No. 19-6287

In the

Supreme Court of the United States

SEFERINO MARTINEZ, 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 Brief in Support of Petition for Writ of Certiorari

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Reply Argument

The government admits that the Circuits are split over whether the new rule announced in *Johnson v. United States*, 135 S.Ct. 2551 (2015), applies to the analogous residual clause in the mandatory guidelines. Br. in Opp. 3-4. The government insists the Court leave this split in place, rather than resolve it because it believes: the conflict is "shallow," Br. in Opp. 3. It gives three other reasons that it believes demonstrate that Martinez's case is not suitable for this Court's review on the question presented: (1) the issue will be moot because Martinez's prison term ends next month, Br. in Opp. 4; (2) even if the guidelines' residual clause is vague, "it was not vague as applied to" Martinez, because the 1995 commentary to USSG § 4B1.2 said the term "crime of violence" included murder, the alleged offense of conviction, and robbery, an alleged prior conviction, Br. in Opp. 4; and (4) irrespective of the commentary, Martinez's convictions for second degree murder and robbery were crimes of violence according to the elements clause in USSG § 4B1.2(1)(i), Br. in Opp. 4.

The Court should not be persuaded by the government's arguments. Nor should the Court follow its suggestion that the circuit split be left in place. As the government acknowledges, this issue is recurring. Br. in Opp. 3-4 (noting that this Court has refused to resolve the issue on at least nine different occasions). Until this Court steps in to resolve the split, it will

continue to receive petitions asking it to do just that. And not just in this specific context. This Circuit split affects how courts define the scope of any newly recognized retroactive right. Pet. 12. This Court's primary function is to maintain uniformity in the lower courts. Sup. Ct.R. 10(a). On this issue, in both a narrow and broad context, there is no uniformity and, never will be, without this Court's review.

I. The Circuit split is not "shallow."

To be clear, there is an established conflict within the courts of appeals over whether *Johnson*'s rule applies to the residual clause of the mandatory guidelines. Pet. 10-12; Br. in Opp. 3. The government refers to this conflict as "shallow," however, because only the Seventh Circuit has decided the issue differently. Br. in Opp. 3. But the government ignores the First Circuit's decision in *Moore v. United States*, 871 F.3d 72, 81-82 (1st Cir. 2018), as well as the various dissents and concurrences from judges outside of the Seventh Circuit supporting that Circuit's position on this issue. Pet. 10-12.

For example, the Ninth Circuit's Judge Berzon, authored a concurrence, disagreeing with that Circuit's precedent. She wrote that "the Seventh and First Circuits have correctly decided this question." *Hodges v. United States*, 778 Fed. Appx. 413, 415 (9th Cir. 2019) (citing *Cross v. United States*, 892 F.3d 288, 294 (7th Cir. 2018); *Moore*, 871 F.3d at 82-83).

Although the Fifth Circuit's Judge Costa concurred with the result in

United States v. London, 937 F.3d 502 (5th Cir. 2019), he stressed that the Fifth Circuit was "on the wrong side of a split over the habeas limitations statute." 937 F.3d at 510. He noted "a unique impediment" to review: because the guidelines are no longer mandatory, "a cramped reading of the limitations provision prevents the only litigants affected by this issue from ever pursuing it." *Id.* at 513 (citing *Brown v. United States*, 139 S.Ct. 14, 15 (2018) (Sotomayor, J., dissenting).

Judge Costa's concurrence recognizes that "this limitations issue affects more than the *Johnson* line of cases." *Id.* Ultimately, the issue involves the appropriate interpretation of § 2255(f)(3), and this issue will arise any time this Court recognizes a new retroactive rule. *See id.* at 510 ("Our approach fails to apply the plain language of the statute and undermines the prompt presentation of habeas claims the statute promotes."). Judge Costa ended with a plea for this Court's review: "at a minimum, an issue that has divided so many judges within and among circuits, and that affects so many prisoners, 'calls out for an answer.'" *Id.* at 513-514 (quoting *Brown*, 139 S.Ct. at 14 (Sotomayor, J., dissenting)).

In a published decision, the Seventh Circuit again reaffirmed that the mandatory guidelines' residual clause is void for vagueness under *Johnson*. *Daniels v. United States*, 939 F.3d 898, 899, 902-03 (7th Cir. 2019) (Sykes, J.). This conflict will remain until this Court resolves it. Finally, this issue is still

an open one in the Second and D.C. Circuits. Pet. 11-12. And on August 9, 2019, a district court within the Second Circuit found that a petitioner could bring a *Johnson* challenge to the residual clause of the mandatory guidelines. *Blackmon v. United States*, 2019 WL 3767511, at *6 (D. Conn. Aug. 9, 2019) (Bolden, J.).

In light of the established Circuit conflict, the dissension within the circuits, and the uncertainty within the Second and D.C. Circuits, this conflict is not shallow, and it is likely to deepen even further soon. The government is aware that in the past its residual clause arguments have not always persuaded this Court. *See e.g., Johnson*, 135 S.Ct. 2551; *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018); *United States v. Davis*, 139 S.Ct. 2319 (2019). It is unsurprising that it opposes certiorari here. But the resolution of this issue is as needed as the resolution of the issues in *Johnson*, *Beckles*, *Sessions*, and *Davis*. Without resolution, prisoners suffer different fates based solely on geography. That arbitrariness cannot be tolerated. This Court's review is very necessary.

II. Martinez's sentence has not expired, so his case is not moot.

In a criminal case, a person wishing to continue his appeal "after the expiration of his sentence" must establish some continuing injury or collateral consequence to satisfy Article III. *United States v. Juvenile Male*, 564 U.S. 932, 936 (2011). Sentence in this context refers to the entire sentence,

including parole or other post-incarceration supervision. *See id.* at 937; *Spencer v. Kemna*, 523 U.S. 1, 6 (1998) (appeal moot because entire sentence, including parole, expired); *Lane v. Williams*, 455 U.S. 624, 631 (1982) (appeal possibly moot because entire sentence, including parole term, complete). In other words, a petitioner needs to show collateral consequences only when his entire sentence has expired. *United States v. Sandoval-Enrique*, 870 F.3d 1207, 1210 (10th Cir. 2017).

In *United States v. DeVaughn*, 694 F.3d 1141, 1157 (10th Cir. 2012), the Tenth Circuit held that mootness "deals with whether the court has power to grant relief, not with whether it should exercise its power." That holding follows this Court's reasoning that a case only becomes moot "if an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party." *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992). Therefore, when the court has the power to grant a "'cognizable remedy requested by a party,'" the appeal is not moot. *DeVaughn*, 694 F.3d at 1157 (quoting *United States v. Hahn*, 359 F.3d 1315, 1323 (10th Cir. 2004) (en banc); *see also Sibron v. New York*, 392 U.S. 40, 53-54 (1968) (appellate court may adjudicate the merits of a criminal appeal "where 'under either state or federal law further penalties or disabilities can be imposed as a result of the judgment'" being contested) (quoting *St. Pierre v. United States*, 319 U.S. 41, 43 (1943)). Here, if this

Court granted Martinez's petition and remanded his case to the circuit court, that court would have to decide whether his sentence is illegal, and if so, then order that it be set aside. In short, the lower courts still can give Martinez relief if they agree with his arguments.

Contrary to the government's suggestion, because Martinez has not completed his entire sentence, his case is not moot. He still is serving the prison term imposed by the district court and when he is done, he will begin the supervised release portion of his sentence. He does not have to show collateral consequences to avoid a finding of mootness; a challenge to one's sentence is not moot if the petitioner is serving an ongoing term of supervised release. *See*, *e.g.*, *United States v. Vera-Flores*, 496 F.3d 1177, 1180 (10th Cir. 2007) (accused on supervised release still enduring consequences of sentence because his "liberty is affected by ongoing obligations to comply with supervised release conditions and restrictions."); *United States v. Brown*, 290 Fed. Appx. 157, 159 n. 2 (10th Cir. 2008) (criminal case not moot until sentence is served and no collateral consequences could potentially flow from conviction) (citing *Minnesota v. Dickerson*, 508 U.S. 366, 371 n. 2 (1993); *United States v. Reider*, 103 F.3d 99, 101 (10th Cir.1996)); *see also United States v. Rhone*, 647 F.3d 777, 779 n.2 (8th Cir. 2011) (finding that appeal of revocation sentence was not moot because accused still serving new term of supervised release). It is unnecessary for Martinez to show collateral

consequences because the entire sentence has not expired.

At least two circuits have held that a *Johnson* petitioner's release from prison did not moot his appeal because he was still serving a term of supervised release. The Seventh Circuit found that the petitioner's appeal from his post-*Johnson* resentencing was not moot even though he had been released from prison. Because he was serving a term of supervised release, relief still was available by shortening that term. *United States v. Rash*, 840 F.3d 462, 464 (7th Cir. 2016). Similarly, the Fourth Circuit held that a *Johnson* petitioner's release from prison did not moot his appeal because he was on supervised release, and the district court could alter any aspect of his sentence, including supervised release terms. *United States v. Johnson*, 729 F. App'x 229, 230 (4th Cir. 2018) (unpublished) (per curiam).[1]

Because Martinez is still serving his prison term which will be followed by a five year term of supervised release, if this Court remands his case to the

[1] Several other circuits have also found that a § 2255 appeal is not moot if the defendant is still serving a term of supervised release that could be shortened at resentencing. *See United States v. Doe*, 810 F.3d 132, 143 (3d Cir. 2015); *United States v. Bejarano*, 751 F.3d 280, 285 n.4 (5th Cir. 2014). *But see United States v. Rhoads*, 718 F. App'x 755 (10th Cir. 2018) (unpublished) (holding that *Johnson* petitioner's appeal was moot because he was released from prison). The *Rhoads* panel specifically found that the petitioner did not challenge his term of supervised release. *Id.* at 756. The same is not true here. *Rhoads* is neither applicable nor persuasive.

lower courts, the circuit court can vacate the enhanced sentence and the district court can impose a shorter term of supervised release. The guideline range for a term of supervised release is 2 to 5 years and the statutory range is 0 to 5 years. USSG § 5D1.2(a)(1); 18 U.S.C. § 3583(b)(1). Thus, as with any resentencing, the district court could impose a shorter term of supervision because the 18 U.S.C. § 3553(a) factors support a shorter term, especially when it is no longer limited from doing so by mandatory guidelines.

III. The guidelines' commentary has no freestanding power to define terms within the substantive guidelines and thus, an offense which is not expressly enumerated in USSG § 4B1.2, like murder and robbery, is a "crime of violence" only if it fits within the elements or residual clauses in § 4B1.2(1)(i), (ii).

The government argues that even if the guidelines' residual clause "were deemed unconstitutionally vague," that finding would be irrelevant here. This is because Application Note 1 to § 4B1.2 states that murder and robbery are crimes of violence irrespective of whether they fit within the crime of violence definitions in § 4B1.2(1)(i), (ii). Br. in Opp. 4. The government's argument is ill-conceived. The only valid function of the guidelines' commentary is to interpret or explain the text of the substantive guideline. The commentary does not have freestanding power to define, alter or add to the terms used in a guideline.

If it were otherwise, the sentencing commission could issue commentary changing or adding to a guideline without complying with its

delegated notice-and-comment rulemaking authority, 28 U.S.C. § 994(x), and without accountability to Congress, 28 U.S.C. § 994(p). Such action would be beyond its delegated powers and therefore invalid. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1869 (2013) ("Both [the] power of [agencies] to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, [] what they do is ultra vires."); *Mission Group Kansas v. Riley*, 146 F.3d 775, 781 (10th Cir. 1998) (agency rule that is not an interpretation of its own regulation is "adopted outside of the procedures Congress has authorized the [agency] to use" and thus has no binding power). Indeed, in *Stinson v. United States*, 508 U.S. 36 (1993), this Court held that commentary issued by the commission is valid and authoritative only if it "interprets or explains a guideline" and is not "inconsistent with, or a plainly erroneous reading of, that guideline," and does not violate the Constitution or a federal statute. *Id*. at 38. 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.

In a variety of contexts, the circuits have used *Stinson* to apply the principle that commentary which does not interpret the text of a guideline or is inconsistent with the text must be disregarded. *See, e.g.*, *United States v. Havis*, 927 F.3d 382, 386 (6th Cir. 2019) (en banc) (guidelines commentary

"serves only to interpret the Guidelines' text, not to replace or modify it"); *United States v. Potes-Castillo*, 638 F.3d 106, 111 (2d Cir. 2011) (rejecting government's reading of commentary that was "inconsistent with the Guidelines section it interprets"); *United States v. Cruz*, 106 F.3d 1134, 1139 (3d Cir. 1997) (relying on *Stinson* to disregard commentary that required greater scienter than text of guideline); *United States v. Dison*, 330 F. App'x 56, 61-62 (5th Cir. 2009) ("[I]n case of an inconsistency between an Application Note and Guideline language, we will apply the Guideline and ignore the Note."); *United States v. Webster*, 615 F. App'x 362, 363 (6th Cir. 2015) ("[T]he text of a guideline trumps commentary about it."); *United States v. Hawkins*, 554 F.3d 615, 618 (6th Cir. 2009) ("Guidelines commentary 'that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.'"); *United States v. Stolba*, 357 F.3d 850, 853 (8th Cir. 2004) (rejecting adjustment supported by commentary that conflicted with the guideline because "the proper application of the commentary depends upon the limits – or breadth – of authority found in the guideline"); *United States v. Landa*, 642 F.3d 833, 836 (9th Cir. 2011) (when a "conflict exists between the text and the commentary," "the text of the guidelines governs"); *United States v. Fox*, 159 F.3d 637, at *2 (D.C. Cir. 1998) (declining to follow commentary that "substantially alters" the requirements

of guideline's text).

This includes offenses listed in the commentary of § 4B1.2. *See*, *e.g.*, *United States v. Hood*, 628 F.3d 669, 671 (4th Cir. 2010) ("Because § 4B1.2(a) does not expressly enumerate felony possession of a sawed-off shotgun, it constitutes a 'crime of violence' only if it falls under the 'residual' or 'otherwise' clause in § 4B1.2(a)(2). Thus, to qualify, it must 'otherwise involve[] conduct that presents a serious potential risk of physical injury to another.'"); *United States v. Leshen*, 453 F. App'x 408, 415 (4th Cir. 2011) ("[F]orcible sex offenses' does not have freestanding definitional power."); *United States v. Shell*, 789 F.3d 335, 340 (4th Cir. 2015) ("[T]he government skips past the text of § 4B1.2 to focus on its commentary," but "it is the text, of course, that takes precedence."); *United States v. Armijo*, 651 F.3d 1226, 1234-37 (10th Cir. 2011) (rejecting the government's argument that Colorado manslaughter qualifies as a crime of violence simply because it is listed in the commentary and need not qualify under the definitions set out in the text; "[t]o read application note 1 as encompassing non-intentional crimes would render it utterly inconsistent with the language of § 4B1.2(a)."); *see also United States v. Lipscomb*, 619 F.3d 474, 477 & n.3 (5th Cir. 2010) (possession of a sawed-off shotgun must satisfy the residual clause in the text, but commentary answers the question where neither party challenged the commission's classification).

Three circuits applied *Stinson* after *Johnson* to hold that a commentary offense had no independent force once the residual clause was excised as void-for-vagueness. *See United States v. Soto-Rivera*, 811 F.3d 53, 58-62 (1st Cir. 2016); *United States v. Rollins*, 836 F.3d 737, 742 (7th Cir. 2016) (en banc); *United States v. Bell*, 840 F.3d 963, 967 (8th Cir. 2016). Although *Beckles* later held that the residual clause is not void-for-vagueness in advisory guidelines cases, the core principle that "application notes are *interpretations of*, not *additions to*, the Guidelines themselves," *Rollins*, 836 F.3d at 742 (emphasis in original), remains good law.

The precedent from this Court and the circuit courts demonstrate the government's argument is unsustainable. Second degree murder and robbery are crimes of violence only if they fit within § 4B1.2(1)(i)'s elements clause definition or subsection (ii)'s hopelessly vague residual clause definition.

IV. Whether Martinez still qualifies as a career offender if the guidelines' residual clause is void-for-vagueness, is a decision that the lower courts have yet to make.

The government suggests this Court deny Martinez's petition because the offense of conviction, federal second degree murder is crime of violence as defined by the guidelines' elements clause. It also says Martinez's New Mexico robbery conviction fits within that clause as well. Although Martinez's 28 U.S.C. § 2255 motion argued that both offenses categorically were not crimes of violence as defined by the elements clause, neither the

district court, nor the Tenth Circuit have addressed this issue. That issue then is not before this Court.

In *Stitt v. United States*, 139 S.Ct. 399, 407 (2018), co-respondent Sims' argument that Arkansas' residential burglary statute is too broad to be generic burglary, relied in part on state law. This Court noted that because the lower courts had not yet considered his argument, it would not address it: "As 'we are a court of review, not of first view,' we remand the [] case to the lower courts for further proceedings." 139 S.Ct. at 407-08 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7 (2005)). Here, as in *Stitt*, it is up to the lower courts to first "decide the merits" of the crime of violence argument. *Id.* at 408; *see also McLane Co. v. E.E.O.C.*, 137 S.Ct. 1159, 1170 (2017) "we are a court of review, not of first view, and the Court of Appeals has not had the chance to review the District Court"s decision under the appropriate standard. That task is for the Court of Appeals in the first instance." (cleaned up).[2]

[2] Martinez does not waive any claim that the government has forfeited or waived its guideline commentary and elements clause arguments which it now advances for the first time in this litigation. According to Tenth Circuit precedent, it may have done so. See *e.g. Maralex Res., Inc. v. Barnhardt*, 913 F.3d 1189, 1197 (10th Cir. 2019) ("In considering whether to address an alternative theory, we take into account (1) whether the ground was fully briefed and argued here and below; (2) whether the parties have had a fair opportunity to develop the factual record; and (3) whether, in light of factual findings to which we defer or uncontested facts, our decision would involve only questions of law."); *United States v. Gaines*, 918 F.3d

Additionally, the government cannot presume to know how either court will decide that issue when the Ninth Circuit already has found that federal second degree murder is not a crime of violence as defined by 18 U.S.C. § 924(c)(3)(A)'s elements clause. *United States v. Begay*, 934 F.3d 1033, 1038, 1041 (9th Cir. 2019); *see also* Br. in Opp. 6 (acknowledging Ninth Circuit has held federal second degree murder categorically is not a crime of violence under § 924(c)(3)(A)'s elements clause). Although the Tenth Circuit held in *United States v. Garcia*, 877 F.3d 944 (10th Cir. 2017) that New Mexico robbery is a violent felony, that decision is irrelevant if the underlying offense is not a crime of violence.

Martinez asks the Court to dismiss this argument as well.

V. If Martinez's case is not ideally suited to address the issue presented, then he asks the Court to grant the petition in *Pullen v. United States*, No. 19-5219 and hold his petition until *Pullen* is decided.

Martinez believes the government's arguments to dissuade this Court from granting his petition are unfounded. The question presented here asks whether *Johnson*'s new rule applies to the mandatory guidelines. If this Court answers that question in the affirmative, it can remand this case to the Tenth Circuit for further proceedings. This would be the proper course

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793, 804 (10th Cir. 2019) (refusing to consider the government's alternative theory where the district court did not address the theory and the record was inadequately developed). This is another reason for this Court to ignore the government's arguments that Martinez's petition is not ideally suited for this Court's review.

because the Tenth Circuit has not yet had an opportunity to address the merits of the crime-of-violence determination in this case.

If Martinez's case is not sufficiently ideal, this Court could simply grant certiorari in *Pullen v. United States*, No. 19-5219. Pullen raises the identical claim. And as his petition points out, post-*Johnson*, it is indisputable that he is not a career offender: the sentencing court qualified him as one by using a prior escape conviction which is only a crime of violence under § 4B1.2's vague residual clause. If this Court grants certiorari in *Pullen*, it should hold this case pending a decision in *Pullen*. Either way, this is an important question that has divided the Circuits and that the Tenth Circuit has decided incorrectly. Whether here or in *Pullen*, Martinez asks this Court to address the question.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Certificate of Service

I, Stephen P. McCue, hereby certify that on December 6, 2019, a copy of the petitioner's Reply Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were mailed postage prepaid, to the Solicitor General of the United States, Department of Justice,

Room 5614, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, counsel for the Respondent.

Respectfully submitted,

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