No. 19-6686

In the

Supreme Court of the United States

DARREN HUNTER, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Ninth Circuit

Reply to Memorandum for the United States in Opposition

AMY M. KARLIN
Interim Federal Public Defender
BRIANNA MIRCHEFF*
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-4784
Facsimile: (213) 894-0081

Attorneys for the Petitioner
* Counsel of Record

The petitioner in this case asked this Court to grant his petition for a writ of certiorari to address whether a motion to vacate under § 2255 raising the timeliness of his claim that *Johnson v. United States*, 135 S. Ct. 2551 (2015), applies to the mandatory guidelines. The government's response cites similar cases that this Court has declined to review, and pointing out the twenty-one petitions this Court has pending on the question right now. Memorandum of the United States, at 2.

Citing nearly two dozen pending cases hardly refutes Petitioner's claim that the issue is an important one that deserves this Court's attention. And it should rebut the assertion that this is an issue on which "few claimants would be entitled to relief on the merits." Memorandum of the United States, at 4.

The government claims that the Circuit split presented here is shallow and that the pool of individuals who could benefit its rule is shrinking. But neither of these arguments presents a good reason to deny review. First, though the government's Memorandum does not acknowledge it, both the Seventh Circuit *and* the First Circuit have endorsed the rule that Petitioner advocates. Petition at 9. District courts within the First Circuit continue to grant relief, undermining the government's attempt to portray the Seventh

Circuit as the lone outlier. *Boria v. United States*, __ F. Supp. 3d __, 2019 WL 6699611, at *4 (D. Mass. Dec. 9, 2019) (citing, inter alia, *United States v. Roy*, 282 F. Supp. 3d 421 (D. Mass. 2017)).

Moreover, any appearance of uniformity masks deep divisions in the lower courts over the analysis of 28 U.S.C. § 2255(f)(3), as demonstrated by the judges who continue to express doubt over their Circuit's supposedly "settled" treatment of this question. *See* Petition at 10-11; *see*, *e.g.*, *Hodges v. United States*, 778 F. App'x 413, 414 (9th Cir. July 26, 2019) (Berzon, J., concurring) (calling on the Ninth Circuit to revisit its decision, then almost a year old, and opining that "the Seventh and First Circuits have correctly decided this question"); *United States v. London*, 937 F.3d 502, 513-14 (5th Cir. 2019) (Costa, J., concurring) ("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'") (quoting *Brown*, 139 S. Ct. at 14 (Sotomayor, J., dissenting)). Only this Court can put an end to this debate.

Second, on a question as important as this one, the alleged "shallowness" of the split should not prevent this Court from addressing the issue. After all, this Court granted certiorari in *Beckles v. United States* in the face of a six-to-one split--and it eventually sided with that minority view.

137 S. Ct. 886, 890 (2017).

Third, though the government has argued from *Gipson* (in July 2018) until now that this problem is likely to go away without the Court's intervention, its current Memorandum is a tacit admission that the question of *Johnson*'s application to the mandatory guidelines is not going anywhere anytime soon. Not only that--the rule that many of the Circuits have created in the wake of *Johnson* will continue to confound habeas litigants about when, precisely, a decision of this Court has created a newly recognized right. This is not an area where such uncertainty should be tolerated--pro se habeas litigants who get only one clean shot to raise their claims should not be left without clear guidance as to when they should do so.

Unlike other similar pending petitions, the government points to no vehicle problems in this case, admitting, though its omission, that the residual clause question is squarely presented in this case and that Mr. Hunter *is* among those who would receive relief if the timeliness question was decided in his favor. Nor could it; the two prior offenses that led to Mr. Hunter's career offender designation were both only crimes of violence under the residual clause. *See United States v. Wofford*, 122 F.3d 787, 793-94 (9th Cir. 1997) (holding that California grand theft from person was a violent

felony under the residual clause); *United States v. Young*, 990 F.2d 469, 472 (9th Cir. 1993) (same with respect to possession of a weapon in prison).

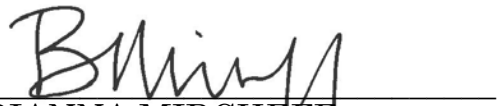
Finally, the government "incorporates by reference" briefing prepared in another case nearly a year and a half ago that does not respond to the arguments made in Mr. Hunter's petition. Nothing it says should make the Court doubt the cert worthiness of this case, for the reasons set out in the Petition.

Mr. Hunter respectfully requests that this Court grant his request for a writ of certiorari.[1]

Respectfully submitted,

AMY M. KARLIN
Interim Federal Public Defender

DATED: December 30, 2019

By: 
BRIANNA MIRCHEFF
Deputy Federal Public Defender
Attorney for the Petitioner

[1] As the government's Brief suggests, this Court has a number of cases pending on this question teed up for conference shortly. Should the Court grant review in any of those cases, it should hold Mr. Hunter's petition pending that case.