No. 20-7386

IN THE SUPREME COURT OF THE UNITED STATES

ANDREW CHAPNICK, 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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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 former Sentencing Guidelines Section 4B1.2(a) (2003) is void for vagueness under Johnson v. United States, 135 S. Ct. 2551 (2015). He further contends 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 district court correctly rejected those contentions, and the court of appeals appropriately declined to issue a COA.

1. 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 Sentencing Guidelines -- which were formerly mandatory before United States v. Booker, 543 U.S. 220 (2005) -- does not warrant this Court's review.[1] This Court has repeatedly denied review of other petitions presenting similar issues.[2] The same result is warranted here.

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[1] We have served petitioner with a copy of the government's brief in opposition in Gipson, which is also available on this Court's online docket.

[2] See, e.g., Mayes v. United States, No. 20-6992 (Mar. 1, 2021); Nunez v. United States, 141 S. Ct. 941 (2020) (No. 20-6221); Archer v. United States, 141 S. Ct. 832 (2020) (No. 20-5928); Jenkins v. United States 141 S. Ct. 452 (2020) (No. 19-8924); Velazquez v. United States, 141 S. Ct. 336 (2020) (No. 19-8820); Scott v. United States, 141 S. Ct. 321 (2020) (No. 19-8745); Jackson v. United States, 141 S. Ct. 451 (2020) (No. 19-8735); Jamison v. United States, 140 S. Ct. 2699 (2020) (No. 19-8041); Castaneda v. United States, 140 S. Ct. 2751 (2020) (No. 19-7981); Hoff v. United States, 140 S. Ct. 2750 (2020) (No. 19-7977); Fleming v. United States, 140 S. Ct. 2750 (2020) (No. 19-7976); Moreno v. United States, 140 S. Ct. 2750 (2020) (No. 19-7974); Quinones v. United States, 140 S. Ct. 2749 (2020) (No. 19-7958); Bogard v. United States, 140 S. Ct. 2693 (2020) (No. 19-7933); Patrick v. United States, 140 S. Ct. 2635 (2020) (No. 19-7755); Lacy v. United States, 140 S. Ct. 2627 (2020) (No. 19-6832); Ward v. United States, 140 S. Ct. 2626 (2020) (No. 19-6818); 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)

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 recognized 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) (explaining 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,

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(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); see also Br. in Opp. 7 & n.3, Bronson v. United States, No. 19-5316 (Oct. 7, 2019) (citing multiple other petitions where the Court denied review of similar issues); Br. in Opp. 6-7 & n.1, Wilson v. United States, No. 17-8746 (Aug. 6, 2018), cert. denied, 139 S. Ct. 374 (2018) (same); Br. in Opp. at 9-14, Gipson, supra (No. 17-8637) (same). We have served petitioner with a copy of the government's briefs in opposition in Bronson and Wilson, which are also available on this Court's online docket.

469 (2d Cir.) (citing decisions from seven additional circuits), cert. denied, 141 S. Ct. 941 (2020).

Only two circuits have concluded otherwise. See Shea v. United States, 976 F.3d 63, 74-82 (1st Cir. 2020); Cross v. United States, 892 F.3d 288, 293-294, 299-307 (7th Cir. 2018). But that shallow conflict does not warrant this Court's review, and this Court has continued to deny petitions for a writ of certiorari on this issue even after its development. See p. 2 n.2, supra.[3] Even if petitioner were correct on the question presented, only a small number of federal prisoners would be entitled to resentencing, because the substantial majority of defendants who received a career-offender enhancement under the formerly binding Sentencing Guidelines would have qualified for that enhancement irrespective of the residual clause. See p. 5, supra; see also, e.g., Br. in Opp. at 9-10, Bronson, supra (No. 19-5316); Br. in Opp. at 10-11, Wilson, supra (No. 17-8746); Br. in Opp. at 16, Gipson, supra (No. 17-8637). And the importance of the question continues to diminish

[3] Petitioner suggests (Pet. 11-12) that the importance of the issue has increased because some circuits would allow prisoners to obtain relief on it through a habeas petition under 28 U.S.C. 2241. But the one case he cites, Lester v. Flournoy, 909 F.3d 708 (4th Cir. 2018), arose in a circuit that agrees with the court below here on the question presented, and the court there granted relief on a non-constitutional claim. See id. at 712; see also United States v. Brown, 868 F.3d 297, 303 (4th Cir. 2017) (holding that a defendant like petitioner is not permitted to challenge his sentence under the formerly mandatory Guidelines based on Johnson), cert. denied, 139 S. Ct. 14 (2018). Petitioner identifies no decision from any court of appeals granting habeas relief on a ground inconsistent with the decision below.

as prisoners sentenced before Booker complete their sentences. See, e.g., Br. in Opp. at 8, Wilson, supra (No. 17-8746); see also Br. in Opp. at 16, Gipson, supra (No. 17-8637).

In addition, this case itself would be an unsuitable vehicle for addressing the question presented, because even if the challenged language in the Guidelines 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(a) (2003). 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 bank robbery, and the district court designated him a career offender based on, inter alia, his prior federal conviction for bank robbery and prior California conviction for robbery. See Pet. 4; Presentence Investigation Report ¶¶ 117, 126, 143. In light of his 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).

2. 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).[4]

Petitioner contends (Pet. 24-40) that armed bank robbery does not qualify as a crime of violence under Section 924(c)(3)(A), asserting that robbery "by intimidation" does not require the use or threatened use of violent force, see Pet. 26-29; that federal bank robbery is not a specific-intent crime, 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 or fake weapon, see Pet. 32-35; and that the bank-robbery statute includes nonviolent intimidation and extortion as

[4] We have served petitioner with a copy of the government's brief in opposition in Johnson, which is also available on this Court's online docket.

indivisible means of committing the offense, see Pet. 35-40. Those contentions lack merit for the reasons explained at pages 9 to 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) and similarly worded provisions encompass federal bank robbery and armed bank robbery. See id. at 7-8. This Court has repeatedly denied petitions for a writ of certiorari challenging the circuits' consensus on that issue, see id. at 8-9 & n.1, and the same result is warranted here.

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

Respectfully submitted.

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Acting Solicitor General

MAY 2021

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