No. 22-1200

IN THE
Supreme Court of the United States

LEE JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY IN SUPPORT OF CERTIORARI

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INTRODUCTION

The government's opposition underscores that this Court should grant review, to clarify when courts should address legal arguments not made by the parties in criminal appeals. Indeed, the government disputes neither this question's importance nor the frequency with which it arises. And though the government tries to suggest that this Court's review would be premature—because the district court *could* still impose the sentence that, because of the government's forfeiture below, the Sixth Circuit should have *required*—this Court regularly grants review in similar circumstances.

Such review is squarely warranted here. The government does not dispute the stark difference in how the circuits articulate their forfeiture standards, with only the Sixth and Tenth Circuits holding that courts are obligated to "get the law right," Pet.App.4a, even when that requires reaching an argument that was never raised. Instead, the government suggests the split does not matter here, because the circuits on both sides will raise and resolve forfeited arguments when necessary to avoid an order "contrary to law." Opp. 11. But the Fifth, Seventh, and Eleventh Circuits permit such *sua sponte* decision-making only rarely, where the law is strikingly clear and the circumstances further warrant judicial intervention. In this case, in contrast, the Sixth Circuit held that courts *must* take such drastic steps, unless the matter is "difficult."

That ruling not only deepens a circuit split but flouts this Court's jurisprudence—which, as even the government admits, holds "that, under the principle

of party presentation, a court should generally consider only the issues and arguments presented by the parties." Opp. 8 (citing *Wood v. Milyard*, 566 U.S. 463, 472 (2012)). Courts of course have the *power* to reach forfeited arguments, as the cases cited by the government recognize. *See Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99 (1991); *Yee v. City of Escondido*, 503 U.S. 519 (1992). But this Court has never recognized a judicial *obligation* to raise and resolve forfeited arguments, as the Sixth Circuit held below. And to the extent there is any tension in this Court's caselaw on the matter, that only underscores the need for review.

The Sixth Circuit squarely held that the government had forfeited its response to Mr. Jones's argument that he was entitled to a 27-month sentence to remedy the conceded Rule 11 violation with his guilty plea. That remedy was supported by precedent, including from the Sixth Circuit. Certainly the law did not squarely preclude the remedy. In nevertheless rejecting Mr. Jones's request on the basis of arguments that were never raised and that are not clearly correct, the Sixth Circuit improperly inverted the default principle of party presentation—and reached a result that cannot be squared with other circuits' law and will wreak havoc in future cases. This Court should grant review.

ARGUMENT

I. THE CIRCUITS ARE DIVIDED ON WHETHER COURTS MUST RAISE AND RESOLVE FORFEITED LEGAL ARGUMENTS IN CRIMINAL CASES.

The government tries to downplay the existence of a circuit split, waiting until the end of its opposition to argue that the decision below "does not implicate any circuit conflict." Opp. 10. As the petition explained, however, the circuits are divided on whether courts are obligated to address forfeited legal arguments in criminal cases. Pet. 15–18. The Fifth, Seventh, and Eleventh Circuits have held that courts *never* have such a duty (but have the discretion to reach forfeited issues in certain cases if exceptional circumstances exist). The Sixth and Tenth Circuits, in contrast, have held that courts *must* address forfeited legal issues in order to avoid outcomes that are contrary to law. The government is wrong to suggest that the Fifth, Seventh, and Eleventh Circuits would have reached the same result in this case.[1]

As the government sees it, any decision "that is 'contrary to law' by definition would qualify as an 'extraordinary circumstance'" in the Seventh and Eleventh Circuits, and thus allow courts in those

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[1] The government is also wrong to suggest a split within the Sixth Circuit. Opp. 11 (citing *Greer v. United States*, 938 F.3d 766, 770 (6th Cir. 2019)). *Greer* involved the government's failure to raise a defendant's appellate waiver in a case where the defendant lost on the merits—thus not implicating the Sixth Circuit's imperative "to get the law right." Pet.App.4a; *contra Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (addressing intra-circuit split on same issue).

circuits to reach a forfeited issue. Opp. 10–11 (citing *United States v. Edwards*, 34 F.4th 570, 584 (7th Cir. 2022)); *United States v. Campbell*, 26 F.4th 860, 872 (11th Cir. 2022) (*en banc*)). But those Circuits have been explicit that forfeited arguments should be considered only in rare circumstances—which are *not* always present with a legal error. Pet. 15–17. For example, even when "the proper resolution of the issue is beyond any doubt," the Eleventh Circuit still requires that the "case presents an extraordinary circumstance such that [a court] should exercise [its] discretion to excuse the [] forfeiture." *Campbell*, 26 F.4th at 873, 877. The Seventh Circuit has held similarly. *See Edwards*, 34 F.4th at 584 (applying *Campbell*, 26 F.4th at 872). As has the Fifth Circuit. *See United States v. Delgado*, 672 F.3d 320, 329 n.6 (5th Cir. 2012) (*en banc*).

Because of this, courts in these circuits routinely enforce the forfeiture of winning legal arguments and, thus, reach outcomes that could be framed as contrary to law. *See, e.g.*, *Wilson v. O'Leary*, 895 F.2d 378, 384 (7th Cir. 1990) (holding that "Illinois has forfeited what would have been its best argument" regarding admissibility of confession that was deemed involuntary); *United States v. Valdez*, 973 F.3d 396, 406 n.6, 413 (5th Cir. 2017) (refusing to grant evidentiary hearing because appellant "forfeited the issue on appeal," even though dissent detailed why one was warranted); *United States v. Otero-Pomares*, 803 F. App'x 251, 261 n.12 (11th Cir. 2020) (granting defendant's untimely appeal in part because "the government can forfeit an objection to an untimely notice of appeal" and did so).

In contrast, courts generally *must* reach winning arguments in the Sixth and Tenth Circuits. Pet. 17–20. For example, as per the Sixth Circuit's decision below, a party generally cannot forfeit a winning legal argument, regardless of whether exceptional circumstances exist. Pet.App.5a & n.1. And though the Sixth Circuit does treat "difficult legal questions with uncertain answers" differently, *id.*, there are many legal arguments that may not be "difficult" (and thus cannot be forfeited under the decision below) but nevertheless lack a "resolution [that] is beyond any doubt" (and thus *would* be forfeited in the Eleventh Circuit and elsewhere). Indeed, the Sixth Circuit rule covers forfeited arguments even if there is no on-point precedent (as happened here), whereas the Eleventh Circuit requires a case "on all fours" with the forfeited argument. *Campbell*, 26 F.4th at 877. And even then, deciding the forfeited issue is discretionary in the Eleventh Circuit but compulsory under the decision below.

Those differences matter here. The government disagrees, arguing that the Eleventh Circuit would have excused the forfeiture in this case because "the issue involves a pure question of law and refusal to consider it would result in a miscarriage of justice," or because "the proper resolution is beyond any doubt." Opp. 11. But the matter was hardly "beyond any doubt," particularly when Sixth Circuit precedent supported Mr. Jones. *See* Pet.App.7a. And the Sixth Circuit never suggested it was avoiding a "miscarriage of justice." To the contrary, the Sixth Circuit expressly held that Mr. Jones could receive a 27-month sentence on remand—exactly what he would receive if the forfeiture were enforced.

Pet.App.7a. Nor do other circumstances warrant excusing the forfeiture under the Eleventh Circuit's standard, or in the Seventh Circuit.

Mr. Jones also would have prevailed in the Fifth Circuit. In *United States v. Garcia-Pillado*, the Fifth Circuit refused to entertain the government's obviously winning argument about a sentence falling below the statutory minimum, enforcing the forfeiture because it would not "result in manifest injustice." 898 F.2d 36, 39 (1990); *see also United States v. Posters N Things Ltd*, 969 F.2d 652, 663 (8th Cir. 1992) (affirming sentence below the statutory minimum despite it being "plainly an error"). When no "manifest injustice" was present there, none is present here. The government is wrong to suggest that *Garcia-Pillado* is inapposite because it involved plain-error review, not "a failure to develop an argument on appeal," Opp. 12; the Fifth Circuit applies the same standard in both contexts. *See Delgado*, 672 F.3d at 328–29 & n.6 (holding that plain-error standard applies to arguments forfeited on appeal).

In short, the courts of appeals are plainly divided regarding the circumstances under which they should consider forfeited legal argument. Only this Court can bring clarity to the issue.

II. THE DECISION BELOW IS WRONG.

The government also argues that the Sixth Circuit's decision was correct. It is mistaken.

1. On whether the Sixth Circuit properly considered the forfeited argument, the government concedes that "[t]his Court has explained that, under the principle of party presentation, a court should

generally consider only the issues and arguments presented by the parties." Opp. 8. That concession is directly contrary to what the Sixth Circuit held.

The government nevertheless argues that courts "retain[] the independent power to identify and apply the proper construction of governing law." Opp. 8 (quoting *Kamen*, 500 U.S. at 99). But no one argues otherwise. The question is not whether courts have the *power* to consider a forfeited legal argument, but rather when they should *exercise* that power. Neither *Kamen* nor *Yee*, which the government also cites, suggests that forfeiture should not typically apply when a party fails to raise an argument on appeal. Indeed, in *Yee*, this Court *declined* to consider an argument that was not "fairly included" in the question presented. 503 U.S. at 537. And in *Kamen*, the Court considered an argument that *was* raised by the petitioner (unlike here) and that bore upon the scope of "a federal common law demand rule" that would govern future cases. 500 U.S. at 99.

The government also remarks that "parties are not limited to the precise arguments they made below." Opp. 8. But this Court routinely holds that legal arguments have been forfeited. *See, e.g.*, *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 140 n.2 (2014). Even the government admits as much. Opp. 8 ("a court should generally consider only the issues *and arguments* presented by the parties" (emphasis added)).

Nor does *Young v. United States*, 315 U.S. 257 (1942), call for a different result. In *Young*, after the government confessed error and stipulated that a criminal statute did not reach the defendant's

conduct, the Court held that it still had to "perform[] [its] judicial function" and interpret the statute, because its "judgments are precedents" that "cannot be left merely to the stipulation of parties." 315 U.S. at 258–59. Treating forfeitures differently would not be "highly anomalous" (as the government suggests), Opp. 8–9, because construing a statute in a precedential decision is nothing like enforcing a forfeiture—as future parties cannot rely on a forfeiture. *Compare Estate of Sanford v. Commissioner*, 308 U.S. 39, 51 (1939) (holding courts are not required to accept "stipulations as to questions of law"); *Kamen*, 500 U.S. at 99, *with Greenlaw v. United States*, 554 U.S. 237, 243–44 (invoking party-presentation principles to reinstate sentence below statutory minimum); *California v. Texas*, 141 S. Ct. 2104, 2116 (2021) (declining to consider forfeited standing argument). At a minimum, any tension between *Young* and this Court's decisions on the party-presentation rule underscore the need for this Court's review, to clarify how these principles interact.

2. The Sixth Circuit also erred in suggesting that it lacked the power to enforce the government's forfeiture by directing a particular sentence. Indeed, the government offers only a cursory defense of the Sixth Circuit's holding that it could not "curtail the sentencing court's discretion on remand" given "this Court's decision in *McCarthy v. United States*, 394 U.S. 459 (1969), the court of appeals' own precedent,

and the rules and practices governing plea agreements." Opp. 9.[2]

McCarthy does not limit an appellate court's power to cap a sentence on remand. There, the Court held that allowing the defendant to plead anew was an appropriate remedy for a Rule 11 violation, but this Court did not suggest that courts were powerless to craft other remedies, including limiting a sentencing court's discretion. *See* 394 U.S. at 464, 468–69.[3] Nor have any other courts of appeals enforced such limits. Certainly this matter is not "beyond any doubt." *Campbell*, 26 F.4th at 873.

As for "the rules and practices governing plea agreements," Opp. 9, neither the decision below nor the government cites any other case holding that these rules preclude an appellate court from limiting a sentencing court's discretion where Rule 11 violations mislead a defendant about his maximum sentence. *See* Pet.App.5a. Instead, courts have endorsed precisely the remedy that Mr. Jones sought. *See United States v. Thorne*, 153 F.3d 130, 134 (4th Cir. 1998) (stating "the Rule 11 error could be rectified . . . by remanding to the district court for the imposition of a lesser sentence to ensure [defendant]'s entire sentence would not exceed the maximum he was told he could receive"); *United States v. Smagola*, 390 F. App'x 438, 443 (6th Cir. 2010) (similar).

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[2] To be clear, Petitioner did not concede his "preferred remedy" would be "contrary to law." Opp. 8–9. Petitioner has consistently argued the imposition of a 27-month sentence would be a proper remedy. Pet.App.4a–5a.

[3] Even the Sixth Circuit implicitly recognized this, as it vacated the sentence but not the guilty plea. Pet.App.7a.

Appellate courts frequently limit sentencing courts' discretion in other contexts, too. *See, e.g.*, *United States v. Irey*, 612 F.3d 1160, 1224 (11th Cir. 2010) (en banc) (directing 30-year sentence because "no downward variance is reasonable"); *United States v. Butler*, 67 F. App'x 798, 799 (4th Cir. 2003) (district court required to impose 20-year sentence). The scope of appellate courts' supervisory power over specific remedies is certainly not settled, *compare United States v. Tsarnaev*, 595 U.S. 302, 324–25 (2022) (Barrett, J., concurring), *with id.* at 342 (Breyer, J., dissenting), but this is all the more reason why courts should not decide such matters *sua sponte*.

III. THE GOVERNMENT DOES NOT DISPUTE THE IMPORTANCE AND RECURRING NATURE OF THE QUESTION PRESENTED.

Notably, the government does not dispute "the recurring nature and exceptional importance of the question presented." Pet. 25–28. Indeed, "[o]ur adversary system is designed around the premise that the parties . . . are responsible for advancing the *facts and arguments* entitling them to relief." *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part); *see also United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring in the judgment). The importance of this issue is illustrated by the Eleventh Circuit's 132-page en banc decision in *Campbell*, where both sides wrestled with questions about "judicial power and its limits" in the context of a government forfeiture. *See* 26 F.4th at 891, 908 (Newsom, J., dissenting).

Nor are forfeitures rare in criminal cases. Indeed, the government itself frequently relies on them. *See,*

e.g., *United States v. Fields*, 832 F. App'x 317, 318–19 & n.1 (5th Cir. 2020); *United States v. Vitrano*, 747 F.3d 922, 925 (7th Cir. 2021). The question whether courts are obligated to reach the "correct" legal result thus has far-reaching implications.

IV. THE CASE IS A CLEAN VEHICLE.

As for whether this case is a clean vehicle for the issue, the government suggests otherwise because of this case's "interlocutory posture," as Mr. Jones might eventually receive a sentence of 27 months or less from the district court. Opp. 7. But this appeal concerns a final judgment. Moreover, the petition raises a purely legal question for which the Sixth Circuit's answer will not change based on further proceedings.

Nor does it matter that Mr. Jones may ultimately receive a sentence of 27 months or less from the district court. This Court frequently hears cases where petitioners seek relief that they could possibly receive later in the district court. *See Tsarnaev*, 595 U.S. 302 (reviewing whether court properly vacated death sentence, even though same sentence was available on remand); *Ford Motor Co. v. Montana Eighth Judicial District*, 141 S. Ct. 1017 (2021) (reviewing whether court properly denied motion to dismiss for lack of personal jurisdiction, even though defendant could have prevailed on other grounds); Order, *McElrath v. Georgia*, No. 22-721 (Jun. 30, 2023) (granting review of decision ordering defendant retried for a crime of which he had previously been

acquitted); *see also* Fed. Prac. & Proc. Juris § 4036 n.74 (collecting cases).[4]

Ultimately, the same prudential factors that warranted grants in the above cases warrant a grant here. The question presented here is a question of law that the Sixth Circuit definitively answered, and that has divided the Circuits. No further developments in the record will change the Sixth Circuit's reasoning or result. Moreover, requiring additional procedures that should be unnecessary (including potentially even a full trial) would impose a significant burden on Mr. Jones and the lower courts—and would also be deeply inequitable, particularly if he ends up serving additional prison time later ruled unlawful.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[4] None of the government's cited cases suggest otherwise. In two, the Court simply observed that it had the "authority to consider questions determined in earlier stages of the litigation." *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam); *see also Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257–58 (1916). And in *Virginia Military Institute v. United States*, 508 U.S. 946 (1993), the record needed further development on the question presented, which is not the case here. *See United States v. Com. of Va.*, 976 F.2d 890, 900 (4th Cir. 1992).

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