No. 15-8544

In the Supreme Court of the United States

TRAVIS BECKLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

In *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), this Court held that the residual clause in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), is unconstitutionally vague. In *Welch* v. *United States*, 136 S. Ct. 1257 (2016), the Court held that *Johnson* announced a new "substantive" rule of constitutional law that applies retroactively in an initial collateral challenge under 28 U.S.C. 2255 to a sentence enhanced under the ACCA. 136 S. Ct. at 1268. The questions presented are:

1. Whether a ruling that the residual clause of Section 4B1.2(a)(2) of the Sentencing Guidelines is void for vagueness would apply retroactively in a motion under Section 2255.

2. Whether the residual clause of Section 4B1.2(a)(2) of the Sentencing Guidelines is void for vagueness.

3. Whether, after *Johnson*, petitioner's conviction for being a felon in possession of a sawed-off shotgun qualifies as a "crime of violence" under the commentary to Section 4B1.2 of the Sentencing Guidelines, which expressly designates possession of a short-barreled shotgun as a crime of violence.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 161-163) is not published in the Federal Reporter but is reprinted at 616 Fed. Appx. 415. A prior opinion of the court of appeals (J.A. 155-158) is not published in the Federal Reporter but is reprinted at 579 Fed. Appx. 833. The relevant orders of the district court (J.A. 127-152, 153-154) are not reported. The opinion of the court of appeals on direct review (J.A. 15-40) is reported at 565 F.3d 832.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 2015. A petition for rehearing was denied on February 11, 2016 (J.A. 164-165). The petition for a writ of certiorari was filed on March 9, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND SENTENCING GUIDELINES PROVISIONS INVOLVED

The relevant constitutional and Sentencing Guidelines provisions are reproduced in the appendix to this brief. See App., *infra*, 1a-12a.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 360 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed, J.A. 16, and this Court denied a petition for a writ of certiorari, 558 U.S. 906 (2009). The district court subsequently reduced petitioner's sentence to 216 months of imprisonment after the government filed a motion under Federal Rule of Criminal Procedure 35(b). J.A. 3 (Doc. 150).

Petitioner then filed a motion to vacate his sentence under 28 U.S.C. 2255(a). J.A. 41. The district court denied the motion but issued a certificate of appealability. J.A. 154. The court of appeals affirmed. J.A. 156. Petitioner filed a petition for a writ of certiorari, and this Court granted the petition, vacated the judgment, and remanded to the court of appeals for further consideration in light of *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). 135 S. Ct. 2928. On remand, the court of appeals again affirmed the denial of petitioner's Section 2255 motion. J.A. 162.

A. Legal Background

1. In the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II, § 217(a), 98 Stat. 2017, Con-

gress created the United States Sentencing Commission and required the Commission to promulgate the federal Sentencing Guidelines. 28 U.S.C. 991(a), 994(a). Under the Guidelines, an offense of conviction receives a "base offense level," which may be adjusted up or down based on factors such as offense characteristics or the defendant's acceptance of responsibility. See Sentencing Guidelines Chs. 2 and 3. The defendant also receives a criminal-history category based on his prior convictions. See *id.* Ch. 4. The offense level coupled with the criminal-history category yields a sentencing range. See *id.* Ch. 5, Pt. A.

The Sentencing Reform Act contemplates that, in addition to guidelines and policy statements, the Commission will issue "official commentary" providing authoritative interpretations of Guidelines provisions or explaining how they apply in practice. 18 U.S.C. 3553(b); see *Stinson* v. *United States*, 508 U.S. 36, 41 (1993). Since first promulgating the Guidelines in 1987, the Commission has issued official commentary containing "application notes" and background information for individual Guidelines provisions. The Sentencing Guidelines have also always included a guideline stating that the commentary may "interpret [a] guideline or explain how it is to be applied" or "suggest circumstances which * * * may warrant departure from the guidelines." Sentencing Guidelines § 1B1.7; see *Stinson*, 508 U.S. at 41.

In *United States* v. *Booker*, 543 U.S. 220 (2005), this Court held that mandatory Sentencing Guidelines violate the Sixth Amendment by predicating higher sentences on judicial factfinding. *Id.* at 243-244. The Court remedied that problem by rendering the Guidelines advisory. *Id.* at 245. Under the advisory Guide-

lines, a district court must still "begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Gall* v. *United States*, 552 U.S. 38, 49-50 (2007). The district court, however, "may not presume that the Guidelines range is reasonable"; instead, the court "must make an individualized assessment based on the facts presented" in light of the sentencing factors set forth at 18 U.S.C. 3553(a). *Gall*, 552 U.S. at 49-50. An appellate court reviews the district court's sentencing decision to ensure both that the court did not make a "procedural error," such as miscalculating the advisory Guidelines range, and that the ultimate sentence does not reflect an abuse of discretion. *Id.* at 51.

2. The Sentencing Reform Act requires the Sentencing Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized" for an adult defendant convicted of a "crime of violence" or a drug felony who had previously been convicted of two or more such offenses. 28 U.S.C. 994(h). The Sentencing Guidelines have accordingly always included a "career offender" guideline that specifies enhanced sentences for the category of defendants described in Section 994(h). See Sentencing Guidelines § 4B1.1. If a defendant is a career offender, he is assigned a criminal-history category of VI and his offense level may be increased, yielding a higher sentencing range. See *id.* § 4B1.1(b).

Section 4B1.2(a) of the Guidelines defines the term "crime of violence" for purposes of the career-offender guideline and several other guidelines. See, *e.g.*, Sentencing Guidelines § 2K1.3, comment. (n.2). The Sentencing Commission originally defined that term by

incorporating the U.S. Criminal Code's definition of "crime of violence" set out at 18 U.S.C. 16. Sentencing Guidelines § 4B1.2(1) (1987). That definition includes any offense with a specified "physical force" element as well as any felony "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. The Commission's 1987 official commentary "interpret[ed] this" to mean that certain offenses, such as murder, kidnapping, extortionate extension of credit, arson, and robbery, "are covered by this provision." Sentencing Guidelines § 4B1.2, comment. (n.1) (1987).

In 1989, the Commission replaced the original definition of "crime of violence" with language modeled on the definition of "violent felony" in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B). The Commission's revised definition had a "physical force" elements clause that was similar to the one in the Section 16 definition, but its second clause differed. The second clause encompassed any offense punishable by more than one year of imprisonment 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." Sentencing Guidelines App. C, Amend. 268 (Nov. 1, 1989). The Commission, however, also specified in the commentary that, in addition to the four enumerated offenses listed in the ACCA definition, the Guidelines' term "'[c]rime of violence' includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling." *Ibid.*

The Commission has periodically amended the commentary to Section 4B1.2 to add or subtract covered offenses. In 1991, the Commission added a note stating that the term "crime of violence" does not include the offense of unlawful possession of a firearm by a felon, see 18 U.S.C. 922(g)(1). Sentencing Guidelines App. C., Amend. 433 (Nov. 1, 1991). This Court held in *Stinson* that courts must treat that note as "a binding interpretation of the phrase 'crime of violence'" in the Guidelines because, although the note is not "compelled by the guideline text," it is not "plainly erroneous or inconsistent" with the text. 508 U.S. at 47 (citation omitted). The Commission later amended the note to specify that a felon-in-possession conviction does qualify as a crime of violence if the firearm that the felon possessed was covered by the National Firearms Act, see 26 U.S.C. 5845(a), which regulates such especially dangerous weapons as short-barreled shotguns and machineguns. Sentencing Guidelines App. C., Amend. 674 (Nov. 1, 2004).

3. As discussed above, the Commission's 1989 definition of "crime of violence" was modeled on the ACCA. The ACCA imposes a sentence of 15 years to life on any person who possesses a firearm in violation of 18 U.S.C. 922(g) and who has at least three prior convictions for a "violent felony" or a "serious drug offense," 18 U.S.C. 924(e)(1). Absent the ACCA enhancement, the maximum punishment for that offense is ten years of imprisonment. 18 U.S.C. 924(a)(2).

In *Johnson*, this Court held that the so-called "residual clause" of the ACCA's definition of "violent felony"—*i.e.*, "otherwise involves conduct that presents a serious potential risk of physical injury to another"—is void for vagueness. 135 S. Ct. at 2557

(citation omitted). The Court concluded that by requiring courts to assess the risk presented by an idealized "ordinary case" of an offense in light of the preceding disparate list of enumerated offenses, including by inquiring into whether violent conduct would likely occur after the completion of the offense, the residual clause was too "shapeless" to comport with the Due Process Clause. *Id.* at 2556-2663. In so holding, the Court overruled its two precedents holding that the residual clause was not vague. See *Sykes* v. *United States*, 564 U.S. 1, 15-16 (2011); *James* v. *United States*, 550 U.S. 192, 210 n.6 (2007).

In *Welch* v. *United States*, 136 S. Ct. 1257 (2016), this Court held that *Johnson*'s holding applies retroactively to prisoners seeking collateral relief for ACCA sentences. *Id.* at 1265. The Court explained that "[a]fter *Johnson*, the same person engaging in the same conduct is no longer subject to the [ACCA] and faces at most 10 years in prison." *Ibid.* Because "*Johnson* affected the reach of the underlying statute," the Court concluded that it was "a substantive decision" that, under this Court's retroactivity doctrine, applies retroactively on collateral review. *Ibid.*

4. Effective August 1, 2016, the Sentencing Commission amended the definition of "crime of violence" in Section 4B1.2(a) to eliminate its residual clause. Sentencing Guidelines App. C, Amend. 798 (Supp.). The current definition retains the elements clause, but the second clause now provides that a "crime of violence" includes "murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c)."

Ibid. The Commission explained that it moved many offenses previously listed in the commentary into the main text "[f]or easier application." *Ibid.*

B. The Current Controversy

1. On April 11, 2007, Police Detective Diego Castro observed petitioner loitering in a public-housing facility. Petitioner saw Castro and fled. After a chase, Castro apprehended petitioner in the apartment of petitioner's girlfriend, Tiovanni Jones, where he sometimes lived. Jones said that a gun was in the bedroom and consented to a search of the apartment. After searching for the gun unsuccessfully, Castro asked petitioner where the gun was located. Petitioner said that a shotgun was under the mattress. Castro recovered a sawed-off Browning shotgun from under the mattress. Petitioner later admitted that he was a drug dealer and had acquired the shotgun for protection. J.A. 18-20; 07-15062 Gov't C.A. Br. 3-5; Presentence Investigation Report (PSR) ¶¶ 4-8.

2. a. A federal grand jury charged petitioner with possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1). J.A. 16. A jury convicted petitioner of that charge. J.A. 18.

b. Petitioner was sentenced in October 2007. J.A. 22. Petitioner's criminal history included at least three qualifying convictions for "serious drug offense[s]." See PSR ¶¶ 18, 24, 30, 33, 35, 38. Under the ACCA, therefore, his statutory sentencing range was 15 years to life imprisonment.

In calculating his advisory Guidelines range, the Probation Office determined that petitioner qualified as a career offender under Section 4B1.1. See PSR ¶¶ 18, 41. That determination rested in part on the conclusion that, under the official commentary in

effect at the time, petitioner's instant Section 922(g)(1) conviction qualified as a "crime of violence" because the firearm that petitioner possessed was a short-barreled shotgun. See Sentencing Guidelines § 4B1.2, comment. (n.1) (2006). As a career offender, petitioner's total offense level was 37 and his criminal-history category was VI, yielding an advisory Guidelines range of 360 months to life imprisonment. PSR ¶ 79.

The district court agreed that petitioner qualified as a career offender under the Guidelines and sentenced him to 360 months of imprisonment. J.A. 2, (Doc. 69); see J.A. 29-30.

c. The court of appeals affirmed. J.A 15-40. Petitioner challenged his designation as a career offender, arguing that the instant conviction did not qualify as a "crime of violence" because he was convicted only of unlawful possession of a firearm by a felon, not of unlawful possession of a firearm listed in 26 U.S.C. 5845(a). J.A. 30.

Reviewing for plain error because petitioner had failed to preserve the argument below, J.A. 30, the court of appeals rejected petitioner's contention. J.A. 30-36. The court explained that the official commentary to Section 4B1.2 expressly provided that a Section 922(g)(1) offense qualifies as a crime of violence if the felon had possessed a short-barreled shotgun. J.A. 29. The court further determined that the district court had not committed reversible error in finding that the weapon petitioner possessed was a short-barreled shotgun. See J.A. 34-36.

d. This Court denied certiorari in October 2009, 558 U.S. 906, at which point petitioner's conviction and

sentence became final. See *Clay* v. *United States*, 537 U.S. 522, 527 (2003).

e. On June 22, 2010, the district court granted the government's motion under Federal Rule of Criminal Procedure 35(b) and reduced petitioner's sentence to 216 months for his substantial assistance to the government. J.A. 3 (Doc. 150).

3. a. Petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255, arguing that he was incorrectly sentenced as a career offender because his offense of conviction was not a "crime of violence." J.A. 41-52. The district court denied the motion but issued a certificate of appealability. J.A. 153-154. The court ruled that petitioner's argument was foreclosed by the Eleventh Circuit's decision in *United States* v. *Hall*, 714 F.3d 1270 (2013), which held that "the definition of 'crime of violence' provided by the Guidelines commentary" was "authoritative" and binding with respect to the offense of possession of an unregistered short-barreled shotgun. *Id.* at 1274; see J.A. 153.

b. The court of appeals affirmed, stating that it was bound by its ruling in *Hall*. J.A. 155-158.

c. Petitioner filed a petition for a writ of certiorari, arguing that his conviction did not qualify as a "crime of violence" under the residual clause of Section 4B1.2(a)(2). See 14-7390 Pet. 10-11. This Court granted the petition, vacated the judgment, and remanded the case to the court of appeals for further consideration in light of *Johnson*. 135 S. Ct. 2928.

d. On remand, the court of appeals again affirmed the judgment of the district court denying petitioner's Section 2255 motion. J.A. 161-163. The court reiterated its earlier holding that petitioner's offense quali-

fied as a crime of violence under the commentary to Section 4B1.2 of the Guidelines. J.A. 162 (citing *Hall*, 714 F.3d at 1270). The court explained that this Court's ruling in *Johnson* "does not control this appeal" because petitioner's career-offender designation was "based not on the ACCA's residual clause, but based on express language in the Sentencing Guidelines classifying [petitioner's] offense as a 'crime of violence.'" J.A. 163 (emphasis omitted).

SUMMARY OF ARGUMENT

Petitioner is not entitled to collateral relief based on his claim of sentencing error. According to petitioner, the residual clause of the Guidelines' former definition of "crime of violence" was unconstitutionally vague and, as a result, the former commentary that the district court used to calculate his advisory Guidelines range was also invalid. He seeks a resentencing at which the court would consider a lower advisory Guidelines range. This Court should reject petitioner's request at the threshold because the new constitutional rule he seeks would not apply retroactively on collateral review. If the Court reaches the merits, it should hold that although the advisory Guidelines are subject to the vagueness doctrine, the commentary applied at petitioner's sentencing is not vague and was legally valid.

I. No dispute exists that the rule petitioner seeks would be "new" and would not be a "watershed" rule within the meaning of this Court's retroactivity precedents. Accordingly, the rule would apply retroactively on collateral review only if it qualifies as "substantive" rather than "procedural." That classification depends on whether the rule would function procedurally in practice: that is, whether it would regulate the man-

ner of imposing a sentence rather than setting the substantive limits on permissible sentences.

Petitioner's rule would function procedurally. Invalidating Section 4B1.2(a)(2)'s residual clause and the associated commentary would have the practical effect of reducing petitioner's advisory Guidelines range. That range plays an important procedural role in the sentencing process by establishing the initial benchmark for the district court's exercise of discretion under 18 U.S.C. 3553(a), and for that reason this Court has repeatedly held that a miscalculation of the range is a form of procedural error. But the advisory Guidelines range does not delimit the bounds of a lawful sentence. It functions as advice—influential advice, but advice nonetheless. Petitioner's rule is therefore not substantive. This Court has held that similar rules—such as the rule that a capital sentencing judge cannot assign weight to a vague aggravating factor—are procedural and thus not retroactive.

Petitioner's rule differs markedly from this Court's ruling in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), voiding the ACCA's residual clause for vagueness. The ACCA imposes higher statutory minimum and maximum sentences for a violation of Section 922(g). The *Johnson* rule therefore narrows the reach of a penalty statute. *Welch* v. *United States*, 136 S. Ct. 1257, 1265 (2016). Petitioner's rule, by contrast, would not change the range of statutorily authorized sentences for a class of offenders. Without finding any additional facts about petitioner's record or his offense, the district court could impose the same sentence in a resentencing proceeding as petitioner originally received, so long as the court began by consider-

ing a lower Guidelines range. That is the essence of a procedural rule.

Permitting petitioner and similarly situated prisoners to attack their sentences years after they were imposed would undermine the basic purpose of the retroactivity doctrine to leave undisturbed final sentences that were imposed in accordance with the governing procedural law. It would also inflict substantial reliance costs on the judicial system.

II. The Due Process Clause prohibits a court from calculating an advisory Guidelines range based on a provision that is so vague that a person of ordinary intelligence cannot understand what it means. The Guidelines range helps structure the sentencing proceeding, and the parties' arguments and the court's ultimate exercise of discretion are often framed in reference to that range. Unlike the general sentencing factors set forth in Section 3553(a), moreover, calculation of a Guidelines range calls for application of legal standards, yet a vague guideline means that such determinations cannot be made in a non-arbitrary manner. Given those features, relying on a vague guideline would seriously undermine the fairness of a sentencing proceeding and produce arbitrary results in violation of the Constitution's guarantee of due process in criminal adjudications. That procedural unfairness would be magnified by the substantial effect that Guidelines advisory ranges exert on sentences actually imposed.

Petitioner's advisory Guidelines range, however, was not calculated based on a vague guideline. Rather, the district court relied on an application note in the official commentary to Section 4B1.2 expressly defining "crime of violence" to include his firearm

offense. That note reflected the Commission's authoritative view about what offenses fell within the Guidelines term "crime of violence," without regard to the definitional provisions in the main text. Petitioner's contention that Section 4B1.2(a)(2)'s former residual clause was facially void for vagueness thus could not entitle him to relief.

In any event, even assuming *arguendo* that the application note interpreted the former residual clause, petitioner's vagueness claim fails. In adjudicating facial vagueness challenges, this Court has first construed the challenged provision in light of authoritative clarifying texts akin to the Commission's commentary and then determined whether the provision is vague as so construed. Construed in light of the commentary, the former residual clause was not vague at all with respect to those offenses that were expressly identified in the commentary. Petitioner suffered no deprivation of due process when his Guidelines range was calculated based on the unambiguous text of the official commentary.

ARGUMENT

PETITIONER IS NOT ENTITLED TO RESENTENCING ON COLLATERAL REVIEW BASED ON HIS CLAIM THAT HIS ADVISORY GUIDELINES RANGE WAS CALCULATED WITH A VAGUE GUIDELINE

As Justice O'Connor explained in her plurality opinion in *Teague* v. *Lane*, 489 U.S. 288 (1989), "[r]etroactivity is properly treated as a threshold question," and thus "before deciding [the merits of a constitutional claim, the Court] should ask whether such a rule would be applied retroactively to the case at issue." *Id.* at 300-301; see *id.* at 316. That sequence accords with this Court's "usual practice" of

"avoid[ing] the unnecessary resolution of constitutional questions." *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 197 (2009).

In this case, the new rule that petitioner seeks would not apply retroactively on collateral review because it would have "a procedural function" rather than "a substantive function," *Welch* v. *United States*, 136 S. Ct. 1257, 1266 (2016). See Part I, *infra*. That suffices to resolve this case. If this Court does reach the merits of petitioner's claim, it should hold that, although the advisory Sentencing Guidelines are subject to the Due Process Clause's prohibition on vague penal laws, petitioner was not denied due process when the district court calculated his advisory Guidelines range based on the unambiguous text of the Commission's official commentary. See Part II, *infra*.

I. THE RULE THAT PETITIONER SEEKS WOULD NOT APPLY RETROACTIVELY ON COLLATERAL REVIEW

Under this Court's established retroactivity doctrine, a new rule has a "substantive" function, and is therefore retroactive on collateral review, if it narrows the scope of a statute that defines an offense or fixes its punishment, forbids a kind of punishment, or excludes a kind of conduct or person from the State's power to punish. The new rule that petitioner asks this Court to adopt—that Section 4B1.2(a)(2)'s former residual clause was void for vagueness and that as a result the official commentary applied by the district court was invalid—would not function in any of those ways. Rather, it would function as a procedural rule by reducing a defendant's advisory Guidelines range, thus changing the initial benchmark that the district court must take into account in imposing a sentence

that satisfies the Section 3553(a) factors. Because of that intrinsically procedural function, petitioner's rule would not be retroactive on collateral review.

A. Whether Petitioner's Rule Applies Retroactively Depends On Whether It Has A Procedural Or Substantive Function

1. When this Court announces a new procedural rule, that rule "applie[s] retroactively to all cases, state or federal, pending on direct review or not yet final." *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987). But prisoners generally cannot invoke new procedural rules to obtain collateral relief from final convictions. Drawing on an approach earlier articulated by Justice Harlan, the plurality opinion in *Teague* concluded that "new constitutional rules of criminal procedure" generally "will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310; see *Mackey* v. *United States*, 401 U.S. 667, 675-702 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part). The full Court has since adopted that approach. See *Welch*, 136 S. Ct. at 1264.

As this Court explained in *Welch*, two categories of new legal rules are not subject to *Teague*'s retroactivity bar. See 136 S. Ct. at 1264. "First, '[n]ew substantive rules generally apply retroactively.'" *Ibid.* (emphasis and citation omitted; brackets in original). The *Teague* bar is concerned with rules of procedure, not the substantive reach of criminal statutes. "Second, new watershed rules of criminal procedure, which are procedural rules implicating the fundamental fairness and accuracy of the criminal proceeding, will also have retroactive effect." *Ibid.* (citation and internal quotation marks omitted). The only example of a watershed

rule that this Court has recognized is the right-to-counsel rule of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). See *Whorton* v. *Bockting*, 549 U.S. 406, 418-419 (2007).[1]

The *Teague* framework recognizes that "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." 489 U.S. at 309 (plurality opinion). Collateral review has never been a "substitute for direct review." *Id.* at 306 (internal quotation marks omitted). Rather, its principal purposes are to deter state and federal courts from violating then-governing procedural law, see *ibid.*, and to provide a remedy when a defendant is imprisoned for conduct that is not criminal, *Bousley* v. *United States*, 523 U.S. 614, 620-621 (1998), or is subject to a sentencing range greater than what the law authorizes, see *Welch*, 136 S. Ct. at 1265. Where those purposes are not implicated, the overriding "interests of comity and finality" generally preclude relief. *Teague*, 489 U.S. at 308 (plurality opinion). As Justice Harlan explained, "[a] rule of law that fails to take account of * * * finality interests would do more than subvert the criminal process itself"; "[i]t would also seriously distort the very limited resources that society has allocated to the criminal process." *Mackey*, 401 U.S.

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[1] Petitioner has not disputed that the *Teague* framework applies in federal collateral review under Section 2255, and indeed he relies on it. Pet. Br. 12-13, 32-34; see *Welch*, 136 S. Ct. at 1264 (in light of the parties' positions, the Court "proceed[s] on th[e] assumption" that the "*Teague* framework applies in a federal collateral challenge to a federal conviction").

at 691 (concurring in the judgments in part and dissenting in part).

2. In this case, petitioner asserts a "new" constitutional rule, because the invalidity of the Guidelines' residual clause and the associated commentary was not "*dictated* by precedent existing at the time [his] conviction became final" in 2009. *Chaidez* v. *United States*, 133 S. Ct. 1103, 1107 (2013) (citation omitted). Importantly for the retroactivity analysis, that rule is "new" not only because *Johnson* v. *United States*, 135 S. Ct. 2551, was decided in 2015, but also because to obtain relief petitioner must establish two additional novel propositions: that the vagueness doctrine applies to the advisory Guidelines and that if the Guidelines' residual clause is void so is the commentary applied by the district court here. Petitioner's asserted rule would therefore be "new" even if his conviction had become final after *Johnson*.

Petitioner is thus foreclosed from obtaining relief unless his asserted rule falls within one of the two categories exempt from the *Teague* bar. Petitioner does not contend that his asserted rule would be a "watershed" rule of criminal procedure. See *Welch*, 136 S. Ct. at 1264 (*Johnson* rule not watershed). Accordingly, petitioner's rule would apply retroactively only if it qualifies as "substantive" under *Teague*.

This Court "has determined whether a new rule is substantive or procedural by considering the function of the rule"—that is, the actual effect of the rule when applied in criminal cases. *Welch*, 136 S. Ct. at 1265. "A rule is substantive rather than procedural," the Court explained in *Welch*, "if it alters the range of conduct or the class of persons that the law punishes." *Id.* at 1264-1265 (quoting *Schriro* v. *Summerlin*, 542

U.S. 348, 353 (2004)). Thus, substantive rules include constitutional rules forbidding criminal punishment for certain primary conduct, *e.g.*, *Loving* v. *Virginia*, 388 U.S. 1 (1967); constitutional rules prohibiting the imposition of certain forms of punishment, such as the death penalty or mandatory life imprisonment without parole, on particular classes of offenders, *e.g.*, *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 734 (2016); statutory-interpretation decisions holding that a criminal offense does not reach certain primary conduct, *Bousley*, 523 U.S. at 620; and decisions voiding for vagueness a statutory provision defining a criminal offense or punishment, see *Welch*, 136 S. Ct. at 1265.

Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'" or faces a more severe range of punishment than the law authorizes. *Summerlin*, 542 U.S. at 352 (quoting *Bousley*, 523 U.S. at 620). In those circumstances, the finality interests underlying *Teague* must give way because "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Montgomery*, 136 S. Ct. at 732 (quoting *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in the judgments in part and dissenting in part)).

In contrast, procedural rules regulate the "manner of determining" either guilt or punishment, but do not shield a defendant from criminal liability or from exposure to a particular sentencing range. *Welch*, 136 S. Ct. at 1265 (emphasis omitted) (quoting *Summerlin*, 542 U.S. at 353). Examples of procedural rules are rules that "'allocate decisionmaking authority' between judge and jury," *ibid.* (quoting *Summerlin*,

542 U.S. at 353), rules that "regulate the evidence that the court could consider in making its decision," *ibid.* (citing *Whorton*, 549 U.S. at 413-414, 417), and rules that govern the sort of considerations that a sentencing judge or jury may take into account, *e.g.*, *Lambrix* v. *Singletary*, 520 U.S. 518, 539-540 (1997); see pp. 24-26, *infra*. Such rules do not alter the authorized range of possible outcomes. Although in any given case procedural rules may have a significant effect on the outcome, a violation of those rules does not mean that any prisoner is serving a sentence that is not legally authorized or change the statutory range. For that reason, the advent of new procedural rules does not warrant upsetting final convictions in light of the overriding societal interest in the finality of criminal judgments.

Accordingly, the retroactivity question in this case depends on the "function" of the rule that petitioner seeks: whether, in practical operation, the rule would "alter[] the range of conduct or the class of persons that the law punishes" or instead regulate only the "manner of determining" an appropriate sentence. *Welch*, 136 S. Ct. at 1264-1265 (citations and emphasis omitted).

B. Petitioner's Asserted Rule Would Have A Procedural Function

An advisory Guidelines range structures the process of sentencing by providing the "lodestar" for the parties' arguments about an appropriate sentence and the district court's ultimate exercise of discretion. *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1342, 1345-1347 (2016). But a Guidelines range does not impose substantive limits on the range of legally authorized sentences. For that reason, a constitution-

al rule invalidating a provision of the advisory Guidelines or commentary would be procedural within the meaning of *Teague*.

1. As this Court has explained repeatedly since it rendered the Guidelines advisory in *United States* v. *Booker*, 543 U.S. 220 (2005), the Guidelines have an important, but ultimately procedural, role in a district court's determination of a lawful sentence. "The sentencing judge, *as a matter of process*, will normally begin by considering the presentence report and its interpretation of the Guidelines," *Rita* v. *United States*, 551 U.S. 338, 351 (2007) (emphasis added), and then "correctly calculating the applicable Guidelines range," *Gall* v. *United States*, 552 U.S. 38, 49 (2007). A failure to calculate the advisory Guidelines range, or a miscalculation of that range, constitutes "significant *procedural* error." *Id.* at 51 (emphasis added).

Once properly calculated, the advisory Guidelines range helps structure the process of determining a just sentence in light of the factors set forth at 18 U.S.C. 3553(a). The "initial benchmark" established by the range "provide[s] the framework" for the parties' arguments and the district court's exercise of discretion to select a sentence within the statutory range. *Molina-Martinez*, 136 S. Ct. at 1342. The parties may, for example, argue that the Guidelines range fails to take account of a fact about the defendant or the offense that should make a difference in the sentence. See *Rita*, 551 U.S. at 351. Or they may argue that the Guidelines range rests on a policy judgment that the district court should reject. See *id.* at 351, 357; see also *Spears* v. *United States*, 555 U.S. 261, 264-266 (2009) (per curiam); *Kimbrough* v. *United States*, 552 U.S. 85, 101 (2007).

Ultimately, the district court must make "an individualized assessment based on the facts presented" that takes account of "all of the [18 U.S.C. 3553(a)] factors," *Gall*, 552 U.S. at 49-50, in order to comply with the statute's "overarching" objective to "'impose a sentence sufficient, but not greater than necessary'" to fulfill the purposes of sentencing, *Kimbrough*, 552 U.S. at 101 (quoting 18 U.S.C. 3553(a)). In doing so, the court "may not presume that the Guidelines range is reasonable." *Gall*, 552 U.S. at 50. That is because although the Guidelines are entitled to "respectful consideration," their advisory function "permits the court to tailor the sentence in light of other statutory concerns as well." *Ibid.* (citation omitted). The advisory Guidelines range thus "inform[s] and instruct[s] the district court's determination of an appropriate sentence," but it does not cabin the district court's discretion to impose any sentence within the statutorily authorized range. *Molina-Martinez*, 136 S. Ct. at 1346.

The advisory Guidelines range also governs the depth of explanation that a district court must provide for a sentence. A within-Guidelines sentence requires less explanation if it is clear that "the judge rests his decision upon the Commission's own reasoning." *Rita*, 551 U.S. at 357. But if the judge "decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Gall*, 552 U.S. at 50.

Finally, the advisory Guidelines range can affect the structure and scope of appellate review. In reviewing a sentence for an abuse of discretion, the appellate court may apply a presumption of reasona-

bleness to a within-Guidelines sentence, but may not presume that an outside-Guidelines sentence is unreasonable. *Rita*, 551 U.S. at 347, 354-355. The court reviews whether the district court committed "procedural error" by miscalculating the advisory Guidelines range. *Gall*, 552 U.S. at 53. But a determination that the range was miscalculated does not render the sentence substantively unlawful. Rather, when a district court commits such an error, its decision is not "*procedurally* sound," *id.* at 51 (emphasis added), and the appellate court must "determine whether [the] district court in fact would have imposed a different sentence" if it had taken into account different advice from the Commission. *Molina-Martinez*, 136 S. Ct. at 1348. That may require a limited remand for further explanation from the district court or a full resentencing. See *ibid.*

The advisory Guidelines thus play a significant role in the determination of a fair sentence, but they do so by structuring the process of selecting a sentence in light of the Section 3553(a) factors, explaining the justification for the sentence, and confirming the reasonableness of the sentence on appellate review. Although a miscalculation of the Guidelines range is thus a "significant procedural error," *Gall*, 552 U.S. at 51, such an error could not result in a sentence beyond what Congress has authorized.

2. Because of the procedural nature of a Guidelines-range-miscalculation error, the rule that petitioner seeks is a procedural rule within the meaning of this Court's retroactivity precedents. The practical effect of that rule would be to lower the advisory Guidelines range that the district court would take into account in a resentencing proceeding. That would

affect the process of determining a sentence by changing the critical starting benchmark. But the rule would not "alte[r] the range of conduct or the class of persons that the law punishes." *Welch*, 136 S. Ct. at 1267 (quoting *Summerlin*, 542 U.S. at 353) (brackets in original). Even if he prevails on his claim, petitioner will still be subject to the same statutory range of punishment, and the district court would be authorized to impose a sentence within that range on remand without finding any additional facts about petitioner's history or offense. Cf. *Montgomery*, 136 S. Ct. at 734 (holding retroactive rule requiring lesser sentence unless court finds that juvenile defendant's offense "reflect[s] irreparable corruption").

The practical effect of petitioner's asserted rule would be only to alter one of the *considerations* before the court—the sentencing range recommended by the Sentencing Commission—and potentially to require the court to provide a more detailed explanation for the sentence and to change whether a presumption of reasonableness applies on appeal. But just as a rule that "regulate[s] the evidence that [a] court could consider in making [a] decision" qualifies as procedural, *Welch*, 136 S. Ct. at 1265, a rule that alters the considerations that a court must take into account in deciding an appropriate sentence is procedural because it governs the *manner* of arriving at a decision, not the substantive bounds of a permissible sentence.

In fact, this Court has already held that materially similar rules—that is, rules that establish what considerations a sentencing judge or jury may or may not take into account in imposing a sentence—are procedural under *Teague*. This Court's decision in *Lambrix* is particularly relevant. *Lambrix* held that the Eighth

Amendment rule of *Espinosa* v. *Florida*, 505 U.S. 1079 (1992) (per curiam), did not apply retroactively on collateral review. 520 U.S. at 520, 539-540. *Espinosa* involved Florida's capital-sentencing framework, in which a jury weighed aggravating and mitigating factors and made a recommendation to the judge about whether to impose the death penalty, and then the judge conducted her own balancing of aggravating and mitigating favors in making the final determination, giving "great weight" to the jury's recommendation. See 505 U.S. at 1080, 1082. This Court held that under that scheme, if a jury recommending death weighs an aggravating factor that is unconstitutionally vague, the vague factor taints the judge's imposition of a capital sentence because of the deference owed to the jury's recommendation. See *id.* at 1082; see also *Lambrix*, 520 U.S. at 528.

In *Lambrix*, after holding that the *Espinosa* rule was "new," 520 U.S. at 528-539, the Court had little trouble concluding that "th[e] exception [for substantive rules] has no application to this case," *id.* at 539. The *Espinosa* rule, the Court explained, "neither decriminalize[s] a class of conduct nor prohibit[s] the imposition of capital punishment on a particular class of persons." *Ibid.* (brackets in original) (quoting *Saffle* v. *Parks*, 494 U.S. 484, 495 (1990)). The Court therefore held that the capital prisoner could not obtain collateral relief on his claim that the sentencing judge had improperly relied on a vague factor in imposing a death sentence. See *id.* at 540.

Lambrix confirms that petitioner's asserted rule is procedural, not substantive. Like the prisoner in *Lambrix*, petitioner contends that the district court improperly took into account an unconstitutionally

vague sentencing factor in the process of determining a just sentence, creating an intolerable "potential for arbitrariness," *Espinosa*, 505 U.S. at 1082. And just as in *Lambrix*, any conclusion that petitioner's advisory Guidelines range was too high would neither decriminalize a class of conduct nor prohibit the imposition of any sentence within the statutory range on a particular class of persons.

That conclusion is fortified by this Court's other decisions holding that new rules governing the process of imposing capital punishment are not retroactive. For example, in *Beard* v. *Banks*, 542 U.S. 406 (2004), this Court held that the rule of *Mills* v. *Maryland*, 486 U.S. 367 (1988)—that capital juries cannot be required to disregard mitigating factors not found unanimously—was not substantive. See *Beard*, 542 U.S. at 408, 417. Likewise, this Court held in *Saffle* that a proposed constitutional rule barring an antisympathy instruction to a capital jury would not be retroactive. 494 U.S. at 486, 495. Under the rules at issue in both *Beard* and *Saffle*, therefore, the capital-sentencing jury should have considered a different mix of factors than it did in selecting an appropriate sentence. Petitioner makes essentially the same type of argument: that in imposing a sentence, the district court should have considered a lower advisory Guidelines range than it did. As in those cases, that rule is ultimately procedural, because it concerns the manner in which the sentencer arrived at a sentence, not whether petitioner is legally eligible for a particular sentencing range.

3. Contrary to the contentions of petitioner and his amici, this Court's holding in *Welch* that the *Johnson*

rule is substantive does not mean that petitioner's proposed rule would be substantive.

a. *Johnson* invalidated as vague the residual clause of the ACCA, which establishes higher statutory minimum and maximum sentences for a class of offenders who violate 18 U.S.C. 922(g). See 18 U.S.C. 924(e). The practical effect of that holding was to render a class of offenders—*i.e.*, those offenders who would qualify for an ACCA sentence only under the residual clause—ineligible for the ACCA's sentencing range of 15 years to life. See *Welch*, 136 S. Ct. at 1265. After *Johnson*, certain offenders previously subject to the ACCA's sentencing range were subject to sentences of no more than ten years for their violations of 18 U.S.C. 922(g)(1). See 18 U.S.C. 924(a)(2).

The *Johnson* rule therefore clearly has a substantive function. Applying the ACCA's unconstitutionally vague residual clause raises the *statutory* minimum and maximum terms of imprisonment so that the defendant is exposed to a wholly new and unauthorized range of sentencing options. *Welch*, 136 S. Ct. at 1265. That error thus directly implicates the separation-of-powers principle that federal courts may not "exact a penalty that has not been authorized by any valid criminal statute." *Id.* at 1268. And accordingly, giving retroactive effect to that rule accords with the basic reason that substantive rules are exempt from the *Teague* retroactivity bar: that the important interest in finality must give way to the bedrock principle that a person should not face punishment that the law does not authorize.

In the Guidelines context, in contrast, sentencing a defendant in light of an erroneous application of Section 4B1.2 does not alter the statutory boundaries for

sentencing set by Congress for the crime. It results in incorrect *advice* to the sentencing court on an important sentencing factor, and as a result it seriously distorts the ensuing process. See Part II.A, *infra*. But it does not authorize an otherwise-inapplicable statutory mandatory-minimum sentence or produce a higher-than-otherwise-applicable statutory maximum.

b. Petitioner also contends (Br. 34-41) that declining to give retroactive effect to his asserted rule, while giving retroactive effect to the *Johnson* rule for ACCA sentences, "would represent a radical departure from this Court's categorical approach to retroactivity," under which "new substantive rules 'must be applied in * * * all federal habeas corpus proceedings.'" Br. 34 (emphasis omitted) (quoting *Danforth* v. *Minnesota*, 552 U.S. 264, 266 (2008)).

That argument rests on a mistaken assumption: that the rule that petitioner seeks is the same rule that this Court announced in *Johnson* and held retroactive in *Welch*. As explained above, it is not. See p. 18, *supra*. Although *Johnson*'s holding that the particular language of the ACCA's residual clause is impermissibly vague is a necessary predicate of petitioner's rule, petitioner also asks this Court to make two further, new determinations: that a vague advisory Guidelines provision is constitutionally void and that as a result the commentary that the district court used to calculate his Guidelines range was invalid. *Those* further determinations are the ones that infuse petitioner's asserted constitutional rule with a procedural character because of the advisory Guidelines' fundamentally procedural role in the overall sentencing process.

Holding petitioner's asserted rule non-retroactive therefore does not violate this Court's categorical approach to retroactivity on collateral review. The *Johnson* holding, which functions to reduce the statutorily authorized sentence for a class of offenders and is therefore substantive, applies to all defendants on collateral review. The rule that petitioner seeks, which would function to change the advice that district courts consider in imposing sentences within an authorized range and would therefore be procedural, should not apply to any defendants on collateral review.[2]

Such a divergence between rules with similar origins is not novel. It has long been recognized that two rules sharing the same "underlying constitutional source" can differ in their "function" and thus in their retroactive applicability. *Welch*, 136 S. Ct. at 1265. For example, in his foundational retroactivity opinion in *Mackey*, Justice Harlan pointed to the "divergent ways" in which the new rule announced in *Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968), applied in *Mackey* and *United States* v. *United States Coin & Currency*, 401 U.S. 715 (1971), to demonstrate that "[s]ome rules may have both procedural and substantive ramifications." *Mackey*, 401 U.S. at 692 n.7 (concurring in the

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[2] As petitioner notes (Br. 38-40, 45), the government previously took the position that ACCA and Guidelines errors were to be treated the same for retroactivity purposes, and some courts of appeals adopted that view. The government has since reconsidered that position and believes that such an approach is inconsistent with this Court's precedents defining a substantive rule that is retroactive to cases on collateral review, which focus on the function of the new rule, not its legal source. See *Welch*, 136 S. Ct. at 1265-1266.

judgments in part and dissenting in part). *Marchetti* and *Grosso* held that a defendant who asserts his Fifth Amendment privilege against self-incrimination may not be prosecuted for failing to register as a gambler and pay the related gambling excise tax. *Marchetti*, 390 U.S. at 60-61; *Grosso*, 390 U.S. at 67. In *United States Coin & Currency*, Justice Harlan's opinion for the Court explained that the holdings of *Marchetti* and *Grosso* applied retroactively in a forfeiture proceeding based on failure to file the incriminating tax documents. 401 U.S. at 723-724.

But in his concurring opinion in *Mackey*, decided on the same day, Justice Harlan concluded that the rule announced in *Marchetti* and *Grosso* did *not* apply retroactively to warrant habeas relief for a prisoner who had been convicted for failure to pay income tax, even though the government had introduced his wagering-excise-tax returns at trial. 401 U.S. at 700. Justice Harlan explained that, unlike the defendant in *United States Coin & Currency*, who was penalized for failure to file the incriminating tax documents, Mackey was being punished for conduct—evading payment of federal income tax—that was not constitutionally immune from punishment. *Ibid.* Mackey claimed only that "the procedures utilized in procuring his conviction were vitiated by" *Marchetti* and *Grosso*. *Id.* at 701.

The distinction between the *Mackey* and *United States Coin & Currency* rules confirms that the practical effect of applying a new rule in a given context, and not the constitutional doctrine vindicated by the new rule, establishes whether the rule is entitled to retroactive application. Declining to give retroactive effect to a rule declaring an advisory Guidelines provi-

sion void—which would have the effect only of changing the district court's manner of arriving at a sentence under Section 3553(a)—is fully consistent with giving retroactive effect to *Johnson*'s invalidation of the ACCA's residual clause, which lowered the range of statutorily authorized punishment.

4. This Court has recognized that, as a practical reality, the Guidelines exert a significant effect on the sentences actually imposed in most cases. See *Molina-Martinez*, 136 S. Ct. at 1345-1346. This Court has relied on the Guidelines' significant effect on actual sentences in holding that they are subject to the Ex Post Facto Clause, see *Peugh* v. *United States*, 133 S. Ct. 2072, 2084 (2013), and that a Guidelines-range-miscalculation error will typically be prejudicial, see *Molina-Martinez*, 136 S. Ct. at 1346. And as explained in Part II.A of this brief, that significant effect is part of why the Due Process Clause prohibits application of a vague guideline in calculating the advisory range. See pp. 44-45, *infra*.

But that significant effect does not support the conclusion that a ruling that a guideline is unconstitutionally vague would be a substantive rule under *Teague*. This Court has held many constitutional rules to be procedural that undoubtedly exert a significant effect not only on the length of a term of imprisonment, but also on whether the defendant is found guilty at all (or pleads guilty) and whether he is sentenced to death. As discussed, this Court has held that constitutional rulings about the mix of considerations that a capital-sentencing judge or jury may consider are not retroactive. See pp. 24-26, *supra*. This Court has held that the rule in *Crawford* v. *Washington*, 541 U.S. 36, 68-69 (2004), that the Confrontation

Clause does not permit testimonial hearsay absent a prior opportunity for cross-examination does not apply retroactively. *Whorton*, 549 U.S. at 409. And it has held that a Sixth Amendment rule requiring defense counsel to warn a defendant about the immigration consequences of pleading guilty, *Padilla* v. *Kentucky*, 559 U.S. 356, 360 (2010), is not retroactive. *Chaidez*, 133 S. Ct. at 1105.

Each of those important procedural rules undoubtedly exerts a significant effect on findings of guilt or the imposition of capital punishment in many cases. Yet this Court recognized that, outside of the narrow watershed category, the impact of a new procedural rule on the likelihood of conviction or the likelihood of an increased sentence is not relevant to the retroactivity analysis, because the principle of *Teague* is that final convictions and sentences obtained in compliance with governing procedural law should remain final. The only difference here is that the effect of a lower advisory Guidelines range on actual sentences can more readily be shown through statistics. But that more easily documentable effect does not render petitioner's asserted rule any more substantive than other important procedural rules that can change the outcomes of criminal adjudications.

5. Petitioner's amici suggest that this Court should hold that petitioner's asserted rule is substantive because the career-offender guideline has a particularly severe effect and covers a broad range of offenses. See Public Defenders Amicus Br. 3-17. They further claim that because African-American citizens are disproportionately arrested and prosecuted for predicate drug and violent crimes, the career-offender

guideline exacerbates racial disparities in sentencing. See *id.* at 18-26.

As an initial matter, Section 4B1.2(a)(2)'s definition of crime of violence also applies to many other provisions of the Guidelines, not only the career-offender guideline. See §§ 2K1.3 & comment. (n.2), 2K2.1 & comment. (n.1), 2S1.1 & comment. (n.1), 4A1.1(e) & comment. (n.5), 4A1.2(p), 5K2.17 & comment. (n.1), 7B1.1(a)(1) & comment. (n.2). But in any event, the severity or perceived unfairness of a guideline has nothing to do with whether a rule invalidating the guideline is substantive or procedural. Because all Guidelines provisions are equally advisory, no greater justification exists for treating an erroneous career-offender designation as a substantive error eligible for correction on collateral review than for treating other errors in calculating the Guidelines range as substantive. Doing so would destabilize this Court's established retroactivity framework and sow confusion in lower courts.

C. Declining To Give Petitioner's Rule Retroactive Effect Accords With The Basic Purposes Of Collateral Relief

This Court derived the *Teague* retroactivity framework from "the purposes for which the writ of habeas corpus is made available": to ensure that courts follow then-governing procedural law and to free prisoners from convictions and sentences that are not legally authorized. 489 U.S. at 305-306 (plurality opinion) (citation omitted). *Teague* teaches that when those important purposes are not implicated, the societal interest in the finality of criminal convictions generally forecloses judicial relief from final convictions. As Justice Harlan recognized, retrials and resentencings

require "expending substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error when made final." *Mackey*, 401 U.S. at 691 (concurring in the judgments in part and dissenting in part). And that "drain on society's resources is compounded" by the need to "relitigate facts buried in the remote past." *Ibid.*

Those basic concerns are acutely implicated by a rule that would potentially lead to thousands of resentencing proceedings for defendants who were originally sentenced years ago and whose statutory sentencing ranges remain unchanged. In suggesting that the disruption will be minimal, petitioner's amici seem to assume that only those sentenced as career offenders would be eligible for retroactive relief—which even petitioner's amici acknowledge would require thousands of new Section 2255 proceedings. See Public Defenders Amicus Br. 2. But as explained, the Section 4B1.2 definition of "crime of violence" applies to many other provisions of the Guidelines. See p. 33, *supra*. Those provisions involve substantial numbers of prisoners. For example, in fiscal year 2015 alone, more than 2500 defendants had their advisory Guidelines ranges calculated under Section 2K2.1(a), which relates to firearms, based on their commission of at least one crime of violence or drug-trafficking offense. See U.S. Sent. Comm'n, *Fiscal Year 15 Use of Guidelines and Specific Offense Characteristics (Offender Based)* 54.[3] That number reflects only one year for

[3] http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2015/Use_of_SOC_Offender_Based.pdf.pdf.

only one of the many Guidelines provisions that would be affected by a ruling that the former residual clause and accompanying commentary of Section 4B1.2(a) is void for vagueness. The total number, which would include convictions obtained many years ago, would likely be substantial.

The amici's assessment also does not account for the many prisoners who will ultimately be unsuccessful in seeking retroactive relief, but only after protracted proceedings in lower courts. Unlike a substantive rule requiring a prisoner to be released because his conduct was not criminally proscribed or because he is ineligible for his sentence, petitioner's asserted rule, if applied retroactively, would lead to complicated proceedings in district and appellate courts and tie up government resources that would otherwise be used to prosecute new crimes. Even for the many prisoners who ultimately will not succeed on their claims or who will not receive a significant sentence reduction, prosecutors and district judges will have to make a host of determinations, such as whether the petition is time-barred or procedurally defaulted; whether the conviction at issue qualifies as a crime of violence under other provisions of Section 4B1.2(a); the impact of this Court's recent decision in *Mathis* v. *United States*, 136 S. Ct. 2243 (2016), on that analysis; and the effect of any plea-bargain waivers. In addition, for any given case, prosecutors might be required to locate old sentencing transcripts, court-reporter steno notes, case files, and state-court documents, if such documents are even still available. The government and the district court may also be required to investigate any claims of rehabilitation by the prisoner since his original sentencing. See *Pepper*

v. *United States*, 562 U.S. 476, 481 (2011). Those substantial costs of reopening long-final criminal judgments are part of the reason that this Court has held that new procedural rules do not apply retroactively.

Holding the rule that petitioner seeks retroactive would also impose unwarranted costs on the public to the extent that it releases dangerous recidivists into communities. According to a Commission report from earlier this year, 47.6% of those subject to the career-offender guideline or the armed-career-criminal guideline (Section 4B4.4) released in 2005 were later convicted of another offense, compared to 31.7% of all federal inmates. U.S. Sent. Comm'n, *Recidivism Among Federal Offenders: A Comprehensive Overview* App. A-2 (Mar. 2016) (*Comprehensive Overview*).[4] And almost 70% of career offenders or armed career criminals were rearrested. *Id.* App. A-1. As the Commission's report summed up, those two guidelines "serve as good predictors of future recidivism." *Id.* at 19.[5] Dramatically reducing sentences for that

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[4] http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf.

[5] Petitioner's amici nevertheless claim that Commission studies show that career-offender status is not "a good measure of the risk of recidivism." Public Defenders Amicus Br. 26-27 & nn.114-117. Amici note that offenders with criminal-history levels of IV or V had higher rearrest rates than career offenders and armed career criminals (74.7% and 77.8% as compared to 69.5%). See *Comprehensive Overview* App. A-1. But that fairly small difference may well be attributable to the fact that career offenders serve longer sentences and are thus much older when released. As the Commission's report shows, recidivism rates are lower for offenders who serve 120 months or more than for offenders who serve 24 to 119 months. See *ibid.* The basic function of the career-offender

class of dangerous recidivists would thus be detrimental to public safety.

Importantly for retroactivity purposes, that cost would be attributable in part to this Court's shifting vagueness jurisprudence. This Court twice—in 2007 and 2011—upheld the ACCA's residual clause. *Johnson*, 135 S. Ct. at 2556. Had this Court concluded in 2007 that its language was unconstitutionally vague, the Sentencing Commission most likely would have revised the identically worded guideline quickly, as it did after *Johnson*, to ensure that violent crimes were included another way. The Commission is capable of reacting quickly to legal change, in order to keep up with empirical knowledge and legal realities. If the Commission had acted, individuals sentenced between 2007 and 2015 would have been classified as career offenders without the constitutional problem that this Court identified for the first time in *Johnson*. The *Teague* retroactivity bar is designed precisely to avoid those sorts of serious reliance costs when this Court changes course in its constitutional doctrine.

II. PETITIONER WAS NOT DENIED DUE PROCESS IN HIS SENTENCING PROCEEDING

The district court classified petitioner's felon-in-possession conviction as a crime of violence because the firearm that petitioner possessed was a short-barreled shotgun and the official commentary to Section 4B1.2 stated at the time that "'[c]rime of violence' does not include the offense of unlawful possession of a firearm by a felon, unless the possession was of a firearm described in 26 U.S.C. § 5845(a)." Sentencing

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guideline, after all, is to advise a court to protect society from individuals who are likely to commit further crimes if released.

Guidelines § 4B1.2, comment. (n.1) (2006). Although petitioner does not dispute that his offense of conviction is clearly encompassed by that text, he nevertheless claims that his sentence violated the Due Process Clause's prohibition on vague penal laws. It did not. Although the government agrees that the advisory Sentencing Guidelines are subject to the vagueness doctrine, any defendant sentenced under the unambiguous text of the commentary received due process.

A. The Advisory Sentencing Guidelines Are Subject To The Due Process Clause's Prohibition On Vague Penal Laws

The government agrees that the advisory Sentencing Guidelines are subject to the constitutional "prohibition of vagueness in criminal statutes." *Johnson*, 135 S. Ct. at 2556-2557. That conclusion is not "dictated" by this Court's precedents in the strong sense required by *Teague*. See *Chaidez*, 133 S. Ct. at 1107 (rule "would have been 'apparent to all reasonable jurists'") (citation omitted); *Butler* v. *McKellar*, 494 U.S. 407, 415 (1990) (rule can be "new" even if it is correct and "within the 'logical compass' of an earlier decision"). But given this Court's precedent reinforcing the importance of a Guidelines range in the sentencing process and the constitutional doctrine in closely related contexts, it would violate the Due Process Clause's basic guarantee of fairness in criminal adjudications to sentence a defendant based on a guideline that is too vague for a person of ordinary intelligence to understand.

1. The "void-for-vagueness doctrine requires that a penal statute define [a] criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not

encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983). In *Johnson*, this Court held that the doctrine applies not only to laws defining the elements of offenses, but also to "statutes fixing sentences" for indisputably criminal conduct. 135 S. Ct. at 2557.

The vagueness doctrine is "an outgrowth * * * of the Due Process Clause of the Fifth Amendment." *United States* v. *Williams*, 553 U.S. 285, 304 (2008); see *Collins* v. *Kentucky*, 234 U.S. 634, 638 (1914). As *Johnson* explained, "[t]he prohibition of vagueness in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,' and a statute that flouts it 'violates the first essential of due process.'" 135 S. Ct. at 2556-2557 (quoting *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926)). The doctrine not only ensures fair notice of criminal offenses and sentences, but also prevents the legislative body from "impermissibly delegat[ing] basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972). This Court has explained that this latter function in preventing the arbitrary enforcement of criminal laws is "the more important aspect of vagueness doctrine." *Kolender*, 461 U.S. at 357-358.

In preventing arbitrariness, the doctrine also bolsters the due process right of criminal defendants to procedurally fair adjudications. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers* v. *Mississippi*, 410 U.S. 284, 294 (1973). But where the standard for crim-

inal liability or punishment is so opaque that a person of ordinary intelligence cannot understand it, a criminal defendant lacks a genuine opportunity to defend against the government's accusations, no matter how scrupulously the court observes other procedural requirements. The vagueness doctrine thus protects the integrity of the judicial system by ensuring that criminal adjudications are not conducted arbitrarily and that terms of imprisonment are not imposed based merely on the "*ad hoc* and subjective" whims of the judge or jury. *Grayned*, 408 U.S. at 108-109.

2. In light of those basic purposes of the vagueness doctrine, a district court's use of a vague guideline to calculate an advisory Guidelines range violates the Due Process Clause. It is true that the advisory Guidelines neither define criminal offenses nor fix sentences. But given the Guidelines' central role in the sentencing process and their substantial practical effect on the sentences ultimately imposed, a vague guideline would offend the due process values of notice, consistency, and the integrity of the judicial system that the vagueness doctrine safeguards.

a. Two intrinsic features of the advisory Sentencing Guidelines give rise to the due process problem when a court uses a vague guideline to calculate the advisory range.

First, correctly calculating the advisory range is a necessary and important step in the process of imposing a sentence. As this Court recently explained, the function of the advisory Guidelines range is to "provide the framework" for the district court's exercise of discretion under 18 U.S.C. 3553(a). *Molina-Martinez*, 136 S. Ct. at 1342. Once the advisory Guidelines range is calculated, the parties have an "initial benchmark"

from which to "argue for whatever sentence they deem appropriate." *Gall*, 552 U.S. at 49; see *Molina-Martinez*, 136 S. Ct. at 1342. Their arguments often key off of that range: Does the defendant or offense conduct have special characteristics that are not taken into account in the Guidelines? Is the policy reflected in the Guidelines ill-advised? Does new information cast doubt on the Commission's empirical assumptions?

Central features of post-*Booker* sentencing procedure reinforce the importance of the initial Guidelines-range calculation in structuring the ensuing process of arriving at a just sentence. See *Peugh*, 133 S. Ct. at 2080. The district court generally must provide a greater explanation for a sentence outside the Guidelines range. A miscalculation of the range is a significant procedural error that requires resentencing if prejudicial. And an appellate court may presume that a within-Guidelines sentence is reasonable. See pp. 21-23, *supra*.

Given those features of the post-*Booker* sentencing regime, it would undermine the fairness of a sentencing proceeding to require application of a guideline that lacks "sufficient definiteness that ordinary people can understand" what conduct, prior convictions, or offense characteristics dictate the Guidelines range. *Kolender*, 461 U.S. at 357. Although that range does not bind the court like a statutory range, it "anchor[s] both the district court's discretion and the appellate review process." *Peugh*, 133 S. Ct. at 2087. If that starting point is skewed by Guidelines language that is inscrutable, then the ensuing sentencing process risks becoming intolerably arbitrary, because it will

have unfolded from a judicial determination that was by definition arbitrary.

Second, the advisory Sentencing Guidelines are designed to yield a precise numeric range that should be identical for defendants with identical criminal histories and offense characteristics, without regard to the sentencing judge's discretionary judgment about what sentence is warranted. In that respect, the calculation of an advisory Guidelines range differs critically from the district court's discretionary application of the Section 3553(a) factors at a later point in the sentencing process. At that stage, the defendant is directed to focus his arguments on the full gamut of relevant sentencing considerations in an effort to persuade the sentencing judge to be lenient: not just the recommendation of the Sentencing Commission, but also his offense characteristics and his criminal history, the deterrent effect of the sentence, his capacity for rehabilitation, and basic notions of justice. 18 U.S.C. 3553(a)(1)-(2). American judges have long made those sorts of judgments in indeterminate-sentencing schemes, and this Court has never understood such discretionary determinations to raise vagueness concerns.

Calculating the advisory Guidelines range is fundamentally different. That threshold stage calls for the application of a legal text to facts. The judge has no discretion to misapply the law or erroneously find facts. The defendant is accordingly limited to making narrow, often wholly legal, arguments, *e.g.,* whether a prior conviction or offense characteristic falls within the text of the relevant guideline or its commentary. But if a Guidelines provision cannot be understood by a person of ordinary intelligence, the defendant and

the court face an impossible task. The defendant, on the one hand, must limit his contentions to the argument that a particular fact does or does not fit within the text of a Guidelines provision. But, on the other hand, he is confronted with a provision that is "so shapeless" that a court could not "derive meaning" from it. *Johnson*, 135 S. Ct. at 2560.

The inherent impossibility of that endeavor—at this important stage of the sentencing process—offends due process. The government may not establish a sentencing process that hinges on a legal determination that is impossible to make in a non-arbitrary manner. See *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 403 (1966) ("Implicit in [due process] is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce."). An inscrutably vague guideline thus introduces an unacceptable degree of arbitrariness into the procedural "framework" for sentencing. *Molina-Martinez*, 136 S. Ct. at 1342.

This Court, in fact, has recognized in the Eighth Amendment context that a vague sentencing factor at the outset of the sentencing process can taint the sentence. As discussed above (see pp. 24-25, *supra*), in *Espinosa*, *supra*, this Court held that the Eighth Amendment is violated when a capital jury is instructed on a vague aggravating factor and the judge ultimately imposing the sentence gives weight to the jury's recommendation. 505 U.S. at 1082. Even though the judge does not directly consider the aggravating factor, the "indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor." *Ibid.* The same "potential for arbi-

trariness" exists when a vague guideline initiates and structures the non-capital sentencing process.

b. Because of the Guidelines' central role in the process of sentencing, the calculated range generally exerts a significant effect on the actual sentence. As this Court has explained, statistical analysis "demonstrate[s] the real and pervasive effect the Guidelines have on sentencing": "In most cases district courts continue to impose 'either within-Guidelines sentences or sentences that depart downward from the Guidelines on the Government's motion.'" *Molina-Martinez*, 136 S. Ct. at 1346 (quoting *Peugh*, 133 S. Ct. at 2084). Perhaps most significantly, "when a Guidelines range moves up or down, offenders' sentences [tend to] move with it." *Ibid.* (brackets in original) (quoting *Peugh*, 133 S. Ct. at 2084). That correlation is attributable in part to the fact that the Guidelines "reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives," and so often a "judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a)." *Rita*, 551 U.S. at 350-351. But it also demonstrates that the Guidelines' numerical anchor can influence the sentence imposed because district judges often give significant weight to the Commission's recommendation. For that reason, "the Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar." *Ibid.*

That legally reinforced reality supports the conclusion that the Due Process Clause prohibits application of a vague guideline. If a key determinant of a defendant's sentence is so hard to decipher that persons of ordinary intelligence—including judges—cannot understand it, then the resulting sentence will reflect

arbitrary judicial decisionmaking: the fortuity of which interpretation of an enigmatic provision the sentencing judge seizes on. That is neither reasoned application of law to fact nor the exercise of judgment. Although no sentencing system will be entirely consistent across offenders, the Due Process Clause does not permit a patently arbitrary determination to have such a substantial effect on the sentences imposed for criminal offenses.

c. Precisely because of the advisory Guidelines' central role in the process of sentencing and their significant influence over the actual sentences imposed, this Court has held that the Guidelines are subject to the Ex Post Facto Clause. *Peugh*, 133 S. Ct. at 2078. That conclusion has great significance here. *Peugh* explained that, in addition to ensuring fair notice to criminal defendants, the Ex Post Facto Clause "reflects principles of 'fundamental justice.' " *Id.* at 2085 (plurality opinion) (quoting *Carmell* v. *Texas*, 529 U.S. 513, 531 (2000)). As the en banc Seventh Circuit has noted, *Peugh*'s "reference to 'fundamental justice' captures the Ex Post Facto Clause's concern about arbitrary governmental action," and "[v]agueness doctrine reflects the same concern[]." *United States* v. *Hurlburt*, No. 14-3611, 2016 WL 4506717, at *7 (Aug. 29, 2016). Thus, a defendant confronted with a vague guideline finds himself in much the same position as a defendant confronted with a guideline that was changed after he committed the offense. No established legal rule of discernible clarity will govern the calculation of his sentencing benchmark.

Beyond that, *Peugh* rejected the most substantial objection to applying either the Ex Post Facto Clause

or the vagueness doctrine to the Guidelines: that the Guidelines are now "only advisory." 133 S. Ct. at 2081. The Court held that this did not defeat the ex post facto problem because "[t]he federal system adopts procedural measures intended to make the Guidelines the lodestone of sentencing," *id.* at 2084, and "considerable empirical evidence indicat[es] that the Sentencing Guidelines have the intended effect of influencing the sentences imposed by judges." *Ibid.*; see *id.* at 2082-2084, 2085-2088.

A similar analysis controls here. When a district court applies a vague guideline, a considerable risk exists that an inherently arbitrary decision at the outset of the sentencing process will increase the sentence ultimately imposed. Like the Ex Post Facto Clause, the Due Process Clause does not tolerate a system in which a "significant risk of a higher sentence," *Peugh*, 133 S. Ct. at 2088 (internal quotation marks omitted), is created by a threshold determination that contravenes "ordinary notions of fair play and the settled rules of law," *Johnson*, 135 S. Ct. at 2557 (quoting *Connally*, 269 U.S. at 391).

3. Since *Johnson* held that sentencing provisions are subject to the vagueness doctrine, the only circuit to hold that the Guidelines are immune from vagueness scrutiny is the Eleventh Circuit. See *United States* v. *Matchett*, 802 F.3d 1185, 1189 (2015); see also *Hurlburt*, 2016 WL 4506717, at *8 (Hamilton, J., dissenting). The Eleventh Circuit's principal argument was that "[t]he vagueness doctrine * * * 'rest[s] on [a] lack of notice,'" *Matchett*, 802 F.3d at 1194 (brackets in original) (quoting *Maynard* v. *Cartwright*, 486 U.S. 356, 361 (1988)), and this Court held in *Irizarry* v. *United States*, 553 U.S. 708 (2008), that "[a]ny ex-

pectation subject to due process protection . . . that a criminal defendant would receive a sentence within the presumptively applicable guideline range did not survive [the] decision in *United States* v. *Booker*," 802 F.3d at 1194 (brackets and ellipsis in original) (quoting *Irizarry*, 553 U.S. at 713).

The Eleventh Circuit's reliance on *Irizarry* lacks merit. *Irizarry* held that, after *Booker*, neither the Due Process Clause nor Federal Rule of Criminal Procedure 32(h) requires a district court to give the parties notice before imposing a sentence that varies from the applicable Guidelines range. 553 U.S. at 713-716. The Court explained that "[n]ow faced with advisory Guidelines, neither the Government nor the defendant may place the same degree of reliance on the type of expectancy [of a within-Guidelines sentence] that gave rise to a special need for notice" under the mandatory Guidelines. *Id.* at 713-714 (internal quotation marks omitted).

That holding is entirely consistent with the conclusion that the Due Process Clause does not tolerate a vague guideline. *Irizarry* did not suggest that due process imposes no constraints on the advisory-Guidelines scheme. Rather, it addressed a specific notice claim and held that, given the *Booker* remedy that requires district courts, in every case, to treat the Guidelines as only advisory and to conduct an independent assessment of the Section 3553(a) factors, a defendant does not have a justifiable expectation that he will receive a within-Guidelines sentence. 553 U.S. at 713-714.

The problem with a vague guideline is not that it upsets an expectation that a defendant will receive a within-Guidelines sentence. Rather, a vague guideline

makes it impossible for courts and litigants to calculate the Guidelines range in a non-arbitrary manner. It therefore skews the sentencing process by anchoring the court to an inherently arbitrary determination. That inevitably yields arbitrarily imposed sentences—*i.e.*, sentences that depend in part on an inscrutably vague recommendation by the Sentencing Commission—which damages the fairness and integrity of the judicial system.

The Eleventh Circuit also expressed the concern that "[h]olding that advisory guidelines can be void for vagueness * * * would upend our sentencing regime," because "many [Guidelines] provisions could be described as vague." *Matchett*, 802 F.3d at 1196. The court gave as examples guidelines using the phrases "sophisticated means" and "minor participant." *Ibid.* (citing §§ 2B1.1(b)(10), 3B1.2(b)). But those provisions are not unconstitutionally vague. As *Johnson* explained, the residual clause is unique in requiring a court to apply a level of risk informed by a disparate list of enumerated offenses to an idealized "ordinary case" of an offense, including by inquiring into whether violent conduct would likely occur after the completion of the offense, and the ACCA's residual clause had confounded courts for years. See 135 S. Ct. at 2556-2563. *Johnson* expressly distinguished provisions, like those cited by the Eleventh Circuit, that "call for the application of a qualitative standard * * * to real-world conduct." *Id.* at 2561. Indeed, the government is not aware of any other Guidelines provision that has been declared unconstitutionally vague in the circuits that have permitted vagueness challenges to the Guidelines.

Finally, the Guidelines are not exempt from the prohibition on vague penal laws on the theory they "do not regulate primary conduct" but rather govern only sentencing judges. *United States* v. *Matchett*, No. 14-10396, 2016 WL 4757211, at *4-*5 (Sept. 13, 2016) (Pryor, J., respecting the denial of rehearing en banc). Although the Guidelines are directed to judges, the sentence is imposed on the defendant as a sanction for his primary conduct (just as the sentence in *Johnson* was imposed for Johnson's primary conduct). And "the advisory nature" of the Guidelines does not eliminate the due process concern that sentences will be imposed arbitrarily, *id.* at *4, given this Court's conclusion that the Guidelines provide "the framework for sentencing"; "anchor * * * the district court's discretion"; and can form "in a real sense the basis for the sentence" even when the judge varies from the range. *Molina-Martinez*, 136 S. Ct. at 1345.

* * * * *

For the foregoing reasons, the Due Process Clause's guarantee of procedural fairness in criminal adjudications prohibits the use of a vague advisory guideline to establish the "lodestar" for the ensuing sentencing process. *Molina-Martinez*, 136 S. Ct. at 1346.

B. Petitioner Was Not Denied Due Process Because His Advisory Guidelines Range Rested On The Clear Text Of The Sentencing Commission's Commentary

Although the advisory Sentencing Guidelines are subject to the vagueness doctrine, the district court did not rely on any vague provision in calculating petitioner's Guidelines range. Rather, the court determined that petitioner's offense of conviction qualified as a "crime of violence," and therefore that peti-

tioner qualified as a career offender, because that offense was explicitly set out in the Commission's commentary to Section 4B1.2. J.A. 153; see Sentencing Guidelines § 4B1.2, comment. (n.1) (2006). Any due process concern that a vague guideline has skewed the sentencing process and resulted in an arbitrarily determined sentence is thus misplaced in this case.

Petitioner nevertheless contends that the district court's calculation of his advisory range violated the vagueness doctrine. According to petitioner, *Johnson* compels the conclusion that the former residual clause of Section 4B1.2(a)(2) was void for vagueness, and the official commentary that the district court invoked was invalid without the residual clause. That argument lacks merit, both because the relevant commentary did not purport to interpret the former residual clause, and because even if it did, the residual clause would not be unconstitutionally vague with respect to those applications expressly specified in the commentary.

1. The former commentary that the district court invoked did not construe Section 4B1.2(a)(2)'s residual clause or any other part of the definition set out in the guideline's main text. Rather, as this Court recognized in *Stinson* v. *United States*, 508 U.S. 36 (1993), "the commentary [was] a[n] * * * interpretation of the phrase 'crime of violence.'" *Id.* at 47. The commentary did not indicate that the enumerated offenses qualified as crimes of violence only under the residual clause. See Sentencing Guidelines § 4B1.2, comment. (n.1) (2006). The best interpretation of the former commentary is therefore that the Commission intended the enumerated offenses to qualify as crimes of

violence under the Guidelines without determining whether each offense satisfied a discrete portion of Section 4B1.2(a)'s definition.

That understanding is fortified by the history and structure of the Guidelines. When the Commission switched from the 18 U.S.C. 16 definition to the ACCA definition in 1989, it retained virtually the same list of enumerated crimes in the commentary, suggesting that the list did not reflect an interpretation of the main text. See Sentencing Guidelines App. C., Amend. 268. In addition, other provisions of the Guidelines in existence when the Commission added petitioner's instant offense in 2004 used the term "crime of violence" and provided that it "has the meaning given that term in §4B1.2 *and Application Note 1 of the Commentary* to §4B1.2." *Id.* §§ 2K1.3(a), comment. (n.2), 2K2.1, comment. (n.1) (2004) (emphasis added). That strongly indicates that the commentary sets out a definition of "crime of violence" *in addition to* the definition in Section 4B1.2(a)'s main text. And another provision of the Guidelines in effect in 2004 defined the term "crime of violence" exclusively in the commentary—confirming that the commentary can set out a definition of that term that does not construe any definitional provision in the main text. See *id.* § 2L1.2(b)(1)(A) & comment. (n.1(B)(iii)) (2004).

Petitioner contends (Br. 49-50) that when the Commission added the commentary identifying his offense of conviction as a crime of violence in 2004, it indicated that the commentary was meant to construe the former residual clause. That is not a fair reading of the amendment's explanatory note. See Sentencing Guidelines App. C., Amend. 674. The explanatory

note, in fact, said that "this amendment *expands the definition* of 'crime of violence' in Application Note 1 to § 4B1.2," confirming that the Commission understood the application note to provide an independent definition of "crime of violence." *Ibid.* (emphasis added). Although the Commission indicated that certain weapons offenses, including those that involve short-barreled shotguns, satisfied the residual clause, it went on to explain that it was adopting a "categorical rule" that possession of *all* Section 5845(a) firearms would qualify. *Ibid.*

Petitioner also contends (Br. 51) that by replacing the former residual clause with a list of enumerated offenses, the Commission's 2016 amendment to Section 4B1.2 demonstrates that the Commission understood those offenses to have been applications of the residual-clause standard. See Sentencing Guidelines App. C, Amend. 798. In promulgating that amendment, however, the Commission made clear that it had not previously understood a distinction between the offenses enumerated in the text and the offenses enumerated in the commentary: "For easier application," the Commission explained, "all enumerated offenses are now included in the guideline at §4B1.2," whereas "prior to the amendment, the list was set forth in both §4B1.2(a)(2) and the commentary at Application Note 1." *Ibid.* And although the Commission stated that offenses involving Section 5845(a) firearms meet the residual-clause standard, it further explained that those offenses were included in the list because of "Congress's determination that such weapons are inherently dangerous and, when possessed unlawfully, serve only violent purposes." *Ibid.*

Accordingly, because petitioner's advisory Guidelines range was calculated based on commentary that defined "crime of violence" independently of the former residual clause, he is not entitled to relief even if the Court holds that the residual clause was unconstitutionally vague.[6]

2. In any event, even assuming *arguendo* that the relevant application note was intended to interpret the former residual clause, its terms would still defeat petitioner's vagueness challenge.

a. As explained in Part II.A, *supra*, the Due Process Clause's prohibition on vague penal laws applies to the advisory Sentencing Guidelines. As a consequence, language that would be vague in a statute defining a criminal offense or a statute fixing a criminal penalty is also vague if it appears in a Guidelines provision without clarifying language or context. But it does not follow that *Johnson*'s holding declaring the ACCA's residual clause void for vagueness translates directly to the residual clause of Section 4B1.2(a)(2).

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[6] Petitioner has not argued that if the Commission intended the former commentary to be a freestanding interpretation of "crime of violence," the commentary would be "inconsistent with, or a plainly erroneous reading of" Section 4B1.2(a) and thus invalid under *Stinson*, 508 U.S. at 38, 47. In any event, the Commission's judgment that a felon's possession of an especially dangerous weapon should be classified as a crime of violence is not plainly erroneous or inconsistent with that term. And although the main text of Section 4B1.2(a) uses the word "means," which typically indicates that a definition is exclusive, see *Colautti* v. *Franklin*, 439 U.S. 379, 392 n.10 (1979), that default rule is not so hard and fast as to render the freestanding definition in the commentary "plainly inconsistent" with the text. See 2A Norman J. Singer & Shambie Singer, *Statutes and Statutory Construction* 47:7 (7th ed. 2014) ("[A] definition which declares what a term 'means' *usually* excludes any meaning not stated.") (emphasis added).

That is because the guideline differs in a critical respect from the ACCA: It contains "binding" commentary that serves as an "authoritative guide" to the meaning of the text and specifically identifies offenses that qualify as crimes of violence. *Stinson*, 508 U.S. at 42-43 (citation omitted).

As to such expressly identified offenses, including petitioner's offense of conviction, the Guidelines' former definition of "crime of violence" was not vague at all. Petitioner and similarly situated defendants had clear notice that committing offenses listed in the commentary would trigger career-offender status. While the vagueness holding of *Johnson* means that Section 4B1.2(a)(2)'s former residual clause was unconstitutionally vague as applied to offenses *not* specified in the commentary, nothing in this Court's vagueness jurisprudence supports the conclusion that petitioner was deprived of fair notice or subjected to arbitrary enforcement by the straightforward application of the commentary's express terms.

Reliance on the commentary to clarify the residual clause does not run afoul of *Johnson*. The Court did reject "the theory that a vague provision is constitutional merely because there is some conduct that [a court might think] clearly falls within the provision's grasp." 135 S. Ct. at 2560-2561. But the application notes play a different role than a court's intuition that *some* offenses "clearly" pose a serious potential risk of physical injury. *Ibid.* The specific offenses listed in the commentary absolve courts from having to apply the problematic text of the residual clause at all, and courts instead may rely on the Commission's determination. Applying those clearly stated offenses there-

fore produces none of the constitutional evils that the vagueness doctrine is designed to prevent.

b. Petitioner reaches the conclusion that the commentary is invalid only by flipping the normal order of operations in adjudicating vagueness challenges. According to petitioner (Br. 49), the first step in the analysis, before any consideration of the Guidelines' commentary, is to "excise[]" the residual clause of Section 4B1.2(a)(2) as unconstitutionally vague. With that change, petitioner says, the commentary "becomes inconsistent with the remaining text of the guideline" and therefore invalid under *Stinson*. *Ibid.*

That sequence squarely contradicts this Court's established approach to constitutional vagueness challenges in a wide array of contexts. For example, in *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), this Court upheld a quasi-criminal ordinance making it unlawful to sell merchandise "designed or marketed for use" with drugs without a license. *Id.* at 492, 500. The allegedly vague terms in the ordinance had been construed by "licensing guidelines prepared by the Village Attorney." *Id.* at 492. In holding that the phrases "designed * * * for use" and "marketed for use" were not unconstitutionally vague, the Court relied expressly on the guidelines' application of those terms to specific items and marketing methods. *Id.* at 500-502 & n.18. And in further holding that "the dangers of arbitrary enforcement" of the ordinance in the future did not warrant voiding the ordinance on its face, the Court explained that "[t]he village may adopt administrative regulations that will sufficiently narrow potentially vague or arbitrary interpretations of the ordinance." *Id.* at 504.

Similarly, in *Grayned*, *supra*, the Court upheld a municipal "antinoise" ordinance enforced through criminal penalties. 408 U.S. at 106. The Court explained that "[w]ere we left with just the words of the [municipal] ordinance, we might be troubled." *Id.* at 111. But it rejected a vagueness challenge after determining from the state supreme court's precedents that state courts would likely interpret the ordinance narrowly. See *id.* at 111-112.

This Court's approach in *Hoffman* and *Grayned* is irreconcilable with petitioner's approach, which would invalidate the residual clause before construing it in light of the authoritative commentary. If that approach were correct, the Court would have invalidated the ordinances challenged in those cases on their face before considering the clarifying constructions by local officials and state courts. Indeed, petitioner's approach of maximum invalidation cannot be reconciled with the analogy that *Stinson* drew between the commentary and "an agency's interpretation of its own legislative rules," 508 U.S. at 45, because in adjudicating vagueness challenges to agency regulations, this Court has taken account of agency interpretations that "add[] precision to the regulations." *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 395 (1969); cf. *Hoffman Estates*, 455 U.S. at 494 n.5 ("In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or *enforcement agency* has proffered.") (emphasis added).

Perhaps most relevantly, petitioner's contention that the residual clause must be excised as vague before consulting the commentary is also inconsistent with the way this Court has evaluated claims that

aggravating or mitigating factors considered by capital juries are unconstitutionally vague. Under this Court's long-settled framework, if a federal court determines that "an individual statutory aggravating or mitigating circumstance * * * is itself too vague to provide any guidance to the sentencer," the federal court "must attempt to determine whether the state courts have further defined the vague terms and, if they have done so, whether those definitions are constitutionally sufficient, *i.e.*, whether they provide some guidance to the sentencer." *Bell* v. *Cone*, 543 U.S. 447, 453 (2005) (per curiam) (quoting *Walton* v. *Arizona*, 497 U.S. 639, 654 (1990)) (emphasis omitted). The Court, in other words, does not void the statutory factor on its face before determining whether state courts have provided an authoritative clarifying construction.

No principled basis exists to treat the Guidelines differently from municipal ordinances, agency regulations, or capital-sentencing factors in this respect. As in those contexts, if an otherwise vague guideline has been authoritatively clarified, none of the constitutional harms that the vagueness doctrine seeks to avert will occur.

* * * * *

Petitioner was not deprived for the Constitution's guarantee of due process when he was deemed a career offender based on the unequivocal text of the official commentary. He therefore is not entitled to be resentenced.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. U.S. Const. Amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived or life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. United States Sentencing Guidelines § 4B1.1 (2006) provides:

Career Offender

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

(b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career of-

fender's criminal history category in every case under this subsection shall be Category VI.

Offense Statutory Maximum		Offense Level*
(A)	Life	37
(B)	25 years or more	34
(C)	20 years or more, but less than 25 years	32
(D)	15 years or more, but less than 20 years	29
(E)	10 years or more, but less than 15 years	24
(F)	5 years or more, but less than 10 years	17
(G)	More than 1 year, but less than 5 years	12

*If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

(c) If the defendant is convicted of 18 U.S.C. § 924(c) or § 929(a), and the defendant is determined to be a career offender under subsection (a), the applicable guideline range shall be determined as follows:

(1) If the only count of conviction is 18 U.S.C. § 924(c) or § 929(a), the applicable guideline range shall be determined using the table in subsection (c)(3).

(2) In the case of multiple counts of conviction in which at least one of the counts is a conviction other than a conviction for 18 U.S.C. § 924(c) or § 929(a), the guideline range shall be the greater of—

(A) the guideline range that results by adding the mandatory minimum

consecutive penalty required by the 18 U.S.C. § 924(c) or § 929(a) count(s) to the minimum and the maximum of the otherwise applicable guideline range determined for the count(s) of conviction other than the 18 U.S.C. § 924(c) or § 929(a) count(s); and

(B) the guideline range determined using the table in subsection (c)(3).

(3) Career Offender Table for 18 U.S.C. § 924(c) or § 929(a) Offenders

§ 3E1.1 Reduction	Guideline Range for the 18 U.S.C. § 924(c) or § 929(a) Count(s)
No reduction	360-life
2-level reduction	292-365
3-level reduction	262-327.

3. United States Sentencing Guidelines § 4B1.2 (2006) provides:

Definitions of Terms Used in Section 4B1.1

(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 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, or extortion, involves use of explosives, or otherwise in-

volves conduct that presents a serious potential risk of physical injury to another.

(b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(c) The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of § 4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

Commentary

Application Notes:

1. For purposes of this guideline—

"Crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses. "Crime of violence" includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included as "crimes of violence" if (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another.

"Crime of violence" does not include the offense of unlawful possession of a firearm by a felon, unless the possession was of a firearm described in 26 U.S.C. § 5845(a). Where the instant offense of conviction is the unlawful possession of a firearm by a felon, § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provides an increase in offense level if the defendant had one or more prior felony convictions for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), § 4B1.4 (Armed Career Criminal) will apply.

Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21

U.S.C. § 841(d)(1)) is a "controlled substance offense."

Unlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a "crime of violence".

Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a "controlled substance offense."

Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense facilitated) was a "controlled substance offense."

Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a "controlled substance offense."

A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" or a "controlled substance offense" if the offense of conviction established that the underlying offense was a "crime of violence" or a "controlled substance offense." (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the two prior convictions will be treated as related cases under § 4A1.2 (Defini-

tions and Instructions for Computing Criminal History).)

"Prior felony conviction" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

2. *Section 4B1.1 (Career Offender) expressly provides that the instant and prior offenses must be crimes of violence or controlled substance offenses of which the defendant was convicted. Therefore, in determining whether an offense is a crime of violence or controlled substance for the purposes of § 4B1.1 (Career Offender), the offense of conviction (i.e., the conduct of which the defendant was convicted) is the focus of inquiry.*

3. *The provisions of § 4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under § 4B1.1.*

4. United States Sentencing Guidelines § 4B1.2 provides:

Definitions of Terms Used in Section 4B1.1

(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 murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(c) The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of vio-

lence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of § 4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

Commentary

Application Notes:

1. *Definitions.—For purposes of this guideline—*

"Crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

"Forcible sex offense" includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

"Extortion" is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a "controlled substance offense."

Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a "controlled substance offense."

Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense facilitated) was a "controlled substance offense."

Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a "controlled substance offense."

A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" of a "controlled substance offense" if the offense of conviction established that the underlying offense was a "crime of violence" or a "controlled substance offense". (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under § 4A1.2 (Definitions and Instruction for Computing Criminal History).)

"Prior felony conviction" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

2. Offense of Conviction as Focus of Inquiry.—Section 4B1.1 (Career Offender) expressly provides that the instant and prior offense must be crimes of violence or controlled substance offenses of which the defendant was convicted. Therefore, in determining whether an offense is a crime of violence or controlled substance for the purposes of § 4B1.1 (Career Offender), the offense of conviction (i.e., the conduct of which the defendant was convicted) is the focus of inquiry.

3. Applicability of § 4A1.2.—The provisions of § 4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under § 4B1.1.

4. Upward Departure for Burglary Involving Violence. —There may be cases in which a burglary involves violence, but does not qualify as a

"crime of violence" as defined in § 4B1.2(a) and, as a result, the defendant does not receive a higher offense level or higher Criminal History Category that would have applied if the burglary qualified as a "crime of violence." In such a case, an upward departure may be appropriate.