No. 17-7563

IN THE SUPREME COURT OF THE UNITED STATES

LESLEY WILLIAM COTTMAN, 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

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QUESTIONS PRESENTED

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

2. Whether, in denying a COA, 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.

3. Whether the court of appeals erred in denying a COA on petitioner's claim that his prior convictions for robbery, in violation of Fla. Stat. § 812.13 (1985) and Fla. Stat. § 812.13 (1995), were not convictions for "violent felon[ies]" under the elements clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(i).

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-A5) is not published in the Federal Reporter but is available at 2017 WL 6765256. The order of the district court (Pet. App. B1-B6) is not published in the Federal Supplement but is available at 2017 WL 1683661.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2017. The petition for a writ of certiorari was filed on January 22, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of conspiracy to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. 841(b)(1)(A)(ii) and 846; one count of possession of a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); and one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g) and 924(e)(1). Pet. App. B1-B2. The district court sentenced petitioner to 322 months of imprisonment, to be followed by five years of supervised release. Sent. Tr. 25; Pet. App. B2. Petitioner did not appeal his conviction or sentence. Pet. App. B2. Petitioner later filed a motion to vacate his sentence under 28 U.S.C. 2255. D. Ct. Doc. 1, at 1 (June 15, 2016). The court denied petitioner's motion and declined to issue a certificate of appealability (COA). Pet. App. B1-B6. The court of appeals similarly denied a COA. Id. at A1-A5.

1. In 2002, petitioner agreed to participate in an armed robbery with Ronnie Dixon and an undercover agent posing as a drug courier. Presentence Investigation Report (PSR) ¶¶ 10-14. Their plan was to steal cocaine and money from a supposed "stash house" in Tampa, Florida. PSR ¶ 11; see PSR ¶ 17. The undercover agent led petitioner and Dixon to a warehouse that, according to the agent, would serve as the storage location for some of the stolen

cocaine. PSR ¶ 17. When petitioner and Dixon arrived, federal agents arrested them. Ibid. The agents seized a shotgun and two black ski caps from Dixon's vehicle. Ibid. In a post-arrest statement, Dixon stated that petitioner had brought the shotgun to the warehouse. PSR ¶ 18. During a subsequent interview, petitioner admitted that he and Dixon had planned to rob the undercover agent after robbing the stash house. PSR ¶ 19.

A federal grand jury in the Middle District of Florida indicted petitioner on one count of conspiracy to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. 841(b)(1)(A)(ii) and 846; one count of possession of a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); and one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g) and 924(e)(1). Pet. App. B1-B2. Petitioner pleaded guilty. Ibid.

2. The Probation Office classified petitioner as an armed career criminal under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e). PSR ¶ 45. The default statutory sentencing range for possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1), is zero to ten years of imprisonment. 18 U.S.C. 924(a)(2). If, however, the offender has three or more convictions for "violent felon[ies]" or "serious drug offense[s]" that were "committed on occasions different from one another," then the ACCA specifies a statutory sentencing range of 15 years to life imprisonment. 18 U.S.C. 924(e)(1). The ACCA defines a "violent

felony" to include, inter alia, any crime punishable by more than one year that "has as an element the use, attempted use, or threatened use of physical force against the person of another" or "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(i)-(ii). The former part of that definition is commonly referred to as the "elements clause," whereas the latter part is known as the "residual clause." Welch v. United States, 136 S. Ct. 1257, 1261 (2016). Although the Probation Office did not identify which of petitioner's prior convictions qualified as violent felonies under the ACCA, it noted that petitioner had five prior Florida convictions for robbery. PSR ¶¶ 54-56, 66; Pet. App. A1-A2.

The Probation Office also determined that petitioner qualified as a career offender under Sentencing Guidelines § 4B1.1 (2001). PSR ¶¶ 40-42; see PSR ¶ 25 (stating that the 2001 edition of the Guidelines was used to calculate petitioner's sentence). 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 "crime of violence" or "controlled substance offense," and (3) he had at least two prior felony convictions for a "crime of violence" or a "controlled substance offense." Sentencing Guidelines § 4B1.1 (2001). The phrase "crime of violence" was defined in Sentencing Guidelines § 4B1.2(a) (2001) 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." Id. § 4B1.2(a) (2001).

In recommending the career-offender enhancement, the Probation Office cited two of petitioner's prior Florida robbery convictions. PSR ¶ 41. With that enhancement, the resulting calculation for the drug-conspiracy and felon-in-possession counts -- which were grouped together for Guidelines purposes, PSR ¶ 27 -- was a total offense level of 34 and a criminal history category of VI, corresponding to a Guidelines range of 262 to 327 months of imprisonment. PSR ¶¶ 43-44, 49-52, 116. The Probation Office also calculated a sentence of five years of imprisonment, to be served consecutively, on the Section 924(c) count. PSR ¶¶ 39, 116.

At sentencing, the district court adopted the Probation Office's Guidelines calculations. Sent. Tr. 24. 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 the applicable Guidelines range unless it found that exceptional circumstances justified a departure. See id. at 233-234. The court sentenced petitioner to 262 months of imprisonment, to be served concurrently, on the drug conspiracy and felon-in-possession counts. Sent. Tr. 25. It also

sentenced petitioner to 60 months of imprisonment on the Section 924(c) count, to be served consecutively. Ibid.

3. In 2015, this Court held in Johnson v. United States, 135 S. Ct. 2551, that the ACCA's residual clause is unconstitutionally vague. Id. at 2557.

In 2016, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. D. Ct. Doc. 1, at 1. Petitioner argued that Johnson's invalidation of the ACCA's residual clause meant that his prior Florida convictions for robbery were not violent felonies under that statute. D. Ct. Doc. 13, at 8-20 (Feb. 6, 2017). He also argued that application of the career-offender guideline in his case had rested on the similarly worded clause in former Sentencing Guidelines § 4B1.2 (2001), and that under Johnson, the Guidelines clause was also unconstitutionally vague. D. Ct. Doc. 13, at 20-22. Petitioner contended that his motion was timely under 28 U.S.C. 2255(f)(3) because he filed it within a year of Johnson. D. Ct. Doc. 13, at 1. Section 2255(f)(3) 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. D. Ct. Doc. 13, at 3 n.4.

The district court denied petitioner's motion. Pet. App. B1-B6. Relying on circuit precedent, the court determined that the mandatory Sentencing Guidelines are not subject to a vagueness challenge under Johnson and that the decision in Johnson therefore did not render petitioner's challenge to the application of the career-offender guideline timely under Section 2255(f)(3). Id. at B3 (citing In re Griffin, 823 F.3d 1350, 1354 (11th Cir. 2016), and United States v. Matchett, 802 F.3d 1185, 1193-1196 (11th Cir. 2015), cert. denied, 137 S. Ct. 1344 (2017)). The court also determined that under circuit precedent, petitioner's prior convictions for Florida robbery qualified as violent felonies under the ACCA's elements clause. Id. at B4-B5 (citing United States v. Fritts, 841 F.3d 937, 941-942 (11th Cir. 2016), cert. denied, 137 S. Ct. 2264 (2017)). The court declined to issue a COA. Id. at B6.

4. The court of appeals likewise denied a COA, finding that "reasonable jurists would not debate the district court's denial of [petitioner's] § 2255 motion." Pet. App. A4. The court of appeals explained that "the Supreme Court and this Court have held that Johnson does not apply to career offender claims such as [petitioner's]." Ibid. (citing Beckles v. United States, 137 S. Ct. 886 (2017), and In re Griffin, supra). The court of appeals thus determined that petitioner's "challenge to his career offender status was untimely" under Section 2255(f)(3). Ibid. Relying on circuit precedent, the court also determined that

petitioner's prior Florida robbery convictions qualified as violent felonies under the ACCA's elements clause. Id. at A3 (citing Fritts, 841 F.3d at 938).

ARGUMENT

Petitioner contends (Pet. 8-15) that this Court should grant review to determine whether the residual clause in former Sentencing Guidelines § 4B1.2(a)(2) (2001), 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 also contends (Pet. 16-17) that this Court should review whether legal determinations in published orders by a court of appeals denying a request to file a second or successive motion under 28 U.S.C. 2255 may be treated as binding precedent in cases that do not involve such requests.[2] Further review of those contentions is not warranted. The court of appeals' denial of a COA on petitioner's Guidelines claim does not squarely conflict with any decision of this Court or another court of appeals, and any question of Johnson's application to

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[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), James v. United States, No. 17-6769 (filed Nov. 9, 2017), and Robinson v. United States, No. 17-6877 (filed Nov. 20, 2017).

[2] The same question is presented in Allen v. United States, supra.

sentences imposed under the mandatory Guidelines is of limited and diminishing importance.

Petitioner additionally contends (Pet. 17-23) that his prior convictions for robbery, in violation of Fla. Stat. § 812.13, were not convictions for "violent felon[ies]" under the ACCA's elements clause. The Court is currently considering an identical question in Stokeling v. United States, cert. granted, No. 17-5554 (Apr. 2, 2018). The petition for a writ of certiorari should therefore be held pending the decision in Stokeling and then disposed of as appropriate in light of that decision.

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). When a district court denies a claim in 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 challenge to the application of the career-offender guideline was not timely. Pet. App. A4. 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 in challenging the application of the career-offender guideline.

a. The courts below correctly recognized that the right recognized in Johnson is not the right that petitioner asserts in his Guidelines claim. 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 petitioner's Guidelines claim, in contrast, is an asserted 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. 10) that the "right" now asserted is the "identical" 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. 8-9), 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 n.7 (noting that the Court in Beckles "expressly and repeatedly limited its holding to the 'advisory' guidelines") (citation omitted). 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 challenge to the application of the career-offender guideline 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)) (citation omitted). 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 (2001); see also id. § 4A1.3 (2001) (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, 18 U.S.C. 3551 et seq., 28 U.S.C. 991 et seq., 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 [ACCA]" 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 to petitioner's Guidelines claim.

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) (citation and internal quotation marks omitted). 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. The Fourth, Sixth, and Tenth 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); United States v. Greer, 881 F.3d 1241, 1248-1249 (10th Cir. 2018). 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 the Fourth and Sixth Circuit 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) (citation omitted); see id. at 302-303. The Second Circuit has also issued an unpublished, nonprecedential decision authorizing a second or successive Section 2255 motion to challenge the mandatory career-offender guideline. Vargas v. United States, No. 16-2112, 2017 WL 3699225, at *1 (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]

Indeed, the first question presented is of limited and diminishing importance. 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 claim 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.

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[3] Petitioner cites (Pet. 10 n.9) a district court decision in United States v. Roy, 282 F. Supp. 3d 421 (D. Mass. 2017), applying Johnson to the mandatory Guidelines, but that decision does not create a conflict warranting this Court's review. See Sup. Ct. R. 10(a).

Particularly in the absence of a square circuit conflict, the issue does not warrant this Court's review.

d. Even if the first question presented merited review, this case would be an unsuitable vehicle for addressing it. When petitioner was sentenced pursuant to the 2001 Sentencing Guidelines, the official commentary to the career-offender guideline expressly stated that a "'[c]rime of violence' includes * * * robbery." Sentencing Guidelines § 4B1.2, comment. (n.1) (2001). In light of that commentary, petitioner cannot claim that the residual clause of the career-offender guideline was unconstitutionally vague as applied to him. See Beckles, 137 S. Ct. 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"); see also United States v. Lockley, 632 F.3d 1238, 1242 (11th Cir.) (determining that Florida robbery is "the equivalent of the generic

form of robbery" referenced in the Guidelines commentary), cert. denied, 565 U.S. 885 (2011).[4]

Moreover, the Sentencing Commission has amended the career-offender guideline to explicitly include "robbery" as an enumerated offense in the definition of a "crime of violence." Sentencing Guidelines § 4B1.2(a)(2) (2016). See United States v. Dixon, 717 Fed. Appx. 958, 960 (11th Cir. 2018) (determining that Florida robbery qualifies as "robbery" under the "enumerated crimes clause" of Sentencing Guidelines § 4B1.2(a) (2016)). Thus, even if petitioner prevailed on his challenge to the mandatory application of the career-offender guideline in his case, he would still be subject to the career-offender guideline and the same Guidelines range of 262 to 327 months at resentencing, except with the Guidelines range treated as advisory.[5] Petitioner offers no specific reason to believe that he would receive a lower sentence in such a proceeding.

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[4] In the district court, the government 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, because petitioner acknowledged that circuit precedent foreclosed his challenge. See D. Ct. Doc. 13, at 3 (citing United States v. Matchett, 802 F.3d 1185 (11th Cir. 2015), cert. denied, 137 S. Ct. 1344 (2017)). And on appeal, the court of appeals denied petitioner a COA without a responsive pleading from the government.

[5] 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).

2. Petitioner separately contends (Pet. 12-14, 16-17) 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, Pet. App. A2, the court did not err in relying on it, and review of petitioner's contrary contention is not warranted.

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 Torres v. United States, 138 S. Ct. 1173 (2018) (No. 17-7514); Vasquez v. United States, 138 S. Ct. 286 (2017) (No. 17-5734); Golden v. United States, 138 S. Ct. 197 (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 the Guidelines claim in his motion 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 has not demonstrated that the court's 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 necessarily have diminished precedential force. See, e.g., Moore v. United States, supra; 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).

3. Petitioner also contends (Pet. 17-23) that his prior convictions for robbery, in violation of Fla. Stat. § 812.13, were not convictions for "violent felon[ies]" under the ACCA's elements clause. The Court is currently considering an identical question in Stokeling v. United States, supra. The petition for a writ of certiorari should therefore be held pending the Court's decision in Stokeling and then disposed of as appropriate in light of that decision.

The intersection of this case with Stokeling presents an additional dispositive reason why review of the first two questions presented would be unwarranted. If this Court determines in

Stokeling that Florida robbery qualifies as a violent felony because it "has as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i), then petitioner's prior convictions for Florida robbery would qualify as "crime[s] of violence" under the career-offender guideline's identically worded elements clause, Sentencing Guidelines § 4B1.2(a)(1) (2001). Petitioner would thus have been a career offender regardless of whether the residual clause of the career-offender guideline was unconstitutionally vague. And if the Court concludes in Stokeling that Florida robbery is not a violent felony, petitioner will be entitled to a resentencing proceeding under current law -- including advisory, rather than binding, Sentencing Guidelines -- thereby mooting the remaining questions presented.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision in Stokeling v. United States, cert. granted, No. 17-5554 (Apr. 2, 2018), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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