THE FEDERAL COURTS LAW REVIEW‡

Volume 10 2018

LESSONS LEARNED FROM RETROACTIVE RESENTENCING AFTER *JOHNSON* AND AMENDMENT 782

*Caryn Devins**

‡ The *Federal Courts Law Review* is a publication of the Federal Magistrate Judges Association. Editing support is provided by the members of the *Mississippi Law Journal*.

* Supreme Court Fellow, Administrative Office of the U.S. Courts. This article is submitted in an independent capacity and does not represent the views of either the Supreme Court or the Administrative Office of the U.S. Courts. I am grateful to the many people who provided helpful comments and feedback on the article, including John Fitzgerald, Michel Ishakian, Cheryl Kearney, Laura Minor, Valerie Nannery, Brent Newton, Paresh Patel, Matthew Rowland, Christine Scott-Hayward, Michael Shenkman, Cordia Strom, Stephen Vance, Windy Venable, and the participants in the Supreme Court Fellows Alumni workshop. In addition, I am grateful to many other individuals within the Administrative Office of the U.S. Courts, the Federal Judicial Center, and the U.S. Sentencing Commission for providing research support. Finally, I would like to thank the study participants, who generously gave their time and invaluable insights.

INTRODUCTION

In different contexts, the United States Sentencing Commission and the Supreme Court of the United States recently made significant retroactive changes to sentencing law. With Amendment 782,[1] the Sentencing Commission voted to reduce retroactively the sentences of federal drug offenders. In *Johnson v. United States*, the Supreme Court held that the residual clause of the Armed Career Criminal Act (ACCA) was unconstitutionally vague.[2] In *Welch v. United States*, the Supreme Court applied the rule announced in *Johnson* retroactively to cases on collateral review.[3] These changes led to a dramatic caseload surge in district courts, with an impact as sweeping as any major sentencing policy reform.

Although the interests of justice and finality are central to modern retroactivity jurisprudence,[4] the impact of retroactivity on court administration has rarely been studied empirically. To better understand the impact of recent changes on district courts, I interviewed stakeholders in six districts that experienced large spikes in the volume of motions following *Johnson* and Amendment 782. The stakeholders included district judges, clerks of court, *pro se* law clerks, probation officers, and representatives from the U.S. Attorney's Office and the federal defender organization in each district. I asked stakeholders to compare the process in their district for implementing *Johnson* with the process for implementing Amendment 782.

---

[1] *See* U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 782 (U.S. SENTENCING COMM'N 2016); *see also id.* app. C, amend. 788 (applying Amendment 782 retroactively).

[2] Johnson v. United States, 135 S. Ct. 2551, 2557-58 (2015).

[3] Welch v. United States, 136 S. Ct. 1257, 1265 (2016).

[4] *See infra* Part I.B.

This paper finds that many courts are confronting greater managerial challenges with *Johnson* cases than they faced with Amendment 782. Implementing large-scale, retroactive changes in sentencing law is particularly challenging from a resource allocation perspective, and affects each stage of a case, including (1) appointing counsel, (2) managing the docket, (3) litigating petitions, (4) resentencing defendants, and (5) managing the reentry process. *Johnson* cases are more legally and administratively complex than Amendment 782 cases, and resolving them requires greater court resources. Further, the timing of Amendment 782 was more predictable than the *Johnson* decision. While the Sentencing Commission delayed the effective date of Amendment 782 by a full year, the Supreme Court issued its ruling in *Welch* approximately two months before the statute of limitations would expire for many claims based on *Johnson*.

In addition, legal uncertainty involved with *Johnson* cases has resulted in wide variations between (and even within) districts. As a result, similarly situated individuals have experienced different outcomes. The legal uncertainty also results in unpredictable outcomes and undermines the probation office's ability to coordinate an effective reentry process. As a result, individuals may be released from prison without necessary transition services. The lack of a proper transition deprives the individuals of the services they may need in order to reintegrate successfully into society and potentially poses a risk to public safety.

This paper provides suggestions for courts, judicial agencies, and policy makers implementing retroactive changes to sentencing law. Although there is a perceived tension between the priorities of judicial administration and the interests of justice, this study suggests that these priorities can be aligned successfully. Districts in which stakeholders acted proactively and collaboratively were in a better position to handle the deluge of filings following *Welch*.

Accordingly, the suggestions for courts include creating centralized administrative procedures, appointing federal defenders as counsel, allowing placeholder motions and streamlined government responses, and adopting a more

comprehensive approach to the reentry process in these cases. For judicial agencies, the paper suggests facilitating eligibility lists; creating opportunities for training, information sharing, and increased resources; updating the rules for resentencing proceedings; and providing practical guidance through a bench book or pocket guide.

Finally, this paper suggests statutory changes that would provide the judiciary with greater flexibility to manage these cases. Most importantly, Congress could add a triggering date to the statute of limitations period for motions under 28 U.S.C. § 2255(f)(3) to run from the date a newly recognized constitutional right is made retroactively applicable to cases on collateral review. This simple change would provide the courts adequate time to process these cases and would provide more certainty and predictability to the process, without altering the class of defendants benefitting from the ruling. In addition, this paper urges policy makers to consider the impact of mandatory minimum sentences on judicial administration and to consider other sentencing reforms.

Part I provides the legal framework for understanding retroactivity in the context of *Johnson* and Amendment 782. Part II describes the methodology for the study. Part III describes the study's findings, including the resource impacts on the court system and the variations between and within districts. Part IV suggests lessons learned for courts, judicial agencies, and Congress.

I. RETROACTIVITY UNDER *JOHNSON* AND AMENDMENT 782

Guidelines amendments and court decisions such as *Johnson* both involve retroactive changes to sentencing law, but with different origins, purposes, and legal effects. Amendment 782 was a policy decision reached through a deliberative process, while *Johnson* was a judicial decision that applied constitutional guarantees to an individual's case. The purposes and criteria for making the decisions applicable retroactively also were distinct. In making Amendment 782 retroactive, the Sentencing Commission weighed the interests of justice and fairness against the administrative burdens on

the court system.[5] In making *Johnson*'s holding retroactive, the *Welch* Court considered whether the constitutional rule announced in *Johnson* altered the range of conduct or class of persons punished, thus compelling an exception to a general bar on retroactivity.[6] The general bar on retroactivity, with its limited exceptions, intends to balance the purposes of collateral review against the interest in finality of criminal convictions.[7]

These retroactivity frameworks result in distinctive policy and administrative challenges. From a judicial administration perspective, Amendment 782 and *Johnson* had a similar result: courts were required to reconsider or reduce the sentences imposed in a large number of cases, sometimes decades after the fact. These proceedings implicate significant administrative and resource concerns related to reintegration into society. In addressing these cases, courts must navigate the balance between fairness and efficiency. Further, courts must consider public safety and the need to ensure that conditions are in place to support individuals' reentry into society.

The legal framework for retroactivity guides and constrains courts' flexibility to address these concerns. This study is designed to compare the policy and administrative consequences of these two different approaches to changes in sentencing law and to discuss the lessons they hold for policymakers and the courts.

A. Retroactivity of Amendment 782

In April 2014, the U.S. Sentencing Commission submitted to Congress a sweeping change to the Sentencing Guidelines for drug offenses. The proposed Guidelines amendment, designated Amendment 782, reduced by two levels the offense levels assigned to the drug quantities described in U.S.S.G. §

---

[5] *See* U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 782 (U.S. SENTENCING COMM'N 2016).

[6] *Welch*, 136 S. Ct. at 1264-65.

[7] *See id*. at 1266 (citing Teague v. Lane, 489 U.S. 288, 310 (1989)).

2D1.1.[8] Absent an objection from Congress, the Amendment became effective November 1, 2014.[9] The Commission voted to make the reduction retroactive.[10] As a result, approximately 30,000 individuals had their sentences reduced, with an average decrease of 25 months.[11]

Though sweeping, Amendment 782 was not unprecedented. Courts implementing the change had the benefit of prior experience with other recent retroactive Guidelines amendments. In 2007, the Sentencing Commission reduced the base offense levels for crack cocaine offenses in order to address concerns that the guidelines were producing unwarranted racial disparities.[12] In March 2008, the Commission applied that change retroactively.[13] The Commission further reduced crack cocaine sentences following Congress's passage of the Fair Sentencing Act of 2010,[14] which reduced the disparity between the mandatory minimum penalties for crack cocaine and powder cocaine distribution offenses.[15] As with the 2007 crack cocaine amendment, the Commission applied the 2010 change retroactively.[16] As a result of the 2007 and 2010 crack cocaine amendments, courts reduced the sentences of approximately 24,181 individuals collectively.[17]

---

[8] U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 782 (U.S. SENTENCING COMM'N 2016).

[9] *See id.*

[10] *See id.* app. C, amend. 788.

[11] U.S. SENTENCING COMM'N, 2014 DRUG GUIDELINES AMENDMENT RETROACTIVITY DATA REPORT at tbl.7 (Oct. 2016).

[12] *See* U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 706 (U.S. SENTENCING COMM'N 2011) (as amended by *id.* app. C, amend. 711); *see also* U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 6-8, 15-16 (May 2007).

[13] U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 713 (U.S. SENTENCING COMM'N 2011).

[14] Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372.

[15] U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 750 (U.S. SENTENCING COMM'N 2011).

[16] *Id.* app. C, amend. 759.

[17] *See* U.S. SENTENCING COMM'N, PRELIMINARY CRACK COCAINE RETROACTIVITY DATA REPORT tbl.1 (Apr. 2011) (noting 16,433 motions for a sentence reduction granted under Amendment 706); U.S. SENTENCING COMM'N, FINAL CRACK RETROACTIVITY DATA REPORT: FAIR SENTENCING ACT tbl.1 (Dec.

The process for enacting these Guidelines amendments, and for making them retroactive, is grounded in policy considerations. In 28 U.S.C. § 994(o), Congress instructs the Commission periodically to "review and revise [the guidelines], in consideration of comments and data coming to its attention."[18] In doing so, Congress requires the Commission to "consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system."[19] In addition, Congress requires the United States Probation System, the Bureau of Prisons (BOP), the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice (DOJ), and the Federal Public Defenders to submit "observations, comments, or questions" whenever useful to the Commission, and to submit annually a written report to the Commission commenting on its work.[20] Guidelines amendments, moreover, are subject to the approval of Congress.[21] The Commission submits proposed amendments, accompanied by a statement of reasons, to Congress, which has the power to modify or disapprove of them.[22]

This statutory framework fosters ongoing dialogue between stakeholders in the criminal justice system. Accordingly, before deciding whether to make Amendment 782 retroactive, the Commission took testimony from stakeholders, and gathered data, and consulted with policy makers.[23] In light of the amendment's purpose, the magnitude of the change in the drug guideline range, and the impact on judicial administration, the Commission determined that applying Amendment 782 retroactively was appropriate.[24] The Amendment reflected the Commission's determination that setting base offense levels above the mandatory minimum

---

2014) (noting 7,748 motions for a sentence reduction granted under Amendment 750).

[18] 28 U.S.C. § 994(o) (2012).

[19] *Id.*

[20] *Id.*

[21] *See id.* § 994(p).

[22] *Id.*

[23] U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 788 (U.S. SENTENCING COMM'N 2016).

[24] *See id.*

penalties was no longer necessary to achieve the purposes of sentencing. Further, reducing drug penalties was an "appropriate step toward[s] alleviating [prison] overcapacity."[25] Although the magnitude of the change was significant, with as many as 46,000 cases affected, the administrative burdens of applying the amendment were manageable.[26]

The Commission determined, however, that "public safety [and] other factors require[d]" a delay in the retroactive application of Amendment 782.[27] The Commission's position was informed by testimony from the Criminal Law Committee of the Judicial Conference, among others.[28] Based on feedback from judges in the districts most likely to be affected and the Probation and Pretrial Services Chiefs Advisory Group, the Criminal Law Committee concluded that it would support a retroactive change to the drug guidelines only if, among other conditions, the effective date of the amendment was delayed until November 1, 2014 and any inmate granted a reduction would not be eligible for release until May 1, 2015.[29] Further, the Commission received testimony that some individuals released under the prior crack cocaine guidelines amendments had not received a reasonable opportunity to prepare for reentry into society.[30] In order to give courts adequate time to review cases and to allow the BOP and probation offices to prepare for the increase in released individuals, the Commission adopted the Committee's suggestions and delayed

---

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.* The Criminal Law Committee was acting on behalf of the Judicial Conference of the United States. Under 28 U.S.C. § 994(o), the Judicial Conference "shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission . . . ." 28 U.S.C. § 994(o) (2012). The Conference delegated this authority to the Criminal Law Committee. *See* U.S. JUDICIAL CONFERENCE, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 69-70 (Sept. 12, 1990).

[29] *See* Testimony of Hon. Irene M. Keeley Presented to the U.S. Sentencing Comm'n on June 10, 2014, on the Retroactivity of the Drug Guideline Amendment 10-11, http://www.uscourts.gov/sites/default/files/keeley-testimony-ussc-retroactivity-2014-drug-guideline.pdf [https://perma.cc/BPD8-SQPF].

[30] *See id.* at 2, 9-10; *see also* 18 U.S.C. § 3624(c)(1) (2012) (requiring the BOP to ensure, to the extent possible, that inmates spend a portion of their imprisonment term in conditions that prepare them for reentry).

the effective date of any reduction orders until November 1, 2015.[31]

As this brief history shows, the Guidelines amendment process is designed to accommodate large-scale, retroactive changes in sentencing policy. The process is deliberative, involving the views of stakeholders. The decision whether to apply an amendment retroactively is driven by policy considerations and balances the interests of fairness against the burdens on judicial administration.

B. Retroactivity of Johnson

In *Johnson*, the Supreme Court struck down the residual clause of the ACCA's definition of "violent felony" as unconstitutionally vague.[32] Under federal law, felons are prohibited from possessing a firearm,[33] an offense which carries a penalty of up to 10 years' imprisonment.[34] If a felon in possession of a firearm has three or more earlier convictions for a serious drug offense or a "violent felony," the ACCA imposes a far more severe penalty: a mandatory term of 15 years to life.[35]

At issue in *Johnson* was the term "violent felony," defined by the ACCA 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; or

---

[31] *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(e)(1) (U.S. SENTENCING COMM'N 2016). The implementation delay, however, resulted in hardship for individuals who would have been eligible for release earlier than November 1, 2015. With future reductions, the Commission could balance the interests of judicial administration and fairness by providing courts with the discretion to release these individuals on a case by case basis.

[32] Johnson v. United States, 135 S. Ct. 2551, 2557-58 (2015).

[33] 18 U.S.C. § 922(g)(1) (2012).

[34] *Id.* § 924(a)(2).

[35] *Id.* § 924(e)(1).

> (ii) is burglary, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another*[.][36]

The language in the first subsection is known as the elements or force clause. The second subsection contains the list of enumerated offenses and the highlighted language that is known as the residual clause.

Johnson held this residual clause language to be vague and thus invalid. Under the Due Process Clause, the government is prohibited from "taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement."[37] These due process guarantees apply to laws that fix the permissible sentences for criminal offenses.[38]

The residual clause failed to satisfy these due process guarantees. In order to determine whether a prior conviction was a violent felony under the ACCA's residual clause, courts were required to "picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury."[39] This wide-ranging inquiry left "grave uncertainty" about how to estimate the risk posed by a crime by tying the judicial assessment of risk to an imagined "ordinary case," not to real world facts or statutory elements.[40] Further, it was unclear how much risk it would take for a crime to qualify as violent.[41]

This "hopeless indeterminacy" was confirmed by the Court's "repeated attempts . . . [and] failures," to apply a consistent standard in its cases interpreting the residual

---

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

[37] *Johnson*, 135 S. Ct. at 2556 (citing Kolender v. Lawson, 461 U.S. 352, 357-58 (1983)).

[38] *Id.* at 2557 (citing United States v. Batchelder, 442 U.S. 114, 123 (1979)).

[39] *Id.* (citing James v. United States, 550 U.S. 192, 208 (2007)). Under this framework, known as the categorical approach, courts assess the definition of the offense, not how the individual offender might have committed it. *Id.*

[40] *Id.* at 2557 (citing *James*, 550 U.S. at 211).

[41] *Id.* at 2558.

clause.[42] The clause also "created numerous splits among the lower . . . courts" and proved "nearly impossible to apply consistently."[43] These features of the residual clause "produce[d] more unpredictability and arbitrariness than the Due Process Clause tolerates."[44]

The *Johnson* decision implicated, but did not decide, the issue of how to treat individuals whose convictions were made final before *Johnson* was decided. As courts have long recognized, this issue of retroactivity poses a "most troublesome question in the administration of justice."[45] The decision to make a ruling retroactive to cases on collateral review involves competing considerations and theories of law. One weighty consideration is the protection of fundamental constitutional guarantees. Once an action is acknowledged as unconstitutional, failure to repudiate it reaps substantial injustice. At common law, an unconstitutional action was "as inoperative as though it had never been passed," and an overruled judicial decision was "only a failure at true discovery and was consequently never the law . . . ."[46] A competing concern is the interest in the finality of judgments. The repeal of prior rulings disturbs settled expectations of the law and may create "injustice or hardship."[47] The subsequent effects of a ruling must be considered, and, in some cases the interests of justice may weigh in favor of a prospective application.[48]

The judicial standards for weighing these interests have evolved over time. Prior to modern doctrine, under the standard set forth in *Linkletter v. Walker* the Court balanced these concerns by rejecting any "set 'principle of absolute retroactive invalidity . . . .'"[49] Instead, courts were required to

---

[42] *Id.* at 2558-60.

[43] *Id.* at 2560 (quoting Chambers v. United States, 555 U.S. 122, 133 (2009) (Alito, J., concurring in judgment)).

[44] *Id.* at 2558.

[45] Linkletter v. Walker, 381 U.S. 618, 620 (1965).

[46] *Id.* at 623.

[47] *Id.* at 625 (citation omitted).

[48] *See id.* at 624-25 (explaining that "[t]he actual existence of the [prior law] . . . 'is an operative fact and may have consequences which cannot justly be ignored'" (quoting Chicot Cty. Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940)).

[49] *Id.* at 627 (quoting *Chicot Cty. Drainage Dist.*, 308 U.S. at 374).

"weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."[50] As a result, there was no clear line drawn between individuals on direct and collateral review. Some new rules were applied only "to cases on direct review, other new rules only to the defendants in the cases announcing such rules, and still other new rules to cases in which trials have not yet commenced."[51]

In *Teague v. Lane*, the Court repudiated *Linkletter*'s balancing standard for cases on collateral review.[52] The Court was troubled by the inconsistent results of the *Linkletter* doctrine. Similarly situated individuals were often treated differently for seemingly unprincipled reasons. *Teague* pointed out two specific instances of this problem. With respect to *Miranda v. Arizona*, the Court applied its holding requiring pre-interrogation warnings to the defendants in *Miranda* and its companion cases, but not to other cases on direct review.[53] In another instance, following *Edwards v. Arizona* the Court did not explain that its holding would not be applied retroactively to cases on collateral review until a later case.[54] In the interim, several lower courts had come to the opposite

---

[50] *Id*. at 629. With respect to the rule announced in *Mapp*, the Court examined these factors and held that the exclusionary rule would not be applied retrospectively to cases on collateral review. Applying *Mapp* retroactively would disturb the final convictions in thousands of cases that had been decided in reliance on prior, overruled precedent. Further, the exclusionary rule's primary purpose of deterring police misconduct would not be served by making the rule retrospective. *See id.* at 636-40. Finally, retrospective application would place undue strain on the judicial process, since hearings would be required "on the excludability of evidence long since destroyed, misplaced, or deteriorated." *Id.* at 637.

[51] *See* Teague v. Lane, 489 U.S. 288, 302 (1989) (citing Desist v. United States, 394 U.S. 244, 256-57 (1969) (Harlan, J., dissenting)).

[52] *Id.* at 305. Previously, in *Griffith v. Kentucky*, the Court established a new categorical standard and held that new constitutional rules must be applied to cases on direct review. Griffith v. Kentucky, 479 U.S. 314, 322 (1987). In *Teague*, the Court applied this categorical standard to cases on collateral review and held that new rules as a general matter would not be made retroactive. *Teague*, 489 U.S. at 316.

[53] *Teague*, 489 U.S. at 303-05.

[54] *Id.* at 305.

conclusion, and individuals on collateral review were afforded relief depending on when their claims were adjudicated.[55]

To resolve these inequities, the *Teague* Court abandoned the prior retroactivity standard and instead adopted Justice Harlan's approach outlined in *Mackey v. United States* and *Desist v. United States*.[56] Justice Harlan argued that new rules should always be applied retroactively to criminal cases on direct review but they should generally not be applied to cases on collateral review.[57] Under Justice Harlan's view, the retroactivity of a new rule should be determined not by its purpose, but rather by "the nature, function, and scope" of the collateral remedy.[58] Collateral review "provid[es] an avenue for upsetting judgments that have become otherwise final," but "[i]t is not designed as a substitute for direct review."[59] In many instances, the interest in finality of a criminal conviction legitimately may outweigh the competing interest in re-adjudicating the case according to the new standards in effect at the time of the petition.[60]

Accordingly, under *Teague*, as a general matter "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."[61] One exception to this general bar applies to substantive rules, which place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe."[62] *Teague* thus preserved the long tradition of giving retroactive effect to substantive constitutional guarantees, as "[a] conviction under an

---

[55] *Id.*

[56] *Id.* at 310-12.

[57] Mackey v. United States, 401 U.S. 667, 701-02 (1971) (Harlan, J., concurring in judgments in part and dissenting in part); Desist v. United States, 394 U.S. 244, 258-62 (1969) (Harlan, J., dissenting).

[58] *Mackey*, 401 U.S. at 682.

[59] *Teague*, 489 U.S. at 306 (quoting *Mackey*, 401 U.S. at 682-83).

[60] *Id.* at 308-10.

[61] *Id.* at 310.

[62] *Id.* at 307 (quoting *Mackey*, 401 U.S. at 692) (internal quotation marks omitted). A second exception includes new "watershed rules of criminal procedure," which are procedural rules "implicating the fundamental fairness and accuracy of the criminal proceeding." Saffle v. Parks, 494 U.S. 484, 495 (1990) (citing *Teague*, 489 U.S. at 311; Butler v. McKellar, 494 U.S. 407, 416 (1990)).

unconstitutional law 'is not merely erroneous, but is illegal and void[.]'"[63]

In *Welch*, the Court applied the *Teague* standard to the new constitutional rule announced in *Johnson*.[64] The Court concluded that the rule was "substantive" and thus retroactively applicable.[65] By striking down the residual clause, the Court concluded, *Johnson* "changed the substantive reach" of the ACCA.[66] Before *Johnson*, a defendant who was sentenced based on the residual clause "faced 15 years to life in prison."[67] "After *Johnson*, the same person engaging in the same conduct is no longer subject to [the ACCA] and face[d] at most 10 years in prison."[68] Because *Johnson* altered the class of persons subject to the ACCA, the rule it announced was substantive.[69]

Teague was animated by the same competing concerns as the *Linkletter* Court—balancing the interest in applying constitutional guarantees against the interest in finality. But the *Teague* Court shifted the frame of reference from the purpose of the new rule, and its effects on the justice system, to the purpose and scope of the collateral remedy. Although the *Teague* standard meant to cure prior inequities between similarly situated individuals, it has the potential to create new ones, as will be explained below.

C. The Practical Consequences of Retroactivity

Unlike the Commission, which makes retroactivity determinations according to statutory procedures and policy criteria, the Court is driven by the purpose and scope of the collateral remedy rooted in the constitutional writ of habeas corpus. The criteria governing retroactivity of Guidelines amendments is, in some respects, comparable to the

---

[63] Montgomery v. Louisiana, 136 S. Ct. 718, 730 (2016) (quoting *Ex parte* Siebold, 100 U.S. 371, 376 (1879)).

[64] Welch v. United States, 136 S. Ct. 1257, 1264 (2016).

[65] *Id*. at 1265.

[66] *Id*.

[67] *Id*.

[68] *Id*.

[69] *Id*.

discontinued *Linkletter* test for the retroactivity of constitutional rulings. Both standards explicitly account for the impacts of retroactivity on judicial administration and consider whether applying a new rule retroactively would be necessary to fulfill the rule's purpose. The modern *Teague* framework, by contrast, draws the lines based on the scope of the collateral remedy.

The frameworks used to make decisions retroactive have practical consequences for court administration. From the outset, there were signs that *Johnson* and *Welch* could create special case management concerns for the courts in three main areas: (1) the timing of implementation, (2) the administrative burden on the courts, and (3) the re-entry process.

1. Timing of Implementation

Unlike Amendment 782, which provided a delayed effective date, the timing of *Johnson* and *Welch* led to a large caseload surge over a highly compressed time period. Although *Johnson* did not explicitly address the issue of retroactivity, in order to benefit from such a decision, individuals were required to file motions collaterally attacking the sentence within the one-year statute of limitations provided for motions to vacate sentence in 28 U.S.C. § 2255(f)(3)—that is, by June 25, 2016, one year after *Johnson* was decided.[70] Despite expediting its ruling in *Welch*, the Court's decision that *Johnson*'s holding was to be applied retroactively was not issued until April 18, 2016, approximately two months prior to the one-year deadline.[71]

The time crunch for the courts is reflected in the filing statistics for motions under Section 2255. In the district courts, the number of motions to vacate, set aside or correct sentence filed in district courts under 28 U.S.C. § 2255 increased from 5,238 in the year ending June 30, 2015 to 22,728 the year ending June 30, 2016—a year-over-year increase of 334

---

[70] *See* 28 U.S.C. § 2255(f)(3) (2012).

[71] *Welch*, 136 S. Ct. at 1257. The Court issued its decision less than three weeks after hearing argument on March 30, 2016.

percent.[72] During the same time period, applications in the courts of appeal to file second or successive collateral challenges under 28 U.S.C. § 2244 increased from 2,757 to 11,347—a 312 percent increase.[73] Although these statistics are not specific to *Johnson* cases, the increase in filings due to *Johnson* can be inferred. These filings are not just for ACCA cases, but also for cases involving other similarly worded sentencing provisions.

2. Administrative Burden

Compared to Amendment 782 cases, *Johnson* cases are more legally complex and require significant resources to resolve, particularly at three stages: (1) applying the statutory procedures for a reduction, (2) determining the magnitude and scope of the legal change, and (3) identifying individuals eligible for relief.

a. Statutory Procedures for a Sentence Reduction

Compared to the procedures for resolving *Johnson* cases, the statutory procedure for resolving Amendment 782 cases is relatively simple and provides flexibility to courts. Under 18 U.S.C. § 3582(c)(2), a court may grant a sentence reduction for an individual who "has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission[.]"[74] Section 3582(c)(2) "does not authorize a sentencing or resentencing proceeding,"[75] but it "giv[es] courts the power to 'reduce' an otherwise final sentence in circumstances specified by the Commission."[76] Courts, moreover, do not have to wait to

---

[72] The statistics regarding *Johnson* filings in this article come from internal Administrative Office of the U.S. Courts data on file with the author that was obtained from the Judiciary Data Analysis Office.

[73] *Id.* Under 28 U.S.C. § 2244(b)(3)(D), the court of appeals has 30 days after the filing of the motion to grant or deny authorization to file a second or successive application. 28 U.S.C. § 2244(b)(3)(D) (2012).

[74] 18 U.S.C. § 3582(c)(2) (2012).

[75] Dillon v. United States, 560 U.S. 817, 825 (2010); *see also* U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(a)(3) (U.S. SENTENCING COMM'N 2016) (providing that the proceedings "do not constitute a full resentencing of the defendant").

[76] *Dillon*, 560 U.S. at 825.

respond to a motion. A court may reduce a sentence upon motion of an individual, the Director of the BOP, or on its own motion.[77]

The vast majority of *Johnson* cases, by contrast, are resolved on collateral review under 28 U.S.C. § 2255, a statute which provides a federal postconviction remedy analogous to the writ of habeas corpus.[78] Courts apply the multi-layered architecture of habeas law in each case, including addressing issues of procedural default, waiver, and other defenses before reaching the merits.[79] Further, second and successive petitions must be certified by a panel of a court of appeals prior to proceeding in a district court based on the requirements contained in 28 U.S.C. § 2244.[80] Unlike motions for a sentence reduction under Section 3582(c), the collateral remedy under Section 2255 does not provide courts the authority to resentence individuals on their own motion or on the motion of the BOP. Further, while Section 3582(c) involves a limited sentence reduction, *Johnson* cases involve the potentially broader relief of resentencing without the residual clause of the ACCA.[81]

b. Determining the Magnitude and Scope of Relief

Another issue for courts was managing the magnitude and scope of the legal change. With Amendment 782, the universe of individuals potentially eligible for a reduction—those convicted of federal drug offenses based on the quantities defined in U.S.S.G. § 2D1.1—was easily definable at the outset. The Commission determined that an estimated 46,000

---

[77] 18 U.S.C. § 3582(c)(2) (2012).

[78] *See* RULES GOVERNING SECTION 2255 PROCEEDINGS advisory committee's notes to R. 1.

[79] For a comprehensive description of the law in this area, see Brent E. Newton, *Post-Conviction Habeas Corpus Review*, *in* PRACTICAL CRIMINAL PROCEDURE: A CONSTITUTIONAL MANUAL (2d ed. 2011); Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. REV. 79, 97-126 (2012) (describing procedural barriers to resentencing under Section 2255).

[80] 28 U.S.C. § 2255(h) (2012).

[81] *See id.* § 2255(b) (stating that court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate").

individuals could benefit from retroactive application of Amendment 782.[82] The Commission was also able to predict the likely extent of sentence reductions, with an average estimated reduction of 18 percent.[83] These estimates, combined with the delayed effective date of the Amendment, provided courts with the information necessary to create a plan for processing cases and for providing reentry services for individuals beginning supervised release.

With *Johnson* and *Welch*, by contrast, the universe of potentially-affected individuals was not easily definable. *Johnson* and *Welch* were silent on certain legal questions regarding the scope of the decisions. Following those decisions, it was unclear whether individuals sentenced under similarly-worded sentencing laws would be eligible for relief. For example, with respect to the Career Offender Guideline, which contains an identically-worded residual clause,[84] the Eleventh Circuit concluded that the guideline was not subject to a constitutional vagueness challenge,[85] while every other circuit held, assumed, or accepted the government's concession otherwise.[86]

In *Beckles v. United States*, the Supreme Court held that sentencing guidelines are not subject to constitutional vagueness challenges.[87] But there remained unanswered questions. *Beckles* did not address whether *Johnson* applies to pre-*Booker* sentences imposed under the mandatory guidelines

---

[82] U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 788 (U.S. SENTENCING COMM'N 2016).

[83] *See id.*

[84] *Id.* § 4B1.2(a)(2).

[85] *See* Beckles v. United States, 616 F. App'x 415, 416 (11th Cir. 2015); United States v. Matchett, 802 F.3d 1185, 1193-96 (11th Cir. 2015).

[86] *See, e.g.*, United States v. Soto-Rivera, 811 F.3d 53, 59 (1st Cir. 2016); United States v. Welch, 641 F. App'x 37, 43 (2d Cir. 2016) (per curiam); United States v. Calabretta, 831 F.3d 128, 133-34 (3d Cir. 2016); United States v. Pawlak, 822 F.3d 902, 911 (6th Cir. 2016); United States v. Frazier, 621 F. App'x 166, 168 (4th Cir. 2015) (per curiam); Ramirez v. United States, 799 F.3d 845, 856 (7th Cir. 2015); United States v. Taylor, 803 F.3d 931, 932-33 (8th Cir. 2015) (per curiam); United States v. Benavides, 617 F. App'x 790, 790 (9th Cir. 2015) (mem.).

[87] Beckles v. United States, 137 S. Ct. 886, 890 (2017).

system.[88] Further, because *Beckles* was decided based on reasoning specific to the Sentencing Guidelines,[89] it remained uncertain whether *Johnson*'s holding applied to other similarly-worded provisions, including 18 U.S.C. § 16(b), part of the Immigration and Nationality Act governing removal of aliens from the United States, and 18 U.S.C. § 924(c)(3)(B), involving gun penalties. Prisoners continued to challenge the constitutionality of their sentences under the residual clause of these provisions and others.[90]

Due to this legal uncertainty, it was nearly impossible to predict the magnitude of the legal change or the potential impact on the court system. According to Sentencing Commission data, for example, there are an estimated 21,184 federal inmates sentenced as Career Offenders.[91] Prior to the Court's decision in *Beckles*, courts anticipated that many Career Offenders would be eligible for resentencing. This belief was entirely reasonable, if ultimately mistaken. Courts have long found authorities interpreting the ACCA's definition of

---

[88] Following *Beckles*, courts disagree over whether a person who was sentenced under the mandatory Career Offender Guideline may be eligible for resentencing under Section 2255 based on the *Johnson* decision. *Compare* United States v. Brown, 868 F.3d 297, 299 (4th Cir. 2017) (holding that movant failed to assert a right newly recognized by the Supreme Court, as required under 28 U.S.C. § 2255(f)(3), and dismissing Section 2255 motion as untimely), *and* Raybon v. United States, 867 F.3d 625, 630-31 (6th Cir. 2017) (same), *with* Moore v. United States, No. 16-1612, 2017 WL 4021654, at *6-8 (1st Cir. Sept. 13, 2017) (certifying successive Section 2255 motion on the grounds that movant had reasonable likelihood of success on claim that *Johnson*'s holding applied to mandatory Career Offender guideline).

[89] *See Beckles*, 137 S. Ct. at 892 ("Unlike the ACCA, however, the advisory Guidelines do not fix the permissible range of sentences . . . [but] merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range.").

[90] As examples of laws with similarly-worded residual clauses, *see* 8 U.S.C. § 1101(a)(43)(F) (2012 & Supp. I 2012); 18 U.S.C. §§ 25, 119, 842(p)(2)(B), 931, 1952, 1956 (2012); § 1031(b)(2) (2012); § 2118(e)(3) (2012); § 2246(4) (2012); § 2258B(b)(2)(B) (2012); § 3286(b) (2012); § 4243(d) (2012); §§ 4246(a), (d), (d)(2), (e), (e)(1), (e)(2), (f), (g) (2012); § 4247(c)(4)(C) (2012); *see also* Sykes v. United States, 564 U.S. 1, 16 (2011) (providing examples of federal laws similar to the ACCA's residual clause); James v. United States, 550 U.S. 192, 210 n.6 (2007) (same).

[91] This internal Sentencing Commission data is on file with the author. The data are current as of March 27, 2016, based on BOP population that match Sentencing Commission files.

"violent felony" to be highly persuasive for interpreting the Guidelines' definition of "career offender," given the substantial similarity between the two definitions.[92] It seemed logical, if not inevitable, that in light of *Johnson* the residual clause of the Career Offender Guideline could no longer stand. The DOJ conceded that the Guideline's residual clause was no longer valid,[93] and all of the courts of appeal, with the exception of the Eleventh Circuit, agreed or accepted that concession.[94] As a result, a number of district courts proceeded to resentence Career Offenders that had been sentenced based on the residual clause. According to federal defender data, at least 88 Career Offenders were resentenced following *Johnson*, and in all but one case, their sentences were reduced, sometimes dramatically.[95]

With the legal fate of Career Offenders uncertain, courts were unable to predict the magnitude of *Johnson*'s impact or to plan comprehensively for the release of affected individuals. A similar, if less dramatic, scenario played out with other similarly-worded provisions. Following *Johnson*, the lower courts anticipated Supreme Court decisions clarifying whether other sentencing laws with similarly-worded residual clauses were still valid. While many individuals were ultimately not eligible for relief because they were not sentenced based on the

---

[92] *See, e.g.*, United States v. Calabretta, 831 F.3d 128, 133-34 (3d Cir. 2016); United States v. Velázquez, 777 F.3d 91, 94-98 & n.1 (1st Cir. 2015); United States v. Madrid, 805 F.3d 1204, 1210-11 (10th Cir. 2015); United States v. Boose, 739 F.3d 1185, 1187-88 & n.1 (8th Cir. 2014); United States v. Gomez, 690 F.3d 194, 197 (4th Cir. 2012); United States v. Griffin, 652 F.3d 793, 802 (7th Cir. 2011); United States v. Park, 649 F.3d 1175, 1177 (9th Cir. 2011); United States v. Walker, 595 F.3d 441, 443 n.1 (2d Cir. 2010); United States v. Mohr, 554 F.3d 604, 609 & n.4 (5th Cir. 2009); United States v. Ford, 560 F.3d 420, 421-22 (6th Cir. 2009); United States v. Hill, 131 F.3d 1056, 1062 & n.6 (D.C. Cir. 1997); United States v. Winter, 22 F.3d 15, 18 n.3 (1st Cir. 1994); *accord* James v. United States, 550 U.S. 192, 206 (2007) (noting the similarity between the two phrases).

[93] *See* Brief for the United States at 29 n.2, Beckles v. United States, 137 S. Ct. 886 (2017) (No. 15-8544), 2016 WL 5116851 (noting that government took the position in the lower courts that ACCA and Guidelines errors should be treated the same for retroactivity purposes).

[94] *See supra* notes 85-86 and accompanying text.

[95] *See* Reply Brief for Petitioner at 12, App. 1, *Beckles*, 137 S. Ct. 886 (2017) (No. 15-8544), 2016 WL 6873025.

residual clause, a large number could have been eligible under different, plausible circumstances. Many others, moreover, filed *pro se* motions even if they lacked any conceivable basis for relief, and the courts were responsible for responding to these motions.

c. Identifying Eligible Individuals

Once the universe of affected individuals is narrowed to those sentenced under the ACCA or the drug guidelines, courts must identify the subset of individuals eligible for relief. With Amendment 782, the task was relatively simple. When the Commission applies an amendment retroactively, it is required to provide policy guidance to courts, including specifying "what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced."[96] A court may only grant a sentence reduction if it is consistent with the Commission's policy statements.[97]

Under U.S. Sentencing Guideline 1B1.10, individuals generally are eligible for a reduction if they were sentenced based on a guideline range that was subsequently lowered by the Commission.[98] Individuals are not eligible for a reduction if they were sentenced based on a different applicable guideline range or if a statutory mandatory minimum prevented a further reduction.[99] Moreover, sentences generally may not be reduced below the minimum of the amended guideline range.[100]

This analysis is straightforward to conduct. The relevant information, such as the guideline range and any applicable mandatory minimum sentencing statutes, is contained in sentencing documentation. At a minimum, the judgment and statement of reasons provide the basis for the sentence. Any confusion may be resolved by looking at the original presentence report, which provides the probation officer's calculation of the applicable guideline range, and the

---

[96] 28 U.S.C. § 994(u) (2012).

[97] 18 U.S.C. § 3582(c) (2012).

[98] U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(a)(1) (U.S. SENTENCING COMM'N 2016).

[99] *Id.* § 1B1.10(a)(2).

[100] *Id.* § 1B1.10(b)(2)(A).

sentencing transcript, which provides the reasons for the sentence. A court does not have to conduct a complicated legal analysis or speculate as to a sentencing judge's intentions.

With *Johnson* cases, by contrast, the legal analysis is far more complex. Among other things, a court must determine whether an individual has three convictions that qualify under the ACCA's definition of "violent felony," absent the residual clause. In determining whether a prior conviction was for a "violent felony," courts use a framework known as the categorical approach. Courts "may 'look only to the statutory definitions'—*i.e.*, the elements—of a defendant's prior offenses, and *not* 'to the particular facts underlying those convictions.'"[101] Courts consider whether the elements of the predicate offense are identical or narrower than the conduct necessary to qualify as a violent felony.[102] A different test, known as the modified categorical approach, applies to statutes that are divisible, meaning that they contain multiple alternative elements. Under the modified categorical approach, courts may consider a limited universe of documents, such as an indictment or judgment of conviction, in determining whether a conviction is a violent felony.[103] Although well-established, this framework requires a level of legal analysis to determine whether a particular inmate is eligible for resentencing.

Sentencing transcripts and other records, moreover, often do not specify the reasons for an enhancement under the ACCA. Nothing in the law required a sentencing court to specify which clause it relied on, and in many cases, it was unclear whether a sentence was based on the residual clause, a different clause, or some combination. Further, courts were not required to specify which convictions served as predicates for the enhancement. The lack of clarity in many cases over whether the residual clause was relied upon made it difficult to estimate how many individuals could be affected by the legal change.

---

[101] Descamps v. United States, 133 S. Ct. 2276, 2283 (2013) (emphasis in original) (quoting Taylor v. United States, 495 U.S. 575, 600 (1990)).

[102] *Id.*

[103] *See* Shepard v. United States, 544 U.S. 13, 26 (2005).

Although the Sentencing Commission recently voted to eliminate the Career Offender Guideline's identically-worded residual clause, it declined to apply the change retroactively.[104] The Commission Chair noted that "sentencing documentation does not consistently report . . . which prong of the 'crime of violence' definition at U.S.S.G. § 4B1.1 was applied" at sentencing or which prior convictions the court relied upon as predicate offenses.[105] Accordingly, retroactive application would be "complex and time intensive" and a complete analysis of affected individuals would not be possible.[106] Following *Welch*, courts were required to undertake a complex, resource-intensive process similar to the one the Commission declined to pursue for Career Offenders.[107] Courts were required to apply a level of legal analysis not present with Amendment 782, and they had little ability to predict or estimate in advance who, or how many, would be affected.

3. Concerns with the Reentry Process

Finally, applying *Johnson* retroactively raised concerns with the reentry process. *Johnson* impacted a class of individuals that, by definition, have prior criminal histories, even if they are no longer considered to be Armed Career Criminals.[108] Retroactivity resulted in a significant difference

---

[104] *See* U.S. SENTENCING COMM'N, Amendments to the Sentencing Guidelines 1-3 (eff. Aug. 1, 2016), https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/20160121_Amendments_0.pdf [https://perma.cc/L4AH-9YT5].

[105] Chief Judge Patti B. Saris, Chair, U.S. Sentencing Comm'n, Remarks for Public Meeting 4 (Jan. 8, 2016), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/testimony/20151021_Saris_Testimony.pdf [https://perma.cc/QG4Q-SNW9].

[106] *Id.*

[107] Courts, however, have access to certain documentation that the Commission does not, such as sentencing transcripts.

[108] In a recent study of the Career Offender Guideline, the Commission determined that offenders with violent criminal histories pose a higher risk of recidivism than nonviolent offenders. Further, the existence of a violent offense in an individual's criminal history is associated "with more serious and extensive criminal histor[y] overall" compared to individuals with a history of drug offenses only. U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS 43 (Aug. 2016). Other Commission research shows that the risk of recidivism is tightly correlated with an individual's number of

in sentence computation for many of these individuals and, for some, it required immediate release from prison. As a result of *Johnson* and *Welch*, individuals eligible for resentencing without the ACCA's residual clause went from facing a 15-year mandatory *minimum* sentence,[109] to facing a mandatory *maximum* sentence of ten years.[110] Questions such as the empirical risk of recidivism or whether the court system, including the probation and pretrial services system, and the BOP was prepared to handle the influx of these cases are factors often considered by the Commission, but are not part of the Supreme Court's retroactivity analysis.

Release planning for prisoners coming onto supervised release requires a coordinated effort over a period of time. The BOP, the probation office, and the prisoner share joint responsibility for this effort. Under 18 U.S.C. § 3624(c), the BOP has the responsibility to ensure, to the extent practicable, that prisoners spend part of their term in conditions that will afford them a reasonable opportunity to adjust to and prepare for reentry into the community.[111]

Ordinarily, prisoners being released from the BOP spend the final portion of their imprisonment term in "prerelease custody," which involves a stay in a halfway house (also known as a residential reentry facility or RRC), home confinement, or a combination of both.[112] This prerelease period, which can last up to one year, is intended to help prisoners transition between imprisonment and community supervision.[113] Once prisoners have been released from prerelease custody, they are no longer considered to be in BOP custody but are instead supervised by

---

criminal history points under the Guidelines. U.S. SENTENCING COMM'N, THE PAST PREDICTS THE FUTURE: CRIMINAL HISTORY AND RECIDIVISM OF FEDERAL OFFENDERS 6-7 (Mar. 2017).

[109] 18 U.S.C. § 924(e)(1) (2012) (providing for term of 15 years to life imprisonment).

[110] 18 U.S.C. § 924(a)(2) (2012) (providing for 0 to 10 years' imprisonment).

[111] 18 U.S.C. § 3624(c)(1) (2012).

[112] *See* CHARLES COLSON TASK FORCE ON FED. CORR., TRANSFORMING PRISONS, RESTORING LIVES: FINAL RECOMMENDATIONS OF THE CHARLES COLSON TASK FORCE ON FEDERAL CORRECTIONS 50 (Jan. 2016) [hereinafter CHARLES COLSON TASK FORCE REPORT] (providing background on federal reentry process).

[113] *Id.*

the U.S. Probation and Pretrial Services Office, an entity within the judicial branch.[114]

In order for this process to work, the BOP and the U.S. probation office must know the prisoner's release date well in advance and have adequate time to develop a supervision plan. Under Judicial Conference Policy, the probation officer has a responsibility "to implement a well-constructed supervision plan at the earliest possible time" during the pre-release period and to ensure that the prisoner receives continuity of services.[115] The BOP assists the probation officer by providing information pertinent to reentry and by offering release planning programs throughout the period of imprisonment.[116] The BOP, moreover, is required to give first priority for scarce RRC bed space to these individuals.[117] While Amendment 782 had a delayed effective date, even for individuals who were eligible for immediate release from prison, such flexibility was not available in the *Johnson* and *Welch* decisions. Some individuals who had overserved the newly-applicable ten-year maximum sentence were eligible immediately for supervised release.

A BOP interpretation of the statute that credits time served, 18 U.S.C. § 3585(b), adds another layer of uncertainty. Under BOP regulation, overserved time in *Johnson* cases is credited towards the sentence for future violations of supervised release.[118] As a result, stakeholders reported that some individuals who overserved their ACCA sentences were not subject to the sanction of imprisonment for violating supervised release conditions unless they committed another, separate crime.

---

[114] *See* 18 U.S.C. § 3603 (2012) (providing duties of probation officers).

[115] *See* Testimony of Hon. Irene M. Keeley, Chair of the Comm. on Criminal Law, Presented to the Charles Colson Task Force on Fed. Corr. 10 (Jan. 27, 2015).

[116] *Id.*

[117] *Id.*

[118] Under 18 U.S.C. § 3585, the BOP has the authority to "develop[] detailed procedures and guidelines for determining the credit available to prisoners." United States v. Wilson, 503 U.S. 329, 335 (1992).

D. Learning from Retroactive Resentencing

The question of *why* and *how* decisions are retroactively applied has practical consequences. Many of the challenges described in this section were common to both Amendment 782 and *Johnson*. The Commission considered these challenges when deciding to make Amendment 782 retroactive, and built in flexibility for the courts to address them. Similar concerns motivated the Commission's decision *not* to make the Career Offender Guideline amendment retroactive. Such flexibility was not available following *Johnson* and *Welch*.

The purpose of this study is to explore these consequences and to learn from them. The policy issues surrounding retroactivity are unlikely to abate. Policymakers, including Congress and the Sentencing Commission, continue to consider sentencing reforms, and some of these changes may be made retroactive. Courts may also continue to rule in ways that result in retroactive changes to sentencing law.[119] Because over 97 percent of federal criminal defendants whose cases are not dismissed plead guilty,[120] sentencing is a critical juncture for the fate of those defendants to be decided. As a result, courts scrutinize the manner in which defendants are sentenced and the laws governing federal sentences to ensure that these processes apply with constitutional guarantees and that the pertinent statutes are interpreted and applied properly.

---

[119] As another recent example, following the Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), which declared that statutes mandating juvenile offenders serve life in prison without the possibility of parole violate the Eighth Amendment, state court litigation arose over whether juvenile offenders sentenced to life without parole had to be resentenced. *See* Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 WAKE FOREST J. L. & POL'Y 151, 151 (2014); Ryan W. Scott, *In Defense of the Finality of Criminal Sentences on Collateral Review*, 4 WAKE FOREST J. L. & POL'Y 179, 192-95 (2014). In *Montgomery v. Louisiana*, the Supreme Court held that *Miller* announced a substantive rule of constitutional law and was thus applicable retroactively to cases on collateral review. Montgomery v. Louisiana, 136 S. Ct. 718 (2016).

[120] *See* ADMIN. OFFICE OF THE U.S. COURTS, CRIMINAL STATISTICAL TABLES FOR THE FEDERAL JUDICIARY tbl. D-4 (Dec. 31, 2016), http://www.uscourts.gov/sites/default/files/data_tables/stfj_d4_1231. 2016.pdf [https://perma.cc/UA5F-X5JS]. In 2016, around 8.5 percent of federal criminal cases were dismissed, but of the remainder, over 97 percent of cases terminated with a guilty plea. *Id.*

While the Sentencing Commission and courts were able to adapt their approach by learning from the implementation of the crack cocaine amendments, courts implementing *Johnson* and *Welch* had little precedent to rely on. Supreme Court decisions requiring courts to resentence large numbers of individuals are relatively rare. "Indeed, *Welch* is the Supreme Court's first ever § 2255 case to make a new rule of constitutional law retroactive less than a year after the rule was announced. Because this situation is so rare, there is very little authority on how to analyze the application of a 'new rule' of that kind."[121]

The closest recent precedent is *Bailey v. United States*.[122] In that decision, the Court read the phrase "uses . . . a firearm" in the sentencing enhancement contained in 18 U.S.C. § 924(c) to require that the government "show active employment of the firearm."[123] *Bailey* triggered a large number of collateral challenges under Section 2255.[124] In *Bousley v. United States*, the Supreme Court held that the rule announced in *Bailey* could be applied to cases on collateral review.[125] *Johnson* presents an important opportunity to learn from retroactive changes to sentencing law and to develop best practices to respond to these changes in a way that preserves both individual rights and judicial efficiency.

II. STUDY DESIGN AND RESEARCH METHODOLOGY

This study employs a qualitative methodology, relying on interviews and legal research, to better understand the process for implementing retroactive changes to sentencing law. I developed the research methodology through discussions with

---

[121] *In re* Chance, 831 F.3d 1335, 1340 (11th Cir. 2016).

[122] *See generally* Bailey v. United States, 516 U.S. 137 (1995).

[123] *Id.* at 142-44.

[124] *See* Bousley v. United States, 523 U.S. 614, 633 (1998) (Scalia, J., dissenting) (noting that the Court's decision in *Bailey* had "generated a flood of 28 U.S.C. § 2255 habeas petitions"); United States v. Hillary, 106 F.3d 1170, 1172 n.1 (4th Cir. 1997) (noting that *Bailey* "unleashed a flood of § 2255 petitions on the district courts, and the authority of the court to resentence has been an issue in nearly every case").

[125] The Court held that *Teague*'s general bar on applying decisions retroactively was "inapplicable to the situation in which th[e] Court decides the meaning of a criminal statute enacted by Congress." *Bousley*, 523 U.S. at 620.

programmatic and subject matter experts at the Administrative Office, the Federal Judicial Center, and the Sentencing Commission. I also drew on my prior experience as a district court law clerk involved with the implementation of Amendment 782.

Sentencing scholars have identified the "contextual variation between courts" as a fruitful and understudied area of scholarship.[126] Policy makers depend on courts to implement their policies in a way that transforms the intentions behind the policy into outcomes in the real world. Such efforts to design policy, however, often produce unintended consequences as they are filtered through the courts and other local actors. Whether sentencing policies are effective depends substantially on how they are implemented. The implementation process, therefore, is a crucial component of any kind of sentencing reform.[127]

Although judges have detailed guidance on the legal aspects of applying retroactive changes to sentencing law, such as Guidelines amendments, there are fewer resources regarding the administrative and procedural aspects. As a result, district courts have adopted a variety of processes with differing organizational arrangements, procedures, and motivations.[128] Although the administrative burden on courts has long been an important consideration in the debate over retroactivity,[129] the nature and extent of this burden has rarely, if ever, been studied empirically.[130]

---

[126] Jeffrey T. Ulmer, *Recent Developments and New Directions in Sentencing Research*, 29 JUST. Q. 26, 29 (2012). For example, only one prior empirical study has been conducted regarding the administrative implementation of retroactive Sentencing Guidelines amendments. *See* Angela K. Reitler & James Frank, *Interdistrict Variation in the Implementation of the Crack Retroactivity Policy by U.S. District Courts*, 25 CRIM. JUST. POL'Y REV. 105 (2014).

[127] *See* Ulmer, *supra* note 126.

[128] *See* Reitler & Frank, *supra* note 126.

[129] The impact of retroactivity on the administration of justice was a substantial motivating consideration in Justice Harlan's criticism of the *Linkletter* doctrine and in the Supreme Court's later adoption of Justice Harlan's views. *See* Mackey v. United States, 401 U.S. 667, 691 (1971) (Harlan, J., concurring) (noting that retroactivity can "seriously distort the very limited resources society has allocated to the criminal process . . . . [by] expending substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions

Qualitative research, such as interviews of court actors, is necessary to shed light on court case management processes. This study will contribute to the literature by providing greater detail regarding how courts implement retroactive changes to sentencing law and the challenges they face. Ultimately, further examination of courts' administrative procedures may enable courts to create greater efficiencies and to address resentencing efforts with lower administrative costs.

This study is based on interviews with stakeholders involved in the implementation of retroactive changes to sentencing law in six of the 94 federal districts. There are a number of potential stakeholders in the process of implementing retroactive changes to sentencing law. A particular stakeholder's level of involvement may depend on the administrative procedures of the stakeholder's federal district. Some districts, for example, consolidate administrative tasks in a particular judge while others distribute them more widely. Further, some stakeholders, such as staff attorneys or *pro se* law clerks, have a greater role in *Johnson* cases or in Amendment 782 cases.

This study is based on interviews of representatives of core stakeholders in the administrative process for each district, including district judges, the clerk's office, the probation office, and the U.S. Attorney's Office and the federal defender organization. In each district, the study began with an initial contact with the clerk's office. Because the clerk of court is familiar with the district's administrative procedures

---

that were perfectly free from error when made final"). On the other hand, some courts have pointed out that the interest in finality is diminished with respect to criminal sentences because the cost of correcting sentences is far less than the cost of correcting a criminal trial. *See, e.g.*, United States v. Williams, 399 F.3d 450, 456 (2d Cir. 2005) (noting that "the cost of correcting a sentencing error is far less than the cost of a retrial" because "[a] resentencing is a brief event, normally taking less than a day" and "review of a sentencing error, unlike a trial error, does not require the appellate court to make its estimate of whether it thinks the outcome would have been non-trivially different had the error not occurred").

[130] This study also sheds light on the scholarly debate regarding whether the finality interest in criminal sentencing should be treated as distinct from the finality interest in criminal trials. *See, e.g.*, Brandon L. Garrett, *Accuracy in Sentencing*, 87 S. CAL. L. REV. 499 (2014); Berman, *supra* note 119; Scott, *supra* note 119; Russell, *supra* note 79.

and the role of each stakeholder, the clerk was ideally situated to select and schedule interviews with particular individuals.[131] Although a majority of the interviews were one-on-one, offices in several districts—most commonly, the probation and clerk's offices—invited a small group of stakeholders, ranging from two to five individuals, to participate. In addition, some judges included their chambers law clerks in the interview.

The selection of districts to study was based largely on the volume of filings pursuant to Amendment 782 and the *Johnson* decision. Almost all of the districts selected were in the top thirty districts nationally in terms of the number of Amendment 782 filings and the numerical increase in 28 U.S.C. § 2255 filings in the one year period beginning in June 2015, the year following the *Johnson* decision. From this list, some districts were selected in order to facilitate in-person interviews, while other districts were selected to provide geographic diversity and representation of urban and rural districts.

This study takes all possible steps to preserve the confidentiality of the participants. The study does not name the districts visited or provide statements or positions that could be attributed to particular individuals. The study provides information regarding court practices and procedures but does not cite information, such as standing orders, that would reveal the identity of the districts visited. Further, although there are judicial opinions cited throughout the study, the reader should not infer that the particular judges or parties involved in those cases, or the districts in which they took place, participated in the study. All opinions cited are available in the public record, and the study does not provide any non-public information with respect to particular cases.

The study's purpose of identifying policy challenges across districts was best served by an interview format. The form of guided interviewing included some structured questions asked of all stakeholders, which ensured that all relevant data was collected and reduced any possible biases or inconsistencies. At

---

[131] This technique is similar to snowball sampling, in which a person interviewed is asked to suggest additional people for interviewing. *See* Allen Rubin & Earl R. Babbie, RESEARCH METHODS FOR SOCIAL WORK 358 (7th ed. 2011).

the same time, the interview format provided flexibility for in-depth discussions and follow-up questions.[132] The interview questions focused on four main stages of the sentence reduction process: (1) the appointment of counsel, (2) the process for identifying eligible defendants, (3) the decision as to whether, and to what extent, to reduce the sentences of individual defendants, and (4) the reentry process and supervised release.

I asked the following general questions of all stakeholders:

> 1. Describe generally the process in your district for addressing motions under Amendment 782 and *Johnson*.
>
> 2. What administrative challenges have you experienced as a result of retroactivity, and how have you addressed those challenges?
>
> 3. Are there particular legal issues that have created administrative challenges or have required special efforts to resolve?
>
> 4. What are some of the most important differences between retroactive Guidelines amendments and *Johnson* cases from an administrative perspective? What lessons can be learned from retroactive Guidelines amendments and applied to any future changes in sentencing law made retroactive by court decisions?
>
> 5. What is your relationship with other stakeholders in the administrative process? How have efforts at communication and coordination changed over time?
>
> 6. What would you like to know about how stakeholders in other districts implement retroactive changes to sentencing law?

In addition, I developed customized questionnaires for each stakeholder. For example, I asked district judges what criteria they used to appoint counsel and how they handled sentence reduction proceedings. I asked probation officers what administrative challenges they encountered in creating lists of eligible defendants and in assisting defendants with the

---

[132] *See id.* at 463-68 (discussing different methods of qualitative interviewing).

reentry process and supervised release. For the U.S. Attorney's Offices and federal defender organizations, I asked about how they handled the increased workload and if they employed any particular advocacy strategies.

While striving to be representative of practices within the federal district courts, this study is concededly limited in scope. The goal of this study is not to comprehensively and systemically record district courts' practices. Although this study provides some representative examples of challenges courts have encountered, there are many other challenges and variations the study does not touch on. Rather, this project aims to begin a conversation about how large-scale, retroactive, changes in the law affect the courts and how courts and policymakers can develop best practices to account for these impacts.

The interviews undertaken were highly revealing of the challenges courts face and the lessons they have learned. Stakeholders consistently engaged in spirited discussion, each with a unique perspective.[133] Many courts have experienced profound impacts on their dockets as a result of *Johnson*. Participants were also eager to compare the differences with prior retroactive changes to sentencing law, such as Amendment 782.

III. FINDINGS ON RESOURCE IMPACTS AND DISPARITIES IN OUTCOME

Many courts are managing greater challenges with *Johnson* cases than they faced with Amendment 782. Stakeholders reported that the implementation process for Amendment 782 was, for the most part, smooth and orderly, even though courts adopted a wide variety of administrative arrangements. The *Johnson* decision's timing and potentially wide-spread effects,

---

[133] The value of these in-depth conversations simply could not be replicated through a broader quantitative study. For one thing, given the time and resource constraints on federal district judges, a survey of all 94 districts is unlikely to garner a high response rate. Further, the usefulness of a quantitative study could be limited by the fact that data with respect to federal resentencing proceedings is often unavailable or incomplete. Data reporting practices often vary by district, and there are no uniform standards for collecting and reporting the data.

by contrast, created distinct administrative and policy challenges for the courts.

District courts adopted a wide variety of practices in addressing complex legal and administrative issues following *Johnson*. These variations created the risk of disparate treatment for similarly situated individuals. Accordingly, this section will explain the study's findings in terms of (1) the resource impacts on courts and (2) the differences in outcomes between similarly situated individuals.

A. Comparing the Resource Impacts of Johnson *and Amendment 782*

The interviews revealed a pattern of challenges and strategies adopted by courts to address them. The unique challenges for *Johnson* cases, generated by the retroactivity framework, were described above: (1) the time crunch created by the interplay between *Welch* and the statute of limitations contained in Section 2255; (2) the complexity of the statutory framework; (3) the difficulty of determining the scope and magnitude of the legal change; and (4) the lack of predictability in the reentry process. With respect to Amendment 782, most of these challenges were either not present or were mitigated by the Sentencing Commission's decision to delay the effective date.

These challenges affected each stage of a case, including (1) the appointment of counsel, (2) managing the docket, (3) litigating petitions, (4) resentencing eligible individuals, and (5) managing the reentry process.

1. The Appointment of Counsel

When a legal change is made retroactive, courts face the challenge of creating a procedure that provides relief to affected individuals accurately and efficiently. One aspect of this challenge is deciding how to allocate the resource burdens of identifying individuals eligible for relief.

There are several possible options. Courts may, in the interests of justice, appoint counsel for motions to vacate

sentence under Section 2255.[134] In addition, most circuits that have decided the issue have held that district courts have the discretion to appoint counsel for motions under Section 3582(c).[135] Accordingly, courts may appoint counsel, such as the federal defender, to screen cases for potential merit and to represent individuals that counsel deems eligible for a reduction. Whether or not counsel is appointed, courts may instruct probation officers to make initial determinations and recommendations as to individuals' eligibility. If a court does not appoint counsel, it can place the burden on individuals to file motions, either *pro se* or with the assistance of counsel. In short, courts can rely on appointed counsel, the probation office, movants only, or some combination.

With Amendment 782, courts took a variety of approaches to appointing counsel. Some judges issued a standing order appointing federal defenders as counsel in all cases, some judges appointed federal defenders as counsel only in cases where the individual was eligible for a reduction or the issue of eligibility was unclear, and some judges did not appoint counsel at all. Put simply, the choice of whether to appoint counsel was less crucial to the outcome than with *Johnson* cases. Section 3582(c) authorizes a court to grant sentence reductions on its own motion, and so courts could grant relief whether or not a motion was filed on behalf of an affected individual. Determining whether an individual was eligible for a reduction under Amendment 782 did not require a complex

---

[134] Under the Criminal Justice Act, representation may be provided for any financially eligible person who is seeking relief under Section 2241, 2254, or 2255 whenever a court "determines that the interests of justice so require." 18 U.S.C. § 3006A(a)(2)(B) (2012).

[135] *See*, *e.g.*, United States v. Harris, 568 F.3d 666, 669 (8th Cir. 2009); United States v. Webb, 565 F.3d 789, 793 (11th Cir. 2009); United States v. Robinson, 542 F.3d 1045, 1052 (5th Cir. 2008); *but see* United States v. Foster, 706 F.3d 887, 888 (7th Cir. 2013) (holding that the Criminal Justice Act does not provide authority for courts to appoint counsel for motions under Section 3582(c)). Although most courts have held that counsel may be appointed in the interests of justice, neither the Criminal Justice Act nor the Administrative Office of the U.S. Courts' *Guide to Judiciary Policy*, § 220 (Appointment of Counsel), explicitly address the appointment of counsel for proceedings under Section 3582(c). *See* ADMIN. OFFICE OF THE U.S. COURTS, GUIDE TO JUDICIARY POLICY § 220 (rev. Sept. 11, 2017), http://www.uscourts.gov/sites/default/files/vol07a-ch02.pdf [https://perma.cc/R2GV-QLT8].

legal analysis in most cases. The Commission, moreover, assisted the courts by providing preliminary lists of eligible defendants to district courts upon request by a district's chief judge.

Accordingly, with Amendment 782, courts were in a position to create a proactive, relatively centralized and efficient process. In most districts visited, judges worked with probation officers and representatives from the U.S. Attorney's Office and federal defender organization in order to create expedited sentence reduction processes. Generally, full sentence reductions for eligible individuals were the norm, and objections to a full reduction were limited to exceptional circumstances, such as an inmate's poor disciplinary history in prison. In many districts, the U.S. Probation Office made an initial determination as to which individuals were eligible and the court decided the sentence reduction motions, often on its own motion. In those districts, typically the U.S. Attorney's Office and federal organization only fully participated in cases where it was debatable whether the individual was eligible for a reduction or whether a full two-level reduction was appropriate.

While this streamlined procedure had the advantages of providing eligible individuals relief relatively quickly and efficiently, it also had downsides. Some federal defenders argued, for example, that courts' reliance on probation officers for initial eligibility determinations could create the appearance of a conflict of interest because the probation office works for the court and does not represent the interests of inmates. There was also the possibility that probation officers and the court could make a mistake and, as a result, potentially eligible individuals would not receive relief. For this reason, appointing federal defenders as counsel was important to ensure that inmates' interests were represented fully in the proceeding.

Compared to Amendment 782, it was more difficult for courts to implement a centralized procedure for *Johnson* cases. Unlike Section 3582(c), Section 2255 does not provide a mechanism for a district court to provide a collateral remedy

on its own motion.[136] Determining whether individuals are eligible for relief under *Johnson*, moreover, requires a more involved legal analysis. Although the Commission provided lists upon request of Armed Career Criminals and other potentially affected individuals, such as Career Offenders, in each district, these lists did not identify which individuals were sentenced based on the residual clause or whether they would qualify for the sentencing enhancement absent the residual clause.

In all districts visited, judges (often the chief district judge) issued a standing order appointing federal defenders as counsel in *Johnson* cases. Courts in the districts visited recognized that federal defender participation was crucial to managing *Johnson* cases in an organized, comprehensive manner. The federal defender community strongly advocated for these standing orders, and judges often consulted federal defenders in crafting the language.

Typically, the standing orders directed the federal defender to identify eligible inmates and to file motions to vacate sentence on their behalf. The language of these orders varied: some directed attorneys from the federal defender organization to screen their files and identify potentially eligible inmates, others appointed federal defenders to represent inmates with *Johnson* claims, and still others did both. These standing orders sometimes were unclear about the scope of representation and the scope of the federal defenders' duties to their clients in *Johnson* cases. Some orders specifically appointed counsel solely for the purpose of determining whether a given individual might have a valid *Johnson* claim. The impetus was on the federal defender to file an initial appearance in order to represent that individual.

Other orders appeared to be far broader, and appointed counsel in essentially *all* cases in which there could be a potential *Johnson* claim. In at least one district, federal defenders interpreted this broad language fairly literally and filed formal motions to withdraw in every case in which they believed there was no legitimate *Johnson* claim. In other

---

[136] *Compare* 18 U.S.C. § 3582(c)(2) (2012), *with* 28 U.S.C. § 2255 (2012).

districts, however, standing appointment orders with similar language were not interpreted as broadly, and counsel did not appear on behalf of clients unless it was to file a *Johnson*-based petition.[137]

The often-ambiguous scope of representation raised other questions, such as whether a client could bring a claim for ineffective assistance of counsel against a defender who erroneously failed to file a *Johnson* claim, or whether potential conflicts of interest precluded representation. Although Criminal Justice Act panel attorneys or other outside counsel have been appointed in cases with a potential conflict of interest, several federal defenders suggested that appointing private counsel lacking experience in this area of law also can be problematic.

Despite the differences between Amendment 782 and *Johnson*, many courts continue to rely on probation officers for an initial determination regarding an individual's eligibility. In most districts visited, federal defenders and probation officers collaborated on identifying eligible inmates, though procedures varied. In some districts, federal defenders took the lead in identifying potentially meritorious *Johnson* claims, while in others federal defenders had the benefit of a preliminary list from the probation office.

Some districts hired lawyers that specialize in sentencing issues to assist probation officers with these resentencing cases. In other districts, probation officers were responsible for recalculating the sentencing range without the residual clause but did not provide a recommendation as to an individual's eligibility for a reduction. Although probation officers are accustomed to providing recommendations to the court on sentencing issues, *Johnson* cases presented a new level of legal analysis. While courts often rely on probation officers for initial recommendations, participation by the federal defender

---

[137] In either case, federal defenders communicated privately with clients in order to explain why they were not providing further representation, but also emphasized that the clients could still pursue their *Johnson* claims *pro se*. This task was more awkward, however, in cases where defenders also had the obligation to file formal motions to withdraw based on their belief that there was no meritorious claim. Out of respect to clients, the defenders often withdrew without explaining the basis for the motion.

organization and U.S. Attorney's Office is crucial in this highly complex area of law.

The role of defense counsel underscores the tension between the courts' desire for a centralized, uniform mechanism for processing these cases, which was generally possible for Amendment 782 cases, and the reality that *Johnson* claims must be decided case by case, using the mechanisms in Section 2255. Further, as some defenders emphasized, the defenders' strong role in the appointment of counsel highlights the independence of the defense function in our court system. District judges often deferred to defenders' judgment in creating these orders, and defenders were given leeway to implement the orders in light of resource constraints.

2. Managing the Docket: The Role of the Clerk's Office

Clerks of court had an integral role in managing Amendment 782 and *Johnson* cases. Clerk's offices are responsible for quality assurance for filings in these cases. Further, clerk's offices may designate certain types of cases for tracking purposes using markers within CM/ECF, such as docket event codes or internal flags. Case tracking has important consequences for understanding the outcomes of these types of cases and for allocating resources to address them.

Amendment 782 cases were generally simpler for clerk's offices than *Johnson* cases. Amendment 782 cases involved Section 3582(c) motions in an existing criminal case. Further, most districts visited had a separate event code for Amendment 782 filings, and some districts had a separate docket number that was used to enter Amendment 782-related documents, such as standing orders. These event codes made it easier to track Amendment 782 cases.

Still, variations in case reporting affected the comprehensiveness of Amendment 782 reporting data.[138] In some districts, the statistics did not reflect the number of denied Amendment 782 motions because, among other things,

---

[138] *See* U.S. SENTENCING COMM'N, 2014 DRUG GUIDELINES AMENDMENT RETROACTIVITY DATA REPORT at tbl.1 (June 2015).

judges may have relied on the probation office for an initial determination to screen out frivolous motions without issuing a formal order denying them. In these districts, the reported statistics reflected an artificially low number of Amendment 782 motions and an artificially high grant rate. In addition, some judges may have issued an order or opinion instead of using the AO 247 form, Order Regarding Motion for Sentence Reduction, and those cases may not have been captured in the data.

With *Johnson* cases, there were many variations in filing and docketing practices. As an initial matter, clerks in some districts reported that some Section 2255 motions were filed under a separate civil case number, some under the existing criminal case number, and some under both. These variations appear to reflect some confusion over whether a Section 2255 motion is a separate civil proceeding or a continuation of the criminal case. A Section 2255 motion is somewhat hybrid in nature as "a continuing part of the criminal proceeding . . . as well as a remedy analogous to habeas corpus by state prisoners."[139] The rules governing Section 2255 proceedings style the proceeding as a "motion," rather than a petition, and direct the clerk to enter the motion "on the criminal docket of the case in which the challenged judgment was entered."[140] At the same time, Section 2255 is intended to provide federal prisoners a "remedy equivalent to habeas corpus as used by state prisoners,"[141] and some courts have considered a Section 2255 motion to be a separate civil action for filing purposes.[142]

In addition, clerks had to coordinate the filing of applications for second and successive motions. As a matter of practice, these applications were often filed in the district court, the court of appeals, or both. As some stakeholders explained, some inmates were concerned that if they waited for the court of appeals to grant them permission to file a second

---

[139] RULES GOVERNING SECTION 2255 PROCEEDINGS advisory committee's notes to R. 6; *see also id.* at advisory committee's notes to R. 1 (discussing Congress's intent to create a remedy in Section 2255 that would be part of the same criminal case rather than a separate civil action).

[140] *Id.* at R. 3(b).

[141] *Id.* at advisory committee's notes to R. 3.

[142] *See, e.g.*, McCune v. United States, 406 F.2d 417, 419 (6th Cir. 1969).

or successive motion, then the motion would no longer be timely by the time they were permitted to file the motion in district court. In order to preserve their claims, inmates often filed the motion in both the district court and the court of appeals.

Some courts made efforts to consolidate the administrative procedures for these cases. At least one district judge, for example, issued a standing order explaining that certain cases would be held in abeyance pending a decision from the court of appeals and attached an appendix identifying the cases affected by the order. Further, in at least one circuit, the court of appeals created panels to provide guidance for certain types of second and successive motions under *Johnson*. For example, there was a panel for Career Offender Guideline claims, for ACCA claims, or for Section 924(c) claims. With respect to each type of claim, the panel issued an opinion explaining whether permission would be granted to proceed on the second or successive motion and providing instructions for the district court. One disadvantage of these panels, however, is that 28 U.S.C. § 2244(b)(3)(E) bars any review of the panel's ruling, including an appeal, petition for rehearing, or writ of certiorari.[143]

Further, case tracking in *Johnson* cases was more difficult than Amendment 782. Filings were characterized in many different ways for case tracking purposes. Some clerks entered a *pro se* petition and a petition filed by counsel as separate docket events, even though both asserted the same *Johnson* claim, while other clerks entered them as one event. Clerk's offices, moreover, were inconsistent in how they designated these cases. Some clerks used internally created flags in the case management system in order to mark *Johnson* cases. In at least one district, the case volume was so high that adding extra designations would not be practical, and the clerk thus treated *Johnson* filings as ordinary case filings.

Characterizing these cases required an act of judgment regarding which cases "count" as *Johnson* cases, including whether they are limited to ACCA cases or also include Section

---

[143] 28 U.S.C. § 2244(b)(3)(E) (2012).

924(c) and Career Offender cases. In addition, many filings may mention "*Johnson*," but do not contain a relevant *Johnson* claim. In order to address these issues, some clerks of court relied on *pro se* law clerks for an initial screening to determine which cases merited these special designations. Due to the complexity of identifying eligible individuals and the lack of a "master list" of *Johnson*-eligible cases, these issues were more difficult to address than in the Amendment 782 context.

These variations in defining and tracking retroactive resentencing proceedings have important administrative and policy consequences. Without consistent tracking practices, it is difficult to understand the outcomes of these cases in the aggregate—*i.e.*, how many requests for re-sentencing are granted and how many are denied. Although the Sentencing Commission estimates that *Johnson* resulted in sentence reductions for about 1,200 inmates nationwide,[144] these cases are likely underreported and interviews in the districts studied suggests that the actual number could be much higher. In addition, without complete data, it is difficult to study the impact of *Johnson* on the court workload or whether variations in administrative procedures may have substantive effects on outcomes.

The way case filings are categorized, moreover, impacts resource allocation in the courts. Stakeholders pointed out many possible examples. Probation officers might not receive credit for the work involved with screening cases and creating eligibility lists because of the way Section 2255 filings are counted for statistical purposes. For the federal defenders, *Johnson* cases may receive different weight depending on how they are characterized in the case tracking system. Some clerks' offices may appear to have much more docket activity than others simply due to different filing practices. A district may receive a greater allocation of *pro se* law clerks based on an increase in Section 2255 motions, even if *pro se* law clerks are not involved with responding to those motions in that

---

[144] *See* ADMIN. OFFICE OF THE U.S. COURTS, POLICY SHIFTS REDUCE FEDERAL PRISON POPULATION (Apr. 25, 2017), http://www.uscourts.gov/news/2017/04/25/policy-shifts-reduce-federal-prison-population [https://perma.cc/G3BD-L89A].

particular district. Case tracking practices also affect the workload of judges. A senior judge, for example, may be assigned a large number of *Johnson* cases but may not receive commensurate work credit.

Implementing uniform procedures could help address some of these issues. Uniformity, however, could also undermine the courts' ability to create filing and tracking practices suited to the particular circumstances of their districts. In some high-volume districts, for example, it might not be practical to require the clerk's office to track *Johnson* cases using special designations. Further, even if there were uniform codes, there is no guarantee that courts would apply them consistently.[145] In any event, these issues require special caution in evaluating and using data collected from the courts in these cases.

3. Litigating the Petitions: The Role of Counsel

For counsel, *Johnson* and Amendment 782 cases created challenges in terms of resources and strategy. While sentence reductions under Amendment 782 were often expedited, *Johnson* cases were heavily litigated. In the districts visited, U.S. Attorney's Offices and federal defender organizations universally struggled with the high volume of *Johnson* cases. Each case presented layers of issues: whether the motion challenged a sentence under the ACCA, the Career Offender Guideline, or some other provision; whether the motion was initial or successive; whether there were issues of timeliness, waiver, or procedural default; and finally, whether the individual deserved relief on the merits of the claim. Individuals found eligible for relief were entitled to resentencing.

With respect to *Johnson* cases, federal defenders faced the formidable challenge of identifying eligible individuals and

---

[145] During the 2008 crack cocaine sentence reduction, the Administrative Office of the U.S. Courts provided a uniform code for courts to use. Stakeholders reported that application of these codes was open to interpretation and the codes were often not applied consistently, which led to problems with case data reporting.

filing Section 2255 motions on their behalf prior to the statutory deadline. The stakes were high; failure to file a motion timely could result in dismissal of the case. Prior to *Welch*, many federal defenders had anticipated that *Johnson* would be applied retroactively and had begun preparing for that outcome. Nonetheless, the time pressure was intense and caseloads were high.

Some districts accommodated the time crunch by permitting federal defenders to file so-called "placeholder" motions. In some districts, these motions were expressly permitted in the language of the standing order appointing counsel. These barebones motions, usually based on a template, allowed federal defenders to file motions within the limitations period on the understanding that the factual basis for the motions would be supplemented at a later date. Many federal defenders argued that these placeholder motions were logistically necessary. In many cases, the federal defenders were not able to obtain copies of all relevant records from the probation office prior to the expiration of the limitations period. Without the ability to file a placeholder motion, federal defenders would face the impossible task of stating the factual basis for a motion without having received the relevant records.

Placeholder motions were not a perfect solution. Because these motions needed to be supplemented later, the ordinary sequence of the filing of a defense motion, followed by a response from the government and a reply, was sometimes disrupted. Some Assistant United States Attorneys (AUSAs) reported confusion over when a motion was considered complete prior to filing a response. Sometimes a court ordered a response date for the government, but the federal defender did not fully brief the motion by that date. These logistical difficulties were heightened by the fact that different judges within the same district sometimes imposed different filing deadlines. Due to the high volume of cases, the federal defender or the government sometimes moved to extend those deadlines, adding yet another layer of changing dates. Many attorneys maintained spreadsheets with filing deadlines but

often could not keep up with the rapidly changing status of these cases.

Stakeholders expressed other concerns with these motions. The broad appointment of counsel and the use of placeholder motions meant that federal defenders represented a wide swath of defendants, even those who had not consented explicitly to be represented. In addition, in the rush to file, the accuracy and completeness of the placeholder motions could be compromised. At least one stakeholder questioned whether placeholder motions comply with Rule 2 of the Rules Governing Section 2255 Proceedings, which requires the motion to "specify all the grounds for relief available to the moving party, state the facts supporting each ground, [and] state the relief requested."[146] Despite these concerns, placeholder motions were used in several districts visited.

In addition, *Johnson* cases required extensive research into an individual's criminal history and prison records. In order to litigate these claims, counsel needed access to various forms of documentation, including the original presentencing report, the inmate's BOP records, and documentation of prior state convictions. Although the probation office or the clerk's office typically retained the pertinent records, these records often were created prior to the advent of electronic filing and retrieving them required substantial efforts and resources. Further, record-keeping practices were not consistent across state courts or even across federal districts. Counsel encountered similar issues when conducting legal research into related issues, such as the version of a state statute that existed at the time the defendant was convicted. Prior versions of state statutes often were not available in modern electronic databases such as Westlaw and needed to be located in hard copy.

In response to the caseload surge, AUSAs and federal defenders adopted differing administrative processes. In some offices, a small number of attorneys handled all *Johnson* cases, a practice which allowed those attorneys to specialize in *Johnson*-related legal issues. This practice helped attorneys to

---

[146] RULES GOVERNING SECTION 2255 PROCEEDINGS R. 2(c).

handle cases more efficiently, to gain deeper knowledge and competency, and to observe trends across multiple cases. Such specialization would not have been possible without a standing order appointing the federal defenders as counsel. Federal defenders reported that the appointment of counsel allowed them to make consistent arguments, adopt broader litigation strategies, and adjust their strategies to account for the views of the particular judge hearing the case.

Such specialization was not always possible. In some offices, it would be impractical to assign most or all *Johnson* cases to a single attorney or a small team of attorneys. A broader distribution of the workload, however, created the risk that attorneys in the same office could take inconsistent positions on the various legal questions that come up during *Johnson* litigation, such as the applicability of certain procedural defenses or whether a statute categorically constituted a violent felony. Further, several stakeholders observed that specialization was only effective if the specializing attorneys already had ample training and experience. In order to litigate these cases effectively, attorneys needed specialized knowledge in the area of collateral review of convictions, the statutes and procedures involved, as well as the evolving case law with respect to the categorical approach and the definitions of violent felonies.

Johnson cases and Amendment 782 also affected the tactical decisions of federal defenders and AUSAs. Many prosecutors, in particular, argued that the reduction of otherwise final sentences undermines the predictability of offense charging and plea negotiations. The U.S. Attorney's manual instructs federal prosecutors to consider the defendant's possible sentencing exposure when charging offenses.[147] Mandatory sentencing provisions such as the ACCA and drug mandatory minimums (which anchor the drug guidelines ranges) are thus critical to the prosecutor's charging decisions. Given the continuing uncertainty about the validity of certain sentencing provisions and whether certain offenses

---

[147] *See, e.g.*, U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL 9-27.300 (Selecting Charges—Charging Most Serious Offenses); *id*. at 9-27.310 (Charges Triggering Mandatory Minimum Sentences in Certain Drug Cases).

are violent felonies, prosecutors often have difficulty evaluating a defendant's possible sentencing exposure in these cases.[148]

Further, many individuals who commit violent crimes are charged with, and plead guilty to, offenses charged under gun or drug statutes with mandatory minimum sentences. The government receives the certainty of a conviction and a substantial sentence, and in exchange agrees to drop other counts charged in the indictment or to not pursue prosecution for other offenses with higher penalties. For many AUSAs, reducing these sentences long after the fact upset these contract principles and undermined the government's bargaining position. More broadly, some prosecutors argue that they had a significant reliance interest in the predictability of sentencing laws. For those prosecutors, each resentencing proceeding invoked avenues not explored and decisions to be revisited from the original prosecution, sometimes decades after the fact.

Prosecutors have many tools at their disposal to overcome these challenges. In some districts, plea agreements routinely contain a provision allowing the government to reinstate dismissed charges if the plea agreement is nullified, as permitted by 18 U.S.C. § 3296(a).[149] Further, plea agreements often contain appeal waivers, waivers for Section 3582(c) claims, and waivers for collateral claims.[150] In addition, charging practices may adapt in order to avoid the impact of future changes by, for example, charging multiple offenses rather than a single count.

There are limits to these remedies, however. For example, courts will not enforce a waiver if the sentence imposed pursuant to the plea agreement exceeds the applicable

---

[148] The inverse, of course, is also true: federal defenders have difficulty advising their clients without knowing their sentencing exposure.

[149] 18 U.S.C. § 3296(a) (2012).

[150] A 2005 study suggests that appeal and collateral waivers are already widely used; out of a random sample of 971 federal cases, more than two-thirds of defendants waived appeal rights in their plea agreements and three-quarters of that group also waived their collateral attack rights. Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 209-10, 212-13 (2005).

statutory maximum or is based on a constitutionally impermissible factor.[151] Further, an individual's claim of actual innocence may fall outside of the scope of a collateral waiver if enforcement of the waiver would result in a "miscarriage of justice."[152] One appeals court concluded that, if the government seeks to reinstate dismissed charges, it may be "tread[ing] dangerously close" to punishing the individual for asserting a claim of actual innocence—a "due process violation of the most basic sort."[153]

Where some prosecutors perceived a windfall for eligible individuals, defenders lamented the harms suffered due to unconstitutional, often extremely punitive, sentences. Changes such as the *Johnson* decision and Amendment 782 were intended to correct errors committed during the sentencing process. For drug defendants who served decades in prison for distributing small amounts of crack cocaine, or for *Johnson* defendants who served many years longer than was constitutionally allowed, being released from prison was not a windfall but a correction, and often an inadequate one. Some defenders criticized what they perceived as the courts' focus on mitigating public safety risks rather than redressing the harms suffered due to unconstitutional or unnecessary sentences. They noted that the individuals being released due to *Johnson* should have never been sentenced under the ACCA to begin with and most were not likely to recidivate.

For both prosecutors and defenders, a common challenge was resource constraints. While Amendment 782 cases were fairly streamlined, *Johnson* cases consumed significant prosecutorial and defense resources. As many stakeholders pointed out, with few exceptions, courts have not received extra resources to assist with the increased caseload. In order to keep the trend sustainable, courts have counted on the dramatic decrease in new prosecutions under the DOJ policies of the Obama Administration. Federal prosecutions declined 25

---

[151] *See, e.g.*, DeRoo v. United States, 223 F.3d 919, 923 (8th Cir. 2000); United States v. Marin, 961 F.2d 493, 496 (4th Cir. 1992).

[152] United States v. Adams, 814 F.3d 178, 182 (4th Cir. 2016) (citing United States v. Johnson, 410 F.3d 137, 151 (4th Cir. 2005)).

[153] *Id.* at 185 (quoting United States v. Goodwin, 457 U.S. 368, 372 (1982)).

percent between fiscal years 2011 and 2016, and are currently at the lowest yearly total since 1997.[154] Under the Trump Administration, however, prosecutions are likely to increase. For example, in a recent memo, Attorney General Sessions instructed federal prosecutors to pursue violent criminals aggressively and to rely on statutes providing mandatory minimum penalties for drug and gun offenses.[155]

4. Conducting Resentencings: The Role of the Judge

Both *Johnson* and Amendment 782 required courts to reconsider an individual's sentence. With Amendment 782, the role of courts in the sentence reduction proceeding was fairly circumscribed. If an individual was eligible for a reduction, a court could, in its discretion, reduce the sentence up to two offense levels. In practice, many judges reduced the sentences of eligible individuals by the full two levels unless a reduction would not be appropriate based on the factors listed in 18 U.S.C. § 3553(a) and U.S.S.G. § 1B1.10. In particular, Sentencing Commission guidance instructed courts to consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the sentence and the individual's post-sentencing conduct.[156]

Under *Johnson*, by contrast, individuals eligible for relief were entitled to resentencing without the ACCA's residual clause. Often, this involved a new resentencing proceeding.[157] These cases involved a number of logistical challenges, including bringing prisoners to court for hearings, obtaining revised presentencing reports, and coordinating on a release

---

[154] *See* John Gramlich, *Federal Criminal Prosecutions Fall to Lowest Level in Nearly Two Decades*, PEW RES. CTR. (Mar. 28, 2017), http://www.pewresearch.org/fact-tank/2017/03/28/federal-criminal-prosecutions-fall-to-lowest-level-in-nearly-two-decades/ [https://perma.cc/62GN-82X6].

[155] OFFICE OF THE ATT'Y GEN., U.S. DEP'T OF JUSTICE, MEM. FOR ALL FEDERAL PROSECUTORS: COMMITMENT TO TARGETING VIOLENT CRIME (Mar. 8, 2017).

[156] U.S. SENTENCING GUIDELINES MANUAL § 1B1.10 Application Note 1(B)(ii), (iii) (U.S. SENTENCING COMM'N 2016).

[157] With respect to remedies, Section 2255(b) provides that the court shall "resentence" the defendant "or correct the sentence as may appear appropriate." 28 U.S.C. § 2255 (2012). Thus, courts have a "'broad and flexible power . . . to fashion an appropriate remedy.'" United States v. Hillary, 106 F.3d 1170, 1171 (4th Cir. 1997) (quoting United States v. Garcia, 956 F.2d 41, 45 (4th Cir. 1992)).

date with the BOP. The resentencing proceedings involved factual statements and objections, determining eligibility for time served, and revising conditions of supervised release. Courts assembled the pertinent documents, including the facts about the original sentencing, the original pre-sentencing report, and the original plea agreement, if any.

The biggest challenge for courts was addressing cases where it was clear that the individual had overserved the new statutory maximum and was entitled to immediate relief. In the most clear-cut cases, the AUSA and federal defender stipulated that the individual was no longer an Armed Career Criminal and was eligible for resentencing. For those individuals, each extra day in prison was tantamount to an unlawful sentence. Creating efficient and fair procedures for these individuals was thus an urgent priority. Courts had to balance this interest with the need to ensure accuracy in the proceedings and to create a comprehensive record in case of further proceedings (such as a revocation of supervised release).

Courts balanced these priorities in a variety of ways. Some courts granted the individuals' *Johnson* motions and resentenced them simultaneously. Other courts granted the motion but, prior to resentencing, asked the probation officers to create a new presentence report or an addendum providing the newly calculated guideline range. While some courts held a full resentencing hearing, with the individual present, other courts resentenced the person without holding a hearing, based on the arguments in the briefs.[158] This diversity of approaches had a common goal of handling the proceedings as expeditiously as possible.

Bail provided an important, if controversial, tool in these resentencing proceedings.[159] If individuals with pending

---

[158] The court may hold a resentencing hearing, but it is not required. *See* RULES GOVERNING SECTION 2255 PROCEEDINGS R. 8(a) (providing court authority to determine whether an evidentiary hearing is warranted).

[159] Courts have inherent authority to grant bail to habeas petitioners, but this authority may be exercised only in special cases. *See* United States v. Eliely, 276 F. App'x 270, 270 (4th Cir. 2008) (unpublished per curiam) ("Before a prisoner may be released on bail pending a collateral attack on his conviction, he must show substantial constitutional claims on which he has a high probability of success, and

motions were clearly eligible for immediate release, some courts placed them on bail in the interim. The bail issue was especially complicated with second and successive motions. A district court may have concluded based on the filings that an inmate was eligible for immediate release, but the motion would still have to be certified by the court of appeals prior to proceeding in the district court. Similarly, in some districts where probation officers participated in screening cases, probation officers discovered that inmates were eligible for release before the federal defender had filed motions or the government had been given an opportunity to respond. In those cases, the court had to decide whether to put inmates on bond even without fully briefed motions.

In all districts visited, the original sentencing judge, if still serving on the bench, handled the request for a new sentence.[160] This assignment practice meant that long-serving and senior judges, who generally had sentenced a larger number of drug and ACCA defendants, were disproportionately impacted by the increased workload. For cases in which the original sentencing judge was no longer serving on the bench, districts differed in their case assignment practices. Some districts randomly assigned cases, while others divided up cases by judge, so all of a former judge's cases were assigned to a single serving judge.

While Amendment 782 involved only a two-level reduction, courts could reconsider the sentences of individuals affected by *Johnson* based on the Section 3553(a) factors. These include "the nature and circumstances of the offense and the history and characteristics of the defendant," as well as "the need for

---

exceptional circumstances making a grant of bail necessary for the habeas remedy to be effective."); Mapp v. Reno, 241 F.3d 221, 226 (2d Cir. 2001) ("[A] habeas petitioner should be granted bail only in unusual cases, or when extraordinary or exceptional circumstances exist which make the grant of bail necessary to make the habeas remedy effective."); *see also* Lee v. Jabe, 989 F.2d 869, 871 (6th Cir. 1993); Calley v. Callaway, 496 F.2d 701, 702 (5th Cir. 1974) (per curiam).

[160] Rule 4(a) Governing Section 2255 Proceedings provides: "The clerk must promptly forward the motion to the judge who conducted the trial and imposed sentence or, if the judge who imposed sentence was not the trial judge, to the judge who conducted the proceedings being challenged. If the appropriate judge is not available, the clerk must forward the motion to a judge under the court's assignment procedure." RULES GOVERNING SECTION 2255 PROCEEDINGS R. 4(a).

the sentence imposed" to serve the purposes of sentencing—just punishment, deterrence, protection of the public, and rehabilitation.[161] Further, courts had wide discretion to consider other factors, such as the defendant's efforts at rehabilitation and other post-sentencing conduct.[162]

There were other special circumstances to consider in *Johnson* cases. Even if an individual is no longer considered to be an Armed Career Criminal, a court has various tools to impose a sentence that accounts for violent acts in the person's past. Courts have wide discretion to impose a sentence consistent with the factors in 18 U.S.C. § 3553(a), and Congress prohibits any limitation on the information a court may consider.[163] Section 4A1.3 of the Sentencing Guidelines expressly provide for an upward departure if "reliable information indicates that the defendant's criminal history category significantly under-represents the seriousness of the defendant's criminal history" or likelihood of recidivism.[164] A district court, moreover, may vary upward from the amended guideline range based on the Section 3553(a) factors, especially the "nature and circumstances of the offense and the history and characteristics of the defendant," the need to "afford adequate deterrence," and the need to "protect the public from further crimes of the defendant."[165]

In order to arrive at an appropriate sentence, some courts engaged in sentence packaging.[166] This practice arises from the court's discretion, in "imposing a sentence on one count of conviction to consider sentences imposed on other counts."[167] On resentencing, some courts restructured a person's entire sentence by running counts consecutively that had previously run concurrently. This practice was sometimes used to lessen a

---

[161] 18 U.S.C. § 3553(a) (2012).

[162] *See* Pepper v. United States, 562 U.S. 476, 487-89 (2011).

[163] 18 U.S.C. § 3661 (2012).

[164] U.S. SENTENCING GUIDELINES MANUAL § 4A1.3 (U.S. SENTENCING COMM'N 2016).

[165] 18 U.S.C. § 3553(a)(1), (2) (2012).

[166] In sentence packaging cases, a court that has been instructed to resentence an individual "reconfigure[s] the sentencing plan to ensure that it remains adequate to satisfy the sentencing factors in 18 U.S.C. § 3553(a)." Greenlaw v. United States, 554 U.S. 237, 253 (2008).

[167] Dean v. United States, No. 15-9260, slip. op. at 4 (Apr. 3, 2017).

sentence reduction in cases where a court was concerned about the public safety impacts of an individual's early release. But this practice can also work in a defendant's favor. Some courts restructured the sentence to further decrease the overall severity of the amended sentence. For example, courts reduced the sentence on a drug count or declined to apply the Career Offender guideline, even though those sentences were not explicitly affected by *Johnson*.

With Amendment 782, the interests of judicial economy and the rights of eligible individuals were often aligned. Sentence reductions were often presumed to be appropriate and a court could reduce sentences on its own motion. With *Johnson* cases, the dynamic was reversed. *Johnson* cases require an adversarial process, and the burden is on a prisoner to file a Section 2255 motion. Further, individuals affected by *Johnson* were sometimes legally entitled to immediate release from prison, while the release of individuals affected by Amendment 782 was always discretionary. As a result, balancing the rights of eligible individuals with a comprehensive, individualized process required special care in *Johnson* cases.

5. Managing the Reentry Process

Finally, courts were responsible for managing the reentry process for prisoners affected by *Johnson* and Amendment 782. As described above, the reentry process requires extensive coordination between the BOP and the Probation Office. As part of the executive branch, the BOP has its own distinct policy objectives and administrative procedures, which can create challenges in coordination and information-sharing with the courts. Moreover, there are many moving parts to the process, including local probation officers coordinating with local BOP officials, RRCs, and local social services. Stakeholders reported that, in many instances, there was little incentive for these various entities to coordinate smoothly and the relationship between them was often disjointed.

Due to the volume of cases under Amendment 782 and *Johnson*, released inmates were not always able to participate fully in prerelease programming. Space in RRCs is highly

limited, and with the increase in released inmates it was often not possible for inmates to spend the statutorily authorized time in an RRC prior to being released. Issues with RRCs have been the subject of several recent investigations, including the Charles Colson Corrections Task Force Report, which examined various issues with the federal criminal justice system, and a recent DOJ Inspector General Report. Among other findings, these reports concluded that the BOP has addressed the influx of prisoners coming into RRCs by prioritizing low-risk offenders for halfway house placement while sometimes releasing higher-risk, violent offenders directly from prison.[168] As the reports noted, these arrangements pose potential risks to public safety.[169]

Another challenge for probation officers is ensuring that individuals have approved plans for place of residence and access to needed services. Because there is no unified case management system for the BOP, RRCs, and probation offices,[170] some stakeholders described difficulties in communicating with BOP officials and accessing SENTRY, the primary database BOP uses to supervise prison inmates. As a result, probation officers did not always have relevant information regarding an inmate's disciplinary history, rehabilitation efforts in prison, participation in drug treatment, vocational and education programs, and mental and physical health conditions. Such information is essential for courts to impose an appropriate sentence and for probation officers to create a plan for supervised release.

Although these issues are common to all released prisoners, the timing and volume of these cases presented special challenges. With Amendment 782, courts were able to provide the BOP with ample notice of release dates. Further, because sentence reductions under Amendment 782 were discretionary, courts had the authority to impose a delay in the

---

[168] *See* CHARLES COLSON TASK FORCE REPORT, *supra* note 112, at 50-56; OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AUDIT OF THE FED. BUREAU OF PRISONS' MGMT. OF INMATE PLACEMENTS IN RESIDENTIAL REENTRY CTRS. AND HOME CONFINEMENT (Nov. 2016).

[169] *See* CHARLES COLSON TASK FORCE REPORT, *supra* note 112, at 50.

[170] *See id.* at 51.

effective date of any judgment to provide the BOP and the U.S. probation office time to process cases. Accordingly, although the high volume of Amendment 782 cases put pressure on the probation system and halfway houses, stakeholders reported that the challenges were largely manageable.

With *Johnson* cases, by contrast, such flexibility and advanced planning often were not possible. With respect to resentenced individuals who overserved their original sentence, courts lacked the authority to delay the release date substantially to allow for transition planning. The BOP often had no formal notice that an inmate was to be released until it received the court's judgment reducing the sentence. According to a number of probation officers, even if local BOP officials were notified ahead of time that an inmate was likely to be released, the BOP often did not act on that information until it received the amended judgment. As a result, in many districts inmates who had overserved the sentence were released immediately, sometimes with little time to gather basic provisions such as clothes or medicine. The transition from prison to supervised release was often particularly difficult for individuals who had been imprisoned for long periods of time and who frequently lacked ties to family, friends, employment, or social services.

Courts employed various strategies to address these challenges. With *Johnson* cases, some judges imposed a standard delay, such as 14 days, in the judgment in order to allow the BOP time to process an inmate's release. Those judges considered imposition of a delay to be part of a court's inherent authority. In addition, some judges amended the terms of supervised release to provide for a period in a halfway house or RRC. Other judges, however, believed they had no legal authority to provide for even a short transition period.

In some districts, probation officers utilized the provisions of the Second Chance Act[171] to soften the impact of the abrupt transition. The Second Chance Act authorizes federal grants

---

[171] Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008); *see also* Hon. Irene M. Keeley Testimony, *supra* note 115, at 12 n.58 (describing the Judicial Conference's efforts to expand the Administrative Office of the U.S. Courts' authority to use the Second Chance Act for reentry services).

for programs aimed at improving the reentry process. Among other programs, Second Chance Act funds can be used to provide a temporary hotel stay, clothes, and other resources for inmates coming onto supervised release.[172] The Second Chance Act can also be used to foster employment opportunities, such as job training, vocational testing and counseling.[173] In some districts, the federal defenders also assisted in supporting individuals through the transition by connecting them with social workers and even encouraging them to consider halfway house time, if available.

Finally, probation and BOP officers have made great efforts to reduce the pressures on halfway house space and other prerelease services. Increasingly, probation officers are improving the effectiveness and efficiency of supervision by tailoring services to the needs of, and risks posed by, individuals. Under the Federal Location Monitoring Program, the BOP may request probation offices to accept low-risk inmates onto supervision through home confinement for up to the final six months of their term.[174] Those inmates bypass halfway house placement, freeing up bed space for higher risk inmates. A recent internal survey of district probation offices indicated that the program is underutilized and that probation offices have the ability to accept significantly more inmates into the program.[175] In addition, some probation officers are recommending that courts terminate supervised release early for low-risk offenders in order to focus resources on higher risk offenders.

Johnson cases pose unique challenges for supervised release. As described above, some individuals resentenced under *Johnson* have overserved the term of imprisonment imposed upon resentencing. Under 18 U.S.C. § 3585, the BOP has authority to calculate credit for overserved time.[176] The BOP will credit any overserved time to any subsequent term of

---

[172] *See* Hon. Irene M. Keeley Testimony, *supra* note 115, at 12.

[173] *Id*.

[174] *See* 18 U.S.C. § 3624(c)(2)-(3) (2012); Hon. Irene M. Keeley Testimony, *supra* note 115, at 12.

[175] *See* Hon. Irene M. Keeley Testimony, *supra* note 115, at 10.

[176] 18 U.S.C. § 3585(b) (2012).

imprisonment imposed for violating supervised release on the amended sentence.[177] The credit, however, does not affect sentences imposed for new crimes or for violating supervised release on a non-*Johnson*-related sentence.[178] Under the BOP's view, this policy is required by 18 U.S.C. § 3585(b), which instructs that an inmate "shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences . . . as a result of the offense for which the sentence was imposed."[179]

Many stakeholders felt that the BOP's policy of crediting overserved time towards violations of supervised release prevented probation officers from supervising individuals effectively. In their view, without the possibility of revocation there is little incentive for individuals to comply with the conditions of supervision. This situation not only renders supervision futile, it endangers the safety of probation officers who are charged with supervising the individuals without a viable sanction for noncompliance. As a result, judges have generally taken one of two paths. Some judges have instructed the BOP not to calculate a sentence of "less than time served" with the aim of preventing a credit of overserved time, even if the person has already served a longer period of imprisonment than the amended sentence. Other judges have declined to impose supervised release at all.

Some defenders question whether there is evidence to support these concerns about supervised release. According to these defenders, most inmates are not aware of the BOP's policy and are not trying to "game" the system. In addition, many of these released inmates are older, and the available evidence strongly suggests that recidivism rates decrease dramatically with age.[180]

---

[177] *See* BUREAU OF PRISONS, PROGRAM STATEMENT 5880.28(c), 1-14 (Feb. 14, 1997) (explaining policy for prior custody time credit).

[178] *Id*.

[179] 18 U.S.C. § 3585(b) (2012).

[180] *See* U.S. SENTENCING COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW 23 (Mar. 2016), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf [https://perma.cc/U4J5-44K5].

Issues with supervised release highlight the reality that although individuals affected by *Johnson* are no longer considered to be Armed Career Criminals, some are high risk offenders or are in need of services upon release from prison. The abrupt transition from prison often does not benefit these individuals or society. This concern accords with Judge Irene Keeley's testimony to the Colson Task Force on behalf of the Judicial Conference's Committee on Criminal Law that, "[i]n addressing the prison overcrowding crisis, policy-makers must not create a new public safety crisis in our communities by simply transferring the risks and costs from the prisons to the caseloads of already strained probation officers and the full dockets of the courts."[181]

B. Disparities in Outcomes in Johnson *Cases*

Stakeholders emphasized that legal uncertainty and complexity in *Johnson* cases impacted the courts' workload and administrative procedures. Each *Johnson* case involved a combination of prior convictions for differing state statutes, the facts underlying those convictions, and prior procedural history. Like the branches of a tree, these cases splintered into a seemingly endless variety of legal and factual variations, many of which were not amenable to decisive, uniform judicial resolution.[182] As many stakeholders explained, this legal

---

[181] Testimony of Hon. Irene M. Keeley, *supra* note 115, at 2.

[182] The splintering of legal questions following *Johnson* is one example of a larger trend. Resentencing claims under Section 2255 have been rife with confusion, complexity, and protracted litigation. For example, prior to *Johnson* the Supreme Court grappled on numerous occasions with whether prior state convictions should be treated as violent felonies. *See*, *e.g.*, Sykes v. United States, 564 U.S. 1, 3-4 (2011) (holding that Indiana offense of knowing or intentional vehicular flight from a law enforcement officer was categorically a crime of violence); Chambers v. United States, 555 U.S. 122, 130 (2009) (holding that Illinois failure-to-report offense was not categorically a crime of violence); Begay v. United States, 553 U.S. 137, 139-40, 148 (2008) (holding that New Mexico offense of driving under the influence of alcohol was not categorically a crime of violence). Following decisions such as *Begay* and *Chambers*, there was vigorous disagreement within courts of appeal over whether motions for resentencing under Section 2255 would be permitted. *See* Garrett, *supra* note 130, at 104-05 (noting that consideration of resentencing claims have "badly split" courts of appeals and "decisions in this area have engendered en banc opinions and heated dissents").

complexity raised concerns that similarly situated individuals were treated differently.

Stakeholders thus described a splintering effect as many *Johnson* cases gave rise to novel procedural and legal questions. As they explained it, this has created a cycle in which the district courts resolve the same question in many different ways, the question is resolved at the circuit level, and the answer quickly gives rise to new permutations and questions, which are also resolved in differing ways. The cycle repeats itself as the circuits decide similar issues in different ways and the Supreme Court resolves the circuit splits. This process of analyzing each new legal permutation as it arises adds substantially to the workload of the courts. In the meantime, there has not always been clear guidance regarding which cases the district courts should hold in abeyance pending resolution by the higher courts. District courts have thus made inconsistent decisions regarding which individuals to resentence.

Because Amendment 782 cases were far simpler, there was less of a splintering effect. Nevertheless, local variations may have resulted in different outcomes for similarly situated individuals. For example, while some courts reduced individuals' sentences to the bottom of the amended guideline range, others imposed a proportional reduction so that a person with a mid-Guidelines sentence, for instance, received a sentence in the middle of the amended Guidelines range. There were other variations as well. Although most districts implemented a fairly streamlined procedure, in a minority of districts the U.S. Attorney's Office objected to a full sentence reduction for eligible individuals in a significant portion of Amendment 782 cases. Some judges required full hearings in contested Amendment 782 cases, while others decided those cases without holding a hearing.

With *Johnson* cases, variations among districts led to disparities in four main areas: (1) inconsistencies among the practices of U.S. Attorney's Offices; (2) the application of threshold and procedural requirements under Sections 2244 and 2255; (3) the application of the categorical approach in determining whether crimes are violent felonies; and (4) the

decision to stay proceedings in light of rapidly changing case law. As explained in Part I, modern retroactivity doctrine under *Teague* was substantially motivated by the desire to eliminate disparities between similarly situated individuals. The presence of ongoing disparities, therefore, should be of special concern.

1. Inconsistencies in the Practices of U.S. Attorney's Offices

Some of these disparities stem from inconsistencies between the U.S. Attorney's approach to these cases in each district. A common observation across districts was that AUSAs took varying positions on legal issues, such as the applicability of certain procedural defenses or whether certain crimes were violent felonies. While some stakeholders assumed that these differences resulted from the need for greater training, supervision, and communication, there are several other possible reasons.

Although the DOJ issued national guidance for *Johnson* cases, this guidance leaves room for interpretation and often does not address all pertinent issues. The U.S. Attorney operates fairly independently in each district, and local variations and culture in the exercise of discretion translated to differences in outcome. For example, in a state with strict gun penalties but lenient drug penalties, the U.S. Attorney's Office might have charged more offenses under the drug mandatory minimum statutes and fewer cases under the ACCA. In a state with strict drug penalties but lenient gun penalties, the opposite may have been true. These differences in charging practices greatly affected the resolution of *Johnson* and Amendment 782 cases years later. Accordingly, some variations between districts may have been the result of tactical or discretionary decisions.

In addition, some variations stemmed from the DOJ guidance itself. The DOJ guidance draws lines between different classes of Section 2255 movants. As many stakeholders (not just AUSAs) verified, as a general matter the guidance recommends waiving procedural defenses on initial motions but not second or successive motions. Because the DOJ guidance is not published, judges and other stakeholders were

sometimes not aware that the government's positions distinguished between individuals based on the status of their motions. It thus appeared that the government was taking inconsistent positions in some instances. Providing the DOJ guidance to the court and opposing counsel would eliminate much of this confusion and bring a higher level of transparency to the resentencing proceedings.

2. The Application of Threshold and Procedural Requirements

Johnson cases, which are subject to collateral review, involve a number of threshold and procedural issues. Disparities have emerged between and within districts with respect to some of these issues, especially the requirement for movants to demonstrate that their claims are timely and not subject to procedural default.

Courts disagreed over the meaning of threshold requirements in Section 2255 and Section 2244. Some courts read the language of these provisions to require movants to demonstrate that the original sentencing court *actually relied* on the residual clause. As a general matter, under Section 2255(a), a movant has the burden of showing that his sentence or conviction is, *inter alia*, "subject to collateral attack."[183] For initial motions, a one-year limitations period runs from, *inter alia*, "the date on which the *right asserted* was initially recognized by the Supreme Court" if made retroactively applicable to cases on collateral review.[184] For second and second successive motions, Section 2244(b)(2) requires the district court to dismiss the claim unless the applicant meets certain requirements, including showing "that the claim *relies* on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable[.]"[185]

In applying these provisions, some courts require movants to show that the sentencing judge had enhanced the sentence based on the residual clause. Under this view, it is the

---

[183] 28 U.S.C. § 2255(a) (2012).
[184] *Id.* § 2255(f)(3) (emphasis added).
[185] *Id.* § 2244(b)(2)(A) (emphasis added).

movant's burden to show an entitlement to relief, "and in this context the movant cannot meet that burden unless he proves that he was sentenced using the residual clause and that the use of that clause made a difference in the sentence."[186] Accordingly, "[i]f the district court cannot determine whether the residual clause was used in sentencing and affected the final sentence—if the court cannot tell one way or the other—the district court must deny the § 2255 motion."[187]

Other courts require the individual only to show that he is no longer an Armed Career Criminal absent the residual clause, based on current case law.[188] These courts reject the requirement of affirmative proof that the residual clause was relied upon as unworkable and unjust. Nothing in the law required the sentencing court to specify which clause it relied on, and, in many cases, it was unclear whether the sentence was based on the residual clause, a different clause, or some combination thereof.[189] Requiring individuals to prove they were sentenced under the residual clause would penalize them for a court's discretionary choice, or simple oversight, not to specify under which clause an offense qualified as a violent felony.[190] Accordingly, under this standard "the required showing is simply that [a statute] may no longer authorize [a] sentence as that statute stands after *Johnson*—not proof of what the judge said or thought at a decades-old sentencing."[191] In this inquiry, "it makes no difference whether the sentencing judge used the words 'residual clause' or 'elements clause' or some similar phrase."[192]

A third, middle-ground approach allows an individual to proceed on a Section 2255 claim if he *could have been* sentenced using the residual clause but the sentencing record

---

[186] *In re* Moore, 830 F.3d 1268, 1273 (11th Cir. 2016).

[187] *Id*.

[188] *See, e.g.*, United States v. Winston, 850 F.3d 677, 682 (4th Cir. 2017); *In re* Chance, 831 F.3d 1335, 1340 (11th Cir. 2016).

[189] *See Winston*, 850 F.3d at 682; *Chance*, 831 F.3d at 1340-41.

[190] *Winston*, 850 F.3d at 682.

[191] *Chance*, 831 F.3d at 1341.

[192] *Id*.

is unclear.[193] This approach requires the judge to probe the record of the original sentencing, but it is more forgiving of ambiguity or silence than a requirement to prove the residual clause was relied upon. Although many courts have treated this approach as equivalent to an inquiry that relies only on whether the person is an Armed Career Criminal, they are in fact analytically distinguishable. For example, in a case from the Western District of Virginia, *United States v. Crawford*, the district court concluded that a movant's Section 2255 claim was procedurally barred, even though he would have been eligible for relief on the merits.[194] Sentenced in 2005, Crawford was subject to the ACCA because he had three prior convictions in Virginia for breaking and entering.[195] The sentencing record unequivocally demonstrated that the sentencing judge had relied on the enumerated offense clause, not the residual clause.[196]

Under subsequent decisions, however, Crawford's convictions for breaking and entering no longer qualified as violent felonies under the enumerated offense clause. Without the residual clause, there was no longer any reason for Crawford to be considered an Armed Career Criminal. Because the sentencing court had unequivocally relied on the enumerated offense clause, however, the district court found Crawford's claim to be procedurally barred.[197] Finding the sentence to be "gravely unjust," the court concluded that "procedural roadblocks created by statute restrict the Court's

---

[193] *See, e.g.*, Shabazz v. United States, No. 3:16-cv-1083, 2017 WL 27394, at *5 (D. Conn. Jan. 3, 2017) ("I find compelling the arguments from other courts that . . . a silence in the record should be read in favor of the petitioner because the Residual Clause, written to be a capacious catch-all, was the most direct and efficient route to establishing an ACCA predicate at the time."); United States v. Winston, 207 F. Supp. 3d 669, 677 (W.D. Va. 2016) ("[C]ourts have held that—when unclear on which ACCA clause the sentencing judge rested a predicate conviction—the petitioner's burden is to show only that the sentencing judge may have used the residual clause.").

[194] United States v. Crawford, No. 3:02-cr-00042, 2016 WL 6900712, at *2 n.1 (W.D. Va. Nov. 22, 2016).

[195] *Crawford*, 2016 WL 6900712, at *1.

[196] *Id.* at *3.

[197] *Id.*

ability to consider the merits of Defendant's petition, and they are the only reason Defendant remains in prison today."[198]

These differences in analysis had the potential to create disparities in relief. Within a single district visited, all three approaches were being used by different judges. Indeed, even within the same circuit, two different appellate panels have applied different standards.[199] The latter of those panels, in *Chance*, acknowledged the split in authority and instructed district courts to "hear from the parties and apply the law to the facts as it thinks best."[200]

The differences in these threshold requirements, moreover, create disparities in the case law governing the proceeding. If courts must consider whether the residual clause was applied explicitly at the original sentencing, then the court would have to disregard intervening case law subsequent to the original sentencing proceeding. In recent years, the Supreme Court has decided several significant cases clarifying the categorical approach, including *Descamps v. United States*, 133 S. Ct. 2276 (2013), and *Mathis v. United States*, 136 S. Ct. 2243 (2016).[201] Under the standard used by some courts, individuals who no longer qualified as Armed Career Criminals absent the residual clause were not necessarily afforded relief.

3. Application of the Categorical Approach

Out of all the challenges facing courts in the wake of *Johnson*, perhaps the most significant to many stakeholders was the ongoing uncertainty over the application of the categorical approach. Following *Johnson*, circuit splits developed over whether similar or identical state statutes are categorically violent felonies, and even panels within the same circuit sometimes took seemingly irreconcilable positions.

The categorical approach involves an interplay of federal and state law. Because the vast majority of prior convictions

---

[198] *Id.* at *4.

[199] *Compare In re* Moore, 830 F.3d 1268, 1273 (11th Cir. 2016), *with In re* Chance, 831 F.3d 1335, 1340-42 (11th Cir. 2016).

[200] *Chance*, 831 F.3d at 1342.

[201] *See* Mathis v. United States, 136 S. Ct. 2243 (2016); Descamps v. United States, 133 S. Ct. 2276 (2013).

are under state, not federal, law, courts must define the elements of varying state statutes. Then, courts must decide whether the definitions of these state law offenses meet the definition of a violent felony under federal law. Courts must decide whether the state offense "has as an element the use, attempted use, or threatened use of physical force against the person of another,"[202] or if it otherwise meets the definition of one of the offenses enumerated in the statute.[203] Following *Johnson*, courts can no longer rely on the residual clause as a type of catch-all provision for close cases.[204]

In applying the categorical approach, courts look not only to the text of the state statute, but to state court decisions interpreting and applying those statutes. Courts must "focus on the minimum conduct" required to sustain a conviction for the state crime.[205] This inquiry has produced some anomalous results. The courts of appeal have divided, for instance, over whether varying state laws proscribing robbery qualify under the force clause of the violent felony definition in the ACCA.[206] While differences in the language of state statutes may account

---

[202] 18 U.S.C. § 924(e)(2)(B)(i) (2012).

[203] *Id.* § 924(e)(2)(B)(ii).

[204] *See* Katherine M. Moore, *A Potential Crime of Violence: The Residual Clause and What it Means for Inmates*, 51(4) CRIM. L. BULL. 897, 902 (2015) (explaining that "the residual clause, seems to be a catch-all, allowing courts to impose an enhanced penalty upon a defendant for a crime that involves conduct that presents any serious *potential* risk of physical injury to another").

[205] Montcrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013).

[206] *Compare, e.g.*, United States v. Harris, 844 F.3d 1260, 1270 (10th Cir. 2017) (holding that conviction under Colorado statute for armed robbery is categorically a violent felony); United States v. Doctor, 842 F.3d 306, 312 (4th Cir. 2016) (concluding South Carolina common law robbery is violent felony); United States v. Duncan, 833 F.3d 751, 758 (7th Cir. 2016) (concluding Indiana robbery statute is violent felony), *and* United States v. Priddy, 808 F.3d 676, 686 (6th Cir. 2015) (concluding Tennessee robbery statute is violent felony), *with* United States v. Mulkern, 854 F.3d 87, 93-94 (1st Cir. 2017) (holding that a state conviction for robbery in Maine was not a violent felony under the ACCA); United States v. Yates, 866 F.3d 723, 732 (6th Cir. 2017) (holding that Ohio robbery is not violent felony); United States v. Nicholas, 686 F. App'x 570, 574 (10th Cir. 2017) (holding that Kansas robbery is not a violent felony); United States v. Parnell, 818 F.3d 974, 981 (9th Cir. 2016) (holding that Massachusetts armed robbery is not a violent felony); United States v. Bell, 840 F.3d 963, 967 (8th Cir. 2016) (holding that robbery in Missouri is not a violent felony), *and* United States v. Gardner, 823 F.3d 793, 804 (4th Cir. 2016) (explaining that North Carolina common law robbery is not a violent felony).

for some of these divisions,[207] courts of appeal have sometimes come to opposing conclusions with respect to the same exact statute. For example, while robbery under Massachusetts state law is considered to be a violent felony in the First Circuit,[208] it is not a violent felony in the Ninth Circuit.[209] Similarly, while burglary under South Carolina state law could have been a violent felony under the modified categorical approach in the Fourth Circuit prior to the *Mathis* decision,[210] it was (and is) considered categorically not to be a violent felony in the Eleventh Circuit.[211]

Even when two state statutes have identical language, moreover, the outcome of the categorical analysis may be different. State courts often interpret the same exact words in different ways. In many states, robbery may be committed by violence, intimidation, or by putting a person in fear. Federal courts have reached differing conclusions on whether those terms involve the use of "force" based on the rulings of state appellate courts. Under Fourth Circuit precedent, for example, a person who commits North Carolina common law robbery, which involves taking property "by means of violence or fear," has not committed a categorically violent felony.[212] If that same person crosses the state line and commits a South Carolina robbery, which involves taking property "by violence or by putting such person in fear," he *has* committed a violent felony.[213] The language of these laws is, in all relevant respects, identical. But North Carolina courts have held the degree of actual force used in the robbery is immaterial while

---

[207] Some state robbery laws, for example, adhere to the common law definition, while others adopted a broader or narrower definition.

[208] United States v. Luna, 649 F.3d 91, 108-09 (1st Cir. 2011).

[209] *Parnell*, 818 F.3d at 981.

[210] United States v. McLeod, 808 F.3d 972, 976 (4th Cir. 2015). Subsequent to *Mathis*, however, the Fourth Circuit ruled that the South Carolina burglary statute was not divisible and, thus, not subject to the modified categorical approach. United States v. Hall, 684 F. App'x 333, 335-36 (4th Cir. 2017) (per curiam).

[211] United States v. Lockett, 810 F.3d 1262, 1272 (11th Cir. 2016).

[212] United States v. Gardner, 823 F.3d 793, 802-04 (4th Cir. 2016) (quoting North Carolina v. Smith, 292 S.E.2d 264, 270 (N.C. 1982)).

[213] *See* United States v. Doctor, 842 F.3d 306, 309 (4th Cir. 2016) (quoting South Carolina v. Rosemond, 589 S.E.2d 757, 758 (S.C. 2003)).

the South Carolina courts have not, and so the outcome under the ACCA is different.[214]

Although these differences may follow logically from the categorical analysis, they have resulted in disparate results for otherwise similarly situated individuals. Most obviously, taking two people with identical state predicate convictions, one might be considered an Armed Career Criminal and the other not, simply depending on which court the person is resentenced in. Individuals, moreover, might have entirely different results if they were convicted for exactly the same underlying conduct in one state rather than another state. In short, individuals who committed factually identical prior offenses received different outcomes depending on legalistic and semantic distinctions in the sentencing laws under which they were convicted.

The disparities do not just arise from judicial interpretations. A person's fate under the ACCA may hinge on other seemingly irrelevant factors. For example, the offense a person is charged with, or pleads guilty to, depends substantially on the local prosecutor's exercise of discretion. A prosecutor in one local jurisdiction may have been more lenient in her charging practices than other prosecutors in the jurisdiction next door, or even within the same jurisdiction. With respect to divisible statutes, moreover, the outcome of the modified categorical approach may be different depending on how meticulous the record keeper was in a particular jurisdiction. If the *Shepard*-approved documents do not provide any indication as to the underlying facts of a conviction, then no ACCA predicate may be found. If the facts of a prior conviction are well-documented, then a finding that the conviction was for a violent felony is more likely.

Taken together, these disparities mean that, aside from a person's actual conduct, many other factors may determine the difference between a fifteen-year minimum sentence and a ten-year maximum sentence—what state the person was convicted in, who the prosecutor was, how records were kept in the local courthouse, and whether and how the highest state appellate

---

[214] *Id.* at 312.

court has weighed in how a statute applies to another case with different facts. These differences provide various avenues for otherwise similarly situated individuals to receive a different outcome. These differences, moreover, have little to do with the purposes of sentencing as articulated in the Sentencing Reform Act.

Many stakeholders pointed out another anomaly with the categorical approach. In some cases, the results were counterintuitive, if not contrary, to the purpose of the ACCA. In the proliferation of robbery cases, for example, several judges have noted that faithful application of the categorical approach yielded unexpected results. In *Parnell*, a concurring opinion explained that although "[t]he notion that robbery is not a 'violent felony' . . . [is] counterintuitive," and "[h]olding that *armed* robbery doesn't qualify as a violent felony seems even more absurd," this result was compelled by features of the Massachusetts armed robbery statute.[215] As another court put it, the conclusion that statutory robbery is a violent felony should be "obvious," but, given the circuit split on the issue, "the obvious may not be so plain."[216] This counterintuitive logic has taken hold in a wide variety of cases. Courts have held that knowingly discharging a firearm into an occupied dwelling, rape of a mentally disabled person, attempted second-degree murder, kidnapping, aggravated assault, and aggravated sexual assault of a child, among other crimes, are not categorically violent felonies or crimes of violence.[217]

---

[215] United States v. Parnell, 818 F.3d 974, 982 (9th Cir. 2016) (Watford, J., concurring) (emphasis in original).

[216] United States v. Harris, 844 F.3d 1260, 1262 (10th Cir. 2017).

[217] *See, e.g.*, United States v. Jenkins, 849 F.3d 390, 394 (7th Cir. 2017) (federal kidnapping conviction not a crime of violence); United States v. Hernandez-Montes, 831 F.3d 284 (5th Cir. 2016) (Florida attempted second-degree murder was not a crime of violence); United States v. Jordan, 812 F.3d 1183, 1186-87 (8th Cir. 2016) (Arkansas conviction for aggravated assault creating a "substantial danger of death or serious physical injury" was not a crime of violence); United States v. Parral-Dominguez, 794 F.3d 440 (4th Cir. 2015) (North Carolina conviction for knowingly discharging a firearm into an occupied building was not a crime of violence); United States v. Shell, 789 F.3d 335 (4th Cir. 2015) (North Carolina conviction for rape of a mentally disabled person was not a crime of violence); United States v. Madrid, 805 F.3d 1204 (10th Cir. 2015) (Texas conviction for aggravated sexual assault of a child was not a

In the wake of *Johnson*, significant circuit splits and legal uncertainty have arisen over the applicability of the remaining clauses of the ACCA. Even if courts are no longer confused about the nature of the inquiry required by the categorical approach,[218] they often vigorously disagree over the application of that inquiry. The problem of vagueness, it seems, has been traded for one of uncertainty. Many stakeholders, moreover, expressed concerns that the rapidly-evolving case law governing the categorical approach may produce confusion among the lower courts. As an opinion from the Western District of North Carolina colorfully describes—labelling the issue the "*Johnson/Mathis/Descamps/Taylor/Shepard* swamp"—the distinction between "elements" and "means" mandated in *Descamps* and *Mathis*, among other issues, "requires the sort of semantic hair-splitting that would make any patent attorney proud."[219]

The categorical approach is settled law, and there are compelling, if not unassailable, reasons to follow it. First, the text of the ACCA focuses on a person's "previous convictions," and not on the underlying facts of offenses previously committed.[220] "Congress well knows how to instruct sentencing judges to look into the facts of prior crimes[.]"[221] It has done so in other statutes, but chose not to do so in the ACCA.[222] Further, allowing a sentencing judge to increase a statutory maximum penalty based on facts not found by a jury would raise serious Sixth Amendment concerns.[223] Finally, an elements-only inquiry provides a vital safeguard to

---

crime of violence); United States v. McMurray, 653 F.3d 367 (6th Cir. 2011) (Tennessee aggravated assault was not a crime of violence).

[218] *Johnson* explained that certain types of circuit conflicts may matter more than others, and "[t]he most telling feature of the lower courts' decisions is not division about whether the residual clause covers this or that crime (even clear laws produce close cases); it is, rather, pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider." Johnson v. United States, 135 S. Ct. 2551, 2560 (2015).

[219] Hall v. United States, No. 3:09-CR-19-MR, 2016 WL 5133790, at *6 n.13 (W.D.N.C. Sept. 15, 2016).

[220] Mathis v. United States, 136 S. Ct. 2243, 2252 (2016).

[221] *Id.*

[222] *Id.*

[223] *Id.*; *see also* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

defendants.[224] In many cases, statements of fact in the records of prior convictions were not vigorously tested in adversarial proceedings, and a defendant may not have had any incentive to contest them.[225] It would not be fair to impose a lengthy mandatory minimum sentence based on facts that did not need to be proven in the original proceeding and, accordingly, may not be accurate or reliable.[226]

The structure of the ACCA itself, and not the categorical approach, may be the real culprit for these disparities. The ACCA creates an all-or-nothing scenario in which individuals who qualify as Armed Career Criminals receive a minimum sentence of fifteen years, while those who do not qualify receive a maximum sentence of ten years. Which of these starkly different outcomes an individual receives depends largely on how one conceives of, and proves, the existence of three predicate convictions for a "violent felony." No matter what interpretative approach is applied, individuals will end up on one side of the chasm or the other—not as the result of a thoughtful and individualized inquiry, but as the result of a one-size-fits all statutory mandate.

4. The Decision to Stay Resentencing Proceedings

Finally, legal uncertainty following *Johnson* has translated into disparities in when and whether individuals receive relief. In some cases, the timing of a motion had as much of an effect on the outcome as the merits of the claim. With rapidly evolving case law on so many *Johnson*-related issues, district courts must decide whether to move forward on pending cases or to hold those cases in abeyance pending a clarification of the law from a higher court.

Either approach has downsides. If the court moves forward, it risks making the wrong decision. The court could rule against an individual who is actually eligible for relief, or it could rule in favor of an individual who, as it later turns out, is *not* eligible for relief. But if the court does not move forward,

---

[224] *Mathis*, 136 S. Ct. at 2253.
[225] *Id.*
[226] *Id.*

it risks keeping someone in prison who should not be there. The timing of these cases, moreover, can be unpredictable. Often, the district court cannot predict when a particular issue will reach the court of appeals, much less when it will be decided. In the case of a circuit split, the delay may be even longer if the Supreme Court grants review on the issue.

The issue of timing has come up in a variety of contexts. As explained above, prior to the Court's decision in *Beckles*, many courts concluded that *Johnson*'s holding applied to Career Offenders. As the petitioner's reply brief in *Beckles* noted, district courts resentenced Career Offenders in at least 88 cases nationwide.[227] In virtually all of those cases, the sentence was reduced, and some individuals were released from prison.[228] Other courts stayed the proceedings pending the outcome in *Beckles*. Following *Beckles*, it is now known that Career Offenders are not eligible for relief. Accordingly, individuals received different outcomes depending on whether courts decided the cases or held them in abeyance.[229]

Predicate offenses present an even more complex issue. As explained above, there is ongoing litigation over a wide variety of state statutes, and it remains unclear whether many of these offenses are categorically violent felonies. In response to this uncertainty, there is a wide divergence in court practices. Some courts have ruled on all *Johnson* motions, even where the status of a predicate offense has not been settled, and other courts have not ruled on any motions involving a predicate offense issue, even if the government has consented to relief. In many cases, the government has not appealed a ruling granting relief. As a result, some individuals may have been released, despite a later court of appeals ruling that would have made them ineligible for relief.

---

[227] Reply Brief for Petitioner at 12, App. 1-14, Beckles v. United States, 137 S. Ct. 886 (2017) (No. 15-8544), 2016 WL 6873025.

[228] *Id.*

[229] *Compare, e.g.*, Stampley v. United States, No. 1:11-cr-10302-IT, 2016 WL 4727136, at *4 (S.D.N.Y. Sept. 9, 2016) (allowing motion to vacate sentence for Career Offender and granting new sentencing hearing), *with* Bradley v. United States, No. 2:08-CR-691-PMD, 2016 WL 7188245, at *1 (D.S.C. Dec. 12, 2016) (denying defendant's motion to vacate after staying the proceedings pending the Supreme Court's decision in *Beckles* and the Fourth Circuit's decision in *Doctor*).

A case from the Second Circuit Court of Appeals, *United States v. Jones*, demonstrates these disparate outcomes with respect to the status of both the Career Offender Guideline and predicate offenses. In *Jones*, the panel originally held that in light of *Johnson*, first-degree robbery under New York law was no longer a crime of violence under the Career Offender Guideline.[230] In the weeks following *Jones*, several district courts proceeded to resentence Career Offenders and Armed Career Criminals on the basis that their New York robbery convictions were no longer crimes of violence or violent felonies.[231] In at least two of these cases, the government stipulated that the individual no longer qualified for the sentencing enhancement and consented to resentencing with an amended guidelines range.[232]

On August 8, 2016, the Second Circuit Court of Appeals panel issued an order staying the mandate in *Jones* in light of the Supreme Court's grant of review in *Beckles*.[233] Even with the stay, however, the precedential panel opinion remained in force. At least one district court declined to reconsider its prior decision to resentence an individual whose sentence had been enhanced under the ACCA.[234] On October 3, 2016, however, the Second Circuit panel vacated the opinion pending the Supreme Court's disposition in *Beckles*.[235] The court held the government's petition for rehearing and rehearing en banc in abeyance.[236]

Following the panel's order vacating the opinion in *Jones*, several district courts denied individuals relief under Section

---

[230] United States v. Jones, No. 15-1518-cr, slip op. at 5 (2d Cir. July 21, 2016), ECF No. 96.

[231] *See, e.g.*, Diaz v. United States, No. 1:11-CR-0381-MAT, 2016 WL 4524785, at *4 (W.D.N.Y. Aug. 30, 2016), *reconsideration denied* No. 1:11-CR-0381-MAT, 2016 WL 5404582 (W.D.N.Y. Sept. 28, 2016); Miles v. United States, No. 11 Cr. 581, 2016 WL 4367958, at *2 (S.D.N.Y. Aug. 15, 2016); Laster v. United States, No. 06 Cr. 1064, 2016 WL 4094910, at *3 (S.D.N.Y. Aug. 2, 2016).

[232] *See Miles*, 2016 WL 4367958, at *1; *Laster*, 2016 WL 4094910, at *3.

[233] *See* Order, *Jones*, No. 15-1518-cr (Aug. 8, 2016), ECF No. 107.

[234] *See Diaz*, 2016 WL 5404582, at *1.

[235] United States v. Jones, 838 F.3d 296 (2d Cir. 2016) (mem.).

[236] *Id.*

2255 on the basis that *Jones* no longer had persuasive force.[237] Because the order vacated the opinion specifically pending the *Beckles* decision, however, courts disagreed as to whether *Jones*'s holding with respect to the New York robbery offense still held precedential value.[238]

On September 11, 2017, the panel issued a new opinion affirming Jones' sentence as a Career Offender because, following *Beckles*, New York first-degree robbery categorically qualifies as a crime of violence under the Career Offender Guideline's residual clause.[239] In a concurring opinion, Judge Calabresi, joined by Judge Hall, called the result legally correct but "close to absurd."[240] Had the panel's original ruling come down slightly earlier, Jones would have been resentenced under a lower Guidelines range; had Jones committed his crime slightly later, he would have been sentenced under the current version of the Guidelines with no residual clause. Thus, "as a result of timing quirks," Jones received "a very, very high sentence in contrast with almost every similarly situated defendant."[241] As Judge Calabresi's concurrence highlights, under these rapidly changing rulings, whether a person received relief depended substantially on when the case was considered. The case law might favor relief in one month, but not the next.[242]

---

[237] *See, e.g.*, Rainey v. United States, No. 14-CR-197 (JMF), 2017 WL 507294, at *3 (S.D.N.Y. Feb. 7, 2017) (mem.); Stuckey v. United States, 224 F.Supp.3d 219 (S.D.N.Y. 2016); Bowles v. United States, No. Cr. 1:04-170, 2017 WL 770531, at *2-3 (D.S.C. Feb. 28, 2017).

[238] *Compare* Shabazz v. United States, No. 3:16-CV-1083 (SRU), 2017 WL 27394, at *14 (D. Conn. Jan. 3, 2017) (relying on *Jones* in considering whether Connecticut first degree robbery requires violent force), *with Rainey*, 2017 WL 507294, at *3 n. 3, *and Stuckey*, 224 F. Supp. 3d 219, 224-25 (S.D.N.Y. 2016) (holding that *Jones* is no longer good law and, under binding Second Circuit precedent, New York robbery is categorically a violent offense).

[239] United States v. Jones, No. 15-1518-cr, 2017 WL 3974269, at *2 (2d Cir. Sept. 11, 2017).

[240] *Jones*, 2017 WL 3974269, at *10 (Calabresi, J., concurring).

[241] *Id*.

[242] On October 5, 2017, the Second Circuit panel issued yet *another* superseding, amended opinion remanding the case "for further consideration as may be just under the circumstances." United States v. Jones, No. 15-1518-CR, 2017 WL 4456719, at *1 (2d Cir. Oct. 5, 2017)

One way of alleviating these disparities was to prioritize motions based on their projected release date. In some districts, the government agreed not to seek a stay in cases where individuals were eligible to be released either immediately or in the near future. In at least one district, individuals with release dates much farther out also consented to a stay motion even if they believed they were eligible for relief. This approach was helpful in clear-cut cases, it was not as useful in closer cases or in cases where legal conclusions were reversed on appeal. Ultimately, courts decided whether to grant a stay, and the decisions had the potential to impact case outcomes substantially.

C. Conclusion

In sum, the key findings of the study are that *Johnson* cases had greater resource impacts on the courts and greater potential to create disparities than Amendment 782 cases. While these findings are troubling in certain respects, the study also revealed an impressive level of care and attention to these cases, as well as a deep-seated commitment to just outcomes. Across districts, stakeholders adapted their procedures in order to manage the caseload efficiently and to give each case its due diligence.

IV. RECOMMENDATIONS AND LESSONS FOR COURT ADMINISTRATION AND SENTENCING POLICY

The findings of this study demonstrate that issues of judicial administration affect substantive case outcomes. This study makes specific recommendations for courts, judicial agencies, and Congress. For courts and judicial policy makers, the interviews revealed a rich array of best practices. Courts that acted proactively, rather than reactively, were the most successful in addressing challenges from *Johnson* and Amendment 782. For judicial agencies and policymakers, the study recommends facilitating information-sharing, training, and increased resources to assist courts in adopting proactive strategies. Finally, the study recommends that Congress

consider the judicial administration impacts of sentencing laws.

A. Lessons for Courts

This study recommends that courts adopt proactive strategies to address retroactive changes to sentencing law. Every district is different, and some practices may work in certain courts but not in others. All courts, however, benefit from identifying stakeholders and facilitating communication as soon as possible. This study identifies a number of possible best practices that courts may consider.

1. Centralize Administrative Procedures

Guidelines amendments lend themselves to centralized administrative procedures while judicial decisions often do not. Nevertheless, stakeholders highlighted several key areas with *Johnson* cases where centralization was both possible and desirable.

For one thing, judges and clerks of court can coordinate to create uniform filing instructions and deadlines that are uniform across an entire district. This uniformity can be achieved in various ways, such as standing orders or local rules. Uniform procedures can help prevent unnecessary confusion and administrative complexity for litigants and attorneys. The deadlines, moreover, can be generous and account for the unusual resource burdens imposed by these types of cases. Otherwise, attorneys may have to move for extensions of time—sometimes on multiple occasions—thus defeating the purpose of a uniform deadline. Further, many districts prioritized filings according to an individual's projected release date. This prioritization allowed courts to focus first on cases with the earliest possible release dates.

Courts may also create orders to communicate the status of particular cases. For example, at least one district judge issued standing orders explaining that certain cases were being held in abeyance while a pertinent decision was pending on appeal, and attached an appendix referencing all affected

cases. This type of standing order can provide greater clarity and uniformity regarding the status of certain classes of cases.

Finally, courts can adopt uniform procedural requirements for the probation office. Courts can agree, for example, on the requirements for amending the presentence reports (PSRs) for *Johnson* and Amendment 782 cases, including whether probation should provide a new PSR, an amended PSR, or simply an addendum with an amended guidelines range. Depending on the probation office's role in a particular district, courts can provide uniform instructions on the types of factual and legal considerations to be included in the amended PSR.

2. Appoint the Federal Defender as Counsel

This study found that broadly appointing federal defenders as counsel in *Johnson* cases helped courts in multiple ways. First, by screening cases and identifying eligible individuals, federal defenders removed some of the administrative burden for screening these cases from the courts. A standing appointment order enabled federal defenders and the probation office to coordinate on screening cases. At its best, this collaboration created redundancies that helped to ensure that all eligible individuals' claims were addressed. Similarly, federal defender participation helped alleviate the burden on *pro se* law clerks, who are responsible in many districts for making recommendations on *pro se* claims under Section 2255. Finally, the federal defender's appointment allowed individuals to communicate directly with counsel instead of communicating through the court.

Federal defender participation was also useful for resolving complex legal questions that arose in the wake of *Johnson*. Unlike Amendment 782, which typically presented debatable legal issues only in borderline cases, *Johnson* cases have inspired vigorous litigation on numerous issues. Resolution of these issues is best served by an adversarial process in which advocates present the issues to the court in a comprehensive and transparent way.

Appointing federal defenders as counsel ensured that individuals would be represented by competent, experienced advocates. Without appointment of federal defenders, courts

would have been required to resolve complex legal questions through a patchwork of *pro se* motions and motions from private or panel attorneys who may not have been experienced in the area of collateral remedies. Many eligible individuals might not have received relief because they did not present their claims properly. Further, legal issues might not have been developed adequately before the court, creating the risk of further confusion in the law.

3. Allow Placeholder Motions and Streamlined Government Responses

Though certainly not perfect, placeholder motions provided an important mechanism to ensure that motions were timely filed. Although Rule 2 of the Rules Governing Section 2255 Proceedings requires the motion to state a factual basis for relief, Rule 3(b) provides flexibility for technically deficient motions by requiring the clerk to file the motion even if it does not comply with the pleading requirements in Rule 2. Although a prior version of Rule 3(b) required the clerk to "ascertain . . . whether the motion on its face complies with Rule 2" prior to filing the motion, the rule was amended in 2004 to remove that requirement.[243] As the advisory committee's notes for Rule 3(b) explain, "a court's dismissal of a defective motion may pose a significant penalty for a moving party who may not be able to file a corrected motion within the one-year limitation period."[244] The advisory committee decided that the better procedure was to accept the defective motion and require the moving party to submit an amended motion.[245]

In addition, Rule 5(a) permits the court to decide the motion without requiring a government response.[246] In appropriate cases, the court may decide not to require a government response at all, or it may require the government to respond only with respect to the most important disputed

---

[243] *See* Michel v. United States, 519 F.3d 1267, 1270 (11th Cir. 2008).

[244] *Id.* (quoting RULES GOVERNING SECTION 2255 PROCEEDINGS advisory committee's notes to R. 3).

[245] *Id.* (quoting RULES GOVERNING SECTION 2255 PROCEEDINGS advisory committee's notes to R. 3).

[246] RULES GOVERNING SECTION 2255 PROCEEDINGS R. 5.

issues in a particular case. Together, these efforts to streamline the proceeding, as contemplated by the Rules, can save significant resources while also ensuring that defendants have the opportunity to have their claims decided by the court.

4. Adopt a Comprehensive Approach to the Reentry Process

Johnson cases presented certain difficult situations not contemplated by existing administrative rules and procedures. Courts often responded by crafting creative, but admittedly controversial, solutions. For example, relying on the inherent authority of the courts, many judges elected to impose a small delay in the amended judgment in *Johnson* cases, such as 10 or 14 days. This delay was seen as necessary for the BOP to process the release and for the BOP and the probation office to coordinate on a release plan. Often, the delay gave the person time to locate relatives and find suitable housing. At the same time, many stakeholders believed that courts lacked the authority to delay imposition of the amended judgment. Any delay, moreover, subjected individuals to further unconstitutional imprisonment and imposed serious hardship.

As another example, there are several possible, yet unconventional, ways to ensure that individuals who received lengthy credits for overserved time are, in fact, sanctioned for violations of supervised release. For example, because the BOP will honor a sentence imposed in connection with a federal prosecution, non-compliant individuals can be charged with contempt of court under 18 U.S.C. § 401 or obstruction of court orders under 18 U.S.C. § 1509.

With *Johnson* cases, courts have been put in the difficult position of crafting policies that balance the interests of fairness and public safety. A more comprehensive approach is needed to coordinate the efforts of courts and the BOP and to prepare individuals sufficiently for reentry into society.[247]

---

[247] In addition, service organizations outside of the judiciary can take a proactive role. For example, the nonprofit organization Project New Opportunity assists with "ensur[ing] the successful return of men and women" whose time in prison was shortened due to a grant of clemency or sentence commutation, a reduction under Amendment 782, or resentencing due to *Johnson*, and helps individuals obtain identification and connect with supporting family, community

B. Lessons for Judicial Agencies

Changes such as Amendment 782 and *Johnson* impact judicial administration at many levels. Given the many administrative differences between district courts, it may not be practical or desirable to offer standard practices to be implemented uniformly throughout the court system. Still, there are several ways in which judicial agencies can support courts implementing retroactive changes to sentencing law. The key benefit of each of these measures is to enable courts to respond proactively.

1. Facilitate the Creation of Eligibility Lists

Judicial agencies can support courts by helping them identify individuals affected by retroactive changes to sentencing law—a time and resource consuming task. When these changes occur, the Sentencing Commission creates lists of those affected, and distributes them to courts upon request by a chief judge.[248] This process, however, could be improved.

First, the Commission's lists are often not complete because the Commission does not always have access to relevant data. Further, data sources such as PSRs are not written or formatted in a way that can be easily analyzed as part of a data set. As a result, the Commission's eligibility lists for Amendment 782 were not always complete; the *Johnson* lists included individuals sentenced by specific offense type, such as ACCA or Career Offender, but did not provide which individuals were sentenced based on the residual clause. Without more complete data, the Commission is not always in a position to assess the magnitude of a legal change or identify all eligible individuals.

The Judicial Conference could examine whether there are ways to encourage greater sharing of sentencing data in order

---

members, and social agencies. *See* PROJECT NEW OPPORTUNITY, *About,* http://projectnewopportunity.org/about/ [https://perma.cc/9NQM-ZMS9].

[248] *See* REPORT OF THE CRIMINAL LAW COMMITTEE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES at 11-12 (Mar. 2016) (encouraging chief district judges to request from the Sentencing Commission a list of inmates who are potentially eligible for relief under *Johnson* and share those lists with local district stakeholders).

to facilitate the creation of complete eligibility lists. For example, there could be further collaboration between the BOP, the Commission, and the courts regarding sentencing and prison records. In addition, the Judicial Conference could examine whether it may be prudent to encourage judges to provide more specific information regarding the basis for a sentencing enhancement during the sentencing proceedings. Part of the difficulty in assessing the potential impact of *Johnson* was that judges often did not explain which clause of the ACCA provided the basis for the sentence enhancement. Providing such information can be a best practice that makes clear the reasons for imposing a substantial sentencing enhancement. These actions may require changes to existing Judicial Conference policies.

Second, stakeholders indicated that the Commission's procedure of distributing eligibility lists upon request of a district's chief judge did not always function optimally. One possible solution would be to implement a procedure where the Commission makes the lists more widely available within the judiciary, such as distributing lists to all district judges. Currently, broader information sharing within the judiciary is inhibited by policies requiring the Commission to keep certain sentencing information confidential.[249] Although it is important to keep individuals' sensitive information from being distributed publicly, these confidentiality concerns are less compelling in the context of providing assessments to courts about individuals whose information came from the courts to begin with.

In addition, the Judicial Conference can consider delegating authority to relevant committees, such as the Criminal Law or Defender Services Committees, to collaborate on a collective effort to obtain the lists. These committees can write the Commission to formally request the lists and ensure that the lists are distributed to judges. Those committees can also resolve any disputes that arise between stakeholders in a district over access to the lists.

---

[249] *See* Public Access to Sentencing Commission Documents and Data, 54 Fed. Reg. 51,279 (Dec. 13, 1989).

2. Create Opportunities to Share Training, Information, and Resources

Many common themes and issues emerged from the study interviews. Stakeholders may benefit from having greater opportunities to learn from others with common challenges. Information sharing between stakeholders and districts with respect to successful practices and lessons learned can be particularly useful.

Information sharing can take several forms. First, information-sharing summits can provide stakeholders with the opportunity to plan for large-scale changes in sentencing law. For example, the federal probation community held national conferences to prepare for various Guidelines amendments. These summits included both content-based panels and breakout sessions so that local probation officers and BOP officials could coordinate on various reentry issues specific to their district or division.

Second, information sharing can take the form of an online forum or an ad hoc advisory group. Building on existing practices, the Administrative Office of the U.S. Courts can provide a forum for stakeholders to communicate on a regular basis and to share questions and best practices. The forums can be organized by district or by the particular type of stakeholder (e.g., clerks of court or district judges).

Third, agencies such as the Federal Judicial Center (FJC) and the Sentencing Commission can provide training and guidance, drawing on experts in the field. The training can include guidance about the law and help stakeholders keep up with changes in case law in each circuit. In addition, these entities can provide sample template forms and standing orders for districts to use.

Finally, judicial agencies can consider opportunities to increase the agility of resource allocation and sharing in circumstances like these cases. Part of the challenge with *Johnson* and Amendment 782 is that these decisions resulted in a huge influx of cases with a limited duration. The judiciary employs a process known as work measurement to provide an empirical and statistical basis for staff requirements in the

courts.[250] These formulas are based on experience and observation, combined with statistical techniques.[251] Prior experience does not always predict future caseload needs, however, especially when there is an anomalous caseload surge, and workload measurement formulas may not fully address the need for a temporary increase in resources.

3. Update Rules for Resentencing Proceedings

Agencies could examine whether rules or procedures need to be updated in order to provide better support to judges. For example, the rules committee can consider whether the Rules Governing Section 2255 needs be updated, since they have not been updated since 2004. It may be helpful to clarify whether placeholder motions should be permitted, among other changes.

As another possibility, although the Criminal Justice Act provides the courts authority to appoint counsel in Section 2255 cases, the authority to appoint counsel in Section 3582(c) cases is less clear. While most courts view the appointment of counsel under Section 3582(c) to be part of the inherent authority of the court, the Judicial Conference may consider updating the Guide to Judiciary Policy to clarify its position on this issue.

---

[250] *See generally* U.S. COURT REPORTERS ASS'N, COURT REPORTERS WORK MEASUREMENT STUDY: FREQUENTLY ASKED QUESTIONS 4 (Dec. 2015) [hereinafter COURT REPORTERS WORK MEASUREMENT STUDY] (defining work measurement as "a general term that encompasses the systematic collection and statistical analysis of workforces and the work they perform for the purposes of empirically deriving a formula that accurately and equitably measures staffing requirements"), *available at* http://www.uscra.org/cnwp/wp-content/uploads/FAQs-FINAL-December-2015.pdf [https://perma.cc/EZ46-C56J]; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-97, FEDERAL JUDICIARY: IMPROVED COST SAVINGS ESTIMATES COULD HELP BETTER ASSESS COST CONTAINMENT EFFORTS 21 tbl.1 (Nov. 2015) ("Work measurement is intended to allow the judiciary to determine required staffing levels, provide justification for budget requests, and allocate staff resources.").

[251] *See* COURT REPORTERS WORK MEASUREMENT STUDY, *supra* note 250, at 4.

4. Update the Bench Book or Create a Pocket Guide

Finally, the FJC can build upon this study by updating its bench book for district judges with guidance on resentencing proceedings. As a concise, "practical guide to . . . situations [federal judges] are likely to encounter on the bench,"[252] the benchbook can provide a roadmap of the issues judges may face and the possible options for addressing them. In addition, the FJC can produce a pocket guide similar to the guide Capital § 2254 Habeas Cases: A Pocket Guide for Judges (2012), for resentencings under guidelines amendments and Section 2255.

C. Lessons for Congress

Ultimately, many of the issues in court administration were caused not by the *Johnson* and *Welch* decisions, the categorical approach, or other jurisprudential developments, but rather by the statutory language chosen by Congress in the ACCA and Section 2255. One of the primary lessons learned from *Johnson* is that these statutes interact to create anomalous results, contrary to the purposes of sentencing and to Congress's apparent intent behind the ACCA. Congress can consider revising these statutes in several ways.

1. Amend the Statute of Limitations in Section 2255

In order to reduce the administrative uncertainty and potential burden on the judiciary's ability to administratively manage cases resulting from new constitutional rules, Congress could add a triggering date in the statute of limitations in Section 2255 for successive motions that runs from the date the Supreme Court makes a new rule of constitutional law retroactive. As the Supreme Court recognized in *Dodd v. United States*, the plain text of the statute of limitations provision has "the potential for harsh results."[253] As the Court stated:

---

[252] FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES iii (5th ed. 2007).

[253] Dodd v. United States, 545 U.S. 353, 359 (2005).

> [T]his Court rarely decides that a new rule is retroactively applicable within one year of initially recognizing that right. Thus, because of the interplay between ¶¶8(2) and 6(3) [as amended, (h)(2) and (f)(3)], an applicant who files a second or successive motion seeking to take advantage of a new rule of constitutional law will be time barred except in the rare case in which this Court announces a new rule of constitutional law and makes it retroactive within one year.[254]

While the *Dodd* Court's reading of Section 2255 certainly has negative consequences for individuals seeking relief, the results of this study also demonstrate the negative results for judicial administration. In the rare situation in which the Supreme Court makes a constitutional decision retroactive within the statute of limitations period, courts will be required to respond to the change within a vanishingly short period of time. Inundated with thousands of cases, some courts may simply be overwhelmed. As many stakeholders reported, without more resources, courts are focusing on reopening old cases at the expense of addressing new and pending cases.

It seems unlikely that such an irrational time crunch is what Congress intended in Section 2255. As Justice Stevens points out in his dissent in *Dodd*, "the probable explanation for [the] statutory text . . . is Congress' apparent assumption that our recognition of the new right and our decision to apply it retroactively would be made at the same time."[255] While Congress's intent to restrict Section 2255 motions is well-understood, it is less clear that Congress understood the ramifications of the restrictive statute of limitations in circumstances where Section 2255 motions *are* permitted, such as the *Johnson* and *Welch* decisions. Permitting the statute of limitations to run from the date a decision is made retroactive would give the courts adequate time to process motions, similar to the delay in Amendment 782's effective date. Further, this change would not affect the class of individuals that benefit from a new constitutional rule.

---

[254] *Id.*

[255] *Id.* at 364 (Stevens, J., dissenting).

2. Revise the Armed Career Criminal Act

Congress could revise the Armed Career Criminal Act in several ways. One remedy would be to close the sentencing gap between the fifteen-year mandatory minimum for those subject to the ACCA and the ten-year maximum for those who are not. The Sentencing Reform and Corrections Act of 2015, if passed, would partially remedy this gap by lowering the mandatory minimum from fifteen to ten years and allowing courts to apply the change retroactively.[256] In cases where it is unclear whether a predicate conviction is a violent felony, courts would have flexibility to impose a sentence in the ten to fifteen-year range. According to the Sentencing Commission, this reform would result in sentence reductions for approximately 2,317 individuals, with an average sentence reduction of 35 months.[257] This solution, however, would not allow courts to impose a sentence of less than ten years even if such a sentence would be appropriate.

Another possibility is to reexamine the use of the categorical approach, which many stakeholders suggested is unworkable. The suggested alternatives, however, also have downsides. For example, citing the "overly complex and resource-intensive" nature of the categorical approach, the Sentencing Commission recently replaced the categorical approach in the guideline for illegal reentry offenses with an approach based on the length of sentences imposed for a prior offense.[258] Although this approach may prove less complex than the categorical approach, the potential for disparities remains, since sentences imposed may vary based on charging and sentencing practices in particular jurisdictions.

Additionally, several stakeholders suggested that Congress could define more explicitly which offenses are

---

[256] *See* S. 2123, 114th Cong. § 105 (2015).

[257] *See Hearing on "S. 2123, Sentencing Reform and Corrections Act of 2015" Before the S. Comm. on the Judiciary*, 114th Cong. 9 (2015) (statement of Hon. Patti Saris, Chair, U.S. Sentencing Comm'n).

[258] U.S. SENTENCING COMM'N, Amendments to the Sentencing Guidelines 27-28 (eff. Nov. 1, 2016), https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/20160428_Amendments.pdf [https://perma.cc/J2X3-4RTY].

subject to the sentencing enhancement. One stakeholder noted, for example, that 18 U.S.C. § 1956, which prohibits money laundering, contains a lengthy list of crimes defined as "specified unlawful activit[ies]."[259] Adopting such a list, however, may lead to further litigation over the definitions of listed crimes and may not address the various definitions of state crimes.

In any event, Congress can determine whether there are simpler, more tailored ways to provide sentencing enhancements based on a defendant's criminal history. In order to avoid further unintended consequences, the potential implications of various alternatives require in-depth study and analysis.

3. Reconsider the Use of Mandatory Minimum Sentences

Congress can reconsider the use of mandatory minimum sentences such as the ACCA. The Judicial Conference has long opposed mandatory minimum sentences because they result in unnecessary prison and supervision costs, impair the Sentencing Commission's efforts to fashion Guidelines consistent with the principles of the Sentencing Reform Act, and often lead to inconsistent or disproportionately severe sentences.[260] Challenges confronted during the implementation of the *Johnson* decision also highlight the effects on judicial administration.

More broadly, the results of *Johnson* and Amendment 782 show that mandatory minimum sentences result in less transparency in sentencing. This lack of transparency poses a major hurdle to the creation of evidence-based sentencing policies, including effective sentencing reforms. With a system of mandatory sentencing, defendants are often charged for an offense with the highest mandatory minimum sentence available, not for an offense that best reflects the conduct committed. Without examining the individual facts of these

---

[259] *See* 18 U.S.C. § 1956(c)(7) (2012).

[260] *See* Testimony of Judge Irene Keeley, Chair of the Comm. on Criminal Law, before the United States House of Representatives Comm. on the Judiciary, Over-Criminalization Task Force of 2014, July 11, 2014, at 6.

cases, it is difficult to generalize about the nature of drug offenders or ACCA offenders or to make sound policy decisions that take these dynamics into account. As a result, judges are often required to impose vastly overbroad statutory penalties that are not tailored to an individual's circumstances.

An advisory guidelines system, while certainly not perfect, is more administrable and transparent than a mandatory minimum sentencing scheme. The advisory guidelines system gives judges the flexibility to impose an individualized sentence consistent with the purposes of the Sentencing Reform Act. A system of guided discretion results in more predictable and consistent outcomes, both at an original sentencing proceeding and if a court resentences an individual at a later time. For these reasons, an advisory guidelines system is better suited to achieve Congress's goal of penalizing violent individuals more harshly and preserving public safety.

4. Provide Alternatives to Section 2255 for Resentencing

The findings of this study demonstrate that Section 2255 is an inefficient, burdensome vehicle for resentencing claims. The finality interests protected by the numerous procedural hurdles in Section 2255 are far more compelling in the context of convictions than in sentencing.[261] When the Supreme Court, the Sentencing Commission, or another entity makes retroactive changes to sentencing law, the interests of judicial administration and fairness are better served by a procedure that allows courts to resolve these claims using straightforward, efficient procedures.

Congress could reconsider changes made in the Sentencing Reform Act of 1984, which eliminated parole in the federal system and revised Federal Rule of Criminal Procedure 35 to

---

[261] *See, e.g.*, United States v. Williams, 399 F.3d 450, 456 (2d Cir. 2005) (noting that "the cost of correcting a sentencing error is far less than the cost of a retrial" because "[a] resentencing is a brief event, normally taking less than a day" and "review of a sentencing error, unlike a trial error, does not require the appellate court to make its estimate of whether it thinks the outcome would have been non-trivially different had the error not occurred").

make it more difficult to correct an illegal sentence.[262] Most simply, Rule 35 could be revised to once again allow courts to correct an illegal sentence. In addition, 18 U.S.C. § 3582 could be amended to encompass claims based on a sentence that is illegal, unconstitutional, or otherwise subject to collateral attack. These revisions would make resentencing proceedings simpler administratively and allow courts greater flexibility.

CONCLUSION

Across the districts visited, I was extremely impressed with stakeholders' thoughtful attention not only to the immediate duties of the courts, but also to the policy implications. Despite formidable administrative hurdles, courts are constantly innovating to address the issues that arise. The study's findings illustrate the importance of competent, effective judicial administration to the legal system. Court decisions are not simply legal holdings, but take on new life as courts implement them using a complex network of stakeholders with competing, sometimes conflicting, interests and motivations. Administrative procedures may have policy consequences, and local variations may lead to differences in outcome.

Above all, the findings of this study underscore the value in having a body of sentencing law that is predictable and stable over time. Attempts to correct a sentence after the fact run the risk of creating human costs, upsetting settled expectations, and imposing administrative burdens. A system of sentencing law should aim for sentences that are clear, certain, and fair. The cost of error may be too high otherwise.

---

[262] Pub. L. No. 98-473, §§ 212, 215, 98 Stat. 1837, 1987, 2015-16 (1984); *see generally* Russell, *supra* note 79, at 91-97.