
No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2018**

Jesus M. Rios Ramos,

Petitioner,

v.

United States of America,
Respondent.

**PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT**

Rachel Brill
263 Domenech Avenue
San Juan, PR 00918
(787) 753-6131
For Petitioner Jesus M. Rios Ramos

QUESTION PRESENTED

Whether this Court should address the application and contours of the residual clause of the Career Offender guideline, U.S.S.G. § 4B1.2, in light of *Johnson v. United States*, 576 U.S. ___, 135 S.Ct. 2551 (2015), *Beckles v. United States*, ___ U.S. ___, 137 S.Ct. 886 (2017), and *Sessions v. Dimaya*, ___ U.S. ___, ___ S.Ct. ___ (2018).

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Petitioner respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit affirming the judgment against him.

PROCEEDINGS AND OPINIONS BELOW

The Judgment of the Court of Appeals for the First Circuit affirming Petitioner's conviction was handed down on April 11, 2018. It is attached as **Appendix A**.

JURISDICTIONAL GROUNDS

Petitioner requests review of the Judgment by the First Circuit. Supreme Court jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Career Offender guideline, **U.S.S.G. § 4B1.2(a)**, at the pertinent time and in relevant part, provided 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. Rios was sentenced as a Career Offender on November 18, 2015 based on, *inter alia*, convictions for attempted robbery and for robbery of a motor vehicle, both under Puerto Rico law. His Guideline sentencing range was 120-150 months, but he received an upward variance to 162 months.

At sentencing Mr. Rios argued, and the government conceded, that the residual clause defining a “crime of violence” in the Career Offender provision of the Guidelines then in effect was unconstitutionally vague following this Court’s decision in *Johnson v. United States*, 576 U.S. __, 135 S.Ct. 2551 (2015) (“*Johnson*”). There, 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.¹

¹ Critically, the United States Sentencing Commission recognized the deficiencies in the ACCA residual clause detailed in *Johnson* by removing the residual clause of the Career Offender “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,

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While the appeal was pending this Court issued its decision in *Beckles v. United States*, ___U.S.__, 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, they “are not subject to a vagueness challenge under the Due Process clause.” 137 S.Ct. at 895. That holding, however, “does not render ‘sentencing procedure[s]’ entirely ‘immune from scrutiny under the due process clause.’” 137 S.Ct. at 896.

On April 11, 2018, the First Circuit Court of Appeals rejected Mr. Rios’ argument that, post-*Beckles*, the residual clause of the guidelines must still be interpreted and applied in light of *Johnson*’s analysis. Citing a 20-year-old pre-*Johnson* determination that robbery presents an “inherent” risk of injury, the court refused to consider that the residual clause could not be employed to support a determination that the prior convictions qualified as “crimes of violence,” since the provision could not be applied consistently and was not susceptible to principled or objective standards. **Appendix A.**

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.

REASONS FOR GRANTING THE WRIT

I. The Interpretation and Application of the Residual Clause in the Career Offender Guideline Continues to be an Important Issue of Federal Sentencing Law Affecting Many Defendants Following This Court’s Decisions in *Johnson v. United States*, *Beckles v. United States*, and *Sessions v. Dimaya*.

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, saying that the courts’ attempts to interpret it “could only be guesswork,” 135 S.Ct. at 2560, and characterizing the clause as “hopelessly indetermina[nt]” and “a judicial morass that defies systemic solution.” 135 S.Ct. at 2558, 2562. The language of the ACCA is identical to that of the residual clause defining “crime of violence” in the Career Offender guideline, U.S.S.G. § 4B1.2(a)(2) eliminated by the United States Sentencing Commission effective August, 2016.

Nevertheless, 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 defining “crime of violence” then in effect in the Career Offender guideline is not unconstitutionally void for vagueness. 137 S.Ct. at 895. *Beckles* did not address whether the residual clause may be applied in cases on direct review.

Mr. Rios was sentenced as a Career Offender on November 18, 2015 under the advisory guidelines then in effect and appealed the Career Offender determination.

Beckles may have disposed of Mr. Rios’ claim that he was sentenced under a Guideline provision that was unconstitutionally vague. However, *Beckles* did not revisit *Johnson*’s

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interpretation of the identical language defining the “violent felony” that may serve as a predicate offense for an enhanced statutory sentence under the ACCA,² nor did it discuss the interpretation or application of the Career Offender residual clause and the criteria to be employed in determining whether any particular offense qualifies as a career offender crime of violence under that clause post-*Johnson*.

In *Sessions v. Dimaya*, ___ U.S. ___, 138 S.Ct. 1204 (2018), this Court addressed the dinition of “violent felony” in 18 U.S.C. § 16, finding it to suffer from the “same constitutional defect” as the clause invalidated in *Johnson*. 138 S.Ct. at 1210. Hewing to a “straightforward application” of *Johnson*, 138 S.Ct. at 1214, this Court pointed to the “hopeless indeterminacy” of what constitutes an “ordinary case” and the “grave uncertainty” accompanying any assessment of risk, before invalidating that statute’s residual clause as well. Concluding that “[o]nce again, the questions have no good answers,” 138 S.Ct. at 1215, this Court invalidated language indistinguishable from that in the Career Offender guideline operating when Mr. Rios was sentenced.

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. 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); U.S.S.G. § 2S1.1 (laundering of monetary instruments; engaging in

²The 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).

monetary transactions or property derived from unlawful activity); and U.S.S.G. § 4A1.1 and 4A1.2 (calculating criminal history).

In addition, and with respect to the definitions in the ACCA and in 18 U.S.C. §16, the definitions of “crime of violence” in 18 U.S.C. § 924(c)(3)(B) and “aggravated felony” in 8 U.S.C. § 1101(43)(F) contain language similar, if not identical, to that of the 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’s Holding that the Language of the Residual Clause of the Guidelines’ “Crime of Violence” Definition is Fatally Flawed was not Changed by Beckles and was Only Reinforced by Dimaya.*

In *Johnson* this Court recognized the ambiguity and lack of clarity of the residual clause of the ACCA’s definition of violent felony, explaining 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. *See also* 135 S.Ct. 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). 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.” 135 S.Ct. at 2558. Decisions of the courts of appeals provided further proof that the residual clause was “nearly impossible to apply consistently.” 135 S.Ct. at 2560 (citations omitted). The residual clause calls for “guesswork and intuition,” 135 S.Ct. 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,’” 135 S.Ct. at 2562 (citations omitted); it yields “anything but evenhanded, predictable, or consistent” results. 135 S.Ct. 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,” 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. 135 S.Ct. at 2557-2558.

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* or *Dimaya*. Indeed, none of the *Beckles* and *Dimaya* opinions denied the inherent difficulty and inaccuracy accompanying residual clause determinations. Nor do they 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 Beckles*, 137 S.Ct. at 899-901 (Sotomayor, J., concurring in the judgment).

While the residual clause in the Guidelines may not be unconstitutionally void for vagueness in violation of the Due Process Clause, it is nevertheless 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. Indeed, 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 further 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).

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 - even under the newly enacted Guideline provisions.

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

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

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Guidelines that aim to embody federal sentencing objectives ‘both in principle and in practice.’” 136 S.Ct. at 1342. They “are not only the starting point for most federal sentencing proceedings but also the lodestar.” 136 S.Ct. 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.” 555 U.S. at 51. *See also Peugh v. United States*, __ U.S. __, 133 S.Ct. 2072, 2081, 2083 (2013). 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. 136 S.Ct. at 1346.

If residual clause determinations are “guesswork” and the clause cannot be clearly and consistently interpreted and applied therefore “offer[ing] no reliable” way to determine whether a conviction constitutes a crime of violence, correct calculations of the Guidelines involving the residual clause are impossible. As a consequence, reliance on the residual clause results in 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

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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 the required 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 statutes, 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,

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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 the Puerto Rico robbery statute 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.

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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*, 136 S.Ct. at 2251-2253. It would also be consistent with the requirements of *Begay* 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 expressly rejected in *Johnson*.

The Puerto Rico robbery statutes would not qualify under such an approach since they can be committed with the “slightest use of force” as well as by intimidation. *Pueblo v. Diaz Diaz*, 13 P.R. Ofic. Trans. 401, 410 (P.R. 1982), *Pueblo v. Lucret-Quinones*, 11 P.R. Ofic. Trans. 902, 933 (P.R. 1981).

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

Respectfully submitted,

s/Rachel Brill

Rachel Brill
263 Domenech Avenue
San Juan, PR 00918
(787) 753-6131
Counsel for Petitioner Jesus M. Rios Ramos

Date: July 10, 2018

United States Court of Appeals For the First Circuit

No. 15-2550

UNITED STATES,

Appellee,

v.

JESUS M. RIOS-RAMOS,

Defendant, Appellant.

Before

Howard, Chief Judge,
Kayatta and Barron, Circuit Judges.

JUDGMENT

Entered: April 11, 2018

Appellant Jesus M. Rios-Ramos appeals from the 162-month sentence imposed by the district court on an 18 U.S.C. § 2119(1) carjacking conviction, relying upon Johnson v. United States, 135 S. Ct. 2551 (2015) (Johnson II), Mathis v. United States, 136 S. Ct. 2243 (2016), and related precedent. Having considered the parties' briefs and relevant portions of the record, we conclude on de novo review that affirmance is in order. See United States v. Wurie, 867 F.3d 28, 32 (1st Cir. 2017), cert. denied, 138 S. Ct. 690 (2018) (standard of review).

Rios-Ramos points to no authority legitimately suggesting that the Puerto Rico robbery convictions relied upon to categorize him as a "career offender" under the advisory guidelines do not qualify as "crime[s] of violence" under, if nothing else, the guidelines residual clause in place at the time of Rios-Ramos' sentencing. See Beckles v. United States, 137 S. Ct. 886, 895 (2017) (holding "that the advisory Sentencing Guidelines are not subject to a vagueness challenge under the Due Process Clause and that § 4B1.2(a)'s residual clause is not void for vagueness"); see also Wurie, 867 F.3d at 32-35 (post-Beckles case applying pre-Johnson II precedent interpreting and applying the residual clause); United States v. De Jesus, 984 F.2d 21, 25 (1st Cir. 1993) (discussing risk of injury inherent in crimes involving taking of property from or in presence of another). We conclude that any deviations from the categorical or modified categorical approach by the sentencing court ultimately were of no moment. See Williams v. United States, 858 F.3d 708, 714 (1st Cir. 2017) (court may "affirm on any basis apparent in the record, even if it would require ruling on arguments not reached by the district court"). We further reject any claim of substantive

APPENDIX A

unreasonableness. See United States v. Politano, 522 F.3d 69, 72-73 (1st Cir. 2008) (standard of review and general principles).

The judgment of the district court is **AFFIRMED**. See Local Rule 27.0(c).

By the Court:

/s/ Margaret Carter, Clerk

cc:

Rachel Brill
Jesus M. Rios-Ramos
Mariana E. Bauza Almonte
Mainon Schwartz