE BREYER: And then they say  
20 what's right, we don't tell them.

21 MS. KOVNER: No, I think if the Court  
22 can say, Marks, and I think the one thing that  
23 the Court can add to Marks if it wants to  
24 provide further guidance, is that what the  
25 Marks rule is doing is it's achieving vertical

1 stare decisis. It's a way of ensuring that  
2 lower courts decide cases in the manner that  
3 this Court would.

4 And so, to the extent that in a  
5 particular case there's difficulty in  
6 identifying one opinion as the narrowest, a  
7 thing that the courts can also do is run the  
8 facts of the case through multiple opinions and  
9 see whether the result that is achieved there  
10 is the result that's favored by a majority of  
11 the court. Of course, that's something this  
12 Court has done in -- in -- in applying Marks  
13 too.

14 JUSTICE SOTOMAYOR: May I ask two  
15 questions? I don't want you to ignore the  
16 third question of the petition.

17 But the first one is, if we are able  
18 to reach a majority in the Freeman question,  
19 should we reach the Marks inquiry and, if so,  
20 how and why? I mean, we usually -- it would be  
21 pure dicta.

22 MS. KOVNER: I think that's right,  
23 Your Honor. And so the Court, I think, has a  
24 choice about how it wants to resolve this case.  
25 And we would urge the Court to resolve the case

1 on the Marks ground because that is where there  
2 is a circuit split.

3 There's no division on Freeman aside  
4 from just the question, the underlying Marks  
5 question of do you need common reasoning or  
6 only common results. So that's really the  
7 issue that's divided the lower courts.

8 As a second sort of reason that  
9 relates to that, Your Honor, is Freeman itself  
10 is a statutory interpretation question that  
11 this Court -- you know, we obviously took a  
12 broader position than Your Honor's opinion in  
13 Freeman, but this Court resolved that issue.  
14 It's essentially an issue for how the parties  
15 are going to bargain.

16 So the parties have arranged their  
17 expectations in subsequent cases, including  
18 this one, around the understanding that Freeman  
19 provided a rule for how their plea agreements  
20 are going to be interpreted.

21 JUSTICE SOTOMAYOR: And -- and what  
22 the prosecutors are now doing is making a  
23 waiver of any amendment of the guidelines in  
24 almost all C agreements.

25 MS. KOVNER: I -- I don't -- I

1 actually think that's the case empirically,  
2 Your Honor. I think that for the most part  
3 prosecutors have been understanding that  
4 Freeman is the rule, and we haven't seen, to my  
5 knowledge, the vast majority of districts  
6 actually incorporate those kinds of waivers.

7 JUSTICE SOTOMAYOR: Now I have a  
8 question on the substance of -- of the  
9 plurality's position. There is some force to  
10 the argument that -- and examples provided in  
11 the briefing -- where the government goes to  
12 sentencing and says we did this in light of the  
13 guidelines.

14 And under the concurrence in Freeman,  
15 that would not count. Is -- is that right?  
16 And why is that right? If -- if the prosecutor  
17 is telling the judge, I'm doing this because of  
18 the guidelines, what difference does it make  
19 that it's in the plea agreement or not? It's  
20 still a representation by the government.

21 MS. KOVNER: That's right, Your Honor.  
22 I think that once Freeman was established, we  
23 can expect the parties to negotiate around the  
24 rule in Freeman. And so, to the extent that  
25 the parties have an understanding that this is

1 a sentence based on the guidelines within the  
2 meaning of Your Honor's opinion in Freeman,  
3 that's something they know that they should be  
4 putting in the plea agreement.

5 And we think that it's desirable to  
6 have that one place to look for where the  
7 parties' understanding is rather than sort of  
8 combing through the background negotiations of  
9 the parties.

10 JUSTICE SOTOMAYOR: Except the  
11 plurality says there's a player that you're not  
12 considering, which is the judge, and the judge  
13 accepts the agreement because a prosecutor has  
14 gotten up and said we think it should be within  
15 the guidelines. It's not in the plea  
16 agreement, but the prosecutor is guiding the  
17 judge and incentivizing the judge to accept  
18 this agreement with that representation.

19 So why shouldn't that be recognized?

20 MS. KOVNER: So I think, you know,  
21 both Your Honor's opinion in Freeman and the  
22 dissenting opinion in Freeman sort of note that  
23 there's a real difference between background  
24 considerations that go into what the deal is  
25 and then what the sort of deal ultimately is.

1           Ultimately, in a C agreement, you  
2 know, the parties bargain for a specific  
3 determined sentence and they urge the court to  
4 impose that -- that sentence. And that is, as,  
5 you know, Your Honor's opinion indicated and --  
6 and -- and four other Justices agreed, that is  
7 what the sentence is based on.

8           And if there's doubt about that, I  
9 think there are a few things that the Court can  
10 look to to resolve that doubt. The first is  
11 the Sentencing Commission's guidance.

12           The Sentencing Commission's guidance  
13 indicates that the only guidelines that should  
14 be changed through 3582 are the guidelines that  
15 were actually applied when the defendant was  
16 sentenced. And that's surely not what happens  
17 in a C case.

18           And the other I think is sort of  
19 reasons of administrability that Your Honor's  
20 opinion alludes to in Freeman.

21           The alternative is, on Petitioner's  
22 approach, you're going to be combing through  
23 the record to see whether in a particular case  
24 the by -- the guidelines bore a sufficiently  
25 close connection to the sentence. That's not



1 an administrable inquiry.

2 And then, on the back end, as Your  
3 Honor's opinion alludes to in Freeman, you're  
4 going to have a judge trying to determine after  
5 the fact what is the alternative agreement that  
6 this part -- the parties would have entered  
7 into if -- if the guidelines had been  
8 different?

9 And that's not the kind of --

10 JUSTICE SOTOMAYOR: Well, that's --  
11 that's the way I phrased the question earlier,  
12 but really the question is not what will the  
13 parties do. The question really is what will I  
14 do.

15 MS. KOVNER: I --

16 JUSTICE SOTOMAYOR: I mean, because  
17 every C agreement before it takes effect has to  
18 be approved by the judge.

19 So really it's the judge who has to  
20 determine would I have accepted this or not --

21 MS. KOVNER: I --

22 JUSTICE SOTOMAYOR: -- knowing that  
23 the guideline was in error?

24 MS. KOVNER: I actually think that's  
25 the way in which a C plea is fundamentally

1 different from other kinds of pleas, as -- as  
2 Your Honor's opinion in Freeman alludes to,  
3 which is part of a -- part of a C plea is that  
4 the parties agreed to it. And so, if a judge  
5 said I'm not going to accept this plea, you'd  
6 be back to the drawing board for the parties.  
7 And so that's why Petitioner's approach means  
8 the judge has to figure out, okay, if the judge  
9 said no, what would the parties have done under  
10 that circumstance?

11 And as Your Honor alluded to in -- in  
12 -- in your questions, often, the government has  
13 given up, for instance, a mandatory minimum,  
14 you know, additional charges, you know. In  
15 this case, I think there's no reason to think  
16 that the government would have agreed to a more  
17 favorable deal if the guidelines had been  
18 different.

19 JUSTICE BREYER: In a C agreement, it  
20 says, the commission, that the judge -- it's  
21 the judge who will depart if that's the  
22 agreement, and it says the agreed -- he has to  
23 write his reasons in writing as to why the  
24 agreed sentence departs from the applicable  
25 guideline range for justifiable reasons.

1           So, if the guideline range is 120  
2 months, he says why it departs from that, and  
3 he has some reasons. And if it's 100 months,  
4 he says why it departs from that.

5           Now, much of the time, perhaps, I  
6 don't know for sure, but, of course, you are  
7 referring to the guideline. And if the  
8 guideline is one thing, you might do A, and if  
9 it's another thing, you might do B. And,  
10 certainly, you will have to say something  
11 different where the guideline is 100 versus  
12 120. Not certainly, but almost certainly.

13           So why isn't that good enough? That's  
14 good enough to say that where the guideline is  
15 two levels lower, you know, you can get that  
16 advantage because your original sentence was in  
17 some sense based upon the guideline; namely,  
18 the sense that I just mentioned.

19           MS. KOVNER: So I think this case is a  
20 -- is a really good example, Justice Breyer, of  
21 why that doesn't work. You're not going to  
22 know in particular cases what the parties would  
23 have done absent the guidelines.

24           So that, you know --

25           JUSTICE BREYER: Well, I don't know.

1 All I have to know is what the judge would have  
2 done. He's the one who departed and he had to  
3 put his -- you know, I'd just be --

4 MS. KOVNER: Right.

5 JUSTICE BREYER: -- repeating what I  
6 said.

7 So we know in every sentence like that  
8 there will be words about the applicable  
9 guideline.

10 MS. KOVNER: Yes.

11 JUSTICE BREYER: And much of the time,  
12 it will have something to do with the  
13 applicable guideline. And why isn't that good  
14 enough?

15 MS. KOVNER: So, Justice Breyer, to  
16 take, for instance, this case, there is no  
17 reason to believe, I think, in this case that  
18 the judge would have rejected the parties' plea  
19 agreement if the judge had calculated the  
20 guidelines differently. For instance, in this  
21 case, the particular change to the Sentencing  
22 Guidelines that the -- you know, that was  
23 ultimately made had already been proposed. The  
24 parties knew about it, the judge knew about it,  
25 and nobody indicated that that fact -- if that

1 guidelines change had been in effect, the  
2 result would have been different.

3           And, here, I think there's good reason  
4 why the judge would have accepted this plea  
5 agreement, which was for a below-guideline  
6 sentence, even if the guidelines had been  
7 different, because the government was giving up  
8 a mandatory minimum and which the government  
9 could have insisted on a life sentence in this  
10 case.

11           JUSTICE BREYER: Suppose we say you're  
12 absolutely right, and that's why the word  
13 "based upon" cannot just refer to these  
14 hypotheticals we know nothing about.  
15 Therefore, "based upon" refers to an instance  
16 where the judge made significant use of the  
17 guideline, either in his reasoning or in the  
18 reasons that he gave, which, of course, would  
19 throw this case right into the opposite side  
20 that you want. But, nonetheless, it would be a  
21 workable rule, and we'd say "based upon" at  
22 least means that.

23           MS. KOVNER: So I think there are a  
24 few reasons. First of all, we don't think,  
25 respectfully, that in the ordinary case, it's

1 going to be easy to sort out whether the -- the  
2 -- whether the court was just calculating the  
3 guidelines, which Petitioner suggests would not  
4 be enough, or was relying --

5 JUSTICE BREYER: In a C agreement, it  
6 would be because he has to write it down.

7 MS. KOVNER: I -- I think all he has  
8 to indicate is that there were justifiable  
9 reasons for him to accept the sentence,  
10 notwithstanding that -- notwithstanding that  
11 the sentence in a particular case was outside  
12 the guidelines. And I think there's some  
13 additional reasons why that approach wouldn't  
14 be a good one. The first is the Sentencing  
15 Commission's guidance. The Sentencing  
16 Commission has indicated it has to be -- in  
17 order for 3582 relief to be available, the  
18 guideline has to have actually been applied at  
19 sentencing.

20 And then I think there's a stare  
21 decisis reason, which is the Court, you know,  
22 whatever -- whatever the merits of the rule in  
23 Freeman, and, obviously, the government took a  
24 slightly broader approach to the extent to  
25 which 3582 denies relief, but this is an

1 opinion of this Court that this plea and other  
2 pleas have been sort of organized around since  
3 the case was decided, and that's a case in  
4 which statutory stare decisis principles have  
5 their greatest force. So -- I'm sorry, Your  
6 Honor.

7 JUSTICE GORSUCH: No, I understand  
8 you'd like us to decide what we're calling the  
9 Marks question, rather than just resolving what  
10 Freeman means.

11 But to what extent is the Marks  
12 problem real outside of the Freeman context? I  
13 know Freeman has beset the lower courts with a  
14 lot of difficulty and generated disagreements.  
15 But have -- have there been real problems  
16 outside of that context?

17 MS. KOVNER: So, I mean, the -- the  
18 courts that have gone against us on the Marks  
19 question have indicated it's sort of their --  
20 it's just their interpretation of Marks, so  
21 it's the interpretation they would apply in  
22 future --

23 JUSTICE GORSUCH: But they've done it  
24 in the context of trying to figure out what  
25 Freeman means. If we relieve them of that

1 confusion, how far have we gone to resolving  
2 the problem?

3 MS. KOVNER: I don't think very far,  
4 Your Honor, because in any future divided  
5 decision of this Court, those courts would go  
6 back to applying the requirement --

7 JUSTICE GORSUCH: There are a lot of  
8 divided decisions of this Court, though.

9 MS. KOVNER: That's right.

10 JUSTICE GORSUCH: And -- and it  
11 doesn't seem to be a pervasive problem outside  
12 of the Freeman context, at least that you've  
13 documented so far. And I was just wondering  
14 whether you had any other evidence of problems  
15 outside of the Freeman context.

16 MS. KOVNER: So I think an additional  
17 circumstance, you know, some of the amicus  
18 briefs allude to is interpreting this Court's  
19 decision in Rapanos. You know, we think this  
20 -- this same issue comes up there, and, you  
21 know, the two circuits that have indicated  
22 shared reasoning is necessary, I think, would  
23 regard this Court's decision in Rapanos as not  
24 having precedential effect. And, of course, as  
25 Your Honor alludes to, there are going to be,



1 you know, future divided decisions of this  
2 Court.

3 JUSTICE GORSUCH: But are there actual  
4 opinions, I guess, is -- I'm sorry for pursuing  
5 this --

6 MS. KOVNER: Yes.

7 JUSTICE GORSUCH: -- but I'll stop.  
8 But -- but are there -- are there any other  
9 actual decisions like we have in the Marks?

10 MS. KOVNER: So I --

11 JUSTICE GORSUCH: In the Freeman  
12 context?

13 MS. KOVNER: This is often, I think,  
14 briefed in -- I know there are a lot of cases  
15 discussing this Marks issue in the context of  
16 Rapanos. The opinions that I focused on, I  
17 think, where this has been framed most are the  
18 Freeman cases. In part, that's because this is  
19 essentially a recent split. So Davis is 2016,  
20 and that's where the Ninth Circuit sets out its  
21 opinion. I think the D.C. Circuit case, it did  
22 arise earlier in one case, that was King, and I  
23 think that -- which I know obviously involved  
24 interpretation of a different opinion of this  
25 Court.

1           I think Your -- Your Honor is right  
2           that this split is framed most squarely in  
3           terms of Freeman. One of the circuits only  
4           arrived to its interpretation of Marks in the  
5           context of Freeman.

6           JUSTICE GINSBURG: Don't you think  
7           that --

8           MS. KOVNER: But those courts have set  
9           out rules that are going to apply in future  
10          cases.

11          JUSTICE GINSBURG: Didn't the  
12          commentary that's been referred to, Re and the  
13          other one, give lots of examples?

14          MS. KOVNER: I think they -- the --  
15          the -- Professor Re's brief I take to indicate  
16          --

17          JUSTICE GINSBURG: Not the brief. The  
18          -- the long article.

19          MS. KOVNER: Yes. I take him to have  
20          identified cases where he asserts that this --  
21          there's been difficulty applying Marks in the  
22          past, so perhaps that supports the idea that  
23          there is benefit to be had from clarifying what  
24          the Marks rule means.

25          JUSTICE GINSBURG: It has been said

1 that -- in one of the briefs, that the  
2 government in several cases endorsed this  
3 so-called Russian doll approach. Is that true  
4 that the government once did, and is the  
5 government giving it up now?

6 MS. KOVNER: No, I mean, in -- I know  
7 in the cases interpreting Rapanos, the  
8 government has consistently taken a position  
9 we've interpreted here. Petitioners, I think,  
10 cite one of the petitions in -- a petition we  
11 filed in a case called McWane, but I -- my  
12 reading of that petition is that it's entirely  
13 consistent with our opinion here. We don't  
14 suggest -- I'm not aware of any filing in which  
15 we've suggested the Marks rule requires shared  
16 reasoning in order for a decision to have  
17 precedential effect.

18 JUSTICE ALITO: If we followed the --  
19 your predictive approach, why should we --  
20 could it not be confined to the opinions that  
21 concurred in the judgment? Why should we count  
22 the dissents? Why -- why not just look at the  
23 -- the -- the ones that concurred in the  
24 judgment?

25 MS. KOVNER: So I -- I take the Marks

1 rule -- I think that would be contrary to what  
2 this Court has said and done for about 40 years  
3 where it said you identify the narrowest  
4 opinion concurring in the judgment and then you  
5 treat that as the controlling rule, even though  
6 in some cases that opinion aligns with the  
7 dissent and in some cases with the plurality.

8           And we think that's the right rule,  
9 Justice Alito, because, otherwise, in every  
10 Marks case, the Court would essentially need to  
11 take the case twice, once for the cases where  
12 the plurality assigns -- aligns with the  
13 concurrence and once for cases where the  
14 concurrence assigns with the -- aligns with the  
15 dissent. And in that case, the members of this  
16 Court could issue identical opinions to the  
17 ones they issued in the first case because all  
18 of the opinions have already fleshed out  
19 exactly what rule the justices are applying,  
20 but it would need to essentially -- this Court  
21 would need to essentially take the case twice.  
22 The rule that was set out in the first case  
23 would depend somewhat arbitrarily on the  
24 vehicle in which the Court initially granted  
25 cert.

1           We don't think there's any need for  
2           the Court to expend its resources in this way,  
3           and the effect would be an undesirable one for  
4           purposes of vertical stare decisis, where for a  
5           period of time you would have courts not -- not  
6           being bound by what five members of the Court  
7           have indicated is the appropriate rule.

8           JUSTICE KENNEDY: And as best you  
9           interpret the Re brief and the Re article, is  
10          it your position or would it be your position  
11          that overruling Marks would be disruptive?

12          MS. KOVNER: I -- I think so, Your  
13          Honor. I mean, the -- the Re article points  
14          out that courts have -- courts of appeals have  
15          relied on Marks quite a lot. There are over  
16          400 decisions of courts of appeals applying  
17          Marks to over 100 decisions of this Court over  
18          a 40-year period. So we think there are --  
19          there's quite a lot of appellate court  
20          jurisprudence that's based on applying Marks to  
21          this Court's decisions. So we think it would  
22          be quite disruptive to overrule Marks.

23          But for the, you know, we -- we  
24          believe Marks is the correct rule for the  
25          additional reason that the principle of

1 vertical stare decisis that it embodies is, I  
2 think, the -- the appropriate way for lower  
3 courts to adhere to this Court's decision.

4 JUSTICE BREYER: When you say that  
5 Marks is fine for the cases that it works with  
6 which are a logical subset, fine, but it  
7 doesn't deal with every case. And we just  
8 recognize it doesn't.

9 And as far as the other cases are  
10 concerned, we don't necessarily have to go into  
11 them. If we did have to go into them, you'd  
12 try to pick out something that is not an  
13 oxymoron but it's something along the lines of  
14 legal common sense. And I -- I -- I -- I don't  
15 know that I can do better than that.

16 MS. KOVNER: So, I mean, we agree that  
17 the Court doesn't need to consider or decide  
18 cases that are not before it, but we would urge  
19 the Court to clarify that there's no  
20 requirement --

21 JUSTICE BREYER: Yeah, I see.

22 MS. KOVNER: -- of common reasoning.  
23 And, you know, to go on and say in this case  
24 the court, the lower court was correct to apply  
25 Marks to the straightforward application of

1 Marks.

2 If there are no further questions, we  
3 would urge that the judgment be affirmed.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 Mr. Shumsky, three minutes.

7 REBUTTAL ARGUMENT OF ERIC SHUMSKY

8 ON BEHALF OF THE PETITIONER

9 MR. SHUMSKY: Thank you, Your Honor.  
10 Justice Sotomayor, I would like to start with  
11 your hypothetical in the circumstance in which  
12 the prosecutor says the sentence here, the  
13 agreement here, was based on the guidelines.

14 The lower courts following Freeman  
15 have interpreted the concurring opinion in  
16 Freeman as prohibiting reliance on that. And  
17 you can look at a case like United States  
18 versus --

19 JUSTICE SOTOMAYOR: I'm not in  
20 disagreement with that. But the one thing  
21 you're -- the Solicitor General's Office said,  
22 when a judge rejects a C agreement, the parties  
23 are put back to their starting point, which  
24 means the government keeps its right to file  
25 the persistent felony certificate or to

1 prosecute the dismissed charges or the charges  
2 it proposed to dismiss.

3 In doing it this way, they don't get  
4 that chance any more.

5 MR. SHUMSKY: Let me --

6 JUSTICE SOTOMAYOR: Doing it the way  
7 the plurality suggests they're losing that  
8 chance.

9 MR. SHUMSKY: Justice Sotomayor, let  
10 me try and address this as sharply as I can.  
11 This is where we started the colloquy at the  
12 beginning of this argument, and I think it's  
13 critical.

14 The government is not losing the  
15 benefit of any bargain here. And it is  
16 certainly not in any greater way than it is for  
17 any other form of plea agreement.

18 JUSTICE SOTOMAYOR: Well, you're --

19 MR. SHUMSKY: When -- when --

20 JUSTICE SOTOMAYOR: -- turning it into  
21 a B, instead of a C, is what you're saying.

22 MR. SHUMSKY: No. Because --

23 JUSTICE SOTOMAYOR: This is like all B  
24 agreements.

25 MR. SHUMSKY: -- because, remember, we



1 have other types of C agreements with a range  
2 and the government says those ones are fine.  
3 We don't mind giving away the benefit of our  
4 bargain for C agreements with a range.

5           Because there, again, when Congress in  
6 these narrow circumstances has said the  
7 commission, again, in narrow circumstances, is  
8 applying a -- is applying a change  
9 retroactively, under those circumstances the  
10 bargain has changed.

11           What was here is now here. And that's  
12 just the same for these agreements.

13           I would emphasize that the record here  
14 shows that the judge, the parties, and the  
15 probation officer were discussing the  
16 sentencing guidelines at length.

17           This is not just a circumstance in  
18 which they are being alluded to. At 32(a) to  
19 36(a) of the record, they're performing a  
20 guidelines calculation. What about the three  
21 point reduction for acceptance of  
22 responsibility? What about two points for  
23 using a gun?

24           And it makes sense under those  
25 circumstances to send it back to the same

1 district court who accepted the bargain and who  
2 had to, relying on Section 6B1.2, assess the  
3 bargain. That is the critical thing about  
4 6B1.2.

5 Congress, when it enacted  
6 994(a)(2)(E), directed the Commission to put  
7 the judges in the middle of this process. The  
8 judges are assessing the agreement to determine  
9 whether it is compliant with the guidelines or  
10 at least compliant enough to be accepted.

11 And so here we have a judge who sat  
12 there and dickered with the parties over the  
13 guidelines. And it only makes sense there to  
14 say this is a circumstance in which you are  
15 eligible to seek relief. You're not guaranteed  
16 to get it, but we're not closing the door.

17 The final point I'd like to make on  
18 Freeman, Congress did not carve out C-type  
19 agreements. It could have. It knew how to do  
20 that. It did that in 3742 in limiting appeals.

21 But it didn't do that for C-type  
22 agreements when it could have.

23 CHIEF JUSTICE ROBERTS: Thank you,  
24 counsel. The case is submitted.

25

1                   (Whereupon, at 11:03 a.m., the case  
2 was submitted.)  
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