No. 10-113

OCT 5 - 2010

In the Supreme Court of the United States

ROBIN EDDIE RIVERA-MARTÍNEZ,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government's brief in opposition is substantially identical to its brief in opposition in *Freeman* v. *United States*, No. 09-10245. Indeed, the government here has specifically acknowledged that *Freeman* "present[s] the same question as the petition in this case." Br. in Opp. 8 n.3. On September 28, 2010, this Court granted certiorari in *Freeman*; accordingly, the government's claim that "[f]urther review is not warranted" in this case (Br. in Opp. 8) must be rejected. At a minimum, this case must be held pending disposition of *Freeman*.

We respectfully submit, however, that the proper course is to grant review in this case and consolidate it for oral argument with *Freeman*. As explained in our petition (at 29-31), this case involves a plea agreement under Fed. R. Crim. P. 11(c)(1)(C) that is squarely based on the Sentencing Guidelines. Indeed, the government attorney candidly admitted at the plea hearing that "we agreed to stipulate to the amount of years *based on* the quantity of drugs," and that the agreed-upon sentence would have been based on a higher guidelines range if it had been appropriate to include other conduct. Pet. App. 33a-34a (emphasis added). Petitioner Freeman's agreement, however, stipulated a sentence that fell within the applicable Guidelines range, both before and after the relevant amendments. It is therefore possible that the Court would ultimately decline to reach the question presented on the ground that its resolution would not ultimately affect Freeman's sentence. Here, by contrast, the sentence petitioner received was *within* the Guidelines prior to their amendment but falls *outside* the amended Guidelines. Thus, petitioner would almost certainly

benefit from reversing the judgment below. Consolidating this case with *Freeman* would assure full resolution of this important question.

In any event, if the Court ultimately affirms in *Freeman* (which, of course, we do not believe would be the proper outcome), it may nonetheless be necessary to grant this petition, vacate the judgment below, and remand for further proceedings. That is so because of the differences between this case and *Freeman* outlined above. That is, depending on the Court's precise rationale, it is possible that *Freeman* could be affirmed but the decision below reversed.

CONCLUSION

The petition for a writ of certiorari should be granted and consolidated with *Freeman.* In the alternative, this case should be held for *Freeman.*

Respectfully submitted.

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