No. 19-6818

IN THE SUPREME COURT OF THE UNITED STATES

JOHN D. WARD, 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. 5-19) 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) (2001) 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 (filed 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 (2018) (No. 18-6599). The same result is warranted here.[2]

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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 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); Jennings v. United States, No. 19-6336 (filed Oct. 17, 2019); Holz v. United States, No. 19-6379 (filed Oct. 21, 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); Hirano v. United States, No. 19-6652 (filed Nov. 12, 2019); Simmons v. United States, No. 19-6658 (filed Nov. 14, 2019); Bridge v. United States, No. 19-6670 (filed Nov. 14, 2019); Hunter v. United States, No. 19-6686 (filed Nov. 14, 2019); Fernandez v. United States, No. 19-6689 (filed Nov. 14, 2019); Garcia-Cruz v. United States, No. 19-6755 (filed Nov. 19, 2019); Lackey v. United States, No. 19-6759 (filed Nov. 20, 2019); Hicks v. United States, No. 19-6769 (filed Nov. 20, 2019); London v. United States, No. 19-6785 (filed Nov. 25, 2019); Lacy v. United States, No. 19-6832 (filed Nov. 25, 2019).

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 below -- has determined that a defendant like petitioner is not entitled to collaterally attack his sentence based on Johnson. See United States v. London, 937 F.3d 502, 507-508 (5th Cir. 2019) (holding that a challenge to the residual clause of the formerly binding career-offender guideline was untimely under Section 2255(f)(3)), petition for cert. pending, No. 19-6785 (filed Nov. 25, 2019); United States v. Blackstone, 903 F.3d 1020, 1026-1028 (9th Cir. 2018) (same), cert. denied, 139 S. Ct. 2762 (2019); 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, 629-630 (6th Cir. 2017), cert. denied, 138 S. Ct. 2661 (2018); see also Upshaw v. United States, 739 Fed.

Appx. 538, 540-541 (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, this case will soon become moot. According to the Federal Bureau of Prisons, petitioner is set to be released on January 21, 2020.[3] Because petitioner's Sentencing Guidelines challenge affects only the length of his term of imprisonment rather than his underlying conviction, the case will be moot on that date. See Lane v. Williams, 455 U.S. 624, 631 (1982) ("Since respondents elected only to attack their sentences, and since those sentences expired during the course of these proceedings, this case is moot.").[4]

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[3] See Fed. Bureau of Prisons, Find an inmate, https://www.bop.gov/inmateloc/ (inmate register number 14160-031).

[4] In United States v. Johnson, 529 U.S. 53 (2000), this Court held that a prisoner who serves too long a term of incarceration is not necessarily entitled to receive credit against his term of supervised release. Id. at 54. And as the Third Circuit has explained, "[t]he possibility that the sentencing court will use its discretion to modify the length of [a defendant's] term of supervised release * * * is so

Second, petitioner's motion for collateral relief was not his first collateral attack, see Pet. App. 2a, 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) -- which itself provides a sufficient reason to deny relief, see Greer, 881 F.3d at 1248-1249 -- 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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JANUARY 2020

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speculative" that it does not suffice to present a live case or controversy. Burkey v. Marberry, 556 F.3d 142, 149, cert. denied, 558 U.S. 969 (2009); see also Rhodes v. Judiscak, 676 F.3d 931, 935 (10th Cir.), cert. denied, 567 U.S. 935 (2012). The courts of appeals do not all agree that a challenge to the length of a term of imprisonment becomes moot when the defendant is released. See Pope v. Perdue, 889 F.3d 410, 414-415 (7th Cir. 2018); Tablada v. Thomas, 533 F.3d 800, 802 n.1 (9th Cir. 2008), cert. denied, 560 U.S. 964 (2010); Levine v. Apker, 455 F.3d 71, 77 (2d Cir. 2006); Johnson v. Pettiford, 442 F.3d 917, 917-918 (5th Cir. 2006) (per curiam). But the need for this Court to resolve the mootness question at a minimum makes this case a poor vehicle for considering the question presented.

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