No. 19-8190

IN THE SUPREME COURT OF THE UNITED STATES

GEORGE LYLE CULLETT, 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 his claim, which he brought in a motion under 28 U.S.C. 2255, that the residual clause in Section 4B1.2(1) (1992) of the previously binding federal Sentencing Guidelines is void for vagueness under Johnson v. United States, 135 S. Ct. 2551 (2015). 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), that contention does not

warrant this Court's review.[1] This Court has recently and repeatedly denied review of other petitions presenting similar issues.[2] 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 below -- has determined that a defendant like petitioner is not

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[1] 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.

[2] 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).

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); 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. 3-4, infra -- does not warrant this Court's review.

In any event, this case would be an unsuitable vehicle for addressing the question presented because 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. 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 (1992). The official commentary to that provision stated that a "'[c]rime of violence' includes * * * robbery." Sentencing Guidelines § 4B1.2, comment. (n.2) (1992).

Petitioner was convicted on two counts of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d) (1988), and at the time of his sentencing, he had three prior convictions for robbery in California. See Pet. App. 3a-4a; Presentence Investigation Report ¶¶ 61-63. Petitioner cannot, therefore, establish that the definition of a "crime of violence" was unconstitutionally vague as applied to him. See Br. in Opp. at 17-18, Gipson, supra (No. 17-8637).

2. Petitioner additionally contends (Pet. 24-40) 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)(A). The court of appeals correctly rejected that contention.

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).[3]

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. 26-29; that federal bank robbery does not require a specific intent to steal, see Pet. 29-32 (citing, inter alia, Carter v. United States, 530 U.S. 255, 268 (2000)); that federal armed bank robbery may be committed using an inoperable gun, see Pet. 32-35; and that the bank-robbery statute includes non-violent extortion as an indivisible means of committing the offense, see Pet. 35-40. Those contentions lack merit for the reasons explained at pages 9-25 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.

[3] 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.

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

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

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