ON YOUR *MARKS*, GET SET, NO

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The U.S. Supreme Court has avoided an opportunity to explain how opinion readers should interpret the Court's fractured decisions in which no opinion garners a majority of the justices' votes.

Court watchers hoped the Court would use this term's *Hughes v. United States*,[1] not only to clarify the substantive sentencing issue raised by that case but also to settle a dispute in the federal courts about the rule the Court first set out in *Marks v. United States*.[2] In *Marks*, the Court announced that, when there was no majority for a single opinion, the Court's holding should be "viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds …."

The federal courts of appeals have interpreted the *Marks* rule in somewhat different ways, sometimes resulting in counterintuitive rulings. For example, in a case in which the justices split 4-1-4 with the concurring justice agreeing with the first four about the result but on narrower bases, lower federal courts often employed the *Marks* rule to decide that the narrower single-justice concurrence set out the Court's holding.

Hughes offered the Court an opportunity either to explain *Marks* in a more workable way or to come up with a different rule. In *Hughes*, the Court agreed to resolve a split among the federal courts of appeals about a sentencing issue that the Court addressed seven years ago in *Freeman v. United States*.[3] In *Freeman*, the Court split 4-1-4, with Justice Sotomayor concurring but with a somewhat narrower rationale than the one employed by the plurality she joined. In the years since, lower federal courts debated whether they were required to treat the Sotomayor concurrence as *Freeman's* holding.

In *Hughes*, the Eleventh Circuit treated Justice Sotomayor's concurrence as binding. The Supreme Court granted review to decide how *Marks* should be applied and, ultimately, how the substantive sentencing issue should be resolved.

The Court issued its decision on June 4, 2018. In a majority opinion by Justice Kennedy, the Court essentially skipped over the *Marks* question and simply decided the underlying substantive issue as though it had not considered *Freeman* only seven years earlier. The Court split 5-1-3 in *Hughes*; it could avoid the *Freeman* split in *Hughes* because Justice Scalia dissented in *Freeman*, but his replacement, Justice Gorsuch, joined the majority in *Hughes*.

While those hoping for clarity in the often difficult task of interpreting fractured decisions might be disappointed with the Court's express avoidance of the issue in *Hughes*, the case could nonetheless be helpful. The Court seemed particularly focused on the fact that *Freeman* had caused such confusion. Indeed, while Justice Sotomayor concurred in *Hughes* as she did in *Freeman*, and while she wrote that she continued to believe her reasoning in the earlier case was correct, she made clear in *Hughes* that she was joining the majority "in full because doing so helps to ensure clarity and stability in the law and promotes uniformity in sentencing imposed by different federal courts for similar criminal conduct."

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Having seen that their fractured decision in *Freeman* was so at odds with one of the Court's principal purposes — to bring uniformity and clarity to important points of federal law — that they had to revisit the same issue just seven years later, the justices may in the future be more sensitive to the need to find greater consensus and avoid issuing splintered and therefore less clear decisions.

Of course, none of that addresses the fractured decisions already in the law books, but *Hughes* may offer some modest help there as well. While the Court may have been able to avoid the *Marks* issue in *Hughes* only because the change in the Court's membership changed the voting alignment, superseding the earlier case's 4-1-4 split, *Hughes* might also signal that the Court will be more willing to revisit existing splintered precedent to provide clearer guidance — especially where courts have struggled to divine and to apply the Court's holdings.

Notes:
[1] No. 17-155.
[2] 430 U.S. 188 (1977).
[3] 564 U.S. 522 (2011).

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