IN THE SUPREME COURT OF THE UNITED STATES

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GREGORY WELCH, :

Petitioner : No. 15-6418

v. :

UNITED STATES, :

Respondent. :

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Washington, D.C.

Wednesday, March 30, 2016

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:09 a.m.

APPEARANCES:

AMIR H. ALI, ESQ., Washington, D.C.; on behalf of Petitioner.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; for Respondent in support of vacatur and remand.

HELGI C. WALKER, ESQ., Washington, D.C.; for Court-appointed amicus curiae in support of the judgment below.

C O N T E N T S

P R O C E E D I N G S

(10:09 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 15-6418, Welch v. United States.

Mr. Ali.

ORAL ARGUMENT OF AMIR H. ALI

ON BEHALF OF THE PETITIONER

MR. ALI: Mr. Chief Justice, and may it please the Court:

Johnson is retroactive because it is a rule of substantive criminal law, not a procedural rule that regulates only the manner of determining a defendant's culpability or sentence. This Court applies a straightforward test for distinguishing between those rules that are procedural and those that are substantive.

Assuming perfect trial or sentencing procedures, does the new rule change the authorized outcomes of the criminal process? If no, meaning that a court could have reached the same outcome had it applied perfect procedures, then we're dealing with a procedural rule.

JUSTICE GINSBURG: Well --

MR. ALI: If --

JUSTICE GINSBURG: What do you do with the -- the argument that the -- the concern that motivated Johnson is all procedural? Fair notice to the defendant that checks against arbitrary enforcement, those are procedural concerns?

MR. ALI: Your Honor, we think under this Court's decision in Bousley, it's clear that you don't look to the source of the rule and that that's not governing. And what's relevant here, as it was in relevant -- in Bousley is that there was no valid active Congress which authorized the punishment for a class of persons. Here the class of persons who, absent the residual clause, would have two or fewer qualifying crimes under ACCA. In Bousley, the class of persons were those who merely possessed firearms.

But to answer your question more directly, Justice Ginsburg, as we explain on page 16, 17 of our reply brief, we think it's far from clear, even if that were the test, that vagueness sounds only in procedural due process. In fact, it's qualitatively different, we think, from procedural due process in the sense that it does control or regulate which criminal prescriptions Congress can or cannot pass in a way that we don't think of when it comes to procedural due process.

So Johnson didn't say, Government, if you

provide notice to people or greater notice, you can still come after them under the residual clause. What Johnson said was the residual clause is facially unconstitutional. No person may be sentenced to 15 to life under the residual clause.

So what we know now is that people, like Petitioner, are spending somewhere between an additional five years to the rest of their life in prison based on where there was no valid active Congress which authorized that punishment. And that, we believe, is very clearly a substantive rule under Bousley.

JUSTICE ALITO: Well, before you get -- you continue too deeply into the substance of your argument, could I just ask a possibly irritating question about the facts of this particular case? The first question that you raise in the cert petition is whether the district court was in error when it denied relief on Petitioner's 2255 motion.

And, I mean, I want to -- if you look at page 96A of the Joint Appendix, the first sentence of -- I'm sorry, the paragraph 8 on that page, can you tell me if you were a district court judge, would you have seen in that argument the argument that the residual clause of the Armed Career Criminal Act is unconstitutionally vague?

MR. ALI: Your Honor, we believe that with liberal pro se pleading standards, that what's said on 96 and what's said on page 83 where Petitioner invokes his Fifth Amendment right to due process, combining that with the language here, that he does not mean -- meet Armed Career Criminal requirements because it's, quote, "ambiguous, vague, and without any violence," we think that would satisfy it. But more importantly, we think that that --

JUSTICE ALITO: Well, just -- and, I mean, this wasn't exactly the question I asked. Particularly when I was on the court of appeals, and we reversed the district court judge, they would always complain that, you know, you're asking us to -- to -- you don't understand our situation.

My -- my question is, if you were a district judge, would you have seen in this sentence, "Petitioner's robbery under Florida State statute Section 812, et cetera, is ambiguous, vague, and was without any violence and/or physical force," if you read that, as a district court judge, would you have seen in that the argument that the Court adopted in Johnson?

MR. ALI: Your Honor, I think the answer is yes. Again --

JUSTICE ALITO: You would have --

MR. ALI: -- when you read it with the sentence before -- and -- and but more fundamentally, I think the answer is that it doesn't matter because there's no question that Petitioner is entitled to the benefit of Johnson in this case.

JUSTICE ALITO: How can it not matter? You're arguing that the district judge made a mistake. So your answer is you would have seen it there, and you would be a very prescient district judge. That's the answer.

MR. ALI: Well, Your Honor, my more complete answer is that the questions presented that were drafted in this case and granted about the Court were drafted by a pro se litigant.

And I think that taking the two questions together, what those questions ask are: Did the court of appeals err in reversing -- or in denying a certificate of appealability? So the first question is referring to, did it err on the basis of the elements clause question. And that raises merely the question of whether reasonable jurists could disagree as to whether Petitioner's conviction qualified under the elements clause.

And the second prong goes to Johnson's retroactivity, which, again, raises the question of

whether reasonable jurists could disagree as to whether Johnson is retroactive.

So it may be the case that the first question presented as drafted by the pro se litigant when it was -- and granted by this Court suggests to you the question is that whether the district court erred. But I think the better reading of the question is whether the district -- sorry, whether the court of appeals was erroneous in reversing -- or in denying this certificate of appealability.

JUSTICE GINSBURG: You mention the elements clause. That wasn't -- that wasn't passed on below, was it? The -- I think the court of appeals said it wasn't deciding it, that --

MR. ALI: Your Honor, with respect to the elements clause, on direct appeal, the Petitioner challenged whether he qualified under either of the two clauses, the residual clause or the elements clause. And the Eleventh Circuit on direct appeal said it's arguable that the elements clause would not have -- have applied. It's -- it was not --

JUSTICE GINSBURG: They didn't make that a holding.

MR. ALI: It did not make that a holding. That's correct, Your Honor. What it did was fall back

on the residual clause, as many courts at this time did, because the residual clause, as this Court acknowledged in Johnson, provided a relatively easy standardless analysis that would allow -- that -- that many people could be subsumed with it, and that's really the problem here, is we're dealing with an instance in which there was no active Congress which authorized this under Johnson. And what we had was essentially courts deciding whether people did or did not fall under this -- this clause that this Court has described as nearly impossible to apply as a judicial morass in a black hole which frustrated any attempt to apply. And we think it follows from that, that this is clearly a substantive rule getting back into the merits of -- of retroactivity.

And if -- if you will, Your Honors, I'd like to just talk briefly about how illogical it would be to deny retroactivity in this case.

So consider a decision of this Court, like Skilling, where the Court narrowly interpreted the honest services fraud statute to its core conduct, bribery and kickbacks.

Now, that case under under -- under Bousley would be retroactive, because it is an interpretation and -- and everybody who falls out of that core scope

would get the benefit of -- of Skilling retroactively, and that's what the court of -- courts of appeals have concluded.

Now if the Court denies retroactivity here, what it would be saying was -- is if the three justices in Skilling had their way and instead the Court had concluded that there is no possible interpretation of this statute, it's incapable of interpretation, all of those same people -- if the Court went the further step, all of those same people would be denied relief, and that -- we think that's entirely arbitrary. And it -- and it shows in the context of ACCA itself.

So this Court in Begay said that DUI does not clearly fall within ACCA's residual clause. And then in chambers the Court said that failure to report to a penal institution does not clearly fall within ACCA's residual clause. And as the Court made those decisions, those are retroactively applicable, and the Court's amicus agrees with those -- should be retroactively applicable.

And what the Court would be saying if it denied retroactivity here is that if the Court goes the further step and says, in fact, we have no idea what Congress did or did not want to follow, so nothing clearly follows or almost nothing clearly falls within

this clause, that retroactivity -- nobody would get the benefit of retroactivity. We think that's an untenable result.

So Your Honor, if I -- if there are no further questions, I think I'll reserve the remaining time I have for rebuttal.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Dreeben.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

FOR THE RESPONDENT

IN SUPPORT OF VACATUR AND REMAND

MR. DREEBEN: Thank you, Mr. Chief Justice, and may it please the Court:

The United States agrees that Johnson constitutes a substantive decision that's retroactively applicable on collateral review. The effect of Johnson is the controlling inquiry here.

What Johnson did was eliminate a substantive basis for imposing an enhanced sentence under the ACCA. And the effect of that is to create a class of people that the law cannot punish under ACCA. This is the Court's language in Schriro v. Summerlin on the definition of a substantive rule.

The reason --

JUSTICE SOTOMAYOR: I'm a little troubled by

the use of the word "class of people." Amicae is right that that's almost a circular argument. You're a class of people because I say you can't be covered by this. It doesn't make much sense in terms -- can't be covered by this law.

What's -- isn't there a simpler way of arguing this, which is that if -- and your co-counsel is -- Petitioner's counsel is suggesting it.

If you can be retried under the existing law with a corrective process, that's procedural. If you can't be retried and sentenced that way, that's substance -- substantive.

MR. DREEBEN: Well, I -- I think that's a fine way, Justice Sotomayor, of --

JUSTICE SOTOMAYOR: Pretty simple rule. What's wrong with it?

MR. DREEBEN: The only caveat that I have about it at all is, as this Court knows from Montgomery v. Louisiana, the government's view is that a law that invalidates a mandatory minimum punishment within an existing range is a substantive rule because it expands the range of outcomes. May not eliminate the outcome that the defendant actually received, but it does require an expanded range of outcomes, and we regard that as a substantive holding.

But with that caveat, I entirely agree that the basic distinction between substance and procedure is the substantive holding changes the question that the court or the sentencer is answering. It changes it from, in this case, did the defendant have a conviction that qualified under the residual clause, to does he have a conviction that qualifies under the elements clause or the enumerated offense clause only. It -- it strikes from the statute a basis -- a discrete basis for finding ACCA applicable.

And that is, I think, as you correctly point out, Justice Sotomayor, very different from a procedural rule that would say you have to give the defendant 20 days' notice before the defendant litigates this, or the defendant has to be able to introduce certain kinds of evidence in support of the defendant's claim. But the Court is still answering the very same question: Was there a violent felony under a preexisting definition unaltered by the Court's new ruling.

And once the Court divides the world between procedural consequences and substantive changes in the law that alter the question, the very question that the Court is answering, I think that resolves the substance-versus-procedure inquiry.

JUSTICE KENNEDY: What happens --

JUSTICE GINSBURG: If --

JUSTICE KENNEDY: -- in a State court -- a State criminal system if the statute says that the judge may take into account whether or not past acts and past crimes were crimes of violence, and a judge makes that finding? It's almost in -- in the same terms as the statute that was struck down in Johnson. What -- what results there?

MR. DREEBEN: Justice Kennedy, I think the result would be the same if it were actually an -- an analogous State law provision that was worded the same and that was invalidated on vagueness grounds in other words.

JUSTICE KENNEDY: And that's -- that's even assuming that the sentence the judge gave after making that finding was within the maximum permitted by the statute?

MR. DREEBEN: Yes. If the substantive basis for imposing that sentence is altered so that the judge could no longer rely on the fact that he did rely on to impose that sentence, then it -- it alters substantive law.

And there may be defendants, and in fact Petitioner may be one for whom ACCA is still applicable, because there is an alternative way of imposing the same

sentence.

JUSTICE GINSBURG: Can you explain it, how -- how this elements clause might work. You say on the residual clause, it's substantive. But you say these elements, it might be -- it still might fall under the elements clause. Can you spell that out?

MR. DREEBEN: Well, Justice Ginsburg, the time of the conviction, he was convicted of strong-arm robbery. And there was an argument that he raises, and continues to raise, that strong-arm robbery doesn't require, as interpreted by Florida law at the time of his conviction, violent force. This is what the court held is required to satisfy the elements clause in ACCA in the other Johnson case, the Curtis Johnson case.

So he argues that violent force wasn't required; that the Eleventh Circuit looked at some State law precedents and said we're just not going to decide this issue; it's easier to resolve under the residual clause. So it remained an open issue under Eleventh Circuit law. And the courts below just haven't decided it.

I think there is a very substantial argument that a proper reading of Florida State law would lead to the conclusion that you do need to use enough force to take property from another person to be convicted of

Florida strong-arm robbery, and that would satisfy the Curtis Johnson standard, in which case his conviction would count, but on an alternative basis.

But he has arguments to the contrary. They have never been reviewed by the courts below. And that is why the government's view is that this Court should resolve the retroactivity of Johnson in this case if it concludes that Johnson is retroactive. Rather than being a court of first view on the elements clause, the Court should let the Eleventh Circuit sort that out.

JUSTICE GINSBURG: The Eleventh Circuit, as counsel said, decided the case on the basis of the residual clause. But there's one other part of this that's a little foggy to me, and it doesn't arise in Welch's case because this is -- his is a first 2255 motion; is that --

MR. DREEBEN: That is correct.

JUSTICE GINSBURG: And there's something about successive -- second or successive motions. Does that work a little differently, or is this --

MR. DREEBEN: It works very differently, Justice Ginsburg. To get certified for filing of a second or successive 2255 motion, a defendant has to go to the court of appeals and request authorization and receive it under 2255(h). And 2255(h)(2) permits

certification when a new rule of constitutional law has been made retroactive to cases on collateral review by this Court. So it requires a ruling from this Court that the ruling that's relied upon is retroactive.

And the courts of appeals have split, methodologically and substantively, on whether this Court has made Johnson retroactive.

To be very brief about it, the government's position is that this Court has done so through a combination of holdings. It's a syllogism. All substantive rules are retroactive; Johnson is a substantive rule; therefore, this Court's jurisprudence makes Johnson retroactive.

But that has occasioned substantial disagreement in the courts of appeals. Unfortunately, Congress precluded certiorari review in the AEDPA, so this Court cannot directly review that conflict.

If the Court in this case were to hold that Johnson is retroactive, it would make Johnson retroactive, and thereby entitle the second or successive filers to come in. And the government believes that that would be appropriate because if, in fact, they are serving an ACCA sentence based on a residual clause conviction, they're in jail for a minimum of five years longer than Congress ever validly

authorized.

And in the government's view, that's the kind of substantive holding that Justice Harlan had in mind in the Mackey case, which was the progenitor of the Teague opinion. It's -- means that the criminal process has come to rest at a point where it never should have come to rest.

The residual clause was not found to be unconstitutional until Johnson, but once the Court has concluded -- contrary to the government's argument, to be sure -- but that it is facially void, it means that Congress never supplied a valid basis for those sentences. And we think that it is consistent with the doctrinal framework that the Court has announced for habeas cases and for the substantive versus procedural inquiry to hold it retroactive.

Now the amicus in support of the judgment has offered an alternative way of analyzing retroactivity. Its method -- its approach is to look at the source of the underlying right rather than the effect that it has in the criminal proceeding.

That approach is in some ways reminiscent of the first step in retroactivity analysis under Linkletter v. Walker, the very approach that the Court overthrew in Teague. That inquiry said, what was the

purpose of the new rule being designed? The amicus's argument would send the courts back to look at that as opposed to looking at the -- the effect of the rule.

And Justice Harlan himself, I think, offered us a very clear indication that he understood that it was the effect of the rule, rather than the source of the rule. He examined two cases in combination in the Mackey decision and the United States in Coin & Currency that involved a Fifth Amendment violation, punishing somebody for compelling -- you know, compelled self-incrimination. And that is a procedural rule, but when it is the very basis for criminal liability, in other words, punishing somebody for failing to incriminate themselves, Justice Harlan said that's a substantive effect, and it's entitled to retroactivity.

When, on the other hand, it simply gives rise to evidence that should not have been admitted in an otherwise valid proceeding, it produces a procedural rule that Justice Harlan believed was not entitled to retroactivity. Same right, two different outcomes depending on the effect in the particular case.

And we think that that effects-based approach is what the Court adopted in Schriro v. Summerlin and in Teague and has applied in numerous other cases. And it's also the basis for the

government's view that while Johnson does apply to the sentencing guidelines, in the sentencing guidelines context, it does not create a substantive rule. It creates a procedural rule. The sentencing guidelines serve as information that the judge must legally consider in imposing the sentence, but it does not alter the statutory maximum or require a statutory minimum.

So a mistake in applying the guidelines functions as a piece of misinformation. It's analogous to wrongly weighed facts or legal considerations within a preexisting range. And in our view, that is, under the definition that Justice Sotomayor articulated, and other definitions, a procedural rule. It influences the way a guideline sentence influences what the judge does, but the judge's charge remains the same, to impose a sentence that is sufficient, but not greater than necessary, to achieve the purposes of punishment within a preexisting statutory minimum and maximum.

JUSTICE KENNEDY: Well, so suppose the -- the judge says in a guidelines case, because you are guilty of a crime of violence, I find you within that class of persons to whom I will give a -- an enhanced sentence? Procedural?

MR. DREEBEN: I think it is still procedural within the meaning of the Teague line of jurisprudence

because errors that result in a judge giving too much weight to a particular factor in making a discretionary decision fall into the procedural basket.

This Court has a number of death penalty cases in which either the jury was deprived of considering certain information or it improperly gave weight to certain factors. It received instructions that may have relieved itself of a sense of responsibility or ignored mitigating factors.

And the Court has said those are procedural. They don't change the ultimate outcomes that the Court has before it. They only influence the way in which the party gets to the outcome. And there may be -- there may be error there, quite serious error, but the question for retroactivity is not whether there is error. It's whether it's procedural error or a substantive error that actually alters the range of conduct that's being punished. Here, we believe it's the latter.

JUSTICE ALITO: Do you have any view about what we should say about whether the vagueness issue was properly raised?

MR. DREEBEN: I believe that the appropriate thing to do, Justice Alito, would be to leave that issue open for the Eleventh Circuit to evaluate in the first

instance. It has not been passed on by any lower court.

I do quite agree with your reading of the district court complaint. I do not believe that a vagueness issue was properly raised in the district court. It was called to the Court's attention in the application for the certificate of appealability and in a request to hold that application for Johnson. At the time that the Eleventh Circuit denied those things, it committed no error, either, because Johnson had not been decided. And that makes this case, as I think we said in our brief, a somewhat unusual procedural vehicle for clarifying the law as to Johnson.

The United States filed a -- a brief at the petition stage saying just to vacate this case and remand it so that the Eleventh Circuit can apply Johnson. And, of course, it would be free to apply other procedural rules, and we still think that's the right --

JUSTICE ALITO: Can we do that? Can we just decide an abstract legal question without deciding whether the issue is before us --

MR. DREEBEN: Yes.

JUSTICE ALITO: -- properly before us?

MR. DREEBEN: I -- I think that the Court has jurisdiction to resolve a pure question of law and

to make clear that other procedural impediments, which have not been ruled on below, remain open for the lower court. I don't see any jurisdictional obstacle to this Court doing it. And the Court has, in some other contexts, resolved legal issues -- I'm sorry. May I complete the answer?

CHIEF JUSTICE ROBERTS: Sure.

MR. DREEBEN: -- and remanded to a lower court with leave for that court to apply a bar if, in fact, that was the appropriate thing to do.

JUSTICE GINSBURG: But the government didn't raise a procedural bar.

MR. DREEBEN: We are most certainly, Justice Ginsburg, not raising procedural default in this case. I was meaning to refer generically to the category of procedural issues along the lines that Justice Alito mentioned that should remain open for consideration below. But the United States is -- has waived procedural default in this case.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Walker.

ORAL ARGUMENT OF HELGI C. WALKER

FOR THE COURT-APPOINTED AMICUS CURIAE

IN SUPPORT OF THE JUDGMENT BELOW

MS. WALKER: Mr. Chief Justice, and may it

please the Court:

In the 25 years since Teague was decided, this Court has never held that a new rule based on the central procedural guarantees of the due process clause, in either the Fifth Amendment or the Fourteenth Amendment, nonetheless constituted a substantive rule that could apply to overturn final criminal judgments.

You should not do so for the first time here.

JUSTICE GINSBURG: How can it not be substantive when, under one rule, the sentence range goes minimum of 15 years up to life, and the other reading, it's zero to ten years? I can't imagine anything more substantive than five extra -- a minimum of five extra years in prison.

MS. WALKER: Because the government's articulation of the test, which is an effects-based test that they draw from a statutory construction case, Bousley, is not the proper inquiry for asking whether a new constitutional rule is substantive or procedural. Since Penry, which, after all, was the case that first extended Teague's first exception into the sentencing context in the first place, there, the Court looked for the existence of a, quote, "substantive categorical constitutional guarantee." And ever since, that's what

this Court has looked for. The foundation stone, as you said, just two months in Montgomery, is the existence of a, quote, "substantive constitutional guarantee." That must be the lodestar for whether a new constitutional rule is procedural or substantive.

JUSTICE GINSBURG: And what is the substantive constitutional guarantees? Much of the Sixth Amendment is -- is all procedure, right?

MS. WALKER: That's true. And that was Summerlin, Justice Scalia. And that actually proves my point about the proper analysis. In Summerlin, Justice Scalia looked to the Sixth Amendment right to jury trial, which was the underlying constitutional basis for the new rule announced in Ring. And he said, well, it can't be substantive because the Sixth Amendment jury trial right has nothing to do with the scope of conduct that Congress can either punish or prohibit.

And so, too, here, I don't think there's really any question. I don't think my friends on the other side have seriously contested this, but Johnson is a case that is founded on the procedural due process right not to be put in jail under a vague law. There is nothing in Johnson that suggests there was any concern, other than clarity, predictability, determinacy. The void for vagueness cases that the author of Johnson

shows appear to have been carefully selected. None of them involved constitutionally protected conduct. None of them involved any other constitutional interest in play.

We have hornbook law that shows -- Professor Tribe's treatise that void for vagueness doctrine has always been understood to come under the procedural due process component of the Due Process Clause, not the substantive due process component.

CHIEF JUSTICE ROBERTS: What -- what procedures would allow somebody to be convicted under the residual clause? If it's a procedural protection, there must be some procedures that would allow people to be convicted. What are they?

MS. WALKER: Absolutely. What Johnson required was the use of a framework that specified the nature of the inquiry to be conducted and the kinds of factors to be considered.

And the fact that Congress can go back and fix the problem with residual clause, as members of this Court have pointed out, and as my friends on the other side concede, only shows that Johnson did not, quote, deprive -- that's the language of Montgomery, that's the language of Penry -- did not deprive Congress of any substantive power, if you will, to impose 15-year

sentences.

The problem in Johnson was not that something was wrong with 15-year mandatory minimums, per se, but just that Congress hadn't articulated its -- its statutory goal in sufficiently precise terms.

JUSTICE SOTOMAYOR: Why don't we --

JUSTICE KENNEDY: Suppose you have a statute which makes it a crime to engage in conduct annoying to others?

MS. WALKER: That was Coates.

JUSTICE KENNEDY: And the Court said this is void because it is vague. That's procedural.

MS. WALKER: That's the Coates decision, which said -- struck down a State law, I think it was -- that said that you can't stand on the street and annoy other people, and you definitely can't annoy a police officer.

The Court said that is void-for-vagueness, because nobody can tell what the particular standard is. What the Court actually went out of its way to say, certainly States can regulate behavior on the street. We're not saying that States lack the power to do this. We're just saying you have to do this in a sufficiently clear way.

So Coates fully supports our reading of the

void-for-vagueness doctrine.

CHIEF JUSTICE ROBERTS: So the procedural protection is that Congress can change the law?

MS. WALKER: The procedural protection is the right to fair notice and an avoidance of the risk of arbitrary enforcement. Those are the two prongs of the void-for-vagueness doctrine. And those have always been understood to come under the procedural due process component.

Johnson was based on the Fifth Amendment. So there are essentially only two options here, Mr. Chief Justice. Johnson was either founded on the procedural component of the due process clause, or it was founded on the substantive component. And I think that if you read fairly, Johnson, from beginning to end, you'll not see any substantive concern. The concern is the underlying conduct was somehow constitutionally protected, which --

JUSTICE SOTOMAYOR: Why did we make Bailey retroactive? Congress could have made mere possession. I think it subsequently did, in some form. It could have changed the law and fixed the problem. How is that different than here?

It could make certain class of crimes -- this defendant's particular crime, if it chose, it could

take the elements of this crime and say, these are violent crimes. So how are they different? We made Bailey retroactive.

MS. WALKER: They're different in two ways.

Yes, you did, Justice Sotomayor.

First, Bailey was a statutory construction case. And what Bousley explained is that when this Court construes Federal criminal statutes in such a way as to definitely exclude particular conduct, they're in mere possession of a firearm --

JUSTICE SOTOMAYOR: But we have excluded particular conduct. We've said the residual clause can't define a violent crime.

MS. WALKER: With all respect, that is not how we read Johnson. Johnson said the statute is indeterminant. We can't say that particular conduct is definitively outside the scope of the statute, which is what the Court did in Begay and Chambers and cases like Bailey. And there, we know that the defendants are innocent of anything that Congress meant by criminal case acts.

JUSTICE SOTOMAYOR: Whether it's Bailey or here, Congress has to redefine the crime.

MS. WALKER: That is --

JUSTICE SOTOMAYOR: It has to step in and

pass a new statute. So why is it substantive in one respect but not another? Same two things have to be done. The law has to be changed.

MS. WALKER: Because we have to ask why the law has to be changed. In Bailey, the law had to be changed because this Court said the statute didn't reach particular conduct. And so the defendants would be innocent of anything that Congress ever meant to criminalize.

In Johnson, though, the Court didn't say we know that all defendants sentenced under the residual clause have been sentenced on the basis of a crime that Congress never meant to cover. In fact, the Court said quite the opposite. They said we can't tell.

JUSTICE SOTOMAYOR: You said when you started that Congress could change the statute to make nonuse criminal, just possession.

MS. WALKER: Yes, and that showed --

JUSTICE SOTOMAYOR: And so Congress could change the statute and make this conduct criminal. I don't see the difference.

MS. WALKER: So what --

JUSTICE SOTOMAYOR: I don't see -- you still need a congressional act --

MS. WALKER: Right.

JUSTICE SOTOMAYOR: -- to --

MS. WALKER: And the fact that you needed a congressional act both in Bailey and here just shows our ultimate point, which is that Johnson didn't deprive Congress of the power to legislate in this area. It simply said you have to do a better job.

The Court didn't strike down the residual clause because Congress had exceeded its powers under Article 1, or regulated something that didn't affect interstate commerce, or regulated something, some conduct, some private, primary conduct, that is entirely and categorically off limits. The Court just said you need to do a better job.

CHIEF JUSTICE ROBERTS: So it's a --

JUSTICE GINSBURG: How do you --

CHIEF JUSTICE ROBERTS: Please.

JUSTICE GINSBURG: How do you deal with the argument that counsel made saying it would be passing strange if, when a law is narrowed, then it's substantive. But if a law is invalidated entirely, then we put it on the procedural side. That -- that, at first, at least, that seems to be a persuasive argument.

MS. WALKER: Well, I would submit it doesn't ultimately work at the end of the day for two reasons, Justice Ginsburg.

First, the case of Bousley is a statutory construction case. There was no new constitutional rule in Bousley. So all the late Chief Justice Rehnquist said there, writing for the Court, is that when this Court interprets a statute, we are outside the Teague framework entirely. And there, of course, the Court hadn't even reversed itself on the statutory question. So there wasn't even a new statutory issue there.

When the court says what a statute definitively means, it is making a judicial determination that the conduct at issue falls definitively outside the scope of the relevant statute. Here, precisely because Johnson said that the clause was hopelessly indeterminant, we can't know with certainty that everybody's conduct fell outside the clause. At the end of the day, it is a function of this Court's approach to statutory construction decisions on the one hand, which just aren't affected by Teague. After all, the problem that Teague set out to solve was retroactivity in a world of changing constitutional rules. And so statutory rules are to one side. We should be looking here to the test for when a new constitutional rule is substantive.

And I think it's quite revealing that my friends on the other side have not even attempted to

argue that the rule in Johnson fits within either of the traditional standards for distinguishing substance and procedure in the constitutional context.

JUSTICE BREYER: If we could go back to Justice Kennedy's question and the Chief Justice's, I may not have the distinction correct, but I thought the distinction, at least as we've interpreted it in Teague, we provided -- produced a different answer. There is a statute. It says that pestiness is a crime. Sounds like a pretty good statute. But you -- you can't pester people.

Okay. Now, the Court says, I'm sorry, desirable though that may be, it's unconstitutional. That's the end of it. Okay?

There are 32 people in prison for having violated that statute. They were convicted many years ago. Do they, under Teague, get out?

MS. WALKER: I don't think they do --

JUSTICE BREYER: Well, that amazes me. Because I thought the point of Teague was that if the statute under which they are convicted doesn't exist anymore because -- for whatever reason -- because, for example -- and did not exist at the time, because it was an unconstitutional statute -- they are serving time under a statute which was then and is now nonexistent

and, therefore, they get out.

But if the change that was made in the law is a change having to do with the accuracy of the procedure that was used to convict them of that statute, that statute still exists. They didn't get the right procedure when they got convicted of it, but we're not going to let everybody out of prison for those kinds of mistakes for a variety of reasons. It may be there are too many of them or whatever. But then he doesn't get out under Teague.

Now, that's what I thought basically, we said, Bousley, I don't know, a bunch of cases here. Now -- now, if I -- if I have this fundamentally wrong, if what I've just said is wrong, so you can explain to me what I -- what I did.

MS. WALKER: Justice Breyer, what Justice Harlan said, and what the Court adopted in Teague, is that habeas should issue when private, primary conduct has been put -- and this Court reiterated in Montgomery --

JUSTICE BREYER: Yeah.

MS. WALKER: -- altogether beyond the power --

JUSTICE BREYER: That's what he says there. But later we say substantive rules include decisions of

this Court holding that a substantive Federal criminal statute does not reach certain conduct.

MS. WALKER: And that's --

JUSTICE BREYER: See?

MS. WALKER: -- the statute --

JUSTICE BREYER: Therefore, there is a statute, perhaps. But this person is in prison, and this person is in prison for doing a thing that there is no statute makes illegal. That's how I read that. That's Bousley.

MS. WALKER: And that's the statutory construction decision, which is all my friends have to rely on here, when of course what we're analyzing is a constitutional rule. And they don't even say that Bousley by its terms applies. They ask you to say -- to adopt a radical new test, a comparable effects test.

But we don't need to analogize by an analogy to a constitutional rule, which is what Bousley is about. We should use the standard for judging whether a constitutional rule is substantive or procedural.

JUSTICE KAGAN: Well, why would Justice Harlan have wanted that distinction in the world of constitutional rules, because it seems to me Justice Harlan, as Justice Breyer suggested, would have looked at this and said, well, yes, but these -- this person or

these 32 people could not -- it is improper for this person to be sitting in jail under any statute that Congress lawfully passed. I mean, it might be that they could be sitting in jail under a different statute that Congress didn't pass. But Congress didn't pass that statute, and that makes this sentence for this person improper, unlawful, under any measure.

So why would justice Harlan have wanted to exclude those people from the protection that he suggested in Mackey?

MS. WALKER: What Justice Harlan was concerned about in Mackey was situations where the conduct at issue is immune from punishment. Nobody is immune from punishment under the residual clause in the sense that they were engaging in constitutionally protected conduct, which is plainly what Justice Harlan was talking about.

And it's not enough that this Court simply invalidates a statute. We must ask why the statute was invalidated. Was it invalidated for a reason that was based on a substantive or a procedural --

JUSTICE KAGAN: I understand your test. I guess I'm just struggling to understand the reason behind it. Because you said if -- if he weren't immune, if Congress could have passed a different statute, you

know, coulda-woulda-shoulda, Congress didn't pass a different statute, and that means he's in jail unlawfully.

MS. WALKER: Well, one is in jail lawfully if, at the time the sentence became final, he was there under the law as it stood at the time. We only apply new rules on habeas when they fall within this narrow category of substantive rules.

And the notion that when this Court declares a statute unconstitutional, for any reason, that makes the underlying judgment or conviction or sentence unlawful and as if it never were, the void ab initio concept, going all the way back to the 19th century, has been rejected by this Court in its retroactivity cases. Linkletter explained that even when this Court invalidates a statute, the prior existence of that statute is an operative fact that cannot justly be ignored.

So we've moved past, well past any notion where a law that has been declared subsequently unconstitutional simply disappears, and we must all pretend it never existed.

JUSTICE BREYER: Yeah, but that's still -- you have a point that, because it's not quite like the pest statute. The pest statute, when we say there is no

such statute, it's unlawful. And there they are, 22 people now in jail because they violated a statute, and that statute, there was no such statute, or it isn't in the future, you see? And so we say, you get out.

On the other hand, if the only reason that they -- anybody got out is because they were convicted under a procedure, you see, that was unconstitutional, they are within the class of a valid statute putting in jail.

The valid statute puts them in jail. But we're not certain he's the right one because the procedure was unfair. Is he really that kind of person? And that's the procedural thing. It doesn't go backwards.

Now, if those are the two categories, this has some of both, you're quite correct. He was convicted for having violated a legitimate law, though he's not quite like our pest.

On the other hand, after time has passed, a large number of these people are sitting there in prison and there is no statute of the Federal government that says a person like you have been told you are, deserves or can be put in jail. And so in that respect, it's like the pest. And so is it like? Which is it like? That seems to be the problem in this case.

MS. WALKER: Well, it actually --

JUSTICE BREYER: I don't know if you want to address that or not. It's up to you.

MS. WALKER: I would love to.

JUSTICE BREYER: All right.

(Laughter.)

MS. WALKER: Johnson has to be substantive if it's going to apply on collateral review. So if you're not quite sure whether it's procedural or substantive, then the default has to go to nonretroactivity, because whether we want to call substantive due process rule an exception to Teague, or whether we simply want to say they're not subject to Teague at all, the point is there's a particular type of rule that qualifies as substantive. And if it doesn't squarely qualify as substantive, and I think the fact that my friends have had to resort to an effects-based test that draws from a statutory construction case that analogizes to the actual first Teague exception, shows that Johnson doesn't squarely fall into the bucket of a substantive rule.

And my second response, Justice Breyer, would be that Teague assumes, it's inherent in Teague, that there will be constitutional violations that go unremedied. Otherwise, all new constitutional rules as

announced by this Court would apply retroactively. And that is certainly not what Justice Harlan ever intended.

CHIEF JUSTICE ROBERTS: How -- my understanding is that it's properly categorized as procedural if there's some people who could be convicted under it legitimately; in other words, Miranda -- you didn't get Miranda warnings, but you know, you were a criminal law professor, you knew what your rights were.

But who is it who could be convicted legitimately under the residual clause? We're sure, yes, okay, it's -- it's vague, whatever, but you are definitely covered, so you shouldn't get the protection of what you would regard as a procedural flaw.

MS. WALKER: We certainly agree that Johnson invalidated the residual clause, and therefore, to answer your question, Mr. Chief Justice, nobody can be sentenced under the residual clause going forward, and the residual -- anybody that was sentenced under the residual clause would get the benefit of that new rule on direct appeal.

But the question that Teague asks is whether that remedy should be available on collateral review. And the answer to that depends upon -- and this was reaffirmed just two months ago in Montgomery -- the existence of a substantive procedural guarantee. Once

we cut the analysis loose, subs procedure under Teague's first exception, cut it loose from the underlying constitutional basis for the rule, we're going to be entirely at sea.

CHIEF JUSTICE ROBERTS: But I -- but my understanding is that the characterization of that as procedural, it turns on whether or not there is a significant group of people who could be convicted under that provision where vagueness would be off the table.

Now, however, it may appear to other people engaging in this type of conduct. Maybe it's vague for them, but for this group of people, that's not vague. So we're not worried about not applying it retroactively.

MS. WALKER: But we can't know that about everybody that was sentenced under residual clause. And yet, holding Johnson retroactive would give relief to everybody categorically that was sentenced under residual clause. Any --

CHIEF JUSTICE ROBERTS: Right. Including -- including some people you think it shouldn't be applied to.

MS. WALKER: Absolutely.

CHIEF JUSTICE ROBERTS: So who shouldn't the residual clause apply to?

MS. WALKER: Well, for instance, let's take the Petitioner in this case, Mr. Welch. His sentence was correct under the residual clause at the time it became final, which is what Justice Harlan said we should be looking at. But even today, Mr. Chief Justice, his sentence is plainly correct under the elements clause, Florida law has made clear since 1922.

CHIEF JUSTICE ROBERTS: What -- what I'm talking about, the residual clause.

MS. WALKER: Yes.

CHIEF JUSTICE ROBERTS: I guess what I'm trying to ask you is who are the people who you can say, without a doubt, their conduct otherwise involves conduct that presents a serious potential risk of physical injury?

MS. WALKER: The people who committed the crimes that were at issue in this Court's decisions in James and Sykes, the people who had engaged in vehicular flight, and the second crime is now escaping.

CHIEF JUSTICE ROBERTS: The problem in Johnson, I think we took a look back and said, yeah, well, we did say that, but I have to think Johnson suggests that those decisions were not clear.

MS. WALKER: Certainly Johnson overruled those decisions with respect to the vagueness holding,

but this Court itself said that people who engaged in those two particular crimes were entirely correctly sentenced under the residual clause. The Court actually didn't say that that itself was wrong.

And what's interesting about void-for-vagueness doctrine, and Johnson in particular, is that it took 30 years for the vagueness of the residual clause, the hopeless indeterminacy of it, to materialize. That's all the more reason not to pretend as if the residual clause never existed at all, as my friends would have us do under the nineteenth century Blackstonian.

CHIEF JUSTICE ROBERTS: So you would go back and say that we think that vehicular homicide is conduct that -- today, with the benefit of the analysis in Johnson -- I mean, assuming we were wrong in those cases, which I think Johnson suggests or said, that nonetheless it's clear that those people, the vehicular homicide people, we shouldn't be concerned about applying this -- not applying this retroactively because they, and other -- and other category clearly are covered by it.

In other words, put aside our cases where I think -- I understand your argument, well, we decided that, but I -- I think Johnson suggests we decided it

wrongly.

MS. WALKER: Right. There's -- there's other -- other kinds of crimes --

CHIEF JUSTICE ROBERTS: Yes.

MS. WALKER: I'm sorry, Mr. Chief Justice. There's other --

CHIEF JUSTICE ROBERTS: What's another example?

MS. WALKER: Other kinds of crimes that have been found by the lower courts to count are attempted rape, child molestation, assault with intent to kill. I think all of those crimes would fall within the heartland of the residual clause without a whole lot of debate.

But the point, again, is that we need to go back to the existence of a substantive constitutional guarantee. The reason why we are here in a sentencing case is because Penry extended Teague into the sentencing context by reasoning that Justice Harlan had spoken of, quote, substantive categorical guarantees accorded by the Constitution. Nobody in this case has even attempted to fit Johnson within that core of Justice Harlan's theory.

The cases that Justice Harlan cited in Footnote 7 of Mackey, that famous opinion, those cases,

those conducts immunizing decisions of this Court, like Griswold, Stanley, Street, and Loving, the other side does not even mention those cases in their briefs. I think that shows just how far Johnson retroactivity would be from anything that Justice Harlan ever intended.

If the Court has no further questions.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

MS. WALKER: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Ali, you have six minutes remaining.

REBUTTAL ARGUMENT OF AMIR H. ALI

ON BEHALF OF THE PETITIONER

MR. ALI: Thank you, Mr. Chief Justice.

I just have a couple of quick points to make.

The first, when questioned by you, Mr. Chief Justice, the Court's amicae suggested that the clear examples under Johnson would be James and Sykes. And I'd just like to point out how this Court describes James and Sykes in Johnson.

This Court said that James -- the case of James illustrates how speculative the enterprise under the residual clause is.

CHIEF JUSTICE ROBERTS: Yeah. Well, she --

she also went on to suggest some holdings in the lower courts that seemed a little more on point than James and Sykes. What -- what about those?

MR. ALI: Well, Your Honor, what this Court said was that it was skeptical that those clear examples cited by the government in -- in Johnson and cited by the dissent in Johnson were so easy once you looked at those more closely. And so the Court gave the example, for instance, of rioting in a prison, and said that when you actually break that down, it's not so simple. And -- and the Court seemed skeptical that there would be very many offenses. Now, it did suggest -- it did accept that there would be some that --

CHIEF JUSTICE ROBERTS: Yeah. Rioting in prison may be right. But the -- the example of rape, doesn't that clearly fall under that language?

MR. ALI: Well, the court accepted that there may be some clear cases. It didn't define what those -- what -- the universe of those cases it had in mind. But more importantly, what the court did was say that the residual clause is so standardless, that despite that fact, we are going for in validate it altogether, because it is not capable of being applied. And that's what's relevant for the purposes of retroactivity.

JUSTICE SOTOMAYOR: What would be your rule on -- on this issue I posited to Mr. -- to the Assistant Solicitor General. What would be your take on its effect on the guidelines?

MR. ALI: Your Honor, with respect to the advisory guidelines, we --

JUSTICE SOTOMAYOR: And I know that's not the issue we've posed, but I -- I just want to have a general idea.

MR. ALI: That's fine. We think that the -- the guidelines are different in that, again, they don't change the statutory range. Now, that would be one basis this Court could distinguish. But we do think it's a complicated question.

So, for instance, in Pugh this Court talked about the anchoring effect of the guidelines, and this Court's pending decision in Molina-Martinez may also comment on the anchoring effect of the guidelines. And so there is an argument to be made there, but I do agree with the government that it can be distinguished on the basis that when somebody brings a challenge based on the residual clause of the guidelines, what they're saying is, my sentence might have been different. When they bring a challenge --

JUSTICE BREYER: That not -- that's not it,

the residual clause. The risk here is the -- which I'd like to know your response to --

MR. ALI: Sure.

JUSTICE BREYER: -- is what we're saying is a person whose sentence -- it's not conviction of the crime. He's been convicted. But a person whose sentence is higher than it otherwise would have been due to an unconstitutional provision of law must get the lower sentence even if he was sentenced 50 years ago. That's what we would be saying.

Now, there are many, many reasons why certain guidelines or perhaps statutory portions of the Sentencing Act might be held unconstitutional.

But I think I agree with you. The reason isn't the point in Teague. The fact is that it's whether the thing is struck out, because if it's struck out, there is no basis for holding the person in the prison, you see? And that's what you're arguing.

MR. ALI: Your Honor, I agree with that, and I --

JUSTICE BREYER: And what I can't foresee in this -- and maybe you have -- is what effect it would have on sentencing across the board. The government's reassuring, because they say, well, we thought about it. Doesn't seem to have that much of an effect. It's

important. But if you could be reassuring on that, if you've thought about it.

MR. ALI: Your Honor, I -- I will be reassuring on that.

JUSTICE BREYER: I'm sure you would.

MR. ALI: What we're saying is this court, to be clear, has not distinguished in the context of retroactivity or habeas between conviction or sentence. And that distinction wouldn't make sense, because we're talking about whether someone's confinement is unlawful. Now, what we're saying and what the -- I think the government -- the reason it wouldn't have such a great effect, is what we're saying is that when it is just one of those substantive criterion in a particular provision which is setting forth the sentence, which is struck down. It's not simply a procedure or some sort of rule governing how you reach that sentence. It's that rare circumstance in which an actual substantive criterion which qualifies someone or makes someone eligible for the punishment authorized, which leads to the circumstance which Your Honor described, which is that this person, the Petitioner, is now spending time in prison that was not authorized by any valid act of Congress.

And that's what makes this case much more

clear than the guidelines, because someone in the guideline's circumstance cannot assert that aspect of it, that my sentence was not authorized by any valid act of Congess.

Now, again, there may be arguments that could be made to suggest that that's valid, that it's relevantly similar, but it's certainly not something that's necessarily entailed.

I'd just like to comment briefly on the idea that substantive rule should be limited to those which -- in which Congress completely is deprived of its authority. We think that Chief Justice Rehnquist answered that question in Bousley. He didn't talk about Congress's intent. In fact, what he said was that when the statute's scope is narrowed, like rules which place conduct beyond the power of Congress, the law doesn't punish those persons. You create a set of persons who the law doesn't punish. And for that reason, in this circumstance, we believe it's controlling, as well.

Johnson invalidated the residual clause. There was no law authorizing the punishment of 15 years that Petitioner received at trial. And -- and we believe that Chief Justice Rehnquist's decision in Bousley controls here, and it follows that the court of appeal's decision should be reversed. Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

Ms. Walker, this Court appointed you to brief and argue this case in an amicus curiae in support of the judgment below. You have ably discharged that responsibility, for which we are grateful.

The case is submitted.

(Whereupon, at 11:05 a.m., the case in the above-entitled matter was submitted.)