No. 19-8044

---

IN THE SUPREME COURT OF THE UNITED STATES

---

BRIAN VIDRINE, PETITIONER

v.

UNITED STATES OF AMERICA

---

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

---

# BRIEF FOR THE UNITED STATES IN OPPOSITION

---

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

ROBERT A. PARKER
Attorney

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

## QUESTION 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 (E.D. Cal.):

United States v. Vidrine, No. 95-cr-482 (Oct. 17, 1997)

Vidrine v. United States, No. 00-cv-1436 (Sept. 29, 2004)

Vidrine v. United States, No. 16-cv-3066 (Sept. 28, 2017)

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

United States v. Vidrine, No. 97-10461 (Dec. 22, 1998)

United States v. Vidrine, No. 05-15697 (Oct. 24, 2005)

Vidrine v. United States, No. 16-72003 (Feb. 21, 2017)

United States v. Vidrine, No. 17-17066 (Dec. 17, 2019)

IN THE SUPREME COURT OF THE UNITED STATES

---

No. 19-8044

BRIAN VIDRINE, PETITIONER

v.

UNITED STATES OF AMERICA

---

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

---

# BRIEF FOR THE UNITED STATES IN OPPOSITION

---

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the Federal Reporter but is reprinted at 788 Fed. Appx. 476. The order of the district court (Pet. App. 4-5) is not published in the Federal Supplement but is available at 2017 WL 4310684.

## JURISDICTION

The judgment of the court of appeals was entered on December 17, 2019. The petition for a writ of certiorari was filed on March 16, 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 Eastern District of California, petitioner was convicted on three counts of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and two counts of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1) (1994). C.A. Excerpts of Record (E.R.) 18. Following a guilty plea, petitioner was additionally convicted of escape, in violation of 18 U.S.C. 751(a). C.A. E.R. 18. The district court sentenced petitioner to 468 months of imprisonment, to be followed by five years of supervised release. Id. at 19-20. The court of appeals affirmed. 1998 WL 894598. In 2000, petitioner filed a motion for postconviction relief under 28 U.S.C. 2255. The district court denied the motion, D. Ct. Doc. 257, at 1-2 (Sept. 29, 2004), and denied a certificate of appealability (COA), D. Ct. Doc. 271, at 1-3 (Mar. 30, 2005). The court of appeals likewise denied a COA. 05-15697 Order (Oct. 24, 2005). In 2016, petitioner filed an authorized second-or-successive motion under Section 2255. The district court denied that motion, Pet. App. 4-5, but granted a COA, id. at 5. The court of appeals affirmed. Id. at 1-3.

1. On August 8, 1995, petitioner escaped from a community corrections center where he was serving a 15-year federal sentence for armed bank robbery. Presentence Investigation Report (PSR)

¶¶ 4, 52-55. While at large following that escape, petitioner robbed three more banks. PSR ¶¶ 5-6, 88.

On August 28, 1995, petitioner robbed a branch of United Security Bank in Fresno, California. PSR ¶ 5. He brandished a handgun, threw two mesh bags at the tellers, and ordered the tellers to fill the bags with money that an armored truck had delivered to the bank a few minutes earlier. Ibid. The tellers filled the bags with $2508 in cash. Ibid. Petitioner collected the bags and left. Ibid.

On September 6, 1995, petitioner carried out a similar robbery at a branch of Glendale Federal Bank in Fresno. PSR ¶ 6. Petitioner entered the bank wearing a mask and brandishing a handgun, threw plastic bags at the tellers, and ordered the tellers to fill the bags with money. Ibid. Petitioner handed a mesh bag to another bank employee and ordered him to fill it with cash that an armored truck had just delivered. Ibid. Petitioner stole about $53,000 in cash and fled. Ibid.

On October 11, 1995, petitioner robbed a branch of San Francisco Federal Bank in Sacramento, California. PSR ¶ 8. Petitioner entered the bank wearing a disguise and brandishing a knife. Ibid. As in the previous robberies, he threw two bags at the tellers and ordered them to fill the bags with money. Ibid. The tellers filled the bags with $1313 in cash, which petitioner took with him as he left the bank. PSR ¶ 10.

On October 15, 1995, United States marshals located petitioner and arrested him. PSR ¶ 9. On December 21, 1995, while petitioner was in federal custody, he once again attempted to escape. See C.A. E.R. 96-97.

2. A federal grand jury in the Eastern District of California charged petitioner with escape, in violation of 18 U.S.C. 751(a); attempted escape, in violation of 18 U.S.C. 751(a); three counts of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d); and two counts of using or carrying a firearm during and in relation to a crime of violence (the armed bank robberies of United Security Bank and Glendale Federal Bank), in violation of 18 U.S.C. 924(c)(1) (1994). C.A. E.R. 95-99. Petitioner pleaded guilty to the escape count, and he was found guilty on the armed bank robbery and Section 924(c) counts following a jury trial. Id. at 18. The district court subsequently dismissed the attempted escape count. Id. at 110 (D. Ct. Doc. 171).

The Probation Office's presentence report determined that petitioner qualified as a career offender under Sentencing Guidelines § 4B1.1 (1995). PSR ¶ 37. 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 (1995). In recommending the career-offender enhancement, the Probation Office cited petitioner's prior federal conviction for armed bank robbery and a California state conviction for robbery as predicate crimes of violence. PSR ¶¶ 37, 49-53.

Application of the career-offender enhancement resulted in an offense level of 34 and a criminal history category of VI, which -- together with the statutory-minimum consecutive sentences required on petitioner's Section 924(c) convictions -- yielded a sentencing range of 562 to 627 months of imprisonment. PSR ¶¶ 39, 60, 71, 75; see 18 U.S.C. 924(c)(1) (1994) (requiring minimum consecutive sentences of five years of imprisonment for a first Section 924(c) offense and 20 years of imprisonment for a "second or subsequent" offense). Without the career-offender enhancement, petitioner's offense level would have been 30 and his criminal history category would have been IV, resulting in a sentencing range of 435 to 468 months of imprisonment. PSR ¶¶ 39, 59, 71.

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 district court determined that the criminal history category of VI required by the career-offender enhancement "significantly over-represent[ed]" the seriousness of petitioner's criminal history,

and it therefore granted a downward departure that reduced petitioner's sentencing range to 451 to 488 months of imprisonment. D. Ct. Doc. 156, at 5 (Oct. 17, 1997) (Statement of Reasons); see Sentencing Tr. 25-27.

The district court sentenced petitioner to 468 months of imprisonment, consisting of a sentence of 60 months of imprisonment on the escape count; concurrent sentences of 168 months of imprisonment on the armed bank robbery counts; a consecutive sentence of 60 months of imprisonment on the first Section 924(c) count; and a consecutive sentence of 240 months of imprisonment on the second Section 924(c) count. C.A. E.R. 19. The court of appeals affirmed. 1998 WL 894598.

3. In 2000, petitioner filed a motion for postconviction relief under 28 U.S.C. 2255, in which he contended that his trial counsel was ineffective. See D. Ct. Doc. 254, at 12-28 (May 11, 2004). A magistrate judge recommended that the motion be denied. Id. at 29. The district court adopted the magistrate judge's recommendation, D. Ct. Doc. 257, at 1-2, and denied petitioner's request for a COA, D. Ct. Doc. 271, at 1-3. The court of appeals likewise denied a COA. 05-15697 Order.

In 2016, petitioner filed an authorized second-or-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 California robbery qualified as predicate "crime[s] of violence" for purposes of the

former career-offender sentencing guideline. D. Ct. Doc. 277, at 4-15 (June 21, 2016) (Second 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(1)(i) (1995), 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(1)(ii).

Petitioner argued that neither armed bank robbery nor California robbery required proof of the elements identified in Section 924(c)(3)(A) and former Section 4B1.2(1)(i), and that Section 924(c)(3)(B) and the residual provision of former 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 Second 2255 Motion. 4-15. The district court referred petitioner's motion to a magistrate judge, who recommended that

the motion be denied. Pet. App. 6-20. The magistrate judge observed that, under circuit precedent, federal armed bank robbery qualifies as a "crime of violence" under Section 924(c)(3)(A). Id. at 11, 12-14. The magistrate judge therefore determined that petitioner's Section 924(c) convictions were valid irrespective of whether the alternative "crime of violence" definition in Section 924(c)(3)(B) was unconstitutionally vague. Id. at 9-18.

The magistrate judge further determined that petitioner's challenge to his career-offender designation was untimely because this Court had not extended Johnson to the career-offender provision of the Sentencing Guidelines. Pet. App. 18-20; see 28 U.S.C. 2255(f)(3) (requiring a prisoner to file a Section 2255 motion within one year of "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 magistrate judge observed that this Court had refused to extend Johnson to the post-Booker advisory Guidelines and had specifically declined to consider whether to extend it to the pre-Booker mandatory Guidelines. Pet. App. 18-19 (citing Beckles v. United States, 137 S. Ct. 886, 896 (2017), and id. at 903 n.4 (Sotomayor, J., concurring in the judgment)).

The district court adopted the magistrate judge's recommendation and denied petitioner's Section 2255 motion. Pet.

App. 4-5. The court granted a COA authorizing petitioner to appeal the court's decision. Id. at 5.

5. The court of appeals affirmed. Pet. App. 1-3. The court observed that petitioner's challenge to his Section 924(c) conviction was foreclosed by circuit precedent holding that federal bank robbery offenses qualify as crimes of violence under Section 924(c)(3)(A). See id. at 2 (citing United States v. Watson, 881 F.3d 782, 784 (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 Guidelines, ibid. (citing United States v. Blackstone, 903 F.3d 1020, 1028 (9th Cir. 2018), cert. denied, 139 S. Ct. 2762 (2019)), and it therefore determined that petitioner's challenge to his career-offender designation was untimely, id. at 2-3.

ARGUMENT

Petitioner contends (Pet. 6-23) that armed bank robbery is not a "crime of violence" under 18 U.S.C. 924(c)(3)(A). He additionally contends (Pet. 23-40) that the residual provision in Section 4B1.2(1)(ii) (1995) 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).[1]

Specifically, petitioner contends that armed bank robbery does not qualify as a crime of violence under Section 924(c)(3)(A) because robbery "by intimidation" does not require a threat of violent force, see Pet. 10-13, and that federal bank robbery does not require a specific intent, see Pet. 14-23 (citing, inter alia, Carter v. United States, 530 U.S. 255, 268 (2000)). Those contentions lack merit for the reasons explained at pages 9-20 of the government's brief in opposition in Johnson, supra (No. 19-7079). Every court of appeals with criminal jurisdiction,

[1] 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.

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 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), petitioner's contention that Johnson recognized a new right that applies to the career-offender provision of the formerly mandatory Sentencing Guidelines does not warrant this Court's review.[2] This Court has recently and repeatedly denied review of other petitions presenting similar issues.[3] The same result is warranted here.

---

[2] 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.

[3] 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,

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 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 provision of the formerly binding career-offender guideline was untimely 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. 13-14, infra -- does not warrant this Court's review.

---

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).

b. In any event, this case would be an unsuitable vehicle for addressing the question presented, for three 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 (1995). The official commentary to the definition of a "crime of violence" stated that the definition "includes * * * robbery." Sentencing Guidelines § 4B1.2, comment. (n.2) (1995). Petitioner was convicted on three counts of federal armed bank robbery and had prior convictions for federal armed bank robbery and California robbery. See Pet. 4; PSR ¶¶ 49, 52. 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, although application of the mandatory Guidelines' career-offender provision ordinarily required a court to impose a sentence within an enhanced sentencing range, district courts

retained authority to depart below that range in exceptional circumstances. See United States v. Booker, 543 U.S. 220, 233-234 (2005). The district court exercised that authority in this case and imposed a 468-month sentence that was within the sentencing range that would have applied without the career-offender enhancement. See C.A. E.R. 19; Sentencing Tr. 25-27; PSR ¶ 71. The court imposed a 468-month sentence even though the downward departure produced a range of 451 to 488 months of imprisonment, and the court indicated that it would likely have imposed the same sentence if petitioner had not been classified as a career offender. See Sentencing Tr. 26. Accordingly, petitioner's sentence would be unlikely to change even if he were not classified as a career offender.

Third, petitioner's motion for collateral relief was not his first collateral attack, see Pet. 5, 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.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

ROBERT A. PARKER
Attorney

JUNE 2020