No. 17-9400

IN THE SUPREME COURT OF THE UNITED STATES

TERRANCE SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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Petitioner contends (Pet. 11-32) that the court of appeals erred in denying a certificate of appealability on his claim, which he brought in a motion under 28 U.S.C. 2255, that the residual clause in Section 4B1.2(a)(2) (2003) of the previously binding federal Sentencing Guidelines is void for vagueness under Johnson v. United States, 135 S. Ct. 2551 (2015). For reasons similar to those explained on pages 9 to 16 of the government's brief in opposition to the petition for a writ of certiorari in Gipson v. United States, No. 17-8637 (filed Apr. 17, 2018), that contention

does not warrant this Court's review.[1] This Court has recently and repeatedly denied review of other petitions presenting 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, 138 S. Ct. 2622 (2018) (No. 17-7635); Raybon v. United States, 138 S. Ct. 2661 (2018) (No. 17-8878); Sublett v. United States, 138 S. Ct. 2693 (2018) (No. 17-9049). The same result is warranted here.[2]

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[1] We have served petitioner with a copy of the government's brief in opposition in Gipson. As noted below, see pp. 5, infra, the legal backdrop of petitioner's claim is not identical to that of the petitioners in Gipson, because his sentencing was subject to more stringent limitations on Guidelines departures that were adopted after the sentencings in Gipson. But as in Gipson, the Guidelines at the time of petitioner's sentencing did not set forth absolute boundaries for a lawful sentence, and petitioner received a sentence within the applicable and unchallenged statutory range.

[2] 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); Wilson v. United States, No. 17-8746 (filed May 1, 2018); Greer v. United States, No. 17-8775 (filed May 1, 2018); Homrich v. United States, No. 17-9045 (filed May 7, 2018); Brown v. United States, No. 17-9276 (filed May 29, 2018); Chubb v. United States, No. 17-9379 (filed June 6, 2018); Buckner v. United States, No. 17-9411 (filed June 11, 2018); Lewis v. United States, No. 17-9490 (filed June 20, 2018); Garrett v. United States, No. 18-5422 (filed July 30, 2018); Posey v. United States, No. 18-5504 (filed Aug. 6, 2018); Kenner v. United States, No. 18-5549 (filed Aug. 8, 2018).

As the district court correctly determined, petitioner's motion under 28 U.S.C. 2255 was not timely, because 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); see also United States v. Green, No. 17-2906, --- F.3d ---, 2018 WL 3717064, at *5-*6 (3d Cir. Aug. 6, 2018) (holding that a challenge to the residual clause of the formerly binding career-offender guideline was untimely under Section 2255(f)(3)). 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). The government's petition for rehearing en banc in the one circuit that has taken petitioner's view remains pending, and since that petition was filed, the Third Circuit has adopted the majority view that a defendant like petitioner is not entitled to collaterally attack his sentence based on Johnson. See Green, 2018 WL 3717064, at *5 (stating that the court was "not persuaded by the [Seventh Circuit's] brief analysis on this issue").

In any event, this case would be an unsuitable vehicle for addressing the question presented for multiple reasons.

First, petitioner's motion for collateral relief was not his first collateral attack, see Pet. App. 4a, and it was therefore subject to additional limitations. See 28 U.S.C. 2255(h); 28 U.S.C. 2244(b)(2)(A) and (4). The limitation on second or successive collateral attacks in Section 2244(b)(2)(A) 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 Br. in Opp. at 18-19, Gipson, supra (No. 17-8637).

Second, 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 two prior convictions for aggravated assault in Arizona. See Presentence Investigation Report ¶¶ 64, 68. At the time petitioner was sentenced pursuant to the 2003 Sentencing Guidelines, the official commentary to Guidelines Section 4B1.2 expressly stated that a "'[c]rime of violence' includes * * * aggravated assault." Sentencing Guidelines § 4B1.2, comment. (n.1) (2003). Petitioner therefore cannot establish that the residual clause of Sentencing Guidelines Section 4B1.2 was

unconstitutionally vague as applied to him. See Br. in Opp. at 17-18, Gipson, supra (No. 17-8637).[3]

Finally, petitioner's sentencing postdated enactment of the PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650, on April 30, 2003, which altered the requirements for district courts to depart from the proscribed Sentencing Guidelines range. See § 401, 117 Stat. 667-676; Pet. App. 4a (noting that petitioner was sentenced on October 15, 2003). Further review of petitioner's claim would therefore directly concern only defendants who were sentenced during the less-than-two-year period between the PROTECT Act and this Court's decision in United States v. Booker, 543 U.S. 220 (2005), which held binding application of the Guidelines to be unconstitutional.

[3] In the district court, the government did not rely on the opinions of Justices Ginsburg and Sotomayor in Beckles v. United States, 137 S. Ct. 886 (2017), 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").

The petition for a writ of certiorari should be denied.[4]

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

AUGUST 2018

[4] The government waives any further response to the petition unless this Court requests otherwise.