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You're Getting Out Early: Welch v. United States Allows Offenders to Retroactively Attack Sentences Under The Armed Career Criminal Act

Carl J. Hall
Valparaiso University

Comment

YOU'RE GETTING OUT EARLY: WELCH V. UNITED STATES ALLOWS OFFENDERS TO RETROACTIVELY ATTACK SENTENCES UNDER THE ARMED CAREER CRIMINAL ACT†

I. INTRODUCTION

Federal Statute 18 U.S.C. § 924, commonly referred to as the Armed Career Criminal Act, was enacted to forbid certain types of people to "ship, possess, and receive firearms" through the imposition of mandatory minimum sentencing.[1] Though many may think the purpose of the Act is to deter the use of guns by convicted felons, its main purpose is to incapacitate career criminals through the imposition of mandatory minimum sentencing.[2] In 2015, the United States Supreme Court issued its opinion in *Johnson v. United States* invalidating the residual clause of the Armed Career Criminal Act.[3] After this decision, the Court had to address whether the new rule created in *Johnson* should be retroactively applied to challenges against prior sentences levied under the Armed Career Criminal Act's residual clause.[4]

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1 Johnson v. United States, 135 S. Ct. 2551, 2555 (2015). *See also* Begay v. United States, 553 U.S. 137, 145 (2008) (explaining that offenders qualifying under the Armed Career Criminal Act as having committed violent offenses are "potentially more dangerous" when armed with a weapon, which is the "eponym of the statute"); United States v. Trujillo, 225 F.Supp.3d 1222, 1225 (D. Colo. 2016) (showing that the Armed Career Criminal Act mandates a 15-year minimum sentence for anyone convicted under the Armed Career Criminal Act).

2 *See* James G. Levine, Note, *The Armed Career Criminal Act and the U.S. Sentencing Guidelines: Moving Toward Consistency*, 46 HARV. J. ON LEGIS. 537, 547–48 (2009) (stating that "[a]lthough the Armed Career Criminal Act enhances the punishment for illegally possessing firearms, it does not appear that Congress's primary intent was to punish career criminals for possessing guns or to deter such possession." Instead, "the Armed Career Criminal Act's primary goal [is] incapacitating career criminals who are likely to re-offend and pose a danger to the public if not incarcerated.").

3 *See Johnson*, 135 S. Ct. at 2557–58 (explaining that the residual clause of the Armed Career Criminal Act violates the Fifth Amendments' Due Process Clause because it is too vague).

4 *See, e.g.*, Welch v. United States, 136 S. Ct. 1257, 1264 (2016) (advising that the Court granted certiorari to address the broader legal issue of whether the new rule established in Johnson applied retroactively on collateral review).

Generally, the Court strictly limits when rules will have retroactive application.[5] In determining whether a new constitutional principle applies retroactively the Court must decide whether the new rule is a substantive or procedural change.[6] In *Welch v. United States*, the United States Supreme Court held that the new rule in *Johnson* was a substantive change to the law and should apply retroactively to cases brought on collateral appeal.[7]

First, this Comment presents the facts of *Welch v. United States*.[8] Next, this Comment discussed the Court's history of retroactive application of new rules to cases on collateral appeal, focusing particularly on the distinction between substantive and procedural rules.[9] Finally, this Comment analyzes the Supreme Court's holding in *Welch* and what the Court failed to address in its decision, and the implications of the decision going forward. [10]

II. STATEMENT OF THE FACTS IN *WELCH V. UNITED STATES*

In 2010, police went to Gregory Welch's apartment looking for a robbery suspect who had shot two people during an attempted robbery.[11] After entering the apartment, police encountered Welch in a bedroom and gained consent to search the apartment for the weapon involved in the robbery.[12] The search uncovered a weapon in the attic which Welch later admitted was his.[13] Welch later plead guilty to being a felon in possession

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5 *See* Bousley v. United States, 523 U.S. 614, 621 (1998) (noting that concerns of finality lead the Court to limit "the circumstances under which a guilty plea may be attacked on collateral review."). *See also* Teague v. Lane, 489 U.S. 288, 307 (1989) (stating that the general rule is that a new rule does not have retroactive application unless it is a substantive rule or a watershed rule of criminal procedure).

6 *See Teague*, 489 U.S. at 311 (adopting the test for retroactive application of new rules as whether the rule is a substantive or procedural rule). *See also* Bousley, 523 U.S. at 621 (stating that the "distinction between substance and procedure is an important one in the habeus context.").

7 *See Welch*, 136 S. Ct. at 1265 (holding that *Johnson* is a substantive decision and should therefore be given retroactive application).

8 *See infra* Part II (providing the factual background of *Welch v. United States*).

9 *See infra* Part III (discussing the history of retroactive application based on whether the new rule created is substantive or procedural).

10 *See infra* Part IV (analyzing the Supreme Court's ruling in *Welch v. United States* by considering a factor that the court failed to address and possible issues related to *Welch* going forward).

11 *See Welch*, 683 F.3d at 1306 (providing the reason why police went to Welch's apartment).

12 *See id.* (outlining how the police gained consent to search Welch's apartment).

13 *See id.* at 1306–07 (upholding the search of Welch's apartment). Welch challenged the validity of the search, but the Eleventh Circuit upheld the search as constitutional based on

of a firearm.[14] Due to his prior three violent felony convictions, Welch was categorized as an armed career criminal and sentenced to the minimum fifteen-year sentence imposed by the Armed Career Criminal Act.[15]

On appeal, Welch argued that his conviction for robbery, which was used to subject him to the minimum sentencing standards of the Armed Career Criminal Act, was not a violent felony as defined by the statute.[16] However, the Eleventh Circuit disagreed and upheld Welch's fifteen-year sentence under the Armed Career Criminal Act.[17] The Supreme Court later granted certiorari in Welch's case to consider whether *Johnson* had created a new rule that should apply retroactively to sentences under the Armed Career Criminal Act.[18]

III. LEGAL BACKGROUND OF *WELCH V. UNITED STATES*

The Fifth Amendment of the United States Constitution provides that "no person shall be . . . deprived of life, liberty, or property, without due process of law."[19] In *Johnson*, the Supreme Court found that the residual clause of the Armed Career Criminal Act was so vague that a normal person could not determine which conduct was being criminalized.[20] Therefore, the Court held that the residual clause of the Armed Career Criminal Act was unconstitutional because it violated the Due Process Clause of the 5th Amendment.[21]

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the initial protective sweep that the police conducted and Welch's subsequent consent of the search of the apartment. *See id.* at 1307.

14 *See id.* at 1306 (discussing that the police searched the attic of Welch's apartment and discovered a weapon which Welch subsequently stated was his gun).

15 *See id.* at 1307 (examining Welch's prior criminal history in designating him eligible for the minimum fifteen-year sentence imposed by the Armed Career Criminal Act).

16 *See Welch*, 683 F.3d at 1310–14 (outlining Welch's argument that he should not have been sentenced under the Armed Career Criminal Act because his prior theft conviction was not a crime of violence).

17 *See id.* at 1313–14 (upholding Welch's sentence). The Court never decided whether Welch's robbery conviction met the definition of a violent felony under the elements clause of the Armed Career Criminal Act because the Court found that it met the requirements for the residual clause and stopped at that. *See id.* at 1313.

18 *See Welch*, 136 S. Ct. at 1264 (stating that the broad issue in *Welch* was whether the new rule in *Johnson* should apply retroactively).

19 U.S. CONST., amend V.

20 *See Welch*, 136 S. Ct at 1262 (stating that "in the *Johnson* Court's view . . . the residual clause [was] more unpredictable and arbitrary in its application than the Constitution allows").

21 *See Johnson*, 135 S. Ct. at 2557 (proclaiming that the "indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites

Traditionally, when the court creates a new rule of criminal law by invalidating part of a statute, they must next decide whether that rule is going to have retroactive application to cases that have already been adjudicated under the old rule.[22] Early on, the Court struggled with finding a consistent standard for deciding when a new rule should or should not apply retroactively, and Justice Harlan attempted to persuade the Court to accept his proposed standard without success.[23] Finally, after years of grasping to find a working test for when retroactive application applies, the Court adopted Justice's Harlan's approach in *Teague v. Lane*.[24] *Teague*, which is the current test that the Court applies, hinges on whether the new rule created is substantive or procedural.[25] The *Teague* analysis, generally, starts with the assumption that the interests of finality are so strong that retroactive application is not allowed.[26] However, the Supreme Court has carved out two exceptions to this general rule, and allowed retroactive application on collateral appeal where: (1) the new rule is a substantive change; or (2) when the new rule is a watershed rule of fairness in criminal procedure.[27]

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arbitrary enforcement by judges" and by "increasing a defendant's sentence under the clause denies due process of law.").

22 *Compare* Sawyer v. Smith, 497 U.S. 227, 232, 245 (1990) (holding that imposition of the death penalty by sentencer that had false belief that the responsibility lied elsewhere was not afforded retroactive application) *with* Montgomery v. Louisiana, 136 S. Ct. 718, 732 (2016) (providing that the new rule stating that juveniles could not be sentenced to life without parole would be afforded retroactive application).

23 *See* Desist v. United States, 394 U.S. 244, 248–49 (1964) (Harlan, J., dissenting) (outlining a three-consideration test to decide whether a new rule applied retroactively). In *Williams v. United States*, Justice Harlan wrote a separate opinion to dissent to the way the court was reviewing retroactive application. *Id. See also* Williams v. United States, 401 U.S. 667, 676 (1971) (criticizing the way the Court was reviewing retroactive application). In criticizing the Court's evaluation of retroactive application, Justice Harlan stated that "the Court is free to act, in effect, like a legislature, making its new constitutional rules wholly or partially retroactive or only prospective as it deems wise" and that Justice Harlan "completely disagree[s] with this point of view." *Id.* at 677.

24 *See Teague*, 489 U.S. at 310 (explaining that the Court has adopted Justice Harlan's view of retroactivity for cases on collateral review).

25 *See In re* Patrick, 833 F.3d 584, 586 (6th Cir. 2016) (stating that substantive changes in the law created by a new rule are retroactive, while procedural changes to the law are not).

26 *See Desist*, 394 U.S. at 254 (holding that new rule concerning electronic surveillance law was not applied retroactively to cases that had been decided before the rule change). *See also* Butler v. McKellar, 494 U.S. 407, 416 (1990) (holding that new rule barring police-initiated interrogation after request for counsel was not given retroactive application to collateral appeals); Chaidez v. United States, 133 S. Ct. 1103, 1113 (2013) (holding that retroactive application was not appropriate where court held that counsel was required to explain deportation risks to their clients arising out of a guilty plea).

27 *See Welch*, 136 S. Ct. at 1264 (stating that when a decision has become final, the only way that retroactive application to collateral appeal will be allowed is where the new rule created is substantive or it is a watershed rule of criminal procedure).

In *Teague*, the Court explained that a new rule is substantive when it "alters the range of conduct or class of person that the law punishes."[28] Furthermore, the Court has stated that a watershed rule of criminal procedure is a new rule that is fundamental in ensuring a fair criminal proceeding.[29] Courts have rarely used the watershed exception in applying retroactivity to a new rule, and they have mostly concentrated on whether the new rule is either substantive or procedural.[30] If the rule is found to be substantive it has retroactive applicability, while new procedural rules are not given retroactive effect.[31]

IV. ANALYSIS OF THE DECISION IN *WELCH V. UNITED STATES*

A. The Welch v. United States *Decision*

In a seven-to-one decision, the Supreme Court held in *Welch* that the new rule created by the Court in *Johnson*, invalidating the residual clause of the Armed Career Criminal Act, applied retroactively to cases brought on collateral appeal.[32] Writing for the majority, Justice Kennedy began by briefly discussing the *Johnson* decision and stating that the Court was reviewing the denial of a Certificate of Appealability for Welch to file his successive § 2255 habeus petition.[33] Justice Kennedy, with very little discussion as to why the Certificate of Appealability should be issued,

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[28] *See* Schriro v. Summerlin, 542 U.S. 348, 354 (explaining that a "decision that modifies the elements of an offense is normally substantive rather than procedural.").

[29] *See* Saffle v. Parks, 494 U.S. 484, 495 (1990) (stating that the second exception created under *Teague* is the "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.").

[30] *See Sawyer*, 497 U.S. at 243 (discussing the limited use of the watershed rule exception). In *Sawyer*, Justice Kennedy quoted *Teague* and explained that finding that a new rule is a watershed rule of criminal procedure is very unlikely because it is unlikely that such fundamental bedrocks of due process have emerged yet. *Id*. *See also* Beard v. Banks, 542 U.S. 406, 417 (2004) (stating that a watershed rule of criminal procedure "is clearly meant to apply only to a small core of rules requiring observance of those procedures that . . . are implicit to the concept of ordered liberty." (citations omitted)).

[31] *See Bousley*, 523 U.S. at 620 (stating that procedural rules have no retroactive application because "unless a new rule of criminal procedure is of such a nature that without [it] the likelihood of an accurate conviction is seriously diminished, there is no reason to apply the rule retroactively on habeus review.").

[32] *See Welch*, 136 S. Ct. at 1268 (finding that *Johnson* establish a new substantive rule that has retroactive effect). The majority in Welch consisted of Justice Kennedy, who delivered the opinion of the Court, Chief Justice Roberts, and Justices Ginsburg, Breyer, Alito, Sotomayor, and Kagan. Justice Thomas filed a dissenting opinion. Only eight Justices participated in the decision due to the passing of the late Justice Scalia. *Id.* at 1260.

[33] *See id*. at 1263–64 (stating that the 11th Circuit Court of Appeals decided to deny Welch's motion to bring a successive § 2255 petition because he failed to show an entitlement for relief and that a reasonable jurist would find that undebatable).

then turned to the retroactive application of the new rule created in *Johnson*.[34] The Court began this discussion by looking at the language of the Armed Career Criminal Act and the residual clause located under the definition of a violent felony.[35] He explained that the Court in *Johnson* found the residual clause unconstitutional under the void-for-vagueness doctrine of the Due Process Clause of the 5th Amendment.[36]

After establishing why the *Johnson* Court found the residual clause unconstitutional, the Court next turned to the broader issue presented in *Welch*; should the rule established in *Johnson* apply retroactively to people who had already been sentenced under the Armed Career Criminal Act's residual clause.[37] The Court answered this question by analyzing the new rule under the *Teague* framework, which hinged on whether the new rule was a substantive or procedural change to the law.[38] The government attempted to argue that the rule was procedural because it was invalidated under procedural due process principles.[39] The Court rejected this argument, however, stating that the constitutional principle which invalidated the law is not part of the analysis under *Teague* and found that the new rule was a substantive change because it changed "the range of conduct and the class of persons" that could be punished under the law.[40] Therefore, the Court held that because the new rule was a

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34 *See id.* at 1264 (asserting that some reasonable jurists would find the issue debatable, then turning to the issue of retroactive application).

35 *See id.* at 1261 (reciting the Armed Career Criminal Act's residual clause under the definition of a violent felony and discussing the minimum mandatory sentence of fifteen years for violation of the Act by possessing a firearm after three or more serious drug offenses or violent felonies). Under 18 U.S.C. § 924(e)(2)(B)'s definition of a "violent felony", there are two sections. Section (i) referred to as the elements clause, defines a violent felony as a crime which "has as an element the use, attempted use, or threatened use of physical force against the person of another." Section (ii) contains the residual clause which encompasses crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." The Court in *Johnson* found the residual clause unconstitutional but the elements clause and the enumerated offenses in Section (ii) remained in force. 135 S. Ct. at 2563.

36 *See Johnson*, 135 S. Ct. at 2557–58 (discussing why the residual clause violates the Fifth Amendment).

37 *See Welch*, 136 S. Ct. at 1264 (advising that the broader legal issue of *Welch* is whether *Johnson* should be applied retroactively).

38 *See id.* (showing when retroactivity is appropriate).

39 *See id.* at 1266 (stating that when the Court is deciding whether a new rule should be retroactively applied, the Court should look to the underlying constitutional principle that created the new rule and decide whether that constitutional principle is procedural or substantive instead of the new rule itself).

40 *See id.* at 1265–66 (rejecting the idea of applying the underlying constitutional principle test advanced by the government, stating that it "would untether the *Teague* framework from its basic purpose.").

substantive change to the law, the new rule created in *Johnson* could be retroactively applied on collateral appeal.[41]

B. Appraisal of the Welch v. United States *Decision*

The Court in *Welch* reached the correct decision when it decided that the new rule created in *Johnson* was a substantive rule and as such, should be applied retroactively.[42] The new rule created in *Johnson* changed the class of persons the law effects because someone that would have been sentenced to the fifteen-year minimum imposed before would not be subjected to the same sentence after the Court invalidated the residual clause.[43] The Court, however, failed to fully discuss whether Welch should have been issued a Certificate of Appealability to bring his case on a successive habeus petition, when the District Court found Welch's sentence appropriate under the elements clause and the residual clause of the Armed Career Criminal Act.[44]

To bring his case before the Court, Welch was required to obtain a Certificate of Appealability, which the Court should only grant when "a reasonable jurist would find it debatable whether defendant has made a substantial showing of the denial of a constitutional right."[45] Therefore, for the Court to issue Welch a Certificate of Appealability, Welch should have been required to show that he was sentenced under the residual clause of the Armed Career Criminal Act by the District Court and not the elements clause.[46] If Welch was sentenced under the elements clause, his

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41 *See id*. at 1268 (holding that the rule in *Johnson* should apply retroactively in *Welch*).

42 *See generally Montgomery*, 136 S. Ct. at 732 (involving a new sentencing rule which stated that juveniles could not be sentenced to life prison sentences without the possibility of parole and the Court, similar to Welch, found that the new rule was a substantive change to the law and could be applied retroactively because it changed the class of persons that the law punished).

43 *See Welch*, 134 S. Ct. at 1265 (advising that an offender would be facing a sentence of 15 years to life in prison if convicted under the Armed Career Criminal Act, but that the same offender would now only be subjected to a ten-year maximum sentence when not subjected to the Armed Career Criminal Act's mandatory minimum sentencing).

44 *See id*. at 1262 (explaining that the District Court found that that Welch's offense of strong-arm robbery qualified under both the elements clause and the residual clause of the Armed Career Criminal Act).

45 *See* Slack v. McDaniel, 529 U.S. 473, 484 (2000) (stating that "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong"). *See also* Miller-El v. Cockrell, 537 U.S. 322 (2003) (stating that until a Certificate of Appealability is issued on petition for habeus relief, the federal courts lacks jurisdiction).

46 *See* Montoya v. United States, 2016 WL 6810727, *1 (D. Utah 2016) (stating that to be able to file a habeus petition, defendant was required to show that at least one of his convictions no longer qualifies as a crime of violence). *See also* Miller-El, 537 U.S. at 337–38

claim would not fall within the scope of the of the new rule created in *Johnson* because his conviction would fall outside the residual clause and the Court would not have issued the Certificate of Appealability for Welch to bring his case.[47]

At the end of the Court's opinion, Justice Kennedy briefly concedes that there has not been a determination on whether Welch's armed robbery conviction meets the elements clause of the Armed Career Criminal Act.[48] He, however, justifies the Court's position by stating that "reasonable jurists at least could debate" whether the conviction meets the elements clause.[49] However, numerous jurisdictions have found that at least some level of their state's robbery laws have met the elements clause's requirements.[50] If Welch's armed robbery conviction does qualify under the element's clause, and he was sentenced appropriately under that clause, he would have been unable to show that the District Court sentenced him under the residual clause to bring a claim that he was denied a constitutional right under *Johnson*.[51] Therefore, the Court should have determined if Welch was sentenced under the elements clause of the Armed Career Criminal Act, because if so, he would not have a *Johnson* claim and they should not have issued a Certificate of Appealability to then decide the retroactive application issue.[52]

(stating that the issuance of Certificates of Appealability should not be a "matter of course" and that it is the defendant's burden to show more than "the absence of frivolity").

47 *See* Ziglar v. United States, 201 F. Supp. 3d 1315, 1322 (M.D. Ala. 2016) (stating that to bring a § 2255 claim for retroactive applicability of the new rule created in *Johnson*, a prisoner must "show that he was sentenced under the residual clause in the Armed Career Criminal Act and that he falls within the scope of the new substantive rule announced in *Johnson*.").

48 *See Welch*, 134 S. Ct. at 1268 (explaining that on remand the Court of Appeals may well find that Welch's arm robbery conviction qualifies under the elements clause and his fifteen-year sentence will be upheld whether *Johnson* applies retroactively or not).

49 *Id.*

50 *See* Jondavid S. Delong, Annotation, *What Constitutes "Violent Felony" for Purpose of Sentence Enhancement Under Armed Career Criminal Act (18 U.S.C.A § 924(e)(1))*, 119 A.L.R. Fed. 319, § 20 Robbery (1994) (outlining that at least some level of the robbery statutes of Tennessee, Michigan, Ohio, Illinois, Colorado, Oregon, Kentucky, Texas, Virginia, South Carolina, North Carolina, Pennsylvania, Vermont, Connecticut, New York, and Massachusetts have been found by courts to qualify as a violent felony for purposes of sentencing an offender to the fifteen-year minimum sentence under the Armed Career Criminal Act).

51 *See Zigler*, 201 F. Supp. 3d at 1322 (discussing that defendants are required to show that the court sentenced them under the residual clause and not the elements clause, to fall within the scope of *Johnson*, and to argue that he should be issued a Certificate of Appealability).

52 *See Welch*, 134 S. Ct. at 1269 (Thomas, J., dissenting) (outlining the fault in issuing the Certificate of Appealability and stating that these "deficiencies should preclude us from deciding in this case whether *Johnson* is retroactive).

C. *Anticipated Consequences of the* Welch v. United States *Decision*

Moving forward, the Court will have to decide whether the new rule created in *Johnson* applies retroactively to sentences levied under the United States Sentencing Guidelines.[53] The Supreme Court has granted certiorari in *United States v. Beckles* to decide whether the invalidation of the residual clause of the Armed Career Criminal Act in *Johnson* will apply retroactively to the "almost identical" language of a violent felony in the United States Sentencing Guidelines.[54] Circuits have differed in whether *Johnson* applies retroactively to the Sentencing Guidelines, and the decision may not be so straightforward because the Sentencing Guidelines are advisory.[55] If the Court fails to apply *Johnson* retroactively to sentences levied under the almost same language in the Sentencing Guidelines, offenders will be unable to bring a collateral appeal of their sentences despite being sentenced under essentially the same language.[56]

V. CONCLUSION

In *Welch*, the Court correctly decided that the new rule in *Johnson* was substantive and should be retroactively applied. However, the Court should not have come to this issue in *Welch*. The Court should not have issued a Certificate of Appealability for Welch to bring his successive §2255 petition without thoroughly discussing whether a reasonable jurist would find it debatable that Welch was denied a constitutional right. If they had thoroughly considered the issue, it is likely that Welch could have been denied the Certificate of Appealability because his prior conviction was a crime of violence under the elements clause of the Armed Career Criminal Act. By allowing offenders to bring their claims when the underlying crime meets the requirements of the elements clause, the Court has subjected the circuit courts to needless re-sentencing decisions where

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53 *See, e.g., In re* Hubbard, 825 F.3d 225, 235 (4th Cir. 2016) (deciding that the new rule in *Johnson* applies to the United States Sentencing Guidelines).

54 *See* United States v. Walker, 214 F. Supp.3d 866, 873 (N.D. Cal. 2016) (stating that the U.S. Supreme Court has granted certiorari in *Beckles*, and discussing the issues that will likely be decided in the case).

55 *See In re* Partick, 833 F.3d 584, 587 (6th Cir. 2016) (stating that the Second, Fifth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits have found that *Johnson* applies retroactively to the Sentencing Guidelines). *But see* United States v. Beckles, 565 F.3d 832, 846 (11th Cir. 2009) (upholding a conviction under the crime of violence definition similar to the residual clause in the Sentencing Guidelines).

56 *See Beckles*, 565 F.3d at 842 (upholding sentence under the crime of violence definition in § 4B1.1(a) of the Sentencing Guidelines despite its almost identical language to the residual clause of the Armed Career Criminal Act).

the same fifteen-year sentence will be imposed under the elements clause of the same Act.

Carl J. Hall[*]

[*] J.D. Candidate, Valparaiso University Law School (2018). I would like to thank my wife, Diane, whose unconditional love and support has made my journey through law school possible. To my twin sons, Alex and Adam, I love you more than words could ever describe. Remember that if you work hard, you can accomplish great things.