No. 20-7792

IN THE SUPREME COURT OF THE UNITED STATES

RALPH STEPHEN GAMBINA, 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 relief 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(1) (1988) is void for vagueness under Johnson v. United States, 576 U.S. 591 (2015). He further contends (Pet. 24-28) 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 those contentions, and no further review is warranted on either issue.

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 (Pet. 6-24) 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., Cullett v. United States, No. 19-8190 (June 21, 2021); Chapnick v. United States, No. 20-7386 (June 14, 2021); Mayes v. United States, 141 S. Ct. 1506 (2021) (No. 20-6992); 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

Petitioner's motion under 28 U.S.C. 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.

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); see also Br. in Opp. 7 & n.3, Bronson v. United States, No. 19-5316 (Oct. 7, 2019) (citing multiple other petitions where this 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.

2762 (2019); see also, e.g., Nunez v. United States, 954 F.3d 465, 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 issue, only a small number of federal prisoners would be entitled to resentencing, because the substantial majority of defendants who received the relevant enhancement under the formerly binding Sentencing Guidelines would have qualified for that enhancement irrespective of the residual clause. See pp. 5-7, 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).

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[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 that petitioner 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.

And the importance of the question continues to diminish 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 would be an unsuitable vehicle for addressing the issue, 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 (1988). The official commentary to the Guidelines' definition of a "crime of violence" stated that the definition includes "aggravated assault, * * * or robbery." Sentencing Guidelines § 4B1.2, comment. (n.1) (1988). Petitioner was convicted of federal armed bank robbery, and the district court designated him a career offender based on, inter alia, his prior convictions for federal bank robbery and assaulting a U.S. marshal with a dangerous weapon. See Pet. 4; Presentence Investigation Report (PSR) ¶¶ 96, 98.[4] In light of those convictions, petitioner

[4] The PSR states that petitioner was found guilty of two counts of assault. See PSR ¶ 98. The Eighth Circuit's decision affirming those convictions clarifies that a jury found 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).

Moreover, this case would be an unsuitable vehicle for the additional reason that petitioner was properly sentenced as a career offender under the Guidelines irrespective of the residual clause. The Guidelines at the time defined "crime of violence," Sentencing Guidelines § 4B1.2(1) (1988), by incorporating the statutory definition of the same term in 18 U.S.C. 16: an offense that either (a) "has as an element the use, attempted use, or threatened use of physical force against the person or property of another"; or (b) "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." Regardless of the residual clause in Section 16(b), petitioner's present conviction for armed bank robbery, as well as his prior convictions for federal bank robbery and assaulting a U.S. marshal with a dangerous weapon, all qualified as crimes of violence under Section 16(a), because each "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. 16(a); see United States v. Watson, 881 F.3d 782, 784 (9th Cir.) (per curiam) (holding that federal armed bank robbery categorically qualifies as a "crime of violence" under

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guilty of two counts of assault with a dangerous weapon. See United States v. Gambina, 564 F.2d 22, 23 (8th Cir. 1977).

18 U.S.C. 924(c)(3)(A), a definitional provision similar to Section 16(a)), cert. denied, 139 S. Ct. 203 (2018); United States v. Juvenile Female, 566 F.3d 943, 947 (9th Cir. 2009) (holding that the offense of "assault involving a deadly or dangerous weapon or resulting in bodily injury," in violation of 18 U.S.C. 111, is categorically a crime of violence under Section 16(a)), cert. denied, 558 U.S. 1134 (2010); see also pp. 7-9, supra.

2. Petitioner's further contention (Pet. 24-28) that armed bank robbery does not qualify as a crime of violence under Section 924(c)(3)(A) likewise 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), cert. denied (June 21, 2021), 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).[5]

Petitioner argues (Pet. 24-28) that armed bank robbery does not qualify as a crime of violence under Section 924(c)(3)(A), asserting that robbery by "extortion" does not require the use or threatened use of violent force, see Pet. 24-25; and that federal armed bank robbery may be committed using inoperable or fake weapons, see Pet. 25-28. Those assertions 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 Br. in Opp. at 7-8, Johnson, supra (No. 19-7079). This Court has recently and repeatedly denied petitions for a writ of certiorari

[5] 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.

challenging the circuits' consensus on that issue. See id. at 8-9 & n.1.[6] The same result is warranted here.[7]

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[6] See also, e.g., Johnson, supra No. 19-7079 (June 21, 2021); Jordan v. United States, No. 19-7067 (June 21, 2021); Rogers v. United States, No. 19-7320 (June 21, 2021); Cullett v. United States, No. 19-8190 (June 21, 2021); Vidrine v. United States, 19-8044 (June 21, 2021); Velasquez v. United States, No. 19-8191 (June 21, 2021); Simpson v. United States, 19-7764 (June 21, 2021); Gray v. United States, No. 19-7113 (June 21, 2021); Harvey v. United States, 19-8004 (June 21, 2021); Blanche v. United States, 19-8899 (June 21, 2021); Peterson v. United States, No. 20-5396 (June 21, 2021); Northcutt v. United States, No. 20-5640 (June 21, 2021); Davis v. United States, No. 20-6284 (June 21, 2021); Cernak v. United States, No. 20-6447 (June 21, 2021); Meece v. United States, No. 20-6425 (June 21, 2021); Ward v. United States, No. 20-6582 (June 21, 2021); Mitchell v. United States, No. 20-6622 (June 21, 2021); Davis v. United States, No. 20-6742 (June 21, 2021); Alexander v. United States, No. 20-7081 (June 21, 2021); Godwin v. United States, No. 20-7137 (June 21, 2021); Davis v. United States, No. 20-7126 (June 21, 2021); Douglas v. United States, No. 20-7223 (June 21, 2021); Alvarez v. United States, No. 20-7235 (June 21, 2021); Chapnick v. United States, No. 20-7386 (June 14, 2021); Thomas v. United States, No. 20-7382 (June 21, 2021); Fields v. United States, No. 20-7413 (June 21, 2021).

[7] In Borden v. United States, No. 19-5410 (June 10, 2021), this Court determined that Tennessee reckless aggravated assault, in violation of Tennessee Code Annotated § 39-13-102(a)(2), lacks a mens rea element sufficient to qualify it as an offense involving "the use of physical force against the person of another" for purposes of the definition of "violent felony" in the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(i). Petitioner does not contend that his conviction for armed bank robbery implicates a similar question under Section 924(c)(3)(A). Even if he had, the Court's decision in Borden would not call into question the judgment in this case, because every court of appeals to have considered the issue has determined that bank robbery by intimidation cannot be committed recklessly; instead, the defendant must act either intentionally or knowingly. See Br. in Opp. at 19 n.3, Johnson, supra (No. 19-7079). This Court has denied multiple petitions for a writ of certiorari after Borden arguing that bank robbery does not qualify as a crime of violence. See p. 9 n.6, supra.

The petition for a writ of certiorari should be denied.[8]

Respectfully submitted.

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JUNE 2021

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