NO. 19-6336

IN THE

SUPREME COURT OF THE UNITED STATES

EDDIE JENNINGS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of *Certiorari* to the
United States Court of Appeals for the Third Circuit

PETITIIONER'S REPLY BRIEF

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December 5, 2019

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The Government concedes, as it must, that the courts of appeal are divided over whether the rule announced in *Johnson v. United States*, 135 S. Ct. 2551 (2015), applies to the identically worded residual clause in the former mandatory Sentencing Guidelines. Yet the Government argues that this Court should deny review for three reasons: (1) Petitioner's motion is untimely, as he filed it more than one year after his conviction became final, and it's not based on a retroactive right; (2) the division among the courts of appeal is "shallow"; (3) and Petitioner's case is not a suitable vehicle for resolving the division as he would lose on the merits. There reasons are unconvincing.

First, as addressed more fully in Petitioner's *certiorari* petition, applying the ruling in *Johnson* to identical language in the former mandatory Sentencing Guidelines is not new. This much is evident from this Court's more recent rulings in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and *United States v. Davis*, 139 S. Ct. 2319 (2019). In these cases, this Court simply applied *Johnson's* rule to similar language in other statutes.

Second, the division among the courts of appeal is not as shallow as the Government suggests. The Government calls this conflict "shallow," however, because only the Seventh Circuit has decided the issue differently. 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/concurrences from judges outside the Seventh Circuit supporting that Circuit's position on this issue. For example, a Ninth Circuit Judge, Judge Berzon, has authored a concurrence,

disagreeing with that Circuit's precedent and stating her belief that "the Seventh and First Circuits have correctly decided this question." *Hodges v. United States*, 778 F. App'x 413, 414-15 (9th Cir. 2019). And the Seventh Circuit has again reaffirmed, in yet another published decision, that the mandatory guidelines' residual clause is void for vagueness under *Johnson*. *See Daniels v. United States*, 939 F.3d 898 (7th Cir. 2019).

Moreover, this issue is still an open one in the Second and D.C. Circuits. For example, a district court within the Second Circuit found that a petitioner could bring a *Johnson* challenge to the residual clause of the mandatory guidelines. *See Blackmon v. United States*, No. 3:16-CV-1080, 2019 WL 3767511, at *6 (D. Conn. Aug. 9, 2019) (Bolden, J.).Likewise, a district court in the District of Columbia Circuit has ruled similarly. *See, e.g., United States v. Carter*, No. 04-CR-0155, 2019 WL 5580091, at *14-15 (D. D.C. Oct. 29, 2019) (Huvelle, J.).

Given 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. There is no good reason for this Court not to resolve it.

Finally, the Government asserts that this case is a poor vehicle to address *Johnson's* application to the mandatory Guidelines, as Petitioner's career-offender predicates—involving robbery—are listed in the 1993 Guideline commentary as a crimes of violence.[1] But this reasoning misses the point. No matter if Petitioner

[1] The Government incorrectly states that the 1993 Sentencing Guideline Manual applied to Petitioner. As his offense occurred the year before, the 1992 Manual applied. *See* (Presentence Investigation Report at ¶ 16).

prevails on the merits, the issue of *Johnson's* application to the Sentencing Guidelines can be resolved here. And it is the text of Section 4B1.2 of the Guidelines, not its application notes, that defines a "crime of violence." *Cf., e,g, United States v. Havis*, 927 F.3d 382, 387 (6th Cir. 2019) (*en banc*) (*per curiam*) (declining to expand the definition of a "controlled substance offense" to include attempt offenses, even though such offenses were included in the commentary). In 1992, the text of that Section did not include robbery. *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 (U.S. SENTENCING COMM'N 1992).

CONCLUSION

For all these reasons, this Honorable Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

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