No. 17-6861

IN THE
Supreme Court of the United States

JESUS ENRIQUE MORENO,
Petitioner,
vs.

UNITED STATES OF AMERICA,
Respondent.

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

PETITIONER'S REPLY BRIEF

MELODY BRANNON
Federal Public Defender
Counsel of Record
DANIEL T. HANSMEIER
Appellate Chief
THOMAS W. BARTEE
Assistant Federal Public Defender
KANSAS FEDERAL PUBLIC DEFENDER
500 State Avenue, Suite 201
Kansas City, Kansas 66101
Phone: (913) 551-6712
Email: melody_brannon@fd.org
Counsel for Petitioner

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The question presented asks whether a guideline amendment's character as "clarifying" or "substantive" should vary from circuit to circuit, depending on whether the amendment is consistent with case law within each circuit, regardless of the Sentencing Commission's intent. Pet. ii.[1] The federal courts of appeals are splintered over this important question. Pet. 13-23. Conceding the conflict exists, BIO 13, the government claims it is "of limited importance" in light of this Court's denial of certiorari in *Sanchez v. United States*, 137 S.Ct. 2114 (2017). The government also would prefer that the Court ignore the acknowledged conflict in light of the Sentencing Commission's authority to label a guideline amendment retroactive. BIO 13-14.

This doctrinal conflict has produced a more specific conflict: whether Amendment 794 is clarifying or substantive (and, thus, whether the Tenth Circuit should have remanded for resentencing under it). Pet. 16-17. The government likewise acknowledges this conflict, but downplays it because the decision below is unpublished. BIO 12. The government also asserts that this case is a poor vehicle to address the conflict because the Tenth Circuit alternatively upheld Mr. Moreno's

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[1] The government reframes the question presented as merely one of error correction, i.e., "[w]hether the court of appeals . . . erred in concluding that it was not required to consider th[e] amendment." BIO (I). *Cf.* Sup.Ct.R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). *But see District of Columbia v. Wesby*, 138 S.Ct. 577, 588, 591 (2018) (granting certiorari to reverse court of appeals for failing to follow "basic and well-established principles of law" governing the probable cause determination and this Court's "straightforward analysis" of qualified immunity doctrine). But this case calls for the rejection of the against-circuit-precedent rule, which denied Mr. Moreno the benefit of an ameliorative amendment because he was prosecuted in a circuit whose case law the Sentencing Commission has since rejected. The Court should reject the government's error-correction straw-man tactic and resolve the question presented.

sentence under Amendment 794. BIO 10, 12.

None of the government's counterarguments are persuasive. The nonprecedential nature of the decision below does not negate the conflicts at issue here. The question presented is also extremely important to federal sentencing procedure. This Court's denial of certiorari in *Sanchez* stemmed from vehicle problems in that case (problems that do not exist here), and not because this Court deemed the issue unimportant. Moreover, the Commission's retroactive sentence-reduction authority does nothing to resolve the conflict at issue here, a conflict which has coexisted with such authority for over two decades. Finally, this case is an excellent vehicle to resolve the conflict. Contrary to the government's claim, the district court has not yet resolved the ultimate guidelines issue under the now-proper approach. And the government wrongly claims that a court of appeals can properly apply Amendment 794 on appeal. It is the district court, not the court of appeals, that resolves fact-bound guideline questions like the one ultimately at issue here. Review is necessary.

Argument

1. The conflict is entrenched.

The government claims that because the Tenth Circuit's opinion below is unpublished and therefore not binding precedent, the opinion cannot "create" a circuit split over whether Amendment 794 is clarifying or substantive. BIO 12. This argument misses the mark for four reasons.

First, this Court often grants certiorari to review unpublished decisions. *See, e.g.*, *Manrique v. United States*, 137 S.Ct. 1266 (2017); *Marvin M. Brandt Revocable Trust et al. v. United States*, 134 S.Ct. 1257 (2014); *Holder v. Martinez Gutierrez*, 566 U.S.

583 (2012); *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002). Thus, an unpublished decision can merit this Court's review.

Second, in at least one subsequent Tenth Circuit case, the government itself has cited the decision below as establishing the rule that "Amendment 794 was a substantive amendment." *United States v. Orduno-Ramirez*, 2017 WL 2807287, at *15 n.3 (June 27, 2017) (government's response brief). Thus, it is unrealistic to think that the Tenth Circuit would not follow the decision below in a subsequent case.

Third, the actual question presented concerns the against-circuit-precedent rule. Pet. i. The split regarding Amendment 794 is merely symptomatic of this far more important question, which has generated a deep and longstanding circuit split via numerous published decisions. Pet. 13-16; BIO 13 (conceding "some disagreement on that issue"). The nonprecedential nature of the decision below does nothing to negate the existence of the broader conflict within the circuits.

And fourth, the opinion below does not "create" this circuit split. It instead reflects the longstanding and entrenched conflict regarding the against-circuit-precedent rule. In the Tenth Circuit, "[d]isposition without opinion does not mean that the case is unimportant." 10th Cir. R. 36.1. Instead, the unpublished nature of the opinion below reflects only "that the case does not require application of new points of law that would make the decision a valuable precedent." *Id.* The opinion broke no new ground because the against-circuit-precedent rule has been the law in the Tenth Circuit since at least 1991. *United States v. Saucedo*, 950 F.2d 1508, 1514 (10th Cir. 1991). The Tenth Circuit will continue to apply this rule, and the conflict will persist, until this Court steps in.

2. The issue presented is not "of limited importance."

Although the government concedes the existence of the circuit split over the proper standard for determining whether an amendment is deemed substantive or clarifying, BIO 13, the government argues that the matter is too insignificant to merit this Court's review, BIO 13-15. In support, the government cites the denial of certiorari in *Sanchez v. United States*, 137 S.Ct. 2114 (2017). BIO 13. But a denial of certiorari does not mean that the question presented was unimportant. *See, e.g.*, *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 917-18 (1950) (Frankfurter, J., respecting denial of certiorari) (listing variety of reasons for denial of certiorari).

In fact, as the government explained in its brief in opposition in *Sanchez*, the case had at least three serious vehicle problems, none of which are present here. First, the proposed amendment relied upon in that case became effective after the date of the filing of the petition for a writ of certiorari. *Sanchez v. United States*, No. 16-6532, BIO 10. This fact was "a sufficient basis for denying plenary review of the petition." *Id.* 11. Second, the amendment at issue in *Sanchez* was a substantive amendment, not a clarifying amendment. *Id.* 12. Thus, this Court could not have used *Sanchez* as a vehicle to address the conflict presented here. And third, there was no conflict within the circuits on whether the specific amendment at issue in *Sanchez* was clarifying or substantive. *Id.* 14. Thus, *Sanchez* does not indicate the limited importance of the issue. If anything, this Court's order requiring the government to respond to the petition in *Sanchez* indicates that the issue is worthy of this Court's review.

The government further claims that the issue is of limited importance because of the Sentencing Commission's authority to designate amendments retroactive under USSG § 1B1.10 and 18 U.S.C. § 3582(c)(2). BIO 13-14. But this argument is a red herring. The courts of appeal disagree over whether a *non-retroactive* amendment applies to defendants on direct appeal. Pet. 13-16. The Commission's retroactivity authority cannot possibly eliminate that conflict. Indeed, the conflict over the against-circuit-precedent rule has existed for decades despite that authority. *Id.*

Moreover, the point of a clarifying amendment is to state what the guideline has always meant. It is thus inaccurate to claim that the application of a clarifying amendment (like Amendment 794) to a not-yet-final sentence (like Mr. Moreno's sentence while on direct appeal) amounts to a "retroactive" application of the law. It is nothing more than the application of the law as it has always existed. *See, e.g., Rivers v. Roadway Express Inc.*, 511 U.S. 298, 312-313 (1994) ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."); *see also United States v. Rivera-Nevarez*, 418 F.3d 1104, 1107 (10th Cir. 2005) ("Decisions of statutory interpretation are fully retroactive because they do not change the law, but rather explain what the law has always meant."). This Court recognizes the imperative of treating similarly situated litigants similarly, even in civil cases. *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993). This Court should hold that a criminal defendant on direct appeal should not be denied the benefit of a favorable guideline amendment because he happens to be in a circuit whose prior unfavorable case law was rejected by the Sentencing Commission.

The government's citation to *Braxton v. United States*, 500 U.S. 344, 348 (1991), BIO 13-14, does not indicate otherwise. To begin, *Braxton* involved the interpretation of a guideline, rather than the reach of a guideline amendment to cases on direct appeal. Moreover, in *Braxton*, this Court granted review of two guidelines questions, but only resolved the second. 500 U.S. at 346-47, 351. After this Court granted certiorari, the Sentencing Commission sought public comment on amending the guideline in a way that would resolve "the precise question raised by the first part of Braxton's petition." *Id.* at 348. This Court opted "not to resolve the first question presented in the current case, because the Commission has already undertaken a proceeding that will eliminate circuit conflict over the meaning of § 1B1.2, and because the specific controversy before us can be decided on other grounds." *Id.* at 348-49. Although this Court mentioned the Commission's authority to reduce sentences, the decision not to resolve the first question was motivated both by the Commission's impending resolution of the underlying issue and the presence of a dispositive second guideline issue. *See id.* at 348-49. This isolated reference to USSG § 1B1.10 in *Braxton* should not be seen as a reason for this Court to deny certiorari on any issue implicating the guidelines.

Nor has this Court treated USSG § 1B1.10 as a substitute for certiorari for all cases that involve the sentencing guidelines. *See, e.g., Koon v. United States*, 518 U.S. 81, 102 (1996) (approving district court's application of USSG § 2H1.4); *Stinson v. United States*, 508 U.S. 36, 46-47 (1993) (disapproving commentary inconsistent with text of guideline); *Williams v. United States*, 503 U.S. 193, 200 (1992) (interpreting guideline departure provisions).

The Commission's authority to retroactively reduce prisoner sentences under USSG § 1B1.10 is not a reasonable alternative to certiorari here. The issue is not whether a single amendment should be deemed clarifying or substantive; it is the validity of the against-circuit-precedent rule, which has generated inter-circuit disparities for over two decades. *Compare United States v. Mondaine*, 956 F.2d 939, 942 (10th Cir. 1992) (approving circuit precedent that "refused to accept the Commission's characterization of an amendment as merely clarifying because we were required to overrule precedent construing the guideline in order to interpret it consistently with the amended commentary"), *with United States v. Caballero*, 936 F.2d 1292, 1299 (D.C. Cir. 1991) ("In light of this clarification, we must reassess [circuit precedent] and reinterpret section 3B1 so that our interpretation comports with the language of the Guidelines."). The Commission has had over two decades to address the validity of the against-circuit-precedent rule and has not done so.

The against-circuit-precedent rule is also essentially a rule of interpretation, one whose application is not peculiar to the guidelines. *See Levy v. Sterling Holding Co., LLC*, 544 F.3d 493, 507 (3d Cir. 2008) ("In determining whether a new regulation merely 'clarifies' the existing law . . . we do not take the fact that an amendment conflicts with a judicial interpretation of the pre-amendment law to mean that the amendment is a substantive change and not just a clarification."). While § 3582(c)(2) and § 1B1.10 create a narrow exception to the general rule that a court may not reduce a sentence once it is imposed, neither of these provisions acts as a mechanism for resolving circuit conflicts over rules for interpreting the guidelines or other regulations.

3. This case is an excellent vehicle to resolve the conflict.

The government claims that this case is a poor vehicle because the Tenth Circuit stated that the district court had "implicitly" applied the within-case comparison required by Amendment 794. BIO 12. But the Tenth Circuit was wrong. Amendment 794 was not in effect when the district court sentenced Mr. Moreno, and Tenth Circuit precedent required a contrary analysis. USSG Supp. to App. C., amend. 794 (recognizing that Amendment 794 overrules Tenth Circuit precedent). Sentencing courts within the Tenth Circuit are presumed to know and follow the law. *United States v. Ruiz-Terrazas*, 477 F.3d 1196, 1201 (10th Cir. 2007) (Gorsuch, J.). The record does not support the government's claim that the district court did otherwise. Rather, the record reveals that the district court engaged in an "explicit[]" typical-case comparison, Pet. App. 10a, since rejected by Amendment 794. The Tenth Circuit's reconstruction of an "implicit[]" within-case comparison (the only comparison allowed under Amendment 794) is at odds with the district court's rationale for denying Mr. Moreno a minor-role adjustment.

Moreover, the notion of unearthing implicit district court findings, especially a finding effectively doubling a sentence, is inconsistent with guideline sentencing. The federal sentencing process requires district courts either to rule on disputed sentencing issues or give reasons not to rule on such issues. Fed.R.Crim.P. 32(i)(3)(B).

The guideline sentencing process promotes transparency. *See United States Sentencing Commission, Fifteen Years of Guidelines Sentencing* x (Nov. 2004) ("The [Sentencing Reform Act] requires judges to document in open court the facts and reasons underlying the sentences they impose, which are then reviewable on appeal."). The government cites nothing to justify constructing implicit findings in the face of explicit but erroneous ones.

The government further claims that, immediately after holding that Amendment 794 was inapplicable, the Tenth Circuit alternatively upheld the enhancement under Amendment 794. BIO 12. But courts of appeal lack the institutional competence to apply Amendment 794 to a cold record. The commentary to the mitigating role guideline recognizes that the analysis "is based on the totality of the circumstances and involves a determination that is heavily dependent upon the facts of the particular case." USSG § 3B1.2, comment. (n.3(C)). As such, the Tenth Circuit erred in trying to insulate the district court's failure to apply the amendment. "When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings." *Pullman-Standard v. Swint,* 456 U.S. 273, 292 (1982); *see also DeMarco v. United States,* 415 U.S. 449, 450 n* (1974). This is especially true in the guideline setting, in which "[d]istrict courts have an institutional advantage over appellate courts . . . as they see so many more Guidelines cases than appellate courts do." *Koon,* 518 U.S. at 98. Indeed, the opinion's final paragraph recognizes "the trial judge's better understanding of the circumstances and his greater experience in these matters." Pet. App. 20a.

Nor did the Tenth Circuit faithfully apply the amendment. Before the purported application of the amendment, the Tenth Circuit said: "[w]hile the amendment may well guide prospective application of the guideline, it cannot do so retroactively, at least in this case." Pet. App. 9a. In the course of the purported application, the court of appeals quoted the "three-legged stool" metaphor on the integrality of drug couriers, even though Amendment 794 quoted this metaphor as an example of the type of analysis that the amendment rejects. *Compare* Pet. App. 14a (quoting *United States v. Martinez*, 512 F.3d 1268, 1276 (10th Cir. 2008), which in turn quotes *United States v. Carter*, 971 F.2d 597, 600 (10th Cir. 1992)), *with* USSG Supp. to App. C., amend. 794 (expressly disapproving *Carter*). The Tenth Circuit then implied that the amendment's core concept, that of an "average" participant, is unworkably vague. Pet. App. 15a. The opinion fails to recognize that under the amendment, a courier such as Mr. Moreno "who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for a mitigating role adjustment." USSG App. C, Amend. 794. And nothing in the opinion below recognizes that the amendment rejects "case law that may be discouraging courts from applying the adjustment in otherwise appropriate circumstances." USSG App. C, amend. 794.

Here, the objected-to calculation raised the sentencing range from 70 to 87 months' imprisonment to 168 to 210 months' imprisonment. Pet. 6. Mr. Moreno's lowest-end 168-month term of imprisonment is 98 months longer than it should be in light of Amendment 794. This Court should reject the notion that a court of appeals can insulate such error from review by taking on the role of the district court in applying a fact-bound guideline determination.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MELODY BRANNON
Federal Public Defender
Counsel of Record
DANIEL T. HANSMEIER
Appellate Chief
THOMAS W. BARTEE
Assistant Federal Public Defender
KANSAS FEDERAL PUBLIC DEFENDER
500 State Avenue, Suite 201
Kansas City, Kansas 66101
Phone: (913) 551-6712
Email: melody_brannon@fd.org
Counsel for Petitioner