No. 17-9045

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT HOMRICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

# BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN BENCZKOWSKI
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 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).

IN THE SUPREME COURT OF THE UNITED STATES

_______________

No. 17-9045

ROBERT HOMRICH, PETITIONER

v.

UNITED STATES OF AMERICA

_______________

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

_______________

BRIEF FOR THE UNITED STATES IN OPPOSITION

_______________

OPINIONS BELOW

The order of the court of appeals (Pet. App. A) is unreported. The order of the district court (Pet. App. B) is unreported.

JURISDICTION

The judgment of the court of appeals was entered December 8, 2017. On March 8, 2018, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including May 7, 2018, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Michigan, petitioner was convicted on one count of conspiracy to distribute cocaine, heroin, and marijuana, in violation of 21 U.S.C. 841(a)(1) and 846. Judgment 1. The district court sentenced petitioner to 360 months of imprisonment, to be followed by five years of supervised release. Judgment at 2-3. The court of appeals affirmed. 1995 WL 390286. In 1996, petitioner filed an unsuccessful motion collaterally attacking his sentence under 28 U.S.C. 2255. See 1999 WL 1206903. 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. 619 (Mar. 28, 2016). The district court denied petitioner's motion, but granted him a certificate of appealability (COA). Pet. App. B. The court of appeals affirmed. Pet. App. A.

1. Between 1985 and 1993, petitioner and others conspired to obtain large quantities of cocaine and marijuana, and smaller quantities of heroin and methamphetamine, from Texas. 1995 WL 390286, at *1. Petitioner subsequently distributed the drugs in Michigan and transmitted the proceeds back to his supplier using Western Union money transfers. Presentence Investigation Report (PSR) ¶¶ 24, 26.

A federal grand jury in the Western District of Michigan charged petitioner with conspiracy to distribute cocaine, heroin,

and marijuana, in violation of 21 U.S.C. 841(a)(1) and 846. PSR ¶ 4. A jury found petitioner guilty. PSR ¶ 13.

2. The Probation Office determined that petitioner qualified as a career offender under Sentencing Guidelines § 4B1.1 (1993). PSR ¶ 80; see PSR ¶ 70 (stating that the 1993 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 (1993). The phrase "crime of violence" was defined in Sentencing Guidelines § 4B1.2(1) (1993) to include a felony offense that (i) "has as an element the use, attempted use, or threatened use of physical force against the person of another," or (ii) "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 for felonious assault in Michigan and attempted second-degree burglary in Colorado. PSR ¶ 80; see also PSR ¶¶ 89-90. The district court adopted the Probation Office's determinations, which set

petitioner's offense level at 37 and criminal history category at VI, resulting in a Sentencing Guidelines range of 360 months to life imprisonment. PSR ¶ 122.

At sentencing, petitioner did not contest the Probation Office's finding that his prior Michigan felonious assault conviction qualified as a crime of violence under Guidelines Section 4B1.2(1). Sent. Tr. 101. Petitioner did dispute whether his prior Colorado conviction qualified him for the career-offender sentencing enhancement, but the district court overruled the objection and determined that his Colorado second-degree burglary conviction involved a serious risk of potential injury within the terms of Guidelines § 4B1.2(1)(ii). Id. at 107. The court accordingly applied the career-offender enhancement. Ibid.

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 360 months of imprisonment. Sent. Tr. 113; Judgment 2.

The court of appeals affirmed. 1995 WL 390286. The court rejected petitioner's claim that the district court had erred in classifying his prior Colorado burglary conviction as a crime of violence for purposes of the career-offender enhancement in Sentencing Guidelines § 4B1.1. Id. at *7. The court agreed that

the Colorado offense "was a crime of violence because it 'otherwise involves conduct that presents a serious potential risk of physical injury to another.'" Ibid. (quoting Guidelines § 4B1.2(1)(ii) (1993)).

3. In 1996, petitioner filed his first motion to vacate his sentence under 28 U.S.C. 2255. D. Ct. Doc. 319 (Nov. 27, 1996). The district court denied petitioner's motion, but granted a COA. D. Ct. Doc. 383 (Mar. 31, 1998). The court of appeals affirmed. 1999 WL 1206903.

4. 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. See 28 U.S.C. 2255(h). The court of appeals granted authorization. D. Ct. Doc. 619. Petitioner subsequently filed a Section 2255 motion in the district court, arguing that application of the career-offender guideline in his case had rested on the clause in former Sentencing Guidelines § 4B1.2(1) (1993) 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. D. Ct. Doc. 626, at 4-8 (Mar. 29, 2016). Petitioner further argued that his motion was timely under 28 U.S.C. 2255(f)(3). D. Ct. Doc. 626, at 11. 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), and he argued that the same reasoning should apply to Guidelines cases on collateral review. D. Ct. Doc. 626, at 12-25.

The district court denied relief. Pet. App. B. The court observed that, as a second or successive collateral attack, petitioner's motion was subject to special limitations. Id. at 3. The court then surveyed the relevant precedent, including this Court's holding in Beckles v. United States, 137 S. Ct. 886 (2017), that the advisory Sentencing Guidelines are not subject to vagueness challenges under the Due Process Clause. Pet. App. B2-B5. The court determined that it "should not today announce that Johnson applies retroactively to collateral cases challenging federal sentencing enhancements under [Guidelines] § 4B1.2(a)(2) -- even if the case arose during a 'mandatory' regime -- when the anti-derivative question of whether Johnson even touched any guideline remains an 'open question' before the Supreme Court."

Pet. App. B5 (quoting Beckles, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring in the judgment)). The court did, however, grant petitioner a COA. Pet. App. B7-B8.

5. The court of appeals affirmed in an unpublished order. Pet. App. A. The court stated that, to be entitled to relief on a second or successive motion under 28 U.S.C. 2255, petitioner must "show[ ] that [his] claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Pet. App. A2 (citing 28 U.S.C. 2244(b)(4)); see 28 U.S.C. 2255(h). The court held that "[t]he district court properly dismissed [petitioner's] motion to vacate because Johnson did not announce a new, retroactive rule of constitutional law that invalidated the residual clause in § 4B1.2 of the mandatory sentencing guidelines." Pet. App. A2 (citing Raybon v. United States, 867 F.3d 625, 630 (6th Cir. 2017), cert. denied, 2018 WL 2184984 (June 18, 2018) (No. 17-8878)).

ARGUMENT

Petitioner contends (Pet. 11-22) that this Court should grant review to consider whether his Section 2255 motion was timely. Review on that issue is not warranted, because petitioner's motion was not denied on that ground. In any event, petitioner is not entitled to relief on his claim that the residual clause in former United States Sentencing Guidelines § 4B1.2(1) (1993), as applied to petitioner in the context of the formerly binding Guidelines

regime, was unconstitutionally vague in light of Johnson v. United States, 135 S. Ct. 2551 (2015). This Court has recently denied certiorari to multiple petitions raising similar issues, including the circuit precedent on which the court of appeals relied here. See Raybon v. United States, 2018 WL 2184984 (June 18, 2018) (No. 17-8878); see also Lester v. United States, 138 S. Ct. 2030 (May 21, 2018) (No. 17-1366); Allen v. United States, 138 S. Ct. 2024 (May 21, 2018) (No. 17-5684); Gates v. United States, 138 S. Ct. 2024 (May 21, 2018) (No. 17-6262); James v. United States, 138 S. Ct. 2024 (May 21, 2018) (No. 17-6769); Robinson v. United States, 138 S. Ct. 2025 (May 21, 2018) (No. 17-6877); Miller v. United States, 2018 WL 706455 (June 11, 2018) (No. 17-7635); Sublett v. United States, 2018 WL 2364840 (June 25, 2018) (No. 17-9049). The Court should follow the same course in this case.[1]

1. As a threshold matter, the arguments in the petition -- which are directed at the timeliness of petitioner's Section 2255 motion -- do not address the actual ground on which the lower

---

[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); Gipson v. United States, No. 17-8637 (filed Apr. 17, 2018); Greer v. United States, No. 17-8775 (filed May 1, 2018); Wilson v. United States, No. 17-8746 (filed May 1, 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).

courts denied relief. As petitioner acknowledges (Pet. 11), in order for his Section 2255 motion to be timely, he was required to file the motion within one year of "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, 356-357 (2005). As petitioner further acknowledges (Pet. 19), a second or successive Section 2255 motion like his is also subject to additional limitations under 28 U.S.C. 2255(h). Section 2255(h) incorporates by reference the procedures in 28 U.S.C. 2244, which require that even when a court of appeals has made a "prima facie" determination that an applicant may satisfy the prerequisites for a second-or-successive motion and has allowed such a motion to be filed, a legal claim in the motion "shall be dismissed" unless (as relevant here) "the applicant shows that the claim 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 (4); see 28 U.S.C. 2255(h) (incorporating Section 2244 procedures); 28 U.S.C. 2244(b)(3)(C). The lower courts relied on that requirement -- not the statute of limitations -- to deny relief here. See Pet. App. A2; Pet. App. B3-B7.

Although that limitation on a second or successive collateral attack is worded similarly to the statute of limitations under Section 2255(f)(3), petitioner himself (Pet. 19) views it as an

independent -- and more stringent -- requirement. He does not directly contend that he satisfies it, but instead emphasizes (ibid.) that his argument in this Court is directed only to the assertedly less-exacting timeliness bar. At a minimum, petitioner's failure directly to challenge the ground on which relief was denied makes this case an unsuitable candidate for further review.

2. In any event, the court of appeals correctly affirmed the district court's dismissal of petitioner's motion under 28 U.S.C. 2255 because this Court's decision in Johnson did not recognize a new retroactive right with respect to the formerly binding Sentencing Guidelines. Pet. App. A2. Petitioner errs in suggesting that this Court's decision in Johnson recognized a retroactive right for him to obtain relief from application of the Guidelines.

a. The court of appeals correctly determined that the right recognized in Johnson is not the right that petitioner asserts or relies on 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 petitioner's 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 contention (Pet. 17) that the "right" he now asserts and relies on is the same right initially recognized by this Court 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). The time bar in Section 2255(f) and the limitation on second or successive collateral attacks in Section 2244(b)(2) would lose force as important constraints on collateral review of federal sentences if defendants were permitted to invoke Section 2255(f)(3) and Section 2244(b)(2)(A) any time they could plausibly ask that a lower court extend one of this Court's recent precedents.

The Court's recent decision in Beckles v. United States, 137 S. Ct. 886 (2017), makes clear that any extension of Johnson to petitioner's case would in fact be a new rule. As petitioner acknowledges (e.g., Pet. 20-21), this Court held in Beckles that the career-offender guideline's residual clause is not unconstitutionally vague in the context of the advisory Sentencing Guidelines. See 137 S. Ct. at 890. This Court did not decide in Beckles whether that clause would be unconstitutionally vague in the context of binding Guidelines. 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). Because that question remains open after Beckles, the right petitioner asserts was not "recognized" by the Court's earlier decision in Johnson, as required by 28 U.S.C 2255(f)(3), and petitioner also cannot "rel[y] on" Johnson as a "new rule" that would bring his claim within 28 U.S.C. 2244(b)(2)(A). Petitioner thus cannot use Johnson to render his challenge to the application of the career-offender guideline timely or to render himself eligible for relief on a second or successive motion.

b. In any event, even assuming the Court had announced a new rule as petitioner contends, it would not be one of the two types of new rules that this Court has made retroactive to cases on collateral review. See 28 U.S.C. 2255(f)(3); 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"); see also 28 U.S.C. 2244(b)(2)(A); Tyler v. Cain, 533 U.S. 656, 662-667 (2001) (describing the retroactivity requirement in Section 2244(b)(2)(A)).

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 binding 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 binding federal Sentencing Guidelines, courts had authority to depart from the prescribed range in exceptional cases, see Sentencing Guidelines § 5K2.0 (1993); see also id.

§ 4A1.3 (1993) (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 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) (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 a non-substantive, non-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.

2. In addition to the court below, the Fourth and Tenth Circuits have denied relief in circumstances analogous 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 binding Guidelines timely under 28 U.S.C. 2255(f)(3). See United States v. Brown, 868 F.3d 297, 303 (4th Cir. 2017), petition for cert. pending, No. 17-9276 (filed May 29, 2018); United States v. Greer, 881 F.3d 1241, 1248-1249 (10th Cir. 2018), petition for cert. pending, No. 17-8775 (filed May 1, 2018). And the Eleventh Circuit has recognized that the formerly binding Guidelines are meaningfully different from the ACCA for purposes of a vagueness claim under the Due Process Clause. See In re Griffin, 823 F.3d 1350, 1354 (2016); see also Upshaw v. United States, No. 17-15742, 2018 WL 3090420 (11th Cir. June 22, 2018).

The Seventh Circuit, by contrast, has recently ordered resentencing for defendants who collaterally attacked their sentences for the first time within one year of Johnson and who argued that the residual clause of the career-offender guideline

was unconstitutionally vague as applied to them in the context of binding Guidelines. See Cross v. United States, 892 F.3d 288, 293-294, 299-307 (2018). The Seventh Circuit did not, however, address the particular requirements for relief on a second or successive collateral attack. And the government has filed a petition for rehearing en banc in Cross urging the full Seventh Circuit to bring its precedent into uniformity with that of the other circuits that have addressed the issue, so the disagreement may soon resolve itself without the need for this Court's intervention. In any event, the disagreement is both recent and shallow and does not warrant this Court's intervention in this case -- particularly given that the question petitioner presents here does not directly implicate the reasoning of the courts below in denying relief.[2]

---

[2] Petitioner notes (Pet. 13) that the First and Third Circuits have granted applications to file second or successive motions under 28 U.S.C. 2255(h)(2) challenging binding Guidelines sentences under Johnson. Moore v. United States, 871 F.3d 72, 80-84 (1st Cir. 2017) (stating that the court was "not sufficiently convinced" by decisions of the Fourth and Sixth Circuit concluding that such claims are untimely); In re Hoffner, 870 F.3d 301, 302-303 (3d Cir. 2017). Those rulings, like the similar authorization in petitioner's case here or in cases in the Second Circuit, do not reflect settled circuit law on the issue. See Vargas v. United States, No. 16-2112, 2017 WL 3699225, at *1 (2d Cir. May 8, 2017). As petitioner's own case shows, such a preliminary ruling will be subject to further examination as the case proceeds. See Moore, 871 F.3d at 84; Hoffner, 870 F.3d at 307-308; Vargas, 2017 WL 3699225, at *1. Indeed, on remand in Hoffner, the district court correctly determined that the movant's claim relied on a "new rule" of law that this Court had not recognized in Johnson. See 289 F. Supp. 3d 658, 662-663 (E.D. Pa. 2018). Petitioner also cites district court decisions (Pet. 14-15)

Furthermore, the disagreement on the question presented is of substantially more limited importance than petitioner suggests (Pet. 21-22), and its relevance is diminishing. Booker is now more than a decade old, and claims involving binding career-offender sentences are decreasing in frequency. The specific question presented is relevant only to a now-closed set of cases in which a Section 2255 motion was filed within one year of Johnson. And even within that subset, many defendants who received a career-offender enhancement under the binding Guidelines could have been deemed qualified for that enhancement irrespective of the residual clause, and thus would not be entitled to resentencing. See, e.g., Br. in Opp. at 17-18, Miller v. United States, No. 17-7635 (May 4, 2018).

---

applying Johnson to the binding Guidelines, but those decisions do not create a conflict warranting this Court's review. See Sup. Ct. R. 10(a).

## CONCLUSION

The petition for a writ of certiorari should denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN BENCZKOWSKI
Assistant Attorney General

DAVID M. LIEBERMAN
Attorney

JULY 2018