NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

DOUGLAS AKIRA HIRANO
Petitioner

- vs -

UNITED STATES
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

AND

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Seventh Circuit holds that the void-for-vagueness doctrine and *Johnson v. United States*, 135 S.Ct. 2551 (2015), apply to the mandatory, pre-*United States v. Booker*, 543 U.S. 220 (2005), United States Sentencing Guidelines. *Cross v. United States*, 892 F.3d 288 (CA7 2018). In *Moore v. United States*, 871 F.3d 72 (CA1 2017), the First Circuit registered agreement with the Seventh that mandatory sentencing guidelines can be too vague to be valid, but resolved the case on other grounds and hasn't revisited the issue. See *Brown v. United States*, 139 S.Ct. 14 (Oct. 15, 2018) (Justice Sotomayor, joined by Justice Ginzburg, dissenting from denial of certiorari, recognizing *Moore* "strongly hint[s]" agreement with *Cross*); see also see also *United States v. Moore*, 2018 WL 5982017 (D. Mass.) (Nov. 14, 2018) (ruling mandatory guideline unconstitutionally vague).

Other circuits hold the vagueness doctrine and *Johnson* don't apply to the mandatory Guidelines. *United States v. Green*, 898 F.3d 315 (CA3 2018); *United States v. Brown*, 868 F.3d 297 (CA4 2017); *United States v. London*, 937 F.3d 502 (CA5 2019); *Raybon v. United States*, 867 F.3d 625 (CA6 2017); *Russo v. United States*, 902 F.3d 880 (CA8 2018); *United States v. Blackstone*, 903 F.3d 1020 (CA9 2018); *United States v. Greer*, 881 F.3d 1241 (CA10 2018); *In re Griffin*, 823 F.3d 1350 (CA11 2016).

Who is right?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Douglas Akira Hirano respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion is unpublished, reported at 775 Fed.Appx. 361 (CA9) (Aug. 22, 2019), and reproduced at Petitioner's Appendix (App.) 1. The district court's order denying the petitioner's 28 USC §2255 motion is unpublished, reported at 2017 WL 2661629 (D. Haw.) (June 20, 2017), and reproduced at App. 2.

JURISDICTION

The court of appeals issued its decision on August 22, 2019 (App. 1). This petition is being filed within 90 days of that decision and will therefore be timely under Rule 13.3. This Court has jurisdiction pursuant to 28 USC §1254(1).

The district court had jurisdiction under 28 USC §2255. The court of appeals had jurisdiction pursuant to 28 USC §1291 and 28 USC §2253.

RELEVANT CONSTITUTIONAL, STATUTORY, AND GUIDELINE PROVISIONS

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

"[T]he term 'violent felony' means any crime … that … 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 USC §924(e)(2)(B)(ii) (2001) (the Armed Career Criminal Act (ACCA)).

"The term 'crime of violence' means any offense … that … is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." USSG §4B1.2(a)(2) (1998).

CASE STATEMENT

For offenses committed in September 1999, the district court sentenced the petitioner in 2003, before this Court decided *Booker*, as a career offender under the United States Sentencing Guidelines. The district court's career offender determination rested upon the conclusion that the petitioner's convictions for burglary in Hawaii state courts were USSG §4B1.2(a) crimes of violence. The court also determined he was subject to the Armed Career Criminal Act because of those same burglary convictions. The court sentenced him to concurrent 262-month terms of imprisonment, the low end of the petitioner's career offender guideline range of 262–327 months. App. 3.

Within a year of *Johnson* and with the Ninth Circuit's leave, the petitioner filed a second §2255 motion. He argued *Johnson* voided the ACCA and career offender determinations, because the district court used the unconstitutionally vague residual clauses of the ACCA and §4B1.2(a)(2) to capture his prior convictions for Hawaii burglary. The district court ruled that the petitioner's ACCA claim was procedurally barred. The district court reasoned that although petitioner demonstrated cause to excuse his failure to raise the ACCA claim on direct review, he could not show prejudice because the career offender determination drove his sentence and rendered

the ACCA determination a nullity. App. 5–6. As to the petitioner's Guidelines claim, the district court ruled that *Johnson* did not apply to the mandatory career offender guideline's residual clause and, therefore, his claim didn't rely on a new rule that applied retroactively to him (for purposes of 28 USC §2244(b)(1)(A) and (d)) or that rendered his motion timely (under 28 USC §2255(f)(3)). App. 6–7. The Ninth Circuit affirmed, citing *Blackstone* and reaffirming its position that "*Johnson* did not recognize a new right applicable to the mandatory Sentencing Guidelines on collateral review." App. 1 (quoting *Blackstone*, 903 F.3d at 1028) (quotation marks omitted).

REASONS FOR GRANTING THE PETITION

1. The Fifth Amendment's due process clause provides that no one shall be deprived of liberty without due process of law. U.S. Const. amend. V; *Johnson*, 135 S.Ct. at 2556. The government violates the due process clause when it imprisons someone "under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson*, 135 S.Ct. at 2556 (citation omitted). This "void for vagueness doctrine" applies to "laws that fix the permissible sentences for criminal offenses," *Beckles v. United States*, 137 S.Ct. 886, 892 (2017) (citations and quotation marks omitted).

The post-*Booker* Guidelines do not fix the range of permissible sentences because a defendant's guideline range is only advisory and the district court, accordingly, may freely impose a sentence outside that range whenever the court disagrees with the

Guidelines. *Beckles*, 137 S.Ct. at 894. The void-for-vagueness doctrine, therefore, does not apply to the post-*Booker*, advisory Guidelines. *Beckles*, 137 S.Ct. at 894. The *pre-Booker* Guidelines, however, were mandatory. (Hence the need for *Booker* in the first place to render them advisory so as to remedy the mandatory Guidelines' violation of the Sixth Amendment's jury trial clause). The mandatory Guidelines were "binding" on district court judges and carried "the force and effect of laws." *Booker*, 543 U.S. at 234. Because they are "laws" that "fix" the range of permissible sentences, a mandatory guideline can be too vague to be valid.

The ACCA's residual clause is worded identically to the mandatory career offender guideline's residual clause. Both capture any (felony) offense that "involves conduct that presents a serious potential risk of physical injury to another." 18 USC §924(e)(2)(B)(ii); USSG §4B1.2(a)(2). In *Johnson*, this Court held this language too vague to be constitutional in the context of its use in the ACCA. *Johnson*, 135 S.Ct. at 2556–2560. This Court relied on two features of this language to hold it unconstitutionally vague: it tied the assessment of risk to an imagined ordinary case of the predicate offense; and it left uncertainty about the degree of risk that sufficed to count. *Johnson*, 135 S.Ct. at 2557–2558. Those two features adhere to the use of the same language in the career offender guideline, because the guideline, like the ACCA, triggers a categorical (not a fact-based) analysis that also looks at an imagined ordinary case to discern an arbitrary degree of risk. *Cross*, 892 F.3d at 299–304. ACCA cases deciding what are and aren't residual clause "violent felonies" have always been precedent for Guidelines cases addressing what are and aren't residual

clause "crimes of violence." *United States v. Crews*, 621 F.3d 849, 856 (CA9 2010) ("the terms 'violent felony' in the ACCA … and 'crime of violence' in [the] Guidelines … are interpreted according to the same precedent"). It should therefore be axiomatic that *Johnson*'s acknowledgement that the ACCA's phrase "involves conduct that presents a serious potential risk of physical injury to another" is too vague also dictates that the same language is too vague as it's used in the mandatory career offender guideline. *Cross*, 892 F.3d at 304–306.

The Ninth Circuit's disagreement with the Seventh Circuit boils down to the fact that *Johnson* didn't "mention[] … the Guidelines" and, therefore, doesn't establish any rule that applies to them. *Blackstone*, 903 F.3d at 1026. That's not a persuasive reason because, as just noted, ACCA cases are precedent for Guidelines cases even when they don't mention the Guidelines. *Crews*, 621 F.3d at 856. In *United States v. Spencer*, 724 F.3d 1133, 1145–1146 (CA9 2013), for example, the Ninth Circuit found no such impediment to invoking *James v. United States*, 550 U.S. 192, 210 n. 6 (2007) (holding the ACCA's residual clause is not vague without discussing whether the career offender guideline's residual clause isn't also), and *Sykes v. United States*, 564 U.S. 1, 15 (2011) (reaffirming the ACCA's residual clause "states an intelligible principle" without saying the career offender guideline did too), as compelling it to hold that "§4B1.2(a)(2)'s residual clause is not unconstitutionally vague," precisely because "precedents interpreting the ACCA residual clause apply to §4B1.2(a)(2) of the Sentencing Guidelines." The circuits all did the same thing with the "purposeful, violent, and aggressive" standard that *Begay v. United States*, 553 U.S. 137 (2008),

held the ACCA's force clause triggered. The circuits did not hesitate to say *Begay* applied to the career offender guideline's force clause, even though *Begay* did not mention the Guidelines. *United States v. Coronado*, 603 F.3d 706, 709–710 (CA9 2010) (so holding and collecting cases).

The other circuits have yet to come up with a more compelling reason to support their own variants of *Blackstone*. The Third Circuit's reasoning tracks the Ninth Circuit's. *Green*, 898 F.3d at 321 (*Johnson* "says nothing about a parallel right [not to] be sentenced under Sentencing Guidelines, whether advisory or mandatory" and noting a concurrence in *Beckles* tagged the question as an "open" one). The Fourth Circuit relied more on reading *Beckles* as making "clear that the right announced in *Johnson* did not automatically apply to all similarly worded residual clauses." *Brown*, 868 F.3d at 302. But *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018) (*Johnson* dictated holding 18 USC §16(b)'s residual clause vague), and *United States v. Davis*, 139 S.Ct. 2319 (2019) (*Johnson* dictated holding 18 USC §924(c)(3)(B)'s residual clause vague), lay bare the fallacy of that line of reasoning. The other circuits rely on the same notions, reading *Johnson* more narrowly and *Beckles* more broadly than either opinion or precedent supports reading them. *London*, 937 F.3d at 507–508 (CA5); *Raybon*, 867 F.3d at 629–630 (CA6); *Russo*, 902 F.3d at 883 (CA8); *Greer*, 881 F.3d at 1247 (CA10). An outlier, the Eleventh Circuit reasons the Guidelines (advisory and mandatory alike) are not subject to the void-for-vagueness doctrine because they just limit a sentencing judge's discretion. *Griffin*, 823 F.3d at (CA11). But that thought doesn't jibe with *Booker*'s recognition that the mandatory Guidelines did more than

that and did, in fact, fix the range of sentences for the defendant's crime. *Booker*, 543 U.S. at 234. The way the circuits uniformly responded to *Begay*, *James*, and *Sykes* gives the lie to the way the majority of them have responded to *Johnson*.

The Seventh Circuit has the better of it. Numerous circuit judges have acknowledged as much, persuasively criticizing their circuits for getting it wrong. *Brown*, 868 F.3d at 304 (Chief Judge Gregory dissenting from the Fourth Circuit's view); *London*, 937 F.3d at 509 (Circuit Judge Costa concurring but disagreeing with the Fifth Circuit's view); *Chambers v. United States*, 763 Fed.Appx. 514, 519 (CA6) (Feb. 21, 2019) (Circuit Judge Moore concurring but disagreeing with the Sixth Circuit's view); *Hodges v. United States*, 778 Fed.Appx. 413, 414 (CA9) (July 26, 2019) (Circuit Judge Berzon concurring but disagreeing with the Ninth Circuit's view); *In re Sapp*, 827 F.3d 1334, 1336 (CA11 2016) (Circuit Judges Jordan, Rosenbaum, and Pryor (yes, the entire panel) disagreeing with the Eleventh Circuit's view). This Court should grant review in this case to say the Seventh Circuit and these circuit judges are correct and the majority of circuits are not, to resolve the entrenched conflict between and within the circuits, and to ensure national uniformity on whether a mandatory Guideline can be, and here is, unconstitutionally vague.

2. The question presented is outcome dispositive in the petitioner's case. Albeit rather elliptically, the district court acknowledged that it relied on the career offender guideline's residual clause when it sentenced the petitioner. App. 7 (acknowledging that, should this Court ever "take up the question of whether the

residual clause of the mandatory Sentencing Guidelines is subject to a vagueness challenge in the future, Petitioner may be able to obtain collateral relief at that time"). Even absent such an acknowledgement, Hawaii defines burglary too broadly to count as generic burglary under the career offender guideline's enumerated offenses clause or its force/elements clause. See Haw. Rev. Stat. §708-810 (1972) (not requiring force in every instance); *United States v. Perry*, 394 Fed.Appx. 356, 2010 WL 3096372 (CA9) (Aug. 9, 2010) (holding Hawaii's burglary offenses define "building" too broadly, capturing moveable structures, to count as generic burglary). That remains true even after *United States v. Stitt*, 139 S.Ct. 399 (2018) (moveables count; what matters is whether a building is adapted or usually used for overnight accommodation), because Hawaii's definition of "building" not only includes moveable structures (the point *Perry* relied upon), but includes structures that have not been adapted or customarily used for overnight accommodation. See Haw. Rev. Stat. §708-800 (defining "building" for purposes of burglary as including "any structure," while defining "dwelling" as "a building which is used or usually used by a person for lodging"); Haw. Rev. Stat. §708-810 (defining first-degree burglary to require entry into a "building," not just a "dwelling"). And, as the district court also made plain, its ACCA, §2244, and §2255(f) rulings all turned on the conclusion that *Johnson* and the void-for-vagueness doctrine did not apply to the mandatory Guidelines. App. 5–8.

CONCLUSION

To resolve an entrenched circuit split on whether the void-for-vagueness doctrine and *Johnson* apply to the mandatory Guidelines, this Court should grant the petition for a writ of certiorari. The question presented is outcome dispositive in the petitioner's case, because only the residual clause of the mandatory career offender guideline captured the petitioner's prior burglary convictions. And the Ninth Circuit, along with the majority of the circuits to decide the issue, have it wrong on this issue of national importance.

DATED: Honolulu, Hawaii, November 12, 2019.

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