No. 23-5364

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

CHRISTOPHER NERIUS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government does not contest the presence of a three-to-three split in the circuit courts on the question presented. Nor does it argue that the question presented is unimportant. Moreover, it concedes that the grant of *certiorari* in *Jackson v. United States*, No. 22-6640 (May 15, 2023), and *Brown v. United States*, No. 22-6389 (May 15, 2023), is predicated on "a similar timing question in the context of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. § 924(e)." BIO at 3. It nonetheless opposes the petition.

The government's opposition boils down to two key points. First, it argues that the Court generally does not review decisions interpreting the United States Sentencing Guidelines "because the Sentencing Commission can amend the Guidelines to eliminate any conflict or correct any error." BIO at 2. Second, it asserts certiorari is unwarranted despite *Jackson* and *Brown* because "the ACCA and Guidelines questions are distinct." BIO at 3. Neither argument justifies denying the Petition prior to the Court's decision in *Jackson* and *Brown*.

1. The very nature of the conflict in the lower courts rebuts the government's first argument. As the Petition explains, three circuits – the First, Second, and Ninth – hold that 18 U.S.C. § 3553(a)(4)(A)(ii) and Sentencing Guidelines obligate courts to apply the drug schedules at the time of the federal sentencing to determine whether a particular substance is "controlled." *See* Pet. at 12-14 (citing *United States v. Gibson*, 55 F.4th 153, 160-62 (2d Cir. 2022); *United States v. Bautista*,

989 F.3d 698, 703 (9th Cir. 2021); *United States v. Abdulaziz*, 998 F.3d 519, 523-27 (1st Cir. 2021)). In sharp contrast, the Third, Sixth, and Eighth Circuits do not consider themselves bound by either the statutory or guideline language. Rather, they hold that *McNeill v. United States*, 563 U.S. 816 (2011), resolves the timing issue, and requires courts to use the drug schedules at the time of the prior conviction to determine whether is a substance is "controlled." *See United States v. Lewis*, 58 F.4th 764, 771 (3d Cir. 2023); *United States v. Clark*, 46 F.4th 404, 412 (6th Cir. 2022); *United States v. Doran*, 978 F.3d 1337, 1338, 1340 (8th Cir. 2020).

Thus, the government's assertion that this case involves only a conflict in circuit court decisions "interpreting the Guidelines," BIO at 2, is incorrect. In actuality, the conflict is between three circuits holding that the statutory and guideline language controls the issue, and three circuits holding that *McNeill* renders the statute and Guidelines irrelevant.

Because the issue presented involves more than a simple Guidelines interpretation conflict, the Sentencing Commission cannot, despite the government's arguments to the contrary, simply amend the Guidelines to eliminate the conflict. The circuit split does not persist due to Commission inaction that might eventually end with a later round of amendments, but because of how some circuits have read *McNeill*. Delineating the reach of *McNeill* is not a problem that the Commission can solve. Only this Court can.

2. The government's second argument – that certiorari is unwarranted because the ACCA and Guidelines questions are "distinct" – is equally unavailing. It, too, turns on the proper reach of *McNeill*. It is true that some circuits have adopted different timing approaches for determining whether a prior conviction was a "serious drug offense" for purposes of the ACCA and the Guidelines. *Compare United States v. Bailey*, 37 F.4th 467, 469-70 (8th Cir. 2022) (adopting time-of-prior-state-conviction-rule for Guidelines cases) with *United States v. Perez*, 46 F.4th 691, 703 n.4 (8th Cir. 2022) (adopting time-of-federal-offense approach for ACCA cases). But it is the lower courts' confusion over the reach of *McNeill* that has caused that differentiation. *See Perez*, 46 F.4th at 703 n.4 (holding "*McNeill* does not apply to the ACCA analysis," but *does* apply to the Guidelines). Whether *McNeill* applies in different ways in different contexts is a question the lower courts cannot answer correctly without a better understanding of the reach of *McNeill*. That will not be possible until this Court decides *Jackson* and *Brown*.

3. The Court will hear arguments in *Jackson* and *Brown* on November 27, 2023 – less than a month after the filing of this reply. The Court's explication of *McNeill* in *Jackson* and *Brown* could be dispositive on the question presented by Petitioner. Denying certiorari at this time does nothing to alleviate the confusion in the courts below on the question presented. The more prudent course is for the Court to hold this petition pending the decisions in *Jackson* and *Brown*.

4. Finally, the government does not dispute that had Petitioner been sentenced in a circuit using the drug schedules on the date of sentencing, his sentence could not have been enhanced under the career offender guideline, and would have been approximately five years shorter. *Compare* Pet. at 16 with BIO, *passim*. It is beyond peradventure that this case implicates the three-to-three split on the issue presented.

Instead, the government argues that this case is not a good vehicle because the issue presented was not raised below. Nevertheless, this Court can – and does – grant certiorari, vacate, and remand cases ("GVR") for consideration of issues raised for the first time in a petition for writ of certiorari. *See, e.g., Webster v. Cooper*, 558 U.S. 1039, 130 S. Ct. 456, 457 (2009) (Scalia, J., dissenting from GVR order) (noting issue on which Court ordered GVR was not raised below); *United States v. Young*, 160 F. App'x 518, 519-20 (7th Cir. 2005) (noting that issue before it following GVR from this Court was raised for the first time in a supplemental petition for certiorari); *United States v. Drewry*, 133 F. App'x 543, 544 (10th Cir. 2005) (similar, but issue was raised for first time in petition for certiorari). Petitioner respectfully requests that the Court follow the same path here, and hold his Petition pending the decision in *Jackson* and *Brown*.

CONCLUSION

For all of the foregoing reasons, as well as those stated in the Petition, the Court should hold the Petition pending the decisions in *Jackson v. United States*, No. 22-6640 and *Brown v. United States*, No. 22-6389. Thereafter, if appropriate in light of the decisions in those cases, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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October 31, 2023