

No. 19-6769

IN THE SUPREME COURT OF THE UNITED STATES

STEVEN HICKS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Introduction

In his petition for a writ of certiorari, Mr. Hicks 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—that an issue merely be “debatable among jurists of reasons.” *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983). Second, Mr. Hicks 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 from 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. Hicks's case. Because these arguments are incorrect, the Court should either grant certiorari or hold Mr. Hicks's case in abeyance pending 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. Hicks 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. Hicks's even though there is a recognized 8-2 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. Hicks 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 fact 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. Hicks’s case both on the merits and as a matter of procedural suitability. Neither contention is correct.

A. On the merits, Mr. Hicks’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. Hicks’s claim that the issue is an important one deserving of this Court’s attention. To the contrary, it actually *rebutts* 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 from its resolution 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 not only the Seventh Circuit, but also the First Circuit, 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 the supposedly “settled” treatment of this question. *See, e.g.*, *Hodes 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). And last year in *Rehaif v. United States*, the Court granted review despite the absence of *any* circuit split, ultimately reversing every single circuit that had ruled on the issue. 139 S. Ct. 2191, 2194 (2019).

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 with murky guidance as to when to file their petitions. Thus, the Court should grant certiorari to resolve this issue on the merits.

B. No procedural hurdle makes Mr. Hicks’s case an unsuitable vehicle.

The government also contends that Mr. Hicks’s case itself would be an unsuitable vehicle for three independent reasons: 1) his release from incarceration mooted the petition; 2) the residual clause of the career offender Guideline was “not vague as applied” to Mr. Hicks; and 3) 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. Hicks’s case an unsuitable vehicle for review.

First, the government argues that Mr. Hicks’s release from incarceration mooted his petition. Gov. BIO at 4 (citing *United States v. Johnson*, 529 U.S. 53, 54 (2000)). But as the government admits, the courts of appeals “do not all agree that a challenge to the length of a term of imprisonment becomes moot when the defendant is released.” Gov. BIO at 5 n.4. And the circuit in which Mr. Hicks filed his habeas petition long ago rejected the government’s reliance on *Johnson* to find a petition moot, holding that the “possibility” that the sentencing court would use its

discretion to reduce a term of supervised release was “enough to prevent the petition from being moot.” *Mujahid v. Daniels*, 413 F.3d 991, 995 (9th Cir. 2005). *See also United States v. Verdin*, 243 F.3d 1174, 1178 (9th Cir. 2001) (holding that a habeas petition was not moot because the defendant “could be resentenced to a shorter period of supervised release” such that he has a “personal stake in the outcome” of his appeal).

Second, the government claims that Mr. Hicks’s offense would have qualified as a “crime of violence” even without the residual clause because it constitutes a “robbery,” 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).¹

Third, the government argues that because this was not Mr. Hicks'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. Hicks's petition, the Court should decline to deny certiorari for this reason.

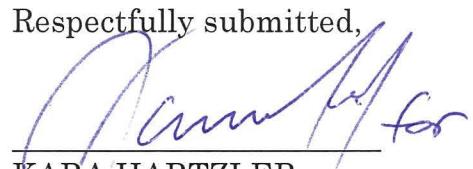
Because Mr. Hicks's petition presents both a procedurally and substantively appropriate vehicle for review, he respectfully requests that this Court grant his request for a writ of certiorari. Alternatively, the Court may hold this case for a grant of certiorari in one of the similarly-situated petitions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

¹ Nor could Mr. Hicks's robbery predicate have satisfied the remaining definition of a "crime of violence" under § 4B1.2(a)(1), as the Ninth Circuit has held that California robbery lacks an element of the use, attempted use, or threatened use of physical force against another. See *United States v. Dixon*, 805 F.3d 1193, 1197 (9th Cir. 2015).

CONCLUSION

For these reasons, the Court should grant Mr. Hicks's petition for certiorari or hold it for a similar case.

Respectfully submitted,



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