

No. 19-6832

IN THE SUPREME COURT OF THE UNITED STATES

JAMES HENRY LACY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioner contends (Pet. 6-24) 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(a) (1997) 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

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); Ward v. United States, No. 19-6818 (filed Nov. 27, 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, even if the challenged language in the Sentencing Guidelines were deemed unconstitutionally vague in some applications, it was not vague as applied to petitioner. Petitioner was convicted of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and at the time of his sentencing, he had three prior convictions for robbery in violation of California law and one prior conviction for robbery of a United States Post Office, in violation of 18 U.S.C. 2114 (1982). See Pet. 4; Presentence Investigation Report ¶¶ 72, 79, 84, 89; Sentencing Guidelines § 4B1.1 (1997) (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"). In the 1997 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) (1997). Therefore, in light of petitioner's current conviction for armed bank robbery and his prior convictions for 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 motion for collateral relief was not his first collateral attack, see D. Ct. Doc. 421 (Sept. 16, 2016), 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 Blackstone, 903 F.3d at 1026-1028 -- 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).

2. Petitioner also contends (Pet. 24-40) that the court of appeals erred in denying a COA on his claim that armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), does not qualify as a "crime of violence" within the meaning of 18 U.S.C. 924(c)(3).

The court of appeals correctly declined to issue a COA on petitioner's claim. To convict a defendant of armed bank robbery, the government must prove that the defendant (1) took money from the custody or control of a bank "by force and violence, or by intimidation," 18 U.S.C. 2113(a); and (2) either committed an "assault[]" or endangered "the life of any person by the use of a dangerous weapon or device" while committing the robbery, 18 U.S.C. 2113(d). For the reasons stated on pages 6 to 13 of the government's brief in opposition to the petition for a writ of certiorari in Lloyd v. United States, No. 18-6269 (filed Jan. 9, 2019), armed bank robbery qualifies as a crime of violence under Section 924(c) because it "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. 924(c) (3) (A).³ Every court of appeals to have considered the question has so held. See Br. in Opp. at 8-9, Lloyd, supra (No. 18-6269). This Court has recently and repeatedly denied petitions for a writ of certiorari challenging the circuits' consensus on the application of Section 924(c) (3) (A) -- and similarly worded federal statutes and provisions of the Sentencing Guidelines -- to bank robbery and armed bank robbery.⁴

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

⁴ See, e.g., Myrie v. United States, No. 19-5392 (Nov. 4, 2019) (armed bank robbery); Lockwood v. United States, 139 S. Ct. 2648 (2019) (No. 18-8799) (armed bank robbery); Cirino v. United

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

Respectfully submitted.

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States; 139 S. Ct. 2012 (2019) (No. 18-7680) (armed bank robbery); Winston v. United States, 139 S. Ct. 1637 (2019) (No. 18-8525) (armed bank robbery); Hearn v. United States, 139 S. Ct. 1620 (2019) (No. 18-7573) (armed bank robbery); Landingham v. United States, 139 S. Ct. 1620 (2019) (No. 18-7543) (armed bank robbery); Scott v. United States, 139 S. Ct. 1612 (2019) (No. 18-8536) (armed bank robbery); Lloyd v. United States, 139 S. Ct. 1167 (2019) (No. 18-6269) (armed bank robbery); Johnson v. United States, 139 S. Ct. 647 (2018) (No. 18-6499) (bank robbery); Faurisma v. United States, 139 S. Ct. 578 (2018) (No. 18-6360) (armed bank robbery); Cadena v. United States, 139 S. Ct. 436 (2018) (No. 18-6069) (bank robbery); Patterson v. United States, 139 S. Ct. 291 (2018) (No. 18-5685) (bank robbery); Watson v. United States, 139 S. Ct. 203 (2018) (No. 18-5022) (armed bank robbery); Perry v. United States, 138 S. Ct. 1439 (2018) (No. 17-6611) (armed bank robbery); Schneider v. United States, 138 S. Ct. 638 (2018) (No. 17-5477) (bank robbery); Castillo v. United States, 138 S. Ct. 638 (2018) (No. 17-5471) (bank robbery); Stephens v. United States, 138 S. Ct. 502 (2017) (No. 17-5186) (armed bank robbery).

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