

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

VERISSIMO TAVARES,
Petitioner

vs.

UNITED STATES,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATE COURT OF APPEALS FOR
THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Judith H. Mizner
Federal Defender Office
51 Sleeper Street, 5th Floor
Boston, MA 02210
Tel: 617-223-8061

Attorney for Petitioner

QUESTION PRESENTED

1. Whether application of the residual clause of the definition of “crime of violence” in U.S.S.G. §4B1.2(a)(2), a clause identical to that of the residual clause of the definition of “violent felony” in 18 U.S.C. §924(e)(2)(B)(ii), in enhancing a defendant’s guidelines sentencing range constitutes procedural error in light of this Court’s decision in *Johnson v. United States*, __U.S.__, 135 S.Ct. 2551 (2015) because the clause is hopelessly indeterminate and violates Congressional directives to the Sentencing Commission?

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Verissimo Tavares, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case.

OPINION BELOW

The judgment of the United States Court of Appeals for the First Circuit entered on April 5, 2018 affirming petitioner's sentence is unreported and is found at Appendix A.

JURISDICTION

The judgment of the Court of Appeals affirming petitioner's conviction was entered on April 5, 2018. This petition is filed within ninety days of that judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S.S.G. § 4B1.2(a) provided at the pertinent time, in relevant part, that a "crime of violence" includes:

"any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that –

.....

(2) is burglary of a dwelling, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."

STATEMENT OF THE CASE

Mr. Tavares was convicted of being a felon in possession of a firearm. His guidelines sentencing range increased from 37-46 months to 120-150 months, based on a conviction for Massachusetts assault and battery with a dangerous weapon (“ABDW”) and a conviction for Massachusetts resisting arrest.¹ Appendix A. p.1-2.

Based on its prior decision in *United States v. Wurie*, 867 F.3d 28 (1st Cir. 2017), *cert. denied*, 138 S.Ct. 690 (2018), the Court of Appeals rejected Tavares’ arguments that, post-*Beckles*,² the residual clause of the guidelines must still be interpreted and applied in light of *Johnson*’s³ analysis of the identical residual

¹ His guidelines range was capped at a statutory maximum of 120 months and the district court varied downward to impose a sentence of 84 months .

² In *Beckles v. United States*, ___U.S.__, 137 S.Ct. 886 (2017) (“*Beckles*”), this Court held that because “the advisory Guidelines do not fix the permissible range of sentences” (137 S.Ct. at 892), “advisory Guidelines are not subject to a vagueness challenge under the Due Process Clause.” 137 S.Ct. at 895. That holding “does not render ‘sentencing procedure[s]’ entirely ‘immune from scrutiny under the due process clause.’” 137 S.Ct. at 896.

³ In *Johnson v. United States*, ___U.S.__, 135 S.Ct. 2551 (2015) (“*Johnson*”) this Court held that the residual clause of the definition of “violent felony” in the Armed Career Criminal Act (“ACCA,” 18 U.S.C. § 924(e)), a provision identical to the residual clause of the definition of “crime of violence” in the guidelines, was unconstitutionally vague.

The Sentencing Commission recognized the deficiencies in the residual clause of the ACCA detailed in *Johnson* in explaining its decision to remove the residual clause of the guidelines crime of violence definition effective August 1, 2016. “The Commission determined that the residual clause...implicates many of the same concerns cited by the Supreme Court in *Johnson* and, as a matter of policy, amends § 4B1.2(a)(2) to strike the clause.” U.S.S.C. Guidelines Manual, Supplement to Appendix C (November 1, 2016), Amendment 798, p.128.

clause of the ACCA and that, applying *Johnson*'s analysis, the residual clause could not be employed to support a determination that his prior convictions qualified as crimes of violence under the residual clause because the applicable guidelines range could not be correctly calculated using a provision that could not be applied consistently and was not susceptible to principled or objective standards. It also rejected his arguments addressing the rule of lenity and, alternatively, limiting application of the residual clause to offenses with certain elements. Rather, citing *Wurie*, it reiterated that its pre-*Johnson* determination that Massachusetts ABDW is a categorical crime of violence under the residual clause of the guidelines remained unaffected by *Johnson* and held that its 2009 pre-*Johnson* determination that Massachusetts resisting arrest is a categorical crime of violence under the residual clause of the guidelines remained unaffected by *Johnson*. Appendix A, pp.1-2.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. The Interpretation and Application of the Residual Clause of the Definition of Crime of Violence in the Career Offender Guideline Following This Court's Decisions in *Johnson v. United States* and *Beckles v. United States* is an Important Issue of Federal Sentencing Law Affecting Many Defendants and Affecting the Interpretation of Other Similarly Worded Provisions of Federal Law.

A. Introduction

In *Johnson v. United States*, ___U.S.__, 135 S.Ct. 2551 (2015), this Court invalidated as unconstitutionally vague the residual clause of the Armed Career Criminal Act definition of "violent felony." It said that the courts' attempts to

interpret it “could only be guesswork.” *Id.* at 2560. The clause was “hopelessly indetermina[nt]” and “a judicial morass that defies systemic solution” *Id.* at 2558, 2562. The language of that residual clause is identical to that of the residual clause of the definition of “crime of violence” in the career offender guideline, used in determining the application of other enhancement provisions in the guidelines.

In *Beckles v. United States*, __U.S.__, 137 S.Ct. 886 (2017), this Court held, in the context of collateral review, that advisory sentencing guidelines are not subject to a vagueness challenge under the Due Process Clause, and that the residual clause of the definition of “crime of violence” in the career offender guideline (U.S.S.G. § 4B1.2(a)(2)) is not unconstitutionally void for vagueness. *Id.* at 895. It did not address whether the residual clause may be applied in cases on direct review. Mr. Tavares was re-sentenced under advisory guidelines and appealed the application of a guidelines enhancement based on the crime of violence definition.

Beckles may have disposed of Mr. Tavares’ claim that he was sentenced under a guideline provision that was unconstitutionally vague in violation of the Due Process Clause. However, *Beckles* did not revisit *Johnson*’s interpretation of the identical language defining the “violent felony” that may serve as a predicate offense for an enhanced statutory sentence under the ACCA,⁴ or discuss the

⁴ The residual clause of U.S.S.G. § 4B1.2(a)(2) was taken from the residual clause of the ACCA. See U.S.S.C. Guidelines Manual, Appendix C, vol. I, Amendment 266 (1989).

interpretation or application of the residual clause or the criteria to be employed in determining whether any particular offense qualifies as a crime of violence under that clause post-*Johnson*.

The impact of whether an offense is a crime of violence under U.S.S.G. § 4B1.2(a)(2) is not limited to those sentenced as career offenders.⁵ That definition is used in calculating the guidelines under U.S.S.G. § 2D1.1 (drug offenses); U.S.S.G. § 2E1.2 (interstate or foreign travel or transportation in aid of a racketeering enterprise); U.S.S.G. § 2K1.3 (receipt, possession or transportation of explosive materials); U.S.S.G. § 2K2.1 (receipt, possession or transportation of firearms or ammunition);⁶ U.S.S.G. § 2S1.1 (laundering of monetary instruments; engaging in monetary transactions or property derived from unlawful activity); and U.S.S.G. § 4A1.1 and 4A1.2 (calculating criminal history). In addition, the definitions of crime of violence in 18 U.S.C. §16⁷ and 18 U.S.C. § 924(c)(3)(B) and aggravated felony in 8 U.S.C. § 1101(43)(F) contain language similar to that of the

⁵ In FY 2017 there were 1,593 career offenders. United States Sentencing Commission *Quick Facts*, “Career Offenders.” Available at: <https://www.ussc.gov/research/quick-facts/career-offenders>. Last visited on July 3, 2018.

⁶ In FY 2017 6,032 offenders were convicted as felons in possession of a firearm and subject to enhancement for prior crimes of violence. . United States Sentencing Commission *Quick Facts*, “Section 922(g) Firearms.” Available at: <https://www.ussc.gov/research/quick-facts/section-922g-firearms>. Last visited on July 3, 2018.

⁷ In *Sessions v. Dimaya*, ___ U.S. ___, 138 S.Ct. 1204 (2018) this Court held the residual clause of the definition of crime of violence in §16 to be unconstitutionally vague.

residual clause of U.S.S.G. § 4B1.2(a)(2). Resolving the applicability of the residual clause in this case could, therefore, provide needed guidance to lower courts addressing a variety of sentencing and other statutory issues.

B. *Johnson* Established that the Language of the Residual Clause of the Guidelines’ “Crime of Violence” Definition is Fatally Flawed. *Beckles* did not Change that Conclusion.

In *Johnson* this Court recognized the ambiguity and lack of clarity of the residual clause of the ACCA’s definition of violent felony. This Court explained in *Johnson* that its efforts and those of the lower courts “to derive meaning from the residual clause” was a “failed enterprise,” and “could only be guesswork.” *Johnson*, 135 S. Ct. at 2560; *id.* at 2558-60 (discussing its prior decisions interpreting the ACCA’s residual clause and lower court decisions interpreting the clause in the ACCA and the career offender guideline).⁸ It described its four decisions interpreting the clause as “repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause that confirm its hopeless indeterminacy,” (*id.* at 2558).⁹ Decisions of the courts of appeals provided

⁸ This Court analyzed four advisory guidelines cases in reaching the conclusion that the residual clause of the ACCA is impossible to apply consistently. *See Johnson*, 135 S. Ct. at 2560 (analyzing *United States v. Carthorne*, 726 F.3d 503 (4th Cir. 2013), *United States v. Whitson*, 597 F.3d 1218 (11th Cir. 2010), *United States v. McDonald*, 592 F.3d 808 (7th Cir. 2010), and *United States v. Williams*, 559 F.3d 1143 (10th Cir. 2009)).

⁹ This Court concluded that “[*James*, [550 U.S. 192 (2007)] *Chambers*, [555 U.S. 122 (2009)] and *Sykes* [564 U.S. 1 (2011)] failed to establish any generally applicable test that prevents the risk comparison required by the residual clause from devolving into guesswork and intuition.” *Johnson*, 135 S. Ct. at 2559. *Begay* [553 U.S. 137 (2008)] similarly “did not succeed in bringing clarity to the meaning of the residual clause.” *Id.*

further proof that the residual clause was “nearly impossible to apply consistently,” (*id.* 2560, citation omitted). The residual clause calls for “guesswork and intuition,” (*id.* at 2559); it is “a ‘judicial morass that defies systemic solution,’ ‘a black hole of confusion and uncertainty’ that frustrates any effort to impart ‘some sense of order and direction,’” (*id.* at 2562, citations omitted); it yields “anything but evenhanded, predictable, or consistent” results (*id.* at 2563). This Court concluded that there was “no reliable way” to “estimate the risk posed by a crime,” because the residual clause “ties the judicial assessment of risk to a judicially imagined ‘ordinary case’ of a crime” (*id.* at 2557–58), or to determine “how much risk it takes for a crime to qualify as a violent felony,” as it ties that assessment to the risk involved in four enumerated crimes that “are far from clear” with respect to degree of risk posed (*id.* at 2558).

The identical language in the residual clause of the United States Sentencing Guidelines’ definition of crime of violence (U.S.S.G. § 4B1.2(a)(2)) suffers from the same deficiencies. This Court did not say otherwise in *Beckles*. The *Beckles* majority did not deny the inaccuracy of residual clause determinations. Nor did it dispute Justice Sotomayor’s reminder that a district court must, at the outset of sentencing, “correctly” calculate the guideline range, or her assertion that it is impossible to correctly interpret the “inscrutably vague” residual clause. *See* 137 S.Ct. at 899-901 (Sotomayor, J., concurring in the judgment). While the residual clause of the guidelines may not be unconstitutionally void for vagueness in violation of the Due Process Clause, it remains standardless and lacks clear or

consistent definition for all of the reasons set out in *Johnson*. And, as this Court also stated in *Beckles*, the opinion did “not render the advisory Guidelines immune from constitutional scrutiny.” 137 S.Ct. at 895. In his concurrence Justice Kennedy also recognized that Constitutional concerns may arise from guidelines provisions that are vague in a general sense, *i.e.* “imprecise or unclear.” 137 S.Ct. at 897. *Beckles* did not change the fact that prior case law interpreting the residual clause has been overruled. In *Johnson* this Court expressly overruled *James v. United States*, 550 U.S. 192 (2007) (setting out the ordinary case analysis, stating that “the proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case presents a serious potential risk of injury to another”) (550 U.S. at 208), and *Sykes v. United States*, 564 U.S. 1 (2011) (relying on *James* and comparing perceived risk arising from vehicular flight to perceived risk arising from enumerated offenses).¹⁰ With both *James* and *Sykes* overruled, whether the ordinary case analysis remains viable, and, if so, how the ordinary case should be defined, is unclear and should be resolved by this Court to provide needed guidance to lower courts.¹¹

¹⁰ The court below relied on the *James* ordinary case analysis in holding that Massachusetts ABDW (*United States v. Glover*, 558 F.3d 71, 82 (1st Cir. 2009)) is a crime of violence under the residual clause of the guidelines.

¹¹ *Begay v. United States*, 553 U.S. 137 (2008) added another layer to residual clause analysis. To qualify as violent felonies (or crimes of violence) under the residual clause, offenses must be crimes that are “roughly similar, in kind as well as in degree of risk posed, to the [enumerated offenses].” (553 U.S. at 143). This Court explained that the enumerated offenses “all typically involve purposeful, ‘violent,’

C. The Residual Clause Does Not Permit the Correct Calculation of the Guidelines Required by Their Central Role in Sentencing.

The federal sentencing guidelines play a “central role in sentencing.” *Molina-Martinez v. United States*, ___ U.S.__, 136 S.Ct. 1338, 1345 (2016). They are “a set of elaborate, detailed Guidelines that aim to embody federal sentencing objectives ‘both in principle and in practice.’” *Id.* at 1342. They “are not only the starting point for most federal sentencing proceedings but also the lodestar.” *Id.* at 1346. “District courts *must* begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process..” *Rosales-Mireles v. United States*, ___ U.S.__, 138 S.Ct. 1897 (2018) (interior quotes omitted). “[I]mproperly calculating” the Guidelines range is “significant procedural error.” *Gall v. United States*, 552 U.S. 38, 51 (2007). *See also Peugh v. United States*, ___ U.S.__, 133 S.Ct. 2072, 2081, 2083 (2013) (failure to calculate correct Guidelines range is procedural error). Indeed, “[t]he Guidelines’ central role in sentencing means that an error related to the Guidelines can be particularly serious.” *Molina-Martinez*, 136 S.Ct. at 1345. Showing that the district court used an incorrect sentencing range will in most cases establish the prejudice required for plain error relief (*id.* at 1346) and “seriously affect the fairness, integrity, and public reputation of judicial proceedings.” *Rosales-Mireles*, 138 S.Ct at 1911.

If residual clause determinations are guesswork and the clause cannot be

and ‘aggressive conduct.’ (553 U.S. at 144-145). How much of this analysis remains viable post-*Johnson* should also be addressed.

clearly and consistently interpreted and applied and “offers no reliable” way to determine whether a conviction constitutes a crime of violence (see *Johnson*, 135 S. Ct. at 2558-60, 2562-63), correct calculations of the Guidelines involving the residual clause are impossible; reliance on the residual clause is procedural error and an abuse of discretion. As one Eleventh Circuit judge has asked: “How can a sentencing court correctly calculate the Guidelines range when it is forced to apply the ‘hopeless[ly] indetermina[te]’ language of the career offender guideline?” *In re Hunt*, 835 F.3d 1277, 1283 (11th Cir. 2016) (Rosenbaum, J., concurring). *See also United States v. Lee*, 821 F.3d 1124, 1133-35 (9th Cir. 2016) (Ikula, J., dissenting) (concluding, pre-*Beckles*, that the residual clause of the advisory guidelines was not void for vagueness because advisory guidelines did not fix the penalty, but concluding that applying the residual clause “would violate the Supreme Court’s instruction that the district court ‘begin all sentencing proceedings by correctly calculating the applicable Guidelines range.’”). Recognizing that the classification of an offense as a violent felony or crime of violence demands a degree of certainty supports the conclusion that application of the standardless residual clause is procedural error. *See Mathis v. United States*, ___ U.S. ___, 136 S.Ct. 2243, 2257 (2016). As *Johnson* makes plain, the residual clause language, with its combination of an imprecise standard and hypothetical analysis, does not provide that certainty.

While the Guidelines are not statutes, they retain “sufficient legal effect to attain the status of a ‘law’ within the meaning of the *Ex Post Facto ClausePeugh v. United States*, 133 S.Ct. at 2085. Similarly, they have sufficient legal effect to

invoke the rule of lenity, “a principle of statutory construction [that] applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose.” *Bifulco v. United States*, 447 U.S. 381, 387 (1980). The Guidelines are promulgated by the Sentencing Commission pursuant to statute – 28 U.S.C. § 991(b) and § 994. They are reviewed and approved by Congress. 28 U.S.C. § 994(p). They are the starting point and the initial benchmark in imposing a sentence under 18 U.S.C. § 3553(a). *Gall*, 552 U.S. at 49.

The rule of lenity requires that “where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.” *United States v. Bass*, 404 U.S. 336, 348 (1971). *See also United States v. Bowen*, 127 F.3d 9, 13 (1st Cir. 1997) (applying rule of lenity to definition of “hashish oil” as used in the sentencing guidelines); *United States v. Canelas-Amador*, 837 F.3d 668, 674 (6th Cir. 2016) (rule of lenity applies to choice of definition of “conviction” to be used in determining applicability of guidelines enhancement). That rule also supports the conclusion that reliance on the residual clause would be procedural error, because the guidelines must be calculated correctly and the ambiguities of the residual clause preclude its accurate interpretation and application. If the ambiguities in the residual clause preclude its accurate application, resolving them in petitioner’s favor would mean holding that Massachusetts ABDW and resisting arrest are not crimes of violence under the residual clause.

In addition, the language of the residual clause of the crime of violence definition as interpreted in *Johnson* conflicts with Congressional statutory

directives to the Sentencing Commission. In 28 U.S.C. § 991(b) Congress instructed the Commission to “establish sentencing policies and practices for the Federal criminal justice system” that, *inter alia*,” provide certainty and fairness” in meeting the purposes of sentencing, including “avoiding unwarranted sentencing disparities” among defendants with similar records who commit similar offenses “while maintaining sufficient flexibility to permit individualized sentencing decisions.” Congress also required that guidelines promulgated by the Commission “shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.” 28 U.S.C. § 994(f). Yet, as this Court made plain in *Johnson*, the language of the residual clause of the guidelines “yields anything but evenhanded, predictable, or consistent results.” 135 S.Ct. at 2563. It is antithetical to the Congressional directives to the Sentencing Commission and, therefore, also statutorily invalid.

Alternatively, this Court should limit the application of the residual clause to offenses that have *as elements* a substantial risk of bodily injury, or actual bodily injury, and an intentional mens rea. This limitation would be consistent with the categorical approach employed in determining whether an offense qualifies as a crime of violence, in that it looks to the definition of the offense, *i.e.*, its elements, rather than the particular facts underlying any conviction. *Taylor v. United States*, 495 U.S. 575, 600-602 (1990); *Johnson*, 135 S.Ct. at 2257, 2561-2562; *Mathis v. United States*, __U.S.__, 136 S.Ct. 2243, 2251-2253 (2016); It would also be

consistent with the requirements of *Begay v. United States*, 553 U.S. at 144-145 that residual clause offenses involve “purposeful, ‘violent,’ and ‘aggressive’ conduct.” In addition, it would remove the ambiguities of the “ordinary case” approach used in *James*, and the quantification of risk approach used in *Sykes*, which were rejected in *Johnson* as this Court expressly overruled *James* and *Sykes*.

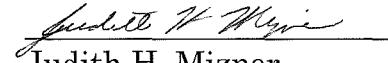
Massachusetts ABDW would not qualify under such an approach as it does not have as an element a substantial risk of bodily injury, or actual bodily injury, and can be committed recklessly. *See e.g. United States v. Windley*, 864 F.3d 36 (1st Cir. 2017); *United States v. Fish*, 758 F.3d 1 (1st Cir. 2014). Massachusetts resisting arrest also would not qualify. *See United States v. Faust*, 853 F.3d 39 (1st Cir. 2017).

CONCLUSION

A number of lower courts, including the court below in this case, have interpreted *Beckles* as reaffirming the viability of the residual clause in the Guidelines’ definition of crime of violence for all purposes. That interpretation contravenes this Court’s sentencing jurisprudence and should be squarely rejected. This case provides this Court with the opportunity to do so and to provide needed guidance to lower courts interpreting and applying both the Guidelines and other statutory provisions with similar language. For the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit, determine that the court below erred in affirming Mr.

Tavares' enhanced guideline sentencing range based on application of the residual clause, vacate his sentence, and remand this case for further proceedings.

Respectfully submitted,
Verissimo Tavares
By his attorney,


Judith H. Mizner
Federal Defender Office
51 Sleeper Street, 5th Floor
Boston, MA 02210
Tel: 617- 223-8061
Attorney for Petitioner

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