No. 18-5422

IN THE SUPREME COURT OF THE UNITED STATES

DEDRICK T. GARRETT, 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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Petitioner contends (Pet. 8-28) that the court of appeals erred in denying a certificate of appealability (COA) 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 binding federal Sentencing Guidelines is void for vagueness under Johnson v. United States, 135 S. Ct. 2551 (2015). For the 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 (July 25, 2018), cert. denied, (Oct. 15, 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, e.g., Molette v. United States, No. 17-8368 (Oct. 15, 2018); Wilson v. United States, No. 17-8746 (Oct. 15, 2018); Greer v. United States, No. 17-8775 (Oct. 15, 2018); Homrich v. United States, No. 17-9045 (Oct. 15, 2018); Brown v. United States, No. 17-9276 (Oct. 15, 2018); Chubb v. United States, No. 17-9379 (Oct. 15, 2018); Smith v. United States, No. 17-9400 (Oct. 15, 2018); Buckner v. United States, No. 17-9411 (Oct. 15, 2018); Lewis v. United States, No. 17-9490 (Oct. 15, 2018). The same result is warranted here.[2]

As the district court correctly determined (Pet. App. B3), 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 because 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). Nearly every court of

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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); Posey v. United States, No. 18-5504 (filed Aug. 6, 2018); Swain v. United States, No. 18-5674 (filed Aug. 7, 2018); Kenner v. United States, No. 18-5549 (filed Aug. 8, 2018); Allen v. United States, No. 18-5939 (filed Aug. 20, 2018).

appeals to address the issue has determined that a defendant like petitioner is not entitled to collaterally attack his sentence. See United States v. Blackstone, 903 F.3d 1020, 1026-1028 (9th Cir. 2018) (holding that a challenge to the residual clause of the formerly binding career-offender guideline was untimely under Section 2255(f)(3)); Russo v. United States, 902 F.3d 880, 883-884 (8th Cir. 2018) (same); United States v. Green, 898 F.3d 315, 322-323 (3d Cir. 2018) (same); United States v. Greer, 881 F.3d 1241, 1248-1249 (10th Cir. 2018), cert. denied, No. 17-8775 (Oct. 15, 2018); United States v. Brown, 868 F.3d 297, 303 (4th Cir. 2017), cert. denied, No. 17-9276 (Oct. 15, 2018); Raybon v. United States, 867 F.3d 625, 629 (6th Cir. 2017), cert. denied, 138 S. Ct. 2661 (2018); see also Upshaw v. United States, No. 17-15742, 2018 WL 3090420, at *3 (11th Cir. June 22, 2018) (per curiam). Only the Seventh Circuit has concluded otherwise. See Cross v. United States, 892 F.3d 288, 293-294, 299-307 (2018). But that shallow conflict -- on an issue as to which few claimants would be entitled to relief on the merits, see Br. in Opp. at 16, Gipson, supra (No. 17-8637); p. 4, infra -- does not warrant this Court's review, and this Court has previously declined to review it. See p. 2, supra.

In any event, this case would be an unsuitable vehicle for addressing the question presented because 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 under Florida law for kidnapping and delivery of cocaine. Presentence Investigation Report ¶ 22. Petitioner does not challenge the constitutionality of classifying his drug conviction as a drug-trafficking offense under the career-offender guideline. Pet. 6 n.3. And with respect to his kidnapping conviction, 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 * * * kidnapping." Sentencing Guidelines § 4B1.2, comment. (n.1) (1997); see also In re Burgest, 829 F.3d 1285, 1287 (11th Cir. 2016) (holding that the defendant was properly classified as a career offender based on, inter alia, his prior conviction for kidnapping in Florida, because "[t]he commentary to section 4B1.2 states that '"crime of violence" includes * * * kidnapping'"). 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]

[3] In the district court, the government did not argue that the career-offender guideline was not unconstitutionally vague as applied to petitioner. The court of appeals then denied petitioner's application for a COA without a responsive pleading from the government. 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 a writ of certiorari should be denied.[4]

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

OCTOBER 2018

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

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