No. 19-6832

In the

Supreme Court of the United States

JAMES HENRY LACY, JR., 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

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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 two dozen pending cases hardly refutes Petitioner's claim that the issue is 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.

The government argues that Mr. Lacy's case does not present a good vehicle for review of this issue. It claims that the career-offender finding in this case did not depend on the residual clause, but rather on the enumerated offense "robbery" in the commentary to the guideline. This is not correct: it is the text of U.S.S.G. 4B1.2, and not its application notes, that defines a "crime of violence." Commentary has no freestanding interpretative value; only commentary that "interprets or explains a guideline" is authoritative. *Stinson v. United States*, 508 U.S. 36, 38 (1993). It follows, then, that if a portion of the guideline is declared unconstitutional, any commentary that interpreted

that portion of the guideline must be excised as well.

The offense of robbery in the commentary could only have interpreted the residual clause. Indeed, time and again, courts have deemed robbery a crime of violence based on the potential risk of injury. *See United States v. McDougherty*, 920 F.3d 569 574 & n.3 ("Clearly, then, robbery as defined in California falls under 18 U.S.C. § 16(b) as a felony that 'by its nature, involves a substantial risk that physical force may be used'"); *see also United States v. Prince*, 772 F.3d 1173, 1176 (9th Cir. 2014); *United States v. Chandler*, 743 F.3d 648, 652-55 (9th Cir. 2014). Because "robbery" no longer interprets or explains any remaining text, it cannot serve as the basis for a career-offender after *Johnson*, as several Circuits have already decided in similar cases. *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).

The government also argues that the Court should not grant review in Mr. Lacy's case, because his was a second-or-successive petition, which "may" present an additional basis to deny relief. Memorandum of the United States at 5. This non-committal statement betrays the weakness of the argument: because there is, in fact, little daylight between the rule for timeliness and

the rule for second-or-successive petitions. One difference--Section 2255(h)(2)'s requirement of a "constitutional" rule--is clearly satisfied here, because *Johnson* is clearly a rule of constitutional law. Section 2255(h)(2) also requires that the rule be made retroactive by this Court, but this Court held that *Johnson* was retroactive to contexts where it applies. *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016). This means that the timeliness question and the second-or-successive question must have the same answer. Moreover, the government, having not made any argument below that Mr. Lacy failed to satisfy the requirements of Section 2255(h)(2) has waived any argument along these lines. The fact that his claim began as a (granted) application for leave to file a second-or-successive habeas petition is no barrier to the Court granting review in his case.

Finally, on the merits, 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. Lacy'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. Lacy respectfully requests that this Court grant his petition.[1]

Respectfully submitted,

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DATED: January 13, 2020

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[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. Lacy's petition pending that case.