

No. 17-9276

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IN THE SUPREME COURT OF THE UNITED STATES

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THILO BROWN, 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 FOURTH CIRCUIT

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 12-33) 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 Section 4B1.2(a)(2) of the previously binding federal Sentencing Guidelines is void for vagueness under Johnson v. United States, 135 S. Ct. 2551 (2015). For the reasons similar to those 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 (Apr. 17, 2018), that contention does not warrant this

Court's review.<sup>1</sup> This Court has recently and repeatedly denied review of other petitions presenting similar issues. See Lester v. United States, 138 S. Ct. 2030 (2018) (No. 17-1366); Allen v. United States, 138 S. Ct. 2024 (2018) (No. 17-5684); Gates v. United States, 138 S. Ct. 2024 (2018) (No. 17-6262); James v. United States, 138 S. Ct. 2024 (2018) (No. 17-6769); Robinson v. United States, 138 S. Ct. 2025 (2018) (No. 17-6877); Miller v. United States, 2018 WL 706455 (June 11, 2018) (No. 17-7635); Raybon v. United States, 2018 WL 2184984 (June 18, 2018) (No. 17-8878); Sublett v. United States, 2018 WL 2364840 (June 25, 2018) (No. 17-9049). The same result is warranted here.<sup>2</sup>

As the court of appeals correctly determined, petitioner's motion under 28 U.S.C. 2255 was not timely, because petitioner

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<sup>1</sup> We have served petitioner with a copy of the government's brief in opposition in Gipson. As noted below, see pp. 3-4, *infra*, the legal backdrop of petitioner's claim is not identical to that of the petitioners in Gipson, because his sentencing was subject to more stringent limitations on Guidelines departures that were adopted after the sentencings in Gipson. But as in Gipson, the Guidelines at the time of petitioner's sentencing did not set forth absolute boundaries for a lawful sentence, and petitioner received a sentence within the applicable and unchallenged statutory range.

<sup>2</sup> Other pending petitions have raised similar issues. See Cottman v. United States, No. 17-7563 (filed Jan. 22, 2018); Molette v. United States, No. 17-8368 (filed Apr. 2, 2018); Greer v. United States, No. 17-8775 (filed May 1, 2018); Wilson v. United States, No. 17-8746 (filed May 1, 2018); Homrich v. United States, No. 17-9045 (filed May 6, 2018); Chubb v. United States, No. 17-9379 (filed June 6, 2018); Smith v. United States, No. 17-9400 (filed June 13, 2018); Buckner v. United States, No. 17-9411 (filed June 11, 2018); Lewis v. United States, No. 17-9490 (filed June 20, 2018).

filed the motion more than one year after his conviction became final, and this Court's decision in Johnson did not recognize a new retroactive right with respect to the formerly binding Sentencing Guidelines that would either provide petitioner with a new window for filing his claim or entitle him to relief on collateral review. See 28 U.S.C. 2255(f)(1) and (3); Br. in Opp. at 9-14, Gipson, supra (No. 17-8637); see also United States v. Green, No. 17-2906, --- F.3d ---, 2018 WL 3717064, at \*5-\*6 (3d Cir. Aug. 6, 2018) (holding that a challenge to the residual clause of the formerly binding career-offender guideline was untimely under Section 2255(f)(3)). Although a circuit disagreement exists on the viability of a claim like petitioner's, the disagreement is shallow, of limited importance, and may soon resolve itself without the need for this Court's intervention. See Br. in Opp. at 14-16, Gipson, supra (No. 17-8637); see also Green, 2018 WL 3717064, at \*5 (stating that the court was "not persuaded by the [Seventh Circuit's] brief analysis on this issue").

Moreover, this case would be an unsuitable vehicle for addressing the question presented because petitioner's sentencing postdated enactment of the PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650, on April 30, 2003, which altered the requirements for district courts to depart from the proscribed Sentencing Guidelines range. See § 401, 117 Stat. 667-676; Pet. 9 (noting that the district court entered judgment on July 21, 2003).

Further review of petitioner's claim would therefore directly concern only defendants who were sentenced during the less-than-two-year period between the PROTECT Act and this Court's decision in United States v. Booker, 543 U.S. 220 (2005), which held binding application of the Guidelines to be unconstitutional.

The petition for a writ of certiorari should be denied.<sup>3</sup>

Respectfully submitted.

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AUGUST 2018

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<sup>3</sup> The government waives any further response to the petition unless this Court requests otherwise.