NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

MARC SHIROMA
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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QUESTIONS PRESENTED

1. Is a threatened use of physical force against the person of another an element of federal bank robbery, 18 U.S.C. §2113(a), so as to make it a crime of violence under USSG §4B1.2(a)(1)'s elements clause, when the Ninth Circuit holds that nothing more than a demand for money suffices to support conviction?

2. Can a guideline violate the due process clause for a reason that is not grounded in the void-for-vagueness doctrine?

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OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit's unpublished order, affirming the district court's denial of the petitioner's 28 U.S.C. §2255 motion, is appended to this petition at App. at 1 and can be found at 2019 WL 951987. The district court's unpublished order denying the petitioner's §2255 motion is attached at App. at 2 and can be found at 2017 WL 4955507.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254 to review Ninth Circuit's order, filed on February 26, 2019. The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. §2253. The district court had jurisdiction pursuant to 18 U.S.C. §3231 and 28 U.S.C. §2255.

CONSTITUTIONAL, STATUORY, & GUIDELINE PROVISIONS

"No person shall … be deprived of … liberty … without due process of law[.]" U.S. Const., amend. V.

"Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another … any … money …belonging to, or in the care, custody, control, management, or possession of, any bank, … [s]hall be fined under this title or imprisoned not more than twenty years, or both." 18 U.S.C. §2113(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, extortion, involves use of

explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." USSG §4B1.2(a) (2014).

"[T]he term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year … 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. §924(e)(2)(B) (a provision of the Armed Career Criminal Act (ACCA)).

"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." 18 U.S.C. §16.

STATEMENT OF THE CASE

In 2015 and using the 2014 version of the Guidelines, the district court sentenced the petitioner for his fourth unarmed bank robbery conviction under 18 U.S.C. §2113(a). The court determined the petitioner was a career offender under USSG §4B1.2 due to his current and prior bank robbery convictions, without identifying whether the court was counting them under §4B1.2(a)(1)'s elements clause or under §4B1.2(a)(2)'s residual clause. Within a year of *Johnson v. United States*, 135 S.Ct. 2551 (2015), the petitioner filed a §2255 motion contesting the legality of counting his bank robbery convictions as crimes of violence. The district court denied relief (App. 2) and the Ninth Circuit affirmed (App. 1). The Ninth

Circuit held that bank robbery counted as a crime of violence under §4B1.2(a)(1)'s elements clause (App. 1). And the Ninth Circuit purported to "not address" the petitioner's residual clause claim, but nonetheless did so by noting that, were the panel to reach it, it would hold that *Beckles v. United States*, 137 S.Ct. 886 (2017), precluded the petitioner's reliance on the due process clause to challenge §4B1.2(a)(2)'s residual clause (App. 1).

REASONS FOR GRANTING THE WRIT

1. The rule in the Ninth Circuit that unarmed federal bank robbery has as an element the threatened use of physical force against another person is inconsistent with *Torres v. Lynch*, 136 S.Ct. 1619 (2016), and *Moncrieffe v. Holder*, 569 U.S. 184 (2013).

The categorical approach used to assess whether an offense is a crime of violence under an elements clause asks whether "the minimum conduct criminalized" requires the use, attempted use, or threatened use of physical force. *Moncrieffe*, 569 U.S. at 190–191; USSG §4B1.2(a)(1). The Ninth Circuit holds that the minimum conduct criminalized by 18 U.S.C. §2113(a) (unarmed bank robbery) is a mere demand for money, unaccompanied by any threat beyond that implicit in the demand. *United States v. Hopkins*, 703 F.2d 1102 (CA9 1983) (Hopkins' "demands for money" sufficed to sustain §2113(a) conviction, even though "the evidence showed that Hopkins spoke calmly, made no threats, and was clearly unarmed"). Discussing 18 U.S.C. §16(a)'s elements clause in *Torres*, this Court recognized that a kidnapper's demand for money plainly does not require the use, attempted use, or threatened use of physical force. *Torres*, 136 S.Ct. at 1629 ("[t]he 'crime of violence' provision would

not pick up demanding a ransom for kidnapping"). The Ninth Circuit's rule that a bank robber's demand for money suffices to make bank robbery a crime of violence cannot be squared with this Court's view that a kidnapper's demand for money does *not* suffice to make kidnapping a crime of violence. *United States v. Gutierrez*, 876 F.3d 1254, 1257 (CA9 2017), reaffirming *United States v. Selfa*, 918 F.2d 749 (CA9 1990); but see *Torres*.

2. The Ninth Circuit continues to apply an "ordinary case" analysis under §4B1.2(a)(2)'s residual clause. See, e.g., *United States v. Door*, ___ F.3d ___, 2019 WL 1119600 (CA9 2019) (citing, among other pre-*Johnson* cases, *Begay v. United States*, 553 U.S. 137 (2008)). This Court has held that the "ordinary case" construction given to the ACCA's and 18 U.S.C. §16(b)'s indistinguishable residual clauses is "senseless" and incapable of consistent, predictable, reliable, uniform application. *Johnson*, 135 S.Ct. at 2555–2556, 2557–2560 (concluding that the ordinary case construction given by past cases, *Begay* among them, to the ACCA's residual clause is "nearly impossible to apply consistently," that past attempts to "derive meaning from the residual clause" was "a failed enterprise," and that the provision is "shapeless"); *Sessions v. Dimaya*, 138 S.Ct. 1204, 1215–1216 (2018) (concluding that the "ordinary case" construction given to §16(b)'s residual clause "produces …unpredictability and arbitrariness"). Both *Johnson* and *Dimaya* went on to hold that such senseless statutes violated the due process clause's void-for-vagueness doctrine, but *Beckles* holds that the void-for-vagueness doctrine does not apply to the advisory version of §4B1.2(a)(2)'s residual clause. *Beckles*, 137 S.Ct. at 895; *Dimaya*, 138 S.Ct. at 1223; *Johnson*, 135 S.Ct. at 2557.

This Court, however, cautioned in *Beckles* that "[o]ur holding today does not render the advisory Guidelines immune from constitutional scrutiny" and, more to the point, that "our holding today also does not render sentencing procedures entirely immune from scrutiny under the due process clause," citing, as an example of a *Beckles*-survivor, a claim arising under *Townsend v. Burke*, 334 U.S. 736, 741 (1948). *Beckles*, 137 S.Ct. at 895–896 (quotation marks omitted). In *Townsend*, this Court overturned a sentence under the due process clause that had been predicated on "misinformation" and "false assumptions" about the severity of the defendant's criminal history. *Townsend*, 334 U.S. at 740–741. So cued, the petitioner here argued below that his claim survived *Beckles* because *Johnson*'s construction of the residual clause, applied to the advisory guidelines' residual clause, gave rise to a *Townsend* misinformation claim. Petitioner's Opening Brief, CA9 DktEntry 2 at 19–21 (header pagination) (arguing guidelines' senseless residual clause produced misinformation about the severity of the petitioner's criminal history); Petitioner's Reply Brief, CA9 DktEntry 13 at 4–13 (header pagination) (same and distinguishing such a claim from the void-for-vagueness doctrine, just as *Beckles* did). The Ninth Circuit rejected the petitioner's *Townsend* claim—which only arises from *Johnson*'s recognition that the language shared by the ACCA's, §16's, and §4B1.2's residual clauses is senseless and incapable of any fair, predictable, and reliable construction—as "precluded" by *Beckles*. Such a holding is a grave misreading of *Beckles* and serves to immunize the guidelines from *all* scrutiny under the due process clause.

CONCLUSION

This Court should grant this petition to ensure consistent adherence to its precedent and to make clear that it meant what it said in *Torres* (that a demand for money does not a crime of violence make) and *Beckles* (that sentencing and the guidelines are not immune from constitutional and, particularly, due process, scrutiny).

DATED: Honolulu, Hawaii, March 13, 2019.

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