No. 19-8191

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IN THE SUPREME COURT OF THE UNITED STATES

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BENJAMIN VELASQUEZ, 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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## QUESTIONS PRESENTED

1. 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).

2. 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).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (C.D. Cal.):

Velasquez v. United States, No. 16-cv-8869 (Aug. 28, 2017)

United States v. Velasquez, No. 92-cr-1173 (Jan. 9, 2020)

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

United States v. Velasquez, No. 93-50775 (Jun. 14, 1994)

Velasquez v. United States, No. 17-56309 (Jan. 9, 2020)

Supreme Court of the United States:

Velasquez v. United States, No. 94-6081 (Oct. 31, 1994)

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is not published in the Federal Reporter. The opinion of the district court (Pet. App. 2a-13a) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on January 9, 2020. The petition for a writ of certiorari was filed on April 1, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Central District of California, petitioner was convicted on two counts of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d); and two counts of using a firearm during a crime of violence, in violation of 18 U.S.C. 924(c)(1) (Supp. IV 1992). Pet. App. 3a. The district court sentenced petitioner to 488 months of imprisonment, to be followed by three years of supervised release. Ibid.; D. Ct. Doc. 76 (Oct. 21, 1993). The court of appeals affirmed, 26 F.3d 135, 1994 WL 259759 (Tbl.), and this Court denied certiorari, 513 U.S. 975. In 2006, petitioner filed a motion for postconviction relief under 28 U.S.C. 2255. The district court dismissed the motion as untimely. D. Ct. Doc. 88 (July 17, 2006). In 2016, petitioner filed an authorized second-or-successive motion under Section 2255. The district court denied that motion, but granted a certificate of appealability (COA). Pet. App. 2a-13a. The court of appeals affirmed. Id. at 1a.

1. On December 14, 1992, petitioner robbed the California Federal Bank in Los Angeles, California. Presentence Investigation Report (PSR) ¶¶ 15-16. He brandished a handgun, ordered a bank employee to unlock several teller drawers, and collected $3781 in a manila envelope. Id. ¶ 16. Petitioner then left the bank in a car driven by an accomplice. Ibid.

Thirty minutes later, petitioner carried out a similar robbery at the Burbank Federal Credit Union. PSR ¶ 18. Petitioner

entered the bank, approached a teller, and handed her a note that said "I have a gun. This is a robbery. Be calm." Ibid. The teller provided petitioner with the money from her cash drawer. Ibid. Petitioner then pointed a handgun at the teller's head, demanded "more large bills," and directed her to "[s]how me" the location of the vault. Ibid. When the branch supervisor arrived, petitioner shouted "[y]ou better show me where the large bills are." Ibid. The supervisor led petitioner to the vault, where petitioner took a small metal box and clear plastic bag containing cash. Ibid. Petitioner left the bank with $73,960. Ibid.

Bank employees recorded the license-plate number of petitioner's car and reported it to law enforcement. PSR ¶ 19. Officers then identified the car on a nearby highway and a high-speed chase ensued. Ibid. After the car hit a guardrail, petitioner attempted to flee, but officers apprehended him. Ibid. Officers also recovered a loaded .45-caliber semi-automatic handgun. PSR ¶ 21.

Petitioner subsequently admitted to robbing the two banks with a handgun. PSR ¶ 24. He also admitted to having robbed multiple other banks over the course of several weeks. PSR ¶ 23.

2. A federal grand jury in the Central District of California charged petitioner with two counts of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and two counts of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1) (SupP. IV 1992). PSR ¶¶ 5-8.

The grand jury also returned a second indictment charging petitioner with two additional counts of armed bank robbery involving other banks, in violation of 18 U.S.C. 2113(a) and (d), and one additional count of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1) (Supp. IV 1992). PSR ¶¶ 10-12. Petitioner pleaded guilty to all the counts in the first indictment, and in exchange, the government agreed to dismiss the counts in the second indictment. PSR ¶ 3.

The Probation Office's presentence report determined that petitioner qualified as a career offender under Sentencing Guidelines § 4B1.1 (1992). PSR ¶ 61. 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 (1992). In recommending the career-offender enhancement, the Probation Office cited petitioner's prior federal conviction for armed bank robbery, and California state convictions for burglary and robbery, as predicate crimes of violence. PSR ¶¶ 61, 82, 85, 88.

The Probation Office calculated an offense level of 34 and a criminal history category of VI, which -- together with the statutory-minimum consecutive sentences required for petitioner's

Section 924(c) convictions -- yielded a sentencing range of 562 to 627 months of imprisonment. PSR ¶¶ 62, 98, 115; see 18 U.S.C. 924(c)(1) (Supp. IV 1992) (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 28 and his criminal history category would have been IV, resulting in a sentencing range of 440 to 475 months of imprisonment. PSR ¶¶ 60, 97.

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 applied the career-offender enhancement, and also determined that petitioner should receive a reduction of three offense levels for acceptance of responsibility under Sentencing Guidelines § 3E1.1. Sent. Tr. 11-12. That ruling yielded a sentencing range of 488 to 535 months. Id. at 12-13.

The district court sentenced petitioner to 488 months of imprisonment, consisting of concurrent sentences of 188 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. Sent. Tr. 38-39; Pet. App. 3a.

The court of appeals affirmed, 26 F.3d 135, 1994 WL 259759 (Tbl.), and this Court denied certiorari, 513 U.S. 975.

3. In 2006, petitioner filed a motion for postconviction relief under 28 U.S.C. 2255. The district court denied that motion as untimely. D. Ct. Doc. 88.

4. In 2016, petitioner filed an authorized second-or-successive motion under Section 2255 in which he argued that his convictions for armed bank robbery (two in this case and one in a previous case), as well as his prior convictions for California robbery and burglary, did not qualify as "crime[s] of violence" for purposes of the former career-offender sentencing guideline. D. Ct. Doc. 93, at 6-23 (Nov. 30, 2016) (Second 2255 Motion). Petitioner further argued that armed bank robbery does not qualify as a "crime of violence" under Section 924(c). Id. at 24-26.

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) (1992), 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). 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).

Petitioner argued that none of his convictions for armed bank robbery, California robbery, and California burglary required proof of the elements identified in Section 924(c)(3)(A) and former Sentencing Guidelines Section 4B1.2(1)(i). See Second 2255 Motion 6-26. 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 Second 2255 Motion 6-26.

The district court denied petitioner's motion. Pet. App. 2a-13a. The court determined that petitioner's prior conviction for California robbery "remains a viable predicate for applying the [Sentencing Guidelines'] career offender enhancement" because the application note in former Section 4B1.2(1) "expressly states that robbery is a crime of violence under [Section] 4B1.2." Id. at 8a (citing Sentencing Guidelines § 4B1.2, comment. (n.2) (1992)); see id. at 5a-8a. The court explained that, because "there could be little doubt that a conviction under [the California robbery statute] was, in fact, encompassed by this

definition, petitioner's argument that [Section] 4B1.2's residual clause is unconstitutionally vague fails." Id. at 8a.

The district court further determined, applying circuit precedent, that petitioner's prior and current convictions for federal armed bank robbery qualify as "crime[s] of violence" under Section 924(c)(3)(A) and former Guidelines Section 4B1.2(1). Pet. App. 8a-9a (citing United States v. Wright, 215 F.3d 1020, 1028 (9th Cir.), cert. denied, 531 U.S. 969 (2000), and United States v. Selfa, 918 F.2d 749, 751 (9th Cir.), cert. denied, 498 U.S. 986 (1990)); see id. at 8a-12a. In particular, the court rejected petitioner's contentions that armed bank robbery lacks a mens rea element and can be accomplished without violent force. The Court thus found that it had properly "appl[ied] the career offender enhancement to [petitioner]," and that "his convictions under [Section] 924(c) remain sound." Pet. App. 13a. The court accordingly denied relief, but it granted a COA. Ibid.

5. The court of appeals summarily affirmed in an unpublished order. Pet. App. 1a. 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 ibid. (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 had recognized a

new right that applies to the pre-Booker mandatory sentencing guidelines. See ibid. (citing United States v. Blackstone, 903 F.3d 1020, 1028 (9th Cir. 2018), cert. denied, 139 S. Ct. 2762 (2019)).

ARGUMENT

Petitioner contends (Pet. 6-24) that the residual provision in Section 4B1.2(1)(ii) (1992) of the previously binding federal Sentencing Guidelines is void for vagueness under Johnson v. United States, 135 S. Ct. 2551 (2015). He additionally contends (Pet. 24-40) that armed bank robbery is not a "crime of violence" under 18 U.S.C. 924(c)(3)(A). 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. 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 pre-Booker mandatory Sentencing Guidelines does not warrant this Court's review.[1] This Court has recently and

[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.

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 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

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[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).

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. 11-12, 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 (1992). The official commentary to the definition of a "crime of violence" stated that the definition "includes * * * robbery." Sentencing Guidelines § 4B1.2, comment. (n.2) (1992). Petitioner was convicted in this case of two counts of federal

armed bank robbery and had prior convictions for federal armed bank robbery and California robbery. See Pet. 4; Pet. App. 4a. 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 Pet. App. 4a, 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).

2. Petitioner's contention (Pet. 24-40) that armed bank robbery is not a "crime of violence" under 18 U.S.C. 924(c)(3)(A) also does not warrant this Court's review. 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]

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. 24-29, and that federal bank robbery does not require a specific intent, see Pet. 29-32 (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.

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[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.

Petitioner additionally contends (Pet. 35-40) that bank robbery cannot qualify as a "crime of violence" because 18 U.S.C. 2113(a) also prohibits "obtain[ing] or attempt[ing] to obtain" bank property "by extortion." In petitioner's view, "obtain[ing] by extortion" and "taking" by "force and violence or by intimidation," Pet. 35-40, are alternative means of committing a single indivisible crime, rather than two separate crimes, and a court must therefore consider nonviolent extortion in applying Section 924(c)(3)(A) to his bank-robbery offense. That argument lacks merit for the reasons explained at pages 20 to 25 of the government's brief in opposition in Johnson, supra (No. 19-7079). Section 2113(a) defines two different crimes against banks, each of which has different elements: a robbery crime in which the offender uses "force and violence" or "intimidation" to "take[ ]" money from a "person"; and an extortion crime in which the offender "obtains" money "by extortion." 18 U.S.C. 2113(a). The statute is therefore divisible, and the charges in this case and petitioner's earlier federal proceeding specified that petitioner committed the offense of armed bank "robbery," not extortion. See PSR ¶¶ 5, 7, 88.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2020