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. 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. 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.” 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; one week later, the U.S. Court of Appeals for the Eleventh Circuit said that it had not. 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. Section 924(a) provides that defendants convicted under § 922(g) shall be “imprisoned not more than 10 years.” 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.” 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.”

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). 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. Courts have also remanded these cases for resentencing where the defendant did not initially...
argue that ACCA’s residual clause was unconstitutionally vague.\textsuperscript{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.

\textbf{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,”\textsuperscript{13} as well as any crime that “is burglary, arson, extortion, or involves use of explosives.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{16}

\textbf{B. The Career Offender Guideline}

Johnson also confounded 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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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).\textsuperscript{22}

Do prisoners sentenced under the career offender Guideline have a Johnson claim?\textsuperscript{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.”\textsuperscript{24} Applying the residual clause of the career offender Guideline amounts to nothing more than “guesswork and intuition,”\textsuperscript{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,\textsuperscript{26} and the district court’s failure to properly calculate the Guidelines range is reversible error.\textsuperscript{27} And last year 46 percent of sentences fell within the recommended Guidelines range.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{31}

It is not hard to imagine an opinion relying on this kind of reasoning to find the Guidelines unconstitutionally vague.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{35} And any fact that establishes a defendant’s eligibility for a mandatory minimum sentence is considered an element
of the offense. But any fact that establishes a defendant’s eligibility for a higher Guidelines range is not an element of the offense. 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.’’ 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. 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. 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.’’

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 20,000 offenders each year receive the career offender guideline enhancement, whereas only 600 offenders each year are sentenced under ACCA. 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.

As of this writing, no court of appeals has decided whether Johnson means the career offender guideline is unconstitutionally vague. 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. 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. As these courts recognized, after Johnson, the Supreme Court vacated sentences of prisoners who were sentenced under the residual clause of the Sentencing Guidelines. But vacatur isn’t a sign of the Court’s views on the merits, and in all of the post-Johnson vacatur cases, 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.”

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.

The short story is that “new” constitutional rules generally do not apply to criminal cases that have already become final. 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.

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.” A decision that “modifies the elements of an offense is normally substantive rather than procedural.” 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.

Johnson falls squarely in this category of substantive rules. Johnson “modify[d] the elements of an offense” by altering what facts establish a defendant’s eligibility for a mandatory minimum term of imprisonment. 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.” 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 could[n] not impose on” them—a term of years exceeding the statutory maximum for their offense of conviction.

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. 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
before filing a second or successive petition for post-
conviction review. The statute permits a second or suc-
cessive 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.”

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 ret-
roactive: 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 sen-
tenced 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 suc-
cessive 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.66 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 prisoner-
s 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.”

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 defend-
ant without proof beyond a reasonable doubt.)59

Tyler reasoned that the Court had not made Cage retro-
active because “Cage itself does not hold that it is retroac-
tive. 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 retroac-
tively unless they are substantive rules or watershed rules of
criminal procedure.) Sullivan 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
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 neces-
sarily dictate retroactivity of the new rule.”74 And Tyler
explained that Sullivan and Teague had not made Cage ret-
roactive 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
Schrino v. Summerlin, the Supreme Court said that “sub-
stantive” 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 Schrino was
that Ring v. Arizona was not retroactive because it was nei-
ter a substantive rule nor a watershed rule of criminal
procedure. Schrino’s statements about what would constit-
te substantive rules therefore might not qualify as
holdings.
Johnson: Beau v. United States comes closer to making—that is, holding—Johnson retroactive.\footnote{Beau v. United States} 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.”\footnote{Teague v. Lane} 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.\footnote{Alleyne v. United States} But it’s not clear that there is a second decision holding that all rules interpreting the elements of a criminal offense are retroactive.\footnote{Johnson v. United States} 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.\footnote{Schriro v. Landeros} 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.\footnote{Bousley v. United States}

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.\footnote{United States v. Price} 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.”\footnote{Johnson v. United States} 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.”\footnote{Johnson v. United States} 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.\footnote{Johnson v. United States}

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 § 924(g) conviction.)\footnote{Rivero v. United States} 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).\footnote{Rivero v. United States} 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.\footnote{Rivero v. United States} 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-represented” the seriousness of

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the defendant’s criminal history or the likelihood that the defendant will commit other crimes.” 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.96)

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 “[i]f the 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—this 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(b)(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.” 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
“original” petitions for habeas corpus—petitions that are filed directly in the Supreme Court (under § 2241). 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. But Felker did note that, under the Supreme Court’s own rules, original petitions are rarely granted—they are granted only in “exceptional circumstances.” 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. The two circuits that have weighed in after Johnson have determined that the decision applies retroactively. 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. 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.

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. 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. A prisoner then has one year to file a petition for post-conviction review. District courts take, on average, 8 to 12 months to adjudicate post-conviction petitions; a prisoner must receive a certificate of appealability from a judge on the court of appeals before proceeding with an appeal; 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. 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.

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; the district court will take 8 to 12 months to adjudicate a second or successive 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 § 924(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. Cúan 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
interpreting ACCA are retroactive;\textsuperscript{116} it has conceded that Johnson applies to the career offender Guideline;\textsuperscript{117} and it has conceded that prisoners may bring a post-conviction petition under § 2241 to correct the mistaken imposition of an ACCA sentence.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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)”\textsuperscript{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”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{126} Prisoners therefore “cannot rely on a court opinion or the prior work of an attorney addressing that claim”\textsuperscript{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.\textsuperscript{128} Additionally, determining whether a prisoner “unlearned in the law, may not comply with the procedural rules or may misapprehend the substantive details” of the law.\textsuperscript{128} Additionally, 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.\textsuperscript{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
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 § 2355’s limitations on second or successive petitions made the § 2355 remedy inadequate for a defendant who was mistakenly subjected to the ACCA enhancement in light of subsequent precedent. And in several cases “the government conceded[d] that a claim that a sentencing error resulted in a sentence longer than the statutory maximum may be brought in an initial § 2355 motion or, if that remedy is foreclosed by § 2355(h), in a § 2241 petition by virtue of the savings clause.” Even cases finding the savings clause inapplicable—thus preventing recourse to § 2241—note that the savings clause permits litigants to sidestep § 2355(h)’s limitations on second or successive petitions “[when] a change of law, retroactively applicable, shows that a prisoner . . . has received an illegally high sentence.” 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.

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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. 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


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/pdfs/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.


4 In re Rivero, __ F.3d __, 2015 WL 4747759 (11th Cir. Aug. 12, 2015). After this article went to print, the Circuit also held that the Court has not made Johnson retroactive. In re Gieswin, __ F.3d __, 2015 WL 5534398 (10th Cir. Sept. 21, 2015).

5 ACCA, 18 U.S.C. § 922(g).


7 Griffith v. Kentucky, 479 U.S. 314, 322–23 (1986); Greene v. United States v. McGregor, __ F. App’x __, 2015 WL 4393876 (6th Cir. July 20, 2015); United States v. Kemmerling, __ F. App’x __, 2015 WL 4242999 (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.


15 Johnson, 135 S. Ct. at 2563.

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).


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


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.


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.”).


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. Reedon, 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.


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.”).

38 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).

39 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. Extravagant 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. 212 (1998). But after Johnson, “[c]riminal history” is not a category of offense elements that are immune from vagueness challenges.

40 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.

41 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).

42 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
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.

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.

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).

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.


United States v. Grayer, __ F. App’x __, 2015 WL 5472743 (6th Cir. Sept. 17, 2015); United States v. Castro-Vazquez, __ F.3d __, 2015 WL 72939 (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.


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) (“In 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) (“When the Supreme Court grants certiorari, vacates an opinion, and remands for further consideration, it makes no determination on the merits of the underlying opinion.”).


Litman, supra note 12, at 60–63.


Schriro, 542 U.S. at 351–52.

Id. at 354.

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

Id. at 354.


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

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. Sipp, 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) (“The 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. AEDPA, 28 U.S.C. § 2255(h)(2).


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


533 U.S. at 665–66.

533 U.S. at 665.


Tyler, 533 U.S. at 665.

Id.

Id.

Id.

Id.

Id.


Id. at 620.

Tyler, 533 U.S. at 666.

See id.

542 U.S. at 351–52.

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”).


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

Id. at *2.

The Eleventh Circuit also suggested that Johnson was not retroactive because it did not “prohibit[] Congress from
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.


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.

Bousley United States v. Rivero, 141 F. App’x 800 (11th Cir. June 28, 2005) (per curiam). In re Rivero, ___ F.3d ___, 2015 WL 4747749, at *2. Id. at *4.

The district court held that “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.

518 U.S. at 664–65. 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).
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.’ . . . Under 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.”).

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