NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

OPHERRO JONES
Petitioner-Appellant-Defendant

- vs -

UNITED STATES OF AMERICA
Respondent-Appellee-Plaintiff

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

PETITIONER'S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

&

PETITION FOR WRIT OF CERTIORARI

PETER C. WOLFF, JR.
Federal Public Defender
District of Hawaii
300 Ala Moana Boulevard, Suite 7104
Honolulu, Hawaii 96850
Telephone: (808) 541-2521
Facsimile: (808) 541-3545
Counsel of Record for Petitioner
OPHERRO JONES

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

OPHERRO JONES
Petitioner-Appellant-Defendant

- vs -

UNITED STATES OF AMERICA
Respondent-Appellee-Plaintiff

PETITION FOR WRIT OF CERTIORARI

PETER C. WOLFF, JR.
Federal Public Defender
District of Hawaii
300 Ala Moana Boulevard, Suite 7104
Honolulu, Hawaii 96850
Telephone: (808) 541-2521
Facsimile: (808) 541-3545
Counsel of Record for Petitioner
OPHERRO JONES

QUESTION PRESENTED

Due process precludes a district court from relying on misinformation when sentencing a criminal defendant, requiring instead accuracy and reliability from the information predicating the defendant's sentence, see, e.g., *Townsend v. Burke*, 334 U.S. 736, 741 (1948) (reliance on materially false information at sentencing violates due process).

In the context of issuing a certificate of appealability under 28 U.S.C. §2253, the question here is whether the petitioner's claim—that due process precludes relying on an advisory Guideline that infects sentencing with misinformation—is reasonably debatable or worthy of further of review after *Beckles v. United States*, 137 S.Ct. 886 (2017), given that *Beckles*, holding "only that the advisory Sentencing Guidelines … are not subject to challenge under the void-for-vagueness doctrine," cautioned against immunizing sentencing from complete scrutiny under the due process clause and specifically identified a *Townsend* misinformation claim as the type of claim that withstood its narrow holding.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES
(Continued)

Cases **Page(s)**

Statutes

TABLE OF AUTHORITIES
(Continued)

Statutes **Page(s)**

Guideline

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit's order denying the petitioner's request for a certificate of appealability is appended to this petition at App. at 1. The district court's order denying the petitioner's 28 U.S.C. §2255 motion is attached at App. at 2 and can be found at 2018 WL 605931.

JURISDICTION

The Ninth Circuit issued its order denying the petitioner's request for a certificate of appealability on July 12, 2018. This Court has jurisdiction to review the denial of a certificate of appealability pursuant to 28 U.S.C. §1254(1), see *Hohn v. United States*, 524 U.S. 236 (1998). The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. §1291 and §2253. The district court had jurisdiction pursuant to 18 U.S.C. §3231 and 28 U.S.C. §2255.

STATEMENT OF THE CASE

Pertinent facts are not disputed. After he pled guilty pursuant to a plea agreement, the district court sentenced the petitioner on May 27, 2015, to a 110-month term of imprisonment for conspiring to racketeer in violation of 18 U.S.C. §1962(d). To capture Hawaii burglary (if not robbery or kidnapping) convictions, the district court necessarily relied, albeit without expressly saying so, on USSG §4B1.2(a)(2)'s residual clause to sentence the petitioner as a career offender. App. at 2–3. Within a year of his judgment of conviction, Jones timely filed a §2255 motion, App. at 4, in which he invoked *Johnson v. United States*, 135 S.Ct. 2551 (2015), to invalidate the collateral attack waiver in his plea agreement, to claim that the district

court's reliance at sentencing on the Guidelines' residual clause violated due process, and to provide cause for his failure to raise that claim on direct appeal. When *Beckles* came down, the petitioner focused his argument on this Court's *Townsend* line of cases, arguing what he does in this petition—that *Johnson*'s construction of the ACCA's residual clause applies to the Guidelines' residual clause, and so construed the latter violates due process because it infects sentencing with misinformation about the severity of a defendant's criminal history.

The district court ruled that *Johnson* provided the petitioner with no claim against the Guidelines, because *Johnson* provided no claim outside of the vagueness claim *Beckles* precluded. App. at 5–6. The district court therefore concluded that the petitioner failed to demonstrate cause to excuse procedural default of his challenge to career offender sentencing and denied his §2255 motion. App. at 5–6. The district court and the Ninth Circuit declined to issue a certificate of appealability on the petitioner's claim that *Johnson*'s construction of the ACCA's residual clause applied to §4B1.2(a)(2) and thereby triggered a *Townsend* misinformation claim against the Guidelines' residual clause. App. at 1, 6.

REASON FOR GRANTING THE WRIT

The due process clause forbids a district court from relying on misinformation at a criminal defendant's sentencing. In *Townsend*, for example, this Court found a violation of due process in a district court's reliance on "misinformation" about the defendant's criminal history at sentencing. *Townsend*, 334 U.S. at 740–741. Since *Townsend*, this Court has consistently reaffirmed that reliance on misinformation at

sentencing—particularly, as in *Townsend* itself, when that misinformation adds aggravating weight to a defendant's criminal history—violates due process. *Zant v. Stephens*, 462 U.S. 862, 887 n. 23 (1983) ("even in a noncapital sentencing proceeding, the sentence must be set aside if the trial court relied at least in part on misinformation of a constitutional magnitude," such as "assumptions concerning the defendant's prior criminal record" (quotation marks and citations omitted)); see also, e.g., *Roberts v. United States*, 445 U.S. 552, 556 (1980); *United States v. Tucker*, 404 U.S. 443, 447–449 (1972) (sentence based on "assumptions concerning [the defendant's] criminal history which were materially untrue" violated due process).

In accord with this Court's *Townsend* line of cases, the circuit courts unanimously agree that "a defendant has a due process right to be sentenced upon information which is not false or materially incorrect." *United States v. Curran*, 926 F.2d 59, 61 (CA1 1991); see also, e.g., *United States v. Malcolm*, 432 F.2d 809 (CA2 1970); *United States v. Matthews*, 773 F.2d 48, 51 (CA3 1985); *United States v. Lee*, 540 F.2d 1205, 1211 (CA4 1976); *United States v. Espinoza*, 481 F.2d 553, 555 (CA5 1973); *United States v. Polselli*, 747 F.2d 356, 358 (CA6 1984); *United States v. Harris*, 558 F.2d 366 (CA7 1977); *United States v. Eagle Thunder*, 893 F.2d 950, 956 (CA8 1990); *United States v. Williams*, 668 F.2d 1064, 1072 (CA9 1982); *United States v. Sunrhodes*, 831 F.2d 1537, 1542 (CA10 1987); *United States v. Dean*, 752 F.2d 535, 544 (CA11 1985); *United States v. Lemon*, 723 F.2d 922, 933 (CADC 1983). Despite the broad ambit of information a district judge may consider at sentencing, to borrow the Sixth Circuit's phrasing, some of that information "can be so misleading

that it is a denial of due process for the district judge to rely on it." *Polselli*, 747 F.2d at 358. Courts, including this one, thus ought to be "concerned not merely when a sentencing judge has relied on demonstrably false information, but 'when the sentencing process created a significant *possibility* that misinformation infected the decision.'" *Lemon*, 723 F.2d at 933 (quoting *United States v. Bass*, 535 F.2d 110, 118 (CADC 1976) (*Bass*'s emphasis)). In light of *Johnson*'s declaration that an identical residual clause is so shapeless as to defy accurate and reliable application, a district judge's reliance on the advisory Guidelines' residual clause is demonstrably, not just possibly, misleading in just the way *Polselli* posits.

"*Johnson* is a straightforward decision." *Sessions v. Dimaya*, 138 S.Ct. 1204, 1213 (2018). "Its principal section," *id.*, construed the ACCA's residual clause and concluded that the clause's language is "shapeless," *Johnson*, 135 S.Ct. at 2560—because it called for imagining an "'ordinary case'" but "'offer[ed] no reliable way' to discern what the ordinary version of any offense looked like," and then layered atop that unreliability a veneer of unpredictability, by leaving "unclear what threshold level of risk" sufficed to make an ordinary case of the predicate crime violent enough for the clause to capture it, *Dimaya*, 138 S.Ct. at 1214 (quoting *Johnson*, 135 S.Ct. at 2558). A uniform and consistent body of precedent makes *Johnson*'s construction of the ACCA's residual clause applicable to its Guideline analogue, in what was, at the time the petitioner was sentenced in 2015, section 4B1.2(a)(2).

Johnson itself relied on Guidelines cases to recognize that the ordinary case risk analysis required by the ACCA's residual clause was too shapeless to be reliably

applied. *Johnson*, 135 S.Ct. at 2559–2560. This Court, moreover, has historically "GVR'd" cases involving Guideline analogues once it has decided a parallel ACCA case. See, e.g., *Archer v. United States*, 553 U.S. 1002 (2008). The circuits have an equally consistent history of construing the ACCA's and the Guidelines' residual clauses the same way and relying on cases about either interchangeably. *United States v. Velazquez*, 777 F.3d 91, 94 n.1 (CA1 2015); *United States v. Gray*, 535 F.3d 128, 130 (CA2 2008); *United States v. Polk*, 577 F.3d 515, 518–519 (CA3 2009); *United States v. Mobley*, 687 F.3d 625, 632 (CA4 2012); *United States v. Hughes*, 602 F.3d 669, 673 n.1 (CA5 2010); *United States v. Ford*, 560 F.3d 420, 421 (CA6 2009); *United States v. Billups*, 536 F.3d 574, 579 n.1 (CA7 2008); *United States v. Williams*, 537 F.3d 969, 971–972 (CA8 2008); *United States v. Spencer*, 724 F.3d 1133, 1337–1338 (CA9 2013); *United States v. Patillar*, 595 F.3d 1138, 1140 (CA10 2010); *United States v. Archer*, 531 F.3d 1347, 1350 n. 1 (CA11 2008). The Guidelines' residual clause is, accordingly, as shapeless as the ACCA's residual clause, such that it defies accurate, reliable, and predictable application. At the very least, the foregoing cases make the application of *Johnson*'s statutory construction analysis to the Guidelines reasonably debatable and worthy of appellate review.

The question then becomes whether a shapeless Guidelines provision, which offers no reasonable way to apply it, violates the due process clause without resort to the one thing *Beckles* inoculated the Guidelines against, the void-for-vagueness doctrine. It does. Applying §4B1.2(a)(2)'s residual clause infects the sentencing process with misinformation (that the defendant is an incorrigibly violent "career

offender," when, in fact, she isn't), which then induces the district judge to make an incorrect assumption about the aggravating weight that the defendant's criminal history carries. As to career offender sentencing, applying §4B1.2(a)(2)'s residual clause resulted in an applicable range so disproportionate to what would otherwise have been applicable as to elevate the government's burden of proof to clear and convincing evidence. See, e.g., *United States v. Mitchell*, 238 Fed.Appx. 243, 244, 2007 WL 1814314 at **1 (CA9 June 22, 2007) (unpublished) (citing *United States v. Staten*, 466 F.3d 708, 717–718 (CA9 2006)). In petitioner's case, being informed that he was a career offender with a history of committing violent crimes led the district court to use an offense level that was ten levels higher than it would have been absent that information. App. at 2–3. *Townsend* precedent recognizes that due process does not allow disproportionately aggravating (in many cases doubling, tripling, or quadrupling) a sentence on the basis of misinformation that a defendant is a violent career offender when she is, in fact, not. The conclusion seems unavoidable—but is certainly reasonably debatable and worthy of appellate review (the only thing that matters here)—that *Johnson*'s construction of the ACCA's residual clause opens the Guidelines' residual clause up to a *Townsend* claim. And not only is there nothing in *Beckles* that immunizes the Guidelines from a *Townsend* claim, this Court explicitly identified a *Townsend* claim as something its holding in *Beckles* did not foreclose. *Beckles*, 137 S.Ct. at 896.

In denying the petitioner a certificate of appealability on his claim that existing precedent mandates applying *Johnson*'s construction of the ACCA's residual

clause to the career offender guideline's residual clause and that, so construed, the latter violates due process under settled *Townsend* precedent on misinformation grounds, the courts below read *Johnson* far too narrowly and *Beckles* far too broadly, so broadly, in fact, as to preclude the very thing it explicitly left open. The question of whether *Johnson* supports a *Townsend* claim against the Guidelines' residual clause is reasonably debatable and worthy of appellate review. This Court, accordingly, should grant this petition and remand this matter to the Ninth Circuit for it to grant the petitioner a certificate of appealability on that question.

CONCLUSION

This Court should grant this petition to ensure that the very claim *Beckles* expressly left open is not precluded by the lower courts' misreading of *Johnson* and *Beckles*.

DATED: Honolulu, Hawaii, September 25, 2018.

PETER C. WOLFF, JR.
Federal Public Defender, District of Hawaii
300 Ala Moana Boulevard, Suite 7104
Honolulu, Hawaii 96850-5269
Telephone: (808) 541-2521
Facsimile: (808) 541-3545
Counsel of Record for Petitioner
OPHERRO JONES