No. 24-1293

IN THE

Supreme Court of the United States

BRETT MORRIS MCALPIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR REHEARING

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October 31, 2025

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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PETITION FOR REHEARING

Pursuant to Rule 44.2, petitioner Brett Morris McAlpin respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on October 6, 2025, (2) granting the petition, or in the alternative, holding the petition pending the decision in *Hunter* and then (3) granting, vacating, and remanding (GVR) the case to the Fifth Circuit for further proceedings in light of the Court's forthcoming decision in the case of *Munson P. Hunter, III v. United States*, No. 24-1063, a case recently granted writ of certiorari on October 10, 2025. As grounds for this motion, petitioner states the following:

GROUNDS FOR REHEARING

Petitions for rehearing of an order denying certiorari may be granted if a petitioner can demonstrate "intervening circumstances of a substantial or a controlling effect." R. 44.2. Here, an intervening petition for certiorari arose from the Fifth Circuit on directly parallel issues concerning the limits and constitutionality of appeal waivers in plea agreements drafted by the United States. Both cases present the question of whether and under what circumstances a defendant who has entered a guilty plea may nonetheless seek appellate review of his sentence despite a government-drafted blanket appeal waiver.

I. The Court's Intervening Grant of Certiorari in the Case of *Hunter v. United States* Will Have a Substantial or Controlling Effect on the Outcome of Brett McAlpin's Appeal.

On October 10, 2025, the Court granted the writ of certiorari in the case of *Munson P. Hunter, III v.*

United States, Case No. 24-1063. The questions presented in *Hunter* are

1. Whether the only permissible exceptions to a general appeal waiver are for claims of ineffective assistance of counsel or that the sentence exceeds the statutory maximum.

2. Whether an appeal waiver applies when the sentencing judge advises the defendant that he has a right to appeal and the government does not object.

In the space of just four days, this Court denied McAlpin's petition (October 6) and granted Hunter's (October 10). This intervening grant of certiorari — occurring after the Court had already considered and denied McAlpin's petition — creates the precise circumstance Rule 44.2 contemplates. The Court's decision to take up these issues in *Hunter* was not, and could not have been, factored into the consideration of McAlpin's petition.

McAlpin sought review of the Fifth Circuit's denial of his statutory right to appellate review of his sentence. McAlpin pled guilty and remains in that plea, but wishes review of the unreasonably excessive sentence.[1]

If the Court holds McAlpin's petition pending, McAlpin would benefit from the outcome of the Court's forthcoming decision in *Hunter*. So long as McAlpin's case is not yet final, his case may be remanded to the

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[1] The United States District Court for the Southern District of Mississippi sentenced Brett McAlpin on April 1, 2024. Pet. ii. McAlpin appealed his sentence on April 15, 2024. Pet. 6. The Court of Appeals for the Fifth Circuit dismissed the appeal on January 31, 2025. Pet.App. 1a. The Fifth Circuit denied McAlpin's petition for rehearing and rehearing en banc on March 20, 2025. Pet.App. 5a.

Court of Appeals for further proceedings in light of the decision in *Hunter*.

Like McAlpin, Hunter challenges the enforcement of an appeal waiver in a plea agreement where he seeks review of his sentence. The Court's resolution of whether the Constitution compels any exceptions to a blanket appeal waiver will directly govern the analysis of McAlpin's near-identical claim.[2] The Court's decision in *Hunter* will establish or clarify the governing legal framework for evaluating the scope and enforceability of government-drafted blanket appeal waivers in plea agreements.

McAlpin recognized the fundamental connection between these cases while both petitions were pending. On June 25, 2025, McAlpin filed an amicus curiae brief supporting Hunter's petition for certiorari.[3] However, at the time McAlpin's petition was considered and denied, the Court had not yet acted on *Hunter*. The grant of certiorari in *Hunter* four days later created a true intervening circumstance — a development that,

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[2] McAlpin's Petition presented the following Question:

"Should an appeal waiver in a plea agreement be enforced when the plea agreement confers no benefit on the defendant in exchange for his guilty plea, thereby eliminating the statutory right of appellate review established by Congress in 18 U.S.C. § 3742?

"The Second Circuit, in *Lutchman v. United States*, 910 F.3d 33, 37-38 (2018), answered that such an appeal waiver was not enforceable against a defendant seeking review of the sentence. Contradicting the Second Circuit with the ruling against Brett Morris McAlpin, the Fifth Circuit now creates a circuit split calling for the Court's review." Pet. i.

[3] Brief of Brett Morris McAlpin as *Amicus Curiae* in Support of Petitioner, Munson P. Hunter, III v. United States, No. 24-1063 (filed June 25, 2025).

by definition, occurred after the Court's decision on McAlpin's petition and could not have influenced that decision.

Because McAlpin's case presents the same fundamental question — whether such a waiver precludes sentencing review — *Hunter*'s resolution will be directly controlling and may well require reconsideration of the Fifth Circuit's decision below.

II. The Court's Multiple Precedents Support the Grant of the Rehearing Petition in Such Situations.

This Court has consistently granted rehearing petitions in precisely this posture. The Court has in recent years granted such petitions for rehearing on the same basis as McAlpin suggests, pending outcome of contemporary cases that have been granted certiorari.

The following are three of the most recent, pertinent examples:

1. ***Boumediene v. Bush***, No. 06-1195, 551 U.S. 1160 (2007) (Mem.).

The Court denied certiorari on April 2, 2007. Petitioners then filed a petition for rehearing under Rule 44.2 pointing to intervening developments and closely related litigation moving forward in the D.C. Circuit under the Military Commissions Act. On June 29, 2007, the Court granted rehearing and then granted certiorari — an exception illustrating that the Court grants rehearing when a closely related case is pending.

Like *Boumediene*, McAlpin's petition involves closely related issues arising from the same circuit,

presenting the same legal question the Court has now agreed to resolve.

2. ***Melson v. Allen***, No. 09-5373, 561 U.S. 1001 (2010) (Mem.), was a capital habeas case challenging a death sentence based on arguments about equitable tolling of the one-year statute of limitations under the Antiterrorism and Effective Death Penalty Act (AEDPA).

The Court denied certiorari on October 5, 2009. No. 09-5373, 558 U.S. 900 (2009).

Petitioner Gary Melson filed a timely petition for rehearing under Rule 44, arguing that the denial should be reconsidered in light of the Court's then-pending review of a similar equitable tolling issue.

Just eight days later, on October 13, 2009, the Court granted certiorari in the related case *Holland v. Florida*, No. 09-5327, 560 U.S. 631 (2010), which addressed whether a lawyer's gross negligence could equitably toll AEDPA's limitations period in a habeas context.

After *Holland* was argued (March 1, 2010) and decided (June 14, 2010), the Court granted Melson's rehearing petition on June 21, 2010, vacated the prior denial of certiorari, and remanded the case to the Eleventh Circuit with instructions to reconsider in light of *Holland*. 561 U.S. 1001.

The rehearing petition explicitly tied the request to the impending *Holland* decision, and the Court's grant of certiorari in that related case provided the key intervening development justifying resurrection of Melson's petition.

Melson is directly on point: there, as here, (1) certiorari was denied, (2) a closely related case was then granted within days, (3) a timely rehearing

petition was filed, and (4) the Court granted rehearing and ultimately remanded for reconsideration in light of the intervening decision. McAlpin's petition presents an even stronger case for rehearing, as the temporal proximity between the denial and *Hunter's* grant is even narrower — four days compared to eight.

3. ***Arlene's Flowers, Inc. v. Washington,*** No. 19-333, 141 S. Ct. 2884 (July 2, 2021) (Mem.), *pet. for reh'g dismissed*, 142 S. Ct. 521 (Nov. 22, 2021) (Mem.)

After the Court denied certiorari on July 2, 2021, petitioners filed a petition for rehearing urging the Court to grant rehearing in light of a closely related free-speech case then percolating — *303 Creative LLC v. Elenis* — and suggested the Court could grant both petitions and consolidate the two cases, or hold one petition for a GVR. The petition expressly framed the situation as a related-case vehicle problem. The Court did not grant rehearing before the parties agreed to dismissal, but granted certiorari in the related case, *303 Creative LLC v. Elenis*, No. 21-476, 142 S. Ct. 1106 (Feb. 22, 2022) (Mem.), the following Term, culminating in a 2023 merits decision.

Unlike *Arlene's Flowers*, where the related case (*303 Creative*) was still merely "percolating," *Hunter* has already been granted certiorari, providing a concrete intervening circumstance. McAlpin's petition thus presents a stronger basis for rehearing than did *Arlene's Flowers.*

III. The Balance of Equities Favors Granting McAlpin's Petition for Rehearing; No Harm Befalls the Government.

Absent the Court's grant of rehearing on this petition, Brett McAlpin's conviction will become final. *Beard v. Banks*, 542 U.S. 406, 411 (2004); *Clay v.*

United States, 537 U.S. 522, 527 (2003) ("Finality attaches when this Court … denies a petition for a writ of certiorari").

The non-retroactivity presumption governing this Court's criminal procedure decisions means that with no rehearing, McAlpin will be permanently barred from benefit of any favorable ruling in *Hunter*, even though his case raises identical issues and was pending before this Court at the time *Hunter* was granted. *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) ("we give retroactive effect to only a small set of 'watershed rules of criminal procedure'"); *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (new "rule applies to all criminal cases still pending on direct review.").

The inequity is particularly acute here. While McAlpin's petition was pending, he filed an amicus curiae brief supporting Hunter's petition for certiorari, urging this Court to grant review on the very questions that govern his own case. The Court granted Hunter's petition just four days after denying McAlpin's — after the Court had already decided McAlpin's petition. Having advocated for this Court's review of these issues — review the Court has now granted — McAlpin faces the anomalous result of being permanently barred from benefiting from the decision he urged the Court to render.

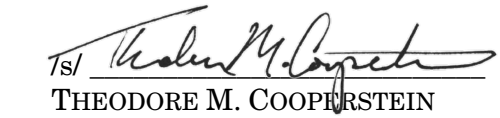
Grant of rehearing in this case does not harm or prejudice the government. McAlpin pled guilty and is currently serving his sentence in the Bureau of Prisons. McAlpin does not seek to withdraw his guilty plea, but will continue serving his sentence during pendency of this appeal. A grant of rehearing and vacation of the denial of McAlpin's petition for a writ of certiorari will not interrupt McAlpin's sentence nor cause any harm from delay to the government.

In contrast, denying rehearing would result in substantial and irreparable prejudice to McAlpin. His case would become final mere days before this Court addresses the precise legal question at issue, foreclosing any opportunity for him to benefit from clarified precedent that may vindicate his position. This result would be particularly inequitable, given the narrow temporal window — only four days — between the denial of McAlpin's petition and the grant in *Hunter*.

CONCLUSION

For the foregoing reasons, and in light of this Court's consistent practice of granting rehearing in analogous circumstances, the Court should enter an order (1) vacating its denial of the petition for writ of certiorari entered on October 6, 2025, (2) granting the petition, or holding it pending the decision in *Hunter*, and (3) remanding to the Fifth Circuit for reconsideration in light of *Hunter*.

Respectfully submitted,

/s/ 

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October 31, 2025

CERTIFICATE OF COUNSEL

Pursuant to Rule 44.2, Counsel certifies that the Petition is restricted to the grounds specified in the Rule with substantial grounds not previously presented. Counsel certifies that this Petition is presented in good faith and not for delay.

Respectfully submitted,

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