No. 19-5316

IN THE SUPREME COURT OF THE UNITED STATES

ABELEE BRONSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DAVID M. LIEBERMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in determining that petitioner was not entitled to collateral relief on his claim that Section 4B1.2(1) of the previously binding United States Sentencing Guidelines is void for vagueness under Johnson v. United States, 135 S. Ct. 2551 (2015).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Kan.):

United States v. Bronson, No. 88-cr-20075 (May 1, 2018)

Bronson v. United States, No. 16-cv-2459 (May 1, 2018)

United States Court of Appeals (10th Cir.):

United States v. Bronson, No. 18-3131 (May 6, 2019)

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter but is reprinted at 765 Fed. Appx. 434. The order of the district court (Pet. App. 3a-7a) is not published in the Federal Supplement but is available at 2018 WL 2020765.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 2019. The petition for a writ of certiorari was filed on July 19, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1989, following a jury trial in the United States District Court for the District of Kansas, petitioner was convicted on one count of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d) (1988). Pet. App. 3a. The district court sentenced petitioner to 262 months of imprisonment, to be followed by five years of supervised release. Ibid. The court of appeals affirmed. 907 F.2d 117. In 2016, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence. The district court dismissed petitioner's motion as untimely but granted his request for a certificate of appealability (COA). Pet. App. 3a-7a. The court of appeals affirmed. Id. at 1a-2a.

1. On August 19, 1988, petitioner and Scott Hazel entered the Federal Savings and Loan Association in Kansas City, Kansas. Presentence Investigation Report (PSR) ¶¶ 8, 10. Petitioner brandished a 9mm automatic pistol to keep the customers and employees under control. Ibid. Hazel then jumped into the teller areas and removed cash from the drawers. Ibid. After completing the robbery, petitioner and Hazel left the scene, exchanged cars, and split the proceeds. PSR ¶ 10. A total of approximately $6524 was taken from the bank. PSR ¶ 14.

A federal grand jury charged petitioner and Hazel with one count of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d) (1988). PSR ¶ 2. Hazel pleaded guilty. Ibid. A jury found petitioner guilty. PSR ¶ 5.

2. The Probation Office determined that petitioner qualified as a career offender under United States Sentencing Guidelines § 4B1.1 (1988). PSR ¶ 25. Under former Guidelines Section 4B1.1, a defendant was subject to a higher guidelines range as a "career offender" if (1) he was at least 18 years old at the time of the offense of conviction; (2) the offense of conviction was a felony that is a "crime of violence" or a "controlled substance offense"; and (3) he had at least two prior felony convictions for a "crime of violence" or a "controlled substance offense." Sentencing Guidelines § 4B1.1 (1988). The phrase "crime of violence" incorporated the definition in 18 U.S.C. 16 and, accordingly, included any felony offense that (a) "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or (b) "by its nature involves a substantial risk that physical force against the person or property of another may be used in committing the offense." Sentencing Guidelines § 4B1.2, comment. (n.1) (1988) (quoting 18 U.S.C. 16 (1988)).

In recommending the career-offender enhancement, the Probation Office stated that petitioner had three prior felony convictions in Missouri: an armed robbery conviction in 1978, and two burglary convictions in 1980. PSR ¶¶ 25, 27-29. The Probation Office calculated an offense level of 34 and a criminal history category of VI, resulting in a recommended sentencing range of 262 to 300 months of imprisonment. PSR ¶¶ 25, 31, 38. Without the

career-offender enhancement, petitioner's Guidelines range would have been 84 to 105 months of imprisonment. Pet. App. 3a.

Because petitioner's sentencing hearing predated this Court's decision in United States v. Booker, 543 U.S. 220 (2005), the district court was obligated to impose a sentence within petitioner's Guidelines range unless it found that exceptional circumstances justified a departure. See id. at 233-234. At sentencing, the court imposed a 262-month sentence, reflecting the low end of the recommended Guidelines range. Pet. App. 3a. The court of appeals affirmed. 907 F.2d 117.[1]

3. In 2015, this Court held in Johnson v. United States, 135 S. Ct. 2551, that the "residual clause" of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), is unconstitutionally vague. 135 S. Ct. at 2557. The ACCA's residual clause defines a "violent felony" to include an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii).

In 2016, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. He argued that application of the career-offender guideline in his case had rested on Sentencing Guidelines § 4B1.2(1) (1988), which borrowed its "crime of violence"

[1] Shortly after petitioner committed the crime at issue in this case, he committed an armed robbery of the United States Postal Savings Association in Kansas City, Missouri. See PSR ¶ 30. He was found guilty by a jury in the Western District of Missouri, and was sentenced to 262 months of imprisonment on that offense. See ibid. As a result, petitioner is continuing to serve his federal sentences.

definition from 18 U.S.C. 16(b), and that under Johnson, both Section 16(b) and the Guidelines clause were unconstitutionally vague. D. Ct. Doc. 98, at 4 (June 24, 2016). Petitioner also noted that Welch v. United States, 136 S. Ct. 1257 (2016), had held Johnson to be retroactive to cases on collateral review. D. Ct. Doc. 98, at 4.

The district court dismissed petitioner's motion as untimely. Pet. App. 3a-7a. The court cited the Tenth Circuit's previous decisions in United States v. Greer, 881 F.3d 1241, cert. denied, 139 S. Ct. 374 (2018), and United States v. Mulay, 725 Fed. Appx. 639 (2018), explaining that "Johnson does not apply to mandatory Guidelines cases on collateral review" because "the right recognized by the Supreme Court in Johnson * * * was limited to a defendant's right not to have his sentence increased under the residual clause of the ACCA." Pet. App. 4a. The district court therefore found that "[petitioner], who was sentenced under the mandatory Guidelines rather than the ACCA, has not invoked a 'right . . . newly recognized by the Supreme Court,'" as required for the Section 2255 motion to be timely under 28 U.S.C. 2255(f)(3). Pet. App. 5a (quoting 28 U.S.C. 2255(f)(3)). Section 2255(f)(3) authorizes a federal prisoner to file a Section 2255 motion within one year from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review."

The district court acknowledged this Court's recent decision in Sessions v. Dimaya, 138 S. Ct. 1204 (2018), which "applied the reasoning of Johnson to support a finding that the residual clause in a similarly worded statute, [18] U.S.C. § 16(b), was unconstitutionally vague." Pet. App. 4a. The district court reasoned, however, that "Dimaya does not contradict" the Tenth Circuit's decisions declining to extend Johnson to sentences under the mandatory Guidelines. Id. at 5a.

The district court issued a COA under 28 U.S.C. 2253(c)(2). Pet. App. 6a.

4. While petitioner's appeal was pending, the court of appeals reaffirmed that "Johnson did not create a new rule of constitutional law applicable to the mandatory Guidelines." United States v. Pullen, 913 F.3d 1270, 1284 (10th Cir. 2019), petition for cert. pending, No. 19-5219 (filed July 15, 2019). The court then issued a summary order in petitioner's case, affirming the district court's dismissal of his Section 2255 motion. Pet. App. 1a-2a.

ARGUMENT

Petitioner contends (Pet. 9-23) that the court of appeals erred in denying relief on his claim, which he brought in a motion under 28 U.S.C. 2255, that the language in Section 4B1.2(1) (1988) of the previously binding federal Sentencing Guidelines is void for vagueness under Johnson v. United States, 135 S. Ct. 2551 (2015). For the reasons 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.[2] This Court has recently and repeatedly denied review of other petitions presenting similar issues. See, e.g., Blackstone v. United States, 139 S. Ct. 2762 (2019) (No. 18-9368); Green v. United States, 139 S. Ct. 1590 (2019) (No. 18-8435); Cannady v. United States, 139 S. Ct. 1355 (2019) (No. 18-7783); Sterling v. United States, 139 S. Ct. 1277 (2019) (No. 18-7453); Allen v. United States, 139 S. Ct. 1231 (2019) (No. 18-7421); Bright v. United States, 139 S. Ct. 1204 (2019) (No. 18-7132); Whisby v. United States, 139 S. Ct. 940 (No. 18-6375) (2019); Jordan v. United States, 139 S. Ct. 653 (No. 18-6599) (2018). The same result is warranted here.[3]

1. The courts below correctly determined that 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

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[2] We have served petitioner with a copy of the government's brief in opposition in Gipson.

[3] Other pending petitions have raised similar issues. See Gadsden v. United States, No. 18-9506 (filed Apr. 18, 2019); Pullen v. United States, No. 19-5219 (filed July 15, 2019); Brigman v. United States, No. 19-5307 (filed July 22, 2019); Aguilar v. United States, No. 19-5315 (filed July 22, 2019).

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 below -- has determined that a defendant like petitioner is not entitled to use Johnson to collaterally attack his sentence. See United States v. Blackstone, 903 F.3d 1020, 1026-1028 (9th Cir. 2018) (determining that a challenge to the residual clause of the formerly binding career-offender guideline was untimely under Section 2255(f)(3)), cert. denied, 139 S. Ct. 2762 (2019); United States v. London, 937 F.3d 502, 506-509 (5th Cir. 2019) (same); Russo v. United States, 902 F.3d 880, 883-884 (8th Cir. 2018) (same), cert. denied, 139 S. Ct. 1297 (2019); United States v. Green, 898 F.3d 315, 322-323 (3d Cir. 2018) (same), cert. denied, 139 S. Ct. 1590 (2019); 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), cert denied, 139 S. Ct. 841 (2019). 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);

pp. 9-10, infra -- does not warrant this Court's review, and this Court has previously declined to review it. See p. 7, supra.

2. In any event, this case would be an unsuitable vehicle for addressing the question presented. First, even if the challenged language in the career offender guideline were deemed unconstitutionally vague in some applications, it was not vague as applied to petitioner, who, at the time of his sentencing, had two prior Missouri convictions for burglarizing a residence. PSR ¶¶ 28-29. At the time petitioner was sentenced pursuant to the 1988 Sentencing Guidelines, the relevant application note to the career-offender guideline expressly stated that a "[c]onviction for burglary of a dwelling would be covered" as a "'[c]rime of violence.'" Sentencing Guidelines § 4B1.2, comment. (n.1) (1988). Therefore, in light of petitioner's burglary convictions, he cannot establish that the challenged language in Sentencing Guidelines § 4B1.2(1) (1988) was unconstitutionally vague as applied to him. See Br. in Opp. at 17-18, Gipson, supra (No. 17-8637).

Moreover, this Court's conclusion that the language of 18 U.S.C. 16(b) is unconstitutionally vague relied on precedent that "required courts to use the categorical approach to determine whether an offense qualified as a crime of violence." United States v. Davis, 139 S. Ct. 2319, 2326 (2019). But that precedent did not exist in 1989, see ibid., and the relevant application note in the version of the Guidelines in effect when petitioner

was sentenced specified that even unlisted offenses would be covered under Section 16(b) as incorporated based on "the conduct for which the defendant was specifically convicted." Sentencing Guidelines § 4B1.2, comment. (n.1) (1988) (emphasis added). Such a circumstance-specific approach does not implicate constitutional vagueness concerns. See Davis, 139 S. Ct. at 2327.[4]

Finally, petitioner's separate conviction for first-degree armed robbery in Missouri (PSR ¶ 27) would also independently qualify as one of the two prior felony convictions required to apply the career-offender enhancement in Guidelines Section 4B1.2(1) (1988), because that offense "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. 16(a); see United States v. Swopes, 886 F.3d 668, 671 (8th Cir. 2018) (en banc) ("Missouri second-degree robbery has as an element the use of physical force upon another person or the threat of an immediate use of such force."), cert. denied, 139 S. Ct. 1258 (2019).

[4] In the district court and the court of appeals, the government did not argue that the guideline was not unconstitutionally vague as applied to petitioner. 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").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DAVID M. LIEBERMAN
Attorney

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