Johnson, Recidivist Sentencing and § 924(c)

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In 2015, the United States Supreme Court decided Johnson v. United States. Four years later the aftershocks continue to rock the federal criminal law bar. In a brief period, the Supreme Court has decided that the residual clauses found in the Armed Career Criminal Act and the general definition of crime of violence in the criminal code (18 U.S.C. § 16(b)) are unconstitutional but that similar language found in the Sentencing Guidelines is permissible. It has also concluded that its ACCA ruling applies retroactively, thereby requiring the relitigation of cases that are often decades old. The remaining question that will most likely receive the Supreme Court's attention soon is whether the residual clause of § 924(c) also violates the Constitution. That will require the Court to delve into every federal criminal lawyer's favorite topic -- the categorical approach.

A. Johnson v. United States, 135 S. Ct. 2551 (2015). The ACCA Residual Clause

In Johnson, the Supreme Court invoked the due process clause of the Fifth Amendment to invalidate the residual clause of the Armed Career Criminal Act (ACCA). The ACCA provides for a mandatory minimum fifteen-year sentence for a person who is convicted of being a felon-in-possession of a firearm after committing three violent felonies or serious drug offenses. The ACCA defines a violent felony as an offense that (1) has as an element the use, attempted use, or threatened use of physical force against the person of another and (2) is burglary, arson, or extortion, involves use of explosives *or otherwise involves conduct that presents a serious potential risk of physical injury to another*. The italicized language is commonly referred to as the residual clause and is the language that was at issue in Johnson.

Despite Congress enacting the ACCA residual clause in 1986, questions about its construction did not reach the Supreme Court until 2007. The Court then considered the provision four times in the next four years, each time sowing more confusion. James v. United States, 550 U.S. 192 (2007); Begay v. United States, 553 U.S. 137 (2008); Chambers v. United States, 555 U.S. 122 (2009); Sykes v. United States, 564 U.S. 1 (2011). Justice Scalia dissented in James and Sykes, arguing that the residual clause was void for vagueness.

In Johnson, Justice Scalia finally got his way. Justice Scalia pointed out that the Court had long held (since 1990 in Taylor v. United States, 495 U.S. 575 (1990)) that the residual clause required the use of the categorical approach, which meant that a crime was considered in terms of how the law defined the offense, not how the defendant committed the offense on a particular occasion. Under this approach, it was incumbent on a court to determine the kind of conduct required to commit the crime in the "ordinary case" and then determine whether this ordinary case presented the serious risk of physical injury required by the residual clause.

Justice Scalia, for the Court, concluded that this approach violated a defendant's right to due process because of the indeterminate standard for deciding whether an offense qualified as a residual clause felony. In this regard, two features of the residual clause conspired to produce the hopeless indeterminacy identified by the Court. First, courts have no way to determine what the ordinary case entails when consideration is limited to statutory elements and not real world facts. As an example, the Court asked rhetorically is the ordinary witness tampering case a bribe or is it a death threat? That would obviously make a difference when deciding whether the crime has the potential to cause physical injury. Second, courts lack a clear standard for determining how much risk of injury is required for a crime to qualify as creating the required serious potential risk of injury. Thus, the Court concluded that the combined indeterminacy about how to measure the risk posed by the crime and the amount of risk needed to qualify as a violent felony under the residual clause produced sufficient vagueness to require invalidation of the residual clause under the Fifth Amendment.

Justice Alito dissented. He argued that the vagueness problem identified by the Court was the result of the categorical approach, which itself was the Court's invention in Taylor. Justice Alito argued that the residual clause could survive under the Court's analysis by jettisoning the categorical approach and focusing instead on the defendant's actual conduct that led to his conviction for the prior offense. The Court refused this suggestion, noting that the government had not argued for doing away with the categorical approach and in any event, there were reasons to retain it, including the utter impracticability of asking a sentencing court to reconstruct the facts of an original conviction, which will often be long after that conviction occurred, to determine the likelihood that the defendant's conduct would cause injury.

B. Welch v. United States, 136 S. Ct. 1257 (2016)
ACCA Retroactivity

Defendants who were convicted under the Armed Career Criminal Act received at least fifteen years in prison, and therefore many of the defendants sentenced under the residual clause were still in prison for convictions that had long been final. Thus, the immediate question after Johnson was whether Johnson had retroactive application such that defendant's with final convictions could invoke Johnson as a basis for relief.

In Welch, the Supreme Court decided that they could do so. The Court determined that a new rule of constitutional law, such as Johnson, applies to final convictions if the rule is substantive. A rule is substantive if it alters the range of conduct or the class of persons that the law punishes. Johnson was a substantive decision because it changed the reach of the ACCA and therefore altered the class of persons that the Act punished. Before Johnson, the ACCA applied to anyone who possessed a firearm after three violent felony convictions, even if some of those convictions were predicates under the now-unlawful residual clause. After Johnson, where one of the defendant's prior convictions was a residual clause predicate, the ACCA no longer applied and therefore the defendant was not subject to the ACCA's enhanced penalties. In other words, the defendant was not guilty of being an ACCA. That was a substantive change in the law that applied retroactively This permitted prisoners to raise Johnson in § 2255 claims (both original and successive).

C. Beckles v. United States, 137 S. Ct. 886 (2017)
Advisory Guidelines.

The language used in the ACCA appears in other places within the federal criminal law. Most prominently, the Sentencing Commission adopted the language of the ACCA's residual clause in drafting the career offender provision of the Sentencing Guidelines. Not surprisingly, after Johnson, the next question for the Supreme Court was whether the career offender residual clause was also void for vagueness.

Despite the identical wording of the ACCA and the career offender residual clauses, the Court reached an opposition result in Beckles. The Court found that due process vagueness does not apply to advisory sentencing guidelines. The key to this decision was the advisory nature of the Sentencing Guidelines as opposed to the mandatory nature of the ACCA. After Booker, the Sentencing Guidelines do no fix the permissible range of the sentences. Rather, they merely guide a sentencing court's exercise of discretion in determining where to sentence a defendant within the statutory range.

The Court concluded that judges have long had the discretion to sentence a defendant to any sentence within the statutory range. Thus, the concerns about fair notice and preventing arbitrariness that underlie the due process vagueness doctrine do not apply when a defendant is sentenced within the legislatively established range. The Court held that if a system of unfettered judicial discretion does not violate due process then neither does a system in which advisory guidelines help guide the judge's discretion. Thus, a defendant has no due process interest in the advice given to a judge about that precise sentence that should be imposed, even if that advice is provided under the same indeterminate standard that the Court held unconstitutional under the ACCA.

D. Moore v. United States, 871 F.3d 72 (1st Cir. 2017)
Mandatory Guidelines.

As just discussed, the linchpin to Beckles was the advisory nature of the Sentencing Guidelines after Booker. Booker, however, was decided in 2005. Prior to that, the Sentencing Guidelines were mandatory. Thus, there are many defendants still in federal prison, who were sentenced when the Guidelines were mandatory. One of these defendants brought a request in the First Circuit Court of Appeals to proceed with a second or successive § 2255 to argue that Johnson invalidates the residual clause under the career offender guideline for cases that were sentenced when the Sentencing Guidelines were mandatory.

This case raised the question of whether mandatory Guidelines are more like statutes such that the analysis under Johnson and Welch applied or more like advisory guidelines such that the Beckles analysis applied. The government argued that Beckles applied because, even though the Guidelines were mandatory, the law still required that the sentencing court impose a sentence within the statutorily authorized range of sentences. According to the government, since the Guidelines did not change the applicable statutory range, the due process clause did not apply to mandatory Guidelines.

While not finally resolving matter, the First Circuit strongly suggested that it did not accept the government's position. (In deciding whether to authorize a second § 2255 motion, the court of appeals must decide only if the defendant has made a prima facie showing that he is entitled to relief and thus the Court is not required to make a definitive legal ruling). The Court explained that mandatory guidelines were binding on district courts and therefore had the force and effect of laws. Thus, the Court indicated that it was skeptical about the government's argument that mandatory Guidelines did not have the effect of fixing a defendant's sentence. The Court concluded that if the mandatory Guidelines did fix the defendant's sentence by stripping the judge of discretion then Johnson's rationale applies and the residual clause of the career offender guideline would be unconstitutional under mandatory Guideline cases. The First Circuit ultimately found that the defendant made the required prima facie showing to proceed but said that it was up to the district court in the first instance to decide the matter. Nevertheless, the analysis in Moore strongly suggests that Johnson applies to invalidate the residual clause of the career offender for mandatory Guideline cases.

E. Sessions v. Dimaya, 138 S. Ct. 1204 (2018)
Section 16(b)

After Beckles, the next post-Johnson battle concerned the residual clause in 18 U.S.C. § 16(b), the criminal code's definition of a crime of violence. The residual clause under § 16(b) is similar to but not identical to the ACCA. The § 16(b) residual clause provides that a crime of violence is an offense "that, 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." Dimaya involved the application of § 16(b) to determine that an individual previously had committed an aggravated felony and thus was subject to removal from the United States. In Dimaya, the government attempted to seize on certain textual differences between the ACCA residual clause and the § 16(b) residual clause. These included: (1) the focus on the use of physical force in § 16(b) rather than the harm to the victim under the ACCA and (2) the requirement under § 16(b) that the force must be used "in the course of committing the offense," a requirement that does not exist in the ACCA.

The Court rejected this claim. The Court observed that the fatal flaws identified for the ACCA residual clause also existed for the § 16(b) residual clause. In particular, both residual clauses required the ordinary case analysis under the categorical approach and then required measuring that ordinary case against a nebulous risk standard. It is these features, according to the Court, that created the constitutional infirmity. Because that infirmity existed in § 16(b) in precisely the same manner as it existed in the ACCA, § 16(b) was constitutional for precisely the same reasons explained in Johnson.

Justice Thomas (like Justice Alito in Johnson) argued that the constitutional infirmity was caused by the categorical approach's demand for the ordinary case analysis. Justice Thomas urged that the constitutional avoidance doctrine required the Court to abandon the categorical approach in favor of a focus on the defendant's actual conduct in committing the offense. A plurality of the Court rejected Justice

Thomas' argument outright, rehashing Justice Scalia's rejection of the same argument in Johnson. But, Court personnel changed since Johnson; Justice Gorsuch replaced Justice Scalia. Justice Gorsuch stated that he voted with the majority on the premise that the categorical approach applied because the government had not argued otherwise and he deemed it unwise to decide the question without adversarial briefing. Nevertheless, he said that he was open to considering an argument that the categorical approach should be abandoned, if the government chooses to make that argument in a later case.

F. Section 924(c) The Final Battle?

Section 924(c) makes it a crime to possess or use a firearm in furtherance of a crime of violence. Section 924(c) defines crime of violence by including a residual clause that is materially indistinguishable from § 16(b). After Dimaya, defendants, who were convicted based on residual clause offenses, are now arguing that these convictions are invalid because the residual clause is unconstitutional. As the above discussion makes clear, the key to the decisions in Johnson and Dimaya is the requirement of the ordinary case analysis under the categorical approach.

In an effort to save the § 924(c) residual clause, the government is taking up Justice Gorsuch's offer to consider whether the categorical approach should apply. Neither the Supreme Court nor the First Circuit has ever expressly held that the categorical approach applies to the § 924(c) residual clause (although several other circuits have). There are reasons to argue that it should not apply. Most prominently, the primary reason for the categorical approach is the impracticability of asking a federal judge at a sentencing to determine facts about a crime committed in the past by the defendant. That problem does not exist for § 924(c). The § 924(c) crime is not a past predicate; it is the present crime for which the defendant possessed or used a firearm. Thus, there is a jury who could decide whether the defendant's actual conduct meets the definition of a crime of violence under the residual clause. That is different from the recidivist statutes at issue in Johnson and Dimaya.

The stakes are high. Section 924(c) imposes stiff mandatory penalties. There are many defendants serving decades in prison based on § 924(c) convictions, where the underlying crime was based on the residual clause. If the Supreme Court ultimately rejects the government's bid to abandon the categorical approach, § 924(c) residual clause will likely fall and many of these prisoners will be released because their convictions will be invalid. It is safe to assume that this issue will be making its way to the Supreme Court soon.