No. 19-6379

IN THE SUPREME COURT OF THE UNITED STATES

TIMOTHY EDWARD HOLZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 6-18) that the court of appeals erred in rejecting his claim, which he brought in a motion under 28 U.S.C. 2255, that the residual clause in Section 4B1.2(a) (2002) 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., 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 (2019) (No. 18-6375); Jordan v. United States, 139 S. Ct. 653 (2019) (No. 18-6599). 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

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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 Gadsden v. United States, No. 18-9506 (filed Apr. 18, 2019); Pullen v. United States, No. 19-5219 (filed July 15, 2019); Bronson v. United States, No. 19-5316 (filed July 19, 2019); Brigman v. United States, No. 19-5307 (filed July 22, 2019); Aguilar v. United States, No. 19-5315 (filed July 22, 2019); Hemby v. United States, No. 19-6054 (filed Sept. 18, 2019); Martinez v. United States, No. 19-6287 (filed Oct. 10, 2019); Jennings v. United States, No. 19-6336 (filed Oct. 17, 2019); Autrey v. United States, No. 19-6492 (filed Nov. 1, 2019); Douglas v. United States, No. 19-6510 (filed Nov. 4, 2019); Simmons v. United States, No. 19-6521 (filed Nov. 4, 2019).

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 below -- has determined that a defendant like petitioner is not entitled to collaterally attack his sentence based on Johnson. 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)), cert. denied, 139 S. Ct. 2762 (2019); United States v. London, 937 F.3d 502, 507-508 (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. 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 for two independent reasons.

First, even if the challenged language in the Sentencing Guidelines' definition of the term "crime of violence" were deemed unconstitutionally vague in some applications, it was not vague as applied to petitioner. Petitioner does not dispute that his criminal history would qualify him as a career offender so long as his offense of conviction -- armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d) (2000) -- qualified as a "crime of violence." See Sentencing Guidelines § 4B1.1 (2002) (stating that a 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" and "the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense"); Presentence Investigation Report ¶¶ 40, 44, 48 (describing petitioner's prior convictions for "controlled substance offense[s]"). Petitioner's challenge to the qualification of his offense of conviction as a crime of violence lacks merit. In the 2002 Sentencing Guidelines, under which petitioner was sentenced, the official commentary to Section 4B1.2 expressly stated that a "'[c]rime of violence' includes * * * robbery." Sentencing Guidelines § 4B1.2, comment. (n.1) (2002). Therefore, in light of petitioner's conviction for armed

bank robbery, 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).

Second, petitioner's conviction for armed bank robbery qualified as a crime of violence under Sentencing Guidelines Section 4B1.2 irrespective of the residual clause, because that 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) (2002). See, e.g., United States v. McCranie, 889 F.3d 677, 681 (10th Cir. 2018) (a "[defendant's] federal bank robbery convictions categorically qualify as crimes of violence" under Sentencing Guidelines § 4B1.2(a)(1)), cert. denied, 139 S. Ct. 1260 (2019); see also Br. in Opp. at 6-13, Lloyd v. United States, No. 18-6269 (Jan. 9, 2019), cert. denied, 139 S. Ct. 1167 (2019).[3]

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

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

NOVEMBER 2019

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

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