No. 17-8775

IN THE SUPREME COURT OF THE UNITED STATES

JASON GREER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH 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. A) is reported at 881 F.3d. 1241. The order of the district court (Pet. App. B) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 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 District of Colorado, petitioner was convicted on one count of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d). Pet. App. A2; Presentence Investigation Report (PSR) ¶¶ 1-2. The district court sentenced petitioner to 188 months of imprisonment, to be followed by five years of supervised release. Pet. App. A2. Petitioner filed a direct appeal, which the court of appeals dismissed. 85 Fed. Appx. 181. In 2005, petitioner filed an unsuccessful motion collaterally attacking his sentence under 28 U.S.C. 2255. D. Ct. Doc. 86 (Jan. 12, 2005); see D. Ct. Doc. 89 (Aug. 5, 2005). In 2016, the court of appeals granted petitioner authorization to file a second or successive motion to vacate his sentence under Section 2255. D. Ct. Doc. 91 (May 13, 2016). The district court subsequently denied petitioner's motion, Pet. App. B, but granted a certificate of appealability (COA), see id. at A2. The court of appeals affirmed. Pet. App. A.

1. On February 3, 2001, petitioner robbed the Union Colony Bank in Greeley, Colorado using a firearm. He stole $11,677. PSR ¶ 5.

A federal grand jury in the District of Colorado charged petitioner with one count of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d); one count of using and carrying a firearm during and in relation to a crime of violence, in violation

of 18 U.S.C. 924(c); and two counts of unlawful possession of a firearm after a previous felony conviction, in violation of 18 U.S.C. 922(g)(1). PSR ¶ 1. Petitioner pleaded guilty to the armed bank robbery charge. PSR ¶ 2.

2. The Probation Office determined that petitioner qualified as a career offender under Sentencing Guidelines § 4B1.1 (2001). PSR ¶ 19; see PSR ¶ 10 (stating that the 2001 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 (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."

In recommending the career-offender enhancement, the Probation Office cited petitioner's prior convictions in Colorado for escape and second-degree assault. PSR ¶ 19; see also PSR

¶¶ 38, 44. The enhancement produced a total offense level of 31 and a criminal history category of VI, resulting in a Sentencing Guidelines range of 188 to 235 months of imprisonment. PSR ¶ 71.

At sentencing, the district court overruled petitioner's objections to the career-offender enhancement. Sent. Tr. 79. The court found that, in addition to the two predicate offenses that were noted by the Probation Office, petitioner also had prior convictions in Colorado for second-degree burglary and third degree assault, which the court found would also qualify as "crime[s] of violence" under Guidelines Section 4B1.2. Ibid.; see also PSR ¶¶ 30, 34.

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 188 months of imprisonment. Sent. Tr. 88-89.

Petitioner filed a direct appeal, which the court of appeals dismissed. 85 Fed. Appx. 181.

In 2005, petitioner filed his first motion to vacate his sentence under 28 U.S.C. 2255. D. Ct. Doc. 86. The district court denied petitioner's motion. D. Ct. Doc. 89.

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 an application for an order authorizing him to file a second or successive motion to vacate his sentence under Section 2255. D. Ct. Doc. 90 (May 13, 2016) (2255 Motion); see 28 U.S.C. 2255(h). The court of appeals granted authorization. D. Ct. Doc. 91, at 1-2 (May 13, 2016). In his 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) (2001) 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 5-7. Petitioner further 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), and he argued that the same reasoning should apply to cases like his. D. Ct. Doc. 95, at 12-17 (June 20, 2016).

The district court denied relief. Pet. App. B. Although the government conceded that petitioner's prior convictions for escape and third-degree assault did not qualify as crimes of violence, id. at B5, the court found that petitioner "still qualifies as a career offender" because "two of [petitioner's] prior convictions

qualify as crimes of violence under the Sentencing Guidelines without application of the residual clause." Id. at B7. The court found -- and petitioner did not dispute -- that petitioner's prior Colorado conviction for second-degree burglary qualified as a crime of violence under the enumerated-crimes clause of Guidelines § 4B1.2(a)(2) (2001), because petitioner had been convicted of burglary of a dwelling. Pet. App. B5. The court further determined that petitioner's prior conviction for second-degree assault also qualified as a crime of violence regardless of the residual clause in Section 4B1.2(a)(2), because it "has as an element the use, attempted use, or threatened use of physical force against the person of another" under Sentencing Guidelines § 4B1.2(a)(1). Pet. App. B5. The court observed that Colorado defines second-degree assault to require that the offender have "knowingly and violently applied physical force" against the victim. Id. at B7 (quoting Colo. Rev. Stat. 18-3-203(1)(f)) (brackets omitted). The court accordingly declined to vacate petitioner's sentence, ibid., but it granted a COA, see id. at A2.

5. The court of appeals affirmed. Pet. App. A. The court explained that "[petitioner's] motion is untimely unless he can show that it is based on a right newly recognized and made retroactive on collateral review by the Supreme Court." Id. at A3 (citing 28 U.S.C. 2255(f)(3)). And the court found that "[t]he right that [petitioner] 'asserts' is a right not to be sentenced under the residual clause of § 4B1.2(a)(2) of the mandatory

Guidelines," but that "[this] Court has recognized no such right." Id. at A5. The court of appeals stated that "the only right recognized by [this] Court in Johnson was a defendant's right not to have his sentenced increased under the residual clause of the ACCA." Id. at A6. The court of appeals further stated that petitioner "is attempting to apply the reasoning of Johnson in a different context not considered by t[his] Court," a request that "is not for th[e] court [of appeals] acting on collateral review to do." Ibid. The court accordingly agreed with the three other circuits that have "held untimely any challenge raised to the mandatory Guidelines beyond one year after conviction." Ibid.

ARGUMENT

Petitioner contends (Pet. 4-9) that this Court should grant review to consider whether his motion to vacate his sentence was timely under 28 U.S.C. 2255(f)(3), and whether the residual clause in former Sentencing Guidelines § 4B1.2(a)(2) (2001), 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 of those issues 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 it has become moot following petitioner's release from prison; because petitioner's entitlement to relief would also depend on his ability to satisfy the particular requirements of a second or successive collateral attack; and because petitioner independently qualified as a career offender irrespective of the Guidelines' residual clause.

1. For the reasons stated in the government's brief in opposition in Gipson v. United States, No. 17-8637 (July 25, 2018), the court of appeals correctly determined that petitioner's motion

[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).

under 28 U.S.C. 2255 was not timely.[2] 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 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 multiple other obstacles to relief that are also present in many other cases raising these issues.

a. This case is moot because petitioner's 188-month term of imprisonment has already expired. According to the Federal Bureau of Prisons, petitioner was released on April 9, 2018.[3] Because petitioner's Guidelines challenge affects only the length of his sentence rather than his underlying conviction, the case became

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

[3] See Fed. Bureau of Prisons, Find an Inmate, https://www.bop.gov/inmateloc (search for inmate register number 31027-013).

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 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. Furthermore, petitioner's motion for collateral relief was not his first collateral attack, and it was therefore subject to additional limitations. See 28 U.S.C. 2255(h). Even if a second or successive motion is timely, it "shall be dismissed unless," as relevant here, "the applicant shows that the claim

[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.

relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. 2244(b)(2)(A) and (b)(4); see 28 U.S.C. 2255(h) (incorporating Section 2244 procedures by reference into Section 2255). That bar to relief is worded similarly, but not identically, to the statute of limitations under Section 2255(f)(3) and may provide an independent basis for denying a motion like petitioner's. See Homrich v. United States, No. 17-1612, at 2 (6th Cir. Dec. 8, 2017) (affirming dismissal of a second or successive motion under 28 U.S.C. 2255 challenging application of the formerly binding career-offender guideline based on 28 U.S.C. 2244(b)(2)(A)), petition for cert. pending, No. 17-9045 (filed May 7, 2018); see also Tyler v. Cain, 533 U.S. 656, 662-667 (2001) (describing the retroactivity requirement in Section 2244(b)(2)(A)).

c. In any event, this case would not be a suitable vehicle for further review of the question presented because petitioner was properly sentenced as a career offender under the Guidelines irrespective of the residual clause. Petitioner did not contest below that his prior Colorado burglary conviction qualified as a crime of violence under former Guidelines § 4B1.2(a) (2001). See Pet. App. A2 n.2; Pet. App. B5. And petitioner's prior conviction for Colorado second-degree assault also supplied a qualifying predicate conviction. In addition to the residual clause, the career-offender guideline defined "crime of violence" to include

any 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(a)(1) (2001). The Tenth Circuit has confirmed that the elements of Colorado second-degree assault include the requisite use of "physical force." See United States v. Ontiveros, 875 F.3d 533, 538 (10th Cir. 2017) (applying 18 U.S.C. 924(e)(2)(B)(i)), cert. denied, 138 S. Ct. 2005 (2018). Thus, even if petitioner were to succeed in showing that the residual clause of the career-offender guideline is unconstitutionally vague in the context of binding Guidelines, he still independently qualified as a career offender.

3. Because the court of appeals correctly determined that petitioner's Section 2255 motion was not timely, this Court should not accept petitioner's request (Pet. 9) to remand this case for further consideration in light of this Court's recent decision in Sessions v. Dimaya, 138 S. Ct. 1204 (2018). Dimaya held the definition of a "crime of violence" in 18 U.S.C. 16(b) as incorporated into the Immigration and Nationality Act -- the language of which is similar to the residual clause in Guidelines Section 4B1.2(a)(2) (2001) -- to be unconstitutionally vague. See 138 S. Ct. at 1223. But Dimaya does not address the constitutionality of any provision of the Sentencing Guidelines or the application of Johnson outside the context of a statute. This Court's holding in Dimaya thus does not resolve any question that would affect the outcome of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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