No. 18-5939

IN THE SUPREME COURT OF THE UNITED STATES

GARY MICHAEL ALLEN, 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

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Petitioner contends (Pet. 13-38) 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]

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 (No. 17-8637). Nearly every court of appeals to address the issue -- including the court of appeals below -- has determined that a

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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); Kenner v. United States, No. 18-5549 (filed Aug. 8, 2018).

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. 4-6, 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 three independent reasons.

First, even if the challenged language were deemed unconstitutionally vague in some applications, it was not vague as applied to petitioner, who had three prior convictions in Delaware

and Pennsylvania for robbery. Presentence Investigation Report (PSR) ¶¶ 34, 37, 39. At the time petitioner was sentenced pursuant to the 1995 Sentencing Guidelines, the official commentary to the guideline expressly stated that a "'[c]rime of violence' includes * * * robbery." Sentencing Guidelines § 4B1.2, comment. (n.2) (1995). Therefore, in light of petitioner's robbery convictions, 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. Instead, the government requested that the district court stay its resolution of petitioner's Section 2255 motion pending this Court's decision in Beckles v. United States, 137 S. Ct. 886 (2017). See Pet. 9. The district court responded by stating that it perceived the government to "impliedly conced[e]" that petitioner's predicate convictions for robbery could qualify as crimes of violence "only under [Guidelines] § 4B1.2(a)'s potentially invalid residual clause," because otherwise a stay would not be necessary. Pet. 9 (citation omitted). In response, the government clarified that it intended to preserve all arguments and defenses, but its primary submission was that petitioner's Section 2255 motion was premature. Ibid. After Beckles, the court denied petitioner's Section 2255 motion without further briefing, Pet. 10-11, and the court of appeals then denied petitioner's application for a COA without a responsive pleading from the government. Because the government clarified to the district court that it did not make a concession regarding petitioner's predicate robbery convictions, the government may 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").

Second, petitioner's other prior convictions for delivery of heroin in Delaware and possession with intent to distribute crack cocaine and marijuana in South Carolina, PSR ¶¶ 29, 46, qualified him for the career-offender enhancement in Guidelines Section 4B1.1 irrespective of Section 4B1.2's residual clause, because those prior drug offenses are "controlled substance offenses" within the meaning of the guideline. See Sentencing Guidelines § 4B1.2(2) (1995) ("The term 'controlled substance offense' means an offense under a federal or state law prohibiting the * * * distribution * * * of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to * * * distribute.").[4]

Third, petitioner's motion for collateral relief was not his first collateral attack, Pet. 5, 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

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[4] Petitioner states (Pet. 7) that the Probation Office "did not base the career offender designation on Petitioner having a 'controlled substance offense conviction.'" Petitioner's PSR stated that, "[s]ince * * * [petitioner] has at least two prior felony convictions of a crime of violence, he qualifies as a career offender." PSR ¶ 26. But that statement would not bar the government from arguing that, regardless of petitioner's robbery convictions, he was properly sentenced as a career offender in light of his prior drug convictions. See United States v. Leach, 724 Fed. Appx. 260, 261 (4th Cir. 2018) (declining to resolve the defendant's argument that his prior conviction did not qualify as a crime of violence under the career-offender guideline, because petitioner had other qualifying convictions, and sentencing errors are subject to harmless-error review).

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.[5]

Respectfully submitted.

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NOVEMBER 2018

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