No. 18-5674

IN THE SUPREME COURT OF THE UNITED STATES

ROGER CLAY SWAIN, 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. 14-27) 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) (2003) 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 court of appeals correctly determined (Pet. App. 14-16), 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

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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); 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); 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. 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 for two independent reasons.

First, petitioner's prior conviction in Michigan for assault with intent to rob while armed, Pet. 11 -- coupled with his

additional prior conviction in Michigan for possession with intent to deliver marijuana, ibid. -- qualified him for the career-offender enhancement in Guidelines Section 4B1.2 irrespective of the residual clause, because that prior assault offense "has as an element the use, attempted use, or threatened use of physical force against the person of another." Sentencing Guidelines § 4B1.2(a)(1) (2003). See United States v. Harris, 853 F.3d 318, 321-322 (6th Cir. 2017) (holding that "convictions for Michigan felonious assault amount to crimes of violence" under the elements clause in Guidelines Section 4B1.2(a)).

Second, petitioner's motion for collateral relief was not his first collateral attack, Pet. 13, 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).

The petition for a writ of certiorari should be denied.[3]

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

OCTOBER 2018

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