No. 19-6926

IN THE
SUPREME COURT OF THE UNITED STATES

ROGER WILLIAM CAMPBELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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I. The government's attempts to show that this case presents an "unsuitable vehicle" are unconvincing.

1. The government suggests that Mr. Campbell's challenge to his sentence is moot, because he has completed the incarceration portion of the sentence. Br. in Opp. at 13-15. According to the Bureau of Prisons, Mr. Campbell was released from physical custody in July of 2019 – but his sentence also includes a 35-month-and-one-day term of supervised release, which he will continue to serve for over two years to come. Pet. App. B at 8.

The government asserts that the circuit courts are in conflict as to whether an appellant in Mr. Campbell's position – having completed the incarceration portion of the challenged sentence while still serving the supervised release portion – presents a live case or controversy. Br. in Opp. at 15 & n.*. Assuming this were so, it would present a reason to *grant* certiorari, not to deny it. Resolving conflicts among the circuit courts on important questions of constitutional law is a fundamental purpose of this Court's certiorari power. S. Ct. R. 10(a).

In any case, the government's mootness argument is meritless. If Mr. Campbell prevails in his challenge to the district court's calculation of the applicable range under the United States Sentencing Guidelines, the district court would likely shorten the supervised release term that he is currently serving, to compensate for the improperly-long incarceration sentence. Indeed, this Court expressly acknowledged – and encouraged – the likelihood of such relief being granted under these circumstances in *United States v. Johnson*, 529 U.S. 53, 60

(2000) (noting that district courts may grant relief in "the interest of justice" under 18 U.S.C. § 3583(e)(1) when a defendant on supervised release has served an erroneously long prison sentence); *see also United States v. Epps*, 707 F.3d 337, 43-48 (D.C. Cir. 2013) (prospect of such relief prevents case from becoming moot); *Levine v. Apker*, 455 F.3d 71, 76-77 (2d Cir. 2006) (same).

The cases on which the government relies are not to the contrary. The government cites *Spencer v. Kemna*, 523 U.S. 1 (1998); *Lane v. Williams*, 455 U.S. 624 (1982); *United States v. Hardy*, 545 F.3d 280 (4th Cir. 2008); *United States v. Mazzillo*, 373 F.3d 181 (1st Cir. 2004); and *United States v. Meyers*, 200 F.3d 715 (10th Cir. 2000). Br. in Opp. at 13-14. But none of those cases involved defendants who continued to serve supervised release (or comparable) portions of their sentences. *Spencer*, 523 U.S. at 3-7; *Lane*, 455 U.S. at 626-28; *Hardy*, 545 F.3d at 282; *Mazzillo*, 373 F.3d at 182; *Meyers*, 200 F.3d at 718.

The government also cites *Burkey v. Marberry*, 556 F.3d 142 (3d Cir. 2009), for the proposition that "'[t]he possibility that the sentencing court will use its discretion to modify the length of [a defendant's] term of supervised release * * * is so speculative' that it does not suffice to present a live case or controversy." Br. in Opp. at 15 (*quoting Burkey*, 556 F.3d at 149). The government's insertion of an ellipsis in this quotation is misleading. It was only "[t]he possibility that the sentencing court w[ould] use its discretion to modify the length of *Burkey's* term of supervised release" that the Third Circuit considered speculative. *Burkey*, 556 F.3d at 149 (emphasis added). That was because the appellant challenged only the

Bureau of Prisons' failure to grant him early release, and the court doubted that the sentencing judge would "alter his view as to the propriety of that sentence because the BOP required the defendant to serve it." *Id.* at 149. In fact, the court acknowledged a prior Third Circuit opinion holding that such an appellant who raises precisely the same type of challenge that Mr. Campbell raises here *did* present a live controversy. *United States v. Cottman*, 142 F.3d 160, 165 (3d Cir. 1998) (case not moot because reduction in Guidelines range that would result from appellant's victory "would likely merit a credit against [his] period of supervised release") (discussed in *Burkey*, 556 F.3d at 150).

In the instant case, the likelihood of relief upon securing a favorable ruling here is far from speculative. The upshot of a victory on the merits of Mr. Campbell's claim would be that the district court erroneously calculated the maximum Guidelines sentence as *840 months*, when in fact it was *nine* months – and imposed a sentence 16 months above the top of the correct Guidelines range. This Court has held that a sentencing court impairs a defendant's "substantial rights" and "seriously affects the fairness, integrity, or public reputation of judicial proceedings" when it sets the maximum Guidelines sentence *nine months* higher than it should be, notwithstanding the fact that it imposes a sentence *within* the correct Guidelines range. *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018); *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016). In light of these holdings, it cannot plausibly be suggested that the possibility of a district court granting relief

in the face of a Guidelines error many times more egregious than these is so minimal as to be speculative.

2. The government posits that this case presents an "unsuitable vehicle" for addressing the question presented because it "arises in a plain-error posture." Br. in Opp. at 8. This assertion is misguided, for two reasons.

a. First, assuming this case did arise in a plain-error posture, this would not affect its suitability as a vehicle for addressing the question presented. The government seems to assume that if the plain-error standard applied, this Court would be required to apply all four of its prongs. *United States v. Olano*, 507 U.S. 725, 732-35 (1993). But that is not how this Court operates. To the contrary, "[a]fter identifying an unpreserved but plain legal error, this Court [] routinely remands the case so the court of appeals may resolve whether the error affected the defendant's substantial rights and implicated the fairness, integrity, or public reputation of judicial proceedings." *Hicks v. United States*, 137 S. Ct. 2000, 2000 (2017) (Gorsuch, J., concurring); *accord Rosales-Mireles*, 138 S. Ct. at 1907 (*quoting Hicks*, 137 S. Ct. at 2000-01 (Gorsuch, J., concurring)). Thus, if this Court grants certiorari, it need only address and decide the question presented, exactly as it would if the plain error standard were inapplicable.

b. In any case, the plain error standard *is* inapplicable. Pursuant to Federal Rule of Criminal Procedure 51(b), all that is required to preserve a claim of error is to "inform[] the court – when the court ruling or order is made or sought – of the action the party wishes the court to take, or the party's objection to the court's

action and the grounds for that objection." Mr. Campbell's trial counsel did precisely that at the final disposition hearing, urging the district court to impose a sentence "within the policy statement," which he argued called for "concurrent" sentences:

> MR. WILLIAMS: Judge, we would ask the Court to consider a sentence within the policy statement, the recommended range. This is his first violation –
>
> THE COURT: This is actually within the policy statement, it's just consecutive.
>
> MR. WILLIAMS: I mean concurrent, within the three to nine months range. Within the three to nine month range. This is his first violation.

Pet. App. B at 4.

In this exchange, while the government "sought" a sentence above the Guidelines range pursuant to a concurrent interpretation, Mr. Campbell's counsel informed the court of the "action [he] wishe[d] the court to take" – *i.e.*, construing the Guidelines as calling for "concurrent" sentencing, and imposing a sentence within the Guidelines range as thus construed. Fed. R. Crim. P. 51(b).

Mr. Campbell made these points in opposing the application of the plain-error standard in the court of appeals. Ct. App. Reply Br. at 2-3. Yet the court of appeals posited that Mr. Campbell forfeited his claim because he "raised no objection to the actual sentence imposed." Pet. App. A at 5. But as this Court observed in *Holguin-Hernandez v. United States*, 140 S. Ct. 762 (2020), "[b]y 'informing the court' of the 'action' he 'wishes the court to take, Fed. Rule Crim. Proc. 51(b), a party ordinarily brings to the court's attention his objection to a contrary decision." *Id.* at 766. Moreover, the drafters of Rule 51 "chose not to require

an objecting party to use any particular language or even to wait until the court issues its ruling" to preserve an objection. *Id.*

c. Assuming that the plain error standard applied, it would clearly call for reversal. Reversible plain error exists where there is (1) error, (2) that is plain, and (3) affected the defendant's substantial rights, and (4) the court in its discretion finds that the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Rosales-Mireles*, 138 S. Ct. at 1904-05 (internal quotation marks omitted).

The district court's ruling was error because, as Mr. Campbell showed in his petition, it seriously misconstrued the applicable Guidelines. The government's suggestion that the error could not qualify as "plain" because it was consistent with the views of the courts of appeals that had addressed the question (Br. in Opp. at 11) is misguided. An error can become plain at the time of appellate review, including review by this Court. *Henderson v. United States*, 568 U.S. 266 (2013). Once this Court has issued its ruling on a question of law, a lower court's contrary ruling on that issue becomes plain error. *Id.* at 270 (district court's error in setting the length of the defendant's sentence to enable him to complete a treatment program "was not plain before *Tapia* [*v. United States*, 564 U.S. 319 (2011)]; it was plain after *Tapia*"). Thus, this Court's agreement with Mr. Campbell's interpretation of the Guidelines in question would confirm both that the district court erred, and that this this error was plain.

Finally, this Court's recent opinions in *Molina-Martinez* and *Rosales-Mireles* leave little doubt that the latter two prongs of the plain error standard are satisfied here. In *Molina-Martinez*, the Court held that in the "ordinary case," a defendant need show no more than that the district court applied an "incorrect, higher Guidelines range" in order to establish that the error affected his substantial rights. 136 S. Ct. at 1347. In *Rosales-Mireles*, the Court held that in the "ordinary case," a district court's plain error in calculating the Guidelines range "will seriously affect the fairness, integrity, and public reputation of judicial proceedings." 138 S. Ct. at 1911. The Court found both of these principles fully applicable to defendants who were sentenced *within* the correct Guidelines ranges. *Id.* at 1910; 136 S. Ct. at 1348. In the instant case, the district court erroneously set the top of the Guidelines range *831 months* higher than it should have been, and imposed a sentence 16 months *above* the top of the correct Guidelines range. If the latter two prongs of the plain error standard were satisfied in *Molina-Martinez* and *Rosales-Mireles*, *a fortiori* they are satisfied here as well.

II. The government's arguments against this Court agreeing to decide the question presented are not compelling.

Mr. Campbell showed in his petition for certiorari that the question presented is an important one that may dramatically affect the calculation of the applicable Guidelines in any case in which a defendant is sentenced upon revocation of multiple concurrent terms of supervised release – a common scenario, given the fact that multiple supervised release terms are required to run concurrently. 18 U.S.C. § 3624(e). The government disputes neither the importance, nor the

frequently recurring nature, of the question. The government does, however, proffer suggested reasons why this Court should not address it, and argues the merits of the issue. These arguments are not compelling.

1. The government asserts that this Court has "denied review in prior cases presenting the same or similar questions," citing *Banks v. United States*, 140 S. Ct. 433 (2019) (No. 19-5969); *Dees v. United States*, 552 U.S. 830 (2007) (No. 06-10826); and *Braxton v. United States*, 500 U.S. 344, 348 (1991). Br. in Opp. at 8. But the questions presented in those cases were neither the same as nor similar to the question presented here. The petitioners in *Banks* and *Dees* challenged the imposition of consecutive sentences upon revocation of multiple concurrent supervised release terms, but their challenges were statutory and constitutional – unlike Mr. Campbell's, which rests entirely on the Guidelines. Pet. for Cert. in *Banks v. United States* (No. 19-5969); *United States v. Dees*, 467 F.3d 847 (3d Cir. 2006). The questions presented in *Braxton* related to the proper application of Section 1B1.2 of the Guidelines, which specifies which Guidelines provision to apply in sentencing on a guilty plea; they had nothing to do with supervised release revocation or concurrent versus consecutive sentencing. *Braxton*, 500 U.S. at 346-47.

The government also cites *Braxton* for the proposition that this Court has held that "questions about the meaning of the Sentencing Guidelines are better resolved by the Sentencing Commission." Br. in Opp. at 12. But while in *Braxton* the Court abstained from addressing a Guidelines-interpretation question where

the Sentencing Commission had "requested public comment" on "the precise question raised" (500 U.S. at 348), the Commission has undertaken no such affirmative steps to address the question raised here. Nor does there appear to be any likelihood that it will do so in the foreseeable future, given the fact that circuit court opinions stretching as far back as 1998 have commented on the Guidelines' failure to address the issue, with no action by the Commission. *United States v. Quinones*, 136 F.3d 1293, 1295 (11th Cir. 1998); *see also United States v. Gonzalez*, 250 F.3d 923, 929 n.8 (5th Cir. 2001).

Moreover, notwithstanding *Braxton*, this Court has no hard-and-fast policy against accepting cases involving the meaning of the Guidelines, and in fact has done so – over the government's *Braxton*-based objection – as recently as 2016. *See* Pet. for Cert. in *Beckles v. United States* (No. 15-8544) at i (asking whether possession of a sawed-off shotgun remained a "crime of violence" under Guidelines § 4B1.2 after *Johnson v. United States*, 135 S. Ct. 2551 (2015)); Br. in Opp. in *Beckles v. United States* (No. 15-8544) at 18-19 (urging Court to deny review of this issue pursuant to *Braxton*); *Beckles v. United States*, 136 S. Ct. 2510 (2016) (granting certiorari).

2. With respect to the merits of the question presented, the government primarily relies upon the court of appeals' reasoning, which Mr. Campbell addressed in his petition. The government also proffers critiques of Mr. Campbell's reliance on the "negative pregnant" and rule of lenity doctrines, but its arguments are unconvincing.

The government posits that the application of the "negative pregnant" principle is inconclusive, because the Guidelines "expressly favor concurrent terms of imprisonment in some circumstances, see, e.g., Sentencing Guidelines § 5G1.2(c), and consecutive terms of imprisonment in other circumstances (including certain supervised-release-revocation circumstances), see, e.g., Sentencing Guidelines § 7B1.3(f)." Br. in Opp. at 10. This argument refutes itself, because it confirms that the government was compelled to reach outside of the Guidelines chapter at issue here – Chapter 7, which governs sentencing upon revocation of supervised release – to find language purportedly cancelling out the express reference to consecutive sentencing in § 7B1.3(f). But the government does not explain why the reference to concurrent sentencing in § 5G1.2 – which has nothing to do with sentencing upon revocation of supervised release – should have any bearing on the question presented here.

With respect to the rule of lenity, the government highlights an important question regarding this rule's applicability to the Guidelines that has divided the circuits. Br. in Opp. at 11. On one side are circuits like the Ninth, which view the rule of lenity as applicable to the Guidelines. *See United States v. Leal-Felix*, 665 F.3d 1037, 1040-44 (9th Cir. 2011) (en banc); *accord United States v. Cortez-Gonzalez*, 929 F.3d 200, 203 (5th Cir. 2019); *United States v. Flemming*, 617 F.3d 252, 269-70 (3d Cir. 2010). On the other side are circuits like the Eleventh, which find it "doubtful that the judicial interpretation of advisory Sentencing Guidelines promulgated by an independent commission implicates either of the twin concerns

that motivate the rule of lenity." *United States v. Burke*, 863 F.3d 1355, 1360 (11th Cir. 2017) (internal quotation marks omitted). Although the First Circuit had previously sided with the former group, *United States v. Luna-Diaz*, 222 F.3d 1, 3 n.2 (1st Cir. 2000), the government notes that after *Beckles* that court stated that it was "now clear from [*Beckles*] [that] concerns about statutory vagueness, which underlie the rule of lenity, do not give rise to similar concerns regarding the Guidelines." *United States v. Gordon*, 852 F.3d 126, 130 n.4 (1st Cir. 2017) (*cited in* Br. in Opp. at 11). Here again, the government actually bolsters the case for certiorari, by identifying an important issue upon which the circuit courts disagree that may be addressed in this case.

In any event, the view of latter circuits is not compelling. This Court in *Beckles* was careful to stress that its holding had no impact on "analytically distinct" doctrines, such as those relating to the Ex Post Facto Clauses and the Eighth Amendment. *Beckles v. United States*, 137 S. Ct. 886, 895-96 (2017) (internal quotation marks omitted). Moreover, the rule of lenity does not rest solely on the "fair warning" concern that *Beckles* arguably undercut; it rests at least equally on the view that, "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *United States v. Bass*, 404 U.S. 336, 348 (1971). The rule of lenity thus should apply fully to the Guidelines.

CONCLUSION

For the reasons set forth above and in Mr. Campbell's Petition for a Writ of Certiorari, the Petition should be granted.

Respectfully submitted on May 4, 2020.

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