No. 17-6262

IN THE SUPREME COURT OF THE UNITED STATES

QUENTERY GATES, 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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QUESTION PRESENTED

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).

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a) is unreported. The order of the district court (Pet. App. 2a-3a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 2017. The petition for a writ of certiorari was filed on October 2, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 2003, following a guilty plea in the United States District Court for the Northern District of Georgia, petitioner was convicted on two counts of conspiracy to possess with intent to distribute cocaine base (crack cocaine), in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(iii) (2000), and 846. The district court sentenced petitioner to 190 months of imprisonment, to be followed by four years of supervised release. Petitioner did not appeal his convictions 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 and his request for a certificate of appealability (COA). Pet. App. 2a-3a. The court of appeals likewise denied a COA. Pet. App. 1a.

1. On March 6, 2002, a confidential source working with the Drug Enforcement Administration negotiated a crack-cocaine purchase from Derrick Lowe. Presentence Investigation Report (PSR) ¶ 17. The confidential source and Lowe then drove to an Atlanta-area doughnut shop, where the source purchased 17 grams of crack cocaine from petitioner for $700. PSR ¶ 18. Two days later, the confidential source and petitioner again met outside the doughnut shop. The source paid $1300 to petitioner for 56.6 grams of crack cocaine. PSR ¶¶ 19-20. Petitioner then accompanied the confidential source to a Cadillac Escalade parked in the next space and introduced the source to Lewis Clay. PSR ¶ 19. Over the next

several days, Clay and the confidential source negotiated additional drug transactions. PSR ¶¶ 21-24.

A federal grand jury charged petitioner with two counts of conspiracy to possess with intent to distribute cocaine base (crack cocaine), in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(iii) (2000), and 846; and two counts of possession with intent to distribute cocaine base (crack cocaine), in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(iii) (2000). PSR ¶¶ 2-5. Petitioner entered into a written plea agreement and pleaded guilty to the two conspiracy charges. PSR ¶¶ 9-11.

2. The Probation Office concluded that petitioner qualified as a career offender under United States Sentencing Guidelines § 4B1.1 (2002). PSR ¶ 49. Under former Guidelines 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 Section 4B1.2(a) (2002) 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 two prior felony convictions for aggravated assault in Georgia, which were classified as "crime[s] of violence." PSR ¶ 49. Based on its findings, the Probation Office calculated an offense level of 34 and a criminal history category of VI under the Guidelines, resulting in a recommended sentencing range of 262 to 327 months of imprisonment. Ibid. Without the career-offender enhancement, petitioner's Guidelines range would have been 151 to 188 months, reflecting an offense level of 29 and a criminal history category of VI. PSR ¶ 37; Pet. 5 n.7.

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 departure. See id. at 233-234. At sentencing, the court departed based on substantial assistance, see Sentencing Guidelines § 5K1.1 (2002), and imposed a 190-month sentence. Sent. Tr. 11. Petitioner did not appeal.

3. In 2015, this Court held in Johnson v. United States, 135 S. Ct. 2551, 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 motion to vacate his sentence under 28 U.S.C. 2255. He argued that application of the career-offender guideline in his case had rested on the similarly worded clause in former Sentencing Guidelines § 4B1.2 (2002), and that under Johnson, the Guidelines clause was also unconstitutionally vague. D. Ct. Doc. 256, at 4-35 (June 20, 2016). Petitioner further argued that his motion was timely under 28 U.S.C. 2255(f)(3). D. Ct. Doc. 256, at 5. That provision authorizes prisoners to file a Section 2255 motion within one year from "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." 28 U.S.C 2255(f)(3). Petitioner noted that this Court had held Johnson to be retroactive to ACCA cases on collateral review in Welch v. United States, 136 S. Ct. 1257 (2016). D. Ct. Doc. 256, at 4.

The district court denied petitioner's motion. Pet. App. 2a-3a. The court cited the court of appeals' previous determination that "Johnson does not apply to the former, mandatory Guidelines and that the former mandatory Guidelines thus are not subject to

a vagueness challenge." Ibid. (citing In re Griffin, 823 F.3d 1350, 1354-1355 (11th Cir. 2016)). The court also declined to issue a COA under 28 U.S.C. 2253(c)(2), stating that, in light of circuit precedent, petitioner "has not made a substantial showing of the denial of a constitutional right." Pet. App. 3a.

4. Petitioner filed an application for a COA in the court of appeals. Relying on Johnson, he again argued that he was not eligible for the career-offender guideline. Pet. C.A. COA Appl. 8-9. The court denied the application, concluding that petitioner had "failed to make a substantial showing of the denial of a constitutional right." Pet. App. 1a.

ARGUMENT

Petitioner contends (Pet. 6-22) that this Court should grant review to determine whether the residual clause in former United States Sentencing Guidelines § 4B1.2(a)(2) (2002), 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).[1] 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

[1] The same question is presented in Allen v. United States, No. 17-5684 (filed Aug. 17, 2017), James v. United States, No. 17-6769 (filed Nov. 9, 2017), and Robinson v. United States, No. 17-6877 (filed Nov. 20, 2017).

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). That requires the prisoner to show "that jurists of reason would find it debatable whether the [Section 2255 motion] states a valid claim of the denial of a constitutional right." Gonzalez v. Thaler, 565 U.S. 134, 140-141 (2012) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). The district court and the court of appeals correctly determined that petitioner was not entitled to a COA under that standard. The district court's ruling, although presented as a ruling on the merits, equally illustrates that petitioner's Section 2255 motion was untimely.

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 relied 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 it is

debatable that he asserts such a new retroactive right, and he therefore cannot satisfy this "threshold query." Pet. 18.

a. The courts below correctly recognized that 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 (Pet. 19) that the "right" now asserted is the "equivalent" 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. 6-7), 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); Pet. 8 ("The Beckles opinion left open the query pending here."). Because that question remains open after Beckles, the right petitioner asserts was not recognized by the Court's earlier decision in Johnson, and petitioner cannot rely on Johnson to render his Section 2255 motion timely under 28 U.S.C 2255(f)(3).

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," ibid., 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. Rodriquez, 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 (2002); 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 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, 494 U.S. at 495). The courts of appeals have uniformly recognized that this Court's decision in United States v. Booker, 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. Petitioner relies on the Tenth Circuit's decision in United States v. Snyder, 871 F.3d 1122 (2017), petition for cert. pending, No. 17-7157 (filed Dec. 15, 2017), to contend that, "[i]n order 'to be timely under § 2255(f)(3), a § 2255 motion need only invoke' the Johnson rule, 'whether or not Johnson ultimately supports the movant's claim.'" Pet. 19 (quoting Snyder, 871 F.3d at 1126) (brackets omitted). But Snyder concluded that a Section 2255 motion filed within one year of Johnson was timely because it was brought by a prisoner whose sentence had been enhanced under the ACCA, see 871 F.3d at 1125 -- not the career-offender sentencing guideline. See id. at 1126 (reading Johnson to concern "the residual clause of the [ACCA]").[2]

Both the Fourth and Sixth Circuits have denied relief in circumstances similar to this case, recognizing 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.

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[2] The Tenth Circuit ultimately affirmed denial of the prisoner's Section 2255 motion because the court concluded that he "was not sentenced based on the ACCA's residual clause that was invalidated in Johnson." Snyder, 871 F.3d at 1124.

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, 302-303 (2017). The Second Circuit has also issued an unpublished, non-precedential decision authorizing a second or successive Section 2255 motion to challenge the mandatory career-offender guideline. See Vargas v. United States, No. 16-2112, 2017 WL 3699225 (2d Cir. May 8, 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; Vargas, 2017 WL 3699225, at *1. They thus do not demonstrate that a movant like petitioner would obtain relief in those circuits, or that this Court's intervention is necessary.[3]

[3] The other decisions cited by petitioner are inapposite. Petitioner cites (Pet. 16-17) two pre-Beckles decisions authorizing the filing of a second or successive Section 2255 motion challenging the mandatory application of the career-offender guideline, but those courts relied on now-overturned circuit precedent applying Johnson to the advisory guidelines. See In re Encinias, 821 F.3d 1224, 1225 (10th Cir. 2016) (per

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 likely subject to the same Guidelines range as in his 2003 sentencing, except with the range treated as advisory.[4] 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

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curiam) (citing United States v. Madrid, 805 F.3d 1204, 1210 (10th Cir. 2015)); In re Patrick, 833 F.3d 584, 587 (6th Cir. 2016) (citing United States v. Pawlak, 822 F.3d 902, 907 (6th Cir. 2016)). Petitioner also cites (Pet. 17 n.41) five unpublished district court decisions applying Johnson to the mandatory Guideline, but those decisions do not create a conflict warranting this Court's review. See Sup. Ct. R. 10(a).

[4] 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).

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. Even if the question presented merited review, this case would be an unsuitable vehicle.

a. Petitioner contends (Pet. 4 & n.5) that his two prior convictions for aggravated assault in Georgia do not qualify as "crime[s] of violence" under the career-offender sentencing guideline, § 4B1.2 (2002). To show that the mandatory career-offender guideline was erroneously applied, however, petitioner must demonstrate not only that the residual clause of that guideline was unconstitutionally vague, but that his two convictions under the Georgia statute do not meet the definition of "crime of violence" under the other clauses of the guideline. Petitioner is unlikely to be able to make such a demonstration.

The career-offender guideline defined "crime of violence" to "include[ ] * * * aggravated assault," or any other offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." Sentencing Guidelines § 4B1.2(1)(a) & comment. (n.1) (2002). The court of appeals is currently considering whether Georgia's aggravated assault statute qualifies as an "aggravated assault" conviction or else has as an element "the use, attempted use, or threatened use of physical force against the person of another" under former

Sentencing Guidelines § 2L1.2, comment. (n.1(B)(ii)) (2015), which employed the same definition of "crime of violence." See Appellant's Br. at xvi, United States v. Morales-Alonso, No. 16-14925 (11th Cir. Oct. 11, 2016); see also Sentencing Guidelines § 2L1.2, comment. (n.1(B)(iii)) (2015). In addition, the Fifth Circuit has already held that Georgia aggravated assault qualifies as a crime of violence under the enumerated-offense provision of Sentencing Guidelines § 2L1.2. See United States v. Torres-Jaime, 821 F.3d 577, 582 (2016), cert. denied, 137 S. Ct. 1373 (2017). Thus, even if petitioner were to succeed in showing that Johnson applies to the residual clause of the mandatory career-offender guideline, he likely still independently qualified as a career offender.

b. Moreover, petitioner's 190-month term of imprisonment will expire shortly. According to the Federal Bureau of Prisons, petitioner will be released on January 31, 2018.[5] Because petitioner's Guidelines challenge affects only the length of his sentence rather than his underlying conviction, the case will become moot on that date. See Lane v. Williams, 455 U.S. 624, 631 (1982) ("Since respondents elected only to attack their sentences, and since those sentences expired during the course of these proceedings, this case is moot.").

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[5] See Fed. Bureau of Prisons, Find an Inmate, https://www.bop.gov/inmateloc (search for inmate register number 54105-019).

The completion of a criminal defendant's sentence will not normally moot an appeal challenging the conviction because criminal convictions generally have "continuing collateral consequences" beyond just their sentences. Spencer v. Kemna, 523 U.S. 1, 8 (1998). But the "presumption of collateral consequences" does not extend beyond criminal convictions. Id. at 12. Therefore, when a defendant challenges an action that affected only the length of his term of imprisonment, his completion of that prison term moots an appeal, unless the defendant can show that the challenged action continues to cause "collateral consequences adequate to meet Article III's injury-in-fact requirement," id. at 14, and that those consequences are "likely to be redressed by a favorable judicial decision," id. at 7 (citation omitted).

Petitioner cannot make that showing here. Although petitioner will be required to serve a four-year term of supervised release after completing his term of imprisonment, this Court held in United States v. Johnson, 529 U.S. 53, 54 (2000), that a prisoner who serves too long a term of incarceration is not automatically entitled to receive credit against his term of supervised release. The Court in Johnson recognized that a prisoner who has been incarcerated beyond his proper term of imprisonment might be able to persuade the sentencing court to exercise its discretion to shorten the duration of the prisoner's

term of supervised release under 18 U.S.C. 3583(e)(1), which permits a court to do so "if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice." See 529 U.S. at 60. But as the Third Circuit has explained, "[t]he possibility that the sentencing court will use its discretion to modify the length of [a defendant's] term of supervised release * * * is so speculative" that it does not suffice to present a live case or controversy. Burkey v. Marberry, 556 F.3d 142, 149, cert. denied, 558 U.S. 969 (2009).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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