

No. \_\_\_\_-\_\_\_\_

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**IN THE  
SUPREME COURT OF THE UNITED STATES**

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**WILLIAM BROWN,**  
*Petitioner,*

**v.**

**UNITED STATES OF AMERICA,**  
*Respondent.*

On Petition for Writ of Certiorari to the  
United States Court of Appeals for the First Circuit

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**PETITION FOR WRIT OF CERTIORARI**

William W. Fick  
*Counsel of Record*  
FICK & MARX LLP  
3 Post Office Square, 7th Floor  
Boston, MA 02109  
(857) 321-8360  
WFICK@FICKMARX.COM

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### **QUESTION PRESENTED**

Whether reliance on the “residual clause” of the “crime of violence” definition in the United States Sentencing Guidelines, U.S.S.G. § 4B1.2(a)(2), is an abuse of discretion and procedural error notwithstanding this Court’s holding in *Beckles v. United States*, 137 S. Ct. 886 (2017), that the Guidelines’ residual clause is not unconstitutionally void for vagueness?

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioner, William Brown, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

### **OPINIONS BELOW**

The unpublished opinion and judgment of the United States Court of Appeals for the First Circuit is included in the Appendix at A2.

### **JURISDICTION**

The court of appeals affirmed the judgment of the district court on April 6, 2018. This petition is being filed within 90 days of the entry of judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

### **CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED**

#### **U.S. Const. Amend. V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

#### **U.S. Const. Amend. VI**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

#### **18 U.S.C. § 924(e)**

- (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen

years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

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(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

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

#### **18 U.S.C. § 16(a)**

The term "crime of violence" means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, 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.

#### **U.S.S.G. § 4B1.2**

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

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

#### **STATEMENT OF THE CASE**

On December 19, 2016, Mr. Brown was sentenced for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The district court found that Mr. Brown had “at least two felony convictions for either a crime of violence or a controlled substance offense,”



which established a base offense level of 24 under U.S.S.G. § 2K2.1(a)(2). The base offense level would have been 20 if he only had a single such conviction. *Id.* § 2K2.1(a)(4)(A). The district court determined that the applicable Guideline Sentencing Range was 77-96 months (level 21 after credit for acceptance of responsibility, CHC VI) and imposed a sentence of 72 months. Judgment entered on January 19, 2017. Mr. Brown then appealed to the First Circuit.

At issue on appeal, *inter alia*, was whether a prior conviction for Massachusetts Assault and Battery with a Dangerous Weapon (“ABDW”) continued to qualify as a “crime of violence” under the Guidelines. Mr. Brown argued, and the government conceded, that the residual clause of the “crime of violence” definition in the Guidelines then in effect was unconstitutionally vague following this Court’s decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015) (holding 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).<sup>1</sup>

However, while Mr. Brown’s appeal was pending, this Court issued its decision in *Beckles v. United States*, 137 S. Ct. 886 (2017) (“*Beckles*”), holding 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. Since that holding did “not render ‘sentencing procedure[s]’ entirely ‘immune from scrutiny under the due process clause.’” 137 S. Ct. at 896, Mr. Brown nevertheless argued that ABDW does not qualify as a crime of violence under the Guidelines.

The First Circuit rejected Mr. Brown’s argument that, post-*Beckles*, the residual clause of the Guidelines must still be interpreted and applied in light of *Johnson*’s analysis of the identical

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<sup>1</sup> Mr. Brown conceded that the district court properly considered a prior state drug conviction as one predicate under section 2K2.1.

residual 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. The First Circuit also rejected his arguments addressing the rule of lenity and, alternatively, limiting application of the residual clause to offenses with certain elements. A2 (citing *United States v. Wurie*, 867 F.3d 28, 32 (1st Cir. 2017), cert. denied, 138 S. Ct. 690 (2018)).

### **REASONS FOR GRANTING THE PETITION**

#### **THE INTERPRETATION AND APPLICATION OF THE RESIDUAL CLAUSE OF THE DEFINITION OF CRIME OF VIOLENCE IN THE SENTENCING GUIDELINES 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 THE INTERPRETATION OF OTHER SIMILARLY WORDED PROVISIONS OF FEDERAL LAW.**

##### **A. Introduction**

In *Johnson v. United States*, 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 Sentencing Guidelines. The Court recently re-affirmed the *Johnson* analysis in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) (finding residual clause of 18 U.S.C. § 16 unconstitutionally vague).

In *Beckles v. United States*, 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 Sentencing Guidelines (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. Brown was sentenced on December 18, 2016 under advisory guidelines and he appealed the Guideline calculation and sentence.

*Beckles* may have disposed of Mr. Brown’s 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,<sup>2</sup> or discuss the interpretation or application of the residual clause or the criteria to be employed in determining whether any particular offense qualifies as a career offender 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.<sup>3</sup> 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

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

<sup>3</sup> In FY 2016 there were 1,796 career offenders. United States Sentencing Commission *Quick Facts*, “Career Offenders.” Available at: <https://www.ussc.gov/research/quick-facts/career-offenders>. Last visited on November 6, 2017.

firearms or ammunition); 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). Resolving the applicability of the residual clause in this case could, therefore, provide needed guidance to lower courts addressing a variety of sentencing 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).<sup>4</sup> This Court 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.<sup>5</sup> Decisions of the courts of appeals provided further proof that the residual clause was “nearly impossible to apply consistently.” *Id.* at 2560 (citation omitted). The residual clause

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<sup>4</sup> 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)).

<sup>5</sup> 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.*

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. 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 is 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, 208 (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”), 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).<sup>6</sup> 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.<sup>7</sup>

**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*, 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 all sentencing proceedings by correctly calculating the Guidelines range,” *Gall v. United States*, 552 U.S. 38, 49 (2007). “[I]mproperly calculating” the Guidelines range is “significant procedural error.” *Id.* at 51. *See also* *Peugh v. United States*, 133 S. Ct. 2072, 2081-83 (2013) (failure to calculate correct Guidelines range is

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<sup>6</sup> The court below relied on the *James* ordinary case analysis in holding that Massachusetts ABDW is a crime of violence under the residual clause of the guidelines. *See United States v. Glover*, 558 F.3d 71, 82 (1st Cir. 2009).

<sup>7</sup> *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].” *Id.* at 143. This Court explained that the enumerated offenses “all typically involve purposeful, ‘violent,’ and ‘aggressive conduct.’” *Id.* at 144-145. How much of this analysis remains viable post-*Johnson* should also be addressed.

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.

If residual clause determinations are guesswork and the clause cannot be 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*, 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* Clause.” *Peugh 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 defendant’s favor would mean holding that ABDW is not a crime 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. See *Taylor v. United States*, 495 U.S. 575, 600-602 (1990); *Johnson*, 135 S. Ct. at 2257, 2561-2562; *Mathis v. United States*, 136 S. Ct. 2243, 2251-2253 (2016). It would also be consistent with the requirements of *Begay v. United States*, 553 U.S. 137, 144-145 (2008), 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*.

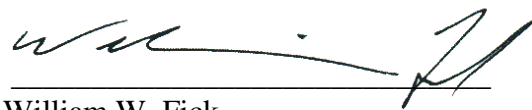
Massachusetts ABDW would not qualify under such an approach as it does not have as an element a substantial risk of bodily injury, or actual bodily injury, and can be committed recklessly. *See e.g. United States v. Windley*, 864 F.3d 36 (2017) *United States v. Fish*, 758 F.3d 1 (1st Cir. 2014).

### **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. Brown's classification as a career offender based on application of the residual clause, vacate his sentence, and remand this case for further proceedings.

Respectfully Submitted,

WILLIAM BROWN  
by his attorney,

A handwritten signature in black ink, appearing to read 'William W. Fick', is written over a horizontal line.

William W. Fick  
*Counsel of Record*  
FICK & MARX LLP  
3 Post Office Square, 7th Floor  
Boston, MA 02109  
(857) 321-8360  
WFICK@FICKMARX.COM

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