No. 18-5549

IN THE SUPREME COURT OF THE UNITED STATES

PHILLIP ANTHONY KENNER, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 2-4) 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(1)(ii) (1995) 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 (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 court of appeals correctly determined (Pet. App. A, at 3-4), 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 provide petitioner with a new window for filing his claim. See 28 U.S.C. 2255(f)(1) and (3); Br. in Opp. at 9-14, Gipson, supra

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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 raise similar issues. See Cottman v. United States, No. 17-7563 (filed Jan. 22, 2018); Garrett v. United States, No. 18-5422 (filed July 30, 2018); Posey v. United States, No. 18-5504 (filed Aug. 6, 2018); Swain v. United States, No. 18-5674 (filed Aug. 7, 2018); Allen v. United States, No. 18-5939 (filed Aug. 20, 2018).

(No. 17-8637). Nearly every court of 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. 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); pp. 4-5, 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 were deemed unconstitutionally vague in some applications, it was not vague as applied to petitioner.

Petitioner acknowledges (Pet. 2) that, at the time of his sentencing, he had multiple prior convictions for "crime[s] of violence," but he argues (Pet. 2) that neither of his current offenses of conviction -- kidnapping in violation of 18 U.S.C. 1201(a)(1) (1994) and transporting a stolen vehicle in violation of 18 U.S.C. 2312 (1994) -- qualified as a "crime of violence." See Sentencing Guidelines § 4B1.1 (1995) (stating that the defendant is a career offender if, inter alia, "the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense"). Petitioner is incorrect. When petitioner was sentenced, the official commentary to the guideline expressly stated that a "'[c]rime of violence' includes * * * kidnapping." Sentencing Guidelines § 4B1.2, comment. (n.2) (1995). Therefore, in light of petitioner's kidnapping conviction, he 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]

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[3] In the district court, the government did not argue that the 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 certiorari and at the beginning of its brief on the merits").

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

Respectfully submitted.

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Counsel of Record

NOVEMBER 2018

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