No. 18-6375

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL WHISBY, 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

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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Petitioner contends (Pet. 9-28) 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(1)(ii) (1993) 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, 139 S. Ct. 373 (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., Swain v. United States, No. 18-5674 (Dec. 3, 2018); Garrett v. United States, No. 18-5422 (Dec. 3, 2018); 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

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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); 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); Upshaw v. United States, No. 18-6760 (filed Nov. 16, 2018).

(No. 17-8637). Nearly every court of appeals to address the issue -- including the court below -- 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.), cert. denied, 139 S. Ct. 374 (2018); United States v. Brown, 868 F.3d 297, 303 (4th Cir. 2017), cert. denied, 139 S. Ct. 14 (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, 739 Fed. Appx. 538, 541 (11th Cir. 2018) (per curiam), petition for cert. pending, No. 18-6760 (filed Nov. 16, 2018). 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, 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, who, at the time of his sentencing, had a prior conviction in Florida for robbery and kidnapping. Pet. App. 3b; see also Pet. 6.[3] At the time petitioner was sentenced pursuant to the 1993 Sentencing Guidelines, the official commentary to the guideline expressly stated that a "'[c]rime of violence' includes * * * kidnapping, [and] * * * robbery." Sentencing Guidelines § 4B1.2, comment. (n.2) (1993). Therefore, in light of petitioner's robbery and 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).[4]

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[3] Petitioner also had a prior conviction for possession with intent to sell cocaine. See Pet. App. 3b; Pet. 6. He does not dispute that the cocaine conviction would independently qualify as one of two prior felony convictions required to apply the career-offender enhancement in Guidelines Section 4B1.1, because it is a "controlled substance offense." See Sentencing Guidelines § 4B1.2(2) (1993) ("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] 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 Court should decline petitioner's request (Pet. 29) to hold his petition pending this Court's decision in Stokeling v. United States, No. 17-5554 (argued Oct. 9, 2018), which will address the question whether a conviction for robbery, in violation of Florida Statutes § 812.13, is a conviction for a "violent felony" under the elements clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e). The resolution of Stokeling will not affect the outcome of this case. Even assuming petitioner's kidnapping and robbery conviction were identical to simple robbery for purposes of the elements clause in the Sentencing Guidelines, § 4B1.2(1)(i) (1993), petitioner's entitlement to relief would still depend on the viability of his claim that the Guidelines' former residual clause -- under which he claims his conviction was classified -- is itself unconstitutionally vague. Accordingly, no independent reason exists to hold the petition pending the disposition of Stokeling.

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

The petition for a writ of certiorari should be denied.[5]

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

DECEMBER 2018

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