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IN THE SUPREME COURT OF THE UNITED STATES

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TRAVIS BECKLES, :

Petitioner : No. 15-8544

v. :

UNITED STATES, :

Respondent. :

- - - - - x

Washington, D.C.

Monday, November 28, 2016

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

JANICE L. BERGMANN, ESQ., Assistant Federal Public Defender, Ford Lauderdale, Fla.; on behalf of the Petitioner.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

ADAM K. MORTARA, ESQ., Washington, D.C.; for Court-appointed amicus curiae in support of the judgment below on Question 2.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 15-8544, Beckles v. United States.

Ms. Bergmann.

ORAL ARGUMENT OF JANICE L. BERGMANN

ON BEHALF OF THE PETITIONER

MS. BERGMANN: Mr. Chief Justice, and may it please the Court:

On average, attaching the "career offender" label to a Federal defendant both doubles his sentence and increases it by seven years. At the time Petitioner was sentenced, a defendant could qualify as a career offender if one or more of his predicate offenses fell within the residual clause of the career offender guideline, and yet all now agree that the residual clause is so unintelligible that it is impossible to discern its meaning.

Petitioner here submits three things: First, that invoking a shapeless -- so shapeless a provision to enhance someone's sentence in such a significant way does not comport with due process.

Second, a ruling that the career offender residual clause is void for vagueness is substantive

1 and, therefore, has retroactive effect in Petitioner's
2 case.

3 And third, that voiding the residual clause
4 also invalidates the Guidelines commentary that
5 identified Petitioner's offense as a crime of violence.

6 As such, Petitioner is entitled to a
7 resentencing without the career offender enhancement.

8 JUSTICE GINSBURG: You would agree, would
9 you not, that, if the commentary counts, if it counts,
10 then there's nothing imprecise about possessing a
11 sawed-off shotgun; right?

12 MS. BERGMANN: Yes, Your Honor. I agree
13 that there is nothing imprecise about possession of a
14 sawed-off shotgun. Where the constitutional concerns
15 come into play with the commentary is actually at the
16 point where the Commission was interpreting the residual
17 clause in order to identify the possession of a shotgun
18 offense as falling within the residual clause.

19 And the reason why that violates due process
20 in part is because the Commission was attempting to
21 clarify a provision that can't be clarified. The Court
22 has held in Johnson that the residual clause --

23 JUSTICE KENNEDY: But the -- but suppose
24 there were a statute -- and this is a -- I don't mean to
25 interrupt, but this is part of Justice Ginsburg's

1 question.

2 Suppose there were a statute in Johnson, and
3 it read just like the residual clause, that -- that an
4 example of a dangerous offense is -- or an offense which
5 creates a serious risk is the possession of a sawed-off
6 shotgun. That was in the statute.

7 MS. BERGMANN: Well, Your Honor, the --

8 JUSTICE KENNEDY: Would the statute then be
9 valid?

10 MS. BERGMANN: The -- Your Honor, the --

11 JUSTICE KENNEDY: In -- in the shotgun case.

12 MS. BERGMANN: In the statute itself --

13 JUSTICE KENNEDY: In the shotgun case.

14 MS. BERGMANN: If the statute itself
15 included that language, yes, Your Honor. But the -- the
16 commentary --

17 JUSTICE KENNEDY: Yes, it would be valid.

18 MS. BERGMANN: If the -- if the possession
19 of a sawed-off shotgun was listed in the statute.

20 JUSTICE KENNEDY: Well, you didn't answer
21 Justice Ginsburg's question. Why can't the Sentencing
22 Commission, the agency, do that?

23 MS. BERGMANN: Well, Your Honor, because
24 when the Sentencing Commission was interpreting -- when
25 the Sentencing Commission created the commentary, it was

1 interpreting the language of the residual clause, and
2 the --

3 JUSTICE GINSBURG: Do we know that for sure?

4 MS. BERGMANN: Well, yes, Your Honor, we
5 know it in several ways.

6 One, the sawed-off shotgun offense can only
7 fall within the residual clause because the text of the
8 Guidelines state three exclusive definitions for the
9 term "crime of violence."

10 Possession of a sawed-off shotgun does not
11 fall within the first definition because there's no
12 element of force. It is not one of the four enumerated
13 offenses. Because the Guidelines states forth these
14 three exclusive definitions, the only definition it
15 could fall within would be the residual clause.

16 We also know it because when the Commission
17 amended the commentary to include the possession of a
18 sawed-off shotgun offense, the reasons for amendment
19 stated that it was doing so based on lower court
20 decisions concluding that possession of a sawed-off
21 shotgun fell within the residual clause.

22 JUSTICE ALITO: Well, what if the -- the
23 Guidelines themselves said that the term "crime of
24 violence" means, among other things, burglary of a
25 dwelling, arson, extortion, involves use of explosives,

1 involves possession of a sawed-off shotgun, or otherwise
2 involves conduct that presents a serious potential risk
3 of physical injury to another?

4 Would there be a vagueness problem then?

5 MS. BERGMANN: No, Your Honor, but that
6 would be because the -- the offense would be in the text
7 of the Guideline itself.

8 And here the issue isn't just the vagueness,
9 but it's also the -- the respect that the Court has to
10 give to the agency's interpretation of a guideline.

11 And with the commentary here, Your Honor,
12 the -- the Commission was not interpreting the -- its
13 own words -- I mean the text of the Guideline was not
14 language that the Commission itself created. It was not
15 interpreting the enabling statute there. It was
16 interpreting the exact same words that the Court was
17 interpreting in the Armed Career Criminal Act.

18 JUSTICE ALITO: But the Guidelines
19 provisions are the -- are the Commission's words. Now,
20 they borrowed them from a statute, but they didn't have
21 to do that?

22 MS. BERGMANN: No, they didn't.

23 JUSTICE ALITO: But they did. So they --
24 they were their words, and they interpreted their words
25 in the commentary.

1 MS. BERGMANN: Yes, Your Honor, but in terms
2 of the deference that this Court gives to agencies'
3 interpretations of its regulations, where a commission
4 is -- I'm sorry. Where the Commission is interpreting
5 guideline text, that is not its own words, but it's the
6 words of a -- Congress here. The text of the Guideline
7 is the same text as the Armed Career Criminal Act.

8 The Commission, in adopting the career
9 offender guidelines, stated it was explicitly
10 incorporating the language of the Armed Career Criminal
11 Act. And so in this instance, the Commission is in no
12 better position to interpret that language than the
13 Court.

14 JUSTICE SOTOMAYOR: Perhaps if we go back to
15 the process here. The Guidelines were passed, including
16 the residual clause at one point in time; correct?

17 MS. BERGMANN: Well, the original definition
18 of the career offender guideline did not include, but --
19 but at some point, yes, Your Honor, the Commission
20 passed an amendment that included the residual clause.

21 JUSTICE SOTOMAYOR: Was it the Commission?
22 Aren't those amendments approved by Congress?

23 MS. BERGMANN: Yes, Your Honor, the residual
24 clause, yes. The text of the Guideline is approved by
25 Congress; the commentary, however, is not.

1 JUSTICE SOTOMAYOR: That's my question. So
2 the commentary is not approved by Congress, and that
3 commentary that added the sawed-off shotgun, was it
4 simultaneous with the adoption of the residual clause to
5 define crime of violence?

6 MS. BERGMANN: No, Your Honor, it was not.
7 It was adopted in 2004. It was not part of the -- the
8 Guideline that was submitted to Congress for approval.
9 The commentary was adopted in 2004 without Congress's
10 approval.

11 JUSTICE ALITO: Let me ask you a more -- let
12 me ask you a more fundamental question. And I don't
13 want to unduly shock the attorneys who are here from the
14 Sentencing Commission, but imagine there were no
15 sentencing guidelines.

16 So you have a criminal provision that says
17 that a person who's convicted of this offense may be
18 imprisoned for not more than 20 years. That's all it
19 says.

20 Now, is that unconstitutionally vague?

21 MS. BERGMANN: No, Your Honor.

22 JUSTICE ALITO: Well, that seems to be a
23 lot -- a lot vaguer than what we have here. So how do
24 you -- how do you reconcile those two propositions?

25 MS. BERGMANN: Well, Your Honor, we submit

1 that arbitrary determinant sentencing such as with
2 the -- a vague guideline is not the same as an
3 indeterminate sentencing scheme such as the Court
4 described.

5 Our position is that the use of a vague
6 guideline, in fact, is worse than indeterminate
7 sentencing because it systematically injects
8 arbitrariness into the entire sentencing process.

9 JUSTICE BREYER: And there is more
10 arbitrariness because of this guideline than there was
11 before the Guidelines were passed? Is there any
12 evidence of that? I have a lot of evidence it wasn't.

13 MS. BERGMANN: Well, I think, Your Honor,
14 it's especially so here because --

15 JUSTICE BREYER: Especially so. Is it so at
16 all? There was a system before the Guidelines exactly
17 as Justice Alito said. Moreover, that system is
18 existing today side by side with the Guidelines in any
19 case in which the judge decides not to use the
20 Guidelines.

21 So I don't get it. I really don't. And you
22 can be brief here, because it's really the government
23 that has to answer this question for me. I don't
24 understand where they're coming from on this, and you
25 don't have to answer more than briefly, but I do have

1 exactly the same question that Justice Alito had.

2 MS. BERGMANN: Well, I think here, Your
3 Honor, that the Guidelines hold a special -- special
4 place in the sentencing scheme because the court has
5 stated repeatedly that the guide -- the Guidelines are
6 both the lodestone and the lodestar of Federal
7 sentencing, and because of that they are sufficiently
8 binding in a way that an indeterminate sentencing scheme
9 is not.

10 CHIEF JUSTICE ROBERTS: Well, less and less,
11 right? I mean, there are steadily increasing percentage
12 of departures from the Guidelines.

13 MS. BERGMANN: That's correct, Your Honor,
14 there is an increasing number of departures from the
15 Guidelines. But it does not mean they don't have force,
16 and the Court has held several times in recent years --
17 in Peugh and Molina-Martinez, the Court recognized that
18 the power that the Guidelines have over the Federal
19 sentences, the Court has recognized that as the
20 Guideline range goes up and down, so too do the
21 applicable sentences.

22 CHIEF JUSTICE ROBERTS: Well, if the
23 indeterminate sentencing is all right, it would seem to
24 me that even the vaguest guideline would be an
25 improvement and so difficult to argue that it's too

1 vague to be applied.

2 MS. BERGMANN: I disagree, Your Honor,
3 because in -- even in an indeterminate sentencing
4 scheme, due process did apply. The Court's early cases
5 in *Townsend v. Burke* and *United States v. Tucker*
6 indicated that there were due process concerns depending
7 on considerations that the Court was using. There, it
8 was material misinformation. Here, the Court also
9 expressed concern about arbitrariness even in an
10 indeterminate sentencing scheme.

11 And here, the problem with using a vague
12 guideline is that it injects arbitrariness into every
13 sentencing decision that relies on that guideline.

14 JUSTICE ALITO: Are you saying there's more
15 arbitrariness under this provision than there was under
16 the pre-Sentencing Reform Act sentencing system, where a
17 judge would pick a sentence between zero and 20 years
18 based on that judge's personal ideas about retribution,
19 deterrence, and incapacitation?

20 And in practice, there were judges who,
21 under that system, always imposed a very light sentence
22 for a particular offense and other judges who always
23 imposed a heavy sentence for that particular offense.

24 MS. BERGMANN: Yes, Your Honor. But it was
25 always an individualized determination. And I would --

1 the respective for Federal judges make me believe that
2 it was not done in an arbitrary way, whereas the problem
3 with the guideline --

4 JUSTICE KENNEDY: Well, but your argument
5 applies to State systems as well, and you're telling us
6 that the more specific a legislature or an agency tries
7 to make guidance for the judge, the more chance there is
8 for vagueness. And the statute, Section 3553 itself of
9 18 U.S.C., they talk about the characteristics of the
10 defendant. Okay. Seriousness of the offense. Okay.

11 MS. BERGMANN: But, Your Honor --

12 JUSTICE KENNEDY: Your argument is sweeping.
13 And you're saying the more specific guidance you give,
14 the more dangers there is of unconstitutionality.
15 That's very difficult to accept.

16 MS. BERGMANN: Well, I -- Your Honor, I
17 would disagree with your premise that this is more
18 specific guidance. The Court stated in Johnson that the
19 words of the residual clause were meaningless, were
20 unintelligible. And so --

21 JUSTICE KENNEDY: The less said the better
22 in sentencing?

23 MS. BERGMANN: I'm sorry, Your Honor.

24 JUSTICE KENNEDY: You're saying that the
25 less said the better?

1 MS. BERGMANN: No, Your Honor. What I'm
2 saying --

3 JUSTICE KENNEDY: You like that system.

4 MS. BERGMANN: What I'm saying, Your Honor,
5 is that if the Court is -- if the -- if a court is
6 provided guidance with respect to how it is supposed to
7 impose a sentence -- and here, district courts are
8 required to calculate the Guideline range. They are
9 required to consider the career offender residual clause
10 in every case. In every case, a court must consider
11 whether a defendant's predicate offenses qualify him for
12 this enhancement that both doubles his sentence and may
13 extend it by a term of years.

14 JUSTICE ALITO: If I go through the
15 Sentencing Guidelines -- I mean, I just opened them at
16 random. I can see provisions that would generate a --
17 you know, an arguable vagueness challenge if they were
18 in a criminal statute.

19 How about more than minimal planning? Do
20 you think that's sufficiently -- that that's
21 sufficiently clear to satisfy vagueness concerns if, you
22 know, you're -- you're guilty of this offense if it
23 involved more than minimal planning? Or the difference
24 between a serious bodily injury and a permanent or
25 life-threatening bodily injury?

1 And those are just -- I mean, just open this
2 at random.

3 MS. BERGMANN: Well, Your Honor, the same
4 concerns expressed in Johnson with respect to the
5 Court's application of the vagueness -- vagueness
6 doctrine in that case. Concerns were expressed about
7 other provisions being ruled vague, and the Court
8 determined that the -- because the career offender --
9 well, the ACCA residual clause, but here the career
10 offender residual clause uses same language, because it
11 used this very specific combination of a significant
12 risk standard and an ordinary case analysis that it was
13 not combination that rendered it vagueness in -- vague
14 in a unique way that wouldn't implicate other
15 provisions.

16 JUSTICE SOTOMAYOR: Wasn't the essence of
17 our ruling in Johnson that it's one thing to ask a judge
18 to apply a determination to existing facts, as opposed
19 to what happens with the residual clause, which is
20 you're asking a judge to basically fantasize about what
21 the average case is like?

22 MS. BERGMANN: That's correct, Your Honor.
23 That --

24 JUSTICE SOTOMAYOR: And so Guidelines that
25 you're being asked to apply to specific facts are

1 reviewable by a court, aren't they?

2 We can look at the facts and say, was the
3 judge right? Was this more than minimal planning or
4 not?

5 Correct?

6 MS. BERGMANN: That's correct, Your Honor.

7 JUSTICE SOTOMAYOR: But it's almost
8 impossible, according to Johnson, to find what an
9 ordinary case would look like because there was no
10 standard of comparison of what ordinary meant.

11 MS. BERGMANN: That's correct, Your Honor.
12 And I'm aware of no other legal provisions, no other
13 guidelines that use this ordinary case analysis that
14 forces the court to imagine a typical case and then
15 apply the guidelines in that way.

16 JUSTICE SOTOMAYOR: There are -- there are
17 circuit courts who already permit vagueness challenges
18 to provisions, right?

19 MS. BERGMANN: That's correct, Your Honor.
20 The Ninth Circuit has allowed vagueness challenges to
21 Guidelines provisions for decades now, and none has been
22 successful.

23 I mean, what's unusual about the residual
24 clause is that it -- it really is unique among
25 sentencing provisions, and that was in part why the

1 Court was concerned about its application in the Armed
2 Career Criminal Act in Johnson, and it should be equally
3 of -- of concerning nature here.

4 CHIEF JUSTICE ROBERTS: I don't know why --
5 I don't know why you run away from the proposition that
6 less is better. I would have thought that's central to
7 your argument, and it's not. It sounds bad, but it's
8 not. I mean, maybe less was going to be more
9 susceptible to another challenge, like it's arbitrary.

10 But you can see that it's not a vagueness
11 problem. I mean, if you -- you know, the coin toss
12 proposition, if you say the sentence will be decided by
13 a coin toss, it's not vague. Everybody knows exactly
14 what's going to happen. But it might be arbitrary.

15 So in that case less would be better. If
16 you did not have the provision about a coin toss, which
17 narrows the uncertainty, then that would be better.

18 MS. BERGMANN: Well, Your Honor, I mean,
19 arbitrary is -- arbitrariness is the main concern here
20 with the residual clause, and also with the commentary,
21 because the arbitrariness comes into play when the
22 Commission is interpreting the vague language of the
23 residual clause to conclude that certain offenses fall
24 within it.

25 The Commission was undertaking an effort

1 that this Court deemed impossible in Johnson. Prior to
2 Johnson --

3 JUSTICE GINSBURG: Let me --

4 MS. BERGMANN: I'm sorry.

5 JUSTICE GINSBURG: Let me ask you a question
6 that's peculiar to this case, and it's essentially
7 whether the issue we're now debating became moot when
8 this sentence was reduced to 216 months, which is well
9 below the Guidelines range.

10 MS. BERGMANN: Yes, Your Honor.

11 JUSTICE GINSBURG: So his sentence, the --
12 the Guideline range, what was it? 262 to 327 months?

13 MS. BERGMANN: Yes, Your Honor.

14 JUSTICE GINSBURG: And he got 216 months.

15 MS. BERGMANN: Yes, Your Honor. He received
16 a reduction in his sentence based on substantial
17 assistance to the government. And if Mr. Beckles were
18 to be resentenced without the career offender provision,
19 at that resentencing the court would establish a
20 guideline range, choose a sentence within that range,
21 and then apply the same 40 percent reduction based on
22 his substantial assistance to whatever sentence the
23 judge -- the judge came up with at that resentencing --

24 JUSTICE SOTOMAYOR: Was this --

25 MS. BERGMANN: -- without the career

1 offender guideline.

2 JUSTICE SOTOMAYOR: Was this 40 percent
3 normal for this judge? Did he say he was basing it on a
4 percentage?

5 MS. BERGMANN: She did, Your Honor. And it
6 was a 40 percent reduction based on his substantial --

7 JUSTICE BREYER: This is -- this is a fairly
8 deep question, actually, you're going into, in my mind.
9 And what is -- before I reached a constitutional
10 question, I would ask whether the Guideline falls within
11 the scope of the words "Guideline-enabling statute." I
12 don't see why you have to get into the Constitution.

13 But even doing it that way, it then becomes
14 a matter of the extent to which the Federal courts are
15 going to review the substantive Guidelines, itself an
16 open question.

17 So rather than get into that, I might think
18 about your case like this: Why was the statute vague?
19 It was vague because with three examples preceding the
20 residual clause, they tried to apply it, Congress, to
21 thousands of State criminal statutes that vary in a
22 variety of ways one from the other. That's what caused
23 the problem, I think.

24 Now, if that was the problem, that isn't
25 present here because these apply to Federal statutes.

1 Moreover, they don't apply to State statutes. Oh,
2 maybe -- I see. Yeah, yeah, you're right. There is.
3 You're right. You're right. I can't get around it that
4 way. Thank you for your answer.

5 (Laughter.)

6 JUSTICE BREYER: But let's go -- let's go a
7 step further.

8 MS. BERGMANN: My -- my best answer of the
9 day.

10 (Laughter.)

11 JUSTICE BREYER: No, you're -- you're
12 thinking the right thing.

13 MS. BERGMANN: No, Your Honor --

14 JUSTICE BREYER: But I have -- I have -- I'm
15 conceding, because one way of clarifying the kind of
16 vagueness that's there in the statute is through
17 example. If we'd had twenty examples instead of three,
18 we might never had to get to that constitutional issue.

19 So here, what the Commission did was provide
20 some examples. That's all. And one of the examples was
21 a sawed-off shotgun.

22 So why isn't that sufficient? I mean, there
23 was vagueness. Assume. Because similar reasons?
24 Assume. And now we have an effort to cure. And the
25 effort to cure is by giving examples. And why isn't

1 that good enough?

2 MS. BERGMANN: Well, Your Honor, because --
3 because -- sorry. I should just keep my mouth shut.

4 Because, Your Honor, I believe that the
5 Court has held that the residual clause has no meaning.
6 And because it has no meaning, the Commission is in no
7 better place to interpret or clarify that language.
8 Where language is meaningless, how can it be clarified?

9 And the Court struggled with this, as you
10 said. And prior to Johnson and James and Sykes and
11 Begay and Chambers, the Court attempted to narrow and
12 clarify this language and provide examples. But for the
13 very reasons that Your Honor states, it was impossible
14 to do so.

15 And the career offender provision is even
16 broader than the Armed Career Criminal Act because the
17 instant offense also has to qualify. In the Armed
18 Career Criminal Act, it was limited simply to felon in
19 possession.

20 JUSTICE SOTOMAYOR: Well, why is this -- I
21 guess the real question on this last point is: If what
22 we're trying to do is to regulate the defendant's
23 conduct, not possessing this thing or not committing a
24 crime of violence, and he knows because the commentary
25 tells him that if he does possess a sawed-off shotgun,

1 he's going to get this enhancement, what's arbitrary at
2 sentencing for imposing what the defendant already knows
3 is illegal or will subject him to the greater
4 enhancement?

5 I buy your argument in terms of it would be
6 arbitrary to the Johnson reasoning to have a judge
7 determine that a sawed-off shotgun --

8 MS. BERGMANN: Here, Your Honor --

9 JUSTICE SOTOMAYOR: -- is violent in one
10 situation but not in another. But if the issue of
11 arbitrariness is the arbitrariness and capriciousness of
12 enforcement, here the defendant knew that he was going
13 to be subject to the enhancement at the time he
14 committed the crime.

15 MS. BERGMANN: But the arbitrary here and
16 the enforcement here comes into play when it is the
17 Commission interpreting the language of the residual
18 clause. The district court -- once the Commission
19 interprets the residual clause to include possession of
20 a sawed-off shotgun, the district court has no
21 discretion not to apply that Guideline. And so it is
22 the Commission's arbitrary --

23 JUSTICE SOTOMAYOR: I agree no discretion to
24 apply the Guideline. But --

25 MS. BERGMANN: No discretion -- I'm sorry --

1 to ignore the Guideline. Once the Commission states
2 that this offense falls within the residual clause,
3 district courts have to apply it. And so it is
4 basically directly requiring the Court to apply or
5 enforce arbitrary provision.

6 JUSTICE SOTOMAYOR: How is this different
7 from all of the examples the government gave in pages 55
8 to 57 or the others where we've had a vague statute and
9 the administrative agency has narrowed it, or you have a
10 municipal ordinance that narrows, that the city narrows
11 in its administrative processes? And all of those cases
12 when they are challenged for vagueness, we look at how
13 the statute is applied to the individual.

14 How is this situation any different? If the
15 statute was vague, it's vague. And what we've done
16 instead is say, no, it's not vague, because the agency
17 has narrowed its application.

18 MS. BERGMANN: Well, two responses, Your
19 Honor.

20 With respect to the cases involving State
21 and local provisions and ordinances, the Court, as a
22 matter of Federalism, has to look to the clarifying
23 constructions that the State court or agency or local
24 governing body has given to that language and accept it
25 to be an interpretation of a statutory provision or

1 whatever the provision is and accept that as a
2 clarifying construction of the State provision.

3 With respect to respecting the decisions or
4 the clarifying actions of a regulatory body, a Federal
5 regulatory body, the Court will do that only in certain
6 situations. And here, that kind of deference should not
7 be afforded to the agency's interpretation of the career
8 offender guideline in part because, as I said, the
9 agency is interpreting not its own words, but Congress's
10 words. And in that respect, under *Gonzales*, the kind of
11 chevron deference is not afforded.

12 The same is true here with respect to
13 *Seminole Rock* deference, which is what *Stinson* deference
14 for the Guidelines relies upon or deference, as the
15 Court also calls it. Here, the Commission was not
16 interpreting ambiguous language. It was not choosing
17 among ascertainable meanings in selecting the commentary
18 as providing -- I'm sorry -- selecting possession of a
19 sawed-off shotgun as an offense that fell within the
20 residual clause. Here, the Commission was interpreting
21 vague language that had no meaning. And in that
22 respect, it is not entitled to the deference in the same
23 way that other interpretations of the Guidelines might
24 be.

25 And I'd like to reserve my remaining time.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 Mr. Dreeben.

3 ORAL ARGUMENT OF MICHAEL R. DREEBEN
4 ON BEHALF OF THE RESPONDENT

5 MR. DREEBEN: Mr. Chief Justice, and may it
6 please the Court:

7 The threshold question in this case is one
8 of retroactivity, whether the rule that Petitioner seeks
9 would be retroactive to cases on collateral review if
10 the Court were to adopt it.

11 In view of the questions from Justice Breyer
12 and Justice Alito and others on the bench, I think it
13 may be useful to start at the outset to describe what we
14 think the Due Process Rule is in this case and why it
15 does not call into question traditional discretionary
16 sentencing within a broad range that is not informed by
17 sentencing guidelines.

18 So I think the starting point for analysis
19 here is due process. Due process does not itself
20 require that all provisions of law not be vague in some
21 customary dictionary sense. Due process protects
22 fundamental fairness. And when looking at fundamental
23 fairness, the Court examines history and practice.

24 Now, the history of this country has
25 included discretionary sentencing within a range without

1 any guidance to the judge since the 1790 Crimes Act.
2 And through much of the 19th century, many statutes were
3 written that way.

4 The idea that due process vagueness analysis
5 would somehow invalidate that contradicts cases like
6 Medina, which take as their touchstone for due process
7 historical practice.

8 I also think that the purposes of what later
9 was announced as the vagueness doctrine are not
10 implicated in traditional sentencing. The reason for
11 that is not that traditional sentencing produces uniform
12 or predictable results. It does not. It maximizes
13 instead another important value of sentencing, which is
14 individualization or proportionality.

15 Sentencing involves a large array of facts
16 that are very difficult to reduce to rules. The
17 traditional sentencing process relies on the judge and
18 the defendant, in the courtroom with counsel, to examine
19 the multiplicity of facts that bear on appropriate
20 sentencing and then to select a sentence within that
21 range.

22 That is not arbitrary. We have cited in
23 footnote 2 of our reply brief a case from this Court
24 where the Court described that as conscientious judgment
25 rather than arbitrary action. It therefore does not

1 implicate the purpose of the due-process vagueness
2 doctrine.

3 On the other hand, the Sentencing Guidelines
4 as this Court has described them in recent opinions that
5 have examined the advisory system that's been put into
6 place post-Booker, stress that that system injects law
7 into the sentencing process. The judge must calculate
8 the Guidelines range. The judge must be cognizant of it
9 throughout the sentencing process.

10 That Guidelines range informs the judge's
11 selection of a sentence because the judge knows that it
12 reflects the considered expert views of the Sentencing
13 Commission filtered through congressional policy. And
14 because of those features of the sentencing system in
15 the district court, the Court has described the
16 Guidelines range as having an anchoring effect, which
17 tends to influence sentences if intended to do so, and
18 has that effect, and it is continuing to have that
19 effect.

20 Since 2011, the rate of within range of
21 government-sponsored departures in the Guidelines has
22 remained relatively constant. It has not dropped
23 significantly. It's still at around the 80 percent
24 range.

25 JUSTICE ALITO: So basically, your argument

1 is that there's a continuum, so that if you have
2 complete judicial discretion, barring the consideration
3 of some impermissible invidious factor, within the
4 statutory guideline range, there's no vagueness problem.

5 On the other hand, if you have mandatory
6 guidelines, you may have to apply vagueness principles
7 to the mandatory guidelines.

8 Now, here it -- so someplace in the middle
9 you get -- you are close enough to the mandatory that
10 that has to apply. That's -- that's your argument?

11 MR. DREEBEN: Yes. And we have not taken a
12 position on the mandatory guidelines in this case. It's
13 an advisory guidelines case, but the Court's description
14 of --

15 JUSTICE ALITO: Well, if advisory guidelines
16 are subject to vagueness challenges, then surely
17 mandatory guidelines would be subject to vagueness --

18 MR. DREEBEN: Yes, for vagueness. But I'm
19 talking about retroactivity.

20 JUSTICE ALITO: All right. So it's for
21 vagueness purposes.

22 Now, suppose what the Court had said is the
23 Guidelines are purely advisory. Now, you know,
24 they're -- the Sentencing Commission, very respected
25 group, studied the problem; judges, you really ought to

1 read them, you ought to take them into account, but in
2 the end, it's your call, based on the factors that are
3 set out in the Sentencing Reform Act.

4 Would the result be the same?

5 MR. DREEBEN: I think it would depend,
6 Justice Alito, on how the Guidelines were implemented
7 and whether additional rules that were procedural in
8 character, designed to reinforce the primacy of the
9 Guidelines, were adopted. It's hard to answer that
10 question in the abstract.

11 What we do know today is that, based on the
12 analysis in Peugh and Molina-Martinez, and the further
13 refinements that the Court has discussed and addressed
14 in cases like Rita and Gall, the Guidelines do have a
15 significant lodestar or lodestone effect in the
16 sentencing process.

17 On appeal, a court of appeals may consider a
18 within-range sentence presumably reasonable. And these
19 legal features of the system lead the Court in the Peugh
20 case to apply the ex post facto clause to changes in the
21 advisory range.

22 JUSTICE ALITO: But what will happen ten
23 years from now? Let's say ten years from now when you
24 have -- there's no district judge anymore who even
25 remembers the mandatory guideline regime and there are

1 departures in 85 percent of the cases, and the judges go
2 through the drill. They -- you know, they calculate the
3 Guidelines and all of that, but then they go on and
4 impose the type of sentence that they think adequately
5 serves the legitimate purposes of sentencing. Would
6 your argument be the same then?

7 MR. DREEBEN: Well, we -- we made a version
8 of that argument in Peugh and this Court rejected it,
9 and I think empirical evidence is not suggesting that
10 sentencing courts are drifting radically away from the
11 Guidelines, and one of the reasons for that is there's a
12 feedback loop in place where the Commission examines the
13 Guidelines in practice, takes note when district judges
14 are varying or departing from them, and incorporates
15 those refinements into the Guidelines.

16 CHIEF JUSTICE ROBERTS: Well, maybe not
17 radically departing, but steadily increasing their
18 departures, isn't that right?

19 MR. DREEBEN: I don't think so,
20 Mr. Chief Justice. I looked at the statistics this
21 weekend, and there is a trend line that hovers around
22 the 80 percent level for within-range sentences, plus
23 the government-sponsored departures, which are
24 incorporated into the Guidelines and recognized as not
25 being non-guideline sentence because the government is

1 seeking them within the framework of the Guidelines.

2 So the Guidelines are continuing to have an
3 influential role in Federal sentencing, as they are
4 intended to do precisely because the Commission is
5 looking at the same 3553(a) factors that the district
6 court judge does. The Commission takes into account
7 actual experience in sentencing and refines the
8 Guidelines in order to incorporate those improvements
9 into it. Courts of appeals can presume within-range
10 sentences reasonable on appeal which the Court
11 recognized in Rita --

12 JUSTICE KENNEDY: It seems to me that that
13 explanation is in conflict and considerable tension with
14 your argument that this is not -- that this is
15 procedural. Why is that substantive?

16 MR. DREEBEN: So I think, Justice Kennedy,
17 that the --

18 JUSTICE KENNEDY: It appears that you're
19 taking two different positions on these points.

20 MR. DREEBEN: And I think that's because
21 there are two different legal tests that are in play.

22 The vagueness doctrine is looking at the
23 potential for lack of notice and arbitrary action. And
24 I think arbitrariness is the essential complaint about a
25 vague guideline that results in something that is little

1 better than a coin flip as to whether a person is
2 treated as a career offender or not.

3 JUSTICE KENNEDY: Well, but you say the
4 vagueness challenge analysis applies because this whole
5 class is affected.

6 MR. DREEBEN: Yes.

7 JUSTICE KENNEDY: And that seems to me
8 inconsistent with saying that they're procedural because
9 they don't play a dispositive role.

10 MR. DREEBEN: They play an important role.
11 I think dispositive is not the right statement. The
12 test in retroactivity is much stricter than the question
13 of whether due process should apply.

14 The test in retroactivity, as this Court
15 most recently articulated it in the Montgomery case and
16 again in the Welch case, is whether a rule alters the
17 range of conduct or the class of persons who is punished
18 in a way such as, effectively, to make the person no
19 longer eligible for the criminal sentence that the
20 government seeks. And that test is narrow, because it
21 responds to the very compelling finality concerns in the
22 habeas context that are different from when the Court is
23 examining what the Constitution requires.

24 JUSTICE BREYER: Here's a thing I'd like you
25 to think about, and -- and tell me what you think. This

1 is -- this is what's bothering me about the government's
2 position. It's important, the government's position.

3 Put in your mind the words that we're
4 talking about, "or otherwise involves conduct that
5 presents a serious potential risk of physical injury."
6 Okay? Those are the words. Put them over here; they
7 appear in the guideline. Put them over here; they
8 appear in the statute.

9 When they appear in the statute, they have a
10 meaning, and it's fairly limited, and there's likely to
11 be one. And eventually there will be an authoritative
12 meaning.

13 When it appears over here in the guideline,
14 it could be viewed as having an authoritative meaning or
15 it could be viewed as leaving up to the district judge
16 the job of interpreting these sensibly in the case, just
17 like we used to do.

18 And then the Commission goes around first to
19 review it for reasonableness at the court of appeals,
20 and then the Commission goes through the feedback
21 process that you -- that you describe.

22 Now, that would mean, one, a system that
23 works itself towards a more logical, sensible approach
24 in terms of punishment, and it also would mean that the
25 normal words vagueness in the Constitution, or, if you

1 like, feed it through the statutory enabling
2 legislation, it would -- it would mean that it would
3 have different meanings in the two constitutional versus
4 statute versus guideline. But the purpose of that would
5 be to get better guidelines.

6 MR. DREEBEN: So, Justice Breyer, I agree
7 with the impulse of that question to the extent that
8 we're talking about the enumerated offenses in the
9 commentary. I think that those, whether they are viewed
10 as construing the language of the residual clause or
11 providing an independent specification of what is a
12 crime of violence, they satisfy due process vagueness
13 concerns.

14 Where I part company with that description
15 of how the constitutional analysis is affected is that
16 the Commission selected the residual clause language to
17 mirror the ACCA residual clause.

18 JUSTICE BREYER: We know that because this
19 is -- the words I read you are just one set of what I
20 bet are hundreds of examples in these Guidelines if you
21 go through and think it doesn't make too much sense.

22 MR. DREEBEN: Well, I think -- no, I'd like
23 to come back to whether the Guidelines are vague as a
24 general matter, because I don't think they are. I spent
25 a lot of time going through them this weekend, and I was

1 amazed at how specific they are and how they do mirror
2 things that are customarily elements of offense.
3 Serious bodily injury is a very customary element of the
4 offense.

5 The Guidelines were framed to be
6 administrable in factual and judgmental ways that courts
7 administer all the time in criminal law.

8 What was different about the residual clause
9 is that the Court wasn't -- Congress instructed the
10 Commission to put together a career offender guideline
11 that covered people who had crimes of violence or
12 serious drug offenses for their instant offense and two
13 others and they were older than 18.

14 The Commission originally defined crime of
15 violence by borrowing the Section 16(b) definition of
16 crime of violence which Congress adopted in the same act
17 that passed the Sentencing Reform Act.

18 It later switched to the ACCA definition,
19 the residual clause that this Court later invalidated in
20 Johnson. It made one tweak to the enumerated offenses.
21 Instead of saying "burglary," it said "burglary of a
22 dwelling," but it otherwise consciously sought to adopt
23 the ACCA framework, and I think it did so largely to
24 simplify the administration of complicated criminal
25 history determinations in recidivism cases in Federal

1 prosecutions.

2 It added to that specifications of
3 particularized offenses, which it had done before when
4 Section 16(b) language was controlling. So it always
5 had a list of enumerated offenses in the commentary, and
6 it refined those slightly, but it retained them.

7 So I think the proper way to look at this is
8 that the Commission was seeking to model this language
9 on congressional statutes in the ACCA, and courts across
10 the country heeded that by interchangeably citing
11 Sentencing Guidelines, residual clause cases, and ACCA
12 residual clause cases.

13 So when this Court in Johnson overruled the
14 two sentencing residual clause cases that had come out
15 in favor of the government and said that the residual
16 clause was vague across the board, sentencing courts no
17 longer had a legal framework at all to interpret the
18 residual clause except for the commentary. The
19 commentary provides specificity.

20 But the methodology that this Court
21 condemned as producing a shapeless provision, a
22 provision that was a black hole of uncertainty and
23 confusion, that language existed, and the problem with
24 that from a due process point of view is that it leads
25 to arbitrary assignments of classifications, such as the

1 career offender classification or the firearms
2 guideline, which also keys on prior crimes of violence
3 that the defendant had in his history, and it leads to
4 the assignment of a range which then serves as the
5 anchor for sentencing that it provides an arbitrary
6 framework.

7 The judge thinks that the commission intends
8 that this individual be treated as a career offender or
9 somebody who has a firearms offense with a crime of
10 violence in his background, but the judge has no way of
11 knowing whether that is arbitrary or non-arbitrary
12 because the commission, having borrowed vague language,
13 ends with up with a vague statute.

14 JUSTICE SOTOMAYOR: Mr. Dreeben, can we go
15 back to Justice Kennedy's question? In Montgomery, we
16 had a rule that appeared procedural, just like this one.
17 The judge at sentencing could still sentence the
18 defendant to life without parole after a particular
19 finding, i.e., that the individual was irredeemable.

20 Why is that different than here? Meaning,
21 if the Guidelines are procedural in the Montgomery sense
22 because they are an anchor on what a judge does, why
23 isn't there a substantial risk like in Montgomery that a
24 defendant is going to be sentenced because of the
25 Guideline and not because of a finding that he or she is

1 entitled to that sentence?

2 And I take that to be -- that substantial
3 risk to be proven by your own statistic. 80 percent of
4 judges sentence within the Guidelines. But more
5 importantly for those circuits that have permitted or --
6 or have applied retroactive activity to Johnson and
7 defendants have been resentenced, the vast majority have
8 received a much lower sentence.

9 MR. DREEBEN: So, Justice Sotomayor, let me
10 try to take the conceptual point and then the practical
11 point. Conceptually, Montgomery interpreted Miller v.
12 Alabama as basically requiring a finding to go to a life
13 sentence, a finding of incorrigibility that prior law
14 had not required. And if that finding was not made, the
15 defendant is not eligible for a life sentence if he's a
16 juvenile homicide defendant.

17 So Montgomery, rather than looking at Miller
18 and saying, well, is it likely or unlikely that youths
19 will get a life sentence, it interpreted Miller as
20 imposing an eligibility requirement. And that is why it
21 satisfied habeas, not because there was some likelihood
22 analysis.

23 If likelihood was the test, the Court would
24 not have had to go through the analysis that it did and
25 focus on the incorrigibility aspect. And that's what

1 distinguishes Miller from a Guideline situation.

2 JUSTICE SOTOMAYOR: But doesn't a judge
3 still have to make a finding that there's a reason to
4 give a defendant a higher sentence? There may be some
5 judges who determine the nature of the past conduct
6 qualifies this defendant for career criminal status, but
7 absent that, it seems like the vast majority of those
8 judges who are now resentencing don't believe that
9 those -- that prior criminal history justifies the
10 higher sentence.

11 MR. DREEBEN: We don't doubt, Justice
12 Sotomayor, that the Guidelines range is influential.
13 The question is whether it sets an eligibility
14 threshold. The test is not likelihood of outcome. That
15 would, in effect, collapse one aspect of the test for a
16 watershed procedural rule into the criterion for a
17 substantive rule for retroactivity.

18 A watershed procedural rule both has to have
19 a fundamental effect on accuracy, plus it has to change
20 our bedrock understanding of the elements of --

21 JUSTICE SOTOMAYOR: Could I just ask
22 something? If we rule in your favor and say it's not
23 retroactive, how much is left of the Johnson ruling?
24 What effect would it have? How many cases are there in
25 fact, except the -- I guess it's the felon in possession

1 cases would be the one example that the Guideline --
2 that the Guidelines haven't already been structured to
3 take care of all career offenders.

4 MR. DREEBEN: Our position is, as the Court
5 knows from our submission in Welch, that in Armed Career
6 Criminal Act cases where the effect of the residual
7 clause was to change a defendant from having a maximum
8 of 10 to a minimum of 15, Johnson is retroactive. And
9 we have sought and supported retroactive rulings in
10 cases where somebody is no longer qualified for an Armed
11 Career Criminal Act sentence under Johnson.

12 JUSTICE SOTOMAYOR: Outside of felon and
13 possessions --

14 MR. DREEBEN: We do not --

15 JUSTICE SOTOMAYOR: -- can you think of any
16 other situations?

17 MR. DREEBEN: We do not think that
18 Sentencing Guidelines should be interpreted --

19 JUSTICE SOTOMAYOR: You're not quite
20 answering my question. What other situations besides
21 the felon in possession would Johnson and Welch be
22 operative? Because as I understand it, in virtually all
23 cases, most others, the Guidelines are within the
24 statutory maximum.

25 MR. DREEBEN: That's right. Well, I think

1 in all cases, Guidelines ranges have to be in the
2 statutory maximum. And that is precisely our point.
3 Guidelines ranges function as advice to the judge when
4 he is sentencing. The Guidelines do not impose an
5 insuperable barrier that requires a specific finding of
6 fact before the judge can sentence outside the
7 Guidelines. That was the problem with mandatory
8 guidelines. Advisory guidelines allow the judge to look
9 at the totality of the circumstances and to make policy
10 judgments that may be at variance with the Commission.

11 Now, they don't do that all that often
12 because the Commission is doing its job. And that is
13 why we are on the side of Petitioner with respect to the
14 due process issue.

15 JUSTICE GINSBURG: The third -- the third
16 issue -- you've confused me by your argument. I thought
17 from your brief that if we decide the first issue, that
18 is, was there fair notice of the sawed-off shotgun, then
19 there's no vagueness, and the case is over. But -- so I
20 was thinking, well, we could decide that third issue and
21 not reach either vagueness or retroactivity.

22 MR. DREEBEN: So, Justice Ginsburg, I would
23 urge the Court to decide retroactivity. There are
24 thousands of cases in the Federal system that have
25 already been filed urging resentencing.

1 JUSTICE GINSBURG: But would you say that is
2 not necessary if we agree that in this case there was
3 fair notice about the sawed-off shotgun being --

4 MR. DREEBEN: Well, Justice Ginsburg, this
5 Court's Teague jurisprudence says that in a collateral
6 review case, a habeas case, the threshold question is
7 retroactivity because if the new rule that the
8 Petitioner seeks would not be retroactive to cases on
9 collateral review, there should be no adjudication of
10 that prisoner's constitutional claim. The issue --

11 JUSTICE ALITO: That's like jurisdiction,
12 that we are bound, we have no choice but to decide
13 retroactivity before deciding anything else.

14 MR. DREEBEN: No. It's not a jurisdictional
15 limitation. Teague is a doctrine that this Court
16 framed, Justice Alito, if the Court wanted to decide
17 something else before then, but the reason why the
18 government thinks that it would be in the interest of
19 criminal justice for the Court to resolve the
20 retroactivity issue is that there are thousands of cases
21 waiting in the wings that are being held up today.

22 Now, Justice Sotomayor, you --

23 JUSTICE SOTOMAYOR: Mr. Dreeben, what will
24 happen to all those cases that have been resentenced
25 already?

1 MR. DREEBEN: They will keep their
2 sentences. And the ones that --

3 JUSTICE SOTOMAYOR: Even the -- where the
4 circuits said no retroactivity -- where they have
5 permitted retroactivity?

6 MR. DREEBEN: Well, no circuit has actually
7 ruled on retroactivity. The circuits have ruled on
8 vagueness. All except for the Eleventh have either said
9 vagueness applies to the Guidelines and the residual
10 clause falls. Or they have said we accept the
11 government's concession that vagueness applies.

12 JUSTICE SOTOMAYOR: But they've been
13 resentencing?

14 MR. DREEBEN: They have been resentencing --
15 88 are pointed to in Petitioner's reply brief, and Your
16 Honor asked about those. My view on those is that they
17 are a tiny, small, and unrepresentative sample of the
18 cases that are waiting being held for this one.

19 The reason that those cases have gone
20 forward are most likely because the judge took a look at
21 that defendant and said, I actually am going to sentence
22 him to a lower sentence, maybe time served. I do not
23 want to wait for the Supreme Court's decision in
24 Beckles.

25 The vast majority of cases, however, are on

1 hold, which I think could represent a view by the
2 sentencing judges that they are not so confident that
3 they will resentence the defendant to a lower sentence.
4 After all, these defendants haven't had a change in
5 their criminal history. They've had a change in the
6 advice that the Sentencing Commission is going to give.

7 JUSTICE SOTOMAYOR: If I were a district
8 court judge and I wasn't going to change the sentence no
9 matter what -- what the reason for the retroactivity
10 ruling, I would have just had the sentence.

11 MR. DREEBEN: Well, Justice Sotomayor, you
12 would have produced an efficient result. But I think
13 that for the --

14 JUSTICE SOTOMAYOR: I was known for that.

15 (Laughter.)

16 MR. DREEBEN: And that's admirable. But for
17 many of the judges that are sitting on hundreds upon
18 hundreds of these cases and for U.S. attorneys that are
19 grappling with old records and attempting to reconstruct
20 sentencings from many years ago, they are looking to a
21 decision by this Court on the retroactivity question.

22 JUSTICE ALITO: Well, if I think that it's
23 retroactive, should I stop there, should I go on to
24 consider whether it's vague, or should I just accept
25 your concession that it's vague?

1 MR. DREEBEN: Well, I think that the Court
2 should decide the legal issue. We have submitted to the
3 Court why the Due Process Rule that we think does exist
4 would not be retroactive if the Court disagrees and
5 thinks that it would be retroactive if it is true. Then
6 I think the Court should go on to say that, yes,
7 vagueness applies to the sentencing guidelines, but in
8 view of the commentary here that specified the sawed-off
9 shotgun, the residual clause is not vague as to that
10 particular offense. And as a result, the judgment
11 should be affirmed.

12 But I think that the systemic interest of
13 justice right now in the wake of this Court's decision
14 in Johnson and knowing the pendency of Beckles is for
15 the Supreme Court to pronounce authoritatively on
16 whether retroactivity should apply to the new Due
17 Process Rule that Petitioner seeks and that the
18 government thinks in light of this Court's decisions in
19 Peugh and Molina-Martinez is correct.

20 So the sequence of analysis in the
21 government's view would be first you address
22 retroactivity. If the Court agrees with the government
23 that this is a procedural rule that does not have the
24 consequences that Welch and Montgomery attributed to
25 procedural rules, then the case is over. If the Court

1 concludes that that Due Process Rule would be
2 retroactive if it were correct, I think the Court should
3 go on to decide whether vagueness applies to the
4 Guidelines. I do not agree that any other guideline is
5 going to be invalid under vagueness analysis. Just this
6 one, except insofar as the commentary has specified in
7 enumerated offenses.

8 On that prong, we believe that Petitioner
9 loses because a sawed-off shotgun is an enumerated
10 offense.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 MR. DREEBEN: Thank you.

13 CHIEF JUSTICE ROBERTS: Mr. Mortara.

14 ORAL ARGUMENT OF ADAM K. MORTARA
15 FOR COURT-APPOINTED AMICUS CURIAE
16 IN SUPPORT OF THE JUDGMENT BELOW
17 ON QUESTION 2

18 MR. MORTARA: Mr. Chief Justice, and may it
19 please the Court:

20 I want to start off correcting something
21 that my friend said when he referred to historical
22 sentencing as not being arbitrary. The United States
23 Senate report on the Sentence Reform -- Sentencing
24 Reform Act said: "Correcting our arbitrary and
25 capricious method of sentencing will not be a panacea."

1 That's in the Senate report on the
2 Sentencing Reform Act. Judge Frankel understood
3 sentencing is arbitrary under the old system. It was
4 arbitrary. It may have been individualized, but it was
5 arbitrary.

6 Now, moving forward --

7 JUSTICE SOTOMAYOR: I'm sorry. It wasn't
8 arbitrary to the judge at issue --

9 MR. MORTARA: Correct, Your Honor.

10 JUSTICE SOTOMAYOR: -- meaning, the judge at
11 issue always had his or her own reasons.

12 MR. MORTARA: Correct.

13 JUSTICE SOTOMAYOR: What was arbitrary was
14 that one judge could have put different values on a
15 reason in one place and -- in New York and different
16 values in California. That's a very different form of
17 arbitrariness.

18 MR. MORTARA: I don't think so, when one
19 looks at the sentencing factors in 3553(a)(2), the
20 purposes of sentencing that my friends both agree are
21 not subject to vagueness challenges. These purposes are
22 even more vague than the career offender enhancement --
23 adequate deterrence, respect for the law, just
24 punishment -- yet they result in the calculation in the
25 mind of the judge of a single number, a fixed,

1 determinate sentence.

2 My friend referred to arbitrary determinate
3 sentencing arising from the career offender enhancement
4 residual clause. But think about what 3553(a), the
5 first sentence says: "The Court shall impose a sentence
6 sufficient but not greater than necessary to comply with
7 the extremely vague purposes of (a) (2)."

8 JUSTICE BREYER: But his point, I think, is
9 that, yes, all that you say is true, but this is a
10 special kind of guideline. This is like a threshold.
11 This is like a rule of law that says, get into this
12 career offender business if and only if you satisfy this
13 rule. Thus, most rules are telling the judge, Judge, go
14 back to your history of what this is about. Look at the
15 offender, figure out what he did, and then try to find
16 an appropriate sentence in light of factors. This isn't
17 that.

18 This is off/on. You either are in the
19 career offender or you are not. And just as you
20 couldn't, even before, have decided the sentence through
21 a throw of the dice, so you cannot now interpret an
22 on-off rule to say it's no worse than what you're
23 talking about.

24 MR. MORTARA: And, Justice Breyer, that
25 amounts to an argument that because the career offender

1 enhancement residual clause isn't quite that vague, it's
2 more subject to constitutional vagueness challenges.

3 JUSTICE BREYER: No, no, I'm not saying it's
4 not that vague. It is that -- it is saying you can't
5 rely on how sentencing used to work in order to save
6 this on-off rule.

7 Then what was worrying me in our
8 conversation is I could think of other parts of the
9 Guidelines; for example, the part that deals with
10 concurrent versus consecutive sentencing, which, you
11 know, is a nightmare and is also the notion of a kind of
12 on-off rule, and I'm afraid of what we would do here.
13 See, that's where I a.m. in this. I mean, I'm not
14 saying don't go ahead, go ahead. But I think he's
15 trying to make a qualitative difference in what we're
16 talking about here.

17 MR. MORTARA: I do want to get back to the
18 (a) (2) factors, but I -- I'll address your question
19 directly.

20 My friend said that the problem here is
21 Molina-Martinez and Peugh and the weight that the
22 Guidelines are given. And that weight in part comes
23 from Rita, which says that -- that an appellate court
24 can presume a within-Guideline sentence is reasonable,
25 because that reflects the judgment of both the

1 Commission and the sentencing judge that the 3553(a)
2 factors have been met.

3 But that's actually not true with the career
4 offender enhancement, and that's because the career
5 offender enhancement exists at the command of Congress
6 in 994(h). The Commission is not actually deploying its
7 expertise when it made the career offender enhancement.
8 It's doing something it was commanded to do, which is
9 make sure that sentences get at or near the statutory
10 maximum.

11 So the rationale for the reasonableness
12 presumption of Rita completely goes away with the career
13 offender guideline, and that's why the career offender
14 enhancement should not get that kind of weight and
15 that's why it doesn't.

16 My friend referred to 80 percent of
17 sentences being within Guidelines ranges. It's
18 75 percent outside of the Guidelines ranges -- Guideline
19 ranges for career offenders. Only 25 percent of career
20 offenders in 2015 got within the Guidelines-range
21 sentences. And some of that is government-sponsored
22 departures to be sure. But an astounding nearly
23 30 percent of career offenders got below Guideline-range
24 sentences without the government sponsoring them.

25 And what's going on there is that judges are

1 not giving the career offender enhancement as much
2 weight as Molina-Martinez and Peugh are talking about
3 because it doesn't come from a Commission's expertise on
4 the 3553(a) factors, and the Rita rationale is gone and
5 because sentencing judges are commanded to consider the
6 very facts of the offense and the criminal history that
7 they were deprived of considering under the ACCA.

8 In Johnson, the Court made very clear that
9 the saving construction offered by one of the other
10 opinions, the so-called criminal history or record-based
11 approach, was not available as a matter of statutory
12 interpretation. But under the sentencing guidelines in
13 factor (a)(1), a sentencing judge must consider those
14 facts.

15 So to take the example from Johnson, a
16 variety in a correctional institution under Connecticut
17 law under the categorical approach, probably a crime of
18 violence, but there might be the rare violence-free
19 riot. A sentencing judge under the Guidelines can look
20 at what actually happened and look at the severe effect
21 of the career offender enhancement and then sentence
22 below the range.

23 And that is what is, in fact, happening,
24 because judges are looking at the facts, and they are
25 not acting like automatons blindly adhering to the

1 Guidelines whatever their weight.

2 But coming back to the (a) (2) factors -- and
3 I do want to come back to them -- in 1984, the (a) (2)
4 factors were enacted. They are vague by anyone's
5 definition. And the only answer we get from my friends
6 is the Sentencing Guidelines require numerical range.
7 The (a) (2) factors lead to a specific number, a fixed
8 sentence in the mind of the judge. Which is more
9 arbitrary or provides less notice? That's easy.

10 The only other explanation we get is the
11 weight afforded to the Guidelines. I've already
12 mentioned that a little bit, but another way we can
13 think about it is a district judge is allowed to deviate
14 from the Guidelines if it disagrees with them as a
15 matter of policy. That's Kimbrough and Spears. A
16 district judge cannot declare that they disagree with
17 the purposes in (a) (2) and say, I a.m. now going to
18 sentence under my theory of radical over-deterrence,
19 instead of adequate deterrence. That would be
20 reversible error under all of this Court's precedents.
21 So whatever weight Molina-Martinez and Peugh say should
22 be given to the Guidelines, the (a) (2) purposes have
23 actually equal or more weight, because a district judge
24 cannot disagree with them. They are, in a sense, more
25 binding than the non-binding career offender

1 enhancement.

2 And in that respect, it goes from
3 discretionary sentencing, which I agree historically
4 we've all accepted as constitutional, and then to the
5 (a) (2) purposes, which may be an attempt to codify that
6 historical practice, but they are law. It -- it is a
7 statute. It says shall impose a sentence, a fixed
8 number. And they are vague. And if you accept that
9 discretionary sentencing is constitutional and you
10 accept that (a) (2) purposes are not subject to a
11 constitutional vagueness challenge, it seems extremely
12 difficult to accept that the career offender enhancement
13 is somehow subject to a constitutional vagueness
14 challenge either because of the numerical range, it's a
15 fixed number for (a) (2), or because of the weight for
16 the reasons I've given.

17 One other thing I wanted to raise, which is
18 related to questions Justice Sotomayor was asking about
19 the resentencings. I'm not aware of the percentage of
20 those 88, what percentage that is of the total
21 resentencing that would come up, and my friend suggested
22 it's an unrepresentative sample. But there's plenty of
23 confounders in this resentencing.

24 The -- the first is, sometimes it's been a
25 different judge.

1 The second is, sometimes the -- the
2 defendant was originally sentenced under Booker, or
3 pre-Booker, so mandatory guidelines.

4 The third is that in some of these cases --
5 and I've looked at the government's sentencing
6 referendum -- the United States has gone in and said,
7 well, because the Commission has gotten rid of the
8 residual clause, we would like the defendant's sentence
9 to reflect the way sentences are going to be going
10 forward, so we're asking you to impose a lower sentence
11 because we want things to look, in the future, the way
12 they are going to look for this defendant today.

13 All of those things are confounders on the
14 actual effect that the career offender guideline had in
15 its original form on the defendant's sentence. And to
16 take an example of Mr. Beckles, we talked a lot about
17 Molina-Martinez and Peugh, and some other decisions that
18 are mentioned in Peugh as giving weight to the
19 Guidelines. Most of those decisions did not exist when
20 Mr. Beckles was actually sentenced. Only Rita was
21 there. And Mr. Beckles' lawyer told the sentencing
22 judge that all the factors in 3553(a) were equal, that
23 none of them had any more weight than any of the others,
24 and Mr. Beckles still got his within-Guidelines range
25 sentence.

1 It is true that six years later the district
2 judge said, I would have sentenced him differently. But
3 that may -- that may be just as much an indication of a
4 Rita-Gall style error of overinterpreting the Guidelines
5 or overweighting them as anything else.

6 If the Court has no further questions,
7 I'm -- I'm prepared to sit down.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 Ms. Bergmann, you have a minute remaining.

10 REBUTTAL ARGUMENT OF JANICE L. BERGMANN

11 ON BEHALF OF THE PETITIONER

12 MS. BERGMANN: I'd like to make -- start
13 with a point about retroactivity analysis.

14 Mr. Dreeben states that the rule here is a
15 procedural rule, and I would disagree in part because
16 Mr. Dreeben misstated Montgomery as an eligibility test.

17 In both Welch and Montgomery, the defendant
18 was eligible for the same sentence so long as the court
19 made specific findings. And here, just like Montgomery,
20 it will be the rare case where a court can impose the
21 same sentence once the defender -- the defendant no
22 longer qualifies as a career offender. And that's
23 because the court would have to make additional findings
24 just was as true in Montgomery. There it was permanent
25 incorrigibility, but here, the very upward from an

1 ordinary guideline range to the career offender range
2 would require the judge to come forward with specific
3 and compelling significant determination, a
4 justification that would be so compelling that would
5 allow a court to double someone's sentence, and those
6 considerations would have to be things that were not
7 already taken into account by the Sentencing Commission
8 when they determined what the ordinary guideline range
9 would be.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 MS. BERGMANN: Thank you, Your Honor.

12 CHIEF JUSTICE ROBERTS: Mr. Mortara, this
13 Court appointed you to brief and argue this case as an
14 amicus curiae in support of the judgment below on
15 Question 2. You have ably discharged that
16 responsibility, for which we are grateful.

17 The case is submitted.

18 (Whereupon, at 11:05 a.m., the case in the
19 above-entitled matter was submitted.)

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