

IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL TYRONE SIMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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JEFFREY B. WALL  
Acting Solicitor General  
Counsel of Record

BRIAN C. RABBITT  
Acting Assistant Attorney General

DAVID M. LIEBERMAN  
Attorney

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

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QUESTIONS PRESENTED

1. Whether armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), is a "crime of violence" under 18 U.S.C. 924(c) (3) (A).
2. Whether petitioner was entitled to collateral relief on his claim that the residual provision of Section 4B1.2 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 (S.D. Cal.):

United States v. Simpson, No. 97-cr-2903 (Jan. 4, 1999)

Simpson v. United States, No. 01-cv-307 (June 4, 2001)

Simpson v. United States, No. 14-cv-1530 (Dec. 5, 2014)

Simpson v. United States, No. 16-cv-1509 (Nov. 20, 2017)

United States Court of Appeals (9th Cir.):

United States v. Simpson, No. 98-50607 (Aug. 25, 1999)

United States v. Simpson, No. 01-56659 (Mar. 15, 2002)

United States v. Simpson, No. 15-55058 (Aug. 25, 2015)

United States v. Simpson, No. 17-56766 (Aug. 22, 2019)

Supreme Court of the United States:

Simpson v. United States, No. 99-9358 (Oct. 2, 2000)

IN THE SUPREME COURT OF THE UNITED STATES

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No. 19-7764

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is not published in the Federal Reporter but is reprinted at 775 Fed. Appx. 364. The opinion of the district court is not published in the Federal Supplement but is available at 2017 WL 5614566.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2019. A petition for rehearing was denied on December 4, 2019 (Pet. App. B). The petition for a writ of certiorari was filed on February 20, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on one count of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d); and one count of using a firearm during a crime of violence, in violation of 18 U.S.C. 924(c)(1) (Supp. V 1996). D. Ct. Doc. 73, at 2 (Jan. 4, 1999). The district court sentenced petitioner to 360 months of imprisonment, to be followed by five years of supervised release. Id. at 3-4. The court of appeals affirmed, 188 F.3d 516, 1999 WL 650565 (Tbl.), and this Court denied certiorari, 531 U.S. 831. In 2001, petitioner filed a motion for postconviction relief under 28 U.S.C. 2255. The district court denied the motion and denied a certificate of appealability (COA). D. Ct. Doc. 87, at 2-11 (June 4, 2001). The court of appeals likewise denied a COA. D. Ct. Doc. 92, at 2 (Mar. 18, 2002). In 2014, petitioner filed a second motion for postconviction relief under 28 U.S.C. 2255. The district court dismissed the motion as unauthorized and denied a COA. D. Ct. Doc. 101, at 1-8 (Dec. 5, 2014). The court of appeals likewise denied a COA. D. Ct. Doc. 104 (Aug. 25, 2015). In 2016, petitioner filed an authorized successive motion under Section 2255. The district court denied that motion, but granted a COA. 2017 WL 5614566. The court of appeals affirmed. Pet. App. A, at 1-3.

1. On May 2, 1996, petitioner and an accomplice, Steven Hayes, entered the Great Western Bank in Spring Valley, California.

Presentence Investigation Report (PSR) 2. Petitioner inquired about opening an account, and a security guard directed him to a bank employee. Ibid. At that point, Hayes shouted, "Forget all that, this is a hold-up!" Ibid. Petitioner and Hayes then disarmed the security guard and ordered everyone in the bank to the floor. Ibid. One man stood guard in the lobby as the other emptied three cash drawers. Ibid.

Petitioner and Hayes were armed during the robbery. PSR 3. One of them pulled an employee up from the ground by her hair and ordered her to open a cash drawer. Ibid. When the employee responded that she did not have the key, the robber motioned with a handgun and said, "I want to kill this bitch." Ibid. Petitioner and Hayes stole \$8453 from the bank. PSR 2.

The bank subsequently placed a newspaper advertisement requesting assistance in identifying the robbers. PSR 3. An anonymous caller contacted the FBI and identified petitioner. Ibid. A teller later identified petitioner as the person who robbed her at gunpoint. Ibid.

2. A federal grand jury in the Southern District of California charged petitioner with one count of conspiracy to commit armed bank robbery, in violation of 18 U.S.C. 371; one count of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d); one count of using a firearm during a crime of violence, in violation of 18 U.S.C. 924(c) (1) (Supp. V 1996); and one count of theft of a firearm in interstate commerce, in violation of 18 U.S.C.

924(1) (Supp. V 1996). D. Ct. Doc. 7, at 2-5 (Oct. 28, 1997). On the government's motion, the district court dismissed the conspiracy count. D. Ct. Doc. 73, at 2. A jury subsequently convicted petitioner of armed bank robbery and the Section 924(c) count, and acquitted him of the firearm-theft count. Ibid.

The Probation Office's presentence report determined that petitioner qualified as a career offender under Sentencing Guidelines § 4B1.1 (1997). PSR 9-10. Under former Section 4B1.1, a defendant was subject to enhanced punishment 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 "crime of violence" or "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 (1997). In recommending the career-offender enhancement, the Probation Office cited petitioner's prior California conviction for robbery as a predicate crime of violence, and it cited his prior Nevada conviction for possession of a controlled substance with intent to sell as a predicate controlled substance offense. PSR 90; see also PSR 5-6.

The Probation Office calculated an offense level of 34 and a criminal history category of VI, which -- together with the statutory-minimum consecutive sentence required for petitioner's Section 924(c) conviction -- yielded a sentencing range of 322 to 360 months of imprisonment. PSR 7, 10; see 18 U.S.C. 924(c) (1) (A)

(Supp. V 1996) (requiring a minimum consecutive sentence of five years of imprisonment for a first Section 924(c) offense). Without the career-offender enhancement, petitioner's offense level would have been 22 and his criminal history category would have been VI, resulting in a sentencing range of 144 to 165 months of imprisonment. PSR 7, 9.

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 the applicable Guidelines range unless it found that exceptional circumstances justified a departure. See id. at 233-234. The court applied the career-offender enhancement and sentenced petitioner to 360 months of imprisonment, consisting of a sentence of 300 months of imprisonment on the armed bank robbery count and a consecutive sentence of 60 months of imprisonment on the Section 924(c) count. D. Ct. Doc. 73, at 3. The court of appeals affirmed, 188 F.3d 516, 1999 WL 650565 (Tbl.), and this Court certiorari, 531 U.S. 831.

3. In 2001, petitioner filed a motion for postconviction relief under 28 U.S.C. 2255, renewing many of the claims that had been addressed during his direct appeal and asserting that his trial counsel had been ineffective. See D. Ct. Doc. 83 (Feb. 23, 2001). The district court denied the motion and denied a COA. D. Ct. Doc. 87, at 2-11. The court of appeals likewise denied a COA. D. Ct. Doc. 92, at 2.

In 2014, petitioner filed a second motion for postconviction relief under 28 U.S.C. 2255, claiming that his sentence violated Alleyne v. United States, 570 U.S. 99 (2013), and Descamps v. United States, 570 U.S. 254 (2013). D. Ct. Doc. 95, at 9-41 (June 24, 2014). The district court dismissed the motion as an unauthorized second-or-successive collateral attack, and in the alternative, found that petitioner's claims lacked merit. D. Ct. Doc. 101, at 3-8. The court also denied a COA. Id. at 8. The court of appeals likewise denied a COA. D. Ct. Doc. 104.

4. In 2016, petitioner filed an authorized successive motion under Section 2255 in which he argued that armed bank robbery does not qualify as a "crime of violence" under Section 924(c), and that neither armed bank robbery nor his prior conviction for California robbery qualified as "crime[s] of violence" for purposes of the former career-offender sentencing guideline. D. Ct. Doc. 105, at 28-46 (June 1, 2016) (Third 2255 Motion).

Section 924(c) defines a "crime of violence" as a felony offense that either "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), or, "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. 924(c) (3) (B). The former career-offender guideline defined a "crime of violence" to include a felony offense that

(1) "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) (1997), or (2) "is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another," id. § 4B1.2(a)(2).

Petitioner argued that his convictions for armed bank robbery and California robbery did not require proof of the elements identified in Section 924(c)(3)(A) and former Guidelines Section 4B1.2(1)(i). He further argued that Section 924(c)(3)(B) and the residual provision of former Guidelines Section 4B1.2(1)(ii) were unconstitutionally vague in light of Johnson v. United States, 135 S. Ct. 2551 (2015), which held that the "residual clause" of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii), is void for vagueness, 135 S. Ct. at 2557. See Third 2255 Motion 28-46.

The district court denied petitioner's motion. 2017 WL 5614566. The court determined, applying circuit precedent, that petitioner's conviction for federal armed bank robbery qualifies as a "crime of violence" under Section 924(c)(3)(A) and former Guidelines Section 4B1.2(a)(1). Id. at \*2, \*4 (citing United States v. Selfa, 918 F.2d 749, 751 (9th Cir.), cert. denied, 498 U.S. 986 (1990), and United States v. Wright, 215 F.3d 1020, 1028 (9th Cir.), cert. denied, 531 U.S. 969 (2000)). The court explained that bank robbery "requires, at the very least, either

'force and violence' or 'intimidation,'" id. at \*2 (quoting Selfa, 918 F.2d at 751), which "satisfies the requirement of a 'threatened use of physical force' under [Section] 4B1.2," ibid. (citation omitted); see also id. at \*4 (reasoning similarly regarding application of Section 924(c)(3)(A)).

The district court also found, applying circuit precedent, that California robbery is "categorically a 'crime of violence' for purposes of the career offender provision" of the Guidelines. 2017 WL 5614566, at \*3 (quoting United States v. Barragan, 871 F.3d 689, 713-714 (9th Cir. 2017), cert. denied, 138 S. Ct. 1565, and 138 S. Ct. 1572 (2018)). And "[b]ecause [petitioner's] instant and predicate robbery offenses qualify as 'crimes of violence'" irrespective of Section 924(c)(3)(B) and the residual provision of former Section 4B1.2(a)(2), the district court determined that petitioner was not entitled to relief based on Johnson. 2017 WL 5614566, at \*4. The court did, however, grant a COA authorizing petitioner to appeal. Ibid.

5. The court of appeals affirmed. Pet. App. A, at 1-3. The court observed that petitioner's challenge to his Section 924(c) conviction was foreclosed by circuit precedent recognizing that federal bank robbery qualifies as a crime of violence under Section 924(c)(3)(A). See id. at 2-3 (citing United States v. Watson, 881 F.3d 782, 784, 786 (9th Cir.) (per curiam), cert. denied, 139 S. Ct. 203 (2018)). The court further observed that circuit precedent foreclosed petitioner's contention that Johnson

recognized a new right that applies to the pre-Booker mandatory Sentencing Guidelines, id. at 2 (citing United States v. Blackstone, 903 F.3d 1020, 1028 (9th Cir. 2018), cert. denied, 139 S. Ct. 2762 (2019)), and the court therefore determined that petitioner's challenge to his career-offender designation was untimely under 28 U.S.C. 2255(f)(3), Pet. App. A, at 2.

#### ARGUMENT

Petitioner contends (Pet. 7-16) that armed bank robbery is not a "crime of violence" under 18 U.S.C. 924(c)(3)(A). He additionally contends (Pet. 16-21) that the residual provision in Section 4B1.2(a)(2) (1997) of the previously binding federal Sentencing Guidelines is void for vagueness under Johnson v. United States, 135 S. Ct. 2551 (2015). Those contentions lack merit, and this Court has consistently declined to review them. The petition for a writ of certiorari should be denied.

1. A conviction for armed bank robbery requires proof that the defendant (1) took or attempted to take 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" through "the use of a dangerous weapon or device" in committing the robbery, 18 U.S.C. 2113(d). For the reasons explained in the government's brief in opposition to the petition for a writ of certiorari in Johnson v. United States, No. 19-7079 (Apr. 24, 2020), 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) . See Br. in Opp. at 7-25, Johnson, supra (No. 19-7079).<sup>1</sup>

In particular, petitioner contends that armed bank robbery does not qualify as a crime of violence under Section 924(c) (3) (A) on the theory that robbery "by intimidation" does not require a threat of violent force, see Pet. 12-15, and that federal bank robbery does not require a specific intent, see Pet. 7-12 (citing, inter alia, Carter v. United States, 530 U.S. 255, 268 (2000)). Those arguments lack merit for the reasons explained at pages 9 to 20 of the government's brief in opposition in Johnson, supra (No. 19-7079). Every court of appeals with criminal jurisdiction, including the court below, has recognized that Section 924(c) (3) (A) or similarly worded provisions encompass federal bank robbery and armed bank robbery. See id. at 7-8. This Court has recently and repeatedly denied petitions for a writ of certiorari challenging the circuits' consensus on that issue, see id. at 7-8 & n.1, and the same result is warranted here.

2. a. For the reasons explained on pages 9 to 16 in 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), petitioner's contention that

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<sup>1</sup> We have served petitioner with a copy of the government's brief in opposition in Johnson. That brief is also available on this Court's electronic docket.

Johnson recognized a new right that applies to the career-offender provision of the pre-Booker mandatory Sentencing Guidelines does not warrant this Court's review.<sup>2</sup> This Court has recently and repeatedly denied review of other petitions presenting similar issues.<sup>3</sup> The same result is warranted here.

Petitioner's motion under Section 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

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<sup>2</sup> We have served petitioner with a copy of the government's brief in opposition in Gipson. That brief is also available on this Court's electronic docket.

<sup>3</sup> See, e.g., Patrick v. United States, No. 19-7755 (Mar. 30, 2020); Lacy v. United States, No. 19-6832 (Feb. 24, 2020); Ward v. United States, No. 19-6818 (Feb. 24, 2020); London v. United States, 140 S. Ct. 1140 (2020) (No. 19-6785); Hicks v. United States, 140 S. Ct. 984 (2020) (No. 19-6769); Lackey v. United States, 140 S. Ct. 984 (2020) (No. 19-6759); Garcia-Cruz v. United States, 140 S. Ct. 984 (2020) (No. 19-6755); Hemby v. United States, 140 S. Ct. 895 (2020) (No. 19-6054); Gadsden v. United States, 140 S. Ct. 870 (2020) (No. 18-9506); Brigman v. United States, 140 S. Ct. 869 (2020) (No. 19-5307); Holz v. United States, 140 S. Ct. 868 (2020) (No. 19-6379); Aguilar v. United States, 140 S. Ct. 868 (2020) (No. 19-5315); Autrey v. United States, 140 S. Ct. 867 (2020) (No. 19-6492); Martinez v. United States, 140 S. Ct. 842 (2020) (No. 19-6287); Bronson v. United States, 140 S. Ct. 817 (2020) (No. 19-5316); Simmons v. United States, 140 S. Ct. 816 (2020) (No. 19-6521); Douglas v. United States, 140 S. Ct. 816 (2020) (No. 19-6510); Pullen v. United States, 140 S. Ct. 814 (2020) (No. 19-5219).

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) (determining that a challenge to the residual provision of the formerly binding career-offender guideline was not timely under Section 2255(f)(3)), cert. denied, 139 S. Ct. 2762 (2019); see also, e.g., Nunez v. United States, 954 F.3d 465, 469 (2d Cir. 2020) (citing decisions from seven other circuits). 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. 12-13, infra -- does not warrant this Court's review.

b. In any event, this case would be an unsuitable vehicle for addressing the Guidelines question, for two independent reasons.

First, even if the challenged language in the former career-offender guideline's definition of the term "crime of violence" were deemed unconstitutionally vague in some applications, it was not vague as applied to petitioner. The version of the Sentencing Guidelines under which petitioner was sentenced provided that a defendant qualified as a career offender if, inter alia, "the instant offense of conviction is a felony that is \* \* \* a crime of violence" and "the defendant has at least two prior felony

convictions of \* \* \* a crime of violence." Sentencing Guidelines § 4B1.1 (1997). The official commentary to the definition of a "[c]rime of violence" stated that the definition "includes \* \* \* robbery." Id. § 4B1.2, comment. (n.1). Petitioner was convicted of federal armed bank robbery and the district court designated him a career offender based on, inter alia, his prior conviction for California robbery. See Pet. 3; PSR 9-10. In light of those robbery convictions, petitioner cannot establish that the residual provision of the career-offender guideline 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. 105-1, at 1-2 (June 1, 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) 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).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL  
Acting Solicitor General

BRIAN C. RABBITT  
Acting Assistant Attorney General

DAVID M. LIEBERMAN  
Attorney

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