No. 22-7716

IN THE
Supreme Court of the United States

MINNELA MOORE,
***Petitioner*,**

v.

UNITED STATES OF AMERICA,
***Respondent*.**

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

REPLY BRIEF FOR PETITIONER

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REPLY ARGUMENT

The government's three main arguments in opposition—that the Court "ordinarily does not review decisions interpreting the Sentencing Guidelines"; that the decision below is correct and the circuit conflicts do not warrant review; and that Petitioner's case is a poor vehicle because the error complained of was reviewed by the court of appeals for plain error—all fail. This Court's intervention and review is urgently required. As such, the Court should grant review, or at a minimum, hold the petition in abeyance pending *Jackson* and *Brown*.

I. That Petitioner seeks review of a particular sentencing guideline does not automatically preclude this Court's review; and, in any case, the Sentencing Commission has failed to address the circuit splits raised in this petition.

In 2023, the Sentencing Commission adopted amendments to the Guidelines, and, as the government acknowledges (Br. in Opp. 7), failed to address the questions presented here. *See generally* Sentencing Guidelines for United States Courts, 88 Fed. Reg. 28,254 (May 3, 2023). Both questions raised in this petition were circulating at the time the Commission was meeting, and the Commission had to have been aware of them because of 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 the questions raised by the petition, 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. in Opp. 7–8. Yet, in the same breath, the government also notes that the Commission failed to address the circuit conflict raised in the first question presented in this petition regarding whether the definition of "controlled substance offense" in the Guidelines is limited to offenses involving substances controlled by the federal Controlled Substances Act, or whether it also applies to offenses involving substances controlled by applicable state law. Br. in Opp. 7. The Commission's failure came after an explicit statement respecting the denial of certiorari in *Guerrant* from Justice Sotomayor—and 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 U.S.S.G. § 3E1.1(b), based upon the call to do so by Justice Sotomayor—and 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, let alone based on the definitional question raised. 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).

Additionally, that the Court denied certiorari in *Altman* is of no moment here. *Altman v. United States*, *cert. denied*, No. 22-5877 (May 1, 2023). When *Altman* was decided, the Commission was still in the process of adopting amendments to the Guidelines. As noted by the government in its response, however, the Commission has since adopted amendments without addressing the issues raised herein. Further, 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. Comm'r, 439 U.S. 940, 942–46 (1978) (statement 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) (statement of Frankfurter, J., respecting denial of petition for writ of certiorari)).

II. Both questions presented have split the circuits below; and this Court will be addressing a question related to the timing issue raised herein in *Jackson* and *Brown*

The government agrees that both questions presented implicate a deep division amongst the circuit courts. Br. in Opp. 9, 11. As such, the Court's intervention is required.

Additionally, with regard to the second question presented—whether the "controlled substance offense" definition in U.S.S.G. § 4B1.2(b) incorporates the drug schedules in effect at the time of the federal offense; at the time of the federal sentencing; or at the time of the defendant's prior state drug offense—the

government—referencing its response brief in *Baker v. United States*, No. 22-7359 (July 26, 2023)—argues in favor of using the drug schedules in place "at the time of the state crime." Br. in Opp. 10. In so arguing, the government relies heavily upon the Court's opinion in *McNeill v. United States*, 563 U.S. 816 (2011). Br. in Opp. 13–14, *Baker v. United States*, No. 22-7359 (July 26, 2023).

The circuit split on the timing issue in the context of the Guidelines exists precisely because some circuits have misread *McNeill*. *See, e.g.*, *United States v. Bailey*, 37 F.4th 467, 469–70 (8th Cir. 2022), *petition for cert. denied sub nom. Altman v. United States*, 143 S. Ct. 2437 (May 1, 2023). In *Bailey*, the Eighth Circuit read the "controlled substance offense" definition to incorporate the drug schedules in place at the time of the prior state drug offense because the court viewed *McNeill* as determinative of the issue. This continuing misinterpretation and misapplication of *McNeill* is a problem only this Court can fix. And the government offers no sound reason why this petition should be denied when the Court will be deciding the *McNeill* question this upcoming term in *Jackson* and *Brown*. Its resolution there will be potentially dispositive of the second question presented here.

Accordingly, the Court should, at a minimum, hold the petition pending its resolution of the *McNeill* issue in *Jackson* and *Brown*. Br. in Opp. 12.

III. That the challenge below was reviewed for plain error does not preclude this Court's review.

The government asserts that the petition should be denied because the court of appeals below addressed Petitioner's claims under the plain-error standard. Br. in

Opp. 12. But that should have no bearing on this Court's decision. This is especially so because the Court has granted petitions in the past where the errors complained of were reviewed under the plain-error standard below, and at the government's own request. *See, e.g.*, *United States v. Cotton*, 2001 WL 34092097, at *4 (U.S. Nov. 8, 2001), *cert. granted*, No. 01-687 (U.S. Jan. 4, 2002).

CONCLUSION

For all of the reasons stated herein and in his petition, the petition for a writ of certiorari should be granted. Alternatively, Petitioner respectfully requests that the Court hold his petition in abeyance pending a decision in *Jackson* (No. 22-6640) and *Brown* (No. 22-6389).

Respectfully submitted,

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