No. 17-6877

IN THE SUPREME COURT OF THE UNITED STATES

TERRANCE ROBINSON, 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

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

JOHN P. CRONAN
Acting Assistant Attorney General

DAVID M. LIEBERMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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. 1a-6a) is unreported. The order of the district court (Pet. App. 7a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 2017. The petition for a writ of certiorari was filed on November 20, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 2000, following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted on one count of attempted possession with intent to distribute cocaine and one count of conspiracy to possess with intent to distribute cocaine, both in violation of 21 U.S.C. 846. The district court sentenced petitioner to 262 months of imprisonment, to be followed by six years of supervised release. The court of appeals affirmed. 252 F.3d 443 (Tbl.). 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. 7a-15a. The court of appeals likewise denied a COA. Id. at 1a-6a.

1. In January 2000, a confidential source informed the Drug Enforcement Administration (DEA) about a planned drug transaction involving Ronald Bishop, petitioner, and another man. Presentence Investigation Report (PSR) ¶¶ 9-10. The confidential source discussed the transaction with petitioner, who was one of Bishop's associates, ahead of time. PSR ¶ 10.

On January 15, petitioner, Bishop, the confidential source, and Kenneth Williams met at a service station in North Atlanta. PSR ¶ 11. Bishop then led the group to a restaurant in Cartersville, Georgia. Ibid. The group entered the restaurant to await the arrival of their supplier. PSR ¶ 12. The confidential

source had previously made arrangements with the supplier (who was actually an undercover DEA officer) to purchase at least two kilograms of cocaine for $19,500 per kilogram. Ibid.

When the supplier arrived, Bishop and the confidential source met him in the parking lot, where Bishop stated that he wanted to purchase five kilograms of cocaine. PSR ¶¶ 12-13. Bishop stated, however, that he had only $19,000 with him, and would pay the balance at a later date. PSR ¶ 14. Bishop gave the supplier a bag that contained $18,740. In exchange, the supplier gave Bishop five kilograms of counterfeit cocaine, which Bishop carried to his car, assisted by the confidential source. Ibid. Law enforcement arrested Bishop, Williams, and petitioner, who was inside the restaurant. PSR ¶ 15.

A federal grand jury charged petitioner with one count of attempted possession with intent to distribute cocaine and one count of conspiracy to possess with intent to distribute cocaine, both in violation of 21 U.S.C. 846. PSR ¶¶ 1-3. A jury found petitioner guilty on both counts. PSR ¶ 6.

2. The Probation Office concluded that petitioner qualified as a career offender under United States Sentencing Guidelines § 4B1.1 (1998). PSR ¶ 40; PSR ¶ 17 (stating that the 1998 edition of the Guidelines Manual was used to calculate petitioner's sentence). Under former Guidelines Section 4B1.1 (1998), 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) (1998) 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 stated that petitioner had one prior felony conviction for a "crime of violence" (a South Carolina conviction for assault and battery of a high and aggravated nature) and one prior felony conviction for a controlled substance offense (a South Carolina conviction for trafficking cocaine). PSR ¶¶ 31, 33, 39-40. The district court adopted the relevant PSR determinations, which set petitioner's offense level at 34 and criminal history category at VI under the Sentencing Guidelines, resulting in a sentencing range of 262 to 327 months of imprisonment. Sent. Tr. 31. Without the career-offender enhancement, petitioner's Guidelines range would have been 135 to 168 months, reflecting an

offense level of 30 and a criminal history category of IV. PSR ¶¶ 28, 39; Pet. 5 n.6.

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 imposed concurrent sentences of 262 months of imprisonment on each count of conviction. Sent. Tr. 36. The court of appeals affirmed. 252 F.3d 443 (Tbl.).

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. D. Ct. Doc. 120. 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 (1998), and that under Johnson, the Guidelines clause was also unconstitutionally vague. D. Ct. Doc. 120, at 4-23. Petitioner further argued that his motion was timely under 28 U.S.C.

2255(f)(3). D. Ct. Doc. 120, 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. 120, at 4.

The district court denied petitioner's motion. Pet. App. 7a-15a. The court cited the court of appeals' previous determination that "the mandatory Sentencing Guidelines are not subject to a vagueness challenge." Id. at 12a (citing In re Griffin, 823 F.3d 1350, 1354-1356 (11th Cir. 2016)). The court also declined to issue a COA under 28 U.S.C. 2253(c)(2), stating that its resolution of petitioner's claim "is not debatable among jurists of reason." Pet. App. 14a.

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 based on its prior decisions, holding that "Johnson does not apply to the career-offender guideline, whether under the advisory or the mandatory guideline system." Pet. App. 5a-6a (citing Griffin, 823 F.3d at

1354-1356 and In re Sapp, 827 F.3d 1334, 1336 (11th Cir. 2016)). The court accordingly determined that petitioner "cannot make a substantial showing of the denial of a constitutional right." Id. at 6a.

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) (1998), 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 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

[1] The same question is presented in Allen v. United States, No. 17-5684 (filed Aug. 17, 2017), Gates v. United States, No. 17-6262 (filed Oct. 2, 2017), and James v. United States, No. 17-6769 (filed Nov. 9, 2017).

"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 lower courts' rulings, although presented as rulings on the merits, equally illustrate 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. 17.

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. 18) 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 id. 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 Sentencing Guidelines § 5K2.0 (1998); see also Sentencing Guidelines § 4A1.3 (1998) (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 10 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.

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]

c. 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. 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

[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.

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) (citation omitted). 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 (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]

d. The Johnson question presented here is of limited and diminishing importance. As previously discussed, Beckles makes

[3] The other decisions cited by petitioner are inapposite. Petitioner cites (Pet. 16 & n.37) 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 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. 16 n.40) five unpublished district court decisions applying Johnson to the mandatory Guidelines, but those decisions do not create a conflict warranting this Court's review. See Sup. Ct. R. 10(a).

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]

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. Even if the question presented merited review, this case would be an unsuitable vehicle for addressing it. When petitioner was sentenced pursuant to the 1998 Sentencing Guidelines, the official commentary to the career-offender guideline expressly stated that a "'[c]rime of violence' includes * * * aggravated

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[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).

assault." Sentencing Guidelines § 4B1.2 comment. (n.1) (1998). In light of that commentary and petitioner's prior South Carolina conviction for assault and battery of a high and aggravated nature, PSR ¶ 31, petitioner cannot establish that the residual clause of the career-offender guideline was unconstitutionally vague as applied to him. See Beckles, 137 U.S. at 897-898 (Ginsburg, J., concurring in the judgment) (arguing that the career-offender guideline was not unconstitutionally vague as applied to the defendant in light of the Guidelines commentary, and that "because [the defendant's] conduct was 'clearly proscribed,' he also 'cannot complain of the vagueness of the guideline as applied to the conduct of others'") (brackets and citation omitted); id. at 898 (Sotomayor, J., concurring in the judgment) (agreeing with Justice Ginsburg that "Johnson affords [the defendant] no relief, because the commentary under which he was sentenced was not unconstitutionally vague").[5]

[5] In the district court, the government argued that circuit precedent in Griffin, 823 F.3d at 1354-1356, foreclosed petitioner's challenge, and did not rely on the opinions of Justices Ginsburg and Sotomayor in Beckles to argue that the career-offender guideline was not unconstitutionally vague as applied to petitioner. The court of appeals denied petitioner a COA without a responsive pleading from the government.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

JOHN P. CRONAN
Acting Assistant Attorney General

DAVID M. LIEBERMAN
Attorney

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