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# Retroactivity and the Uncertain Application of *Johnson v. United States*: Is the Rule 'Constitutional' on Post-Conviction Review?

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On June 26, the U.S. Supreme Court finally cut through the Gordian knot of the ''residual clause'' of the Armed Career Criminal Act (ACCA) by declaring the clause unconstitutionally vague in *Johnson v. United States*.[1] Going forward, *Johnson* will decrease the number of offenders subject to the enhanced statutory mandatory minimum.

For those already sentenced under the ACCA, if the enhancement required using the residual clause under the ACCA, the availability of post-conviction relief is less certain than one might initially think. post-conviction relief should be available.

This article explores issues relevant to obtaining post-conviction relief under *Johnson* for offenders sentenced under the ACCA and its close counterpart, the Career Offender provisions of the U.S. Sentencing Guidelines.

## INTRODUCTION AND HISTORY: GETTING TO *JOHNSON*

The ACCA allows prosecutors to request a 15-year minimum mandatory for a single crime—possession of a firearm after a felony conviction[2]—when the offender has three previous convictions for serious drug offenses or violent felonies.[3] Under the ACCA's definition of ''violent felony,'' an offense can qualify in one of three ways:

(1) it ''has as an element the use, attempted use, or threatened use of physical force against another'';

(2) is equivalent under the law of the relevant jurisdiction to ''generic''[4] burglary, arson, extortion, or involves the use of explosives; or,

(3) ''otherwise involves conduct that presents a serious potential risk of physical injury to another.''[5]

This third provision is known as the residual clause.

Justice Antonin Scalia had outlined the conceptual weakness of the residual clause in a series of dissents and concurrences, culminating in *Sykes v. United States*.[6] In his view, the Court could not articulate any intelligible principle by which lower courts could determine whether an offense was an ACCA predicate, as shown by its need to announce a new test with each ACCA case it decided.[7] Thus, the Court's ad-hoc decisions offered little to no guidance beyond the holdings: in the jurisdictions considered, attempted burglary and vehicular flight qualified, but drunk driving and failure to report to prison did not.

According to Justice Scalia, poor draftsmanship was the culprit. Congress had rendered the statute unwork-

[1] *Johnson v. United States*, No. 13-7120 (June 26, 2015) (see related story this issue).

[2] 18 U.S.C. 922(g)(1).

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[3] 18 U.S.C. 924(e).

[4] *See Descamps v. United States*, 2013 BL 162692 (U.S. 2013) (93 CrL 442, 6/26/13).

[5] 18 U.S.C. 924(e)(2)(B).

[6] 2011 BL 157471 (U.S. 2011) (89 CrL 409, 6/15/11).

[7] *Id.* (describing the various tests as: whether an offense creates a degree of risk comparable to the least risky enumerated crime (*Sykes*); whether the offense is ''purposeful, violent, and aggressive'' (*Begay v. United States*, 553 U.S. 137 (2008) (83 CrL 76, 4/23/08)); a hybrid of both that also incorporates empirical data (*Chambers v. United States*, 555 U.S. 122 (2009); 84 CrL 402, 1/21/09); and/or, whether the risk created is comparable to the offense's closest analog among the enumerated offenses (*James v. United States*, 550 U.S. 192 (2007); 81 CrL 71, 4/25/07).

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able by tying the interpretation of the residual clause to the enumerated offenses, from which the Court could distill no common denominator: ''The phrase 'shades of red,' standing alone, does not generate confusion or unpredictability; but the phrase 'fire-engine red, light pink, maroon, navy blue, or colors that otherwise involve shades of red' assuredly does so.''[8] Moreover, no reliable empirical method would allow courts to determine whether a certain offense was generally linked to an increased risk of physical violence. [9]

In *Johnson*, the Court faced the issue of whether a conviction for possession of a sawed-off shotgun was a crime of violence under the ACCA. Justice Scalia wrote for the Court that ''the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges. Increasing a defendant's sentence under the clause denies due process of law.''[10] The Court reasoned that the residual clause's two fatal flaws—''grave uncertainty about how to estimate the risk posed by a crime'' and ''uncertainty about how much risk it takes for a crime to qualify''—rendered the residual clause void for vagueness.[11]

## SCOPE OF *JOHNSON*: SPECIFIC OFFENSES THAT NO LONGER QUALIFY

A complete survey of offenses deemed ACCA predicates under the residual clause is beyond the scope of this article. Indeed, different courts have disagreed on how to treat identical offenses. [12] However, some common offenses include:

1) Statutory rape;[13]

2) Possession of an illegal weapon (*e.g.*, a sawed-off shotgun);[14]

3) Non-generic burglaries;

4) Offenses against or involving government officials or custodial status;[15]

5) Crimes resulting in injury that have a non-intentional *mens rea*[16]; and,

6) Inchoate crimes.[17]

## RETROACTIVITY: WHY SECTION 2255 PROBABLY WILL NOT BE AVAILABLE

For federal offenders, 28 U.S.C. Section 2255 provides the default vehicle for post-conviction relief. This statute imposes procedural barriers to applying new constitutional cases retroactively which are likely to prove insurmountable to federal prisoners.[18]

After a federal conviction becomes final by the conclusion of the direct appeal, subsequent favorable decisions of constitutional law only apply if they satisfy the criteria articulated in *Teague v. Lane* and its progeny.[19] Applying *Teague* begins with a procedural/substantive dichotomy that effectively determines the outcome.[20] If a new rule is considered to be procedural in nature, it will not be applied retroactively unless it is a ''watershed rule of criminal procedure,'' a designation re-

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[8] *Id.* (Scalia, J., dissenting) (quoting *James*, 550 U.S., at 230, n. 7).

[9] *Id.*; *see also Johnson*, slip op. at 5 (''How does one go about deciding what kind of conduct the 'ordinary case' of a crime involves? 'A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?' '' (quoting *United States v. Mayer*, 560 F. 3d 948, 952 (9th Cir. 2009) (84 CrL 678, 3/25/09) (Kozinski, C. J., dissenting from denial of rehearing en banc)).

[10] *Johnson*, slip op. at 5.

[11] *Id.* at 5-6.

[12] *Compare United States v. Brown*, 514 F.3d 256, 269 (2d Cir. 2008) (New York's third-degree burglary statute is always a violent felony), with *United States v. Prater*, 766 F.3d 501, 517 (6th Cir. 2014) (same provision sometimes qualifies and sometimes does not).

[13] *United States v. Velazquez*, 777 F.3d 91 (1st Cir. 2015) (96 CrL 487, 2/4/15) (in Maine, offense of statutory rape applies to engagement in sexual act with minors under fourteen years of age.); *United States v. Daye*, 571 F.3d 225, 229-36 (2d. Cir. 2009) (85 CrL 592, 8/12/09) *abrogated by Johnson v. United States*, No. 13-7120, *supra* (statutory rape); *United States v. Mincks*, 409 F.3d 898 (8th Cir. 2005) (second-degree statutory rape and sodomy); *United States v. Eastin*, 445 F.3d 1019 (8th Cir. 2006) (sexual intercourse with minor daughter).

[14] *United States v. Fortes*, 141 F.3d 1 (1st Cir. 1998) (possession of sawed-off shotgun falls within ACCA residual clause); *United States v. Johnson*, 246 F.3d 330 (4th Cir. 2001) (same); *United States v. Serna*, 309 F.3d 859 (5th Cir. 2002) (72 CrL 87, 10/30/02) (possession of sawed-off shotgun falls within U.S. Sentencing Guidelines residual clause); *United States v. Brazeau*, 237 F.3d 842 (7th Cir. 2001) (same); *United States v. Childs*, 403 F.3d 970 (8th Cir. 2005) (same); *United States v. Hayes*, 7 F.3d 144 (9th Cir. 1993) (same).

[15] *United States v. Cisneros*, 763 F.3d 1236, 1236 (9th Cir. 2014) (Oregon conviction for attempting to elude police); *Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328, 1341 (11th Cir. 2013) (Florida conviction for battery on a law enforcement officer); *United States v. Smith*, 652 F.3d 1244, 1248 (10th Cir. 2011) (assault or battery by a person in custody of an employee of the Office of Juvenile Affairs); *United States v. Delgado*, 320 F. App'x 286, 287 (5th Cir. 2009) (holding that, despite *Chambers*, walkaway escape is crime of violence because all escape comes with risk of harm); *United States v. Sawyers*, 409 F.3d 732, 742-43 (6th Cir. 2005) (77 CrL 364, 6/29/05) (statute punishing, *inter alia*, non-physical threats against officials), *abrogated on other grounds by United States v. Vanhook*, 640 F.3d 706 (6th Cir. 2011) (89 CrL 127, 4/27/11).

[16] *United States v. Espinoza*, 733 F.3d 568, 572-74 (5th Cir. 2013) (93 CrL 774, 9/25/13) (Texas conviction for reckless assault constitutes violent felony).

[17] *United States v. Gore*, 636 F.3d 728, 734, 738 (5th Cir. 2011) (89 CrL 16, 4/6/11) (conspiracy to commit aggravated robbery); *United States v. Chandler*, 743 F.3d 648 (9th Cir. 2014) (conspiracy to commit robbery); *United States v. Davis*, 689 F.3d 349, 357-58 (4th Cir. 2012) (attempted burglary); *United States v. Smith*, 645 F.3d 998, 1004-05 (8th Cir. 2011) (Minnesota's attempted burglary law); *United States v. Preston*, 910 F.2d 81, 87 (3d Cir. 1990) (''Since [the defendant] was convicted of conspiracy to commit a violent felony, the use or threat of physical force was a part of his prior conviction for this crime.'').

[18] Lower federal courts assumed that the anti-retroactivity doctrine applies in federal review of federal convictions, just as in federal review of a state conviction. However, this threshold issue has not been settled in the Supreme Court. *Chaidez v. United States*, 2013 BL 44424 (U.S. 2013).

[19] *Teague v. Lane*, 489 U.S. 288 (1989).

[20] Courts dealing with mandatory life sentences imposed on juvenile offenders have struggled to apply this dichotomy. E.g., *Songster v. Beard*, 35 F. Supp. 3d 657, 664 (E.D. Pa. 2014) (citing cases). The Supreme Court has granted certiorari to resolve the issue of whether *Miller* applies retroactively, as well as whether *Teague* sets the minimum requirements for retroactivity under state law. *Montgomery v. Louisiana*, No. 14-280 *cert. granted.* (U.S. Mar. 23, 2015) (96 CrL 671, 3/25/15).

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served for rules such as the right to counsel itself.[21] Unsurprisingly, no procedural rule has ever been deemed retroactive.

Substantive rules, however, are applied retroactively to cases on collateral review. *Johnson* is not a procedural rule, but unfortunately that does not automatically make it substantive. The test of a substantive rule is whether it ''place[s] an entire category of primary conduct beyond the reach of the criminal law'' or prohibits certain punishments for certain offenses.[22] Although *Johnson* has held that the ACCA cannot constitutionally support sentence enhancements under the residual clause, it certainly does not hold that Congress could not enhance a federal sentence based on prior convictions for statutory rape, or non-generic burglary, or for any other conviction, if it chose to do so. The Court applied the void-for-vagueness strand of due process jurisprudence, which existed long before *Johnson* was decided. Therefore, although constitutionally driven, I feel *Johnson* is a new rule of statutory interpretation, and not a new rule of constitutional law.

Even if *Johnson* is deemed retroactive, it may not help prisoners who have already filed a Section 2255 motion. Theoretically, a new, retroactive rule of constitutional law permits prisoners to file a second or successive motion, and also resets the one-year limitations period.[23] However, both provisions require the decision on retroactivity must come directly from the Supreme Court. Until the Supreme Court decides the issue, the Circuit Courts of Appeals are bound to deny permission to file a successive petition within 30 days of the date the prisoner requests it.[24] Because the one-year statute of limitations begins on the date *Johnson* was decided—not on the date retroactivity is decided—any Supreme Court decision may come too late, as the court itself has observed. [25] Thus, winning the retroactivity may only be possible for prisoners filing a first, timely Section 2255 petition.

## RETROACTIVITY: THE CASE FOR SECTION 2241

Section 2255 includes its own work-around provision. The ''Savings Clause'' in Section 2255(e) provides that a petition for a writ of habeas corpus under Section 2241 may be used instead if Section 2255 is ''inadequate or ineffective to test the legality of his detention.'' Courts have not agreed on whether and when Section 2241 is available, especially with regard to sentencing claims.[26] However, Section 2241 has been held to provide a vehicle for challenges to sentences based on new, retroactive interpretations of statutes that cannot proceed under Section 2255 because they are not based on constitutional law.[27] Section 2241's availability for *Johnson* claims is less certain than in previous ACCA cases, which clearly relied solely on statutory interpretation and not constitutional principles of due process. However, because *Johnson* is at its core a decision of statutory interpretation and not a new rule of constitutional law, *Johnson* claims ought to be cognizable in jurisdictions that allow Section 2241 challenges to sentencing errors based on the misapplication of a statute. Because the relevant jurisdiction is the place of *incarceration*, not *conviction*, the Bureau of Prisons may be the single most important actor in determining whether a prisoner obtains retroactive relief under *Johnson*.[28]

## GUIDELINES ISSUES: 'VIOLENT FELONIES' UNDER THE CAREER OFFENDER GUIDELINE

Courts rely on ACCA jurisprudence to interpret the term ''violent felony'' in U.S.S.G. § 4B1.1., the Sentencing Guideline for Career Offenders.[29] However, it is not clear that *Johnson* has any effect on the Guidelines, because courts have generally held that offenders have no constitutional right to a sufficiently reliable sentencing range within the statutory limits. These courts have rejected arguments that a specific guideline could ever be void for vagueness.[30] Prisoners sentenced as a career offender also face another hurdle: with only minor exceptions, guidelines issues are generally not cognizable under Section 2255[31] or under Section 2241. Courts allowing post-conviction challenges to the career offender guideline have pointed to the severity of the recommended sentence and the legislative directive to ensure that career offenders are sentenced ''at or near''

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[21] *Whorton v. Bockting*, 549 U.S. 406, 418-21 (2007) (80 CrL 591, 3/7/07).

[22] *Sawyer v. Smith*, 497 U.S. 227 (1990).

[23] 28 U.S.C. § § 2255(f)(3), 2255(h)(2).

[24] 28 U.S.C. § 2244(3).

[25] *Dodd v. United States*, 545 U.S. 353, 363-66 (2005) (77 CrL 321, 6/22/05) (Stevens, J., dissenting); *Tyler v. Cain*, 533 U.S. 656, 676-77 (2001) (69 CrL 423, 7/4/01) (Breyer, J. dissenting, joined by Stevens, Souter, Ginsberg).

[26] Case, Jennifer L., ''Kaleidoscopic Chaos: Understanding the Circuit Courts' Various Interpretations of § 2255's Savings Clause'' (Jan. 7, 2014). Available at SSRN: http://ssrn.com/ abstract=2375960 or http://dx.doi.org/10.2139/ssrn.2375960.

[27] *See* Gray Proctor, ''Christmas Comes Early in the Eleventh Circuit: Using *Bryant* and 28 U.S.C. § 2241 when Section 2255 is Inadequate to Challenge Illegally Enhanced Sentences,'' (94 CrL 479, 1/22/14) (discussing *Bryant v. Warden*, 738 F. 3d 1253 (11th Cir. 2013); 94 CrL 419, 1/8/14).

[28] *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (75 CrL 291, 6/30/04).

[29] *United States v. Whitson*, 597 F.3d 1218, 1222 (11th Cir. 2010) (per curiam) (86 CrL 662, 3/10/10); *see also* U.S.S.G. § 4B1.2 (defining ''crime of violence'' to include, in relevant part, any offenses that ''otherwise involves conduct that presents a serious potential risk of physical injury to another.'')

[30] *United States v. Wivell*, 893 F.2d 156, 159-60 (8th Cir. 1990); *State v. Rourke*, 773 N.W.2d 913, 922 (Minn. 2009); *State v. Baldwin*, 150 Wn.2d 448, 459, 78 P.3d 1005, 1011 (2003); *but see United States v. Johnson*, 130 F.3d 1352, 1354 (9th Cir. 1997) (allowing vagueness challenges to Guideline when ''the law is vague as applied to the facts of the case at hand''); *State v. Wagner*, 194 Ariz. 310, 982 P.2d 270, 272-73 (Ariz. 1999); *see also Cook v. United States*, 2006 BL 141197 (S.D.N.Y. 2006) (noting that Second Circuit has not decided the issue).

[31] *Spencer v. United States*, 773 F.3d 1132, 1138 (11th Cir. 2014) (96 CrL 226, 11/26/14) (rejecting § 2255 challenge to guidelines because ''erroneously designating a defendant as a career offender [] is not a fundamental defect that inherently results in a complete miscarriage of justice.''); *but see Whiteside v. United States*, 748 F.3d 541, 550-51 (4th Cir. 2014) (holding that application of career offender guideline may be challenged in a Section § 2255 motion) (95 CrL 66, 4/16/14) *vacated on other grounds on reh'g en banc Whiteside v. United States*, 775 F.3d 180, 182 (4th Cir. 2014); *Narvaez v. United States*, 674 F.3d 621, 628-29 (7th Cir. 2011) (90 CrL 362, 12/14/11) (allowing Section § 2255 challenge based on new ACCA case where offender was sentenced in pre-*Booker* mandatory guideline regime).

the statutory maximum,[32] but to date, most jurists have not found these arguments persuasive. Ultimately, however, it may be more likely that the Sentencing Commission will act to change the Guidelines, and then recommend that the change be applied retroactively, allowing prisoners to proceed to resentencing under 18 U.S.C. § 3582(c).

## CONCLUSION

*Johnson* illustrates the problems with the current retroactivity jurisprudence. These problems have persisted because only rarely does a new constitutional case present any real challenge. Applying *Johnson* will require federal courts to either re-think *Teague* and its interpretation of the statutory limits on federal post-conviction review, reconsider the criteria for deeming Section 2255 ''inadequate or ineffective,'' or accept the current status quo: that an unknown but presumably very large number of prisoners have been sentenced under an unconstitutional statute, and their eligibility for resentencing depends entirely on where the Bureau of Prisons has decided to house them.

[32] 28 U.S.C.A. § 994(h).

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