No. 17-9379

in the

Supreme Court

of the

United States

Term,

CHARLES CHUBB,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY TO BRIEF IN OPPOSITION

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On Petition for a Writ of Certiorari from the
United States Court of Appeals for the Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

In arguing for a denial of certiorari, the Government first asserts that the question presented by this petition does not constitute a true circuit split and therefore this Court's intervention is unnecessary. (Brief in Opposition, hereinafter BIO, 3). In making this argument, the Government relies on its brief in opposition filed in *Gipson v. United States*, No. 17-8637 (filed Apr. 17, 2018). To the extent that the Government relies on its brief in *Gipson*, Petitioner Chubb submits that *Gipson*'s reply undermines the Government's assertion. *See* Reply to Brief in Opposition, *Gipson v. United States*, No. 17-8637 (filed Apr. 17, 2018). *See also* Reply to Brief in Opposition, *Greer v. United States*, No. 17-8775 (filed May 1, 2018); Reply to Brief in

Opposition, *Brown v. United States*, No. 16-7056 (filed May 29, 2018). As the aforementioned petitions clearly demonstrate, the passage of time has only served to deepen the circuit split on this issue. Thus, contrary to the Government's position, Court intervention is required.

The Government next argues that if this Court determines the split must be resolved, the petition at hand should still be denied because it is an "unsuitable vehicle" for addressing the question presented. (BIO, 3). In support of its position, the Government notes that Petitioner Chubb's claim was raised as a second or successive petition, rather than a first collateral attack. (BIO, 3-4). Like the Government's argument on the growing circuit split, this argument too fails. As noted in *Gipson*'s reply brief, in addition to the circuit split on whether *Johnson* applies retroactively to the mandatory guideline context, the circuits are also divided on the question of whether Petitioners can seek this relief in second or successive petitions. Reply to Brief in Opposition, *Gipson v. United States*, No. 17-8637 (filed Apr. 17, 2018). Because Petitioner Chubb's case encompasses both issues, this petition presents the perfect vehicle for certiorari review.

Finally, the Government argues that certiorari should be denied in Petitioner Chubb's case because his prior convictions were enumerated offenses (i.e., kidnapping and robbery) under Guidelines Section 4B1.2, and therefore the residual clause was not unconstitutionally vague "as applied" to Petitioner Chubb. (BIO, 4). This argument is meritless.

In 1991, when Petitioner Chubb was sentenced, U.S.S.G. § 4B1.2(a)(2) contained the following enumerated offenses: "burglary of a dwelling, arson, or extortion, involves the use of explosives". The Government avers that, in addition to the list contained in the guideline itself, there also existed, in Application Note 1, *another* enumerated list which included "kidnapping" and "robbery". (BIO, 4). However, the Government misinterprets the list contained in Application Note 1. Contrary to the Government's assertion, the offenses listed in Application Note 1 are not themselves enumerated offenses. Rather, they are simply examples of offenses which would have qualified under the now defunct "residual" clause.

This Court has held that Guidelines commentary is only authoritative if it interprets the text of the guideline itself and does not violate the Constitution or some other federal statute. *Stinson v. United States*, 508 U.S. 36, 40-41 (1993). Where "commentary and the guideline it interprets are inconsistent, in that following one will result in violating the dictates of the other, the Sentencing Reform Act itself commands compliance with the guideline." *Id.* at 43.

Here, the commentary in question is found in Application Note 1 to U.S.S.G. § 4B1.2 (prior to August 1, 2016). Application Note 1 provided a list of offenses not included in the text of the guideline itself. A plain reading of the guideline makes clear that those offenses were included as examples of conduct that would fall under the residual clause. Thus, it follows, after this Court's holding in *Johnson*, that both the residual clause, and the commentary in the Application Note that

interpreted/explained the residual clause, are invalidated.

The applicability of Application Note 1 (and the offenses within it) to the guideline's residual clause is supported by the Sentencing Commission's post-*Johnson* revisions to the text of U.S.S.G. § 4B1.2. Under the Guideline Amendment which went into effect in August 2016, the residual clause language is struck in its entirety. In its place, in addition to the enumerated offenses previously listed under §4B1.2(a)(2), some of the offenses from the Application Note were moved from the commentary to the text of the guideline itself, thereby changing their nature to enumerated offenses. *Notice*, 81 Fed. Reg. 4741-02 (January 27, 2016).

The restructuring of the guideline in this way clarifies that those offenses, which were once used to interpret or explain conduct that would have fallen under the residual clause, are now to be considered, on an independent basis, as part of the definition of the crime of violence. Had the Sentencing Commission believed that those offenses applied to anything other than the residual clause, there would be no need to move them from the commentary to the guideline text, as they would still serve to interpret or explain the provisions in the guideline that were left undisturbed by *Johnson*.

There is no free standing definitional power to former Application Note 1 for U.S.S.G. § 4B1.2. Any such interpretation of the commentary is inconsistent with this Court's law as enunciated in *Stinson*. *See United States v. Soto-Rivera*, 811 F.3d

53 (1st Cir. 2016). *See also United States v. Rollins*, 836 F.3d 737 (7th Cir. 2016) (en banc) (adopting *Soto-Rivera*). *But see United States v. Marrero*, 743 F.3d 389 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 950 (2015); *United States v. Jeffries*, 822 F.3d 192 (5th Cir.) (per curiam), *pet. for reh'g denied*, 829 F.3d 769 (5th Cir. 2016), *cert. pet. filed*, No. 16-6490 (Oct. 17, 2016).

Therefore, in light of *Stinson* and the plain language of the Guideline itself, the additional offenses in the commentary can only be valid, pre-*Johnson*, if they are tied to the text of § 4B1.2. As noted *supra*, because those offenses were mere examples of conduct that fell under the residual clause, robbery and kidnapping were not, as the government contends, enumerated offenses at the time of Petitioner Chubb's initial sentencing.

Because Petitioner Chubb was sentenced when the Guideline provisions were mandatory, and because his designation as a career offender was dependent on the now defunct residual clause of Guidelines Section 4B1.2, this Court should grant certiorari review.

CONCLUSION

For the foregoing reasons, as well as those presented in the initial Petition for Certiorari, this Court should grant the petition for certiorari.

Respectfully submitted,

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