No. 22-7359

IN THE
SUPREME COURT OF THE UNITED STATES

DEVIN BAKER,

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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A. This case is not in an interlocutory posture.

At the outset, the government argues that the case is in an interlocutory posture because the Sixth Circuit remanded it to the district court. (See Br. Opp'n, at 7.) It is true that this Court has observed in certain circumstances that a case that is remanded to the district court is not ripe for discretionary review. See Brotherhood of Locomotive Firemen and Enginemen v. Bangor & A. R. Co., 389 U.S. 327, 328 (1967). In these cases, however, there tends to be something left for the district court to do upon remand. For instance, in Locomotive Firemen, a contempt case, the appellate court directed the district court on remand to consider whether there had in fact been a contempt, and, also, if there was a contempt, whether it was 'of such magnitude as to warrant retention, in part or to any extent, of the coercive fine originally provided for in contemplation of an outright refusal to obey.' Id. In Virginia Military Institute v. United States, 508 U.S. 946, 946 (1993), where the men-only nature of the military school was in issue, the appellate court directed the district court on remand to rule upon a number of suggested permissible remedies. More recently, in City of Ocala, Florida v. Rojas, 143 S. Ct. 764, 765 (2023), an Establishment Clause case, the appellate court directed the district court on remand to consider this Court's intervening opinion in Kennedy v. Bremerton School District, 142 S. Ct. 2407 (2022).

Here, the appellate court found that the district court flatly erred by applying the wrong legal rule. See United States v. Baker, No. 22-5110, 2022 WL 17581659, at *2 (6th Cir. Dec. 12, 2022). The appellate court's decision was based upon prior precedent in United states v. Clark, 46 F.4th 404 (6th Cir. 2022). The appellate court thus directed the district court to resentence Mr. Baker as a career offender based upon his prior marijuana conviction. Id. The district court will therefore be unable to impose the same sentence, as suggested by the government. (See Br. Opp'n, at 7.)

Besides, this Court has previously found the interlocutory nature of an appeal to be no impediment to certiorari review where the opinion of the court below has decided an important issue, otherwise worthy of review, where this Court's intervention may serve to hasten and finally settle the litigation. See, e.g., Central Bank v. First Interstate Bank, 511 U.S. 164, 191-92 (1994) (reversing denial of summary judgment); Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977) (reversing denial of motion to dismiss); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (reversing denial of summary judgment). And it is apparent that the court below has decided an important issue, otherwise worthy of review, which this Court's intervention will serve to hasten and finally settle the litigation. This is evident because this Court has agreed to accept certiorari review of the exact same issue presented by Mr. Baker, only in the context of the Armed Career Criminal Act,

18 U.S.C. § 924(e) ("ACCA"). See Jackson v. United States, No. 22-6640 (May 15, 2023); Brown v. United States, No. 22-6389 (May 15, 2023). Moreover, a petition for certiorari was filed in Clark and remains pending, presumably because of the certiorari review grants in Jackson and Brown. See Clark v. United States, No. 22-6881 (filed Feb. 24, 2023).

This Court has unquestioned jurisdiction to review interlocutory judgments of federal courts of appeals pursuant to 28 U.S.C. § 1254(1). Invocation of such jurisdiction is not premised on the finality of the judgment or order. The interlocutory nature of the judgment is relevant only to the Court's discretionary assessment of the appropriateness of immediately reviewing such a judgment. Mr. Baker has provided a sound basis for the exercise of this Court's jurisdiction in this matter. Mr. Baker therefore respectfully requests the Court to entertain his Petition.

B. The Sentencing Commission has foregone addressing the issue.

The government's brief in opposition to Mr. Baker'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. As noted by the government in its brief, 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 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 government points to a broadly worded proposed priority for the upcoming amendment cycle where the Commission lists "[c]ontinued examination of the career offender guidelines,' and "[r]esolution of circuit conflicts as warranted." (Br. Opp'n, at 11.) Yet, the government also noted that the Commission failed to address the related circuit conflict about whether the definition of "controlled substance offense" in § 4B1.2(b) is limited top offenses involving substances controlled by the federal Controlled Substances Act, or whether it also applies to offenses involving substances controlled by applicable state law. Id. at 9. This was after a statement from Justices Sotomayor, joined by Justice Barrett, stressing the need for the Commission to address the issue because of the "direct and severe consequences for defendants' sentences." See Guerrant v. United States, 142 S. Ct. 640, 640 (2022) (statement of Sotomayor, J.). The nebulous priority of

resolving circuit conflicts "as warranted" certainly does not match the Justices' concern for the direct and severe consequences for defendants' sentences.

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), based upon the call to do so Justice Sotomayor, joined by Justice Gorsuch. 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).

The Court denied of certiorari in Altman v. United States, cert. denied, No. 22-5877 (May 1, 2023), which raised the same timing question presented here, only in the context of Iowa's marijuana and cocaine laws. 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. Alternatively, and as also suggested by the government, Mr. Baker requests the Court hold his petition in abeyance pending the resolutions in Jackson and Brown. (See Br. Opp'n, at 18.)

DATED: 31st day of July, 2023.

Respectfully submitted,

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