

NO. \_\_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2017

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JAMES McCANDLESS  
*Petitioner-Appellant-Defendant*

- vs -

UNITED STATES OF AMERICA  
*Respondent--Appellee-Plaintiff*

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

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

**&**

**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

Is denial of a certificate of appealability, under 28 U.S.C. §2253, appropriate because there is no reasonable debate that *Beckles v. United States*, 137 S.Ct. 886 (2017), broadly immunizes United States Sentencing Guidelines from any and all due process claims, rather than just from challenges predicated on the void-for-vagueness doctrine?

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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 and can be found at 2018 WL 1586964. The district court's order denying the petitioner's 28 U.S.C. §2255 motion is attached at App. at 2–7 and can be found at 2017 WL 4019415.

## **JURISDICTION**

The Ninth Circuit issued its order denying the petitioner's request for a certificate of appealability on January 30, 2018. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1), as *Hohn v. United States*, 524 U.S. 236 (1998), holds. 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**

The underlying facts are not disputed. For a drug crime committed in 2010, the district court sentenced the petitioner as a career offender on May 7, 2012, granted a government-requested departure, and imposed a 145-month term of imprisonment. A necessary predicate to the career offender designation was a Hawaii conviction for second-degree burglary. The district court counted that burglary as a crime of violence under USSG §4B1.2(a)(2)'s residual clause, due to Hawaii's over-broad definition of the types of structures that can be burglarized. App. at 2 and 6 (see footnote 3).

On November 3, 2015, the petitioner filed a §2255 motion in which he claimed that the career offender designation violated due process in light of *Johnson v. United*

*States*, 135 U.S. 2551 (2015) (*Johnson 2015*). The petitioner argued that his claim survived *Beckles v. United States*, 137 S.Ct. 886 (2017). He contended that existing precedent established that *Johnson 2015*'s reading of the residual clause of the Armed Career Criminal Act applied to the career offender guideline's residual clause. As so read, relying on the guideline's residual clause injected misinformation into the sentencing process, which then skewed the starting point for selecting his sentence. The sentence that the district court selected after using that starting point consequently violated established due process principles that demand the use of only reliable information at sentencing and preclude the imposition of an arbitrary sentence. The district court ruled that *Beckles* foreclosed the petitioner from relying on *Johnson 2015* at all and that, consequently, his petition was not timely under 28 U.S.C. §2255(f)(3). App. at 3–5. The district court also refused to issue a certificate of appealability, on the ground that no reasonable jurist would find debatable the district court's determination that *Beckles* foreclosed the petitioner from relying on *Johnson 2015*. App. at 5–6.

The petitioner then sought a certificate of appealability from the Ninth Circuit. The Ninth Circuit denied the petitioner's request for a certificate of appealability on the same ground as had the district court: *Beckles* completely forecloses a petitioner from relying on *Johnson 2015* to challenge an advisory guideline provision. App. at 1.

### **REASON FOR GRANTING THE WRIT**

*Johnson 2015* is a straightforward decision. *Sessions v. Dimaya*, \_\_\_ S.Ct. \_\_\_, 2018 WL 1800371 at \*7 (2018). "Its principal section" is one of simple statutory

construction, reading the ACCA's residual clause to require an analysis that turns on hypothesizing an ordinary case and the risk it poses. *Id.*; see also *Johnson 2015*, 135 S.Ct. at 2557–2258. That ordinary case risk analysis, *Johnson 2015* holds, “offers no reliable way” to determine what crimes count and what crimes don’t. *Johnson 2015*, 135 S.Ct. at 2558. And that ordinary case risk analysis, *Johnson 2015* further holds, also produces “unpredictability and arbitrariness[.]” *Id.* Only after holding that the established, and only plausible, construction of the ACCA's residual clause required use of an unreliable and arbitrary ordinary case risk analysis, did this Court then hold that the ACCA's residual clause was invalid under the due process clause's void-for-vagueness doctrine. *Id.* at 2558, 2560–2563. The due process clause is not a one trick pony. It has other aspects, equally well settled, beyond the void-for-vagueness doctrine. *Johnson 2015*, however, did not discuss what else the due process clause requires when it comes to sentencing a criminal defendant.

Constructions of the ACCA's violent felony provisions have always been held to apply to their Guideline analogues and vice-versa. *Johnson 2015* itself relied on readings of the career offender's residual clause to recognize that the ordinary case risk analysis required by the ACCA's residual clause was unreliable and arbitrary. *Johnson 2015*, 135 S.Ct. at 2559–2560. This Court has historically “GVR'd” cases involving the Guideline analogues once it has decided a parallel ACCA case. See, e.g., *Archer v. United States*, 553 U.S. 1002 (2008) (granting cert., vacating, and remanding for further consideration of whether carrying a concealed weapon was a residual clause crime of violence under the career offender guideline in light of *Begay v. United*

*States*, 553 U.S. 137 (2008) (a case construing the ACCA’s force and residual clauses)). The circuits have an equally storied body of precedent holding that cases construing the ACCA’s and the career offender guideline’s residual clauses are fungible. *United States v. Velazquez*, 777 F.3d 91, 94 n.1 (1st Cir. 2014); *United States v. Gray*, 535 F.3d 128, 130 (2d Cir. 2008); *United States v. Polk*, 577 F.3d 515, 518–519 (3d Cir. 2009); *United States v. Mobley*, 687 F.3d 625, 632 (4th Cir. 2012); *United States v. Hughes*, 602 F.3d 669, 673 n.1 (5th Cir. 2010); *United States v. Ford*, 560 F.3d 420, 421 (6th Cir. 2009); *United States v. Billups*, 536 F.3d 574, 579 n.1 (7th Cir. 2008); *United States v. Williams*, 537 F.3d 969, 971–972 (8th Cir. 2008); *United States v. Spencer*, 724 F.3d 1133, 1337–1338 (9th Cir. 2013); *United States v. Patillar*, 595 F.3d 1138, 1140 (10th Cir. 2010); *United States v. Archer*, 531 F.3d 1347, 1350 n. 1 (11th Cir. 2008). So while it may well be, as *Beckles* holds, that *Johnson 2015*’s **constitutional** holding does not apply to the career offender guideline’s residual clause, the foregoing precedent nonetheless dictates that *Johnson 2015*’s **statutory interpretation** holding **does** apply to the career offender guideline’s residual clause.

Read as *Johnson 2015* thus dictates, the ordinary case risk analysis that the career offender guideline requires corrupts the sentencing process with misinformation about the weight that should be given to a defendant’s criminal history. Offenses are unreliably and arbitrarily found to be captured by the career offender guideline’s residual clause, thereby triggering career offender sentencing, which then hijacks the defendant’s offense level or criminal history category, or both. The petitioner here is as good an example of this as any. Career offender sentencing

elevated his offense level by seven levels, from 27 up to 34, a difference that doubled the range the court used as its starting point at sentencing, increasing the anchoring range from 130–162 months up to a lodestar of 262–327 months. App. at 3. Unreliable information (misinformation) arbitrarily imparted such weight to the petitioner’s criminal history that this single factor alone effectively doubled the starting point that the court used to select the petitioner’s sentence.

And that’s a flaw due process doesn’t allow, even when turning a blind eye on vagueness. This Court holds that due process requires that sentences not be imposed on the basis of “misinformation.” *Roberts v. United States*, 445 U.S. 552, 556 (1980) (quoting *United States v. Tucker*, 404 U.S. 443, 447 (1972)). And that rule has nothing to do with the void-for-vagueness doctrine, which isn’t even discussed in the cases recognizing the due process clause’s prohibition of relying on misinformation at sentencing. Due process does not allow sentencing a defendant, be it due to a vague provision or one perfectly clear, “on the basis of assumptions concerning his criminal record which were materially untrue.” *Tucker*, 404 U.S. at 592 (quoting *Townsend v. Burke*, 334 U.S. 736, 741 (1948)). But that is precisely what happens when a court uses a career offender range, necessarily predicated on the guideline’s residual clause, as its starting point at sentencing—the sentencing court has used ordinary case risk analysis to make an arbitrary and unreliable assumption about the severity and weight of the defendant’s criminal history.

*Beckles* is not a construction case, as it says absolutely nothing about how the career offender guideline’s residual clause is or ought to be read under the settled

precedent cited above. The *Beckles* majority did not discuss *Johnson 2015*'s construction of the ACCA's residual clause, nor did it spend any time discussing the ordinary case risk assessment that both the ACCA's and the career offender guideline's residual clauses have been held to require. From start to finish, *Beckles* is purely a constitutional decision. But, even so, *Beckles* is not a decision about the due process clause writ large. It is a decision that, quite explicitly, *limits* the immunization it dispenses to immunization from attack under the due process clause's void-for-vagueness doctrine. "This Court holds only that the advisory Sentencing Guidelines, including 4B1.2(a)'s residual clause, are not subject to a challenge under the void-for-vagueness doctrine." *Beckles*, 137 S.Ct. at 896. And this Court expressly acknowledged that *Beckles* did "not render sentencing procedures," which includes correctly calculating the applicable guideline range, "entirely immune from scrutiny under [other aspects of] the due process clause." *Id.* (citation, brackets, and quotation marks omitted).

As Justice Gorsuch noted in *Dimaya*, the void-for-vagueness doctrine's roots in the due process clause spring from two concerns: fair notice and accountability, with the latter being the "more important" of the two. *Dimaya*, 2018 WL 1800371 at \*20 (Gorsuch, J., concurring). The due process clause's concern with reliability and misinformation have little to do with fair notice and accountability among the branches of government. It thus stretches *Beckles*' narrow holding far beyond its breaking point to read the case as immunizing the Guidelines from attack on reliability and misinformation grounds, two things that have nothing to do with the

doctrine *Beckles* is more properly read (can only reasonably be read) to be about. And to say the point is beyond reasonable dispute ... well, that just takes things to a completely different level. Legal fiction cum legal epic fantasy.

In denying the petitioner a certificate of appealability on his claim that existing precedent mandates applying *Johnson 2015*'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 on reliability and misinformation grounds, the courts below read *Johnson 2015* too narrowly and *Beckles* too broadly. Those readings are reasonably debatable. So the courts' refusal to issue the petitioner a certificate of appealability was incorrect. Given the national importance of *Johnson 2015* and *Beckles*, this Court should correct the lower courts' mistaken reading of those cases.

### CONCLUSION

This Court should grant this petition to correct the Ninth Circuit's mistaken view that *Beckles* so clearly dictates that no due process challenge, of any kind, can be mounted against the Guidelines that no jurist of reason could debate the point. And upon doing so, this Court should remand for issuance of a certificate of appealability.

DATED: Honolulu, Hawaii, April 23, 2018.



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