No. 19-6755

IN THE SUPREME COURT OF THE UNITED STATES

FREDERICK GARCIA-CRUZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

KARA HARTZLER
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

Attorneys for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Federal Cases

Federal Statutes

Other

IN THE SUPREME COURT OF THE UNITED STATES

FREDERICK GARCIA-CRUZ,
Petitioner,

- v. -

UNITED STATES OF AMERICA,
Respondent.

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Introduction

In his petition for a writ of certiorari, Mr. Garcia-Cruz asked this Court to resolve two questions. First, he asked it to consider whether the courts of appeals are misapplying the lenient standard for a certificate of appealability given that the court's denial here suggests that an 8-2 circuit split does not present an issue that is "debatable among jurists of reasons." *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983). Second, Mr. Garcia-Cruz asked the Court to decide once and for all whether its decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), invalidated the residual clause of the mandatory Sentencing Guidelines that existed prior to 2005.

In its response opposing certiorari, the government never addresses the first question, apparently content to recycle its stock response used in cases that did not raise this issue. As to the second question, the government claims that both merits-

based and procedural obstacles prevent this Court from granting certiorari in Mr. Garcia-Cruz's case. For the reasons below, the Court should either grant certiorari in Mr. Garcia-Cruz's case or hold it for a grant of certiorari in a similar one.

Argument

I. The government's silence on the first question—whether courts of appeals are misinterpreting the standard for a certificate of appealability—underscores the need to resolve it.

In his petition, Mr. Garcia-Cruz first asserted that the courts of appeals are misapplying this Court's test for a certificate of appealability—that a petitioner need not show they would prevail on the merits, but only that the legal issue is "debatable among jurists of reason." *See Barefoot*, 463 U.S. at 893 n.4; *see also Miller-El v. Cockrell*, 537 U.S. 322, 326 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Indeed, courts of appeals are routinely denying certificates of appealability in mandatory Guidelines cases like Mr. Garcia-Cruz's even though there is a recognized circuit split, a plethora of district court and circuit court judges believe *Johnson* invalidated the residual clause of the mandatory Guidelines, and this Court has acknowledged that the issue remains an open question. *See* Petition at 6-10.

Though Mr. Garcia-Cruz devoted the first half of his petition to this question, the government nowhere addresses or even mentions it. Its failure to do so is a tacit admission that the courts of appeals are rewriting this Court's longstanding

precedent with no explanation or justification. This pattern alone merits review and correction.

II. The Court should also grant review on the constitutionality of the mandatory Guidelines' "residual clause."

On the second question presented, the government asserts that the Court should deny review of Mr. Garcia-Cruz's case both on the merits and as a matter of procedural suitability. Neither contention is correct.

A. On the merits, Mr. Garcia-Cruz's case presents an urgent question in need of resolution.

On the merits, the government first points to various cases in which this Court previously denied certiorari and cites the twenty-one petitions pending on the question right now. Gov. BIO at 2. But citing several dozen pending cases hardly refutes Mr. Garcia-Cruz's claim that the issue is an important one deserving of this Court's attention. To the contrary, it actually *rebuts* the assertion that this is an issue on which "few claimants would be entitled to relief on the merits." Gov. BIO at 4.

The government also claims that the circuit split presented here is shallow and that the pool of individuals who could benefit its rule is shrinking. Gov. BIO at 4. But neither of these arguments presents a good reason to deny review. First, the government does not refute that it is not only the Seventh Circuit, but also the First Circuit that has ruled in favor of similarly-situated petitioners. *See Cross v. United States*, 892 F.3d 288 (7th Cir. 2018); *Moore v. United States*, 871 F.3d 72 (1st Cir. 2017). And district courts within the First Circuit continue to grant relief,

undermining the government's attempt to portray this as a lopsided split. *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, 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 v. United States*, 139 S. Ct. 14 (2018) (Sotomayor, J., dissenting)). Only this Court can put an end to these judicial doubts.

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—eventually siding with the minority view. 137 S. Ct. 886, 890 (2017).

Third, though the government has argued for the past year-and-a-half that this problem is likely to go away without the Court's intervention, its current brief citing dozens of cases is a tacit admission that the opposite is true. Furthermore, the rule that many of the circuits have created in the wake of *Johnson* will continue

to confound habeas litigants who are unsure when a decision of this Court has created a newly recognized right for purposes of determining timeliness under 28 U.S.C. § 2255(f). 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 to file their petitions. Thus, the Court should grant certiorari to resolve this issue on the merits.

B. No procedural hurdles make Mr. Garcia-Cruz's case an unsuitable vehicle.

The Solicitor General also contends that Mr. Garcia-Cruz's case would be an unsuitable vehicle for two independent reasons: 1) the residual clause of the career offender Guideline was "not vague as applied" to Mr. Garcia-Cruz; and 2) the petition was a second or successive one that was "subject to additional limitations" under 28 U.S.C. 2255(h). Gov. BIO at 4-5. But none of these makes Mr. Garcia-Cruz's case an unsuitable vehicle for review.

First, the government claims that Mr. Garcia-Cruz's offense would have qualified as a "crime of violence" even without the residual clause because it constitutes a "forcible sex offense," one of the examples listed in the commentary to U.S.S.G. § 4B1.2. Gov. BIO at 5. But the commentary itself has no freestanding authority—rather, it is the *text* of § 4B1.2 that defines a "crime of violence." *See Stinson v. United States*, 508 U.S. 36, 45 (1993) (holding that courts may not follow commentary that is "inconsistent" with the Guideline itself).

Here, the text of the Guideline listed four—and only four—types of convictions that qualified as *per se* crimes of violence: "burglary of a dwelling, arson,

or extortion, [or a crime that] involves use of explosives." U.S.S.G. § 4B1.2(a)(2) (1996). Because treating the additional crimes listed in the commentary as freestanding enumerated offenses would be "inconsistent" with the Guideline itself, the only way to construe them is as an interpretive tool for the now-invalidated residual clause. Indeed, several courts of appeals have already reached this exact conclusion. *See United States v. Soto-Rivera*, 811 F.3d 53, 60 (1st Cir. 2016); *United States v. Rollins*, 836 F.3d 737, 743 (7th Cir. 2016) (en banc); *United States v. Havis*, 927 F.3d 382, 386 (6th Cir. 2019) (en banc).

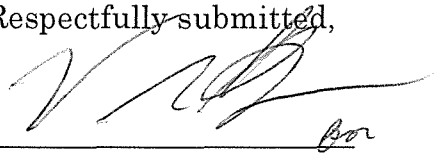
Second, the government argues that because this was not Mr. Garcia-Cruz's first collateral attack, the limitation on second or successive challenges at 28 U.S.C. § 2255(h) "may provide an independent basis" for denying his petition. Gov. BIO at 6 (citing *United States v. Blackstone*, 903 F.3d 1020, 1026-28 (9th Cir. 2018). But the petition in *Blackstone* was also a second or successive challenge, yet the court of appeals still relied exclusively on § 2255(f)(3) to find it untimely. 903 F.3d at 1026-28. And as the government asserts no reason or theory to believe § 2255(h) provides "an independent basis" for resolving Mr. Garcia-Cruz's petition, the Court should decline to deny certiorari for this reason.

Because Mr. Garcia-Cruz's petition presents both a procedurally and substantively appropriate vehicle for view, he respectfully requests that this Court grant his request for a writ of certiorari. Alternatively, the Court may hold this case for a grant of certiorari in one of the similarly-situated petitions the government cites in its brief. *See* Gov. BIO at 2 n.2.

CONCLUSION

For these reasons, the Court should grant Mr. Garcia-Cruz's petition for certiorari.

Respectfully submitted,



Date: January 7, 2019

KARA HARTZLER
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

Attorneys for Petitioner