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## ESSAY

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### HOW THE SENTENCING COMMISSION DOES AND DOES NOT MATTER IN *BECKLES v. UNITED STATES*

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LEAH M. LITMAN<sup>†</sup> & LUKE C. BEASLEY<sup>‡</sup>

#### INTRODUCTION

Two years ago, in *Johnson v. United States*, the Supreme Court held that the so-called “residual clause” of the Armed Career Criminal Act (ACCA) is unconstitutionally vague.<sup>1</sup> Last spring, the Court made this rule retroactive in *Welch v. United States*.<sup>2</sup> Then in June, the Court granted certiorari in *Beckles v. United States* to resolve two questions that have split lower courts in the wake of *Johnson* and *Welch*: (1) whether an identically worded “residual clause” in a U.S. Sentencing Guideline—known as the career offender Guideline—is unconstitutionally void for vagueness; and (2) if so, whether the rule invalidating the Guideline’s residual clause applies retroactively.<sup>3</sup>

The questions on which the Court granted certiorari in *Beckles* turn on how similar the ACCA and the Sentencing Guidelines are. Both the ACCA and the Sentencing Guidelines impose additional punishment on defendants with previous convictions for violent felonies,<sup>4</sup> and both the ACCA and the Sentencing Guidelines define “violent felonies” to include any crime that “involves conduct that presents a serious potential risk of physical injury to another.”<sup>5</sup> Those thirteen words are called the “residual clause,” in both the

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Thanks to Erwin Chemerinsky and Song Richardson for helpful comments.

<sup>1</sup> 135 S. Ct. 2551, 2555-63 (2015).

<sup>2</sup> 136 S. Ct. 1257, 1263-68 (2016).

<sup>3</sup> 136 S. Ct. 2510 (2016) (mem.).

<sup>4</sup> 18 U.S.C. § 924(e)(1) (2012); U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (U.S. SENTENCING COMM’N 2014).

<sup>5</sup> 18 U.S.C. § 924(e)(2)(B)(ii); U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(2).

ACCA and the Sentencing Guidelines, and courts have interpreted this identical language the same way.<sup>6</sup>

But the ACCA and the Guidelines trigger different kinds of penalties. The ACCA is a federal statute—enacted by Congress—that subjects defendants to mandatory minimum sentences *and* increases defendants’ statutory maximum sentences. With the ACCA’s residual clause, the statutory *minimum* sentence is fifteen years; without it, the statutory *maximum* sentence is ten years.<sup>7</sup> Accordingly, *Johnson* meant that prisoners whose sentences depended on the ACCA’s residual clause received sentences that were *greater* than the maximum sentence provided for by statute.

In contrast, the Sentencing Guidelines are rules promulgated by the United States Sentencing Commission.<sup>8</sup> Under the career offender Guideline, a defendant who has committed two prior violent felonies is subject to an offense-level enhancement, meaning a correspondingly higher sentencing range.<sup>9</sup> The sentencing range, however, does not change a defendant’s statutory minimum or maximum sentence. While judges must sentence defendants within the sentencing range that is established by statute, judges are not required to sentence defendants within the sentencing range that is established by the Guidelines. Judges retain discretion to deviate from the sentencing range provided for by the Guidelines.<sup>10</sup> Therefore, if *Beckles* invalidates the identically worded “residual clause” in the Sentencing Guidelines, prisoners whose sentences depended on the Guidelines’ residual clause *could* still receive the same sentence at resentencing. However, while judges are not required to sentence a defendant within the sentencing range established by the Guidelines, the Guidelines’ range has a significant impact on a defendant’s ultimate sentence.<sup>11</sup>

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<sup>6</sup> Leah M. Litman, *Residual Impact: Resentencing Implications of Johnson’s Potential Ruling on ACCA’s Constitutionality*, 115 COLUM. L. REV. SIDEBAR 55, 64 & n.46 (2015).

<sup>7</sup> Compare 18 U.S.C. § 924(e)(1) (mandating the fifteen-year minimum for those previously convicted of violent felonies), with *id.* § 924(a)(2) (fixing the maximum prison sentence at ten years).

<sup>8</sup> See *Stinson v. United States*, 508 U.S. 36, 45 (1993) (noting that the Sentencing Commission drafts the sentencing guidelines and “the guidelines are the equivalent of legislative rules adopted by federal agencies”).

<sup>9</sup> See U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (setting the requirements for career offenders—including the conviction of previous violent felonies—and fixing corresponding criminal history categories).

<sup>10</sup> See *Dillon v. United States*, 560 U.S. 817, 820 (2010) (noting that *United States v. Booker*, 543 U.S. 220, 259 (2005), “rendered the [Sentencing] Guidelines advisory”); U.S. SENTENCING GUIDELINES MANUAL § 5G1.1(c)(1) (stating that a court may not impose a sentence “greater than the statutorily authorized maximum sentence”); *id.* § 5G1.1(c)(2) (stating that a court may not impose a sentence that is “less than any statutorily required minimum sentence”).

<sup>11</sup> See Brief Amicus Curiae of Scholars of Criminal Law, Federal Courts, and Sentencing in Support of Petitioner at 12, *Beckles v. United States*, No. 15-8544 (U.S. Aug. 18, 2016) (“Although the Guidelines are no longer mandatory, they have considerable influence on sentencing determinations because of the procedures courts must follow in imposing sentence.”).

This short Essay considers how significant the differences between the ACCA and the Guidelines are, and how important the Sentencing Commission should be to *Beckles*'s resolution of the retroactivity question. Some of the differences between the ACCA and the Guidelines also may be relevant to whether the career offender Guideline's residual clause, like the ACCA's residual clause, is unconstitutional.<sup>12</sup> But this Essay focuses on whether the differences between the ACCA and the Guidelines matter to the second question the Court is poised to address in *Beckles*—namely whether a rule invalidating the Guideline's residual clause applies retroactively, rather than whether the Guideline's residual clause should be invalidated.

There are two ways in which the Sentencing Commission might affect the retroactivity question. One way would be if the Guidelines promulgated by the Commission frequently affect defendants' sentences. An important difference between the ACCA and the Guidelines is that judges are required to sentence defendants within the range established by the ACCA, but they are not required to sentence defendants within the range established by the Guidelines. But that difference should not matter much if judges routinely sentence defendants within the range established by the Guidelines. As it happens, there is good evidence that a defendant's sentence changes dramatically depending on whether a court is allowed to impose a sentence by relying on the Guideline's residual clause. Every court of appeals, except for the Eleventh Circuit, has either held that the Guideline's residual clause is invalid or assumed that it is. And the resentencings that have occurred have resulted in dramatically *lower* sentences.

The experience in the courts of appeals confirms that judges routinely sentence defendants within the range established by the Guidelines. But more importantly for the question in *Beckles*, the experience makes perfectly clear that a defendant's sentence changes dramatically depending on whether a court can sentence a defendant under the Guideline's residual clause. And because a rule invalidating the Guideline's residual clause affects defendants' sentencing outcomes, whatever finality interests exist in defendants' sentences are outweighed by the profound effects that a rule invalidating the Guideline's residual clause has on the terms of imprisonment defendants actually serve. Accordingly, a rule invalidating the Guideline's residual clause should apply retroactively on collateral review.

There is also a second way in which the Sentencing Commission might affect whether the Court will retroactively apply a rule invalidating the Guideline's residual clause. When the Supreme Court decides whether to apply a rule retroactively, it occasionally considers the burden that would

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<sup>12</sup> See *United States v. Matchett*, 802 F.3d 1185, 1193-96 (11th Cir. 2015) (relying on differences between statutes and the Guidelines to conclude that the vagueness doctrine does not apply to the Guidelines).

result from doing so. If the Sentencing Commission thought it burdensome to retroactively apply a rule invalidating the Guideline's residual clause, then the Commission's views might be evidence that retroactively applying the rule actually would be burdensome. But here, the Sentencing Commission matters little because the Commission never even investigated the extent of any possible burden on the federal courts.

This Essay proceeds in two parts. Part I argues that the resentencings in jurisdictions where the Guideline's residual clause is invalid indicate that a rule invalidating the Guideline should apply retroactively. Part II argues that nothing the Commission has done suggests that it would be unduly burdensome to retroactively apply a rule invalidating the Guideline's residual clause.

### I. THE IMPACT OF RESENTENCINGS

Under *Teague v. Lane*, new constitutional rules of criminal procedure generally do not apply on collateral review.<sup>13</sup> But new *substantive* rules of constitutional law do apply.<sup>14</sup> The Supreme Court's definition of substantive rules has evolved over time. *Teague* originally stated that a substantive rule is one that "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'"<sup>15</sup> But the Court's most recent retroactivity cases have solidified a somewhat different definition of substantive rules: a rule is substantive if it "necessarily carries a significant risk that a defendant . . . faces a punishment that the law cannot impose upon him."<sup>16</sup> Included in that definition are rules that "narrow the scope of a criminal statute by interpreting its terms,"<sup>17</sup> as well as rules concluding that "the Constitution itself deprives the State of the power to impose a certain penalty."<sup>18</sup> Last term, the Court held retroactive a rule that invalidated a criminal statute, which had imposed a mandatory minimum sentence and raised the statutory maximum sentence.<sup>19</sup> And in *Montgomery v. Louisiana*, the Court made retroactive a rule that invalidated the *mandatory* imposition of life without parole on certain offenders (juveniles) but did not rule out the actual imposition of life without parole on those same offenders.<sup>20</sup>

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<sup>13</sup> 489 U.S. 288, 306-07 (1989) (plurality opinion).

<sup>14</sup> See *Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016) ("[C]ourts must give retroactive effect to new substantive rules of constitutional law.").

<sup>15</sup> 489 U.S. at 307 (plurality opinion) (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in the judgment)).

<sup>16</sup> *Montgomery*, 136 S. Ct. at 734 (alterations omitted) (internal quotation marks omitted) (quoting *Schiro v. Summerlin*, 542 U.S. 348, 352 (2004)).

<sup>17</sup> *Schiro*, 542 U.S. at 351 (citing *Bousley v. United States*, 523 U.S. 614, 620-21 (1998)).

<sup>18</sup> *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989).

<sup>19</sup> *Welch v. United States*, 136 S. Ct. 1257, 1262, 1268 (2016).

<sup>20</sup> 136 S. Ct. at 732-36.

There are many reasons why a rule invalidating the Guideline should apply retroactively. This Essay focuses on only one of them, in part because this particular reason has not been raised in any of the briefs in support of Mr. Beckles.<sup>21</sup> That reason is: a rule invalidating the Guideline affects defendants' sentencing outcomes, and under the Court's recent decision in *Montgomery*, this means that the rule should apply retroactively.

*Montgomery* is one of the most significant precedents for the retroactivity question in *Beckles*. It held retroactive a rule—announced in *Miller v. Alabama*<sup>22</sup>—that *did not actually rule out* the imposition of a particular sentence on certain defendants. Before *Miller*, juveniles could be sentenced to life without parole. The Court in *Miller* struck down a statute imposing a sentence of mandatory life without parole for certain offenders,<sup>23</sup> but it left open the possibility that some juveniles could *still* be sentenced to life without parole.<sup>24</sup> Therefore, the rule announced in *Miller*—and the rule *Montgomery* held retroactive—was that juveniles could not be sentenced to life without parole under a statute that *mandated* the imposition of this sentence, but they *could* be sentenced to life without parole by a court that had some discretion in imposing such a sentence.<sup>25</sup> *Miller* and *Beckles* are thus parallel in this respect: in both cases, judges *could* impose the same sentences upon resentencing.

Even though *Miller* did not foreclose the possibility that defendants could receive the same sentences upon resentencing, the Court held *Miller* retroactive,<sup>26</sup> and the United States even argued for that result.<sup>27</sup> The Court reasoned that *Miller* was retroactive because, while *Miller* did not *rule out* the imposition of life without parole, the result of *Miller* was that only “the rare juvenile offender whose crime reflects irreparable corruption” would receive life without parole.<sup>28</sup> The United States pressed a similar argument in its

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<sup>21</sup> See generally, e.g., Brief for Petitioner, *Beckles v. United States*, No. 15-8544 (U.S. Aug. 11, 2016); Brief of the Federal Public and Community Defenders and the National Association of Federal Defenders as Amici Curiae in Support of Petitioner, *Beckles*, No. 15-8544 (U.S. Aug. 18, 2016); Brief Amicus Curiae of Scholars of Criminal Law, Federal Courts, and Sentencing in Support of Petitioner, *supra* note 11.

<sup>22</sup> 132 S. Ct. 2455 (2012).

<sup>23</sup> *Id.* at 2463-75.

<sup>24</sup> See *id.* at 2471 (“Our decision does not categorically bar a penalty for a class of offenders or type of crime . . .”).

<sup>25</sup> *Id.* at 2475.

<sup>26</sup> *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016).

<sup>27</sup> See *infra* note 29 and accompanying text.

<sup>28</sup> *Montgomery*, 136 S. Ct. at 734 (internal quotation marks omitted) (quoting *Miller*, 132 S. Ct. at 2469); see also *id.* at 726 (“Although *Miller* did not foreclose a sentencer’s ability to impose life without parole on a juvenile, the Court explained that a lifetime in prison is a disproportionate sentence for all but the rarest of children . . .”); *id.* at 733 (“The Court [in *Miller*] recognized that a sentencer might encounter the *rare* juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified.” (emphasis added)).

amicus brief urging the Court to apply *Miller* retroactively. The United States maintained that the “experience post-*Miller* confirms that the *Miller* rule is substantive,” and then pointed to (among other things), the fact that “the federal juvenile offenders who have been resentenced under *Miller*”—all ten of them—“received sentences less severe than life imprisonment without parole.”<sup>29</sup>

Interestingly, something similar has occurred in jurisdictions where courts have held that the Sentencing Guideline’s residual clause is invalid. After *Johnson*, every court of appeals, aside from the Eleventh Circuit, has held or assumed that the residual clause is invalid.<sup>30</sup> When defendants have been resentenced in jurisdictions where the residual clause is invalid, they have uniformly received less severe sentences, as shown below. That is, offenders who have been resentenced under a rule invalidating the Guideline’s residual clause—that is, sentenced *without* the residual clause—have received sentences less severe than the sentences they received *with* the residual clause. And this has occurred in eight of the eleven circuits that have determined the residual clause is invalid. The same will likely occur in the other three circuits where defendants are awaiting resentencing because these defendants’ amended Guidelines ranges—without the career offender Guideline—are dramatically lower than the ranges they were initially given due to the career offender Guideline.<sup>31</sup>

Turning to some specific cases, one set of defendants that span eight circuits—that is, a group of defendants which includes one defendant from each circuit that has conducted resentencings—have had their terms of imprisonment collectively reduced by 288 months (over twenty-four years):

1. First Circuit

Anthony Soto-Rivera: resentenced to 87 months of imprisonment instead of 108 months.<sup>32</sup> Soto-Rivera has appealed from resentencing.<sup>33</sup>

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<sup>29</sup> Brief for the United States as Amicus Curiae Supporting Petitioner at 17, 22, *Montgomery*, 136 S. Ct. 718 (2016) (No. 14-280); see also *id.* at 1a-3a (listing the ten sentences and their respective outcomes).

<sup>30</sup> See Brief for Petitioner, *supra* note 21, at 28 & n.7 (collecting cases). Since that brief was filed, the Seventh Circuit has also held that the Guideline’s residual clause is invalid. See *United States v. Hurlburt*, No. 14-3611, No. 15-1686, 2016 WL 4506717, at \*3-7 (7th Cir. Aug. 29, 2016) (en banc).

<sup>31</sup> Given how many defendants are sentenced as career offenders—orders of magnitude more than ten, see Litman, *supra* note 6, at 74—we did not collect the outcomes of all resentencings.

<sup>32</sup> See *United States v. Soto-Rivera*, 811 F.3d 53, 56 (1st Cir. 2016); Amended Judgment at 2, *United States v. Soto-Rivera*, No. 3:13-0463 (D.P.R. July 28, 2016).

<sup>33</sup> Notice of Appeal, *United States v. Soto-Rivera*, No. 3:13-00463 (D.P.R. Aug. 4, 2016).

## 2. Second Circuit

Lucian Petrillo: resentenced to 151 months of imprisonment instead of 188 months.<sup>34</sup>

## 3. Third Circuit

Willis Duane Evans: resentenced to time served—and thus released after 153 months of imprisonment—when the original sentence was 205 months of imprisonment.<sup>35</sup>

## 4. Fifth Circuit

Raymond Estrada: resentenced to 120 months of imprisonment instead of 188 months.<sup>36</sup> Estrada has appealed from resentencing.<sup>37</sup>

## 5. Sixth Circuit

Jesse J. Pawlak: resentenced to 71 months of imprisonment instead of 105 months.<sup>38</sup>

## 6. Eighth Circuit

Chad Taylor: resentenced to 18 months of imprisonment instead of 37 months.<sup>39</sup>

## 7. Ninth Circuit

Demarkus Dante Benavides: resentenced to 35 months of imprisonment instead of 87 months.<sup>40</sup>

## 8. Tenth Circuit

Nathaniel J. Smith: resentenced to 63 months of imprisonment instead of 120 months.<sup>41</sup>

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<sup>34</sup> See *Petrillo v. United States*, 147 F. Supp. 3d 9, 12 (D. Conn. 2015); Amended Judgment at 1, *United States v. Petrillo*, No. 3:05-0312 (D. Conn. Jan. 29, 2016).

<sup>35</sup> See *United States v. Evans*, No. 2:02-0001, No. 2:14-171, 2015 WL 9480097, at \*4 (W.D. Pa. Dec. 29, 2015); Amended Judgment at 2, *United States v. Evans*, No. 1:02-0001 (W.D. Pa. Jan. 6, 2016).

<sup>36</sup> See Amended Judgment at 2, *United States v. Estrada*, No. 2:14-0681 (S.D. Tex. Dec. 18, 2015); Sentencing Transcript at 4, *United States v. Estrada*, No. 2:14-0681 (S.D. Tex. Dec. 17, 2015).

<sup>37</sup> Notice of Appeal, *United States v. Estrada*, No. 2:14-0681 (S.D. Tex. Dec. 21, 2015).

<sup>38</sup> See *United States v. Pawlak*, 822 F.3d 902, 903 (6th Cir. 2016); Minutes of Proceedings, *United States v. Pawlak*, No. 1:14-0305 (N.D. Ohio Aug. 16, 2016).

<sup>39</sup> See *United States v. Taylor*, 803 F.3d 931, 933 (8th Cir. 2015) (Colloton, J., dissenting); Amended Judgment at 2, *United States v. Taylor*, No. 4:13-0142-001 (E.D. Ark. Dec. 14, 2015).

<sup>40</sup> See *United States v. Benavides*, 617 F. App'x 790 (9th Cir. 2015); Amended Judgment at 2, *United States v. Benavides*, No. 4:13-0718 (N.D. Cal. Dec. 17, 2015).

<sup>41</sup> See *United States v. Smith*, 628 F. App'x 565, 566 (10th Cir. 2015); Amended Judgment at 2, *United States v. Smith*, No. 1:14-1136 (D.N.M. Nov. 9, 2015).



No matter how you slice the 288 months (24+ years) of imprisonment, the numbers underscore how much the Guidelines matter to defendants' sentences. Each defendant received, on average, thirty-six months less imprisonment—three *years* less imprisonment—when sentenced without the residual clause, demonstrating the pull that the Guidelines exert on defendants' sentences. Indeed, because the career offender Guideline recommends so much additional imprisonment, Willis Duane Evans was ordered released, as his new Guidelines range and sentence exceeded the time he had already served.<sup>42</sup>

The same results are likely to follow in the three circuits where defendants are awaiting potential resentencing.<sup>43</sup> The sheer disparity between the new and old Guideline ranges for these defendants strongly suggests that they too will have their terms of imprisonment dramatically reduced:

#### 1. Fourth Circuit

Jolon Devon Carthorne, Sr.: Guidelines range with the career offender designation: 322–387 months of imprisonment. Guidelines range without the career offender designation: 181–211 months of imprisonment. Actual sentence: 300 months of imprisonment (downward departure for acceptance of responsibility).<sup>44</sup> Carthorne sought to amend his sentence on the theory that the Guideline's residual clause was invalid under *Johnson*, but the district court rejected his claim.<sup>45</sup> He has since sought a certificate of appealability from the Fourth Circuit.<sup>46</sup>

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<sup>42</sup> See *United States v. Evans*, No. 2:02-0001, No. 2:14-171, 2015 WL 9480097, at \*4 (W.D. Pa. Dec. 29, 2015) (discussing how the advisory range is now calculated and applying it to Evans).

<sup>43</sup> Because other provisions of the career offender Guideline remain valid, not all defendants sentenced as career offenders must be resentenced if the career offender Guideline's residual clause is held invalid. For example, the career offender Guideline imposes additional punishment where a defendant has prior convictions for violent felonies or controlled substance offenses. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1(a) (U.S. SENTENCING COMM'N 2014). The provision imposing punishment based on controlled substance offenses remains valid. So too do other definitions of "violent felonies" aside from the residual clause. See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(2) (defining "crime of violence" to include, inter alia, "burglary of a dwelling, arson, or extortion"). For further explanation, see Leah M. Litman, *Resentencing in the Shadow of Johnson v. United States*, 28 FED. SENT'G REP. 45, 46-47 (2015) (detailing how *Johnson* does not directly affect sentences resulting from the application of the enumerated offense, element of force, or serious drug offense clauses).

<sup>44</sup> *United States v. Carthorne*, 726 F.3d 503, 508-09 (4th Cir. 2013).

<sup>45</sup> *Carthorne v. United States*, No. 1:10-96-1, No. 1:14-447 (M.D.N.C. Nov. 20, 2015) (recommending denial of the motion to vacate sentence); see also *Carthorne v. United States*, No. 1:10-96-1, No. 1:14-447 (M.D.N.C. Mar. 4, 2016) (adopting the magistrate's recommendation).

<sup>46</sup> Memorandum of Supporting Facts and Request for Certificate of Appealability, *Carthorne v. United States*, No. 16-6515 (4th Cir. May 10, 2016). In *United States v. Frazier*, the Fourth Circuit "assume[d] without deciding" that the Guideline's residual clause was invalid but declined to order

## 2. Seventh Circuit

Myron Zollicoffer: Guidelines range with the career offender designation: 262–327 months of imprisonment. Guidelines range without the career offender designation: 92–115 months of imprisonment. Actual sentence: 230 months of imprisonment.<sup>47</sup> Zollicoffer has moved to amend his sentence on the theory that the Guideline’s residual clause is invalid under *Johnson*.<sup>48</sup>

## 3. D.C. Circuit

Dante Sheffield: Guidelines range with the career offender designation: 360 months of imprisonment–life imprisonment. Guidelines range without the career offender designation: 92–115 months of imprisonment. Actual sentence: 230 months of imprisonment.<sup>49</sup> The D.C. Circuit has remanded Sheffield’s case for resentencing, finding the Guideline’s residual clause invalid under the reasoning of *Johnson*.<sup>50</sup>

Again, no matter how you slice the numbers, they are striking. These three defendants together received terms of imprisonment that are 319 months longer—more than twenty-six *years* longer—than the *top* of their Guidelines ranges without the career offender designation. Indeed, the D.C. Circuit observed that Mr. Sheffield “was sentenced to *double* the top of the Guidelines range he otherwise would have faced.”<sup>51</sup>

Should the experience in these circuits be relevant? We believe so. Without expanding on that belief in great detail, we highlight what the United States said in its own brief in *Montgomery*, when it made a similar claim:

The *Teague* principles balance the respect accorded to a final judgment and the interest in fundamental fairness in criminal proceedings. The Court has explained that procedural rules generally do not apply retroactively because the interest in finality outweighs the speculative effect of the new rule on a conviction or sentence.

Substantive rules, in contrast, apply retroactively because their effects on the fairness of a defendant’s conviction or sentence are sufficiently profound to justify upsetting final judgments. The Court has observed that the

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resentencing because it concluded that the error did not affect the defendant’s sentence—a finding based, in part, on the fact that the district court varied upward to the statutory maximum sentence. See 621 F. App’x 166, 168–69 (4th Cir. 2015).

<sup>47</sup> See Amended Motion to Vacate Sentence Under 28 U.S.C. § 2255, at 2, *Zollicoffer v. United States*, No. 3:15-03337 (C.D. Ill. Jan. 29, 2016).

<sup>48</sup> *Id.* at 4–18. The Seventh Circuit has since held the Guideline’s residual clause invalid. See *United States v. Hurlburt*, No. 14-3611, No. 15-1686, 2016 WL 4506717, at \*3–7. (7th Cir. Aug. 29, 2016) (en banc).

<sup>49</sup> See *United States v. Sheffield*, No. 12-3013, 2016 WL 4254995, at \*11 (D.C. Cir. Aug. 12, 2016).

<sup>50</sup> *Id.* at \*13–15.

<sup>51</sup> *Id.* at \*13.

substantive rules it has recognized “necessarily carry a significant risk that a defendant . . . faces a punishment that the law cannot impose upon him,” and that risk is sufficient to overcome a State’s interests in finality and comity.

The same reasoning applies to *Miller*. Although the Court did not preclude a life-without-parole sentence . . . , the Court expected that . . . life without parole would be an “uncommon” sentence . . . . [T]he federal experience proves this point . . . .<sup>52</sup>

Applied to *Beckles*, the argument is just as straightforward. If the Court invalidates the Guideline’s residual clause, the risk that defendants received additional punishment—years in prison—because they were sentenced under the invalid Guideline provision is sufficient to overcome the interest in finality.<sup>53</sup>

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<sup>52</sup> Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 29, at 21-22 (citations omitted). Arguing that a rule invalidating the Guideline’s residual clause is not substantive, the United States hedged on the argument it made in *Montgomery*: “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.” Brief for the United States as Respondent at 20, No.15-8544, *Beckles v. United States* (U.S. Sept. 19, 2016). The United States then listed several procedural rules, such as the “rule requiring defense counsel to warn a defendant about the immigration consequences of pleading guilty,” *id.* at 32, and maintained:

Each of those important procedural rules undoubtedly exerts a significant effect on findings of guilt or the imposition of capital punishment in many cases. . . . 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 . . . .

*Id.* at 32.

This framing differs from the United States’ claim that a rule may be substantive, rather than procedural, *because* the rule results in different sentencing outcomes. Moreover, the United States previously maintained that rules were procedural *because* they had only “speculative effect[s]” on a conviction or sentence, whereas now it maintains that even “documentable effects” are not sufficient. The United States’ new argument also overlooks how the Guidelines function as substantive law imposing punishment in a way that is not true for the other rules or procedures the Court invalidated and the United States identified. *See id.* at 26-28 (listing rules). The Guidelines specify additional prison time for punitive reasons, whereas the other rules the United States identified concerned advice to criminal defendants or the manner in which testimonial evidence may be presented at trial. The Guidelines—in particular the career offender Guideline—also differ from instructions at capital sentencings. The application of the career offender Guideline subjects a defendant to the *maximum* criminal history category, whereas any one component in a jury instruction does not automatically yield a particular sentencing outcome or range for a defendant. *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.1(b) (U.S. SENTENCING COMM’N 2014) (“A career offender’s criminal history category in every case under this subsection shall be Category VI.”). And “the Guidelines are in a real sense the basis for the [defendants’] sentence[s]” in a way that jury instructions are not. *Peugh v. United States*, 133 S. Ct. 2072, 2083 (2013) (quoting *Freeman v. United States*, 131 S. Ct. 2685, 2692 (2011) (plurality opinion) (emphasis removed)).

<sup>53</sup> *See, e.g., Schiro v. Summerlin*, 542 U.S. 348, 352 (2004) (stating that substantive rules “necessarily carry a significant risk that a defendant . . . faces a punishment that the law cannot impose upon him” (citation omitted)).

Although defendants *could* receive the same sentences after *Beckles* (without the career offender Guideline) that they received before *Beckles* (when they were sentenced under the career offender Guideline), that result would be “uncommon,” as the above examples illustrate. Those examples show that a rule invalidating the Guideline’s residual clause has “profound” effects on defendants’ actual sentences.<sup>54</sup> Therefore, a rule invalidating the Guideline’s residual clause should apply retroactively.

## II. THE IMPACT OF THE SENTENCING COMMISSION’S (IN)ACTION

The resentencing outcomes for defendants sentenced under the Guideline’s residual clause highlight the importance of the Sentencing Commission to defendants’ terms of imprisonment.

But the Sentencing Commission is less significant to another aspect of *Beckles*. When the Supreme Court has analyzed whether to apply a rule retroactively, it has, at times, considered the effect on the criminal justice system of doing so. For example, when the Court in *Montgomery* made retroactive the rule invalidating mandatory imposition of life without parole on juveniles, the Court explained, “Extending parole eligibility to juvenile offenders does not impose an onerous burden on the States . . . .”<sup>55</sup>

The Sentencing Commission *could* hypothetically have a claim to assessing the burden imposed by retroactively applying a rule invalidating the Guideline’s residual clause. Before the Court decided to hear *Beckles* and to resolve whether the Guideline’s residual clause is unconstitutional, the Sentencing Commission issued an amendment deleting the Guideline’s residual clause.<sup>56</sup> But the Commission made the amendment deleting the Guideline’s residual clause effective August 1, 2016.<sup>57</sup> That means the amended career offender Guideline—the version that does not include the residual clause—only applies to sentencings that are conducted *after* August 1, 2016.<sup>58</sup> In other words, the amendment is not “retroactive”; it does not apply to convictions that became final before August 2016. Indeed, the amendment does

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<sup>54</sup> Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 29, at 21–22.

<sup>55</sup> 136 S. Ct. 718, 736 (2016).

<sup>56</sup> U.S. SENTENCING COMM’N, AMENDMENT TO THE SENTENCING GUIDELINES 2 (2016), [http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160121\\_RF.pdf](http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160121_RF.pdf) [<https://perma.cc/H7DD-3PFD>].

<sup>57</sup> *Id.* at ii.

<sup>58</sup> The Guidelines direct courts to apply the version of the Guidelines “in effect on the date the defendant is sentenced” unless doing so “would violate the *ex post facto* clause of the United States Constitution,” in which case the court is to use the Guidelines Manual “in effect on the date that the offense of conviction was committed.” U.S. SENTENCING GUIDELINES MANUAL § 1B1.11 (U.S. SENTENCING COMM’N 2014). Because the Guideline amendment deleting the residual clause imposes *less* punishment than the prior version of the Guideline, courts could apply the amendment to defendants who committed their offenses prior to the amendment, but were sentenced after the amendment.

not even apply to cases that have not yet become final if sentencing occurred prior to August 2016.

The Sentencing Commission could have chosen to make the amendment retroactive. The Sentencing Commission has the authority to make a Guideline amendment retroactive.<sup>59</sup> It has chosen to make retroactive some recent amendments that reduced the term of imprisonment recommended in Guidelines applicable to certain drug offenses.<sup>60</sup> And when the Commission decides whether to give a Guideline amendment retroactive application, the Sentencing Guidelines direct the Commission to consider “the difficulty of applying [an] amendment retroactively.”<sup>61</sup> Therefore, the Commission’s decision not to make retroactive the amendment deleting the Guideline’s residual clause *could* be seen as evidence that such retroactive application would be burdensome.

But in this case, the Sentencing Commission’s own choice about retroactivity is not particularly good evidence of how burdensome it might be for the Supreme Court to make a rule invalidating the Guideline’s residual clause retroactive. That is, in part, because the Sentencing Commission opted not to investigate the possibility of making its amendment retroactive at all—a decision that appears to have been based on incomplete reasoning and supposition. For example, the Sentencing Commission merely observed that the process for determining which career offenders should be resentenced would be more difficult than the process used for the retroactive drug Guideline amendments.<sup>62</sup> Administrability concerns were also raised when

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<sup>59</sup> 18 U.S.C. § 3582(c)(2) (2012); 28 U.S.C. § 994(o), (u) (2012); U.S. SENTENCING GUIDELINES MANUAL § 1B1.10 cmt. background. The statutes and Guidelines refer to retroactivity as specifying that prisoners may have their terms of imprisonment reduced in light of a Guideline amendment that lowers the term of imprisonment recommended in the Guideline. But the Commission itself sometimes refers to this as retroactivity. *See, e.g.*, U.S. SENTENCING COMM’N, FREQUENTLY ASKED QUESTIONS: RETROACTIVE APPLICATION OF THE 2014 DRUG GUIDELINES AMENDMENT, [http://www.ussc.gov/sites/default/files/pdf/amendment-process/materials-on-2014-drug-guidelines-amendment/20140724\\_FAQ\\_revised.pdf](http://www.ussc.gov/sites/default/files/pdf/amendment-process/materials-on-2014-drug-guidelines-amendment/20140724_FAQ_revised.pdf) [<https://perma.cc/2G5H-DRBK>] (stating that changes in guideline ranges for drug trafficking offenses may allow for certain prisoners to have the changes applied retroactively).

<sup>60</sup> *See* U.S. SENTENCING COMM’N, FREQUENTLY ASKED QUESTIONS, *supra* note 59 (detailing the retroactive application of these amendments).

<sup>61</sup> U.S. SENTENCING GUIDELINES MANUAL § 1B1.10 cmt. background.

<sup>62</sup> *See* U.S. SENTENCING COMM’N, CHAIR REMARKS FOR PUBLIC MEETING 4 (Jan. 8, 2016), <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160108/remarks.pdf> [<https://perma.cc/ERU2-FNHD>] [hereinafter REMARKS] (statement of Hon. Patti B. Saris, Chair, U.S. Sentencing Comm’n) (noting that sentencing documentation does not identify which provision led to the career offender designation or which criminal history events were counted as predicates, making it difficult to “identify cases in which the residual clause alone qualified an offender for the career offender provision”); U.S. SENTENCING COMM’N, PUBLIC MEETING MINUTES 6-7 (Jan. 8, 2016), [http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160108/meeting\\_minutes.pdf](http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160108/meeting_minutes.pdf) [<https://perma.cc/BC8V-C9QB>] [hereinafter MINUTES] (highlighting similar issues); *see also Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines Before the U.S. Sentencing Comm’n* 153-55 (Nov. 5, 2015), <http://www.ussc.gov/sites/default/files/>

the Commission investigated whether to apply the drug Guideline amendments retroactively, but after the Commission chose to apply the amendments retroactively, experience has shown that such fears did “not come to pass.”<sup>63</sup>

Moreover, at the hearing about the career offender Guideline amendment, the Commission was informed that the number of career offender designations that depended on the residual clause—or even violent crimes, as opposed to controlled substance offenses—was “far fewer . . . than the thousands of defendants who got resentenced during” the drug Guideline amendments.<sup>64</sup> The testimony continued: “The numbers [of potential *Beckles* claims] are a lot smaller so the total burden is the same or less and the importance of it is even greater because the swings [from applying the career offender designation] are so great.”<sup>65</sup> The chair noted in response only “[t]hat’s interesting” and “[w]e need to look at that.”<sup>66</sup> It is not clear from the explanation or statements accompanying the Commission’s final amendments—which say nothing about the possible number of career offenders sentenced based on violent crimes, or the number of career offender designations that might depend on the residual clause—that they did look into the burden issue.<sup>67</sup>

Additionally, some of the reasons the Commission gave for not making the Guideline amendment retroactive suggested it should have done so. For

transcript\_4.pdf [https://perma.cc/7VFR-JUNX] [hereinafter TRANSCRIPT] (statement of Hon. Patti B. Saris, Chair, U.S. Sentencing Comm’n) (“[O]n the retroactivity piece, drugs minus two was easy. . . . [L]et’s say you knock out . . . the residual clause. . . . It’s just not as simple as drugs. . . . It’s just more complicated.”).

<sup>63</sup> *Public Hearing Before the U.S. Sentencing Comm’n* 65 (June 1, 2011), [http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110601/Hearing\\_Transcript.pdf](http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110601/Hearing_Transcript.pdf) [https://perma.cc/7K9X-UEGE] (statement of Michael S. Nachmanoff, Federal Public Defender for the Eastern District of Virginia); *see also* Brief of Scholars of Federal Courts & Sentencing as Amici Curiae in Support of Petitioner at 28-30, *Welch v. United States*, 136 S. Ct. 1257 (2016) (No. 15-6418) (arguing that recent retroactive amendments to the Sentencing Guidelines did not present the administrability problems that were initially surmised).

<sup>64</sup> TRANSCRIPT, *supra* note 62, at 155 (statement of Zachary Margulis-Ohnuma, Nat’l Ass’n of Criminal Defense Lawyers).

<sup>65</sup> *Id.* at 156 (statement of Zachary Margulis-Ohnuma, Nat’l Ass’n of Criminal Defense Lawyers).

<sup>66</sup> *Id.* (statement of Hon. Patti B. Saris); *cf. id.* at 37 (statement of Hon. Charles R. Breyer) (“I don’t think we are at a point know [sic] where we can make a determination as to what would be the impact of any changes . . .”).

<sup>67</sup> *See* REMARKS, *supra* note 62, at 4 (stating without specification that “it is difficult, if not impossible to ascertain the overall effect” of giving retroactive application); *see also* MINUTES, *supra* note 62, at 6-7 (noting the potential difficulties of giving retroactive application without reference to any specific studies undertaken). The Criminal Law Committee deferred to the Commission on the issue of retroactivity because of incomplete information regarding the potential burden imposed by the resentencing process. *See Testimony of Hon. Irene M. Keeley Presented to the U.S. Sentencing Comm’n on Nov. 15, 2015, on Proposed Changes to Definitions of “Crime of Violence” and Related Issues* 10-11, <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20151105/Keeley.pdf> [https://perma.cc/CE2F-MSET] (discussing the Committee’s reasons for deferring).

instance, the Commission's decision not to make the residual clause's deletion retroactive was based, in part, on its observation that the purpose of the amendment was "to address the litigation associated with the crime of violence definition in the career offender guideline."<sup>68</sup> At the same time, the Commission took note of the fact that "the very issue of retroactivity is already being litigated."<sup>69</sup> Presumably, making the amendment retroactive would have addressed this litigation, just as deletion of the residual clause addressed the litigation over that issue.

#### CONCLUSION

The Sentencing Guidelines and Sentencing Commission are both *more* and *less* significant to *Beckles* than one might expect. They are *more* significant because the experience with resentencings under the career offender Guideline highlights how much the Commission's sentencing determinations affect defendants' sentences. But they are *less* significant with respect to the extent of any difficulty that would ensue were the Court to make retroactive a rule invalidating the Guideline's residual clause, because the Commission opted not to investigate the extent of any potential difficulty at all.

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<sup>68</sup> MINUTES, *supra* note 62, at 6.

<sup>69</sup> *Id.* at 6-7.