SUPREME COURT
OF THE UNITED STATES

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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4 Petitioner,)

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9 Washington, D.C.

10 Tuesday, March 27, 2018

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12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United

14 States at 10:10 a.m.

15

16 APPEARANCES:

17 ERIC SHUMSKY, ESQ., Washington, D.C.;

18 on behalf of the Petitioner.

19 RACHEL P. KOVNER, Assistant to the Solicitor

20 General, Department of Justice, Washington,

21 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
2 up, often, certain things. Sometimes they
3 dismiss additional charges. Sometimes, as
4 here, they give up filing a persistent felony
5 certificate. Sometimes they agree not to
6 prosecute someone important to the defendant.
7 There are many things that go into that
8 bargain.
9 How is a district court judge to
10 determine whether a departure from the
11 guideline range is justified? In what
12 circumstances is what the government given up
13 valuable enough to keep the original deal and
14 when is it not?
15 MR. SHUMSKY: Justice Sotomayor, let
16 me answer the question in two parts if I can.
17 First of all, those conditions, the
18 way Your Honor describes C-type agreements, are
19 true also for B-type agreements and for the
20 sort of C-type agreements that the government
21 concedes open the door to eligibility for
22 relief under 3582(c)(2). So this particular
23 category of C-type agreement that the
24 government is proposing to carve out is not
25 different in that way than all of these other

1 categories of agreements. This --
2 JUSTICE SOTOMAYOR: Except that --
3 let's take -- dismissing charges, I -- I think
4 it could be seen as relatively easy. How
5 different were the charges and the exposure
6 from what was kept and what was the strength of
7 the government's evidence? And the government
8 could talk about that at sentencing on those
9 charges.
10 But the persistent felony offender
11 certificate is a different judgment, which is:
12 I, the government, think that a sentence of X
13 amount justifies giving up that certificate.
14 How would a district court make up for the loss
15 of that belief by the government?
16 MR. SHUMSKY: Well, so -- Justice
17 Sotomayor, let me push back a little bit still
18 --
19 JUSTICE SOTOMAYOR: Okay.
20 MR. SHUMSKY: -- on the first part of
21 my answer and then -- and then get to the
22 second part. Again, that's no different than
23 in a C-type agreement in which there is a range
24 defined by the guidelines, and the government
25 agrees that those sentences are eligible for

1 relief under 3582(c)(2). The only difference
2 there is that, rather than a number potentially
3 moving a bit, a range will move a bit. So,
4 again, I don't think it's categorically
5 different in that way.
6 But to answer the second part of the
7 question, the district court judge, exercising
8 her or his discretion, will apply the 3553(a)
9 factors just like they do in any other case
10 where there's a request for discretionary
11 relief under 3582(c)(2).
12 Remember that this is only a question
13 of eligibility. It's not a guarantee of
14 relief. It just enables the case ordinarily to
15 go back to the very same district court judge
16 who is the one who approved the agreement in
17 the first place and determine whether under the
18 circumstances, again, the 3553(a)
19 circumstances, some adjustment is appropriate.
20 JUSTICE SOTOMAYOR: When wouldn't any
21 -- what would disqualify a defendant from
22 eligibility? The plurality said this
23 determination has to be made on a case-by-case
24 basis. But as I read your brief, I can't --
25 what are the scenarios where you think someone

1 would not be eligible?
2 MR. SHUMSKY: Let me answer again in
3 two ways and again maybe in exactly the same
4 two ways. This is no different than any other
5 sentencing determination in the sense that it
6 is predicated on the 3553(a) factors. And
7 so --
8 JUSTICE SOTOMAYOR: No, I'm saying we
9 read the transcript. Government comes in under
10 a (C) agreement where it says we're not
11 recommending a guideline sentence. We want to
12 deviate from it because we think he cooperated
13 but not enough to be substantial. He has an
14 ill child, whatever the reasons are, we think a
15 lower sentence is appropriate, and this is the
16 sentence we picked.
17 Would that defendant, under your
18 reading, still be eligible to go back to the
19 district court for reconsideration?
20 MR. SHUMSKY: Well, just to clarify,
21 Your Honor, if it is a -- a sentence under
22 1B1.10 cannot drop below the bottom of an
23 amended guidelines range. So that there's a
24 floor on -- on how much the movement can be.
25 But, again, it will simply be the

1 district court considering all of 35 --
2 JUSTICE SOTOMAYOR: So are you
3 conceding there's no -- you can't imagine a
4 scenario where someone wouldn't be eligible?
5 MR. SHUMSKY: No, Your Honor. I'm
6 sorry. Perhaps I misunderstood the question.
7 In a circumstance, for instance, under
8 which the district court says -- using the
9 discretion that it has post-Booker under cases
10 like Gall and Spears, the district court says
11 I'm not applying the guidelines at all, I
12 disagree with the guidelines as a policy
13 matter; under those circumstances, it's very
14 hard to see how in any ordinary meaning of the
15 term a sentence is based on the guidelines.
16 But absent circumstances like those,
17 ordinarily, a sentence will be based on the
18 guidelines, and that only makes sense. This
19 Court has said over and over and over
20 post-Booker, in cases like Gall and Peugh and
21 most recently in Molina-Martinez, that
22 sentences are ordinarily based on the
23 guidelines.
24 And so it won't be surprising if,
25 indeed, a district court concludes that that's

1 what occurs. Not only is a sentence bargained
2 for in the shadow of the guidelines, as the
3 concurrence in Freeman put it; that is where
4 the parties start.
5 The United States Attorneys' Manual
6 directs prosecutors, not just to charge, but to
7 make plea-bargaining determinations consistent
8 with the guidelines. Defense attorneys do
9 exactly the same thing when they sit down with
10 their client for the first time, they look at
11 the guidelines and say: Here's what you're
12 looking at.
13 And so it shouldn't be surprising
14 that, ordinarily, other than in the sort of
15 relatively extreme circumstances I was alluding
16 to a moment ago, sentences, indeed, will be
17 based on the guidelines.
18 CHIEF JUSTICE ROBERTS: The first
19 question we posed was how to apply Marks in
20 this situation, and I wonder if I'm a court of
21 appeals judge, it seems to me the most
22 important thing in deciding the case is to make
23 sure that I'm not reversed. And it seems to me
24 the best way to do that is through the --
25 whatever you want to call it, the walking

1 through, sort of counting out what would happen
2 if you count where the different votes are.
3 And it seems to me if you take any
4 other approach, you're -- you're subject to
5 reversal because, by definition, a majority of
6 the Court here would -- would reach a different
7 result.
8 MR. SHUMSKY: I would say a couple of
9 things about that, Mr. Chief Justice.
10 First of all, Marks focuses on the
11 holding or the judgment of the Court. And so,
12 under Marks, what we're trying to figure out is
13 whether there's precedent. Ordinarily, only a
14 court's holding qualifies as precedent, and a
15 holding is the reasoning that's necessary to
16 support the judgment.
17 The government's alternate approach,
18 its run-the-facts-through-the-opinions
19 approach, first of all, I'm not sure it even
20 purports to be an application of Marks in that
21 sense.
22 Second of all, it is predicated upon
23 counting dissenting votes. And Marks itself
24 says quite specifically that that's not what
25 Marks is about.

1 Marks talks about the position taken
2 by those members who concurred in the
3 judgments. And O'Dell at page 160 speaks in
4 similar terms, votes necessary to the judgment.
5 CHIEF JUSTICE ROBERTS: But as a
6 practical --
7 JUSTICE ALITO: Well, suppose we --
8 no, you go ahead.
9 CHIEF JUSTICE ROBERTS: As a practical
10 matter, though, in a particular case, that
11 would have the court of appeals writing an
12 opinion that would be subject to reversal.
13 MR. SHUMSKY: And that -- and that,
14 Mr. Chief Justice, is the other thing I was
15 going to say. I think that -- that the way you
16 put it a moment ago -- a moment ago in asking
17 the question, is that a lower court would be
18 wise to look at what the opinions say.
19 And, of course, it would be. The same
20 way that lower courts are wise to look at this
21 Court's dicta, to look at concurring
22 opinions --
23 JUSTICE GINSBURG: Then why should
24 they -- why should they pretend that this Court
25 had an opinion that counts as precedent? They

1 can say: All right, we see four justices
2 thought this, two justices thought that, and
3 we're going to read those opinions and then
4 give our best judgment of what the right answer
5 is without being bound by a minority of the
6 justices.
7 MR. SHUMSKY: Justice Ginsburg, that
8 -- we think that that is exactly correct. A
9 lower court is wise to pay attention to the
10 votes of justices, but that is a very different
11 question than whether there is binding
12 precedent.
13 And, here, what the Eleventh Circuit
14 concluded was simply that it had to follow the
15 concurring opinion in Freeman, that it was the
16 vote of one justice was the law of the land,
17 notwithstanding the fact that eight justices
18 had sharply disagreed with that reasoning.
19 And so, Justice Ginsburg, we think
20 that that's not right. Now, to be clear, a
21 lower court could say: I am going to count
22 votes. I am going to predict what the Supreme
23 Court might do.
24 But I think that a slightly different
25 hypothetical points out the difficulty with

1 this.

2 Mr. Chief Justice, if you imagine

3 instead of a case that comes right back up to a

4 nearly identically constituted court on the

5 exact same question, 15 years have passed or 20

6 years have passed. It would be quite strange

7 under those circumstances for a court to engage

8 in that same kind of nose counting and say:

9 Well, because that one justice 20 years ago

10 thought this thing, that is the only decision

11 we can reach.

12 JUSTICE ALITO: Well, Marks has been

13 the -- the law for 40 years, and for better or

14 worse, it has had a big effect, I think, on

15 what we have understood to be the jurisprudence

16 of this Court and what the lower courts have

17 understood to be our precedents and on the way

18 in which justices of this Court go about doing

19 their job.

20 And if we abandon anything like Marks,

21 perhaps it requires -- it certainly could

22 benefit from some clarification and maybe some

23 refinement -- but if we abandon it completely,

24 it could have pretty profound changes. Why

25 should we do that?

1 MR. SHUMSKY: Justice Alito, our first
2 argument, of course, is that the Court should
3 refine Marks. And we think that the logical
4 subset test or, as this Court put it in
5 Nichols, looking for a common denominator, is
6 the most sensible way to do that, consistent
7 with the norms about precedent and holdings
8 that I was alluding to earlier. Let me --
9 JUSTICE ALITO: Well, you know,
10 Professor -- Professor Re wrote an interesting
11 amicus brief in this case arguing that the
12 logical subset approach is illogical. And I
13 think there might be something to that. Let me
14 give you this example.
15 Let's say that nine people are
16 deciding which movie to go and see, and four of
17 them want to see a romantic comedy, and two of
18 them want to see a romantic comedy in French,
19 and four of them want to see a mystery.
20 Now is the -- are the -- are the two
21 who want to see the romantic comedy in French,
22 is that a logical subset of those who want to
23 see a romantic comedy?
24 MR. SHUMSKY: Justice Alito, the
25 answer is it depends. And those people could

1 say what their view about that is. And the
2 just --
3 JUSTICE ALITO: Well, suppose we know
4 nothing more than that.
5 MR. SHUMSKY: Then it is a fair
6 presumption, at least under certain
7 circumstances, I can't speak to romantic
8 comedies in French, but there are a couple of
9 this Court's precedents under which, contrary
10 to what Professor Re has said, logical subsets
11 do, in fact, make a great sense -- a great deal
12 of sense, if not all the time, then nearly all
13 the time. So if you --
14 JUSTICE ALITO: I mean, if that's a
15 logical subset, I think there's a serious
16 problem with the argument because the four who
17 want to see a romantic comedy might think: I
18 don't want to see anything in a foreign
19 language, particularly in French. I'd rather
20 go see a mystery or something else.
21 MR. SHUMSKY: So, Justice Alito, and I
22 think this is the key to the -- the puzzle,
23 anytime two people, be they justices of this
24 Court or people going to see a romantic comedy,
25 can say here's how far I go, but I don't agree

1 with that thing over there.

2 And so sometimes we see justices

3 saying: I take an absolutist view and anything

4 less than that is legally wrong. And under

5 those circumstances, we would know what those

6 justices think. And, of course, justices would

7 have, like they always have, the prerogative to

8 articulate how far their view goes and whether

9 something less makes sense. But at least --

10 CHIEF JUSTICE ROBERTS: Well, that --

11 MR. SHUMSKY: -- as a way of

12 understanding --

13 CHIEF JUSTICE ROBERTS: I'm -- I'm

14 sorry, but that means that you would want them

15 to engage in -- in dicta. In other words,

16 you're saying, let's say someone has an

17 absolute view of the First Amendment. You

18 can't have any restraints at all.

19 And the concurring opinion says, well,

20 I agree with that, except when it comes to, you

21 know, communists, then I think they shouldn't

22 have the right to speak. And you don't know

23 that the people who think there's an absolute

24 right may say, well, it's absolute, but, if

25 you're going to carve out anybody, you've got

1 to carve out everybody.
2 And what you're suggesting is that to
3 make things clearer for the courts of appeals
4 down the road, those justices should talk about
5 these hypothetical cases, about how they would
6 apply the rule in the event, you know, that
7 this or that happens.
8 And I wonder if that's more
9 problematic than the difficulties you have with
10 just sort of the counting -- counting-through
11 approach.
12 MR. SHUMSKY: I don't think it is,
13 Your Honor. The point is simply that justices
14 have the prerogative, like they always do, to
15 articulate how far their rule goes.
16 But I do want to make sure, Justice
17 Alito, to get to at least a couple of examples
18 that demonstrate that the logical subset, while
19 it may be imperfect, like all of these rules
20 are, it at least has some significant utility,
21 contrary to what Professor Re said.
22 So if you look like -- at a case like
23 Ford, that was interpreted in Panetti, you have
24 a plurality of justices saying we require full
25 competency proceedings with all of the

1 hallmarks of a trial, and Justice Powell
2 writing separately saying: Something less than
3 that is enough. We don't need
4 cross-examination. We don't need live
5 witnesses.
6 There, it's pretty fair to say that
7 the lesser version is included within the
8 broader version that the plurality would have
9 wanted, or in a case like Caldwell --
10 JUSTICE SOTOMAYOR: That's covered by
11 Marks automatically.
12 MR. SHUMSKY: I'm not sure what it
13 means to say that something is covered --
14 JUSTICE SOTOMAYOR: Meaning Marks says
15 what's the narrowest holding of a plurality in
16 a concurrence. And under that interpretation,
17 the literal interpretation of Marks, your
18 situation's covered. We're talking about a
19 situation where the reasoning doesn't
20 necessarily overlap completely.
21 MR. SHUMSKY: Again, two points,
22 Justice Sotomayor.
23 I think that -- that the language of
24 narrowest in Marks is, frankly, part of the
25 problem here. And that is the strength of --

1 of what Professor Re has said. Whatever
2 guidance Marks may have provided, it's probably
3 caused more confusion than -- than guidance.
4 JUSTICE SOTOMAYOR: Why -- but -- is
5 the confusion -- is the -- why is the confusion
6 necessarily so evil? Meaning, the government
7 makes a counterpoint which says you want
8 something to -- to follow a split decision by
9 the Court. You want some even-handed,
10 predictable, and consistent development of the
11 law, at least on some level. And even if
12 there's some confusion, there is some
13 predictability that's going on.
14 Under the Re test, there isn't any.
15 It's as if the decision was made and nothing
16 has happened because we're still sending it
17 back for the lower courts to be without real
18 guidance.
19 MR. SHUMSKY: I think the strength of
20 Professor Re's view, Justice Sotomayor, is that
21 the current situation is not, in fact,
22 providing much, if any, guidance. And at pages
23 16 to 17 of his amicus brief and in the
24 underlying paper, he lays out innumerable
25 circuit splits that have resulted from efforts

1 to attempt to apply the Marks rule. And so the
2 idea would be --
3 JUSTICE KAGAN: Mr. Shumsky?
4 MR. SHUMSKY: -- simply that --
5 JUSTICE KAGAN: I'm sorry. Please
6 continue --
7 MR. SHUMSKY: Well, simply that --
8 that to return to the -- the older historical
9 norm of actual majority rule would provide
10 clarity. And absent that, percolation could
11 occur in the lower courts, which would aid this
12 Court in its ultimate decision-making.
13 JUSTICE KAGAN: I mean, the question
14 is, what is the second best? We're in a world
15 in which the first-best option, which is five
16 people agreeing on the reasoning, that doesn't
17 exist. And so everything else is going to
18 be -- is going to have some kind of problem
19 attached to it, and we're really picking among
20 problems.
21 I guess what I wonder is why you say
22 the -- the solution that we should pick is just
23 a solution in which this Court is giving no
24 guidance and courts are out there on their own
25 and doing their own thing and splitting with

1 each other, dividing with each other, not
2 having any way to resolve these cases, which
3 sounds like chaos to me.
4 And the government -- what the
5 government says is: Look, this isn't the best
6 approach, but it's the second-best approach, is
7 if you don't have common reasoning, just ask
8 about results. And if you can look at a case
9 and know that there are five justices on the
10 Supreme Court who think X rather than Y, then
11 you should go with X.
12 And we can talk about how that counts
13 dissenting votes or, you know, give various
14 theoretical objections to that, but, in the
15 end, we do try to get to five here. We know
16 how to get to five in some of these cases, even
17 if the five depend on different reasoning. Why
18 isn't that just the second-best approach?
19 MR. SHUMSKY: So, just to clarify if I
20 may, Justice Kagan, and then to turn to that,
21 our position is not that there should be chaos,
22 nor -- nor, at least in the first instance,
23 that the Re argument is the best one. Logical
24 subset or common denominator, as the D.C.
25 Circuit put it in King versus Palmer, is --

1 JUSTICE KAGAN: Well, you carve out a
2 set of cases, and then, when it's not
3 completely nested in the way that you want it
4 to be, you vote for chaos. And I guess I'm
5 asking, why vote for chaos in all of these
6 cases or even in some of these cases?
7 MR. SHUMSKY: So, to be clear, Justice
8 Kagan, and I -- I don't want to quibble, but, I
9 mean, the idea is not that it's chaos; it's
10 that the lower courts can then percolate the
11 issue, as this Court often invites them to do.
12 JUSTICE BREYER: Well, why --
13 MR. SHUMSKY: But let me --
14 JUSTICE BREYER: Yeah, go ahead.
15 MR. SHUMSKY: Sorry, let me -- let me
16 turn to the question about the -- the running
17 the facts through the opinions approach. I
18 mean, it is not just a secondary concern that
19 that relies on dissents. That is quite
20 contrary to everything that this Court has said
21 for not just decades but hundreds of years
22 about how to identify precedents and holdings.
23 If dicta is not precedent, it doesn't count as
24 part of the holding of the Court, then surely
25 the votes that aren't even necessary to the

1 judgment --
2 JUSTICE KAGAN: Well, Mr. Shumsky, I
3 think -- I think your approach relies on
4 dissents sometimes too, because take one of
5 these logical subset cases. You have a
6 concurrence that is a logical subset of the
7 plurality. And you say, well, the concurrence
8 controls. And that's true even as to times
9 where the concurrence splits off with the
10 plurality and joins with the dissent.
11 So you're counting dissents too, I
12 think.
13 MR. SHUMSKY: To be very clear about
14 this, Your Honor, that is not our position,
15 that the concurring opinion would only be given
16 force insofar as to -- or, the extent that it
17 is an opinion that is necessary to the
18 judgment. But I -- I do want to --
19 JUSTICE KAGAN: It's necessary to the
20 judgment, but the result of applying -- but,
21 you know, the plurality would grant relief in
22 this much -- this many cases. The concurrence
23 would grant relief in many fewer cases and deny
24 relief in lots of cases where the dissent would
25 also deny relief. So, by privileging the

1 concurrence, you're essentially saying that
2 when the concurrence agrees with the dissent,
3 the concurrence wins, which I take it is a way
4 -- is -- is -- is because the concurrence plus
5 the dissent equals five.
6 MR. SHUMSKY: I -- I don't think so,
7 Justice Kagan. And, Justice Sotomayor, I think
8 this gets back to a question that you were
9 asking earlier.
10 If the Venn diagrams overlap, if the
11 Russian dolls don't fit, then, under those
12 circumstances, it's not a logical subset.
13 JUSTICE KAGAN: I'm talking about a
14 case in which it is completely nested, but the
15 -- but -- it is completely nested, but the
16 concurrence is sometimes granting the relief
17 that the plurality would but sometimes,
18 instead, reaching the result the dissent would.
19 And by saying the concurrence controls
20 in those cases, you're giving effect to the
21 times when the concurrence plus the dissent
22 equals five.
23 MR. SHUMSKY: I think that for the
24 same reasons I was indicating about reliance on
25 -- about the importance of holdings, we would

1 not say that it controls under those
2 circumstances.
3 Now perhaps the next case might come
4 up and there would be an opportunity to
5 evaluate that, but, Justice Kagan, I want to
6 make sure to answer --
7 JUSTICE KAGAN: So, in those
8 circumstances, there is no result?
9 MR. SHUMSKY: Well, there would be a
10 bare result, certainly, but the concurrence
11 would not be controlling as to cases in which
12 it has to be paired with the dissent.
13 I want to make sure to answer directly
14 your question, Justice Kagan, about what's
15 wrong with the government's approach, and then
16 I might try and -- and turn back to the -- the
17 3582 question for a moment if I can.
18 What is wrong with the government's
19 approach is not just that it is contrary to
20 these pretty fundamental notions about
21 precedent and holdings but because it would
22 stunt the development of the law.
23 It would say at precisely the moment
24 at which this Court is unable to reach a
25 majority, the lower courts should stop trying

1 to sort these issues out. We should stop
2 hoping that we can get to an actual result,
3 whether because of the coming together of the
4 lower courts or because a justice changes their
5 mind or a justice joins a --
6 JUSTICE SOTOMAYOR: I'm sorry. Why is
7 the development of the law stunted completely?
8 You tell us that there's confusion in a split,
9 which suggests to me that the split is
10 occasioned, likely in part, by the circuit's
11 view of the persuasiveness of the split of some
12 other side's argument on the split.
13 So it's not, I don't think,
14 necessarily that it stifles discussion in any
15 meaningful way. You're just -- you just don't
16 -- you say this kind of confusion, I don't
17 like.
18 MR. SHUMSKY: I think the point is a
19 bit different, Justice Sotomayor, in the
20 following way: The idea would be that once
21 this Court splinters and when there is no
22 middle ground, as the government puts it, at
23 that point, all that is left for a lower court
24 to do is run the facts through the opinions.
25 You don't think about the issue

1 further. You don't attempt to resolve it on
2 the merits. You just plug things into the
3 vote-counting algorithm and get bare results in
4 bare cases. If --
5 JUSTICE ALITO: Well, can I just ask
6 you this quick question? Suppose that there's
7 a majority of the Court that -- that agrees
8 that a particular party is entitled to relief,
9 but there is no majority as to the provision of
10 the Constitution that provides the relief.
11 What happens in that situation?
12 MR. SHUMSKY: I --
13 JUSTICE ALITO: So that's never a
14 precedent unless one of the two -- and both of
15 these groups feel very strongly that the other
16 is wrong in identifying the constitutional
17 provision. So one of them has to give way or
18 else this issue is never going to be resolved?
19 MR. SHUMSKY: I think that -- let me
20 answer your question, Justice Alito, and then
21 -- and then reserve the balance of my time.
22 I think that that is the
23 quintessential case in which there is not
24 precedent. If we have less than a majority of
25 this Court resolving a question of

1 constitutional import on different grounds,
2 then it would be very strange to think that the
3 constitutional issue has been resolved for all
4 time.
5 JUSTICE ALITO: So the lower courts
6 would then be free to deny relief in -- in all
7 these cases?
8 MR. SHUMSKY: In a case just like the
9 one that had been before the Court, surely --
10 and this goes to my answer to the Chief
11 Justice. Surely, the lower courts would be
12 wise to pay very careful attention to all of
13 the opinions of this Court. But if there is no
14 majority on the question, then there is no
15 precedent.
16 If I can reserve the balance of my
17 time.
18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.
20 MR. SHUMSKY: Thank you.
21 CHIEF JUSTICE ROBERTS: Ms. Kovner.
22 ORAL ARGUMENT OF RACHEL P. KOVNER
23 ON BEHALF OF THE RESPONDENT
24 MS. KOVNER: Mr. Chief Justice, and
25 may it please the Court:

1 The circuit split here concerns the
2 interpretation of the Marks rule. And this
3 Court should decide this case by rejecting the
4 view of the two circuits that treat divided
5 decisions of this Court as entitled to no
6 precedential effect unless the separate
7 opinions of this Court share the same
8 reasoning.
9 That approach is flatly contrary to
10 what this Court said in Marks. It's contrary
11 to how this Court has applied Marks. And it
12 undercuts the principle of vertical stare
13 decisis that generally requires lower courts to
14 decide cases in the way that this Court would
15 decide them.
16 Now I take Petitioner to raise two
17 main objections to that. The first is an
18 argument that Marks, as this Court has
19 developed it, requires considering dissents.
20 I do want to make clear that's only
21 true in a limited sense. When this Court
22 applies the Marks doctrine, it's picking one of
23 the opinions that led to the judgment in the
24 case at hand and treating that judgment --
25 treating that opinion as controlling.

1 So it's -- the Marks --

2 JUSTICE GINSBURG: Even though it's

3 the opinion of only one. So let's take, I

4 think, an illustration that's familiar.

5 For years, it was thought that Justice

6 Powell's opinion in Bakke was controlling.

7 That was a 4-4-1. And he was in the middle.

8 But none of the others took the position that

9 he did. So a single justice was thought to

10 determine what this Court's precedent for the

11 nots was.

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

13 I think that this Court has consistently

14 applied Marks in that way by picking an opinion

15 that's not subscribed to by the members -- by

16 all the members of the Court or by a majority

17 and describing that as the controlling opinion.

18 And I think the reason, Justice

19 Ginsburg, is that when the Court applies that

20 opinion, it's not applying an opinion that

21 leads to the result that's favored by only one

22 member of the Court. It's applying an opinion

23 that leads to the result that's favored by a

24 majority of the Court. And in every

25 application, the application of that opinion

1 also is supported by the reasoning of a
2 majority of members of this Court.
3 JUSTICE KAGAN: That might be true,
4 but it might not be. I mean, there are middle
5 ground positions that, if --in a 4-1-4 case,
6 where the four would say, well, if we can't get
7 what we want, we'd rather have the middle
8 ground position. But there are some cases
9 where there are middle ground positions which
10 seem utterly incoherent to anybody else,
11 incoherent or maybe it's based on what you
12 think is an impermissible criterion, or for
13 some reason the middle ground is the worst of
14 all possible worlds.
15 So how do you deal with those sorts of
16 cases?
17 MS. KOVNER: So we think ordinarily
18 that the opinions in the case itself will deal
19 with that in the following sense: So, to take
20 Freeman as an example, there's, I think, a sort
21 of broad opinion, a in-between opinion, and a
22 narrow opinion.
23 And it's true that some opinions in
24 Freeman criticize the middle ground, but,
25 nevertheless, the plurality in Freeman voted

1 with the concurrence to create a common result.
2 I think if the plurality thought that
3 it were intolerable to have that middle ground
4 position control the day, the plurality could
5 say, given that we can't have our rule, our
6 second choice is the categorical rule on the
7 other side, and could join that opinion.
8 But we think the plurality indicated
9 through its vote that that's not what it wanted
10 to have happen. It wanted to join with the
11 concurrence and have that control the day.
12 JUSTICE BREYER: So how -- look, I --
13 I don't know what I'd write in this case. And
14 the reason I would write, if we have to get to
15 this issue, the reason I don't know is because
16 I think law is part art and part science. And
17 you learn in law school and thereafter how to
18 read an opinion. There are no absolute rules.
19 Marbury versus Madison, two-thirds of
20 it is not necessary to the conclusion. So
21 should we pay no attention to it? Of course,
22 we pay attention to it.
23 And then I can cite five, but I won't,
24 where it may be that on this matter there was a
25 unanimous Court, but nobody believes it because

1 it wasn't, you see. And they all go off.
2 And Powell, of course, is, in part,
3 key because he had a sensible view. And the
4 public, the lawyers, the -- the clients, the
5 other judges, are the ones who tell us that
6 over time.
7 So, if you ask me to write something
8 better than Marks, I don't know what to say,
9 except what I just said, which will help
10 nobody.
11 (Laughter.)
12 MS. KOVNER: So I -- I think the
13 question that lower courts are in need of
14 guidance on in this case --
15 JUSTICE BREYER: Well, what guidance?
16 MS. KOVNER: Yes. So --
17 JUSTICE BREYER: I mean, what?
18 MS. KOVNER: Sure.
19 JUSTICE BREYER: You talk about the
20 French movie. That was great -- I mean fine.
21 (Laughter.)
22 JUSTICE BREYER: There I say, you mean
23 they really don't want to see The Philadelphia
24 Story? They must be crazy. All right.
25 (Laughter.)

1 JUSTICE BREYER: But -- but -- but --
2 but you see, if you have, of course, a real
3 French comedy, fine. But suppose you have --
4 to show off -- Mr. Hulot's Holiday, you know,
5 it's a comedy, but is it romantic, you see.
6 (Laughter.)
7 JUSTICE BREYER: I mean, that's what
8 law is about. And now suddenly you want us to
9 write a rule. They -- they've done all right
10 with Marks. Leave it alone.
11 MS. KOVNER: So --
12 JUSTICE BREYER: And say -- interpret
13 it with common sense.
14 MS. KOVNER: So I agree with that, but
15 I think there is one clarification that there's
16 a circuit split on and it would be helpful for
17 this Court to resolve.
18 There are two circuits that say,
19 contrary to the views of other circuits, that
20 you need to have not only shared results, which
21 I think is --
22 JUSTICE BREYER: You say they're
23 wrong.
24 MS. KOVNER: That's right, Your Honor.
25 JUSTICE BREYER: And then they say

1 what's right, we don't tell them.
2 MS. KOVNER: No, I think if the Court
3 can say, Marks, and I think the one thing that
4 the Court can add to Marks if it wants to
5 provide further guidance, is that what the
6 Marks rule is doing is it's achieving vertical
7 stare decisis. It's a way of ensuring that
8 lower courts decide cases in the manner that
9 this Court would.
10 And so, to the extent that in a
11 particular case there's difficulty in
12 identifying one opinion as the narrowest, a
13 thing that the courts can also do is run the
14 facts of the case through multiple opinions and
15 see whether the result that is achieved there
16 is the result that's favored by a majority of
17 the court. Of course, that's something this
18 Court has done in -- in -- in applying Marks
19 too.
20 JUSTICE SOTOMAYOR: May I ask two
21 questions? I don't want you to ignore the
22 third question of the petition.
23 But the first one is, if we are able
24 to reach a majority in the Freeman question,
25 should we reach the Marks inquiry, and, if so,

1 how and why? I mean, we usually -- it would be
2 pure dicta.
3 MS. KOVNER: I think that's right,
4 Your Honor. And so the Court, I think, has a
5 choice about how it wants to resolve this case.
6 And we would urge the Court to resolve the case
7 on the Marks ground because that is where there
8 is a circuit split.
9 There's no division on Freeman aside
10 from just a question -- the underlying Marks
11 question of do you need common reasoning or
12 only common results. So that's really the
13 issue that's divided the lower courts.
14 As a second sort of reason that
15 relates to that, Your Honor, is Freeman itself
16 is a statutory interpretation question that
17 this Court -- you know, we obviously took a
18 broader position than Your Honor's opinion in
19 Freeman, but this Court resolved that issue.
20 It's essentially an issue for how the parties
21 are going to bargain.
22 So the parties have arranged their
23 expectations in subsequent cases, including
24 this one, around the understanding that Freeman
25 provided a rule for how their plea agreements

1 are going to be interpreted.
2 JUSTICE SOTOMAYOR: As -- and what the
3 prosecutors are now doing is making a waiver of
4 any amendment of the guidelines in almost all
5 (C) agreements.
6 MS. KOVNER: I -- I don't -- I
7 actually don't think that's the case
8 empirically, Your Honor. I think that, for the
9 most part, prosecutors have been understanding
10 that Freeman is the rule, and we haven't seen,
11 to my knowledge, the vast majority of districts
12 actually incorporate those kinds of waivers.
13 JUSTICE SOTOMAYOR: Now I have a
14 question on the substance of the -- of the
15 plurality's position. There is some force to
16 the argument that -- and examples provided in
17 the briefing -- where the government goes to
18 sentencing and says we did this in light of the
19 guidelines.
20 And under the concurrence in Freeman,
21 that would not count. Is -- is that right?
22 And why is that right? If -- if the prosecutor
23 is telling the judge, I'm doing this because of
24 the guidelines, what difference does it make
25 that it's in the plea agreement or not? It's

1 still a representation by the government.
2 MS. KOVNER: That's right, Your Honor.
3 I think that once Freeman was established, we
4 can expect the parties to negotiate around the
5 rule in Freeman. And so, to the extent that
6 the parties have an understanding that this is
7 a sentence based on the guidelines within the
8 meaning of Your Honor's opinion in Freeman,
9 that's something they know that they should be
10 putting in the plea agreement.
11 And we think that it's desirable to
12 have that one place to look for the -- where
13 the parties' understanding is rather than sort
14 of combing through the background negotiations
15 of the parties.
16 JUSTICE SOTOMAYOR: Except the
17 plurality says there's a player that you're not
18 considering, which is the judge, and the judge
19 accepts the agreement because a prosecutor has
20 gotten up and said we think it should be within
21 the guidelines. It's not in the plea
22 agreement, but the prosecutor is guiding the
23 judge and incentivizing the judge to accept
24 this agreement with that representation.
25 So why shouldn't that be recognized?

1 MS. KOVNER: So I think, you know,
2 both Your Honor's opinion in Freeman and the
3 dissenting opinion in Freeman sort of note that
4 there's a real difference between background
5 considerations that go into what the deal is
6 and then what the sort of deal ultimately is.
7 Ultimately, in a (C) agreement, you
8 know, the parties bargain for a specific
9 determinate sentence and they urge the court to
10 impose that -- that sentence. And that is, as,
11 you know, Your Honor's opinion indicated and --
12 and -- and four other justices agreed, that is
13 what the sentence is based on.
14 And if there's doubt about that, I
15 think there are a few things that the Court can
16 look to to resolve that doubt. The first is
17 the Sentencing Commission's guidance.
18 The Sentencing Commission's guidance
19 indicates that the only guidelines that should
20 be changed through 3582 are the guidelines that
21 were actually applied when the defendant was
22 sentenced. And that's surely not what happens
23 in a C case.
24 And the other I think is sort of
25 reasons of administrability that Your Honor's

1 opinion alludes to in Freeman.
2 The alternative is, on Petitioner's
3 approach, you're going to be combing through
4 the record to see whether in a particular case
5 the by -- the guidelines bore a sufficiently
6 close connection to the sentence. That's not
7 an administrable inquiry.
8 And then, on the back end, as Your
9 Honor's opinion alludes to in Freeman, you're
10 going to have a judge trying to determine after
11 the fact what is the alternative agreement that
12 this part -- the parties would have entered
13 into if -- if the guidelines had been
14 different?
15 And that's not the kind of --
16 JUSTICE SOTOMAYOR: Well, that's --
17 that's the way I phrased the question earlier,
18 but really the question is not what will the
19 parties do? The question really is what will I
20 do?
21 MS. KOVNER: I --
22 JUSTICE SOTOMAYOR: I mean, because
23 every (C) agreement before it takes effect has
24 to be approved by the judge.
25 So really it's the judge who has to

1 determine would I have accepted this or not --
2 MS. KOVNER: I --
3 JUSTICE SOTOMAYOR: -- knowing that
4 the guideline was in error?
5 MS. KOVNER: I actually think that's
6 the way in which a C plea is fundamentally
7 different from other kinds of pleas, as -- as
8 Your Honor's opinion in Freeman alludes to,
9 which is part of a -- part of a C plea is that
10 the parties agreed to it. And so, if a judge
11 said I'm not going to accept this plea, you'd
12 be back to the drawing board for the parties.
13 And so that's why Petitioner's approach means
14 the judge has to figure out, okay, if the judge
15 said no, what would the parties have done under
16 that circumstance?
17 And as Your Honor alluded to in -- in
18 -- in your questions, often, the government has
19 given up, for instance, a mandatory minimum,
20 you know, additional charges, you know. In
21 this case, I think there's no reason to think
22 that the government would have agreed to a more
23 favorable deal if the guidelines had been
24 different.
25 JUSTICE BREYER: In a (C) agreement,

1 it says, the Commission, that the judge -- it's
2 the judge who will depart if that's the
3 agreement, and it says the agreed -- he has to
4 write his reasons in writing as to why the
5 agreed sentence "departs from the applicable
6 guideline range" for justifiable reasons.
7 So, if the guideline range is 120
8 months, he says why it departs from that, and
9 he has some reasons. And if it's 100 months,
10 he says why it departs from that.
11 Now, much of the time, perhaps, I
12 don't know for sure, but, of course, you are
13 referring to the guideline. And if the
14 guideline is one thing, you might do A, and if
15 it's another thing, you might do B. And,
16 certainly, you will have to say something
17 different where the guideline is 100 versus
18 120. Not certainly, but almost certainly.
19 So why isn't that good enough? That's
20 good enough to say that where the guideline's
21 two levels lower, you know, you can get that
22 advantage because your original sentence was in
23 some sense based upon the guideline, namely,
24 the sense that I just mentioned.
25 MS. KOVNER: So I think this case is a

1 -- is a really good example, Justice Breyer, of
2 why that doesn't work. You're not going to
3 know in particular cases what the parties would
4 have done absent the guidelines.
5 So that, you know --
6 JUSTICE BREYER: No, I don't know.
7 All I have to know is what the judge would have
8 done. He's the one who departed and he had to
9 put his -- you know, I'd just be --
10 MS. KOVNER: Right.
11 JUSTICE BREYER: -- repeating what I
12 said.
13 So we know in every sentence like that
14 there will be words about the applicable
15 guideline.
16 MS. KOVNER: Yes.
17 JUSTICE BREYER: And much of the time,
18 it will have something to do with the
19 applicable guideline. And why isn't that good
20 enough?
21 MS. KOVNER: So, Justice Breyer, to
22 take, for instance, this case, there is no
23 reason to believe, I think, in this case that
24 the judge would have rejected the parties' plea
25 agreement if the judge had calculated the

1 guidelines differently. For instance, in this
2 case, the particular change to the Sentencing
3 Guidelines that the -- you know, that was
4 ultimately made had already been proposed. The
5 parties knew about it, the judge knew about it,
6 and nobody indicated that that fact -- if the
7 -- if that guidelines change had been in
8 effect, the result would have been different.
9 And, here, I think there's good reason
10 why the judge would have accepted this plea --
11 plea agreement, which was for a
12 below-guidelines sentence, even if the
13 guidelines had been different, because the
14 government was giving up a mandatory minimum in
15 which the government could have insisted on a
16 life sentence in this case.
17 JUSTICE BREYER: Suppose we say you're
18 absolutely right, and that's why the word
19 "based upon" cannot just refer to these
20 hypotheticals we know nothing about.
21 Therefore, "based upon" refers to an instance
22 where the judge made significant use of the
23 guideline, either in his reasoning or in the
24 reasons that he gave, which, of course, would
25 throw this case right into the opposite side

1 that you want. But, nonetheless, it would be a
2 workable rule, and we'd say "based upon" at
3 least means that.
4 MS. KOVNER: So I think there are a
5 few reasons. First of all, we don't think,
6 respectfully, that in the ordinary case, it's
7 going to be easy to sort out whether the -- the
8 -- whether the court was just calculating the
9 guidelines, which Petitioner suggests would not
10 be enough, or was relying --
11 JUSTICE BREYER: In a (C) agreement,
12 it would be because he has to write it down.
13 MS. KOVNER: I -- I think all he has
14 to indicate is that there were justifiable
15 reasons for him to accept the sentence,
16 notwithstanding that -- notwithstanding that
17 the sentence in a particular case was outside
18 the guidelines.
19 And I think there's some additional
20 reasons why that approach wouldn't be a good
21 one. The first is the Sentencing Commission's
22 guidance. The Sentencing Commission has
23 indicated it has to be -- in order for 3582
24 relief to be available, the guideline has to
25 have actually been applied at sentencing.

1 And then I think there's a stare
2 decisis reason, which is the Court, you know,
3 whatever -- whatever the merits of the rule in
4 Freeman, and, obviously, the government took a
5 slightly broader approach to the extent to
6 which 3582 denies relief, but this is an
7 opinion of this Court that this plea and other
8 pleas have been sort of organized around since
9 the case was decided, and that's a case in
10 which stare -- statutory stare decisis
11 principles have their greatest force. So --
12 I'm sorry, Your Honor.
13 JUSTICE GORSUCH: No, I understand
14 you'd like us to decide what we're calling the
15 Marks question, rather than just resolving what
16 Freeman means.
17 But to what extent is the Marks
18 problem real outside of the Freeman context? I
19 know Freeman has beset the lower courts with a
20 lot of difficulty and generated disagreements.
21 But have -- have there been real problems
22 outside of that context?
23 MS. KOVNER: So, I mean, the -- the
24 courts that have gone against us on the Marks
25 question have indicated it's sort of their --

1 it's just their interpretation of Marks, so
2 it's the interpretation they would apply in
3 future --
4 JUSTICE GORSUCH: But they've done it
5 in the context of trying to figure out what
6 Freeman means. And if we relieve them of that
7 confusion, how far have we gone to resolving
8 the problem?
9 MS. KOVNER: I don't think very far,
10 Your Honor, because in any future divided
11 decision of this Court, those courts would go
12 back to applying the requirement --
13 JUSTICE GORSUCH: There are a lot of
14 divided decisions of this Court, though.
15 MS. KOVNER: That's right.
16 JUSTICE GORSUCH: And -- and it
17 doesn't seem to be a pervasive problem outside
18 of the Freeman context, at least that you've
19 documented so far. And I was just wondering
20 whether you had any other evidence of problems
21 outside of the Freeman context.
22 MS. KOVNER: So I think an -- an
23 additional circumstance, you know, some of the
24 amicus briefs allude to is interpreting this
25 Court's decision in Rapanos. You know, we

1 think this -- this same issue comes up there,
2 and, you know, the two circuits that have
3 indicated shared reasoning is necessary, I
4 think, would regard this Court's decision in
5 Rapanos as not having precedential effect.
6 And, of course, as Your Honor alludes to, there
7 are going to be, you know, future divided
8 decisions of this Court.
9 JUSTICE GORSUCH: But are there actual
10 opinions, I guess, is -- I'm sorry for pursuing
11 this --
12 MS. KOVNER: Yes.
13 JUSTICE GORSUCH: -- but I'll stop.
14 But -- but are there -- are there any other
15 actual decisions like we have in the Marks?
16 MS. KOVNER: So I --
17 JUSTICE GORSUCH: In -- in the Freeman
18 context?
19 MS. KOVNER: This is often, I think,
20 briefed in -- I know there are a lot of cases
21 discussing this Marks issue in the context of
22 Rapanos. The opinions that I focused on, I
23 think, where this has been framed most are the
24 Freeman cases. In part, that's because this is
25 essentially a recent split. So Davis is 2016,

1 and that's where the Ninth Circuit sets out its
2 opinion. I think the D.C. Circuit case, it did
3 arise earlier in one case, that was King, and I
4 think that -- which I know obviously involved
5 an opinion -- interpretation of a different
6 opinion of this Court.
7 I think Your -- Your Honor is right
8 that this split is framed most squarely in
9 terms of Freeman. One of the circuits only
10 arrived to its interpretation of Marks in the
11 context of Freeman.
12 JUSTICE GINSBURG: Don't you think
13 that --
14 MS. KOVNER: But those courts have set
15 out rules that are going to apply in future
16 cases.
17 JUSTICE GINSBURG: Didn't the
18 commentary that's been referred to, Re and the
19 other one, give lots of examples?
20 MS. KOVNER: I think they -- the --
21 the -- Professor Re's brief I take to indicate
22 --
23 JUSTICE GINSBURG: Not the brief. The
24 -- the long article.
25 MS. KOVNER: Yes. I take him to have

1 identified cases where he asserts that this --
2 there's been difficulty applying Marks in the
3 past, so perhaps that supports the idea that
4 there is benefit to be had from clarifying what
5 the Marks rule means.
6 JUSTICE GINSBURG: It has been said
7 that -- in one of the briefs, that the
8 government in several cases endorsed this
9 so-called Russian doll approach. Is that true
10 that the government once did, and is the
11 government giving it up now?
12 MS. KOVNER: No, I mean, in -- I know
13 in the cases interpreting Rapanos, the
14 government has consistently taken the position
15 we've interpreted here. Petitioners, I think,
16 cite one of the petitions in -- a petition we
17 filed in a case called McWane, but I -- my
18 reading of that petition is that it's entirely
19 consistent with our opinion here. We don't
20 suggest -- I'm not aware of any filing in which
21 we've suggested the Marks rule requires shared
22 reasoning in order for a decision to have
23 precedential effect.
24 JUSTICE ALITO: If we followed the --
25 your predictive approach, why should we --

1 could it not be confined to the opinions that
2 concurred in the judgment? Why should we count
3 the dissents? Why -- why not just look at the
4 -- the -- the ones that concurred in the
5 judgment?
6 MS. KOVNER: So I -- I take the Marks
7 rule -- I think that would be contrary to what
8 this Court has said and done for about 40 years
9 where it said you identify the narrowest
10 opinion concurring in the judgment and then you
11 treat that as the controlling rule, even though
12 in some cases that opinion aligns with the
13 dissent and in some cases with the plurality.
14 And we think that's the right rule,
15 Justice Alito, because, otherwise, in every
16 Marks case, the Court would essentially need to
17 take the case twice, once for the cases where
18 the plurality assigns -- aligns with the
19 concurrence and once for the cases where the
20 concurrence assigns with the -- aligns with the
21 dissent.
22 And in that case, the members of this
23 Court could issue identical opinions to the
24 ones they issued in the first case because all
25 of the opinions have already fleshed out

1 exactly what rule the justices are applying,
2 but it would need to essentially -- this Court
3 would need to essentially take the case twice.
4 The rule that was set out in the first case
5 would depend somewhat arbitrarily on the
6 vehicle in which the Court initially granted
7 cert.
8 We don't think there's any need for
9 the Court to expend its resources in this way,
10 and the effect would be an undesirable one for
11 purposes of vertical stare decisis, where for a
12 period of time you would have courts not -- not
13 being bound by what five members of the Court
14 have indicated is the appropriate rule.
15 JUSTICE KENNEDY: As best you
16 interpret the Re brief and the Re article, is
17 it your position or would it be your position
18 that overruling Marks would be disruptive?
19 MS. KOVNER: I -- I think so, Your
20 Honor. I mean, the -- the Re article points
21 out that courts have -- courts of appeals have
22 relied on Marks quite a lot. There are over
23 400 decisions of courts of appeals applying
24 Marks to over 100 decisions of this Court over
25 a 40-year period. So we think there are --

1 there's quite a lot of appellate court
2 jurisprudence that's based on applying Marks to
3 this Court's decisions. So we think it would
4 be quite disruptive to overrule Marks.
5 But for the -- you know, we -- we
6 believe Marks is the correct rule for the
7 additional reason that the principle of
8 vertical stare decisis that it embodies is, I
9 think, the -- the appropriate way for lower
10 courts to adhere to this Court's decision.
11 JUSTICE BREYER: When you say that
12 Marks is fine for the cases that it works with
13 which are a logical subset, fine, but it
14 doesn't deal with every case. And we just
15 recognize it doesn't.
16 And as far as the other cases are
17 concerned, we don't necessarily have to go into
18 them. If we did have to go into them, you'd
19 try to pick out something that is not an
20 oxymoron, but it's something along the lines of
21 legal common sense. And I -- I don't -- I -- I
22 don't know that I can do better than that.
23 MS. KOVNER: So, I mean, we agree that
24 the Court doesn't need to consider or decide
25 cases that are not before it, but we would urge

1 the Court to clarify that there's no
2 requirement of --
3 JUSTICE BREYER: Yeah, I see.
4 MS. KOVNER: -- of common reasoning.
5 And, you know, to go on and say in this case
6 the court -- lower court was correct to apply
7 Marks to the straightforward application of
8 Marks.
9 If there are no further questions, we
10 would urge that the judgment be affirmed.
11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.
13 Mr. Shumsky, three minutes.
14 REBUTTAL ARGUMENT OF ERIC SHUMSKY
15 ON BEHALF OF THE PETITIONER
16 MR. SHUMSKY: Thank you, Your Honor.
17 Justice Sotomayor, I'd like to start
18 with your hypothetical in the circumstance in
19 which the prosecutor says the sentence here,
20 the agreement here, was based on the
21 guidelines.
22 The lower courts following Freeman
23 have interpreted the concurring opinion in
24 Freeman as prohibiting reliance on that. And
25 you can look at a case like United States

1 versus Dixon --
2 JUSTICE SOTOMAYOR: I -- I'm not in
3 disagreement with that. But the one thing
4 you're -- the Solicitor General's Office said,
5 when a judge rejects a (C) agreement, the
6 parties are put back to their starting point,
7 which means the government keeps its right to
8 file the persistent felony certificate or to
9 prosecute the dismissed charges or the charges
10 it proposed to dismiss.
11 In doing it this way, they don't get
12 that chance anymore.
13 MR. SHUMSKY: Let me --
14 JUSTICE SOTOMAYOR: Doing it the way
15 the plurality suggests, they're losing that
16 chance.
17 MR. SHUMSKY: Justice Sotomayor, let
18 me try and address this as sharply as I can.
19 This is where we started the colloquy at the
20 beginning of this argument, and I think it's
21 critical.
22 The government is not losing the
23 benefit of any bargain here, and it is
24 certainly not in any greater way than it is for
25 any other form of plea agreement.

1 JUSTICE SOTOMAYOR: Well, you're --
2 MR. SHUMSKY: When -- when --
3 JUSTICE SOTOMAYOR: -- turning it into
4 a B, instead of a C, is what you're saying.
5 MR. SHUMSKY: No. Because --
6 JUSTICE SOTOMAYOR: This is like all
7 (B) agreements.
8 MR. SHUMSKY: -- because, remember, we
9 have other types of (C) agreements with a range
10 and the government says those ones are fine.
11 We don't mind giving away the benefit of our
12 bargain for (C) agreements with a range,
13 because there, again, when Congress in these
14 narrow circumstances has said the Commission,
15 again, in narrow circumstances, is applying a
16 guide -- is applying a change retroactively,
17 under those circumstances, the bargain has
18 changed. What was here is now here. And
19 that's just the same for these agreements.
20 I would emphasize that the record here
21 shows that the judge, the parties, and the
22 probation officer were discussing the
23 sentencing guidelines at length.
24 This is not just a circumstance in
25 which they're being alluded to. At 32a to 36a

1 of the record, they're performing a guidelines
2 calculation. What about the three point
3 reduction for acceptance of responsibility?
4 What about two points for using a gun?
5 And it makes sense under those
6 circumstances to send it back to the same
7 district court who accepted the bargain and who
8 had to, relying on Section 6B1.2, assess the
9 bargain. That is the critical thing about
10 6B1.2.
11 Congress, when it enacted
12 994(a)(2)(E), directed the Commission to put
13 the judges in the middle of this process. The
14 judges are assessing the agreement to determine
15 whether it is compliant with the guidelines or
16 at least compliant enough to be accepted.
17 And so here we have a judge who sat
18 there and dickered with the parties over the
19 guidelines. And it only makes sense there to
20 say this is a circumstance in which you are
21 eligible to seek relief. You're not guaranteed
22 to get it, but we're not closing the door.
23 The final point I'd like to make on
24 Freeman, Congress did not carve out C-type
25 agreements. It could have. It knew how to do

1 that. It did that in 3742 in limiting appeals.
2 But it didn't do that for C-type
3 agreements when it could have.
4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel. The case is submitted.
6 (Whereupon, at 11:03 a.m., the case
7 was submitted.)
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