No. 17-9490

IN THE SUPREME COURT OF THE UNITED STATES

PAUL LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (Pet. 9-29) that the court of appeals erred in denying relief 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) (1997) of the previously mandatory United States Sentencing Guidelines is void for vagueness under Johnson v. United States, 135 S. Ct. 2551 (2015). For the reasons 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]

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

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

[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); Smith v. United States, No. 17-9400 (filed June 13, 2018); Buckner v. United States, No. 17-9411 (filed June 11, 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).

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 questions presented for multiple independent reasons.

First, 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 robbery with a firearm and aggravated assault with a firearm in Florida. See Presentence Investigation Report ¶¶ 33, 37, 41. At the time petitioner was sentenced pursuant to the 1997 Sentencing Guidelines, the official commentary to Guidelines Section 4B1.2 expressly stated that a "'[c]rime of violence' includes * * * aggravated assault, [and] * * * robbery." Sentencing Guidelines § 4B1.2, comment. (n.1) (1997); see also United States v. Lockley, 632 F.3d 1238, 1241-1244 (11th Cir.) (holding that a conviction for attempted robbery in Florida qualifies as a "crime of violence" because robbery is an enumerated offense in the Guidelines commentary), cert. denied, 565 U.S. 885 (2011). 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).

Second, and alternatively, petitioner's prior convictions for robbery with a firearm and aggravated assault with a firearm qualified him for the career-offender enhancement in Guidelines Section 4B1.2 irrespective of the residual clause, because those prior offenses "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another." Sentencing Guidelines § 4B1.2(a)(1) (1997); see also, e.g., United States v. Golden, 854 F.3d 1256, 1256-1257 (11th Cir.) (per curiam) (Florida aggravated assault qualifies as a "crime of violence" under Sentencing Guidelines § 4B1.2(a)(1)), cert. denied, 138

S. Ct. 197 (2017); United States v. Fritts, 841 F.3d 937, 940-945 (11th Cir. 2016) (Florida armed robbery qualifies as a "violent felony" under identically worded language in the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e)(2)(B)(i)), cert. denied, 137 S. Ct. 2264 (2017).[3]

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

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

AUGUST 2018

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[3] This Court has granted certiorari to review whether a defendant's prior conviction for Florida robbery qualifies as a "violent felony" under the ACCA. See Stokeling v. United States, cert. granted, 138 S. Ct. 1438, No. 17-5554 (oral argument scheduled for Oct. 9, 2018).

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

No. 17-8637

IN THE SUPREME COURT OF THE UNITED STATES

BOBBY JO GIPSON, 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

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QUESTION PRESENTED

Whether the court of appeals erred in determining that petitioners were not entitled to collateral relief on their 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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_____

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A, B) are not published in the Federal Reporter but are reprinted at 710 Fed. Appx. 696 and 710 Fed. Appx. 697.[1]

JURISDICTION

The judgments of the court of appeals were entered on February 7, 2018. The petition for a writ of certiorari was filed on April

[1] Pursuant to this Court's Rule 12.4, petitioners are Bobby Jo Gipson and Keith Walker, who received separate judgments from the same court of appeals presenting closely related questions. See Pet. 1 n.1.

17, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following jury trials in separate proceedings before the United States District Court for the Western District of Tennessee, petitioners were convicted of federal offenses. The district court sentenced petitioner Bobby Jo Gipson to 234 months of imprisonment, 97-cr-20211 Judgment 2, and petitioner Keith Walker to 432 months of imprisonment, 95-cr-20211 Judgment 2. The court of appeals affirmed. 182 F.3d 919, cert. denied, 528 U.S. 1033; 181 F.3d 774, cert. denied, 528 U.S. 980.

In 2016, Gipson filed a motion to vacate his sentence under 28 U.S.C. 2255. 13-cv-2823 D. Ct. Doc. 12 (Apr. 4, 2016). The district court denied relief, but granted a certificate of appealability (COA). 13-cv-2823 D. Ct. Doc. 22 (Mar. 16, 2017). The court of appeals affirmed. Pet. App. A.

In 2000, Walker filed an unsuccessful motion collaterally attacking his sentence under 28 U.S.C. 2255. See 17-5500 Gov't C.A. Br. 4. In 2016, the court of appeals granted Walker authorization to file a second or successive motion to vacate his sentence under Section 2255. 16-cv-2429 D. Ct. Doc. 6 (Sept. 6, 2016). The district court subsequently denied Walker's motion, but granted a COA. 16-cv-2429 D. Ct. Doc. 12 (Apr. 11, 2017). The court of appeals affirmed. Pet. App. B.

1. Petitioners were arrested, tried, and found guilty of separate offenses in the Western District of Tennessee.

a. In 1997, petitioner Gipson robbed the First Tennessee Bank in Memphis. Upon reaching the teller, Gipson said "give me the money" and held out a dark nylon bag. Gipson Presentence Investigation Report (PSR) ¶¶ 4-5. Gipson eventually fled the bank with $3570.73 in cash, along with a dye pack that exploded in the parking lot. Gipson PSR ¶¶ 6, 10. Police traced the getaway car to Gipson's residence and arrested him several days later. Gipson PSR ¶¶ 7-9. A search of Gipson's person revealed several $1 bills with dye stains. Gipson PSR ¶ 9.

A jury subsequently found Gipson guilty of bank robbery, in violation of 18 U.S.C. 2113(a). Gipson PSR ¶ 3.

b. In 1995, while executing a search warrant at a home in Memphis, law enforcement officers patted down each occupant, including petitioner Walker. Walker PSR ¶ 5. During this process, the officer noticed a bulge in Walker's pants, which the officer believed to be drugs. Ibid. Officers searched that area and recovered 5 grams of cocaine base (crack cocaine). Ibid. Officers then traveled to Walker's residence and obtained consent to search the premises from Walker's father. Officers recovered 155 grams of crack cocaine and $4400 cash from Walker's bedroom. Ibid.

A jury subsequently found Walker guilty on two counts of possessing with intent to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1). Walker PSR ¶¶ 2-4.

2. The Probation Office determined that each petitioner qualified as a career offender under Sentencing Guidelines § 4B1.1. Gipson PSR ¶¶ 14, 23; Walker PSR ¶¶ 9, 18.[2] 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 (1995 & 1997). The phrase "crime of violence" was defined in Sentencing Guidelines § 4B1.2 (1995 & 1997) 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."

a. In recommending the career-offender enhancement for Gipson, the Probation Office cited his two prior Arizona convictions for attempted burglary of a residence. Gipson PSR ¶ 23; see id. ¶¶ 26, 30 (stating that Gipson burglarized an apartment on each occasion). With the enhancement, Gipson's offense level was 32 and criminal history category was VI,

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[2] The 1997 edition of the Guidelines was used to calculate Gipson's sentence. Gipson PSR ¶ 14. The 1995 edition of the Guidelines was used to calculate Walker's sentence. Walker PSR ¶ 9.

resulting in a Sentencing Guidelines range of 210 to 240 months of imprisonment. Gipson PSR ¶ 80.

Because Gipson'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 district court sentenced Gipson to 234 months of imprisonment. 97-cr-20211 Judgment 2. The court of appeals affirmed. 182 F.3d 919. This Court denied certiorari. 528 U.S. 1033.

b. In recommending the career-offender enhancement for Walker, the Probation Office cited his prior Tennessee convictions for criminal negligent homicide and solicitation to commit aggravated robbery. Walker PSR ¶ 18; see id. ¶¶ 29, 34. With the enhancement, Walker's offense level was 37 and criminal history category was VI, resulting in a Sentencing Guidelines range of 360 months to life imprisonment. Walker PSR ¶ 59.

Walker's sentencing also predated this Court's decision in Booker, supra. The district court sentenced Walker to 432 months of imprisonment. 95-cr-20211 Judgment 2. The court of appeals affirmed. 181 F.3d 774. This Court denied certiorari. 528 U.S. 980.

In 2000, Walker filed his first motion to vacate his sentence under 28 U.S.C. 2255. See 17-5500 Gov't C.A. Br. 4. The district

court denied Walker's motion and declined a COA. Ibid. The court of appeals similarly denied a COA. Ibid.

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). Petitioners subsequently filed motions for collateral relief under 28 U.S.C. 2255, asserting that Johnson required vacatur of their non-ACCA sentences.

a. Gipson filed his Section 2255 motion in 2016. He argued that application of the career-offender guideline in his case had rested on the clause in former Sentencing Guidelines § 4B1.2 (1997) 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. 13-cv-2823 D. Ct. Doc. 12-1, at 3-5. Gipson further contended that Johnson applies retroactively to cases on collateral review. Id. at 8-18.

The district court denied relief. Citing this Court's decision in Beckles v. United States, 137 S. Ct. 886 (2017), the district court determined that the "Sentencing Guidelines are not subject to a vagueness challenge under the Due Process Clause, and that the residual clause in [Guidelines] § 4B1.2(a)(2) therefore

is not void for vagueness." 13-cv-2823 D. Ct. Doc. 22, at 2. The court did, however, grant a COA. Id. at 3.

b. In 2016, Walker 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 that application. See 17-5500 Gov't C.A. Br. 6. Walker then filed his Section 2255 motion, arguing (like Gipson) that his sentence was invalid under the logic of Johnson. 16-cv-2429 D. Ct. Doc. 1-2, at 2-11 (June 16, 2016).

The district court denied relief, citing Beckles and providing the same explanation as it had in Gipson's case. 16-cv-2429 D. Ct. Doc. 12, at 2. The court did grant a COA. Id. at 3.

4. The court of appeals affirmed in largely identical unpublished decisions, finding petitioners' Section 2255 motions untimely. Pet. App. A, B. The court observed that both petitioners had filed their claims "in the context of a [Section] 2255 motion," meaning that their "motion[s] [are] untimely unless Johnson recognized a new right that applies retroactively to [them] on collateral review." Pet. App. A2, B2. The court cited 28 U.S.C. 2255(f)(3), which authorizes the filing of a Section 2255 motion outside the normal statute of limitations if the otherwise-untimely filing is filed within one year of "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." See Pet. App. A2, B2. The court of appeals explained that, because "Johnson dealt only with the Armed Career Criminal Act, not with the Guidelines," that decision does not provide "a 'right' that 'has been newly recognized by the Supreme Court' let alone one that was 'made retroactively applicable to cases on collateral review'" for "defendants sentenced under the Guidelines' residual clause -- even when that clause was mandatory." Ibid. (quoting Raybon v. United States, 867 F.3d 625, 630 (6th Cir. 2017), cert. denied, 2018 WL 2184984 (June 18, 2018) (No. 17-8878)).

ARGUMENT

Petitioners contend (Pet. 16-31) that this Court should grant review to consider whether the residual clause in former Sentencing Guidelines § 4B1.2 (1995 & 1997), as applied to petitioners 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' decisions denying relief on petitioners' Section 2255 motions were correct, and this Court has recently denied certiorari to multiple petitions raising similar issues. See 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); 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.[3] Although a disagreement on the question presented exists in the circuits, the disagreement is shallow, of substantially more limited importance than petitioners suggest, and may soon resolve itself without the need for this Court's intervention. Moreover, petitioners' cases would be unsuitable vehicles for addressing the question presented, because the career-offender guideline was not unconstitutionally vague as applied to Gipson, and because Walker's entitlement to relief would depend not only on the timeliness of his motion, but also on his ability to satisfy the particular requirements of a second or successive collateral attack.

1. The court of appeals correctly determined that petitioners' Section 2255 motions were not timely. Pet. App. A2, B2. The one-year period for filing a Section 2255 motion runs

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[3] 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).

from the latest of four dates. See 28 U.S.C. 2255(f). The limitations period on which petitioners 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, 356-357 (2005). Petitioners err in suggesting that this Court's decision in Johnson recognized a retroactive right for them to obtain relief from application of the Sentencing Guidelines.

a. The court of appeals correctly determined that the right recognized in Johnson is not the right that petitioners assert 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 petitioners' cases, 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.

Petitioners' contention (Pet. 22) that the "right" they now assert 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) would lose force as an important procedural constraint on collateral review of federal sentences if defendants were permitted to invoke Section 2255(f)(3) any time they could plausibly ask that a lower court extend one of this Court's recent precedents.

The collateral-review decisions on which petitioners rely (Pet. 24-28), which involved different rules and different contexts, do not show that the particular rule in Johnson would apply here. To the contrary, the Court's recent decision in Beckles v. United States, 137 S. Ct. 886 (2017), makes clear that any extension of Johnson to petitioners' cases would in fact be a new rule. As petitioners acknowledge (e.g., Pet. 14), 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 petitioners assert was not "recognized" by the Court's earlier decision in Johnson, as required by 28 U.S.C 2255(f)(3), and thus petitioners cannot rely on Johnson to render their challenge to the application of the career-offender guideline timely.

b. In any event, even assuming the Court had announced a new rule as petitioners contend, 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, petitioners' 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, petitioners could not have received "a punishment that the law cannot impose," ibid., because they were sentenced within the applicable statutory range for their offenses.

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 (1995 & 1997); see also id. § 4A1.3 (1995 & 1997) (criminal history departures), and until the passage of the PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650, in 2003 (which postdated petitioners' sentencings), 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 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 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 government has, however, 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. The disagreement may therefore 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.[4]

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[4] Petitioners acknowledge (Pet. 16) that "no[ ] * * * direct circuit conflict" exists between the majority view and the First Circuit's grant of authorization to file a second or successive motion under 28 U.S.C. 2255(h) challenging a binding

The narrow disagreement is also of substantially more limited importance than petitioners suggest (Pet. 17 & n.6), 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 particular 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 formerly 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).

Guidelines sentence 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). That ruling, like the similar authorizations in petitioner Walker's case here, or in cases in the Second and Third Circuits, does not reflect settled circuit law on the issue. See In re Hoffner, 870 F.3d 301, 302-303 (3d Cir. 2017); Vargas v. United States, No. 16-2112, 2017 WL 3699225, at *1 (2d Cir. May 8, 2017). As Walker's own case shows, such a preliminary ruling is 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). Petitioners also cite district court decisions (Pet. 19, 31) 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).

3. Petitioners' cases, moreover, illustrate other obstacles to relief that are also present in many cases raising this issue.

a. 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 Gipson, who had multiple prior convictions for attempted residential burglary in Arizona. See Gipson PSR ¶¶ 23, 26, 30. When Gipson was sentenced, the official commentary to the career-offender guideline expressly stated that a "'[c]rime of violence' includes * * * burglary of a dwelling." Sentencing Guidelines § 4B1.2, comment. (n.1) (1997). As Justice Ginsburg explained in her concurring opinion in Beckles, "because [the defendant's] conduct was 'clearly proscribed'" in light of the Guidelines commentary, he "'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]

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[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 Gipson. 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

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 Gipson. 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.

b. Petitioner Walker'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 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 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 Walker'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.

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response to the petition for certiorari and at the beginning of its brief on the merits").

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)); p. 15 n.4, supra.

CONCLUSION

The petition for a writ of certiorari should denied.

Respectfully submitted.

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