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Resentencing in the Shadow of *Johnson v. United States*

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On June 26, 2015, the Supreme Court handed down a decision many years in the making—*Johnson v. United States*.[1] *Johnson* held that the "residual clause" of the Armed Career Criminal Act (ACCA) is unconstitutionally vague. Although *Johnson* may have been overshadowed in the final days of a monumental Supreme Court term, the decision is a significant one that will have important consequences for the criminal justice system. ACCA's residual clause imposed a severe 15-year mandatory minimum term of imprisonment, and many federal prisoners qualify for ACCA's mandatory minimum.[2] *Johnson* did away with ACCA's residual clause such that defendants will no longer face the prospect of its harsh penalties.

But will *Johnson* have any significance for the prisoners who have already been sentenced under ACCA's residual clause and whose convictions have become final? The answer to this question turns on a set of doctrines and statutes that govern federal courts' authority in collateral or post-conviction review proceedings—proceedings that occur after a defendant's conviction has become final. The courts of appeals have begun to sort through these issues, and at least one circuit split may have already emerged.

Under the Anti-terrorism and Effective Death Penalty Act (AEDPA), a prisoner may file a second or successive petition for post-conviction review if a court of appeals certifies that the petition contains "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court."[3] Although new rules of constitutional law generally do not apply to convictions that have become final, certain "retroactive" rules do, and prisoners can raise claims that are based on retroactive rules in petition for post-conviction review. To file a second or successive petition for post-conviction review, a prisoner must show that the Supreme Court has made a rule retroactive (as opposed to a court of appeals or district court doing so).

Less than two months after *Johnson* was decided, the courts of appeals issued differing decisions on whether the Supreme Court has made *Johnson* retroactive. The U.S. Court of Appeals for the Seventh Circuit said that it had;[4] one week later, the U.S. Court of Appeals for the Eleventh Circuit said that it had not.[5]

In this short piece, I'll flag some questions that have arisen as the courts of appeals have begun to assess who can be resentenced in light of *Johnson*. First, who actually has a *Johnson* claim? *Johnson* may affect only a small number of federal prisoners—those who were convicted of the predicate offense for the ACCA enhancement, and whose prior convictions qualify as violent felonies only under ACCA's residual clause. Second, is *Johnson* retroactive? The decision is at least retroactive for those prisoners who were sentenced under ACCA's residual clause. Third, has the Supreme Court "made" *Johnson* retroactive such that a court of appeals may certify a second or successive post-conviction petition on that basis? Although it is not clear that the Court has "made" *Johnson* retroactive, I will offer some thoughts on how the Supreme Court, the Department of Justice (DOJ), and the federal courts may nonetheless allow prisoners with *Johnson* claims to be resentenced so that they do not serve more than the statutory maximum for their offense of conviction.

I. Who Has a *Johnson* Claim?

The Armed Career Criminal Act imposes a series of penalties on defendants who are convicted of being a felon in possession of a firearm. Title 18 § 922(g) makes it unlawful for any person convicted of a felony—meaning a crime punishable by more than one year imprisonment—to possess a firearm.[6] Section 924(a) provides that defendants convicted under § 922(g) shall be "imprisoned not more than 10 years."[7] But ACCA—§ 924(e)—imposes a 15-year mandatory minimum sentence for defendants who are convicted under § 922(g) and who have three or more convictions for "violent felonies."[8] And, prior to *Johnson*, ACCA defined a violent felony to include "any crime . . . that . . . otherwise involves conduct that presents a serious potential risk of physical injury to another." (This language was referred to as the "residual clause.")

Johnson held that the residual clause was unconstitutionally vague. *Johnson* reasoned: "[T]he indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges."[9]

Johnson will apply to any case that is still on direct appeal. "New" constitutional rules apply to all cases that have not yet become final—meaning the prisoner has not yet exhausted his direct appeal in the court of appeals, or the Supreme Court has not yet denied a petition for certiorari (or the time to file a petition for certiorari has not yet expired).[10] The courts of appeals have thus far uniformly remanded cases for resentencing where the case is on direct appeal and the defendant was sentenced under ACCA's residual clause.[11] Courts have also remanded these cases for resentencing where the defendant did not initially

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argue that ACCA's residual clause was unconstitutionally vague.[12]

However, *Johnson* does not affect prisoners who were sentenced under other provisions of ACCA, and it is unclear whether *Johnson* will affect prisoners who were sentenced under an analogous provision of the Federal Sentencing Guidelines.

A. The Residual Clause Only

Johnson did not find all of ACCA unconstitutionally vague. In addition to the residual clause, ACCA defines a violent felony to include any crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another,"[13] as well as any crime that "is burglary, arson, extortion, [or] involves use of explosives."[14] And *Johnson* was careful to say that the decision "does not call into question application of . . . [ACCA] to the four enumerated offenses, or the remainder of the Act's definition of a violent felony."[15]

Defendants therefore can still be sentenced to ACCA's 15-year mandatory minimum under either the enumerated-offense clause or the element-of-force clause, and defendants who are eligible for the 15-year mandatory minimum under these provisions do not have a *Johnson* claim. The courts of appeals have thus far affirmed sentences that were imposed under ACCA where the prisoners' prior convictions qualify as violent felonies under ACCA's enumerated-offense or element-of-force clause.[16]

B. The Career Offender Guideline

Johnson also confined its ruling in other ways. *Johnson* maintained that the decision did not call into question the myriad laws that use terms like "substantial risk," most of which "require gauging the riskiness of conduct in which an individual defendant engages on a particular occasion," rather than the riskiness of a category of crimes.[17]

There is, however, at least one provision that is almost entirely of a piece with ACCA's residual clause—the career offender Guideline of the Federal Sentencing Guidelines. The Federal Sentencing Guidelines recommend sentencing ranges based on defendants' conduct and characteristics. Federal judges first calculate the sentencing range recommended by the Guidelines, and then choose a sentence to impose. Judges are not, however, required to impose a sentence within the recommended guidelines range.[18]

The career offender Guideline mirrors ACCA in both its wording and its interpretation. Section 4B1.1 of the Guidelines increases a defendant's recommended sentencing range if the defendant is a "career offender."[19] The Guideline defines a career offender as someone who, among other things, has "at least two prior felony convictions of . . . a crime of violence."[20] And § 4B1.2 of the Guidelines defines a "crime of violence" using precisely the same language as ACCA's residual clause: A "crime of violence" includes any offense punishable by more than one year that "involves conduct that presents a serious potential risk of physical injury to another."[21] Courts of appeals have interpreted the career offender Guideline to require the same "wide-ranging inquiry" the Supreme Court had used to interpret ACCA's residual clause (and that it found unconstitutionally vague).[22]

Do prisoners sentenced under the career offender Guideline have a *Johnson* claim?[23] There are some arguments for why *Johnson* might mean the residual clause of the career offender Guideline is unconstitutionally vague. *Johnson* held that the language used in the career offender Guideline's residual clause—or at least how courts are interpreting that language—is "indetermina[te]" and "both denies fair notice to defendants and invites arbitrary enforcement by judges."[24] Applying the residual clause of the career offender Guideline amounts to nothing more than "guesswork and intuition,"[25] and so it is strange to think that a court could still impose a sentence that relied on the career offender Guideline's residual clause. That is all the more true given the substantial role the Guidelines play in determining a defendant's ultimate sentence. District courts must first accurately calculate the Guidelines range,[26] and the district court's failure to properly calculate the Guidelines range is reversible error.[27] And last year 46 percent of sentences fell within the recommended Guidelines range.[28]

In part for these reasons, the Supreme Court recently held that it was a violation of the Ex Post Facto Clause to impose a sentence using Guidelines that were promulgated after the defendant's criminal acts where the new Guidelines provide for a higher Guidelines range.[29] The Court rejected the argument that the Guidelines' advisory nature meant there was no violation of the Ex Post Facto Clause. The Court reasoned, "That a district court may ultimately sentence a given defendant outside the Guidelines range does not deprive the Guidelines of force as the framework for sentencing."[30] The Court thus concluded that "[a] retrospective increase in the Guidelines range applicable to a defendant *creates a sufficient risk* of a higher sentence to constitute an ex post facto violation."[31]

It is not hard to imagine an opinion relying on this kind of reasoning to find the Guidelines unconstitutionally vague.[32] A Guidelines range might "create[] a sufficient risk of a" particular sentence such that Guidelines must provide clear notice to defendants and ensure against arbitrary enforcement by courts.[33] And *Johnson* held that the way in which courts interpret the residual clause of the career offender Guideline amounts to nothing more than "guesswork and intuition."[34] Thus, if the Guidelines are amenable to vagueness challenges, the career offender Guideline is probably unconstitutionally vague.

But in other contexts, the Guidelines' advisory nature insulates them from certain kinds of constitutional challenges. Consider the Court's Sixth Amendment doctrine. The Sixth Amendment requires juries to make findings on any "element of the offense"; if a fact constitutes an element of the offense, that fact must be found by the jury.[35] And any fact that establishes a defendant's eligibility for a mandatory minimum sentence is considered an element

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of the offense.[36] But any fact that establishes a defendant's eligibility for a higher Guidelines range is *not* an element of the offense.[37] The reason for this is because the Guidelines are recommendations: The Guidelines' advisory nature means they do not constitute elements of a criminal offense—they are not the functional equivalent of mandatory statutes—for purposes of the Sixth Amendment.[38]

It is therefore also possible to imagine an opinion finding that *Johnson* does not apply to the Guidelines on the ground that the advisory Guidelines are not amenable to vagueness challenges. Although *Johnson* decided that the language in the career offender Guideline was unconstitutionally vague, the Guidelines' advisory nature may alter the due process calculus. Defendants may not be constitutionally entitled to fair notice of their recommended sentencing ranges.[39] And courts' arbitrary enforcement of the advisory Guidelines may not amount to a deprivation of due process: Whereas ACCA requires courts to sentence defendants to more time, the Guidelines merely recommend that they do so.[40] Because the Guidelines are advisory, in other words, they may not qualify as the kinds of criminal laws that are subject to vagueness challenges, just as they do not qualify as elements of a criminal offense for purposes of the Sixth Amendment. Indeed, for these reasons, one court of appeals held that "the Guidelines are not susceptible to vagueness challenges."[41]

One other note: the sheer number of prisoners who are sentenced under the career offender Guideline may be a significant factor in how courts resolve whether *Johnson* requires invalidating the career offender Guideline. Many more defendants are subjected each year to the career offender Guideline than to ACCA—approximately 2,000 offenders each year receive the career offender Guideline enhancement, whereas only 600 offenders each year are sentenced under ACCA.[42] And a ruling that the career offender Guideline is unconstitutionally vague may require courts to determine, in every case that has not yet become final, whether every defendant who was sentenced under the career offender Guideline was sentenced under the residual clause.[43]

As of this writing, no court of appeals has decided whether *Johnson* means the career offender Guideline is unconstitutionally vague.[44] It may be that they never have to do so—as Stephen Sady and Gillian Schroff note, the government has conceded in several cases that *Johnson* applies to the advisory career offender Guideline.[45] Some courts of appeals have remanded cases so that district courts may consider, in the first instance, whether prisoners sentenced under the career offender Guideline have a *Johnson* claim.[46] As these courts recognized, after *Johnson*, the Supreme Court vacated sentences of prisoners who were sentenced under the residual clause of the Sentencing Guidelines.[47] But vacatur isn't a sign of the Court's views on the merits,[48] and in all of the post-*Johnson* vacaturs, Justice Alito concurred to note that "[o]n remand, the Court of Appeals should understand that the Court's disposition of this petition does not reflect any view regarding petitioner's entitlement to relief."[49]

II. Are *Johnson* Claims Retroactive?

Assuming a prisoner has a *Johnson* claim—which I take here to mean the prisoner was sentenced under ACCA's residual clause—will that be of any use for a prisoner who has already been sentenced under ACCA's residual clause? I'll keep my remarks on *Johnson*'s retroactivity brief in light of what has already been written on this issue.[50]

The short story is that "new" constitutional rules generally do not apply to criminal cases that have already become final.[51] However, new constitutional rules are retroactive—meaning the new rules apply to convictions that have already become final—if the new rule is "substantive," or if it is a "watershed" rule of criminal procedure.[52]

The Supreme Court has said that one example of a "substantive" rule is a "decision[] that narrow[s] the scope of a criminal statute by interpreting its terms."[53] A decision that "modifies the elements of an offense is normally substantive rather than procedural."[54] Substantive rules create "'a significant risk that a defendant stands convicted of an act that the law does not make criminal' or faces a punishment that the law cannot impose upon him."[55]

Johnson falls squarely in this category of substantive rules. *Johnson* "modifie[d] the elements of an offense" by altering what facts establish a defendant's eligibility for a mandatory minimum term of imprisonment.[56] The Supreme Court has said in no uncertain terms that "any fact that increases the mandatory minimum" sentence is an "element" of an offense: "[A] fact triggering a mandatory minimum . . . constitute[s] a new, aggravated crime."[57] By changing who is eligible for a mandatory minimum sentence, *Johnson* modified the elements of a criminal offense. The decision also altered what punishment defendants convicted under § 922(g) could receive. Without the ACCA enhancement, the statutory maximum term of imprisonment for a conviction under § 922(g) is ten years, whereas with the enhancement, the statutory mandatory minimum term of imprisonment is fifteen years. *Johnson* therefore means that defendants sentenced under ACCA's residual clause received "a punishment the law c[ould] not impose on" them—a term of years exceeding the statutory maximum for their offense of conviction.[58]

The courts of appeals cases also point in this direction. Prior to *Johnson*, the courts of appeals were unanimous in saying that Supreme Court decisions interpreting ACCA's scope were substantive and therefore retroactive.[59] It is hard to see how a decision "interpreting" ACCA's scope would be substantive, but a decision invalidating ACCA's residual clause—which also alters ACCA's scope—would not be. Both kinds of decisions modify the elements of an offense and alter a defendant's eligibility for a 15-year term of imprisonment.

III. Second or Successive Petitions: *In re Rivero* and *Price*

The story is a bit more complicated, however, for defendants who have already filed one petition for post-conviction review. Under AEDPA, a prisoner must obtain permission from a three-judge panel on the court of appeals

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before filing a second or successive petition for post-conviction review. The statute permits a second or successive petition to proceed if the petition contains "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."[60]

In this final Part, I'll offer some thoughts on whether the Supreme Court has "made" *Johnson* retroactive. In *Tyler v. Cain*, the Supreme Court created a very high threshold for establishing that the Court has "made" a decision retroactive: The Court can only "make" a decision retroactive through holdings in particular cases. And in light of *Tyler*, it's not clear that the Court has "made" *Johnson* retroactive for purposes of AEDPA.

I'll also analyze the two court of appeals opinions—the Seventh Circuit in *Price* and the Eleventh Circuit in *Rivero*—that have thus far grappled with whether the Supreme Court has "made" *Johnson* retroactive. *Rivero* is a bit quirky because the defendant in that case wasn't actually sentenced under ACCA—he was sentenced under the career offender Guideline. The defendant therefore may not have had a *Johnson* claim at all. *Rivero* should be understood in this light—that is, as saying that the Supreme Court has not made *Johnson* retroactive only as to those defendants who were sentenced under the career offender Guideline. *Price* allowed the second or successive post-conviction petition to proceed on the theory that the Supreme Court has made *Johnson* retroactive. I'm sympathetic to allowing prisoners with *Johnson* claims to be resentenced—both because the decision is retroactive and because prisoners with *Johnson* claims have received sentences that are five years longer than the statutory maximum for their offense of conviction. But it's not clear that these petitions satisfy § 2255(h)(2)'s requirements for second or successive petitions, or at least how the Court has interpreted these requirements.

I'll therefore offer some thoughts on how prisoners with *Johnson* claims can be resentenced even if *Johnson* claims do not satisfy § 2255(h)(2)'s preconditions for second or successive petitions. There are things the Supreme Court, DOJ, and the federal courts can do by way of providing remedies to prisoners who have received unconstitutional sentences under *Johnson*.

A. Has *Johnson* Been "Made Retroactive . . . by the Supreme Court"?

1. Background. Whether the Supreme Court has "made" *Johnson* retroactive turns on how you read the Court's decision in *Tyler v. Cain*.[61] *Tyler* interpreted a provision of § 2244 that governs federal courts' ability to grant second or successive post-conviction petitions for prisoners who were convicted in state court.[62] This provision, however, is virtually the same as the one applicable to federal prisoners under § 2255. Section 2244 reads: "A claim presented in a second or successive habeas corpus application . . . shall be dismissed unless . . . the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court."[63]

Tyler said that the Court can "make" a rule retroactive only through "holdings" rather than dicta.[64] And *Tyler* determined that the Supreme Court had not made *Cage v. Louisiana* retroactive. (*Cage* held that a jury instruction is unconstitutional if the instruction creates a reasonable likelihood that a jury would think it could convict a defendant without proof beyond a reasonable doubt.[65])

Tyler reasoned that the Court had not made *Cage* retroactive because "*Cage* itself does not hold that it is retroactive. The only holding in *Cage* is that the particular jury instruction violated the Due Process Clause."[66] *Tyler* then rejected the argument that "the reasoning in *Sullivan* [*v. Louisiana*] makes clear that retroactive application [of *Cage*] is warranted by the principles announced in *Teague v. Lane*."[67] (*Teague* held that new rules do not apply retroactively unless they are substantive rules or watershed rules of criminal procedure.[68]) *Sullivan* had held that a *Cage* error always requires invalidating a conviction on direct review (in other words, that a *Cage* error is a structural error).[69] *Sullivan* held that *Cage* errors always require a conviction to be reversed because *Cage* errors "undermine[] the reliability of a trial's outcome" and "deprive a defendant of a bedrock element of a procedural fairness."[70] The defendant in *Tyler* argued that *Sullivan*'s reasoning also established that *Cage* qualified as a "watershed" rule of criminal procedure under *Teague* such that the Court had made *Cage* retroactive.[71] *Tyler* rejected this argument: "The most [the defendant] can claim is that, based on the principles outlined in *Teague*, this Court *should* make *Cage* retroactive. . . . What is clear, however, is that we have not 'made' *Cage* retroactive."[72]

Tyler came pretty close to suggesting that the Supreme Court can "make" a rule retroactive only by issuing a decision holding that rule retroactive or applying that rule to a case on collateral review. But *Tyler* acknowledged that "with the right combination of holdings" the Court could "make a rule retroactive."[73] That would be the case, *Tyler* maintained, only where "the holdings in those cases necessarily dictate retroactivity of the new rule."[74] And *Tyler* explained that *Sullivan* and *Teague* had not made *Cage* retroactive because "[t]he holding in *Sullivan* is that a *Cage* error is [a] structural error. There is no second case that held all structural-error rules apply retroactively."[75]

To me, the argument that the Court has "made" *Johnson* retroactive looks, in some respects, like the failed argument in *Tyler* for why the Court had "made" *Cage* retroactive. In *Schriro v. Summerlin*, the Supreme Court said that "substantive" rules include "decisions that narrow the scope of a criminal statute" or decisions that create "a significant risk that a defendant . . . faces a punishment that the law cannot impose on him."[76] But the "holding" in *Schriro* was that *Ring v. Arizona* was not retroactive because it was neither a substantive rule nor a watershed rule of criminal procedure. *Schriro*'s statements about what would constitute substantive rules therefore might not qualify as holdings.

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Bousley v. United States comes closer to making—that is, holding—*Johnson* retroactive.[77] *Bousley* held that a decision interpreting what it means to "use" firearms during a drug trafficking offense—in violation of § 924(c)—applied retroactively because the rule announced by the decision was substantive. *Bousley* explained that *Teague* did not prohibit the retroactive application of decisions where "this Court decides the meaning of a criminal statute enacted by Congress."[78] That fairly describes what the Court did in *Johnson*—it decided the meaning of a criminal statute (ACCA). But *Bousley* did not "hold" a rule establishing a defendant's eligibility for a mandatory minimum sentence to be retroactive. The rule that *Bousley* held retroactive was a decision about what conduct the law proscribes—what "uses" of a firearm were prohibited by § 924(c).

This doesn't mean that *Johnson* is not retroactive; I think it clearly is. But I'm not sure that some of the reasons why *Johnson* is retroactive—the statements in *Schriro*; the unanimity among the courts of appeals that Supreme Court decisions interpreting ACCA are retroactive; and the Court's Sixth Amendment cases—are "holdings" of the Supreme Court that "necessarily dictate" *Johnson*'s retroactivity. For example, "[t]he holding of [*Alleyne v. United States*] is that" a fact establishing a defendant's eligibility for a mandatory minimum sentence is an element of the offense.[79] But it's not clear that there is a second decision holding that all rules interpreting the elements of a criminal offense are retroactive.[80] *Bousley* is the most natural candidate for such a decision, and it certainly helps that *Schriro* construed *Bousley* to say that all "decisions that narrow the scope of a criminal statute" are substantive.[81] But it's not clear whether the "holding" of *Bousley* is that all decisions altering the meaning of a criminal statute are substantive, or whether the "holding" of *Bousley* is that all decisions interpreting what conduct the law proscribes are substantive. There is language in the decision to support either reading.[82]

2. Courts of Appeals. In *Price*, the Seventh Circuit concluded that the Supreme Court had "made" *Johnson* retroactive through its decisions announcing that substantive rules apply retroactively.[83] But the only decisions the Seventh Circuit could point to were *Schriro* and *Bousley*. The statements in these cases might suggest *Johnson* is retroactive, and I think that the better reading of these cases is that *Johnson* is retroactive. But it's less clear whether the "holdings" in these cases "dictate" that *Johnson* is retroactive.

On the other side, the Eleventh Circuit's explanation in *Rivero* for why the Supreme Court had not "made" *Johnson* retroactive was slightly puzzling. Before diving into whether the Supreme Court had "made" *Johnson* retroactive, the Eleventh Circuit stated that "the new rule announced in *Johnson* is substantive rather than procedural because it narrowed the scope of section 924(e) by interpreting its terms, specifically, the term violent felony."[84] But in explaining why the Supreme Court had not "made" *Johnson* retroactive, the Eleventh Circuit maintained that "the rule announced in *Johnson* does not meet the criteria the Supreme Court uses to determine whether the retroactivity exception for new substantive rules applies."[85] I'm not sure how a new rule can be "substantive"—as the Eleventh Circuit held *Johnson* was—but at the same time not satisfy "the retroactivity exception for new substantive rules." These are two sides of the same coin: A rule is retroactively applicable in post-conviction proceedings if it's substantive—that is the retroactivity exception for new substantive rules. I don't think there is any conceptual space between a rule being retroactive because it is substantive and a rule satisfying the retroactivity exception for substantive rules.[86]

B. An Unnecessary (and Nonexistent?) Circuit Split?

The Seventh and Eleventh Circuits thus seem to have come to different conclusions on whether the Supreme Court has "made" *Johnson* retroactive. But that circuit split was potentially unnecessary—because the prisoner in *Rivero* may not have had a *Johnson* claim at all—and may also be potentially nonexistent—because *Price* and *Rivero* determined whether the Supreme Court has "made" *Johnson* retroactive regarding two different kinds of prisoners.

1. Potentially Unnecessary. The prisoner in *Rivero* was sentenced under the career offender Guideline rather than ACCA. Rivero was convicted of conspiring to possess with intent to distribute cocaine and using a firearm in furtherance of a drug trafficking offense. (He was also originally convicted of being a felon in possession of a firearm—the predicate offense for ACCA's mandatory minimum—but the Eleventh Circuit had previously vacated his § 922(g) conviction.[87]) Based on Rivero's prior convictions, the district court sentenced him using the career offender Guideline (in particular, using the "serious potential risk" provision of the career offender Guideline).[88] Because Rivero was sentenced under the career offender Guideline, it might be the case that Rivero simply didn't have a *Johnson* claim at all.

But the facts of *Rivero* are more complicated than the ordinary case where a prisoner was sentenced under the advisory career offender Guideline. The Guidelines haven't always been advisory, and they weren't advisory when the district court sentenced Rivero. Before the Supreme Court's decision in *United States v. Booker*, the Guidelines were "mandatory"—courts were required to impose sentences within the Guidelines range, and Rivero was sentenced when the Guidelines were mandatory.[89] This makes Rivero look a lot more like the prisoners who were sentenced under ACCA than prisoners who were sentenced under the advisory Guidelines. But there are still differences between mandatory Guidelines and ACCA. For example, even when the Guidelines were mandatory, the Guidelines authorized courts to reduce a defendant's recommended sentencing range if the court determined the defendant's criminal history "substantially over-represent[ed] the seriousness of

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the defendant's criminal history or the likelihood that the defendant will commit other crimes."[90] That is, courts could depart from the career offender Guideline's "mandatory" sentencing range, but they can't do the same with respect to ACCA's mandatory minimum. (As a further aside, the Eleventh Circuit, on appeal, rejected Rivero's argument that the district court erred by not departing downward from the Guidelines range under this provision. The court also affirmed Rivero's conviction and sentence after *Booker* was decided, but didn't remand for resentencing in light of *Booker*.[91])

Rather than deciding whether Rivero had a *Johnson* claim, the Eleventh Circuit (or at least the majority opinion) merely noted the defendant was sentenced under the mandatory Sentencing Guidelines and "assume[d] that . . . *Johnson* applies to the residual clause of section 4B1.2(a)(2) of the Sentencing Guidelines."[92]

2. Potentially Nonexistent. Working off that assumption, the Eleventh Circuit chose to decide another question: Is *Johnson* a new rule that has been "made retroactive to cases on collateral review by the Supreme Court"?[93] Although the Eleventh Circuit decided the case on these grounds, it's not clear there is a sharp split between the Eleventh and the Seventh Circuits on this question or any other one.

For example, *Rivero* said that *Johnson* did not fall within the retroactivity exception for new substantive rules. [94] But I don't think there is a real disagreement between *Price* and *Rivero* on whether *Johnson* is retroactive. *Rivero* maintained that "the new rule announced in *Johnson* is substantive rather than procedural because it narrowed the scope of section 924(e) by interpreting its terms, specifically, the term violent felony."[95] While *Rivero* later said that *Johnson* did not fall within the retroactivity exception for new substantive rules, it said this in the course of explaining why the Supreme Court had not "made" *Johnson* retroactive for purposes of § 2255(h)(2)—that is, for reasons that apply only to second or successive petitions for post-conviction review.

It's also not entirely clear that *Rivero* decided the same question that *Price* decided—namely, whether the Supreme Court has "made" *Johnson* retroactive for defendants who were sentenced under ACCA's residual clause. There's a pretty good argument that *Rivero* held only that the Supreme Court has not made *Johnson* retroactive for defendants sentenced under the career offender Guideline. The Eleventh Circuit reasoned that the dissent's "assumption"—which the majority also made—that "*Johnson* . . . applies to the residual clause of the career offender" Guideline "makes clear that precedents of the Supreme Court do not necessarily dictate" that *Johnson* is retroactive.[96] The Supreme Court could not have made *Johnson* retroactive to Rivero's case, the Eleventh Circuit reasoned, because "[t]he Supreme Court has never held that the Sentencing Guidelines are subject to a vagueness challenge. And four of our sister circuits have held that the Sentencing Guidelines—whether mandatory or advisory—cannot be unconstitutionally vague."[97] In other words, the Supreme Court had not "made" *Johnson* retroactive to cases involving the career offender Guidelines because the Court has never addressed a vagueness challenge to the Guidelines. (Of course, the Eleventh Circuit's reasoning for why the Supreme Court has not made *Johnson* retroactive—which assumes that Guidelines aren't amenable to vagueness challenges—is in tension with its threshold assumption that *Johnson* applies to the Guidelines.)

This is a pretty limited reading of *Rivero*, and it's probably informed by my view that *Johnson* is retroactive (because it satisfies the retroactivity exception for substantive rules). It's also probably driven by my opinion that the Eleventh Circuit shouldn't have decided questions about *Johnson*'s retroactivity without first addressing whether it was even necessary to do so—that is, without first deciding whether *Johnson* even applied to defendants sentenced under the career offender Guideline. That is all the more true given that the Eleventh Circuit seemed to be of the view that it is an easy call that *Johnson* does not apply to the career offender Guideline: the court noted that the Supreme Court has never entertained a vagueness challenge to the Guidelines, and that four courts of appeals have held that Guidelines, even mandatory ones, could never be unconstitutionally vague.[98] But because the Eleventh Circuit didn't address whether *Johnson* applies to the career offender Guideline, we're left with a potentially unnecessary circuit split and some uncertainty about who, exactly, the Eleventh Circuit has said cannot be resentenced in light of *Johnson*.[99]

C. Recommendations

Even if *Johnson* claims do not satisfy § 2255(h)(2)'s preconditions for second or successive petitions, there are things the Supreme Court, DOJ, and the federal courts can do to ensure that prisoners who have received unconstitutional sentences under *Johnson* can be resentenced.

1. Supreme Court. AEDPA limits the Supreme Court's ability to review courts of appeals' decisions to grant or deny authorization to file second or successive petitions for post-conviction review. The Court could, however, weigh in on whether such petitions should be allowed by granting review in a case involving a first petition for post-conviction review.

Even if there were a clear split between the Seventh and the Eleventh Circuits on whether the Supreme Court has "made" *Johnson* retroactive, the Court is unlikely to review either of the two cases. AEDPA greatly circumscribes the Supreme Court's ability to review courts of appeals' determinations regarding second or successive post-conviction petitions. Under § 2244(b)(3)(E), "the grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari."[100] In *Felker v. Turpin*, the Supreme Court upheld this provision against a constitutional challenge, noting that § 2244 did not repeal the Court's jurisdiction to entertain

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"original" petitions for habeas corpus—petitions that are filed directly in the Supreme Court (under § 2241).[101] An "original" petition in *Rivero* would make the same argument that was made in the court of appeals, but the Court wouldn't technically be reviewing the judgment of the court of appeals.

But "original" habeas petitions aren't a full substitute for petitions for certiorari—they are very rarely granted. *Felker* didn't decide whether the statutory limitations on courts of appeals' (and district courts') authority to grant habeas petitions also apply to the Supreme Court's authority to grant original habeas petitions under § 2241.[102] But *Felker* did note that, under the Supreme Court's own rules, original petitions are rarely granted—they are granted only in "exceptional circumstances."[103] It's not clear what those exceptional circumstances would be, but getting the Court to hear an original petition in *Rivero* may be an insurmountable barrier.

So what should the Supreme Court do? I think there are good reasons to dispense with the Court's usual rules for granting certiorari so that it can say whether *Johnson* is retroactive. Doing so may, in effect, be the only way it can speak to the question whether it has "made" *Johnson* retroactive.

Typically, the Court will wait for a circuit split to emerge before deciding to take up an issue. However, it seems somewhat unlikely that a circuit split will emerge on whether *Johnson* is retroactive (at least regarding prisoners who were sentenced under ACCA's residual clause). Before *Johnson*, five circuits had already held that Supreme Court decisions narrowing ACCA's scope apply retroactively.[104] The two circuits that have weighed in after *Johnson* have determined that the decision applies retroactively.[105] And for reasons I explained, I also think the case law largely points in one direction—toward retroactivity.

The question on which a circuit split is more likely to arise is whether the Supreme Court has "made" *Johnson* retroactive, but it is on that question that the Supreme Court is least able to weigh in. The Court can't review by way of a petition for certiorari the courts of appeals' decisions to grant or deny authorizations to file a second or successive post-conviction petition.[106] And any "original" habeas petition the Court agreed to hear under § 2241 wouldn't require the Court to decide whether it has "made" *Johnson* retroactive because § 2255(h)'s requirements on second or successive petitions do not apply with equal force to original petitions filed under § 2241.[107]

There is one way the Court could review a court of appeals' determination on whether the Court has made *Johnson* retroactive. It could grant review in a case where the district court and court of appeals heard a second or successive post-conviction petition on the merits after the court of appeals authorized the filing of a second or successive petition.[108] But the sheer length of time it would take these petitions to reach the Court would mean that even a decision saying that the Court has made *Johnson* retroactive might not provide meaningful relief for some defendants who were sentenced under ACCA's residual clause. A prisoner who is filing a second or successive petition for post-conviction review has already spent some number of years in prison—it takes, on average, about a year and a half for a prisoner's conviction to become final.[109] A prisoner then has one year to file a petition for post-conviction review.[110] District courts take, on average, 8 to 12 months to adjudicate post-conviction petitions;[111] a prisoner must receive a certificate of appealability from a judge on the court of appeals before proceeding with an appeal;[112] if the appeal proceeds, the courts of appeals take, on average, a year to decide a case once a notice of appeal has been filed.[113] And once the proceedings in the court of appeals have finished, defendants have ninety days after the court of appeals' entry of judgment to file a petition for certiorari.[114] That process starts all over again for a second or successive petition: The prisoner first seeks authorization to file the petition in the court of appeals, which has 90 days to dispose of a request to file a second or successive petition;[115] the district court will take 8 to 12 months to adjudicate a post-conviction petition; and the court of appeals will take a year to decide a case once a notice of appeal has been filed. By the time the Supreme Court hears an appeal from a second or successive petition that has been adjudicated on the merits, the prisoner may already be close to serving ten years in prison, which is the statutory maximum term of imprisonment for a defendant convicted under § 922(g) (who does not qualify for the ACCA enhancement).

Therefore, the way for the Supreme Court to weigh in on whether it has "made" *Johnson* retroactive—and to do so in time to ensure that defendants do not serve a longer term of imprisonment than the statutory maximum for their offense of conviction—may be for the Court to grant review in a case involving a first petition for post-conviction review. It is unlikely that these cases would qualify under one traditional criterion for certiorari—the existence of a circuit split—but AEDPA's restrictions on the Court's ability to review courts of appeals' determinations on whether to allow such petitions to proceed may be a reason why certiorari would be warranted anyway.

2. DOJ (& Congress?). AEDPA and *Tyler v. Cain* create a real predicament for prisoners with *Johnson* claims: Even though *Johnson* is, in my view, clearly retroactive, the Supreme Court must make the decision retroactive before a second or successive post-conviction petition raising a *Johnson* claim may proceed. And after *Tyler*, it is hard to show that the Supreme Court has "made" a rule retroactive.

One solution for DOJ to consider is simply to waive the argument that the Supreme Court has not made *Johnson* retroactive. Litigants don't have to make every argument on which they might prevail, and the government could agree to waive procedural barriers to resentencing—including that the Supreme Court have "made" a rule retroactive—in order to allow prisoners with *Johnson* claims to be resentenced. The government has waived resentencing arguments in the past: It has conceded that decisions

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interpreting ACCA are retroactive;[116] it has conceded that *Johnson* applies to the career offender Guideline;[117] and it has conceded that prisoners may bring a post-conviction petition under § 2241 to correct the mistaken imposition of an ACCA sentence.[118] And the government could issue a blanket public policy waiving the argument that the Supreme Court has not "made" *Johnson* retroactive so that prisoners may bring second or successive post-conviction petitions based on *Johnson*. Courts do not generally take up arguments that litigants have voluntarily and deliberately waived unless an argument goes to the courts' jurisdiction.[119] For reasons I'll explain in a future article, I do not think that the preconditions for issuing a certificate of appealability under § 2255(h) are jurisdictional; only the actual issuance of a certificate of appealability is.[120]

Besides allowing defendants with *Johnson* claims to be resentenced in time, waiving the argument that the Supreme Court has not "made" *Johnson* retroactive has other salutary benefits as well. Section 2255(h)(2) puts courts of appeals in the difficult position of saying both that a decision such as *Johnson* is retroactive under current doctrine, and that the Supreme Court's decisions do not logically dictate that conclusion. Courts decide cases—especially retroactivity ones—by looking to the Supreme Court's cases, so what court wants to admit that its conclusion doesn't follow, or at least isn't compelled by, precedent? Saying that the Supreme Court's cases are even slightly ambiguous opens up the court of appeals' retroactivity determination to question.

Finally, the procedure for filing a second or successive petition is another example of the shortcomings with our system of post-conviction review. Much of the criticism of post-conviction review has focused on federal post-conviction review of state criminal convictions.[121] But § 2255(h)(2) is a restriction that applies to both federal and state criminal convictions. It is also a restriction that has little to recommend it. It forecloses meritorious claims. The claims it forecloses may be especially significant ones; § 2255(h)(2) may foreclose claims that are retroactive either because they are "substantive" (meaning there is "'a significant risk that a defendant stands convicted of an act that the law does not make criminal' or faces a punishment that the law cannot impose upon him"[122]) or because they are "watershed rules of criminal procedure" (meaning the claims implicate "the fundamental fairness and accuracy of the criminal proceeding" and are "implicit in the concept of ordered liberty"[123]). The provision puts courts of appeals in the awkward position of saying precedent indicates but does not compel a rule's retroactivity. And it creates a draconian precondition for second or successive petitions: Given how few cases the Supreme Court hears each term, it is unlikely that the Court will "hold" all rules retroactive that should be retroactive, or that fairly are retroactive under the Court's precedents.

3. Federal Courts. There are also a few things federal courts may consider as they are reviewing resentencing claims.

Prisoners have no general right to counsel in post-conviction proceedings.[124] Under the current rules governing appointment of counsel, courts "may" appoint counsel if "the interests of justice so require" where a prisoner is seeking relief under § 2255.[125] There are good reasons to appoint counsel in any post-conviction proceeding where a prisoner has even a colorable *Johnson* claim. For one thing, it is unlikely that many prisoners seeking resentencing in light of *Johnson* will have made the *Johnson* argument—that ACCA's residual clause is unconstitutionally vague—before. Circuit precedent foreclosed that argument in almost every court of appeals.[126] Prisoners therefore "cannot rely on a court opinion or the prior work of an attorney addressing that claim"[127] when preparing their post-conviction petitions. Moreover, whether a *Johnson* claim will succeed depends on arguments—such as retroactivity, plain error, procedural default, and statutory restrictions on post-conviction review—that also would not have been developed by a prior court opinion or the prior work of an attorney. These rules are also complicated, and a prisoner "unlearned in the law, may not comply with the [] procedural rules or may misapprehend the substantive details" of the law.[128] Additionally, determining who has a colorable *Johnson* claim—which may involve determining whether the career offender Guideline is unconstitutionally vague and whether prisoners' prior convictions qualify as violent felonies under other ACCA provisions—is just plain hard. Prisoners and courts may therefore benefit from having briefing prepared by counsel.

Courts may also consider whether there is another avenue to relief—besides § 2255(h)(2)—for prisoners with *Johnson* claims who have already filed one petition for post-conviction review. Section 2241 authorizes federal courts to grant writs of habeas corpus, and § 2241 does not contain any of the limitations applicable to petitions for review under § 2255. However, there are limits on when prisoners may use § 2241 to evade § 2255's limitations: Section 2255(e) (the "savings clause") permits prisoners to utilize § 2241 only where "the remedy [provided by § 2255] is inadequate or ineffective to test the legality of [the prisoner's] detention."

Section 2255(e)'s savings clause may allow prisoners sentenced under ACCA who have already filed one petition for post-conviction review to obtain relief under § 2241. Section 2255's limitations on second or successive petitions mean that defendants sentenced under ACCA will linger in prison—possibly for a term of imprisonment that exceeds the statutory maximum for their offense—because they must wait to file a petition for post-conviction review until the Supreme Court makes *Johnson* retroactive. That makes the § 2255 remedy nonexistent—and thus inadequate or ineffective—to test the legality of these prisoners' detentions.[129]

However narrow the savings clause may be, it probably should, at a minimum, allow defendants to obtain relief where they were subjected to an unconstitutionally vague mandatory sentencing enhancement that resulted in

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a sentence that exceeds the statutory maximum for their offense of conviction. Some cases have gestured in this direction. *Moore v. Warden, FCC Coleman-Medium* held that § 2255's limitations on second or successive petitions made the § 2255 remedy inadequate for a defendant who was mistakenly subjected to the ACCA enhancement in light of subsequent precedent.[130] And in several cases "the government concede[d] that a claim that a sentencing error result[ing] in a sentence longer than the statutory maximum may be brought in an initial § 2255 motion or, if that remedy is foreclosed by § 2255(h), in a § 2241 petition by virtue of the savings clause."[131] Even cases finding the savings clause inapplicable—thus preventing recourse to § 2241—note that the savings clause permits litigants to sidestep § 2255(h)'s limitations on second or successive petitions "[w]hen a change of law, retroactively applicable, shows that a prisoner . . . has received an illegally high sentence."[132] This would be the case for defendants convicted under § 922(g) and sentenced under ACCA: Without the ACCA enhancement, the statutory maximum term of imprisonment for a § 922(g) conviction is ten years, but ACCA requires a minimum term of fifteen years' imprisonment.

* * *

Whether *Johnson* has any significance for prisoners who have already been sentenced under ACCA's residual clause will be determined in part by whether courts find the decision retroactive, and whether courts allow prisoners to raise *Johnson* claims in second or successive post-conviction petitions. But part of *Johnson*'s significance may be that the decision will lead courts to make determinations about what kinds of constitutional rules are retroactive, and to interpret several little known but important provisions of AEDPA.[133] These rules—retroactivity doctrine and AEDPA—are the gatekeeping mechanisms that dictate, in case after case, whether prisoners have any remedies for constitutional violations. *Johnson* provides an occasion to understand these rules and their limitations.

Notes

* Climenko Fellow and Lecturer on Law, Harvard Law School. This piece builds on a casetext post I wrote on the Eleventh Circuit's decision in *In re Rivero*. *See* Leah Litman, *The Circuit Split on Johnson Retroactivity*, Casetext, Aug. 14, 2015, *available at* https://casetext.com/posts/the-circuit-split-on-johnson-retroactivity. This piece also uses portions of an essay that was originally published in the *Columbia Law Review Sidebar*. *See* Leah M. Litman, *Residual Impact: Resentencing Implications Of* Johnson*'s Potential Ruling on ACCA's Constitutionality*, 115 Colum. L. Rev. Sidebar 55 (2015). Thanks to Susannah Barton Tobin, Daniel Deacon, Evan Lee, Ben Levin, Will Ortman, Eve Brensike Primus, and Richard Re for helpful comments and conversations, and to Luke Beasley for research assistance.

1 *Johnson*, 135 S. Ct. 2551 (2015).

2 U.S. Sentencing Commission, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 293 (2011) [hereinafter Mandatory Minimum Penalties], Ch. 9, *available at* http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_09.pdf (2.9% of federal prisoners qualify for ACCA enhancement). Defendants who were eligible to be sentenced under ACCA may have pled guilty to lesser offenses in order to avoid ACCA's mandatory minimum.

3 AEDPA, 28 U.S.C. § 2255(h)(2).

4 Price v. United States, __ F.3d __, 2015 WL 4621024 (7th Cir. Aug. 4, 2015).

5 In re Rivero, __ F.3d __, 2015 WL 4747759 (11th Cir. Aug. 12, 2015). After this article went to print, the 10th Circuit also held that the Court has not made Johnson retroactive. In re Gieswin, __ F.3d __, 2015 WL 5534388 (10th Cir. Sept. 21, 2015).

6 ACCA, 18 U.S.C. § 922(g).

7 18 U.S.C. § 924(a).

8 18 U.S.C. § 924(e)(2).

9 *Johnson*, 135 S. Ct. at 2557.

10 Griffith v. Kentucky, 479 U.S. 314, 322–23 (1986); Greene v. Fisher, 132 S. Ct. 38, 44 (2011).

11 United States v. Langston, __ F.3d __, 2015 WL 5236039 (8th Cir. Sept. 9, 2015) (per curiam); United States v. Castle, __ F. App'x __, 2015 WL 5103093 (6th Cir. Aug. 31, 2015); United States v. Holder, __ F. App'x __, 2015 WL 4091208 (6th Cir. Aug. 31, 2015); United States v. Bell, __ F. App'x __, 2015 WL 4746360 (6th Cir. Aug. 12, 2015) (per curiam); United States v. Thetford, __ F. App'x __, 2015 WL 4727033 (11th Cir. Aug. 11, 2015); United States v. Brown, __ F.3d __, 2015 WL 4666284 (8th Cir. Aug. 7, 2015) (per curiam); United States v. Bilal, __ F. App'x __, 2015 WL 4568815 (6th Cir. July 20, 2015) (mem. op.); United States v. Rivera, __ F. App'x __, 2015 WL 4393876 (6th Cir. July 20, 2015); United States v. Snyder, __ F. 3d __, 2015 WL 4394325 (10th Cir. July 20, 2015); United States v. McGregor, __ F. App'x __, 2015 WL 4081947 (9th Cir. July 7, 2015). *United States v. Emeary*, __ F. 3d __, 2015 WL 4524299 (5th Cir. July 23, 2015), recalled a mandate issued in 2010, when the court had certified there were no nonfrivolous issues and dismissed the appeal. After recalling the mandate, *Emeary* appointed the defendant counsel to address several procedural issues with respect to whether the defendant could be resentenced. *Id*. at *3 n.4.

12 United States v. Braun, __ F. 3d __, 2015 WL 5201729 (11th Cir. Sept. 8, 2015); United States v. Durham, __ F.3d __, 2015 WL 4637900 (11th Cir. Aug. 5, 2015) (en banc) (modifying prior decisions so that defendants may raise *Johnson* claims even if they did not do so in their opening brief). An ACCA error qualifies as plain error—meaning an error that affects a defendant's substantial rights and that a defendant may prevail on by raising for the first time on appeal or in a petition for certiorari. *See* Leah M. Litman, *Residual Impact: Resentencing Implications Of* Johnson*'s Potential Ruling on ACCA's Constitutionality*, 115 Colum. L. Rev. Sidebar 55, 59–60 (2015).

13 ACCA, 18 U.S.C. § 924(e)(1).

14 18 U.S.C. § 924(e)(2).

15 *Johnson*, 135 S. Ct. at 2563.

16 United States v. Taylor, __ F.3d __, 2015 WL 5011012, at *13-15 (6th Cir. Aug. 25, 2015); United States v. Ker Yang, __ F.3d __, 2015 WL 4978999, at *32 (7th Cir. Aug. 21, 2015); United States v. Whindleton, __ F.3d __, 2015 WL 4719600 (1st Cir. Aug. 10, 2015); United States v. Kemmerling, __ F. App'x __, 2015 WL 4567471 (6th Cir. July 30, 2015);United States v. Harris, __ F.3d __, 2015 WL 4430481 (8th Cir. July 21, 2015); United States v. Tinker, __ F. App'x __, 2015 WL 4430678 (11th Cir. July 21, 2015); United States v. Kosmes, __ F.3d __, 2015 WL 4097125 (8th Cir. July 8, 2015); *see* United States v. Guzman, __ F.3d __, 2015 WL 4911159 (5th Cir. Aug. 18, 2015) (finding no plain error where the defendant's prior convictions may qualify as violent felonies under other ACCA provisions). ACCA also imposes a mandatory minimum 15-year term of imprisonment where the defendant has three or

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more convictions for "serious drug offense[s]." 18 U.S.C. § 924(e)(2)(A). Defendants sentenced under this provision also do not have a *Johnson* claim. *See, e.g.*, United States v. Turner, __ F. App'x __, 2015 WL 4978692 (10th Cir. 2015) (affirming ACCA sentence where defendant has three convictions for serious drug offenses).

17 135 S. Ct. at 2561. For an analysis of what statutes might still fall within *Johnson*'s ambit, see Evan Lee, *Is* Johnson v. United States *A Sleeper?*, Casetext, June 28, 2015, *available at* https://casetext.com/posts/is-johnson-v-united-states-a-sleeper.

18 *See* Litman, *supra* note 12, at 63–64.

19 U.S. Sentencing Guidelines § 4B1.1.

20 *Id*.

21 U.S. Sentencing Guidelines § 4B1.2. The career offender Guideline defines a crime of violence to include other things as well. *See, e.g.*, United States v. Collins, __ F.3d __, 2015 WL 4997453 (Aug. 24, 2015) (finding defendant who was sentenced under the career offender Guideline—but not the residual clause of the Guideline—did not have a *Johnson* claim); United States v. Ozier, __ F.3d __, 2015 WL 4636669 (6th Cir. Aug. 5, 2015) (rejecting *Johnson* claim where prisoner was sentenced under career offender Guideline provision that defined violent felony to include burglary).

22 Litman, *supra* note 12, at 64 & n. 46.

23 Even if prisoners who were sentenced under the career offender Guideline have a *Johnson* claim, I think it is unlikely that, under current doctrine, a rule invalidating a Guideline provision would be retroactive. I also think other procedural barriers may preclude defendants from challenging their career offender designation in post-conviction proceedings. *See* Litman, *supra* note 12, at 63–64, 73–74, 77. DOJ could, of course, waive these challenges.

24 *Johnson*, 135 S. Ct. at 2557.

25 *Id*. at 2559.

26 Rita v. United States, 551 U.S. 338, 347–48 (2007).

27 Gall v. United States, 552 U.S. 38, 51 (2007) ("[T]he appellate court must . . . first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range.").

28 U.S. Sentencing Commission, *Annual Report: Fiscal Year 2014*, at A-5, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/2014-Annual-Report.pdf.

29 Peugh v. United States, 133 S. Ct. 2072 (2013).

30 *Id*. at 2083–84.

31 *Id*. at 2084 (emphasis added).

32 The Ninth Circuit has allowed vagueness challenges to the Guidelines. *See* United States v. Reardon, 349 F.3d 608, 614 (9th Cir. 2003) ("We allow challenges to the sentencing guidelines on vagueness grounds."); United States v. Willis, __ F. 3d __, 2015 WL 4547542, at *7 (9th Cir. July 29, 2015) ("It is an open question . . . whether this residual clause remains valid in light of *Johnson*.").

33 A student note proposed a similar kind of argument so that Guideline errors may be cognizable in post-conviction proceedings. *See* Kate Huddleston, Comment, *Federal Sentencing Error as Loss of Chance*, 124 Yale L.J. 2663 (2015); *cf.* Litman, *supra* note 12, at 63–64, 73–74, 77 (summarizing courts of appeals decisions saying that decisions interpreting the Guidelines are not retroactive and that Guidelines errors do not render a sentence illegal or unlawful).

34 *Johnson*, 135 S. Ct. at 2559.

35 Apprendi v. New Jersey, 530 U.S. 466, 483 n.10, 490 (2000).

36 Alleyne v. United States, 133 S. Ct. 2151, 2155, 2158 (2013). Any fact that establishes a defendant's eligibility for a higher statutory maximum sentence is also considered an element of the offense. *Apprendi*, 530 U.S. at 476, 483 n.10, 490.

37 United States v. Booker, 543 U.S. 220, 223 (2005) ("If the Guidelines . . . could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts . . . [they] would not implicate the Sixth Amendment."); Rita v. United States, 551 U.S. 338, 352 (2007); United States v. Jones, 744 F.3d 1362, 1369–70 (D.C. Cir. 2014) ("We also lack any basis to reconsider the settled rule that enhancing a sentence within the statutory range based on facts found by the judge, as opposed to the jury, does not violate the Sixth Amendment."); United States v. Settles, 530 F.3d 920, 923 (D.C. Cir. 2008) ("[L]ong-standing precedents of the Supreme Court and this Court establish that a sentencing judge may consider uncharged or even acquitted conduct in calculating an appropriate sentence, so long as that conduct has been proved by a preponderance of the evidence and the sentence does not exceed the statutory maximum for the crime of conviction. . . . Under those cases, there is no Fifth Amendment due process problem with this long-standing sentencing practice. As to the Sixth Amendment, moreover, the District Court's reliance on acquitted conduct in calculating the Guidelines range no longer poses a problem because the post-*Booker* Guidelines are only advisory."); *cf.* United States v. Norman, 465 F. App'x 110, 120–21 (3d Cir. 2012) (collecting cases that have rejected due process challenges to sentences imposed under the advisory Guidelines).

38 *See Booker*, 543 U.S. at 223; Benjamin J. Priester, *From* Jones *to* Jones*: Fifteen Years of Incoherence in the Constitutional Law of Sentencing Factfinding*, at 11, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2648397 ("To date the Court's cases have drawn the line between permissible and impermissible sentencing factfinding based on the principle of judicial discretion in sentencing. Extraverdict factfinding . . . undertaken in the exercise of judicial discretion is permissible; factfinding pursuant to any provision of law with mandatory impact on the sentence must be conducted as offense elements."). The Court has also held that a defendant's "criminal history," even if it establishes a defendant's eligibility for a mandatory minimum, is not an element of an offense that must be found by a jury. Almendarez-Torres v. United States, 523 U.S. 224 (1998). But after *Johnson*, "criminal history" is not a category of offense elements that are immune from vagueness challenges.

39 Consider, for example, § 3553(a), which requires courts to consider, among other things, a defendant's "characteristics" when imposing a sentence. 18 U.S.C. § 3553(a)(1). A district court's failure to consider the factors listed in § 3553(a) is reversible error, just as a district court's failure to properly calculate the Guidelines range is reversible error. *See* Gall v. United States, 552 U.S. 38, 51 (2007) ("It must first ensure that the district court committed no significant procedural error, such as . . . failing to consider the § 3553(a) factors."). Some of the § 3553(a) factors might be just as vague as ACCA's residual clause—what are the defendant's "characteristics"?—but the fact that courts are required to consider these factors when imposing a sentence might not mean that defendants are constitutionally entitled to fair notice of the precise contours of those factors.

40 *Cf.* Litman, *supra* note 12, at 65–74, 77 (describing courts of appeals cases that maintain a Guidelines error does not result in an illegal or unlawful sentence).

41 *See* United States v. Tichenor, 683 F.3d 358, & 365 n.3 (7th Cir. 2012); United States v. Rollins, __ F.3d __, 2015 WL 5117087 (7th Cir. Sept. 1, 2015) (finding sentence imposed under the career offender Guideline was not plain error because the Guideline application notes listed the defendant's offense as a qualifying offense). *Tichenor* cited cases from other circuits, but these cases involved the mandatory

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Guidelines. *Id.* at 365 n.3. As this piece went to print, the Eleventh Circuit similarly held that advisory Guidelines are not amenable to vagueness challenges and that the career offender Guideline was not invalid for that reason. United States v. Matchett, __ F.3d __, (11th Cir. Sept. 21. 2015). In *Matchett*, the government had conceded error.

42 Guidelines estimates suggest that over 2,000 offenders each year are subjected to the career offender Guideline enhancement, but this number does not differentiate between defendants convicted of unlawful firearms possession under § 922(g) rather than other offenses. U.S. Sentencing Comm'n, *Quick Facts: Career Offender*, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender.pdf. These numbers also do not distinguish between defendants who were sentenced under the residual clauses of ACCA or the career offender Guideline, as opposed to other provisions. But courts would still have to sort through all of the offenders that were sentenced under ACCA or the career offender Guideline to determine which ones have *Johnson* claims.

43 Litman, *supra* note 12, at 59–60 & n.28 (explaining how new rules apply to cases on direct review and that a Guidelines error may constitute plain error).

44 *United States v. Frazier* assumed that a plain error occurred where the defendant had been sentenced under the career offender Guideline's residual clause. __ F. App'x __, 2015 WL 5062273 (4th Cir. Aug. 28, 2015). But *Frazier* concluded the error did not affect the defendant's substantial rights because the district court "chose to vary upward to the statutory maximum prison term for the offense" for several reasons. *Id.* at *2.

45 Stephen R. Sady & Gillian R. Schroff, *Johnson*: Remembrance of Illegal Sentences Past, 28 Fed. Sent'g Rep. __ (2015) (this Issue); *see, e.g.*, United States v. Goodwin, __ F. App'x __, 2015 WL 5167789, at *2-3 (10 Cir. Sept. 4, 2015). The Eleventh Circuit nonetheless chose to address this issue and hold that the career offender Guideline was not unconstitutionally vague in United States v. Matchett, __ F.3d __, 2015 WL 5515439 (11th Cir. Sept. 21, 2015).

46 United States v. Grayer, __ F. App'x __, 2015 WL5472743 (6th Cir. Sept. 17, 2015); United States v. Castro-Vazquez, __ F.3d __, 2015 WL 5172839 (1st Cir. Sept. 4, 2015); Ramirez v. United States, __ F.3d __, 2015 WL 5011965, at *9 (7th Cir. Aug. 25, 2015); United States v. Franklin, __ F. App'x __, 2015 WL 4590812, at *11 (6th Cir. July 31, 2015) (prisoner was sentenced under both ACCA and the career offender Guideline); United States v. Willis, __ F. 3d __, 2015 WL 4547542, at *7 (9th Cir. July 29, 2015) ("It is an open question . . . whether this residual clause remains valid in light of *Johnson*."); United States v. Harbin, __ F. App'x __, 2015 WL 4393889 (6th Cir. July 20, 2015 (per curiam); United States v. Darden, 605 F. App'x 545 (6th Cir. July 6, 2015) (per curiam). *United States v. Lux*, __ F. App'x __, 2015 WL 4622422 (9th Cir. Aug. 4, 2015) (mem.), dismissed an appeal as moot where the prisoner sought to argue *Johnson* applied to the career offender Guideline, in the event "that, if he commits another federal crime, he will face exposure to an enhanced sentence in a future, hypothetical sentencing proceeding." *Id.* at *1.

47 *See* United States v. Maldonado, 581 F. App'x 19, 22–23 (2d Cir.2014), vacated, 135 S. Ct. 2928 (June 30, 2015); Beckles v. United States, 579 F. App'x 833, 833–34 (11th Cir.2014), vacated, 135 S. Ct. 2928 (June 30, 2015).

48 *See, e.g.*, Tyler v. Cain, 533 U.S. 656, 666 n.6 (2001) ("*Adams* . . . vacated and opinion of the Court of Appeals. . . . Our order, however, was not a 'final determination on the merits.'"); United States Nuclear Reg. Comm'n v. Sholly, 463 U.S. 1224, 1226 (1983) ("[I]n vacating the Court of Appeals' judgment this Court expressed no view of the merits.") (Blackmun, J., dissenting); United States v. Simmons, 635 F.3d 140, 144 (4th Cir. 2011) ("[W]hen the Supreme Court grants certiorari, vacates an opinion, and remands for further consideration, it makes no determination on the merits of the underlying opinion.").

49 *See, e.g.*, United States v. Beckles, 135 S. Ct. 2928, 2928–29 (June 30, 2015) (mem.) (Alito, J., concurring in the decision to grant, vacate, and remand).

50 Litman, *supra* note 12, at 60–63.

51 Griffith v. Kentucky, 479 U.S. 314, 322–23 (1986); Teague v. Lane, 489 U.S. 288, 310 (1989).

52 *Teague*, 489 U.S. at 307; Schriro v. Summerlin, 542 U.S. 348, 351–52 (2004).

53 *Schriro*, 542 U.S. at 351–52.

54 *Id*. at 354.

55 *Id*. at 352 (quoting Bousley v. United States, 523 U.S. 614, 620 (1998)).

56 *Id*. at 354.

57 Alleyne v. United States, 133 S. Ct. 2151, 2155, 2158, 2160–61 (2013).

58 *Schriro*, 542 U.S. at 352 (quoting Bousley, 523 U.S. at 620).

59 *See* Jones v. United States, 689 F.3d 621, 625–26 (6th Cir. 2012); Welch v. United States, 604 F.3d 408, 415 (7th Cir. 2010); United States v. Shipp, 589 F.3d 1084, 1091 (10th Cir. 2009); *cf.* Miller v. United States, 735 F.3d 141, 147 (4th Cir. 2013) (same for Fourth Circuit opinion interpreting ACCA's scope as retroactive); Lindsey v. United States, 615 F.3d 998, 100 (8th Cir. 2010) ("[T]he district court erred when it held *Begay* did not apply retroactively."). *United States v. Montes*, 570 F. App'x 830 (10th Cir. 2014), held that *Descamps v. United States*, 133 S. Ct. 2276 (2013) was not retroactive, but on the ground that it was an application of existing precedent rather than a "new" rule.

60 AEDPA, 28 U.S.C. § 2255(h)(2).

61 *Tyler*, 533 U.S. 656 (2001).

62 28 U.S.C. § 2244(b) (referring to a "habeas application under section 2254").

63 28 U.S.C. § 2244(b)(2)(A).

64 533 U.S. at 663–64.

65 *Cage*, 498 U.S. 39 (1990).

66 533 U.S. at 665–66.

67 533 U.S. at 665.

68 *Teague*, 489 U.S. 288, 307 (1989).

69 *Sullivan*, 508 U.S. 275 (1993).

70 *Tyler*, 533 U.S. at 665.

71 *Id*.

72 *Id*.

73 *Id*. at 666.

74 *Id*.

75 *Id*.

76 *Schriro*, 542 U.S. 348, 351–52 (2004).

77 *Bousley*, 523 U.S. 614 (1998).

78 *Id*. at 620.

79 *Tyler*, 533 U.S. at 666.

80 *See id*.

81 542 U.S. at 351–52.

82 Compare 523 U.S. at 620 (describing as retroactive "decisions of this Court holding that a substantive federal criminal statute does not reach certain conduct") with *id*. (describing as retroactive decisions "in which this Court decides the meaning of a criminal statute enacted by Congress").

83 Price v. United States, __ F.3d __, 2015 WL 4621024 (7th Cir. Aug. 4, 2015).

84 *In re Rivero*, __ F.3d __, 2015 WL 4747749, at *2 (11th Cir. Aug. 12, 2015).

85 *Id*. at *2.

86 The Eleventh Circuit also suggested that *Johnson* was not retroactive because it did not "prohibit[] Congress from

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punishing a criminal who has a prior conviction for attempted burglary nor prohibit[] Congress from increasing that criminal's sentence because of his prior conviction." 2015 WL 4747749, at *3. But, as Judge Jill Pryor noted in her dissent, *Bousley* held a decision construing § 924(e) retroactive even though that decision did not "prohibit[] Congress" from punishing particular conduct or from imposing a particular sentence. *Id.* at *11 (Pryor, J., dissenting). The majority responded that *Bousley* was not a constitutional decision, *id.* at *4, but it's not clear why that would mean *Johnson* is not retroactive. If *Bousley* held that all Supreme Court decisions that "decide[] the meaning of a criminal statute," 523 U.S. at 620, are retroactive, it shouldn't matter whether those decisions are purely constitutional, purely statutory, or some combination of the two. The "holding" of *Bousley* might fairly encompass any decision that changes the meaning of a criminal statute.

87 United States v. Gunn, 369 F.3d 1229, 1238 (11th Cir. 2004).

88 United States v. Rivero, 141 F. App'x 800 (11th Cir. June 28, 2005) (per curiam).

89 *Booker*, 543 U.S. 220 (2005).

90 U.S. Sentencing Guidelines § 4A1.3; U.S. Sentencing Commission, *Chapter Four—Criminal History and Criminal Livelihood*, *in* 2014 Guidelines Manual, *available at* http://www.ussc.gov/guidelines-manual/2014/2014-chapter-4.

91 United States v. Rivero, 141 F. App'x 800 (11th Cir. June 28, 2005) (per curiam).

92 In re Rivero, __ F.3d __, 2015 WL 4747749, at *2 (11th Cir. Aug. 12, 2015).

93 AEDPA, 28 U.S.C. § 2255(h)(2).

94 *In re Rivero*, 2015 WL 4747749, at *2.

95 *Id.*

96 *Id.* at *4.

97 *Id.*

98 *Id.* Indeed, one member of the Rivero panel was on the panel in Matchett, which held the career offender Guideline was not unconstitutionally vague. __ F.3d __, 2015 WL 5515439. Whether the Guidelines—especially mandatory versions—are amenable to vagueness challenges is, in my opinion, a more difficult question after *Johnson*, which invalidated a mandatory sentencing enhancement on vagueness grounds, and *Booker*, which held that mandatory sentencing enhancements may be elements of a criminal offense.

99 One month after *Rivero* was decided, the Eleventh Circuit, on its own initiative, appointed the Federal Defenders Office (FDO) to represent the defendant and ordered the FDO and the United States Attorney to file briefs on "whether Rivero's application for leave to file a second or successive motion . . . should be granted." *In re Rivero*, No. 15-13089, Order (11th Cir. Sept. 14, 2015).

100 AEDPA, 28 U.S.C. § 2244(b)(3)(E).

101 *Felker*, 518 U.S. 651, 661–62 (1996). Section 2241 provides "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." 28 U.S.C. § 2241(a).

102 *See* 518 U.S. at 662–63. The prisoner in *Felker* had been convicted in state court; therefore the relevant statutory limitations were those contained in § 2254 rather than § 2255. And § 2255(e) at least seems to contemplate that a court would sometimes be able to grant a writ under § 2241 even though it could not do so under § 2255. See 28 U.S.C. § 2255(e) ("An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the . . . court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.").

103 518 U.S. at 664–65.

104 They are: Jones v. United States, 689 F.3d 621, 625–26 (6th Cir. 2012); Welch v. United States, 604 F.3d 408, 415 (7th Cir. 2010); United States v. Shipp, 589 F.3d 1084, 1091 (10th Cir. 2009); *cf.* Miller v. United States, 735 F.3d 141, 147 (4th Cir. 2013) (same for Fourth Circuit opinion interpreting ACCA's scope retroactive); Lindsey v. United States, 615 F.3d 998, 100 (8th Cir. 2010) ("[T]he district court erred when it held *Begay* did not apply retroactively."). *United States v. Montes*, 570 F. App'x 830 (10th Cir. 2014), held that *Descamps v. United States*, 133 S. Ct. 2276 (2013), was not retroactive, but on the ground that it was an application of existing precedent rather than a "new" rule.

105 In re Rivero, __ F.3d__, 2015 WL 4747749 (11th Cir. 2015); Price v. United States, __ F.3d __, 2015 WL 4621024 (7th Cir. Aug. 4, 2015).

106 AEDPA, 28 U.S.C. § 2244(b)(3)(E).

107 *See Felker*, 518 U.S. at 662–63.

108 Section 2244(b)(4), for example, authorizes district courts to dismiss second or successive petitions that were authorized by the courts of appeals on the ground that such petitions do not meet the requirements for second or successive petitions contained in § 2244.

109 Litman, *supra* note 12, at 59.

110 28 U.S.C. § 2255(f). That period runs from "the latest of" four events, including "the date on which the judgment of conviction becomes final" or "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(1), (3). The second period runs from the date on which the Supreme Court recognized the right, as opposed to the date on which the right was recognized as retroactive. *See* Dodd v. United States, 545 U.S. 353 (2005). The limitations period, however, may be tolled for actual innocence claims. Litman, *supra* note 12, at 74–75.

111 Nancy J. King, Fred L. Cheesman II, & Brian J. Ostrom, *Final Technical Report: Habeas Litigation in U.S. District Courts* 36–45, (Aug. 2007) *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf.

112 28 U.S.C. § 2253(c). If a certificate of appealability is granted, then the appeal would proceed in the court of appeals. If a certificate of appealability is denied, then the appellate proceedings in the court of appeals are over, but a prisoner can file a petition for certiorari from the court of appeals' denial of the certificate of appealability. *See* Slack v. McDaniel, 529 U.S. 473 (2000) (reversing denial of certificate of appealability); Miller-El v. Cockrell, 537 U.S. 322 (2003) (same).

113 Bureau of Justice Statistics, U.S. Courts of Appeals—Median Time Intervals, tbl. B-4 (Sept. 2010), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/appendices/B04Sep10.pdf.

114 Sup. Ct. R. 13.

115 28 U.S.C. § 2244(3)(D).

116 Narvaez v. United States, 674 F.3d 621, 625 (7th Cir. 2011) ("The Government now concedes that *Begay* and *Chambers* decided questions of substantive statutory construction and that they apply retroactively on collateral review."); Sun Bear v. United States, 644 F.3d 700, 703 (8th Cir. 2011) ("The government has conceded in § 2255 proceedings around the country that *Begay* announced a new substantive rule that should be applied retroactively."); *cf.* Price v. United States, __ F.3d __, 2015 WL 4621024, at *1 (7th Cir. 2015) ("We now conclude, consistently with the government's position, that *Johnson* announces a new substantive rule of constitutional law that the Supreme Court has categorically made retroactive to final convictions.").

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[117] United States v. Goodwin, __ F. App'x __, 2015 WL 5167789, at *2-3 (10th Cir. Sept. 4, 2015) ("In its supplemental brief, the government 'concedes, in light of *Johnson*, that Mr. Goodwin's criminal trespass conviction may no longer be deemed a crime of violence.' . . . [U]nder the circumstances of this case, where the government has unequivocally conceded reversible error under the plain-error standard, and this conclusion is not patently incorrect, we summarily reverse and remand for re-sentencing.").

[118] Brown v. Rios, 696 F.3d 638, 640 (7th Cir. 2012) ("The government has conceded that Brown can use the habeas corpus statute to challenge the legality of his sentence.").

[119] Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006); *cf.* Wood v. Milyard, 132. S. Ct. 1826, 2830 (2012) ("A court is not at liberty, we have cautioned, to bypass, override, or excuse a State's deliberate waiver of a limitations defense.").

[120] *See* Luke C. Beasley & Leah M. Litman, Jurisdiction Over *Johnson v. United States* Resentencing Claims (manuscript on file with author); *cf.* Gonzales v. Thaler, 132 S. Ct. 641, 649 (2012) ("The parties also agree that §2253(c)(2) is nonjurisdictional. That is for good reason. Section 2253(c)(2) speaks only to when a COA may issue—upon a 'substantial showing of the denial of a constitutional right.' . . . It follows that § 2253(c)(3) is nonjurisdictional as well. Like § 2253(c)(2), it too reflects a threshold condition for the issuance of a COA—the COA's indication of 'which specific issue or issues satisfy the showing required by paragraph (2).' It too 'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the [appeals] courts.'").

[121] *See, e.g.*, Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 Cal. L. Rev. 1, 1–2 (2010).

[122] Schriro v. Summerlin, 542 U.S. 348, 352 (2004) (quoting Bousley v. United States, 523 U.S. 614, 620 (1998)).

[123] O'Dell v. Netherland, 521 U.S. 151, 157 (1997).

[124] Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions. We decline to so hold today.").

[125] Guide to Judiciary Policy, Vol. 7: Defender Services, Part A: Guidelines for Administering the CJA and Related Statutes, Chapter 2: Appointment and Payment of Counsel, § 210: Representation under the CJA, Section 210.20.20(a)(2) (rev. June 2015), *available at* http://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-2-ss-210-representation-under-cja.

[126] *E.g.*, United States v. Van Mead, 773 F.3d 429 (2d Cir. 2014); United States v. Johnson, 526 F. App'x 708 (8th Cir. 2013); United States v. Hawkins, 512 F. App'x 746 (10th Cir. 2013); United States v. Brown, 516 F. App'x 461 (6th Cir. 2013); United States v. Guadalupe, 493 F. App'x 146 (1st Cir. 2012); Unite States v. Battle, 494 F. App'x 404 (4th Cir. 2012); United States v. Jones, 689 F.3d 696 (7th Cir. 2012); United States v. Devo, 457 F. App'x 908 (11th Cir. 2012); United States v. Gibbs, 656 F.3d 180 (3d Cir. 2011); United States v. Wilson, 64 F. App'x 417 (5th Cir. 2003); United States v. Powell, 967 F.3d 595 (9th Cir. 1992).

[127] Martinez v. Ryan, 132 S. Ct. 1309, 1317 (2012).

[128] *Id*. For a discussion of how difficult it may be for pro se prisoners to navigate post-conviction proceedings, see *United States v. Doe*, __ F.3d __, 2015 WL 5131208 (3d Cir. Sept. 2, 2015).

[129] Although this establishes a work-around to *Tyler*'s rule that the Supreme Court must make a rule retroactive before a second or successive petition is permitted, § 2255(e) specifically contemplates that § 2241 will operate as a backstop for certain post-conviction petitions that are not permitted to proceed under § 2255.

[130] *Moore*, 568 F. App'x 838, 840–41 (11th Cir. 2014).

[131] Gilbert v. United States, 640 F.3d 1293, 1306 (11th Cir. 2011) (en banc); see also Brown v. Rios, 696 F.3d 638, 640 (7th Cir. 2012) ("The government has conceded that Brown can use the habeas corpus statute to challenge the legality of his sentence."); *cf.* Bryant v. Warden, 738 F.3d 1253, 1274, 1277–79 (11th Cir. 2013) (allowing claim that defendant was wrongly sentenced under ACCA to proceed under § 2241).

[132] Webster v. Caraway, 761 F.3d 764, 767 (7th Cir. 2014), rev'd on other grounds on reh'g en banc, Webster v. Daniels, 784 F.3d 1124 (7th Cir. 2015).

[133] For other questions that courts will confront in addressing *Johnson* claims, see Litman, *supra* note 12.

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