Johnson: Remembrance of Illegal Sentences Past

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The Armed Career Criminal Act (ACCA) imposes a harsh mandatory minimum sentence for simple possession of a firearm.[1] Under the ACCA, an individual convicted of unlawfully possessing a firearm or ammunition under 18 U.S.C. § 922(g), who also has three prior convictions that qualify as serious drug offenses or violent felonies, faces a mandatory minimum sentence of 15 years.[2] Violent felonies are broken down into two types of crimes: (1) crimes that have an element of physical force against the person of another, and (2) crimes that are "burglary, arson, or extortion, involve[] use of explosives, *or otherwise involve[] conduct that presents a serious potential risk of physical injury to another*."[3] The final phrase is known as the "residual clause." Courts have long struggled to determine what crimes qualify under the residual clause.[4]

On June 26, 2015, the Supreme Court declared the residual clause void for vagueness in *Johnson v. United States*—a case decided almost thirty years after the residual clause was added to the ACCA and the Supreme Court's fifth case analyzing the clause.[5] Given the long life of the ACCA and the varied circumstances in which the residual clause has been applied, *Johnson* could have profound effects in the federal criminal system. Incarcerated individuals whose sentences depend on the ACCA residual clause, or similar guideline and statutory provisions, may have claims for sentencing relief.

I. Justice Scalia's Decision on Vagueness under the Due Process Clause

Undercover agents of the Federal Bureau of Investigation met with Samuel Johnson as part of an investigation involving white supremacist organizations. During the investigation, Johnson showed various firearms and rounds of ammunition to agents. Subsequently, Johnson pled guilty to being a felon in possession of a firearm in violation of § 922(g). Because Johnson's criminal record included two robberies and possession of a short-barreled shotgun, the government argued that he should be sentenced under the ACCA. The district court agreed that the prior convictions qualified as violent felonies under the ACCA and imposed the mandatory minimum 15-year sentence. The Eighth Circuit Court of Appeals affirmed.

On certiorari, the initial question before the Supreme Court was whether a prior conviction for possession of a sawed-off shotgun constituted a "violent felony" under the residual clause of the ACCA.[6] However, after argument, the Supreme Court asked for supplemental briefing and re-argument on whether the residual clause itself, 18 U.S.C. § 924(e)(B)(ii), was unconstitutionally vague.[7] In an opinion authored by Justice Scalia, the Court held that imposition of an increased sentence under the ACCA's residual clause violates the Due Process Clause's vagueness prohibition:

> We are convinced that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges. Increasing a defendant's sentence under the clause denies due process of law.[8]
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> . . .
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> Invoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process.[9]

The Court's holding invalidated the residual clause in its entirety because the Court rejected the argument that "a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp."[10]

II. ACCA Sentences Based on Residual Clause Offenses

Neither ACCA convictions based on the enumerated generic predicate offenses, nor convictions for "serious drug offenses," nor crimes with an element of physical force are directly affected by *Johnson*. Instead, the case only invalidated residual clause convictions. Still, *Johnson* will be highly significant in circuits where state crimes that do not match the generic definition of the enumerated offenses have been held to qualify as predicates only under the residual clause.

For example, the burglary statutes of many states have been held not to constitute generic federal burglary under *Taylor v. United States*,[11] as reinforced by *Descamps v. United States*,[12] yet have still been used as ACCA predicate offenses under the residual clause.[13] Because many state burglary statutes are indivisibly overbroad—meaning that convictions under the statutes cannot qualify as the enumerated generic "burglary" crime—prisoners with these non-generic prior burglary convictions are among the potential beneficiaries of the Supreme Court's decision.

In the Ninth Circuit, the court approved the use of nongeneric burglaries as ACCA residual clause predicate convictions in *United States v. Mayer*, finding

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"unpersuasive" the argument that the crime did not categorically pose a serious potential risk of physical injury.[14] Then–Chief Judge Kozinski, along with Judges Reinhardt and Fletcher, dissented from the Ninth Circuit's decision not to rehear *Mayer* en banc, calling the decision's failure to provide consistent standards "a train wreck in the making."[15] Not only did *Johnson* reject the holding of *Mayer*, Justice Scalia also approvingly quoted Judge Kozinski's prescient critique about how courts were to assess the risks in the "ordinary case" under the residual clause: "A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?"[16] Several days after issuing its opinion in *Johnson*, the Supreme Court granted certiorari, vacated the judgment, and remanded in over 40 cases being held pending *Johnson*,[17] including an action brought by Mr. Mayer.[18]

With *Mayer*'s holding reversed, the rule of *Descamps* and *Taylor* governs in the Ninth Circuit, meaning that overbroad burglary statutes are not predicate ACCA convictions. In *United States v. Grisel*, an en banc panel of the Ninth Circuit held that the "building" element of the Oregon burglary statute was overly broad.[19] In *United States v. Wilkinson*, the Ninth Circuit also held in an unpublished opinion that a state burglary statute criminalizing licensed entries was overbroad and granted relief from an ACCA conviction under the statute.[20] With the last refuge of the residual clause no longer available, individuals sentenced based on nongeneric burglaries, and other nongeneric enumerated offenses, are serving illegal sentences.[21]

Convictions for fleeing and eluding police officers, which have been treated as ACCA predicate convictions under the residual clause, are also no longer valid ACCA predicates. Several years ago, over Justice Scalia's dissent arguing vagueness, the Court upheld eluding the police as a "violent felony" under the residual clause in *Sykes v. United States*.[22] Defense attorneys have since been attacking these convictions because most state fleeing and eluding statutes encompass relatively innocuous conduct such as temporary noncompliance with flashing lights.[23] *Johnson* expressly overrules *Sykes*, so all ACCA sentences predicated on eluding convictions should be reviewed. For example, following *Johnson*, the Supreme Court granted certiorari, vacated the decision, and remanded in *Martinez v. United States*,[24] in which the Ninth Circuit, following its precedent in *United States v. Snyder*[25] and *United States v. Cisneros*[26] on Oregon eluding, found that California eluding constituted an ACCA "violent felony" under the residual clause.[27] On direct appeal, the Sixth Circuit also remanded a post-*Johnson* ACCA case for resentencing due to the use of an eluding conviction as an ACCA predicate conviction under the invalid residual clause.[28]

Defendants whose ACCA sentences depend on convictions that qualified only under the residual clause can pursue motions and petitions for relief to challenge the increase from a statutory range of 0 to 10 years for possession of a firearm under § 922(g) to the range of 15 years to life under the ACCA. Other defendants sentenced under statutes and guidelines with provisions analogous to the ACCA residual clause may also be able to seek relief based on the *Johnson* holding.

III. The Effects of *Johnson* Beyond the ACCA

The Supreme Court's holding invalidating the residual clause should apply beyond the ACCA to statutory or sentencing guideline provisions that combine a "serious potential risk" criterion with application of the categorical approach. The most directly analogous provision is found in the career-offender sentencing guideline, where the United States Sentencing Commission used language identical to the ACCA residual clause in the definition of "crime of violence."[29] Prior to *Johnson*, various courts of appeals held that the Supreme Court's interpretations of the ACCA residual clause apply equally to the career offender residual clause.[30] Thus, enhancement based on the guideline residual clause should be just as much of a due process violation as enhancement based on the statutory residual clause.[31] The Supreme Court's post-*Johnson* cases that were granted, vacated, and remanded (GVRs) include seven cases involving career offender sentences.[32] In *United States v. Lee* and other cases, the government conceded that *Johnson* applied to the advisory career offender sentencing guidelines.[33]

The sentencing guideline for non-ACCA unlawful possession of a firearm, § 2K2.1(a), is implicated as well because it permits an increase of up to ten offense levels based on prior "crimes of violence" under the career offender definition of that term, which includes the invalid residual clause.[34] The post-*Johnson* GVRs include the Ninth Circuit's unpublished opinion in *United States v. Talmore*.[35] In that case, the lower court upheld an increase in the base offense level under § 2K2.1 for simple felon-in-possession under § 922(g) based on a California burglary conviction that would not qualify as generic federal burglary.[36] On remand, the government has conceded that *Johnson* applies.[37] In *United States v. Pagan-Soto*, another §2K2.1 case, the government has similarly noted:

> The position of the United States is that Johnson's constitutional holding regarding ACCA's residual clause applies to the identically worded Guidelines residual clause. This affects the application of the career offender Guideline, U.S.S.G. § 4B1.1, as well as other Guidelines that use the career-offender Guideline's definition of "crime of violence." *See* U.S.S.G. §§ 2K1.3 & cmt. n.2 (explosive materials Guideline); 2K2.1 & cmt. n.1 (firearms Guideline); 2S1.1 & cmt. n.1 (money laundering Guideline); 4A1.1(e), 4A1.2(p) (criminal history Guidelines); 5K2.17 & cmt. n.1 (departure Guideline for semi-automatic firearms); and 7B1.1(a)(1) & cmt. n.2 (probation and supervised release Guideline).[38]

For probation and supervised release violations, U.S.S.G. § 7B1.1 instructs that, if the violation is a "crime of violence" as defined in U.S.S.G. § 4B1.2, the guideline range

increases to the level for Grade A violations. That provision should also be subject to *Johnson*'s invalidation of the vague residual clause.[39] One of the *Johnson* GVRs involved the application of the § 7B1.1 supervised release violation guideline in the Eleventh Circuit.[40]

The residual clause of 18 U.S.C. § 16(b) should also be vulnerable to *Johnson* vagueness arguments. Under § 16(b), a prior offense qualifies as a "crime of violence" if the offense "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."[41] The phrase, "by its nature" requires the type of hypothetical "ordinary case" analysis that the Supreme Court identified in *Johnson* as "leav[ing] grave uncertainly about how to estimate the risk posed by a crime."[42] In *James v. United States*, the Supreme Court indicated that the phrase "by its nature" is equivalent to "in the ordinary case."[43] Thus, based on the *Johnson* analysis, the "ordinary case" language in § 16(b)'s residual clause makes it unconstitutionally vague. Although the Supreme Court did not explicitly address § 16(b) in its decision, the government conceded in its briefing that the reasoning on vagueness applies equally in both the ACCA and § 16(b) contexts.[44]

The lack of enumerated offenses in § 16(b) does not change this result. In *Johnson*, the Court noted that the "confusing list" of enumerated offenses in the ACCA residual clause failed to dispel the confusion surrounding the amount of risk required under the provision because the enumerated offenses themselves required an "ordinary case" analysis.[45] But the Court also made clear that the "[m]ore important[]" cause of the confusion was the application of that imprecise standard to "an idealized ordinary case of the crime," rather than to "real world conduct," creating unconstitutional vagueness.[46] Although § 16(b) does not have a "confusing list" of enumerated offenses, it similarly requires courts to apply an imprecise standard ("substantial risk that physical force will be used") to an imaginary offense. The ordinary case problem exists, with or without enumerated offenses, whenever an "ordinary case" analysis is present without connection to specific conduct. Because § 16(b) requires the prohibited, unmoored "ordinary case" inquiry, it is unconstitutionally vague.

In addition, although the language in § 16(b) and the ACCA is not identical, various courts have recognized that the § 16(b) provision is similar to the ACCA and career offender residual clauses.[47] Courts have referenced ACCA and career offender holdings in § 16(b) cases and vice versa.[48] Thus, although § 16(b) has not been interpreted as often as the ACCA at the Supreme Court level, that does not mean that § 16(b) is clearer or less difficult to apply. Instead, this simply reflects the fact that § 16(b) cases have often relied on cases interpreting and clarifying the ACCA to give meaning to the vague § 16(b) terms. The ambiguity in § 16(b) is no different from that created under the ACCA residual clause.[49] Moreover, although there are certainly offenses that would qualify as "core" § 16(b) crimes of violence, this cannot save the provision from vagueness under *Johnson*.[50]

Because § 16(b) is susceptible to challenge under *Johnson*, *Johnson* is relevant to the many criminal provisions that rely on the § 16(b) definition of "crime of violence." For example, in illegal reentry prosecutions under 8 U.S.C. § 1326, the definition of "aggravated felony" incorporates the definition of "crime of violence" from 18 U.S.C. § 16(b).[51] For the same reason, prior removal proceedings, as well as enhancements under U.S.S.G. § 2L1.2(b)(1)(C) for unlawful entry and remaining in the United States, may also be subject to challenge based on *Johnson* and the Due Process Clause. Other statutes that have been construed to include the § 16(b) definition, or that explicitly include the § 16(b) definition by cross-reference, include:

- Restitution under 18 U.S.C. § 3663A;
- Mandatory life imprisonment under 18 U.S.C. § 3559(c);
- Release or detention pending trial, sentencing, or appeal under 18 U.S.C. §§ 3142–3143;
- Extradition limitations under 18 U.S.C. § 3181;
- Sex offender registration under 18 U.S.C. § 2250;
- Money laundering under 18 U.S.C. § 2250;
- Racketeering under 18 U.S.C. § 1959;
- Prohibition on body armor for persons convicted of a crime of violence under 18 U.S.C. § 931;
- Restrictions on use of ammunition under 18 U.S.C. § 929;
- Mandatory minimums for possession or use of firearms under 18 U.S.C. § 924;
- Use of minors in crimes of violence under 18 U.S.C. § 25;
- Penalties regarding distribution and storage of explosive materials under 18 U.S.C. §§ 842 and 844.

IV. Procedural Mechanisms for Review

The prospective benefits for incarcerated individuals from *Johnson* should be relatively straightforward: defense attorneys should assert and preserve challenges to prior convictions that implicate residual clauses in cases at trial, at sentencing, and on direct appeal. The big questions for obtaining review will arise in the many cases where individuals are serving illegal sentences after direct review is over. In general, the procedural mechanism for review of sentencing claims will depend on the stage of litigation. For cases that would have won on appeal under *Johnson*, a motion to recall the mandate may be appropriate, even under the standard requiring an "exceptional" need to prevent injustice.[52] Where *Johnson* is directly controlling, the courts of appeals should provide the forum for preventing the patent injustice of the defendant serving an illegal sentence the court countenanced in the absence of guidance from *Johnson*. Where the appeal does not provide appropriate relief, federal habeas relief should be readily

available at any stage under either 28 U.S.C. §2255 or 28 U.S.C. § 2241. Individuals unlawfully sentenced under guidelines sentencing enhancements, such as career offender provisions based on prior convictions that no longer qualify as "crimes of violence" under *Johnson*, will also have claims for relief under either § 2255 or § 2241.

A. Initial Motions Challenging ACCA Sentences under 28 U.S.C. § 2255

Generally, relief should be available for those individuals who have not previously filed a motion under 28 U.S.C. § 2255. An individual who is filing a first petition under § 2255 must satisfy three procedural requirements: (1) the claim must be cognizable under § 2255(a), (2) the decision referenced as a basis for relief must be retroactive, and (3) the petition must be timely under § 2255(f). The government appears to be waiving discretionary procedural defenses in ACCA cases.[53]

First, a claim is cognizable under § 2255(a) when a sentence is "in excess of the maximum authorized by law" or is "imposed in violation of the Constitution or laws of the United States." A defendant serving an invalid ACCA sentence qualifies on both grounds. The 15-year mandatory minimum ACCA sentence is five years above the statutory maximum of ten years authorized under law for violations of § 922(g), meaning that an individual unlawfully sentenced under the ACCA is subject to a sentence beyond the statutory maximum.[54] When defendants are subject to a sentence beyond the statutory maximum, their due process rights are violated because they are serving *per se* illegal sentences that the law cannot impose upon them.[55] Further, when defendants are serving ACCA sentences based on the residual clause, their due process rights are violated because their sentences were predicated on a statutory provision that is unconstitutionally vague under *Johnson*.

Second, the *Johnson* decision applies retroactively because Supreme Court decisions apply retroactively if they are "substantive."[56] Under Supreme Court precedent, a decision is considered "substantive" if it "narrow[s] the scope of a criminal statue by interpreting its terms" or makes a "constitutional determination[] that place[s] particular conduct or persons covered by the statute beyond the State's power to punish."[57] Because *Johnson* narrows the reach of the ACCA, the decision is "substantive" and applies retroactively. Federal courts have consistently held that the Supreme Court's prior decisions narrowing the scope of the ACCA—*Begay* and *Chambers*—are substantive decisions that apply retroactively to cases on collateral review.[58] That conclusion applies with even more force to *Johnson* because it both narrowed the ACCA's reach by voiding the residual clause and expressly declared that "[i]ncreasing a defendant's sentence under the clause denies due process of law."[59]

Third, a claim is timely under § 2255(f)(3) if it is filed within one year of "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." Defendants who file their petitions within one year of *Johnson* should easily satisfy this criterion. For the reasons previously set forth, *Johnson* is retroactive. There is no question that *Johnson* also established a new right.[60] Thus, for the year following the *Johnson* decision, individuals should be able to obtain a ruling on the merits under § 2255, where the prior conviction is no longer an ACCA predicate and the petition is the client's first § 2255 motion.

Note that the one-year limitation period runs from the "latest of" the date described in § 2255(f)(3) or the "date on which the judgment of conviction becomes final" under § 2255(f)(1). If the conviction became final within the year before *Johnson* and the petitioner has one or more clams in addition to a *Johnson* claim, it may be prudent to file a first § 2255 raising all claims together within a year of the conviction becoming final. If the *Johnson* claim is filed later, it will be a successor motion subject to the requirements of § 2255(h). If a first § 2255 is pending, it would be wise to supplement it with a *Johnson* claim lest the *Johnson* claim be deemed successive.

B. Successive Motions Challenging ACCA Sentences under 28 U.S.C. § 2255(h)(2)

After an initial § 2255 motion, a defendant can seek permission from the court of appeals to file a second or successive motion.[61] Section 2255(h)(2) limits second or successive motions to claims based on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."[62] The Seventh Circuit in *Price* held that these requirements were met and granted authorization to bring a successive § 2255 motion based on an invalid ACCA sentence[63]:

> *Johnson* announces a new rule: It explicitly overrules the line of Supreme Court decisions that began with *Begay*, and it broke new ground by invalidating a provision of ACCA. *Johnson* rests on the notice requirement of the Due Process Clause of the Fifth Amendment, and thus the new rule that it announces is one of constitutional law.[64]
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> There is no escaping the logical conclusion that the Court itself has made *Johnson* categorically retroactive to cases on collateral review.[65]

The *Price* court relied on a combination of Supreme Court cases that made *Johnson* retroactive. In *Tyler v. Cain*,[66] Justice O'Connor indicated that the Court "could make a rule retroactive 'through multiple holdings that logically dictate the retroactivity of the new rule.'"[67] She explained: "If we hold in Case One that a particular type of rule applies retroactively . . . and hold in Case Two that a given rule is of that particular type, then it necessarily follows that the given rule applies retroactively. . . . In such

circumstances, we can be said to have 'made' the given rule retroactive."[68] Justice O'Connor further elaborated that, when a court announces a new substantive rule, "it necessarily follows that this Court has 'made' that new rule retroactive."[69] Under these terms, because *Johnson* clearly announced a substantive rule, the Seventh Circuit held that "[t]here is no escaping the logical conclusion that the Court itself has made *Johnson* categorically retroactive to cases on collateral review."[70]

In a career offender case, a split panel of the Eleventh Circuit found that *Johnson* announced a new substantive rule of constitutional law that was retroactive for purposes of an initial § 2255 motion, but declined to authorize a successive § 2255 motion, finding that "[n]o combination of holdings of the Supreme Court 'necessarily dictate' that *Johnson* should be applied retroactively on collateral review."[71] As the *Rivero* dissenter argued, the Eleventh Circuit thus "agree[d] that the rule announced in *Johnson* fits squarely into the . . . category of retroactive rules,"[72] yet failed to heed the Supreme Court's declaration, in no uncertain terms, that "decisions that narrow the scope of a criminal statute by interpreting its terms" apply retroactively.[73] The panel decision, which was reached without an attorney representing Mr. Rivero, has been withdrawn and set for rebriefing with appointed counsel.[74]

C. Savings Clause Petitions Challenging ACCA Sentences under 28 U.S.C. § 2241

If a defendant is unable to obtain authorization to file a successive motion under § 2255(h)(2), then a § 2241 petition provides an alternative means for relief. Section 2255(e)'s savings clause, or "escape hatch," applies when "the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of [the] detention,"[75] in which case the prisoner may file a petition under 28 U.S.C. § 2241. The law interpreting § 2255(e) and § 2241 petitions vary significantly by circuit, and bringing such a claim based on *Johnson* may be more or less feasible depending on the relevant circuit's standards.

Johnson error should be cognizable under § 2241 for two independent reasons. First, an unlawful ACCA sentence exceeds the maximum sentence authorized by law. For this reason, the Eleventh Circuit in *Bryant v. Warden, FCC Coleman-Medium*, held that a challenge to an unlawful ACCA sentence based on a *Begay* error was cognizable.[76] Second, the *Johnson* error is cognizable under § 2241 because, as previously discussed, it renders any sentence—whether ACCA or guidelines—unconstitutional.[77] The text of § 2241(c) provides that a sentence imposed "in violation of the Constitution . . . of the United States" should be remedied, and the courts of appeals have reinforced that constitutional errors are cognizable under § 2241.[78]

D. Relief from Unconstitutional Guideline Enhancements

Johnson not only impacts individuals sentenced under the ACCA but also those sentenced under analogous guideline residual clauses. Many defendants have been sentenced to dramatic enhancements, particularly under the residual clause in the career offender guideline, which *Johnson* has now nullified. The analysis for seeking relief from invalid ACCA sentences generally applies to unconstitutional guidelines sentences.

A *Johnson* challenge to a guideline sentence is cognizable under the plain language of § 2255(a) because the sentence was "imposed in violation of the Constitution . . . of the United States."[79] As the government has conceded in a number of guideline cases on direct appeal, *Johnson*'s constitutional holding applies to the guidelines whether they are mandatory or advisory.[80] The Government correctly explained in *Pagan-Soto*:

> The Guidelines crime-of-violence residual clause uses the same language that *Johnson* held was impermissibly vague because it "produces more unpredictability and arbitrariness than the Due Process Clause tolerates." 135 S. Ct. at 2558. This Court and other courts of appeals have held that ACCA's residual clause and the Guideline's residual clause must be interpreted in the same way and have applied decisions interpreting the two provisions interchangeably.
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> The ACCA cases on which courts have relied to decide whether offenses fall within the guideline's residual clause are now overruled, leaving courts with no body of law to apply. After *Johnson*, judges attempting to determine whether a particular offense qualifies as a crime of violence under the residual clause will be forced to rely on "guesswork and intuition." 135 S. Ct. at 2559.[81]

Moreover, "[a]pplication of a vague Guideline conflicts with the proper role of the Guidelines in providing a uniform baseline for sentencing."[82] Under the advisory guidelines system, courts are still required to "begin all sentencing proceedings by correctly calculating the applicable Guidelines range" and to use the guidelines as "the starting point and the initial benchmark for sentencing."[83] The guidelines still have "force as the framework for sentencing."[84] Thus, any sentence that used as its starting point a guideline range calculated in reliance on the residual clause is unconstitutional. The Sixth Circuit so held in vacating two advisory guidelines sentences in light of *Johnson*.[85] The Seventh Circuit recently authorized a successive motion in a career offender case because "*Johnson* announced a new substantive rule of constitutional law."[86]

Johnson challenges to pre-*Booker* mandatory guideline sentences are cognizable not only because they are unconstitutional, but because they too result in a sentence "in excess of the maximum authorized by law."[87] Prior to *Booker*, the guidelines were "binding on all judges" and "ha[d] the force and effect of laws," by virtue of 18 U.S.C. § 3553(b), a congressional statute directed to the courts.[88] The top of the guideline range thus provided the relevant maximum sentence authorized by law, and an erroneous

sentence above the top of the guideline range exceeded the maximum authorized by law. In *Brown v. Caraway* and *Narvaez v. United States*,[89] the Seventh Circuit held that erroneous mandatory career offender sentences based on *Begay* error could be remedied under §§ 2241 and 2255.[90] Pre-*Booker Johnson* errors are even more egregious than statutory *Begay* errors because they take a defendant's sentence beyond the statutory maximum *and* they violate the Constitution.[91]

Finally, in addition to skewing the guidelines toward a harsher sentence, career offender status causes ongoing damage to drug defendants because it disqualifies them from the benefits of retroactive guideline amendments that ameliorate overly severe guideline provisions.[92] For example, in 2014, the Sentencing Commission determined that the Drug Quantity Table should be reduced by two levels and that past sentences should be corrected.[93] Defendants who have been unconstitutionally designated as career offenders not only had their sentences unlawfully enhanced at the time of sentencing, they cannot receive the benefits that, under a constitutional sentencing scheme, would have benefitted them retroactively. And it's worse for crack defendants. In addition to the recent two-level overall reduction, the Commission in 2007 and 2011 retroactively reduced the crack offense levels by two levels, then additionally reduced the 100:1 powder-to-crack cocaine ratio to 18:1.[94] Again, the unconstitutional career offender designation barred these sentence reductions. Leaving unconstitutional career offender designations in place perpetuates the over-incarceration and racial disparities that retroactive amendments were intended to address, costing years of unjust incarceration and millions in wasted incarceration expenses.

V. Starting Points for Litigation

In looking at *Johnson* sentencing claims, a few starting points should be emphasized. First, individuals need representation on *Johnson* issues, so defense attorneys should assist them in applying for appointed counsel under the Criminal Justice Act.[95] Second, these cases, like any others, require negotiation. In some litigation involving sentencing errors under the ACCA, the government has declined to assert potential procedural obstacles.[96] Faced with sentencing errors, some prosecutors have conceded without extensive litigation and entered into agreed judgments. Thus, negotiation should be an initial step.[97]

Third, practitioners should move quickly but deliberately in these cases. Once the cases have been identified, the presentence report and the docket sheet should provide the basic information to determine whether there is a viable *Johnson* claim and what procedural device is most suitable. Those filing under §§ 2255(e) and 2241 need to research questions of venue and choice of law. Although § 2241 claims regarding the manner of execution of a sentence are generally filed in the district of custody, the sentencing district may be the appropriate venue to file § 2241 petitions that challenge the lawfulness of the sentence under the § 2255(e) escape hatch. In any event, the law of the home district should govern the legality of the sentence, regardless of where the case is filed, given § 2255's default to the home district.[98]

VI. Last Thoughts about ACCA Litigation

The ACCA is not only poorly drafted, but its irrational harshness has become one of the engines driving mass over-incarceration in America.[99] Remember the recent Sixth Circuit case where possession of shotgun shells under benign circumstances required the judge to blind his conscience and impose the 15-year mandatory minimum, even though the defendant had not been in trouble for over twenty years?[100] In the concurring opinion, after comparing the result to something out of a Charles Dickens novel, one judge said, "I therefore join the continuous flood of voices expressing concern that the ACCA and other mandatory minimum laws are ineffective in achieving their purpose and damaging to our federal criminal justice system and our nation."[101] Under the ACCA, prior convictions can be for relatively innocuous conduct and they never become stale, no matter how old. As a federal defender wrote back in 1994:

> A hunter in possession of a rifle is stopped by a game warden. The hunter has led an exemplary life for thirty-five years. A record check reveals that in 1959 he was convicted at the age of eighteen for three unarmed burglaries of businesses in a single night, in which little or nothing was taken. Under the Armed Career Criminal Act, the hunter is an armed career criminal subject to a mandatory term of fifteen years incarceration, with no probation or parole, and a potential sentence of life without parole.
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> A penal statute's moral validity should be reflected in society's acceptance of both the prohibition and the punishment as generally applied. There are undoubtedly individuals who, merely by possessing a firearm, create an easily recognized danger to the community based on their prior convictions for crimes of violence. However, the ACCA is so loosely written that appropriate application is aberrational, rather than the norm.[102]

More than twenty years have passed since those words were written, yet individuals continue to be subjected to punishments under the ACCA and the guidelines identical residual clause that are far in excess of what is fair and reasonable. When the court or the government corrects sentences based on unconstitutional sentencing enhancements, they are making the punishment at least somewhat closer to fitting the crime.

Notes

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[1] ACCA, 18 U.S.C. § 924(e) (2012); *see* United States v. Young, 766 F.3d 621, 632 (6th Cir. 2014)) (Stranch, J., concurring), cert. denied, 135 S. Ct. 1475 (2015) ("The practical problems with—and unfairness of—the ACCA and mandatory minimum sentences in general have long been a concern of legal scholars and many in the judiciary."); *see also, e.g.*, United States v. Thomson, 268 F. App'x 430, 431 (6th Cir. 2008) ("Though we recognize that the imposition of the mandatory minimum is a harsh sentence considering only the facts of [the defendant's] crimes of conviction, it is nevertheless the minimum imposed by Congress, which we are duty-bound to follow."); United States v. Calloway, 7 F.3d 235 (6th Cir. 1993) (unpublished) ("We agree with [the trial judge] that the severely limited discretion afforded the trial judge under the Armed Career Criminal Act results in an extremely harsh sentence in this case."); Jewell v. United States, 982 F. Supp. 81, 83 (D. Mass. 1997) ("While [the defendant's] fifteen-year sentence seems harsh under the circumstances, this court is bound by [precedent] and by the Congressional mandate of the Armed Career Criminal Act.").

[2] 18 U.S.C. § 924(e).

[3] *Id.* § 924(e)(2)(B) (emphasis added).

[4] *See* Sykes v. United States, 131 S. Ct. 2267, 2284 (2011) (Scalia, J., dissenting), overruled by Johnson v. United States, 135 S. Ct. 2551 (2015) ("As was perhaps predictable, instead of producing a clarification of the Delphic residual clause, today's opinion produces a fourth ad hoc judgment that will sow further confusion . . . We should admit that ACCA's residual provision is a drafting failure and declare it void for vagueness."); Chambers v. United States, 555 U.S. 122, 133 (2009) (Alito, J., concurring) ("ACCA's residual clause is nearly impossible to apply consistently. Indeed, the 'categorical approach' to predicate offenses has created numerous splits among the lower federal courts."); James v. United States, 550 U.S. 192, 216 (2007) (Scalia, J., dissenting), overruled by Johnson v. United States, 135 S. Ct. 2551 (2015) ("Imprecision and indeterminacy are particularly inappropriate in the application of a criminal statute. Years of prison hinge on the scope of ACCA's residual provision, yet its boundaries are ill defined.").

[5] *Johnson*, 135 S. Ct. at 2559.

[6] *Id.* at 2556.

[7] *Johnson v. United States*, 135 S. Ct. 939 (2015) (mem).

[8] *Johnson*, 135 S. Ct. at 2557.

[9] *Id.* at 2560.

[10] *Id.* at 2561.

[11] *Taylor*, 495 U.S. 575 (1990).

[12] *Descamps*, 133 S. Ct. 2276 (2013).

[13] *See, e.g.*, United States v. Boggan, 550 F. App'x 731, 737 (11th Cir. 2013), cert. denied, 134 S. Ct. 1802 (2014) ("The court holds that a conviction for violation of Alabama's third-degree burglary statute constitutes a 'violent felony' for purposes of statutory sentencing enhancements under the ACCA because it 'involves conduct that presents a serious potential risk of physical injury to another.'" (internal citations omitted)); United States v. Maldonado, 696 F.3d 1095, 1104 (10th Cir. 2012) ("Having determined that first-degree burglary under California law presents a serious potential risk of personal injury to another and that it is roughly similar to the generic offense, we conclude that the offense qualifies under the ACCA's residual clause as a violent felony."); United States v. Matthews, 466 F.3d 1271, 1275 (11th Cir. 2006) ("We hold that, even if Matthews's third-degree burglary convictions [under Florida law] are not convictions for 'generic burglary,' they are convictions for violent crimes under the ACCA because they satisfy this alternative definition."); United States v. Moncrief, 356 F. App'x 11, 12 (9th Cir. 2009) ("[T]he Tennessee aggravated burglary statute is broader than the generic definition of burglary because it extends to tents and motor homes. Nonetheless, the Tennessee aggravated burglary statute satisfies the ACCA's "residual clause." (internal citations omitted)); United States v. Lynch, 518 F.3d 164, 171 (2d Cir. 2008) (noting that "[w]hile a conviction must qualify as a generic burglary to fit within the specific statutory reference to 'burglary' in § 924(e)(2)(B)(ii) . . . , a non-generic burglary may nevertheless qualify as a violent felony under the statute's residual provision" and holding that New York attempted burglary in the third degree falls under the residual clause).

[14] *Mayer*, 560 F.3d 948, 961 (9th Cir. 2009).

[15] *Id.* at 951 (Kozinski, C.J., dissenting from denial of rehearing en banc).

[16] *Johnson*, 135 S. Ct. at 2557 (quoting *Mayer*, 560 F.3d at 952 (Kozinski, C.J., dissenting from denial of rehearing en banc).

[17] Certiorari—Summary Dispositions, 576 U.S. __ (June 30, 2015) (granting certiorari vacating, and remanding for consideration of *Johnson*), *available at* http://www.supremecourt.gov/orders/courtorders/063015zr_pnk0.pdf.

[18] Mayer v. United States, No. 14-9326, 2015 WL 1698543 (June 30, 2015).

[19] *Grisel*, 488 F.3d 844, 850–51 (9th Cir. 2007) (en banc).

[20] *Wilkinson*, 589 F. App'x 348, 350 (9th Cir. 2014).

[21] *See* Summers v. Feather, __ F.3d __, 2015 WL 4663277, *3–6 (D.Or. Aug. 5, 2015) (vacating ACCA sentence after *Johnson* because Washington prior burglary convictions do not constitute generic federal burglary convictions).

[22] *Sykes*, 131 S. Ct. 2267 (2011).

[23] *See, e.g.*, Appellant's Brief, United States v. Rivera, No. 14-3409, 2015 WL 4393876 (6th Cir. July 20, 2015), 2014 WL 5494363; Appellant's Brief, United States v. Hawkins, 512 F. App'x. 746 (10th Cir. 2013), 2012 WL 6211617; Supplemental Brief of Appellant, United States v. Hudson, 673 F.3d 263 (4th Cir. 2012), 2011 WL 3515659.

[24] *Martinez*, 135 S. Ct. 2939 (2015).

[25] *Snyder*, 643 F.3d 694 (9th Cir. 2011).

[26] *Cisneros*, 763 F.3d 1236 (9th Cir. 2014).

[27] United States v. Martinez, 771 F.3d 672 (9th Cir. 2014), vacated by Martinez v. United States, 135 S. Ct. 2939 (2015).

[28] *See Rivera*, 2015 WL 4393876, at *2.

[29] U.S.S.G. § 4B1.2(a)(2) ("(a) The term 'crime of violence' means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that . . . (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another*." (emphasis added)).

[30] *See, e.g.*, United States v. Denson, 728 F.3d 603, 607 (6th Cir. 2013) ("[W]e analyze a crime of violence under the career-offender guideline just as we do a 'violent felony' under the Armed Career Criminal Act (ACCA)"). United States v. Jarmon, 596 F.3d 228, 231 n.* (4th Cir. 2010) ("[P]recedents evaluating the ACCA apply with equal force to U.S.S.G. § 4B1.2"). United States v. Womack, 610 F.3d 427, 433 (7th Cir. 2010) ("We interpret coterminously the ACCA and the career offender § 4B1.1 provision."); United States v. Coronado, 603 F.3d 706, 709 (9th Cir. 2010) ("[B]ecause the language of both the ACCA and the [career offender] Guideline adopt the same 'serious risk of injury' test . . . the definitions should be interpreted similarly."); United States v. Willings, 588 F.3d 56, 58 n.2 (1st Cir. 2009) ("[T]he terms 'crime of violence' under the career offender guideline and 'violent felony' under the ACCA are nearly identical in meaning, so that decisions construing one term inform the construction of the other.").

[31] *See* Peugh v. United States, 133 S. Ct. 2072, 2080 (2013) (applying the constitutional prohibition on ex post facto laws to the Sentencing Guidelines because they provide the "starting point and initial benchmark" for imposition of

a sentence (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007))).

[32] The Supreme Court vacated career offender sentences in the following cases: Vinales v. United States, No. 14-7347, 2015 WL 2473520 (U.S. June 30, 2015) (11th Cir. case); Denson v. United States, No. 14-7832, 2015 WL 2473521 (U.S. June 30, 2015) (11th Cir. case); Beckles v. United States, No. 14-7390, 2015 WL 2473527(U.S. June 30, 2015) (11th Cir. case); Maldonado v. United States, No. 14-7445, 2015 WL 2473524 (U.S. June 30, 2015) (2d Cir. case); Smith v. United States, No. 14-7587, 2015 WL 2473526 (U.S. June 30, 2015) (6th Cir. case); Wynn v. United States, No. 14-9634, 2015 WL 2095652 (U.S. June 30, 2015) (6th Cir. case); and Jones v. United States, No. 14-9574, 2015 WL 1970390 (U.S. June 30, 2015) (3d Cir. case).

[33] Government's Letter Brief Addressing the Applicability of *Johnson*, *United States v. Lee*, No. 13-10507 (9th Cir. Aug. 17, 2015); *see also* Letter Brief of the United States, *United States v. Zhang*, No. 13-3410 (2d Cir. Aug. 13, 2015); United States Supplemental Authority under Fed. R. App. P. 28(j), *United States v. Smith*, No. 14-2216 (10th Cir. Aug. 20, 2015).

[34] U.S.S.G. § 2K2.1(a).

[35] *Talmore*, 585 F. App'x 567 (9th Cir. 2014).

[36] *Id.*

[37] Supplemental Brief for the United States at 4, *United States v. Talmore*, No. 13-10650 (9th Cir. Aug. 17, 2015).

[38] Supplemental Brief for the United States at 6, *United States v. Pagan-Soto*, No. 13-2243 (1st Cir. Aug. 11, 2015); *see also* Supplemental Brief of the United States, *United States v. Goodwin*, No. 13-1466 (10th Cir. Aug. 21, 2015).

[39] *See* United States v. Willis, Nos. 13-30376, 13-30377, 2015 WL 4547542, at *7 (9th Cir. July 29, 2015) ("Like 'violent felony' in ACCA, 'crime of violence' in § 4B1.2(a)(2) of the Sentencing Guidelines is defined as including an offense that 'otherwise involves conduct that presents a serious potential risk of physical injury to another.' We make no distinction between 'violent felony' in ACCA and 'crime of violence' in § 4B1.2(a)(2) for purposes of interpreting the residual clauses. But we have not yet considered whether the due process concerns that led *Johnson* to invalidate the ACCA residual clause as void for vagueness are equally applicable to the Sentencing Guidelines." (internal citation omitted)).

[40] United States v. Cooper, 598 F. App'x. 682 (11th Cir. 2015), vacated by Cooper v. United States, 135 S. Ct. 2938 (2015).

[41] 18 U.S.C. § 16 (2012).

[42] *Johnson*, 135 S. Ct. at 2557 ("[T]he residual clause leaves grave uncertainty about how to estimate the risk posed by a crime. It ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements.").

[43] *See* James v. United States, 550 U.S. 192, 209 (2007) (using "ordinary case" and "by its nature" interchangeably to describe the ordinary case analysis required by the ACCA residual clause).

[44] Supplemental Brief for the United States at *22–23, *Johnson v. United States*, 135 S. Ct. 2551 (2015), 2015 WL 1284964 ("Although Section 16 refers to the risk that *force* will be used rather than that *injury* will occur, it is equally susceptible to petitioner's central objection to the residual clause: Like the ACCA, Section 16 requires a court to identify the ordinary case of the commission of the offense and to make a commonsense judgment about the risk of confrontations and other violent encounters." (emphasis in original)).

[45] *Id.* at 2557–58.

[46] *See Johnson*, 135 S. Ct. at 2561 ("As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct. . . . The residual clause, however, requires application of the 'serious potential risk' standard to an idealized ordinary case of the crime. Because 'the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect,' this abstract inquiry offers significantly less predictability than one '[t]hat deals with the actual, not with an imaginary condition other than the facts.'").

[47] *See, e.g.*, United States v. Keelan, 785 F.3d 864, 871 n.7 (11th Cir. 2015) ("Although one of Keelan's counts of conviction is an attempt offense, that fact does not preclude finding he committed a crime of violence under § 16(b). The Supreme Court has held the analogous ACCA residual clause 'does not by its terms exclude attempt offenses.'"); United States v. Stout, 706 F.3d 704, 709 (6th Cir. 2013) (explaining, in a § 16(b) case, that "[w]e also recognize that other circuits have concluded that escape from a secured facility is a crime of violence or violent felony within similar contexts" and citing ACCA and career offender cases); United States v. Echeverria-Gomez, 627 F.3d 971, 976 (5th Cir. 2010) ("Supreme Court precedent interpreting an analogous provision of the Armed Career Criminal Act ('the ACCA') further undergirds our conclusion that California's first-degree-burglary offense is a 'crime of violence' under 18 U.S.C. § 16(b).").

[48] *See, e.g.*, Stout, 706 F.3d at 706 ("In evaluating the residual clause of § 16(b), we recognize that the United States Sentencing Guidelines and the Armed Career Criminal Acts ('ACCA') each contain similar residual clauses relating to crimes of violence."); Echeverria-Gomez, 627 F.3d at 976 ("Supreme Court precedent interpreting an analogous provision of the Armed Career Criminal Act ('the ACCA') further undergirds our conclusion that [the crime] is a 'crime of violence' under 18 U.S.C. § 16(b)."); United States v. Daye, 571 F.3d 225, 234 (2d Cir. 2009), abrogated by Johnson v. United States, 135 S. Ct. 2551 (2015) ("[W]e . . . find examination of our previous analysis of § 16(b) to be helpful in applying § 924(e)(2)(B)(ii)."); Addo v. Attorney Gen. of U.S., 355 F. App'x 672, 677 (3d Cir. 2009) ("The inquiry under § 16(b) and under the ACCA are analogous."); Jimenez-Gonzalez v. Mukasey, 548 F.3d 557, 562 (7th Cir. 2008) ("Given that Section 16(b) and the residual clause of the ACCA contain similar language and that the Supreme Court applied similar logic in [ACCA and § 16(b) cases], we believe that the reasoning in [an ACCA case] supports the view that crimes with a mens rea of recklessness are not crimes of violence under Section 16(b).").

[49] *See* United States v. Fish, 758 F.3d 1, 17–18 (1st Cir. 2014) (explaining, in a § 16 case, that "[i]t is no secret that the statutes Congress chose to enact in its understandable effort to focus on violent conduct are imperfect," citing ACCA cases).

[50] *Johnson*, 135 S. Ct. at 2561 ("[O]ur *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." (emphasis in original)).

[51] 8 U.S.C. § 1101 (a)(43) ("The term 'aggravated felony' means . . . (F) a crime of violence (as defined in section 16 of Title 18 . . .).")

[52] *See* Nevius v. Sumner, 105 F.3d 453, 460 (9th Cir. 1996) ("In general, we will recall a mandate only when we are animated by 'an overpowering sense of fairness and a firm belief that this is the exceptional case requiring recall of the mandate in order to prevent an injustice.'").

[53] *See* Gov't's Response to Appellant's Motion for Summary Action, *United States v. Imm*, Nos. 14-4809, 14-4810 at 5 (3d Cir. Aug. 6, 2015) ("The government further waives any objection based on procedural default, and agrees that Imm is entitled to relief."); *see also* Brief for the United States at *24, *Hunter v. United States*, 558 U.S. 1143 (2010), 2009 WL 4099534 ("Petitioner has been sentenced to a term of imprisonment that all agree is in excess of what the law

permits, based on a pure legal error that was exposed as incorrect by intervening decisions of this Court and the court of appeals. Petitioner has had no other opportunity to assert these claims. The government believes that in these circumstances the interests of justice warrant relief, and the government therefore does not oppose such relief by asserting discretionary procedural defenses.").

54 *See* United States v. Newbold, No. 10-6929, 2015 WL 3960906, at *4 (4th Cir. June 30, 2015) (recognizing, in the case of an invalid ACCA enhancement, that "[s]uch circumstances, where 'a change in law reduces the defendant's statutory maximum sentence below the imposed sentence, have long been cognizable on collateral review'"); Welch v. United States, 604 F.3d 408, 412 (7th Cir. 2010) ("[The defendant] pointedly argues that his sentence, as enhanced by the ACCA, is above the statutory maximum, which would entitle him to relief.").

55 *See Newbold*, 2015 WL 3960906, at *4 ("It is axiomatic that 'there are serious, constitutional, separation-of-powers concerns that attach to sentences above the statutory maximum penalty authorized by Congress,' for it is as if the defendant 'is being detained without authorization by any statute.' Thus, a defendant who 'does not constitute an armed career criminal . . . [has] received a punishment that the law cannot impose upon him.'" (internal citation omitted) (quoting *Bryant v. Warden, FCC Coleman-Medium*, 738 F.3d 1253 (11th Cir. 2013))); United States v. Shipp, 589 F.3d 1084, 1091 (10th Cir. 2009) ("Where, as here, [the defendant] was sentenced beyond the statutory maximum for his offense of conviction, his due process rights were violated.").

56 Schriro v. Summerlin, 542 U.S. 348, 351 (2004).

57 *Id.* at 351–52.

58 *See* Begay v. United States, 553 U.S. 137 (2008); *Chambers*, 555 U.S. 122; *see* also *Bryant*, 738 F.3d at 1277–78; Narvaez v. United States, 674 F.3d 621, 623 (7th Cir. 2011); Jones v. United States, 689 F.3d 621, 625 (6th Cir. 2012); Welch v. United States, 604 F.3d 408, 415 (7th Cir. 2010); Lindsey v. United States, 615 F.3d 998, 1000 (8th Cir. 2010); *Shipp*, 589 F.3d at 1090.

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

60 Price v. United States, No. 15-2427, 2015 WL 4621024, at *1 (7th Cir. Aug. 4, 2015) (citing *Chaidez v. United States*, 133 S. Ct. 1103, 1107 (2013) ("[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final")).

61 28 U.S.C. § 2255(h) (2012) ("A second or successive motion must be certified . . . by a panel of the appropriate court of appeals.").

62 *Id.*

63 *Price*, 2015 WL 4621024, at *1 ("*Johnson* announces a new substantive rule of constitutional law that the Supreme Court has categorically made retroactive to final convictions."); *accord* Stork v. United States, No. 15-2687, slip op. at 1 (7th Cir. Aug. 13, 2015) ("*Johnson* announced a new substantive rule of constitutional law made categorically retroactive to cases on collateral review by the Supreme Court"); Best v. United States, No. 15-2417, slip op. at 1–2 (7th Cir. Aug. 5, 2015) ("Because *Johnson* announced a new substantive rule of constitutional law and Best has made a prima facie showing that he may be entitled to relief, we GRANT Best's application and authorize the district court to consider Best's proposed claim." (internal citation omitted)).

64 *Id.* at *1.

65 *Id.* at *3.

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

67 *Price*, 2015 WL 4621024, at *2 (quoting *Tyler*, 533 U.S. at 668 (O'Connor, J., concurring)).

68 *Tyler*, 533 U.S. at 668–69 (O'Connor, J., concurring).

69 *Id.* at 669 (O'Connor, J., concurring).

70 *Price*, 2015 WL 4621024, at *3.

71 *See* In re Rivero, No. 15-13089-C, 2015 WL 4747749, at *2 (11th Cir. Aug. 12, 2015) ("Although we agree that *Johnson* announced a new substantive rule of constitutional law, we reject the notion that the Supreme Court has held that the new rule should be applied retroactively on collateral review.").

72 *Id.* at *8 (Jill Pryor, J., dissenting).

73 *Schriro*, 542 U.S. at 351.

74 In re Rivero, No. 15-13089-C (11th Cir. Sept. 14, 2015) (order appointing counsel and ordering rebriefing). Another panel of the Eleventh Circuit recently held that *Johnson*'s vagueness holding did not apply to the sentencing guidelines, despite the stipulation of both parties that *Johnson* was applicable and the fact that the Supreme Court vacated and remanded guidelines cases following *Johnson*. *See* United States v. Matchett, No. 14-10396 (11th Cir. Sept. 21, 2015).

75 28 U.S.C. § 2255(e).

76 *Bryant*, 738 F.3d 1253, 1287 (11th Cir. 2013); *see also* Brown v. Rios, 696 F.3d 638, 639–40 (7th Cir. 2012) (noting that the government conceded that § 2241 was the proper vehicle for challenging an ACCA sentence based on *Begay*); United States v. Shipp, 589 F.3d 1084, 1091 (10th Cir. 2009) (holding in a case involving a first § 2255 that "Mr. Shipp does not constitute an 'armed career criminal' for purposes of the ACCA and thus he received a punishment that the law cannot impose upon him. Where, as here, Mr. Shipp was sentenced beyond the statutory maximum for his offense of conviction, his due process rights were violated. 'There can be no room for doubt that such a circumstance inherently results in a complete miscarriage of justice and presents exceptional circumstances that justify collateral relief.'" (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974)) (internal citation and quotation marks omitted)); *see also* Sanders v. United States, 373 U.S. 1, 8 (1963) ("Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged.").

77 *See* discussion *supra* Section III.

78 *See, e.g.*, Marrero v. Ives, 682 F.2d 1190, 1995 (9th Cir. 2012) (collecting cases); Webster v. Daniels, 784 F.3d 1123, 1138–39 (7th Cir. 2015).

79 28 U.S.C. § 2255(a).

80 *See* Supplemental Brief for the United States, *United States v. Pagan-Soto*, No. 13-2243 (1st Cir. Aug. 11, 2015); Letter Brief of the United States, *United States v. Zhang*, No. 13-3410 (2d Cir. Aug. 13, 2015); Supplemental Brief for the United States, *United States v. Talmore*, No. 13-10650 (9th Cir. Aug. 17, 2015); Supplemental Letter Brief for the United States, *United States v. Lee*, No. 13-10507 (9th Cir. Aug. 17, 2015); United States Supplemental Authority under Fed. R. App. P. 28(j), *United States v. Smith*, No. 14-2216 (10th Cir. Aug. 20, 2015); Supplemental Brief of the United States, *United States v. Goodwin*, No. 13-1466 (10th Cir. Aug. 21, 2015).

81 Supplemental Brief for the United States at 7–8, *United States v. Pagan-Soto*, No. 13-2243 (1st Cir. Aug. 11, 2015).

82 *Id.* at 8.

83 Gall v. United States, 552 U.S. 38, 49 (2007).

84 Peugh v. United States, 133 S. Ct. 2072, 2083 (2013).

85 *See* United States v. Harbin, Nos. 14-3956, 14-3964, 2015 WL 4393889 (6th Cir. July 20, 2015); United States v. Darden, 605 F. App'x. 545 (6th Cir. July 6, 2015).

86 Best v. United States, No. 15-2417, slip op. at 1–2 (7th Cir. July 6, 2015).

87 28 U.S.C § 2255(a).

88 United States v. Booker, 543 U.S. 220, 234 (2005).

89 *Brown v. Caraway*, 719 F.3d 583 (7th Cir. 2013); *Narvaez*, 674 F.3d at 623.

[90] *See* Hawkins v. United States, 706 F.3d 820, 822 (7th Cir. 2013) ("Narvaez, as our opinion emphasized . . . had been sentenced when the guidelines were mandatory. . . . It was arguable therefore that his sentence exceeded the maximum authorized by 'law.' Before *Booker*, the guidelines were the practical equivalent of a statute.").

[91] In *Reina-Rodriguez v. United States*, the Ninth Circuit permitted a challenge to a non-constitutional advisory guideline error that resulted in an enhancement of 16 offense levels. 655 F.3d 1182 (9th Cir. 2011).

[92] *See, e.g.*, United States v. Charles, 749 F.3d 767, 770 (9th Cir. 2014); *see also* Spencer v. United States, 773 F.3d 1132, 1150–51 (11th Cir. 2014) (Martin, Wilson, and Jordan, JJ., dissenting) (noting in a non-constitutional case that, with retroactive guideline amendments, the bottom of the guidelines range would be 24 months rather than the 151-month career offender sentence).

[93] U.S.S.G. App. C, amend. 782.

[94] U.S.S.G. App. C, amends. 706, 750.

[95] *See* 18 U.S.C. § 3006A; 28 U.S.C. § 2255(g).

[96] *See, e.g.*, Jones v. United States, 689 F.3d 621, 624 n.1 (6th Cir. 2012) (noting, in an ACCA sentencing error § 2255 case, that "[t]he United States has identified a number of affirmative defenses that it has explicitly declined to assert, including . . . procedural default"); Chaplin v. Hickey, 458 F. App'x 827 (11th Cir. 2012) (accepting, in an ACCA sentencing error case, "the Government's concession that [the defendant] may present his claim in a § 2241 petition"); King v. United States, 419 F. App'x 927, 928 (11th Cir. 2011) (recognizing "the Government's concession on appeal that the actual-innocence exception should be available to petitioners raising procedurally defaulted claims challenging non-capital sentences enhanced under the ACCA").

[97] In cases where the government fears setting a precedent but recognizes the fairness of release from over-incarceration, the parties may reach a compromise order under Federal Rule of Criminal Procedure 48 "to do justice" and strike the enhancement. *United States v. Weber*, 721 F.2d 266, 268 (9th Cir. 1983) ("[I]t is the duty of the United States Attorney not simply to prosecute, but to do justice."). Similarly, in combination with a § 2255 motion, it may be feasible to bring a motion for relief from the judgment under Federal Rule of Civil Procedure 60(b)(6) for "any other reason that justifies relief" if the government is willing to settle. *See Tanner v. Yukins*, 776 F. 3d 434, 438 (6th Cir. 2015) ("Rule 60(b) . . . 'reflects and confirms the courts own inherent and discretionary power . . . to set aside a judgment whose enforcement would work inequity.'" (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 233–34 (1995))).

[98] *See* 28 U.S.C. §2255(a); *see also* Morgenstern v. Andrews, No. 5:12-HC-FL, 2013 WL 6239262 (E.D.N.C. Dec. 3, 2013), aff'd, 569 F. App'x. 158 (4th Cir. 2014) (holding that the law of the court of conviction applies in a § 2255(e) "escape hatch" case); Salazar v. Sherrod, No. 09-cv-619-DRH-DGW, 2012 WL 3779075 (S.D.Ill. Aug. 31, 2012) (same); Eames v. Jones, 793 F. Supp. 2d 747, 750 (E.D.N. C. 2011) (same).

[99] *See* Matt Stroud, *What Does it Matter if a White Supremacist Gets Too Much Time Behind Bars?*, Bloomberg, Apr. 20, 2015, *available at* http://www.bloomberg.com/news/articles/2015-04-20/what-does-it-matter-if-a-white-supremacist-gets-too-much-time-behind-bars; Editorial, *Injustice in a Sentencing Law*, N.Y. Times, Mar. 19, 2012, *available at* http://www.nytimes.com/2012/03/20/opinion/injustice-in-a-sentencing-law.html.

[100] *Young*, 766 F.3d 621.

[101] *Id.* at 634 (Stranch, J., concurring).

[102] Stephen R. Sady, *The Armed Career Criminal Act—What's Wrong with Three Strikes, You're Out?*, 7 Fed. Sent'g Rep. 69, 69 (1994).