CASE NO. 22-7755

IN THE

Supreme Court of the United States

October 2023 Term

JEROME WILLIAMS

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari
to the Eighth Circuit Court of Appeals

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Submitted By:

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REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The government's memorandum is largely unresponsive to Petitioner's central claim. To recap, Petitioner argues that:

- His enhanced sentence is a result of the Eighth Circuit joining the "time of conviction" side of a deep Circuit split.
- That split stems primarily from confusion over the Court's holding in *McNeill v. United States*, 563 U.S. 816 (2011).
- The Court has agreed to clarify *McNeill* in the relevantly similar context of the Armed Career Criminal Act ("ACCA").
- Given the above, the Court should grant the petition or hold it pending the coming clarification of *McNeill*.

As to the last point, the government agrees that holding the petition is a viable option, although it still opposes that option. U.S. Memo. 3 ("To the extent that the Court may nevertheless perceive the Guidelines issue to be properly influenced by the ACCA issue, the Court could elect to hold petitions presenting the Guidelines issue pending its resolution of the ACCA issue in *Jackson* and *Brown*."). Its opposition to anything other than rejecting the petition boils down to two claims: (i) the Court generally does not take up guidelines questions; and (ii) there are differences between ACCA and the guidelines. U.S. Memo. 2-3. Both points are correct, but neither means the petition is unworthy of review now or following the decision in case no. 22-6640.

The Commission has already been clear that the application of the guidelines depends on the law in effect at sentencing. *See* U.S.S.G. § 1B1.11 (2021). The case that planted a "time-of-conviction" flag in the Eighth Circuit did not acknowledge this relevant guidelines text because it read *McNeill* as effectively determinative. *United*

States v. Bailey, 37 F.4th 467, 469-70 (8th Cir. 2022) (per curiam), *petition for cert. denied sub. nom. Altman, et al. v. United States* (No. 22-5877), 143 S. Ct. 2437 (May 1, 2023). The current split does not persist due to Commission inaction that might eventually end with a later round of amendments, but because some Circuits have misread *McNeill*. Serial misinterpretation of *McNeill* is a problem only this Court can solve. The government does not claim otherwise, yet it fails to take the next step of recognizing that this dispute is fundamentally about *McNeill*.

The government's memorandum also avers to a separate brief in *Baker* to make its case that "the ACCA and Guidelines questions are distinct." U.S. Memo. 2-3 (citing Br. for U.S. 16-18 (U.S. No. 22-7359) (July 26, 2023)). That brief's main contentions are that the timing question in this case "may not have the same answer" as the ACCA cases due to textual differences between the two enhancements, and that some Circuits (like the Eighth) "have reached different outcomes on the timing question under the Guidelines and the ACCA." Br. for U.S. 17 (U.S. No. 22-7359) (July 26, 2023). The government is again right about the legal landscape but wrong about what it should mean for the petition.

Yes, there are textual differences between § 4B1.2 and ACCA, but as noted above, the text has been largely beside the point in Circuits that interpret *McNeill* broadly. And whether *McNeill* as properly understood ought to apply in different ways to different texts is necessarily a question courts cannot answer until they properly understand *McNeill*. That reality weighs in favor of granting or holding the petition, not prematurely denying it while *McNeill*'s meaning is a live issue. Further, it says

little to note that some Circuits have reached a split decision on the timing question. What matters is *why* the Circuits are divided both internally and among themselves. Take the Eighth. Despite rejecting a time-of-conviction rule under ACCA, it has decided that *McNeill* "requires" that approach in guidelines cases when the prior conviction at issue was a violation of state law. *United States v. Perez*, 46 F.4th 691, 703 n.4 (8th Cir. 2022). So while it is true that the Eighth Circuit treats ACCA and the guidelines differently on this issue, *it does so because of McNeill.* All roads lead back to that case's meaning, something the Court will soon resolve.

The government offers no sound reason to deny Petitioner's petition while the Court is set to decide a question that will be potentially dispositive to the question he has raised. Deferring to the Commission is not a solution; it has spoken, but *McNeill* drowns out its voice in some Circuits. That some lower courts have reached disparate outcomes on the timing issue in ACCA cases vs. guidelines cases is not a reason to deny the petition but rather an indication of just how widespread the confusion over *McNeill* has become and will continue to be absent the Court's intervention. Denying the petition does nothing to alleviate the effects of that confusion—effects that include wildly divergent sentencing outcomes across the country. *See Guerrant v. United States*, 142 S. Ct. 640, 640 (2022) (Mem) (statement of Sotomayor, J., joined by Barrett, J.) (describing how related § 4B1.2 split results in some defendants being "subject to far higher terms of imprisonment for the same offenses as compared to defendants similarly situated").

CONCLUSION

WHEREFORE, Petitioner renews his request that the Court grant his Petition for a Writ of Certiorari. Petitioner further requests that the Court temporarily hold his petition pending a decision in case nos. 22-6389 and 22-6640.

Respectfully submitted,

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