No. 08-1149

In the Supreme Court of the United States

DEREK CUNNINGHAM, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 7-15) that this Court should grant certiorari to resolve the circuit conflict on the question whether the holding of *United States* v. *Booker*, 543 U.S. 220 (2005), which remedied the constitutional defect in the Sentencing Guidelines by rendering them advisory, applies in a sentence modification proceeding under 18 U.S.C. 3582(c). This Court has received several other petitions raising the same basic claim. As the government has explained in its brief in opposition to the first of those petitions, see *Rhodes* v. *United States*, No. 08-8318 (filed Mar. 27, 2009), cert. denied (Apr. 27, 2009), although the courts of appeals are divided on this issue, this Court's review of that issue is not currently warranted.[1] This Court recently

[1] We have served petitioner with a copy of the government's brief in opposition in *Rhodes*.

denied certiorari in *Rhodes* and in two other cases presenting the same question. See *Dunphy* v. *United States*, No. 08-1185 (May 18, 2009); *Melvin* v. *United States*, No. 08-8664 (May 18, 2009). There is no reason for a different result here.

Seven of the eight courts of appeals to consider the issue have held (correctly, in the government's view) that *Booker* does not apply in sentence modification proceedings under Section 3582(c). See U.S. Br. in Opp. at 15-16, *Rhodes*, *supra* (No. 08-8318) (citing cases); see also *United States* v. *Doe*, No. 08-3968, 2009 WL 1151939 (3d Cir. Apr. 30, 2009). Although the Ninth Circuit's decision in *United States* v. *Hicks*, 472 F.3d 1167 (2007), is inconsistent with these decisions, *Hicks* is the subject of a pending government appeal in *United States* v. *Fox*, No. 08-30445 (9th Cir. filed Nov. 21, 2008). On March 13, 2009, the government filed its opening brief in the Ninth Circuit in *Fox*, and on April 13, 2009, the government filed a petition for an initial en banc review, which is currently pending before a merits panel, urging the Ninth Circuit to overrule its decision in *Hicks*. If the Ninth Circuit agrees that *Hicks* should be overruled, the current circuit conflict will disappear. If the court of appeals rejects the government's argument and affirms *Hicks*, the government would retain the option of seeking this Court's review at that time. The pendency of the proceedings in *Fox*, therefore, renders this Court's review of the issue premature.[2]

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[2] The government waives any further response to the petition unless this Court requests otherwise.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 2009