August 21, 2015

Guidance regarding *Johnson v. United States*, 135 S. Ct. 2551 (2015) for clients whose sentences would not be enhanced today based on a "violent felony" or "crime of violence," and timing for filing a clemency petition in light of *Johnson*.

I. Background

A person convicted under 18 U.S.C. § 922(g) (felon-in-possession of a firearm) is subject to a statutory term of imprisonment of 0-10 years. However, the Armed Career Criminal Act (ACCA) enhances this penalty to 15 years to life if the person has three prior convictions for a "violent felony" or a "serious drug offense." "Violent felony" is defined as any crime punishable by imprisonment for a term exceeding one year that: "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another [elements clause]; or (ii) is burglary, arson, or extortion, involves use of explosives [enumerated offenses clause], or *otherwise involves conduct that presents a serious potential risk of physical injury to another [residual clause]*."

On June 26, 2015, the Supreme Court held in *Johnson v. United States*, 135 S. Ct. 2551 (2015), that the ACCA's residual clause is unconstitutionally vague under the Fifth Amendment's due process clause. *Id*. at 2556-62. "[I]mposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process." *Id.* at 2560. The ACCA's residual clause does not "survive[] the Constitution's prohibition of vague criminal laws." *Id.* at 2555. The Court also overruled its prior decisions in *James v. United States*, 550 U.S. 192 (2007) (holding that Florida attempted burglary was a "violent felony" under the residual clause), and *Sykes v. United States*, 131 S. Ct. 2267 (2011) (holding that Indiana knowingly and intentionally fleeing a police officer by use of a vehicle was a "violent felony" under the residual clause).

The same is true of the identical residual clause in the definition of "crime of violence" in the guidelines. A defendant is subject to the career offender guideline, which significantly increases the guideline range by linking the offense level to the statutory maximum and automatically placing the defendant in Criminal History Category VI, if the instant offense is a felony and is either a crime of violence or a controlled substance offense, and the defendant has at least two prior convictions for a "crime of violence" or a controlled substance offense. USSG § 4B1.1(a). A "crime of violence" is defined as "any federal or state offense, punishable by a term of imprisonment exceeding one year, that—(1) has as an element the use, attempted use, or threatened use of physical force against the person of another [elements clause], or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives [enumerated offenses clause], or *otherwise involves conduct that presents a serious potential risk of physical injury to another* [residual clause]." USSG § 4B1.2(a).

The same definition applies under the non-ACCA firearms guideline range, and can increase the offense level there by many offense levels. *See* USSG § 2K2.1(a) & n.1.

The Supreme Court GVR'd nine guidelines' cases in light of *Johnson*. The government has conceded on direct appeal,[1] and several district courts have found at sentencing,[2] that *Johnson*'s

[1] *See, e.g.*, Supp. Br. for the United States, *United States v. Pagan-Soto*, No. 13-2243 (1st Cir. Aug. 11,

constitutional holding applies to the residual clause in the career offender or firearms guideline.

The residual clause of 18 U.S.C. § 16(b) should also be unconstitutionally vague under *Johnson*, though no court has yet ruled as far as we know. 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." "By its nature" is the type of "ordinary case" language that the Supreme Court identified in *Johnson* as "leav[ing] grave uncertainly about how to estimate the risk posed by a crime."[3] While the Supreme Court did not explicitly address § 16(b) in *Johnson*, the government conceded in its briefing that the reasoning on vagueness applies equally to § 16(b).[4] Sentencing provisions that rely on the § 16(b) definition of "crime of violence" include:

- Guideline increase under USSG § 2L1.2(b)(1)(C) [5]
- Mandatory minimums for possession or use of firearms under 18 U.S.C. § 924;
- Penalties regarding distribution and storage of explosive materials under 18 U.S.C. §§ 842, 844;
- Mandatory life imprisonment under 18 U.S.C. § 3559(c)(2)(F)(ii).

II. ***Johnson*'s Impact on Clemency**

For clients whose sentences were increased or based upon a prior offense that qualified at the time as a "violent felony" or a "crime of violence" under one of the residual clauses discussed

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2015); Letter Br. of the United States, *United States v. Zhang*, No. 13-3410 (2d Cir. Aug. 13, 2015); Supp. Br. for the United States, *United States v. Talmore*, No. 13-10650 (9th Cir. Aug. 17, 2015); Supp. Letter Br. for the United States, *United States v. Lee*, No. 13-10507 (9th Cir. Aug. 17, 2015); United States Supp. Authority under Fed. R. App. P. 28(j), *United States v. Smith*, No. 14-2216 (10th Cir. Aug. 20, 2015); Supp. Br. of United States, *United States v. Goodwin*, No. 13-1466 (10th Cir. Aug. 21, 2015).

[2] *See, e.g., United States v. Williams*, JSW-13-466, Sent. Tr. (N.D. Cal. July 28, 2015); *United States v. Ware*, CMC-14-806 (D.S.C.); *United States v. Lee*, JA-DAB-14-00268, Sent. Tr. at 4-5 (M.D. Fla. July 15, 2015); *United States v. Negrete*, 14-cr-00266-LJO, Sent. Mem. & Formal Objections to the PSR (E.D. CA. July 6, 2015), Sent. Tr. at 2 (E.D. CA. Aug. 3, 2015).

[3] *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."); *see also id.* 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." (emphasis added)).

[4] 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)).

[5] 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 . . .).")

above, you can use *Johnson* as a reason the sentence would be lower if imposed today.

You must first determine whether the prior offense that qualified at the time as a "violent felony" or "crime of violence" depended on the residual clause, that is, it did not meet the elements clause or the enumerated offense clause. If it did depend on the residual clause, you must also determine whether the client has any other prior conviction that was not counted previously that is valid under *Johnson*.

You also need to determine whether the prior offense in fact involved violence. Recall that a prior conviction is disqualifying for clemency purposes if the "proven facts of record" demonstrate that "the client herself used, attempted to use, made a credible threat to use, or directed the use of physical force against the person of another." *See* Was the Client a Non-Violent Offender? Does She Have Any History of Violence?

The memorandum in support of clemency will have to explain that (1) the prior offense no longer qualifies as a "violent felony" (or "crime of violence") as a matter of law, and that (2) the prior offense did not involve violence.

Also recall for clients sentenced under the ACCA that possession or presence of a firearm alone does not render a person ineligible.

Timing and Other Cautions. As explained in Part III, many clients will also want to pursue post-conviction relief in the courts, and generally have one year from the date *Johnson* was decided – no later than Friday, June 24, 2016 or a couple of weeks earlier to be safe -- to file. If you are inexperienced in the law of federal habeas corpus or do not wish to represent the client in seeking post-conviction relief, contact the Federal Defender in the district in which s/he was sentenced, or contact abaronevans@gmail.com or paresh_patel@fd.org. Do this immediately so that the filing deadline is not missed. As always, consider the scope of your representation and your competency in the relevant law before advising a client on any matter outside of clemency.

A petition for sentence commutation may be submitted and will be considered in cases in which a habeas petition is pending. Given the potential procedural hurdles to habeas relief and the time it often takes to get those cases resolved, you should file clemency petitions as soon as practicable, and ideally before January 2016 (in order to allow enough time before January 2017 for the submission to be reviewed).

In response to Question 4 on OPA's form petition and in your Memorandum: (1) if a habeas petition has not yet been filed, say nothing about a habeas petition, or (2) if a habeas petition has been filed, write the following OPA-approved paragraph:

> A habeas petition has been filed. We ask that you consider this petition in light of the many hurdles to habeas relief and the length of time it takes for these cases to reach resolution.

In the past, OPA policy was that if the inmate had any court matter pending, OPA would hold his/her petition in abeyance until resolution of that court matter. But it is most unlikely that a habeas motion filed by June 25, 2016 will be ruled upon before you need to submit the clemency

petition. The OPA understands this reality and has therefore approved the above statement.

Because clemency is not a sure thing, you cannot say or do anything in the clemency representation that would jeopardize habeas litigation. For example, you cannot advise the client to wait to file a habeas petition until he finds out if he is granted clemency. The absolute deadline for filing a habeas motion is June 25, 2016. You also cannot say in the clemency filing that the client is not entitled to post-conviction relief, even if circuit law currently precludes habeas relief under your client's circumstances. This could be construed as a concession in the litigation in the event the government got ahold of it. Circuit law may be unfavorable now, but the en banc court may vacate an unfavorable panel decision, or the Supreme Court may resolve the issue favorably. For more information, consult Pending and Possible Court Challenges.

III. Post-Conviction Relief

See Timing and Other Cautions in Part II. The following is intended as only the briefest overview. The law in these cases is developing daily. Whether or not a post-conviction *Johnson* claim is permitted and under what circumstances has no effect on your argument in clemency that the sentence would be lower if imposed in the first instance today.

ACCA

For clients erroneously sentenced based on a prior offense that qualified as a "violent felony" under the ACCA's residual clause, the path to judicial relief is a motion under 28 U.S.C. § 2255. Section 2255 authorizes federal prisoners to file petitions for collateral review after their convictions have become final.

The claim must be cognizable under § 2255(a), the decision must be retroactive, the petition must be timely under § 2255(f), and the claim must not have been procedurally defaulted. The claim is cognizable because the sentence is "in excess of the maximum authorized by law" and is "imposed in violation of the Constitution or laws of the United States." § 2255(a). *Johnson* is a substantive change in the law and therefore retroactively applicable on collateral review in ACCA cases. For clients seeking to file their initial §2255 petition, the deadline is June 25, 2016, one year from the date on which the decision in *Johnson* was issued. *See* 28 U.S.C. § 2255(f)(1) & (3). The government appears to be conceding that relief is available under § 2255 in ACCA cases and waiving procedural default. *See* Govt's Response to Appellant's Motion for Summary Action, *United States v. Imm*, Nos. 14-4809, 14-4810 (3d Cir. Aug. 6, 2015).

Clients who previously filed one or more § 2255 motions that are no longer pending need to seek leave from the court of appeals to file a second or successive petition. *See* 28 U.S.C. § 2255(h)(2); *Price v. United States*, __ F.3d __, 2015 WL 4621024 (7th Cir. 2015) (approving successor under *Johnson* in ACCA case). They should file an application seeking leave to file a second or successive § 2255 petition at least 30 days before June 25, 2016 because the court of appeals has 30 days to rule. It would be a good idea to move in the move in the district court to stay and abey until court of appeals decides.

Another avenue is 28 U.S.C. §2241. Section 2241 authorizes federal courts to grant writs of habeas corpus. Section 2255(e) (the "savings clause") permits prisoners to proceed by § 2241 only if "the remedy [provided by §2255] is inadequate or ineffective to test the legality of [the

prisoner's] detention." The rules for § 2255(e) and § 2241 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

Guidelines

As noted in Part I, *Johnson* also has an impact on clients who were erroneously sentenced under the identically worded residual clause in the guidelines. The claim is cognizable whether the guidelines were advisory or mandatory because the sentence was "imposed in violation of the Constitution … of the United States." § 2255(a). The Seventh Circuit recently approved a successive § 2255 in a career offender case. *See* Order, *United States v. Best*, No. 15-2417 (7th Cir. Aug. 5, 2015). Two members of an Eleventh Circuit panel disagreed in a confusing opinion, over a cogent dissent. *United States v. Rivero*, __ F.3d __, 2015 WL 4747749 (11th Cir. Aug. 12, 2015).