NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

JAMES TROIANO
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

1. *Townsend v. Burke*, 334 U.S. 736, 740–741 (1948), held that a sentence violates due process when it is tainted by "misinformation" and "false information" about recidivism's severity. *Johnson v. United States*, 135 S.Ct. 2551 (2015), held the Armed Career Criminal Act's residual clause, 18 U.S.C. §924(e)(2)(B)(ii), void for vagueness because it wasn't capable of sensible construction. *Beckles v. United States*, 137 S.Ct. 886 (2017), held the advisory guidelines immune from the void-for-vagueness doctrine, but emphasized they were not immune from a *Townsend* misinformation claim (*id.* at 896), and did not displace the uniform and well-settled practice of applying constructions of the ACCA to identical Guidelines. Here, the district court ruled that *Beckles* foreclosed relying on *Johnson*'s interpretation of the ACCA's residual clause to raise a *Townsend* claim against the residual clause of the advisory career offender guideline, USSG §4B1.2(a)(2) (2005). And, to the point of this petition, both the district court and the Ninth Circuit denied a certificate of appealability on petitioner James Troiano's *Johnson-Townsend* claim. The question presented is:

Should a COA issue because reasonable jurists could conclude that *Johnson*'s interpretation of the ACCA's residual clause triggers a *Townsend* claim against the residual clause of the advisory career offender guideline, given *Beckles*'s acknowledgment that *Townsend* claims survived its narrow vagueness holding, or because this issue is important enough to justify percolation in the circuit courts?

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PETITION FOR WRIT OF CERTIORARI

James Troiano respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the United States District Court for the District of Hawaii's order denying him a certificate of appealability on his *Johnson-Townsend* claim.

OPINIONS BELOW

The Ninth Circuit's opinion is published as *Troiano v. United States*, 918 F.3d 1082 (CA9 2019), and is appended to this petition at App. 11. The Ninth Circuit's order denying rehearing and rehearing en banc is unpublished and is appended to this petition at App. 16. The district court's order denying a certificate of appealability on Troiano's *Johnson-Townsend* claim is unpublished (but can be found as *Troiano v. United States*, 2018 WL 715322 (D. Haw. Feb. 5, 2018)) and is appended to this petition at App. 6. The district court's order denying Troiano's *Johnson-Townsend* claim is unpublished (but can be found as *Troiano v. United States*, 2017 WL 3688147 (D. Haw. Aug. 25, 2017)) and is appended to this petition at App. 1.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254 and §2253. 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.

"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) (2005).

"[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)).

STATEMENT OF THE CASE

Using the 2005 version of the sentencing guidelines, the district court sentenced Troiano in 2006 as a career offender, due to prior Hawaii burglary convictions (violations of Haw. Rev. Stat. §708-810) that fell within the career offender guideline's residual clause but were not generic burglaries under the guideline's enumerated offense clause.[1] Within a year of this Court's decision in

[1] Hawaii's definition of what buildings can be burgled was long thought overbroad, for purposes of categorically matching generic burglary under the career offender guideline's enumerated offenses clause, because of Hawaii's inclusion of vehicles. *United States v. Stitt*, 139 S.Ct. 399 (2018), undermines such reasoning. But Hawaii's definition of "building" remains overbroad because it includes structures that are not adapted nor customarily used for overnight accommodation. See Haw. Rev. Stat. §708-800 (definitions of "building" and "dwelling").

Johnson, Troiano filed a §2255 motion that, among other things, challenged his career offender designation.

Once *Beckles* was decided, he argued that his reliance on *Johnson* remained valid (to render his motion timely and meritorious) because *Johnson*'s interpretation of the ACCA's residual clause (as not being susceptible to a sensible construction at all) applied to the advisory career offender guideline's indistinguishable residual clause (making it just as senseless). He acknowledged that the consequence of that interpretation under the void-for-vagueness doctrine did not apply to the advisory guideline. So says *Beckles*. But, he argued, that was not the only consequence flowing from *Johnson*'s interpretation of the ACCA's residual clause. Applying *Johnson*'s holding that the ACCA's residual clause was not capable of sensible construction (at all) to the advisory guideline's identical residual clause triggered a due process misinformation claim under *Townsend*. Under *Townsend*, applying a senseless advisory guideline violated due process by tainting sentencing with misinformation about the severity of and the weight that should be given to his criminal history and, in doing so, prejudicially inflated the court's starting point for determining what sentence was no longer than necessary to achieve the goals of sentencing. And the *Beckles* Court, he emphasized, explicitly noted that such a *Townsend* claim survived, it was not foreclosed by, *Beckles*.

The district court nonetheless ruled that *Beckles* shut the door to any and all reliance on any aspect of *Johnson* to challenge the advisory career offender guidelines. The district court also refused to grant Troiano a certificate of

appealability on his *Johnson-Townsend* claim. In a published opinion rejecting other claims not at issue here, the Ninth Circuit similarly refused to grant a certificate of appealability on Troiano's *Johnson-Townsend* claim.

REASON FOR GRANTING THE WRIT

There are two holdings in *Johnson*. It held that the ACCA's residual clause was void-for-vagueness. But the necessary antecedent to that holding was its holding overruling this Court's four prior cases "about the meaning of the residual clause." *Johnson*, 135 S.Ct. at 2559. Those cases, this Court recognized, "had trouble making sense of the residual clause." *Id.* at 2559–2560. This Court acknowledged that in the lower courts the clause "has proved nearly impossible to apply consistently," not only because of disagreement over what crimes the clause picked up, but because of "pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider." *Id.* at 2560. The *Johnson* Court thus finally conceded, after "[n]ine years' experience trying to derive meaning from the residual clause," that the clause simply lacked sense and was too "shapeless" to bear any reasonable construction at all. *Id.* at 2560.

Beckles said nothing at all about whether the advisory Guidelines' identical residual clause, in the career offender guideline, was senseless too. *Beckles* did not discuss how the Guideline's residual clause should be construed. Instead, *Beckles* simply held that the void-for-vagueness doctrine did not apply to the advisory Guidelines. This was because, being advisory, the Guidelines did not fix a range of punishment for a defendant's crime. *Beckles*, 137 S.Ct. at 895, 896. The *Beckles*

Court, moreover, cautioned that this holding did "not render the advisory Guidelines immune from constitutional scrutiny" nor, more specifically, "immune from scrutiny under the due process clause." *Beckles*, 137 S.Ct. at 895–896. And as an example, this Court cited *Townsend* as delineating the type of claim that survived *Beckles*. *Id.* at 896. *Townsend* held that a sentence violates due process when it is tainted by "misinformation" and "false information" about recidivism's severity. *Townsend*, 334 U.S. at 740–741.

Troiano invokes *Johnson* to raise a *Townsend* claim against the application of the advisory career offender guideline's residual clause to him. The lower courts ruled that such a claim is foreclosed by *Beckles* and refused to issue a certificate of appealability on the issue. "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck v. Davis*, 137 S.Ct. 759, 773 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 3276 (2003)). This Court has itself said that a *Townsend* claim survives *Beckles*. Jurists of reason can thus debate that point.

Reasonable jurists are, moreover, of the uniform view that constructions of the ACCA apply, as they have always applied, to their identical Guidelines analogues. See, e.g., *United States v. Chandler*, 743 F.3d 648 (CA9 2014); *United States v. Spencer*, 724 F.3d 1133 (CA9 2013); *United States v. Park*, 649 F.3d 1175 (CA9 2011); see also, e.g. *United States v. Willings*, 588 F.3d 56, 58 n.2 (CA1 2009); *United States*

v. Mead, 773 F.3d 429, 432 (CA2 2014); *Royce v. Hahn*, 151 F.3d 116, 120 (CA3 1998); *United States v. Vann*, 660 F.3d 771, 773 n.2 (CA4 2011) (en banc); *United States v. Moore*, 635 F.3d 774 (CA5 2011); *United States v. Denson*, 728 F.3d 603, 607 (CA6 2013); *United States v. Womack*, 610 F.3d 427, 433 (CA7 2010); *United States v. Boose*, 739 F.3d 1185, 1187 n.1 (CA8 2014); *United States v. Wray*, 776 F.3d 1182, 1184-85 (CA10 2015); *United States v. Alexander*, 609 F.3d 1250, 1253 (CA11 2010); *In re Sealed Case*, 548 F.3d 1085, 1089 (CA DC 2008). This Court and the circuits routinely cited ACCA and analogue Guideline cases interchangeably when construing one or the other. See, e.g., *Johnson*, 135 S.Ct. at 2559–2560; *United States v. Spencer*, 724 F.3d 1133, 1137–1138 (CA9 2013); see also, e.g., *United States v. Ramirez*, 708 F.3d 295, 307 n.13 (CA1 2013); *United States v. Van Mead*, 773 F.3d 429, 438 n.7 (CA2 2014); *United States v. Mobley*, 687 F.3d 625, 632 n.7 (CA4 2012); *United States v. Cowan*, 696 F.3d 706, 708 (CA8 2012); *United States v. Orona*, 724 F.3d 1297, 1311 (CA10 2013); *United States v. Travis*, 747 F.3d 1312, 1314 n.1 (CA11 2014). And, prior to *Beckles*, four circuits held that *Johnson* (in its entirety, so both its statutory construction and constitutional holdings) applied to invalidate the career offender guideline's residual clause. See *United States v. Madrid*, 805 F.3d 1204, 1210-11 (CA10 2015); *United States v. Collins*, 799 F.3d 554, 596 (CA6 2015); *United States v. Harbin*, 610 Fed.Appx. 562, 563 (CA6 July 6, 2015) (unpublished); *United States v. Townsend*, 638 Fed.Appx. 172, 177–178 (CA3 Dec. 23, 2015) (unpublished); *United States v. Welch*, 641 Fed.Appx. 37, 42–43 (CA2 Feb. 11, 2016) (unpublished). The idea that *Johnson*'s construction of the ACCA's residual clause (too senseless to support a

reasonable construction) applies to its analogue in the advisory career offender guideline (also too senseless to support a reasonable construction) is, accordingly, subject to reasonable debate.

The development of the law in this area, finally, is sufficiently important to not stymie it by refusing to grant Troiano (and any other similar advisory Guideline petitioners) certificates of appealability. The question of whether *Johnson* triggers a *Townsend* claim (as *Beckles* expressly signals it may) against the advisory Guidelines is worthy of percolation in the lower federal courts. The refusal to issue a COA on that issue unreasonably turns off that percolation and will prevent the issue from being litigated at all.

CONCLUSION

This Court should grant this petition to ensure that the question of whether a *Johnson-Townsend* claim survives *Beckles* percolates through the appellate courts. Whether *Beckles* forecloses a due process claim that has nothing to do with the void-for-vagueness doctrine is not beyond reasonable debate.

DATED: Honolulu, Hawaii, May 10, 2019.

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