No. 17-5684

IN THE SUPREME COURT OF THE UNITED STATES

GREGORY EUGENE ALLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in denying a certificate of appealability on petitioner's claim that the residual clause in Section 4B1.2(a)(2) of the previously mandatory United States Sentencing Guidelines is void for vagueness under Johnson v. United States, 135 S. Ct. 2551 (2015).

2. Whether, in denying a certificate of appealability, the court of appeals erred in relying on a previously published decision of that court denying an application to file a second or successive motion under 28 U.S.C. 2255.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A-1) is unreported. The orders of the district court (Pet. App. A-2 & A-3) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 2017. The petition for a writ of certiorari was filed on August 17, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 2001, following a guilty plea in the United States District Court for the Middle District of Florida, petitioner was convicted of possession with the intent to distribute cocaine base (crack cocaine), in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(iii). Judgment 1. The district court sentenced petitioner to 262 months of imprisonment, to be followed by five years of supervised release. Id. at 2-3. Petitioner did not appeal his conviction or sentence. In 2016, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. The district court denied petitioner's motion, Pet. App. A-2, and denied his request for a certificate of appealability (COA), Pet. App. A-3. The court of appeals likewise denied a COA. Pet. App. A-1.

1. On September 22, 2000, a confidential source informed law enforcement that petitioner was in possession of a large quantity of rock cocaine. Presentence Investigation Report (PSR) ¶ 6. Officers then observed petitioner as he drove away from his residence. When petitioner committed a traffic violation, officers stopped his car. PSR ¶ 7. A drug-detection dog alerted to the presence of narcotics in the vehicle. PSR ¶ 8. Officers then searched the vehicle and seized 526 grams of cocaine base. PSR ¶¶ 9-10.

A federal grand jury charged petitioner with one count of possession with the intent to distribute cocaine base (crack cocaine), in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(iii). PSR ¶ 2. Petitioner pleaded guilty. PSR ¶ 4.

2. The Probation Office concluded that petitioner qualified as a career offender under United States Sentencing Guidelines § 4B1.1 (2000). PSR ¶ 25. Under former Section 4B1.1, a defendant was subject to enhanced punishment as a "career offender" if (1) he was at least 18 years old at the time of the offense of conviction; (2) the offense of conviction was a felony that is a "crime of violence" or a "controlled substance offense"; and (3) he had at least two prior felony convictions for a "crime of violence" or a "controlled substance offense." The phrase "crime of violence" was defined in Guidelines § 4B1.2(a) (2000) to include a felony offense that (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another," or (2) "is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."

In recommending the career-offender enhancement, the Probation Office cited petitioner's prior convictions for a "crime of violence" on May 28, 1987, and a "controlled substance offense" on August 23, 1990. PSR ¶ 25. The former notation appeared to reference petitioner's prior conviction for burglary of a dwelling

in Florida. PSR ¶ 34. Based on its findings, the Probation Office calculated an offense level of 34 and a criminal history category of VI, resulting in a Guidelines range of 262 to 327 months. PSR ¶ 76. Without the career-offender enhancement, petitioner's Guidelines range would have been 235 to 293 months, reflecting an offense level of 33 and a criminal history category of VI. PSR ¶¶ 23, 49; Pet. 4 n.1.

Because petitioner's sentencing hearing predated this Court's decision in United States v. Booker, 543 U.S. 220 (2005), the district court was obligated to impose a sentence within petitioner's Guidelines range unless it found that exceptional circumstances justified a downward departure. See id. at 233-234. At sentencing, the district court sentenced petitioner to 262 months of imprisonment, reflecting the low end of his Guidelines range. Judgment 2-3, 7. Petitioner did not appeal.

3. In 2011, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. The district court denied the motion without prejudice. See No. 11-cv-1746 Doc. 2 (M.D. Fla. Aug. 8, 2011).

In 2015, this Court held in Johnson v. United States, 135 S. Ct. 2551 (2015), that the "residual clause" of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), is unconstitutionally vague. 135 S. Ct. at 2557. The ACCA's residual clause defines a "violent felony" to include an offense that

"otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii).

In 2016, petitioner filed a new motion to vacate his sentence under 28 U.S.C. 2255, in which he argued that application of the career-offender guideline in his case had rested on the similarly worded clause in former Guidelines § 4B1.2 (2000), and that in light of Johnson, that guidelines clause was also unconstitutionally vague. D. Ct. Doc. 1, at 5 (June 24, 2016).

The district court denied petitioner's motion. Pet. App. A-2. The court stated that petitioner's motion could not be timely without retroactive application of a Supreme Court precedent, because it was filed on June 23, 2016, long after petitioner's conviction had become final. Id. at 1 n.1. Under 28 U.S.C. 2255(f)(3), a movant must file an otherwise-untimely Section 2255 motion within one year of "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." The district court rejected petitioner's claim that Johnson made his motion timely. The court observed that, while Johnson had held unconstitutional the residual clause of the ACCA, petitioner was sentenced under the Sentencing Guidelines. Pet. App. A-2, at 1. And the court noted the Eleventh Circuit's determinations that, "even in light of Johnson, the career offender guideline was not

unconstitutionally vague" and the application of that guideline did not provide a basis for a defendant like petitioner, who "was sentenced when the guidelines were mandatory," to collaterally attack his sentence. Id. at 2 (citing United States v. Matchett, 802 F.3d 1185 (11th Cir. 2015), cert. denied, 137 S. Ct. 1344 (2017); In re Griffin, 823 F.3d 1350 (11th Cir. 2016)).

The district court declined to issue a COA under 28 U.S.C. 2253(c)(2), stating that, in light of Eleventh Circuit precedent, petitioner had "failed to make a substantial showing of the denial of a constitutional right." Pet. App. A-3, at 1.

5. Petitioner filed an application for a COA in the court of appeals. He relied on Johnson, which this Court held to be retroactive to cases on collateral review in Welch v. United States, 136 S. Ct. 1257 (2016), to argue that his Section 2255 motion was timely and that he was not eligible for the career-offender guideline. Pet. C.A. COA Appl. 4.

The court of appeals denied petitioner's application. Pet. App. A-1. The court determined that petitioner's Section 2255 motion was untimely and that petitioner "cannot rely on Johnson to extend the time period to timely file his § 2255." Id. at 3. The court observed that this Court had held in Beckles v. United States, 137 S. Ct. 886 (2017), that "the residual clause of the career-offender guideline is not subject to a vagueness challenge under Johnson," and the court of appeals stated that "any argument

that such vagueness challenges can be raised against mandatory Sentencing Guidelines, which applied when [petitioner] was sentenced in 2001, is foreclosed by binding circuit precedent." Pet. App. A-1, at 3 (citing, among others, Griffin, 823 F.3d at 1354).

ARGUMENT

Petitioner contends (Pet. 6-8) that this Court should grant review to determine whether the residual clause in former United States Sentencing Guidelines § 4B1.2(a)(2) (2000), when it was applied in the context of a mandatory Guidelines regime, was unconstitutionally vague in light of Johnson v. United States, 135 S. Ct. 2551 (2015). Petitioner further contends (Pet. 10-12) that this Court should review whether published orders by a court of appeals denying a request to file a second or successive motion under 28 U.S.C. 2255 constitute binding precedent outside the context of other such requests. Petitioner is not entitled to relief on his Section 2255 motion; the court of appeals' decision does not squarely conflict with any decision of this Court or another court of appeals; and any question of Johnson's application to sentences imposed under the mandatory Guidelines is of limited and diminishing importance. Further review is not warranted.

1. A federal prisoner seeking to appeal the denial of a motion to vacate his sentence under Section 2255 must obtain a COA. 28 U.S.C. 2253(c)(1)(B). To obtain a COA, the prisoner must

make "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). Where, as here, a district court denies a Section 2255 motion on procedural grounds, the prisoner must show both "[1] that jurists of reason would find it debatable whether the [Section 2255 motion] states a valid claim of the denial of a constitutional right and [2] that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Gonzalez v. Thaler, 565 U.S. 134, 140-141 (2012) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). Here, the court of appeals correctly concluded that petitioner's Section 2255 motion was not timely. The one-year period for filing a Section 2255 motion runs from the latest of four dates. See 28 U.S.C. 2255(f). The limitations period on which petitioner relies in this case runs from "the date on which the right asserted was initially recognized by th[is] Court, if that right has been newly recognized by th[is] Court and made retroactively applicable to cases on collateral review." 28 U.S.C 2255(f)(3); see Dodd v. United States, 545 U.S. 353, 357 (2005). Petitioner, however, has not shown that he asserts such a new retroactive right.

a. The right recognized in Johnson is not the right that petitioner asserts here. Johnson applied due process vagueness principles to recognize a right not to be sentenced pursuant to a vague federal enhanced-punishment statute. 135 S. Ct. at 2555, 2561. The right asserted in this case, in contrast, is a claimed

due process right not to have a defendant's guidelines range calculated under an allegedly vague provision within otherwise-fixed statutory limits on the sentence. Petitioner's assertion that the "right" now asserted is the same right that was recognized in Johnson operates at a level of generality and abstraction that is too high to be meaningful and blurs critical differences between statutes and guidelines. See Sawyer v. Smith, 497 U.S. 227, 236 (1990) ("[T]he test would be meaningless if applied at this [high] level of generality."); Saffle v. Parks, 494 U.S. 484, 490 (1990) (defining the right recognized in two prior cases with reference to "the precise holding[s]" of those cases, and concluding that neither case "speak[s] directly, if at all, to the issue"); cf. Anderson v. Creighton, 483 U.S. 635, 639 (1987) (emphasizing, for qualified immunity purposes, that the operation of the requirement that a legal rule must have been clearly established "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified," and explaining that "the right to due process of law is quite clearly established, yet too abstract to provide a workable standard in every case).

As petitioner acknowledges (e.g., Pet. 6), this Court held in Beckles v. United States, 137 S. Ct. 886 (2017), that the career-offender guideline's residual clause is not unconstitutionally vague in the context of an advisory Guidelines regime. See id. at 890. This Court did not decide in Beckles whether that clause

would be unconstitutionally vague in the context of a mandatory Guidelines regime. See Beckles, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring in the judgment) (noting that the Court's opinion "leaves open" the question whether mandatory guidelines would be subject to vagueness challenges). Because that question remains "open" after Beckles, ibid., it necessarily was not recognized by the Court's earlier decision in Johnson, and petitioner cannot rely on Johnson to render his Section 2255 motion timely.

b. Even assuming the Court had announced a new rule as petitioner asserts, it would not be one of the two types of new rules that this Court has "made retroactively applicable to cases on collateral review," 28 U.S.C. 2255(f)(3). See Welch v. United States, 136 S. Ct. 1257, 1264 (2016) (assuming that the "normal framework" for determining retroactive application from Teague v. Lane, 489 U.S. 288 (1989), "applies in a federal collateral challenge to a federal conviction").

First, Petitioner's proposed rule would not be a "substantive" rule because it would not "alter[ ] the range of conduct or the class of persons that the law punishes." Schriro v. Summerlin, 542 U.S. 348, 353 (2004). Substantive rules are applied retroactively because they necessarily create a significant risk that individuals have been convicted of "'an act that the law does not make criminal'" or exposed to "a punishment that the law cannot impose." Id. at 352 (quoting Bousley v. United

States, 523 U.S. 614, 620 (1998)). Here, however, even under a mandatory Guidelines regime, petitioner could not have received "a punishment that the law cannot impose," Schriro, 542 U.S. at 352, because he was sentenced within the applicable statutory range for his offense.

This Court has explained that even "mandatory" guidelines systems "typically allow a sentencing judge to impose a sentence that exceeds the top of the guidelines range under appropriate circumstances." United States v. Rodriguez, 553 U.S. 377, 390 (2008). Under the mandatory federal Guidelines, courts had authority to depart from the prescribed range in exceptional cases, see U.S.S.G. § 5K2.0 (2000); see also U.S.S.G. § 4A1.3 (2000) (criminal history departures), and until the passage of the PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650, in 2003 (which postdated the sentencing in this case), courts exercised considerable discretion in deciding whether to do so. See, e.g., Koon v. United States, 518 U.S. 81, 98 (1996) ("A district court's decision to depart from the Guidelines * * * will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court."); Mistretta v. United States, 488 U.S. 361, 367 (1989) (noting that, although the Sentencing Reform Act of 1984 makes the Guidelines binding on sentencing courts, "it preserves for the judge the discretion to depart from the guideline applicable to a particular case"). The logic of

Welch v. United States, supra -- which held that Johnson "changed the substantive reach of the Armed Career Criminal Act" by providing that a "class of persons" who previously "faced 15 years to life in prison" were "no longer subject to the Act and face[d] at most ten years in prison," 136 S. Ct. at 1265 (citation and quotation marks omitted) -- is accordingly inapposite here.

Second, the rule asserted here would not fit within the "small set of 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." Schriro, 542 U.S. at 352 (quoting Saffle v. Parks, 494 U.S. 484, 495 (1990)). The courts of appeals have uniformly recognized that this Court's decision in Booker v. United States, 543 U.S. 220 (2005), which held mandatory application of the Guidelines to be unconstitutional, was not a watershed rule. See, e.g., Lloyd v. United States, 407 F.3d 608, 613-615 (3d Cir.), cert. denied, 546 U.S. 916 (2005). It follows that any vagueness in the application of one specific clause of the Guidelines is similarly not retroactive.

c. Both the Fourth and Sixth Circuits have recognized that filing within one year of Johnson does not render a challenge to the application of the career-offender guideline in the context of the mandatory Guidelines regime timely under 28 U.S.C. 2255(f)(3). See United States v. Brown, 868 F.3d 297, 303 (4th Cir. 2017); Raybon v. United States, 867 F.3d 625, 629 (6th Cir. 2017). The

First Circuit has recently stated, in the course of a "tentative" examination of whether to authorize the filing of a second or successive motion under Section 2255, see 28 U.S.C. 2255(h), that it was "not sufficiently convinced" by those decisions. Moore v. United States, 871 F.3d 72, 80, 82 (2017); see id. at 80-84. The Third Circuit has similarly viewed a second or successive Section 2255 motion challenging a mandatory application of the residual clause of the career-offender guideline to contain a "prima facie showing" of reliance on a new retroactive rule. In re Hoffner, 870 F.3d 301, 302 (2017). But those preliminary rulings will be subject to further examination as those cases proceed. See Moore, 871 F.3d at 84; Hoffner, 870 F.3d at 307-308. They thus do not demonstrate that a movant like petitioner would obtain relief in those circuits, or that this Court's intervention is necessary.

Indeed, the Johnson question presented here is of limited and diminishing importance. As previously discussed, Beckles makes clear that application of the residual clause of the career-offender guideline presents no vagueness concerns in the context of an advisory Guidelines regime. As a result, the only relief to which petitioner (or another similarly situated movant) would be entitled if he prevailed on his Section 2255 motion would simply be a resentencing proceeding in which he is subject to the same guidelines range as in his 2001 sentencing, except with the range

treated as advisory.* Petitioner does not provide any reason to conclude that he is likely to receive a significantly different sentence in such a proceeding.

Furthermore, Booker is now more than a decade old, and cases involving mandatory career-offender claims are decreasing in frequency. The particular question of the timeliness of a motion like petitioner's is relevant only to a now-closed set of cases in which a Section 2255 motion was filed within one year of Johnson. Particularly in the absence of a square circuit conflict, the issue does not warrant this Court's review.

2. Petitioner separately contends (Pet. 10-12) that certiorari is warranted to review the court of appeals' assignment of precedential weight to In re Griffin, 823 F.3d 1350 (11th Cir. 2016) –- a published decision denying an application to file a second or successive motion under 28 U.S.C. 2255 -- in this case, which did not involve a request for permission to file a second or successive Section 2255 motion. Given that the court of appeals viewed Griffin as resolving certain issues definitively rather than tentatively, the court did not err in relying on it, and review of petitioner's contrary contention is not warranted.

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* If petitioner were to be resentenced, the sentencing court would apply the current advisory Guidelines, so long as the guidelines range does not exceed the range applicable under the version of the Guidelines in effect at the time of his offense. See Peugh v. United States, 133 S. Ct. 2072 (2013).

This Court has recently and repeatedly denied petitions for writs of certiorari challenging the practice of affording precedential weight to published decisions that deny applications for leave to file a second or successive Section 2255 motion. See Vasquez v. United States, No. 17-5734, 2017 WL 3676395 (Oct. 2, 2017) (No. 17-5734); Golden v. United States, No. 17-5050, 2017 WL 2855232 (Oct. 2, 2017) (No. 17-5050); Lee v. United States, 137 S. Ct. 2222 (2017) (No. 16-8776); Eubanks v. United States, 137 S. Ct. 2203 (2017) (No. 16-8893). The same result is warranted here.

First, the court of appeals' ultimate conclusion -- that petitioner failed to demonstrate that his petition was timely under Section 2255(f)(3) -- was correct, for the reasons stated above. Whether the opinions consulted by the court qualify as precedential or merely persuasive authorities does not bear on his entitlement to relief. Second, petitioner forfeited this argument because his COA application to the court of appeals did not argue that Griffin lacked precedential force as a result of the posture in which that decision was issued. See Pet. C.A. COA Appl. 4-7. Third, petitioner has not demonstrated that the court of appeals' practice deviates from the approach of other courts of appeals, which also publish their decisions granting or denying applications to file second or successive Section 2255 motions without stating that those decisions have diminished precedential force. See, e.g., Moore v. United States, 871 F.3d 72 (1st Cir. 2017); Sherrod v.

United States, 858 F.3d 1240 (9th Cir. 2017); Dawkins v. United States, 829 F.3d 549 (7th Cir. 2016) (per curiam). Finally, even if meaningfully different practices existed, this Court has repeatedly observed that "[t]he courts of appeals have significant authority to fashion rules to govern their own procedures." Cardinal Chem. Co. v. Morton Int'l, Inc., 508 U.S. 83, 99 (1993).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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