

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

LANCE FOX

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

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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 predicated 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 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.

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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 650200.

JURISDICTION

The Ninth Circuit issued its order denying the petitioner's request for a certificate of appealability on July 13, 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 April 14, 2014, to a 69-month term of imprisonment for violating 18 U.S.C. §922(g) and §924(a) (the petitioner was not charged under 18 U.S.C. 924(e), the Armed Career Criminal Act (ACCA)). The district court relied on USSG §4B1.2(a)(2)'s residual clause at sentencing, without objection from petitioner's counsel, to enhance the petitioner's guideline range under USSG §2K2.1. App. at 6 ("Fox was sentenced under the residual clause of the Sentencing Guidelines"). In 2016, Fox filed a §2255 motion in which he invoked *Johnson v. United States*, 135 S.Ct. 2551 (2015), to render timely

his petition and unenforceable his collateral attack waiver in his plea agreement, and to claim that the district court's reliance at sentencing on the Guidelines' residual clause violated due process.

The district court held the §2255 motion in abeyance while this Court mulled its decision in *Beckles*. 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 *Beckles*, and therefore ruled his motion untimely and his collateral attack waiver enforceable. App. at 4–6. 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 (CA12 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 (CA DC 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 such 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 2014, 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 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. See, e.g., USSG §2K2.1(a) (staggering alternative base offense levels on the basis of §4B1.2 crimes-of-violence convictions, among other things). Indeed, as to career offender sentencing under USSG §§4B1.1 and 4B1.2, application of the career offender guidelines results in an applicable guidelines range that is so disproportionate to what would otherwise have been the applicable range 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)). *Townsend* precedent recognizes that due process does not allow doubling, in many cases tripling (or increasing even more), 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.


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