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1 P R O C E E D I N G S

2 (10:09 a.m.)

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

6 Mr. Ali.

7 ORAL ARGUMENT OF AMIR H. ALI

8 ON BEHALF OF THE PETITIONER

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

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

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

24 JUSTICE GINSBURG: Well --

25 MR. ALI: If --

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

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

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

25 So Johnson didn't say, Government, if you

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

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

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

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

1                   MR. ALI: Your Honor, we believe that with  
2 liberal pro se pleading standards, that what's said on  
3 96 and what's said on page 83 where Petitioner invokes  
4 his Fifth Amendment right to due process, combining that  
5 with the language here, that he does not mean -- meet  
6 Armed Career Criminal requirements because it's, quote,  
7 "ambiguous, vague, and without any violence," we think  
8 that would satisfy it. But more importantly, we think  
9 that that --

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

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

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

25                  JUSTICE ALITO: You would have --

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

7                     CHIEF JUSTICE ROBERTS: Thank you, counsel.  
8                     Mr. Dreeben.

9                     ORAL ARGUMENT OF MICHAEL R. DREEBEN  
10                    FOR THE RESPONDENT

11                    IN SUPPORT OF VACATUR AND REMAND

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

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

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

24                    The reason --

25                    JUSTICE SOTOMAYOR: I'm a little troubled by

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

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

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

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

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

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

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

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

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

25                  JUSTICE KENNEDY: What happens --

1 JUSTICE GINSBURG: If --

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

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

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

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

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

1 sentence.

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

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

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

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

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

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

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

17 MR. DREEBEN: That is correct.

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

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



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

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

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

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

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

1 authorized.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 MR. DREEBEN: Yes.

23 JUSTICE ALITO: -- properly before us?

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

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

7 CHIEF JUSTICE ROBERTS: Sure.

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

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

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

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
21 Ms. Walker.

22 ORAL ARGUMENT OF HELGI C. WALKER

23 FOR THE COURT-APPOINTED AMICUS CURIAE

24 IN SUPPORT OF THE JUDGMENT BELOW

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

1 please the Court:

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

8 You should not do so for the first time  
9 here.

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

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



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

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

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

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

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

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

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

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

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

1 sentences.

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

6 JUSTICE SOTOMAYOR: Why don't we --

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

10 MS. WALKER: That was Coates.

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

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

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

25 So Coates fully supports our reading of the

1 void-for-vagueness doctrine.

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

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

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

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

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

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

4 MS. WALKER: They're different in two ways.  
5 Yes, you did, Justice Sotomayor.

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

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

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

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

24 MS. WALKER: That is --

25 JUSTICE SOTOMAYOR: It has to step in and

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

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

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

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

18 MS. WALKER: Yes, and that showed --

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

22 MS. WALKER: So what --

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

25 MS. WALKER: Right.

1 JUSTICE SOTOMAYOR: -- to --

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

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

14 CHIEF JUSTICE ROBERTS: So it's a --

15 JUSTICE GINSBURG: How do you --

16 CHIEF JUSTICE ROBERTS: Please.

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

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

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

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

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



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

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

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

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

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

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

1 and, therefore, they get out.

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

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

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

21 JUSTICE BREYER: Yeah.

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

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

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

3                     MS. WALKER:   And that's --

4                     JUSTICE BREYER:   See?

5                     MS. WALKER:   -- the statute --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 MS. WALKER: Well, it actually --

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

4 MS. WALKER: I would love to.

5 JUSTICE BREYER: All right.

6 (Laughter.)

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

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

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

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

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

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

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



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

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

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

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

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

23 MS. WALKER: Absolutely.

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

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

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

10 MS. WALKER: Yes.

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

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

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

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

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

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

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

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

1       wrongly.

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

4                   CHIEF JUSTICE ROBERTS:   Yes.

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

7                   CHIEF JUSTICE ROBERTS:   What's another  
8       example?

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

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

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

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

7                     If the Court has no further questions.

8                     CHIEF JUSTICE ROBERTS: Thank you, Counsel.

9                     MS. WALKER: Thank you.

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

12                    REBUTTAL ARGUMENT OF AMIR H. ALI

13                    ON BEHALF OF THE PETITIONER

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

15                    I just have a couple of quick points to  
16     make.

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

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

25                    CHIEF JUSTICE ROBERTS: Yeah. Well, she --

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

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

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

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

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

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

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

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

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

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

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

3 MR. ALI: Sure.

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

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

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

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

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



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

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

5 JUSTICE BREYER: I'm sure you would.

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

25 And that's what makes this case much more

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

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

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

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

1 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

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

6 The case is submitted.

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