No. 22-6881

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES CLARK, III,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The government's response in opposition to Mr. Clark's petition for certiorari hangs its hat heavily upon this Court's reticence to review Sentencing Guidelines questions and its preference that the Sentencing Commission address jurisdictional conflicts through Guidelines amendments. The government also points to this Court's denial of certiorari in Altman v. United States, cert. denied, No. 22-5877 (May 1, 2023), which raised the same timing question presented by Mr. Clark's petition in the context of Iowa's marijuana and cocaine laws. The government provided counsel with a copy of its response in opposition in the Altman case, wherein it made the same argument that the Sentencing Commission should address the timing question, now that it has a quorum, through amendment to the Guidelines.

The problem is that when Altman was decided, the Commission was in the process of adopting amendments to the Guidelines. As noted by the government here in response, however, the Commission has since adopted amendments without addressing this issue. The timing question presented here was well in play during the amendment process and the Commission had to have been aware of it due to the jurisdictional conflicts in both the Guidelines arena and under the Armed Career Criminal Act ("ACCA"). Thus, though "Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might

suggest," Braxton v. United States, 500 U.S. 344, 348 (1991), the Commission chose to forego doing so here. Since the Commission chose not to address this question, this Court would not be "using [its] certiorari power as the primary means of resolving [this] conflict[]." Id. (emphasis added).

The Commission did take up the conflict as to whether a suppression hearing is a valid basis for denying a reduction under USSG § 3E1.1(b). This was based upon the call to do so from two of this Court's esteemed Justices who noted the conflict was both longstanding and had a potentially significant impact on defendants. See U.S. Sent'g Comm'n, Amendments to the Sentencing Guidelines (Reader Friendly Version), 72 (Apr. 27, 2023) (citing Longoria v. United States, 141 S. Ct. 978, 979 (2021) (statement of Sotomayor, J., with whom Gorsuch, J. joined, respecting the denial of certiorari, "emphasiz[ing] the need for clarification from the Commission" on this "important and longstanding split among the Courts of Appeals over the proper interpretation of § 3E1.1(b)"). The Justices' concern in Longoria was that "[t]he present disagreement among the Courts of Appeals means that similarly situated defendants may receive substantially different sentences depending on the jurisdiction in which they are sentenced." Longoria, 148 S. Ct. at 979. The same is true here. Defendants in the First, Second, and Ninth Circuit Courts of Appeal are receiving substantially lower sentences than those in the Third, Sixth and Eighth Circuit Courts of Appeal based on the timing question presented in

this petition. Surely this Court can now step in because the Sentencing Commission did "have the opportunity to address this issue in the first instance." Id. (citing Braxton, 500 U.S. at 348).

This is particularly true since the Court has agreed to accept certiorari review of this timing question in the context of the ACCA. See Jackson v. United States, No. 22-6640 (May 15, 2023); Brown v. United States, No. 22-6389 (May 15, 2023). Indeed, in its response in opposition in Altman, the government suggested that to the extent that the Cout might perceive the Guidelines issue to be properly influenced by the ACCA issue, it could elect to hold petitions raising the Guidelines issue pending any resolution to the ACCA issue. (See Altman v. United States, No. 22-5877, Govt.'s Resp. Opp'n., at 26-27 (filed Mar. 24, 2023)). At the very least, Mr. Clark respectfully requests that the Court do so here.

Finally, the fact that this Court denied certiorari in Altman is of no moment here. It is a well-settled proposition that this Court's denial of certiorari does not constitute a ruling on the merits. United States v. Carver, 260 U.S. 482, 490 (1923); see also Singleton v. Commissioner, 439 U.S. 940, 942-946 (1978) (opinion of Stevens, J., respecting denial of petition for writ of certiorari). As explained by Justice Stevens in Singleton, "A variety of considerations underlie denials of the writ." 439 U.S. at 942. "Narrowly technical reasons may lead to denials." Id. at 943. "A decision may satisfy all . . . technical requirements and yet may commend

itself for review to fewer than four members of the Court." Id. "Pertinent considerations of judicial policy here come into play. A case may raise an important question but the record may be cloudy." Id. "It may be desirable to have different aspects of an issue further illumined by the lower courts." Id. Thus, "this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review." Id. at 944 (quoting Maryland v. Baltimore Radio Show, 338 U.S. 912, 917-19 (1950) (opinion of Frankfurter, J., respecting denial of petition for writ of certiorari)).

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully continues his prayer that this Court grant certiorari to review the judgment of the Sixth Circuit in his case.

DATED: 26th day of May 2023.

Respectfully submitted,

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