

No. 17-9411

IN THE SUPREME COURT OF THE UNITED STATES

JOHN ELWOOD BUCKNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 11-25) that the court of appeals erred in denying a certificate of appealability 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) (2001) 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 (filed Apr. 17, 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. 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, 138 S. Ct. 2622 (2018) (No. 17-7635); Raybon v. United States, 138 S. Ct. 2661 (2018) (No. 17-8878); Sublett v. United States, 138 S. Ct. 2693 (2018) (No. 17-9049). The same result is warranted here.²

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 this Court's decision in Johnson did not recognize a new retroactive right with respect to the formerly

¹ We have served petitioner with a copy of the government's brief in opposition in Gipson.

² 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); Wilson v. United States, No. 17-8746 (filed May 1, 2018); Greer v. United States, No. 17-8775 (filed May 1, 2018); Homrich v. United States, No. 17-9045 (filed May 7, 2018); Brown v. United States, No. 17-9276 (filed May 29, 2018); Chubb v. United States, No. 17-9379 (filed June 6, 2018); Smith v. United States, No. 17-9400 (filed June 13, 2018); Lewis v. United States, No. 17-9490 (filed June 20, 2018); Garrett v. United States, No. 18-5422 (filed July 30, 2018); Posey v. United States, No. 18-5504 (filed Aug. 6, 2018); Kenner v. United States, No. 18-5549 (filed Aug. 8, 2018).

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). The government's petition for rehearing en banc in the one circuit that has taken petitioner's view remains pending, and since that petition was filed, the Third Circuit has adopted the majority view that a defendant like petitioner is not entitled to collaterally attack his sentence based on Johnson. See Green, 2018 WL 3717064, at *5 (stating that the court was "not persuaded by the [Seventh Circuit's] brief analysis on this issue").

In any event, this case would be an unsuitable vehicle for addressing the question presented for multiple reasons.

First, petitioner challenges only his sentence, not his conviction, see Pet. 4, and petitioner's challenge to his sentence will shortly become moot when petitioner is released from prison,

which is scheduled to occur on January 12, 2019.³ See Br. in Opp. at 8-10, Wilson v. United States (No. 17-8746) (Aug. 6, 2018).⁴

Second, petitioner's motion for collateral relief was not his first collateral attack, see Pet. 9, 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).

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

Respectfully submitted.

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³ See Fed. Bureau of Prisons, Find an Inmate, <https://www.bop.gov/inmateloc> (search for inmate register number 96825-071).

⁴ We have also served petitioner with a copy of the government's brief in opposition in Wilson.

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