NO. 18-5594

IN THE

SUPREME COURT OF THE UNITED STATES

CORY DEVON WASHINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. Since Mr. Washington filed his petition for certiorari, the split among the circuits has deepened.

In addition to the circuit split as laid out in Mr. Washington's petition, additional circuits have since weighed in and further deepened the divide in the lower courts. Even the government acknowledges that "some inconsistency exists in the approaches of different circuits to *Johnson*-premised collateral attacks like petitioner's." Government's Memorandum in Opposition at 4.

In the three months since Mr. Washington filed his petition, the lower courts continue to grapple with this issue. In *United States v. Weise*, the Fifth Circuit held that courts must look to the law at the time of sentencing to determine whether a sentence was imposed under the enumerated offenses clause or the residual clause. 896 F.3d 720, 724 (5th Cir. 2018). In dicta, the *Weise* court endorsed the "more likely than not" standard used by the Tenth Circuit over the "may have" standard articulated by the Fourth Circuit. But, ultimately, the *Weise* court refused to decide which standard is required, finding that the defendant could not even establish that the sentencing court "may have" relied upon the residual clause. *Id.* at 726.

In *United States v. Walker*, the Eighth Circuit announced its agreement with the First, Tenth, and Eleventh Circuits, requiring a movant to show by a preponderance of the evidence that the residual clause led the sentencing court

to apply the Armed Career Criminal Act enhancement. 900 F.3d 1012, 1015 (8th Cir. 2018).

The Third Circuit joined the Fourth Circuit in looking to the factual record to determine procedural eligibility and then the Fourth and Ninth Circuits by looking to current law on the merits. *United States v. Peppers*, 899 F.3d 211, 221, 224, 230 (3rd Cir. 2018). The Sixth Circuit has done the same, though unlike the Fourth and Ninth it requires *affirmative* evidence in the sentencing record (rather than silence) to establish procedural eligibility before looking to current law to adjudicate the merits. *See Raines v. United States*, 898 F.3d 680, 868, 688-90 (6th Cir. 2018). To compound the confusion, the Sixth Circuit relies on the sentencing record only to determine procedural eligibility for second or successive petitions under § 2255(h)(2), not to determine timeliness under § 2255(f)(3). *Id.* at 687.

This Court should step in to resolve the growing circuit split on this issue.

II. The sheer number of petitions raising the same or related issues demonstrates the necessity of review.

The government points out that this Court has "recently and repeatedly denied review of similar issues in other cases" and that "other pending petitions raise the same issue, or related issues." Government's Memorandum in Opposition at 3, n.1 and n.2. But the government's argument cuts in favor of

granting certiorari because it proves that this is an important and recurring issue throughout the country for countless criminal defendants. If this Court decides that one of the other pending cases is the ideal vehicle for resolving this issue instead of Mr. Washington's case, Mr. Washington requests that his case be held and remanded with appropriate instructions if the decision in the other case is favorable to him.

It is time for this Court to adjudicate the burgeoning circuit split and to decide this recurring issue of national importance where the liberty interests of thousands of criminal defendants are at stake.

CONCLUSION

Based on the foregoing reply and the previously-filed petition, Petitioner Cory Washington requests that the Court grant this petition for a writ of certiorari.

Respectfully submitted,

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