No. 17-8746

IN THE SUPREME COURT OF THE UNITED STATES

CARLOS WILSON, 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 determining that petitioner was not entitled to collateral relief on his claim that the residual clause in Section 4B1.2 of the previously binding 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 opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is reprinted at 710 Fed. Appx. 435. The order of the district court (Pet. App. 5a-9a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 2018. The petition for a writ of certiorari was filed on May 1, 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 Southern District of Florida, petitioner was convicted on one count of possession with intent to distribute cocaine base (crack cocaine), in violation of 21 U.S.C. 841(a). Judgment 1. The district court sentenced petitioner to 235 months of imprisonment, to be followed by five years of supervised release. Id. at 2-3. The court of appeals affirmed. 48 Fed. Appx. 326 (Tbl.). In 2016, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. 16-cv-14258 D. Ct. Doc. 1 (June 24, 2016). The district court denied petitioner's motion, but issued a certificate of appealability (COA). Pet. App. 5a-9a. The court of appeals affirmed. Id. at 1a-4a.

1. On January 4, 2001, petitioner purchased three small bags of marijuana from an undercover officer. Presentence Investigation Report (PSR) ¶¶ 4-5. Officers arrested petitioner and, during a subsequent search, seized a plastic cigar tube containing numerous crack cocaine rocks and $580 in currency. PSR ¶ 6. Law enforcement recovered a total of 12.2 grams of crack cocaine. PSR ¶ 9. Petitioner subsequently admitted that he often purchased half-ounce quantities of crack cocaine, which he cut up into smaller pieces to sell. PSR ¶ 8.

A federal grand jury in the Southern District of Florida indicted petitioner on one count of possession with intent to

distribute cocaine base (crack cocaine), in violation of 21 U.S.C. 841(a). Petitioner pleaded guilty. PSR ¶ 1.

2. The Probation Office determined that petitioner qualified as a career offender under Sentencing Guidelines § 4B1.1 (2000). PSR ¶ 19; see PSR p. 1 (stating that the 2000 edition of the Guidelines Manual 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 (2000). The phrase "crime of violence" was defined in Sentencing 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 in Florida for burglary of a dwelling and second-degree murder. PSR ¶ 19. The district court adopted the Probation Office's determinations, which set petitioner's total offense level at 31 and criminal

history category at VI, resulting in a Sentencing Guidelines range of 188 to 235 months of imprisonment. PSR ¶ 59.

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 235 months of imprisonment. Sent. Tr. 4.

The court of appeals affirmed. 48 Fed. Appx. 326 (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. See 16-cv-14258 D. Ct. Doc. 1 (June 24, 2016) (2255 Motion). Petitioner argued that application of the career-offender guideline in his case had rested on the clause in former Sentencing Guidelines § 4B1.2(a)(2) (2000) that is similarly worded to the clause at issue in Johnson, and that under the logic of Johnson, the Guidelines clause was also unconstitutionally vague. 2255 Motion at 3-4. Petitioner also

contended that his motion was timely under 28 U.S.C. 2255(f)(3) because he filed it within one year of Johnson. 2255 Motion at 8-9. 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).

The district court denied relief. Pet. App. 5a-9a. Citing circuit precedent, the court determined that "[t]he Guidelines -- whether mandatory or advisory -- cannot be unconstitutionally vague because they do not establish the illegality of any conduct and are designed to assist and limit the discretion of the sentencing judge." Id. at 7a (quoting In re Griffin, 823 F.3d 1350, 1354 (11th Cir. 2016)). The court also cited this Court's decision in Beckles v. United States, 137 S. Ct. 886 (2017), which held that advisory Sentencing Guidelines are not subject to a vagueness challenge under the Due Process Clause. Pet. App. 8a. The district court reasoned that, because "the Sentencing Guidelines do not alter the statutory minimum or maximum penalties for a crime," the "mandatory nature of a Guideline range between those statutory penalties" does not make "their application subject to a vagueness challenge." Ibid. The court did, however, grant a COA. Id. at 9a.

4. The court of appeals affirmed. Pet. App. 1a-4a. The court explained that petitioner's argument "that [Section] 4B1.2(a) is unconstitutionally vague in light of Johnson" is "foreclose[d]" by the court's prior decision in In re Griffin that "'the Guidelines -- whether mandatory or advisory -- cannot be unconstitutionally vague.'" Id. at 2a-3a (quoting Griffin, 823 F.3d at 1354) (brackets omitted).

ARGUMENT

Petitioner contends (Pet. 10-20) that this Court should grant review to consider whether the residual clause in former Sentencing Guidelines § 4B1.2 (2000), as applied to petitioner in the context of the formerly binding Guidelines, was unconstitutionally vague in light of Johnson v. United States, 135 S. Ct. 2551 (2015). Review on that issue is not warranted. The court of appeals' decision denying relief on petitioner's Section 2255 motion was correct, and this Court has recently denied certiorari to multiple petitions raising similar issues. See Lester v. United States, 138 S. Ct. 2030 (2018) (No. 17-1366); Allen v. United States, 138 S. Ct. 2024 (2018) (No. 17-5684); Gates v. United States, 138 S. Ct. 2024 (2018) (No. 17-6262); James v. United States, 138 S. Ct. 2024 (2018) (No. 17-6769); Robinson v. United States, 138 S. Ct. 2025 (2018) (No. 17-6877); Miller v. United States, 2018 WL 706455 (June 11, 2018) (No. 17-7635); Raybon v. United States, 2018 WL 2184984 (June 18, 2018) (No. 17-8878); Sublett v. United States, 2018 WL 2364840 (June 25, 2018) (No. 17-9049). The

Court should follow the same course here.[1] Moreover, petitioner's case would be an unsuitable vehicle for addressing the question presented because this case has become moot following petitioner's release from prison, and because the career-offender guideline was not unconstitutionally vague as applied to petitioner.

1. For the reasons stated in the government's brief in opposition in Gipson v. United States, No. 17-8637 (July 25, 2018), petitioner's motion under 28 U.S.C. 2255 was not timely.[2] Although the court of appeals framed its decision in terms of the merits, its determination that the decisions of this Court do not entitle petitioner to relief also shows that petitioner's Section 2255 motion was not timely. Petitioner filed the motion more than one year after his conviction became final, and this Court's decision in Johnson did not recognize a new retroactive right with respect to the formerly binding Sentencing Guidelines that would either provide petitioner with a new window for filing his claim or

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[1] Other pending petitions have raised similar issues. See Cottman v. United States, No. 17-7563 (filed Jan. 22, 2018); Molette v. United States, No. 17-8368 (filed Apr. 2, 2018); Greer v. United States, No. 17-8775 (filed May 1, 2018); Wilson v. United States, No. 17-8746 (filed May 1, 2018); Homrich v. United States, No. 17-9045 (filed May 6, 2018); Brown v. United States, No. 17-9276 (filed May 29, 2018); Chubb v. United States, No. 17-9379 (filed June 6, 2018); Smith v. United States, No. 17-9400 (filed June 13, 2018); Buckner v. United States, No. 17-9411 (filed June 11, 2018); Lewis v. United States, No. 17-9490 (filed June 20, 2018).

[2] We have served petitioner with a copy of the government's brief in opposition in Gipson.

entitle him to relief on collateral review. See 28 U.S.C. 2255(f)(1) and (3); Br. in Opp. at 9-14, Gipson, supra (No. 17-8637). Although a circuit disagreement exists on the viability of a claim like petitioner's, the disagreement is shallow, of limited importance, and may soon resolve itself without the need for this Court's intervention. See Br. in Opp. at 14-16, Gipson, supra (No. 17-8637).

2. Petitioner's case, moreover, illustrates other obstacles to relief that are also present in many cases raising these issues.

a. This case is moot because petitioner's 235-month term of imprisonment has already expired. According to the Federal Bureau of Prisons, petitioner was released on May 11, 2018.[3] Because petitioner's Guidelines challenge affects only the length of his sentence rather than his underlying conviction, the case became 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.").

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

[3] See Fed. Bureau of Prisons, Find an Inmate, https://www.bop.gov/inmateloc (search for inmate register number 54049-004).

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. The only portion of petitioner's sentence to which he is still subject is his five-year term of supervised release. In United States v. Johnson, 529 U.S. 53, 54 (2000), this Court held that a prisoner who serves too long a term of incarceration is not entitled to receive credit against his term of supervised release. The Court in United States v. 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." 529 U.S. at 60 (quoting 18 U.S.C. 3583(e)(1)). 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); see also Rhodes v. Judiscak, 676 F.3d 931, 935 (10th Cir.), cert. denied, 567 U.S. 935 (2012).[4]

b. Moreover, even if the challenged language in the career-offender guideline's residual clause were deemed unconstitutionally vague in some applications, it was not vague as applied to petitioner, who had prior convictions for burglary of a dwelling and second-degree murder in Florida. PSR ¶ 19. When petitioner was sentenced, the official commentary to the career-offender guideline expressly stated that a "'[c]rime of violence' includes * * * murder" and "burglary of a dwelling." Sentencing Guidelines § 4B1.2, comment. (n.1) (2000). As Justice Ginsburg explained in her concurring opinion in Beckles v. United States, 137 S. Ct. 886 (2017), "because [the defendant's] conduct was 'clearly proscribed'" in light of the Guidelines commentary, he

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[4] The courts of appeals do not all agree that a challenge to the length of a term of imprisonment is moot in these circumstances. See Pope v. Perdue, 889 F.3d 410, 414-415 (7th Cir. 2018); Tablada v. J.E. Thomas, 533 F.3d 800, 802 n.1 (9th Cir. 2008), cert. denied, 560 U.S. 964 (2010); Levine v. Apker, 455 F.3d 71, 77 (2d Cir. 2006); Johnson v. Pettiford, 442 F.3d 917 (5th Cir. 2006) (per curiam). But the need for this Court to resolve the mootness question at a minimum makes this case a poor vehicle for considering the question presented.

"'cannot complain of the vagueness of the guideline as applied to the conduct of others.'" 137 S. Ct. at 897-898 (brackets and citation omitted); see also id. at 898 (Sotomayor, J., concurring in the judgment) ("Johnson affords [the defendant] no relief, because the commentary under which he was sentenced was not unconstitutionally vague.").[5]

The Tenth Circuit has accordingly held that the Guidelines commentary can clarify the meaning of the career-offender guideline's residual clause such that relief is foreclosed for a movant like petitioner. See United States v. Miller, 868 F.3d 1182, 1187 (2017), cert. denied, No. 17-7635, 2018 WL 706455 (June 11, 2018). And no other court of appeals decision since Beckles has disagreed.

[5] In the court of appeals, 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. The government may, however, defend the lower court judgment on "any ground permitted by the law and the record." Dahda v. United States, 138 S. Ct 1491, 1498 (2018) (citation omitted); see ibid. (accepting "an argument that the Government did not make below but which it did set forth in its response to the petition for certiorari and at the beginning of its brief on the merits").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2018