HUGHES V. UNITED STATES: AFTER 40 YEARS, WILL THE SUPREME COURT HIT THE MARKS?

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How do the lower courts apply a Supreme Court decision when there is no majority opinion to serve as precedent?

This problem happens more often than one would think: Four justices take part in a plurality opinion, and one or more of the justices writes a concurrence. When you get a 4–1–4 split or something similar, the question arises, how should lower courts treat the plurality opinion? Is the plurality opinion controlling? How much weight, if any, should be given to the concurrence? What if the plurality and the concurrence are based on different rationales?

The Supreme Court tried to answer these questions 41 years ago in *Marks v. United States*.[1] *Marks* dealt with whether the Supreme Court's decision in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*[2] set forth the correct obscenity standard. The majority opinion in *Memoirs* had a three-justice plurality; three other justices concurred in the opinion but had a broader view of the correct standard. *Marks* held that the plurality opinion in *Memoirs* was controlling, holding that when the Supreme Court decides a case and "no single rationale explaining the result enjoys the assent of five Justices," the holding is the "position taken by those Members who concurred in the judgment on the narrowest grounds."[3] This is problematic, though, because under the *Marks* rule, a single justice's concurring opinion could be considered controlling precedent simply because it contains the narrowest holding. Indeed, this has been the case on more than one occasion.

However, with *Hughes v. United States*, the Supreme Court has the chance to give a decisive and clear answer on how to interpret opinions that lack majority support.

First, some background on *Hughes*. Petitioner Hughes was sentenced to 180 months in prison for drug- and firearm-related offenses. Hughes sought a reduction in his sentence under 18 U.S.C. § 3582(c)(2) after the U.S. Sentencing Commission retroactively amended the guidelines. The district court determined that Hughes was ineligible for a sentence reduction, basing its decision on Justice Sotomayor's concurrence in *Freeman v. United States*.[4] In *Freeman*, the Supreme Court reversed and remanded the lower court in a 4–1–4 split, holding that the petitioner was eligible for a sentence reduction after the U.S. Sentencing Commission retroactively reduced the sentencing guidelines range. Like Hughes, petitioner Freeman had agreed to the original sentence in a plea deal. The four-justice plurality held that, even when a defendant enters into a plea agreement, "the judge's decision to accept the plea and impose the recommended sentence is likely to be based on the Guidelines; and when it is, the defendant should be eligible to seek § 3582(c)(2) relief."

Justice Sotomayor wrote a concurrence in which she agreed with the plurality that petitioner Freeman was eligible for a sentence reduction but differed as to the reason why. Justice Sotomayor concluded that when a plea

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agreement "expressly uses a Guidelines sentencing range to establish the term of imprisonment, and that range is subsequently lowered by the Commission, the defendant is eligible for sentence reduction under § 3582(c)(2)." Her opinion was slightly narrower than the plurality because, under her test, the sentence specified in the plea agreement had to be clearly based on the sentencing guidelines. Thus, under *Marks*, Justice Sotomayor's concurrence is the controlling opinion in *Freeman*.

Applying Justice Sotomayor's reasoning to the *Hughes* case, the Eleventh Circuit affirmed the district court's ruling because Hughes's plea agreement did not expressly refer to a particular sentencing range. The Eleventh Circuit stated that "[t]he plea agreement does not 'make clear' that a sentencing range formed the basis for Hughes's sentence" and that "the agreement does not make any recommendation about a specific application of the Sentencing Guidelines."[5]

Hughes appealed, and the Supreme Court granted certiorari.

Commentators have suggested three different approaches to the fractured-precedent situation. Under the first approach, lower courts would apply the plurality opinion and concurring opinion(s) to see if they arrive at the same conclusion. This approach would essentially give both opinions equal weight. Under the second approach, lower courts would look for "common ground shared by five or more justices."[6] Common ground between the plurality opinion and the concurrence would form the controlling precedent. Under the third approach, a Supreme Court decision would not have precedential effect unless at least five justices agreed on a single decision. Plurality opinions and concurrences would be considered persuasive authority, as opposed to binding authority.

It is unclear which approach the Supreme Court will choose, but four decades of uncertainty suggest that *Marks* isn't hitting the, well, mark.

Hughes v. United States is set for argument on Tuesday, March 27, 2018.

Notes
[1] 430 U.S. 188 (1977).
[2] 383 U.S. 413 (1966).
[3] 430 U.S. at 193.
[4] 564 U.S. 522 (2011).
[5] 849 F.3d 1008, 1015–16 (11th Cir. 2017).
[6] Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1182 (2d Cir. 1992).

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