IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, Petitioner,

v.

JAMES BUCHANAN BARNES, Respondent.

The petition for a writ of certiorari is granted. The parties are directed to brief the following questions:

(1) Since the residual clause defining a "crime of violence" in the United States Sentencing Guidelines § 4B1.2(a)(2) is identical to the residual clause in 18 U.S.C. § 924(e)(2)(B)(ii) that this Court held unconstitutional in *Johnson v. United States*, 135 S. Ct. 2551 (2015), does that ruling apply to the Sentencing Guidelines, thus invalidating the definition of possession of a sawed-off shotgun as a "crime of violence"?

(2) If *Johnson* applies under the Sentencing Guidelines, should it apply retroactively?

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF WESTCHESTER

JAMES BUCHANAN BARNES,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

ORDER

Movant James Buchanan Barnes filed a Motion to Vacate pursuant to 28 U.S.C. § 2255 attacking his federal sentence for being a felon in possession of a firearm on the basis that he was erroneously classified as a career offender under the Sentencing Guidelines. The parties have fully briefed the issue, and oral argument was held before the undersigned. For the foregoing reasons, this court **DENIES** Barnes's Motion to Vacate his sentence.

I. BACKGROUND

On December 16, 2007, at approximately 2 a.m., Barnes held two victims at gunpoint in the back alley of a popular nightclub in downtown Samford, Westchester. Barnes took the victims' wallets, cellular phones, and other valuables, and threatened to shoot them if they should scream or call for help. After Barnes fled the scene, the victims promptly reported the incident to local authorities. During the initial investigation, detectives uncovered video from the nightclub's surveillance system of Barnes, with a clear shot of his face, fleeing the scene.

Facial recognition software pointed the detectives to Barnes, who was previously in their system from his extensive criminal history that spans decades.

A search warrant was issued for Barnes's last known address on December 21, 2007, and was executed while Barnes was not present at the residence. While law enforcement officers did not recover the victims' property or the firearm that the victims described in the robbery, they did recover a pump-action shotgun with a sawed-off barrel. Based on this evidence, the government indicted Barnes on one count of being a felon in possession of a firearm.

On August 4, 2008, Barnes pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). Following the plea, the probation office prepared a Pre-Sentence Investigation Report ("PSR"), which recommended that Barnes be sentenced as an armed career criminal pursuant to the Armed Career Criminal Act ("ACCA"). 18 U.S.C. § 924(e), which requires that a minimum sentence of 15 years (180 months) be imposed. The offense statutory maximum is a life sentence.

The PSR recommended that Barnes also be sentenced as a career offender under the United States Sentencing Guidelines ("USSG") § 4B1.1 sentencing enhancement due to his three prior felony convictions for drug offenses[1] and because the instant offense of possessing a sawed-off shotgun was a felony crime of violence. This court agreed, and calculated Barnes's sentence based on a total offense level of 34 and a criminal history category of VI. This put Barnes's sentencing range from 262–327 months. This court sentenced him at the low end of that Guidelines range to 262 months' imprisonment.

After his unsuccessful attempt to overturn his conviction and sentence on direct appeal, Barnes brings this habeas petition to challenge his sentence, asserting that this court wrongfully

[1] Barnes concedes that his prior drug offense convictions qualify as "controlled substance offense[s]" under USSG §§ 4B1.1(a), 4B1.2(b).

applied the career offender sentencing enhancement of USSG § 4B1.1. According to Barnes, possession of a sawed-off shotgun is not a "crime of violence" as defined in USSG § 4B1.2.[2] Thus, Barnes argues that his offense level should have been determined under USSG § 4B1.4(b)(3)(A), which would have yielded a lower sentencing range of 188–235 months.

II. LEGAL STANDARD

28 U.S.C. § 2255, entitled "Federal custody; remedies on motion attacking sentence" provides, inter alia,

> (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

The Supreme Court has made clear that an error of law provides a basis for collateral attack only when "the claimed error constitute[s] a fundamental defect which inherently results in a complete miscarriage of justice." *United States v. Addonizio*, 442 U.S. 178, 185 (1979). A non-constitutional error that results in a miscarriage of justice "should present exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *Hill v. United States*, 368 U.S. 424, 428 (1962) (quotation omitted). Errors that seriously undermine the validity of criminal proceedings have been held to constitute a miscarriage of

[2] Under the operative 2008 Guidelines, under which Barnes was sentenced, § 4B1.2(a) defines a "crime of violence as a federal or state offense punishable by a term of imprisonment exceeding one year, that —

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*."

(emphasis added). The Application Notes indicate that "crimes of violence" includes "the possession . . . of a firearm described in 26 U.S.C. § 5845(a)" which another application note clarifies as including (e.g., a sawed-off shotgun." This understanding was made explicit in the recent 2016 Guidelines, which explicitly classifies carrying weapons as described in 26 U.S.C. § 5845(a) as being a crime of violence under the amended USSG § 4B1.2(a)(2). Both parties agree that the 2008 Guidelines control this case.

justice. *See, e.g.*, *Ayuso v. United States*, 361 Fed. App'x 988, 991 (11th Cir. 2010) (distinguishing guideline miscalculation sentencing claims from errors that constitute a miscarriage of justice which implicate a fundamental defect in the validity of the district court proceedings).

III. DISCUSSION[3]

Barnes argues that this court should grant him habeas relief pursuant to 18 U.S.C. § 2255 on the basis that his misclassification as a career offender during sentencing proceedings violated the laws of the United States and constituted an error so egregious that it resulted in a miscarriage of justice. More specifically, he argues that recent holdings of the Supreme Court and Eleventh Circuit—*Begay v. United States*, 553 U.S. 137 (2008), *United States v. Archer*, 531 F.3d 1347 (11th Cir. 2008), and *United States v. McGill*, 618 F.3d 1273 (11th Cir. 2010)—manifest a change in law that possession of a sawed-off shotgun is not a crime of violence.[4]

In addressing this court's application of the career offender sentencing enhancement, the court looks to the armed career criminal guidelines first. The USSG provide that the offense level for an armed career criminal is the greater of "the offense level from § 4B1.1 (Career Offender) if applicable," or "34, . . . if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a)." USSG § 4B1.4(b). Barnes concedes that a sawed-off shotgun is indeed a type of firearm described in 26 U.S.C. § 5845(a). He argues, however, that the court erred in adopting and applying § 4B1.1. Admittedly, the advisory notes that interpret § 4B1.1

[3] Our newly created Twelfth Circuit has yet to address this issue squarely, so we rely upon 11th Circuit precedent, from which the Twelfth Circuit was recently split. *See, e.g.*, *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (holding that the Eleventh Circuit would follow Fifth Circuit precedent upon its splitting from the Fifth Circuit).

[4] While the general rule is that a petitioner cannot raise an issue for habeas relief that could have been raised on direct appeal, *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004), Barnes may proceed with this action because this line of cases was decided after Barnes's direct appeal.

state that "[u]nlawfully possessing . . . a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun is a crime of violence." USSG § 4B1.2, cmt. 1. Barnes believes this Guidelines Advisory Note is superseded by the recent precedent of *Begay*, *Archer*, and especially *McGill*, which he argues hold that possession of a sawed-off shotgun is not a "crime of violence."

Archer and *McGill* were both premised on the Supreme Court decision in *Begay*, which clarified the definition of "violent felony" as the term is used in the ACCA. *See* 18 U.S.C. § 924(e). Thus, *Archer* held that carrying a concealed firearm was not a crime of violence under the career offender enhancement, 531 F.3d at 1351–52, and *McGill* held that possession of a sawed-off shotgun is not a "violent felony" under the ACCA. 618 F.3d at 1277–79. In light of the almost identical interpretation afforded to the residual clauses of the ACCA and the criminal offender enhancement, Barnes argues that *Archer* and *McGill* are persuasive precedents that possession of a sawed-off shotgun should not have been used to enhance Barnes's sentence as a criminal offender.

The government argues, however, that *United States v. Hall*, 714 F.3d 1270 (11th Cir. 2013), controls this case. In *Hall*, the Eleventh Circuit held that possession of an unregistered sawed-off shotgun was a crime of violence under the career offender enhancement. *Hall* explicitly addressed *McGill* and found that it did not control in the context of the career offender enhancement "because the text of the ACCA [at issue in *McGill*] is silent on whether an unregistered sawed-off shotgun is a 'violent felony,' unlike the commentary to § 4B1.2, which affirmatively lists possession of a sawed-off shotgun as a 'crime of violence.'" *Id.* at 1270. Thus, the court held unequivocally "that the definition of 'crime of violence' provided by the

Guidelines commentary is authoritative." *Id.* at 1274 (citing *Stinson v. United States*, 508 U.S. 36, 38 (1993)).

While Barnes is aware of the holding in *Hall*, he argues that it was wrongly decided, and that it breaks with precedent that the residual clauses of the ACCA and career offender enhancements should be interpreted interchangeably. *See Gilbert v. United States*, 640 F.3d 1293, 1309 n.16 (11th Cir. 2011) (en banc). This court, however, does not depart from this principle, but rather acknowledges that the reasoning in *Hall* is persuasive because of the practical difference that the ACCA does not have an accompanying set of interpreting regulations, whereas the career offender enhancement does. Thus, we find *Hall* persuasive, which effectively forecloses Barnes's arguments.

IV. CONCLUSION

For the reasons stated herein, Barnes's Motion to Vacate his sentence is **DENIED**.

IT IS SO ORDERED.

s/ J. Rhodes
James Rupert Rhodes
United States District Court Judge

UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

JAMES BUCHANAN BARNES

Appellant,

v.

UNITED STATES OF AMERICA

Appellee,

Before: ROGERS, STARK, and WILSON, Circuit Judges.

OPINION

ROGERS, Circuit Judge:

James Buchanan Barnes appeals the district court denial of his motion to vacate his sentence under 28 U.S.C. § 2255 for his misclassification as a career offender. Barnes argued that possession of a sawed-off shotgun was not a "crime of violence" under the United States Sentencing Guidelines ("USSG"). USSG §§ 4B1.1, 4B1.2. During the course of this appeal, the Supreme Court declared the residual clause of the Armed Career Criminal Act ("ACCA") unconstitutional. *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015). Because we believe

that this decision also applies to the identical language in the residual clause of the career offender sentencing enhancement, we find that provision unconstitutional with retroactive effect, and conclude that Barnes cannot be found a career offender under this clause.

I. *Background*

In 2008, Barnes was indicted by a grand jury and pleaded guilty to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g), after police found a sawed-off shotgun at Barnes's residence while executing a lawful search warrant. Barnes was sentenced by the district court under the ACCA due to his previous three convictions for "serious drug offenses." 18 U.S.C. § 924(e)(2). The statutory penalty for the ACCA is a mandatory minimum of 180 months, and a maximum of life imprisonment. *Id.* § 924(e)(1).

In addition to this statutory requirement, the court also applied the sentencing enhancement in § 4B1.1 of the United States Sentencing Guidelines ("USSG"), finding that Barnes's previous drug offenses were "controlled substance offense[s]" and that the instant offense of possessing a sawed-off shotgun was a "crime of violence." USSG § 4B1.2(a), (b). Under the sentencing structure, the court found that Barnes had a total offense level of 34, *id.* § 4B1.1(b)(A), and a criminal history category of VI, which yielded a Guidelines range of 262–327 months. The court sentenced Barnes at the low end of the Guidelines range to a 262 month imprisonment. Barnes challenged his classification as a career offender on direct appeal, but this court affirmed.

In the years since, the Supreme Court and the Eleventh Circuit have shaken up this area of federal sentencing with a host of paradigm shifting opinions. *Johnson v. United States*, 135 S. Ct. 2551 (2015), *Begay v. United States*, 553 U.S. 137 (2008), *United States v. Archer*, 531 F.3d 1347 (11th Cir. 2008), *United States v. McGill*, 618 F.3d 1273 (11th Cir. 2010), *United States v.*

Hall, 714 F.3d 1270 (11th Cir. 2013), and others have all touched on these issues in their own way. *Begay* instituted new standards for applying the residual clause of the ACCA, and begat *Archer* and *McGill*, which held that carrying a concealed weapon was not a "crime of violence" for career offender sentencing purposes, and that possession of a sawed-off shotgun was not a "violent felony" under the ACCA respectively. *Begay*, 553 U.S. at 145–48; *Archer*, 531 F.3d at 1351–52; *McGill*, 618 F.3d at 1279. *Hall*, decided only a few years later, held that possession of a sawed-off shotgun was a "crime of violence" under the career offender enhancement. *Hall*, 714 F.3d at 1273–74. *Johnson*, however, invalidated the residual clause of the ACCA—which bears the exact language of the residual clause of the career offender enhancement—for being unconstitutionally vague.

II. *Discussion*

This appeal requires our consideration of several questions, including whether *Johnson* applies to the career offender sentencing enhancement and whether it should apply to Barnes's case retroactively. In a § 2255 proceeding, we review questions of law de novo. *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004).

The Due Process Clause of the Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const., amend. V. The government "violates this guarantee by 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." *Johnson*, 135 S. Ct. at 2556.

Johnson determined that "[t]wo features of the residual clause conspire to make it unconstitutionally vague." *Id*. First, the "ordinary-case" analysis creates "grave uncertainty about how to estimate the risk posed by a crime." *Id*. Second, the residual clause creates

"uncertainty about how much risk it takes for a crime to qualify as a violent felony" because it "forces courts to interpret 'serious potential risk' in light of the four enumerated crimes" preceding it, and those enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives, *see* 18 U.S.C. § 924(e)(2)(B)(ii)—"are 'far from clear in respect to the degree of risk each poses.'" *Id*. at 2558 (quoting *Begay v. United States*, 553 U.S. 137, 143 (2008)). The combination of those uncertainties led the Court to conclude that "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges," thereby "produc[ing] more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id*. at 2557–58.

A. *Applicability of* Johnson

Barnes thus argues that due to the virtual interchangeability of the "otherwise" residual clauses of 18 U.S.C. § 924(e)(2)(B)(ii) and USSG § 4B1.2(a)(2), *Johnson* should bind this court to declare the latter void for vagueness. This argument finds support not only from the identical language of the two clauses, but also from the Eleventh Circuit's usage of both clauses to interpret each other. *Gilbert v. United States*, 640 F.3d 1293, 1309 n.16 (11th Cir. 2011) (en banc). The fifteen words comprising the residual clause do "not somehow magically become clearer or more meaningful because [they] appear in the guideline, rather than in the ACCA." *In re Clayton*, __ F.3d __, 2016 WL 3878156, at *12 (11th Cir. July 18, 2016) (No. 16-14556) (Rosenbaum, J., concurring). Two of our sister circuits have also held that *Johnson* invalidates the residual clause of § 4B1.2(a)(2). *See United States v. Pawlak*, 822 F.3d 902, 903, 911 (6th Cir. 2016); *United States v. Madrid*, 805 F.3d 1204, 1210–13 (10th Cir. 2015).

We find this precedent persuasive. We can perceive of no reason why, after decades of going hand in hand, we should now divorce the residual clauses of the ACCA and the career

offender sentencing enhancement. Their destinies are intertwined, and the Supreme Court's declaration that the residual clause of the ACCA is void for vagueness based on its language and interpretation should also apply to the residual clause of the career offender sentencing enhancement because it carries the *same* language and the *same* interpretation.

B. *Retroactivity of* Johnson

We now turn to *Teague v. Lane*, 489 U.S. 288 (1989), in which the Supreme Court "laid out the framework to be used in determining whether a rule announced in one of [its] opinions should be applied retroactively to judgments in criminal cases that are already final on direct review." *Whorton v. Bockting*, 549 U.S. 406, 416 (2007). Generally, the Court applies a bar to retroactivity, but provides for exceptions where the following three criteria are met:

> First, the court must determine when the defendant's conviction became final. Second, it must ascertain the legal landscape as it then existed, and ask whether the Constitution, as interpreted by the precedent then existing, compels the rule. That is, the court must decide whether the rule is . . . 'new.' Finally, if the rule is new, the court must consider whether it falls within either of the two exceptions to nonretroactivity.

Beard v. Banks, 542 U.S. 406, 411 (2004).

First, Barnes's conviction became final in 2008 when the Twelfth Circuit denied him relief on direct appeal and the Supreme Court denied certiorari. *See Clay v. United States*, 537 U.S. 522, 527 (2003) ("Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires."). Second, Barnes argues that *Johnson* indeed issued a new rule as to his conviction, because at the time of his appeal, *James v. United States*, 550 U.S. 192 (2007), specifically foreclosed a challenge that the residual clause of either the ACCA or the career offender enhancement was void for vagueness. *Johnson* expressly overruled that precedent. 135 S. Ct. at 2563; *Saffle v. Parks*, 494 U.S. 484, 488 (1990) ("The explicit overruling of an earlier

holding no doubt creates a new rule."). Third, the Supreme Court has explicitly stated that *Johnson* indeed has retroactive effect for cases, like this one, on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016).

The circumstances of this case compel us to hold that *Johnson* should indeed apply retroactively and invalidate the residual clause of career offender enhancement.

C. *Application to Barnes's Case*

While *Johnson* should indeed void the residual clause of the career offender enhancement and should apply retroactively, we must still consider the affect this has on the Sentencing Guidelines and its advisory notes. At the time Barnes was sentenced, the commentary to USSG § 4B1.2 specified that his offense—the unlawful possession of a sawed-off shotgun—was a "crime of violence" for purposes of that guideline. § 4B1.2 cmt. n.1 (2008). As relevant here, the commentary provided: "[u]nlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (*e.g.*, a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a 'crime of violence'." However, this advisory note must perish if it is based upon an unconstitutional residual clause.

In *Stinson v. United States*, 508 U.S. 36, 45 (1993), the Court clarified that the Guidelines are "the equivalent of legislative rules adopted by federal agencies," and that commentary interpreting or explaining a guideline is "authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Id.* at 38. Thus, in keeping with the administrative law analogy, the advisory note—which seems to clearly include sawed-off shotguns as a crime of violence under its reference to 26 U.S.C.

§ 5845(a)—must fail because it is interpreting the unconstitutional residual clause of § 4B1.2(a)(2).[5]

III. *Conclusion*

For the reasons stated herein, we reverse the district court's ruling denying relief under 28 U.S.C. § 2255 for the misapplication of the career offender sentencing enhancement to Barnes's sentence and remand to the district court for further proceedings in line with this decision.

STARK, Circuit Judge, dissenting:

While I agree that *Johnson* should apply to invalidating the residual clause of the career offender sentencing enhancement going forward, I disagree with the majority's conclusions on retroactivity. Therefore, I must dissent.

I. *Discussion*

A. Johnson's *Retroactivity*

When this Court announces a new procedural rule, that rule "applie[s] retroactively to all cases, state or federal, pending on direct review or not yet final." *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). But prisoners generally cannot invoke new procedural rules to obtain collateral relief from final convictions, as is the case with Barnes's conviction and sentence. Drawing on an approach earlier articulated by Justice Harlan, the plurality opinion in *Teague* concluded that "new constitutional rules of criminal procedure" generally "will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310; *see Mackey v.*

[5] The dissent argues that, in the case that *Johnson* does not apply retroactively, *Hall* would control and Barnes's arguments must fail. We find it unnecessary to discuss this point given our reasoning. While we acknowledge the somewhat binding nature of Eleventh Circuit precedent on this court, the reasoning in *Hall* is problematic given the Supreme Court's and the Eleventh Circuit's similar interpretation of the clauses.

United States, 401 U.S. 667, 675–702 (1971) (Harlan, J., concurring in part and dissenting in part). The full Court has since adopted that approach. *See Welch*, 136 S. Ct. at 1264.

As this Court explained in *Welch*, two categories of new legal rules are not subject to *Teague's* retroactivity bar. *See* 136 S. Ct. at 1264. "First, '[n]ew substantive rules generally apply retroactively.'" *Id*. (emphasis and citation omitted; brackets in original). The *Teague* bar is concerned with rules of procedure, not the substantive reach of criminal statutes. "Second, new watershed rules of criminal procedure, which are procedural rules implicating the fundamental fairness and accuracy of the criminal proceeding, will also have retroactive effect." *Id*. Since Barnes does not argue that *Johnson* represents a "watershed" rule of criminal procedure,[1] he must rely on the exception to retroactivity that *Johnson* represented a substantive rule.

This Court "has determined whether a new rule is substantive or procedural by considering the function of the rule"—that is, the actual effect of the rule when applied in criminal cases. *Welch*, 136 S. Ct. at 1265. "A rule is substantive rather than procedural," the Court explained, "if it alters the range of conduct or the class of persons that the law punishes." *Id*. at 1264–65 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)). Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'" or faces a more severe range of punishment than the law authorizes. *Schriro*, 542 U.S. at 352.

What the majority misses in its analysis is that an effect on the *advisory* Guidelines range is not a substantive rule, but rather is just a "lodestar" for the parties' arguments on the

[1] One of the only "watershed" rules that the Supreme Court has applied retroactively was the landmark criminal rights case of the right-to-counsel rule of *Gideon v. Wainwright*, 372 U.S. 335 (1963). This illustrates the gravity and weight of fundamental fairness to criminal proceedings that a rule must represent to qualify as a "watershed" rule.

appropriate sentence. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1342, 1345–47 (2016). A Guidelines range does not impose substantive limits on the range of legally authorized sentences. For that reason, a constitutional rule invalidating a provision of the advisory Guidelines or commentary would be procedural within the meaning of *Teague*.

Because of the procedural nature of a Guidelines-range-miscalculation error, the rule that Barnes seeks is a procedural rule within the meaning of this Court's retroactivity precedents. The practical effect of that rule would be to lower the advisory Guidelines range that the district court would take into account in a resentencing proceeding. Such a rule would only serve to alter *one* of the considerations before the court—the sentencing range recommended by the Sentencing Commission—and potentially require the court to provide a more detailed explanation for the sentence and to change whether a presumption of reasonableness applies on appeal. But just as a rule that "regulate[s] the evidence that [a] court could consider in making [a] decision" qualifies as procedural, *Welch*, 136 S. Ct. at 1265, a rule that alters the considerations that a court must take into account in deciding an appropriate sentence is procedural because it governs the manner of arriving at a decision, not the substantive bounds of a permissible sentence. *See also Lambrix v. Singletary*, 520 U.S. 518, 528 (1997).

Furthermore, the Supreme Court's holding in *Welch* that the *Johnson* rule is substantive does not mean that Barnes's proposed rule would be substantive. This is where the ACCA and the career offender sentencing enhancement diverge. Where declaring the residual clause of the ACCA void for vagueness serves a substantive function of lowering the statutory mandatory minimum of a class of offenders deemed to be armed career criminals, the career offender enhancement does not alter the statutory boundaries for sentencing set by Congress for the crime.

While determining the correct Guidelines sentencing range does have a significant effect, it is no more significant than other constitutional rules that were not applied retroactively. The Supreme Court held that the rule in *Crawford v. Washington*, 541 U.S. 36, 68–69 (2004)—that the Confrontation Clause does not permit testimonial hearsay absent a prior opportunity for cross-examination—does not apply retroactively. *Whorton v. Bockting*, 549 U.S. 406, 409 (2007). Also, the Sixth Amendment rule requiring defense counsel to warn a defendant about the immigration consequences of pleading guilty, *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010), does not apply retroactively either. *Chaidez v. United States*, 133 S. Ct. 1103, 1105 (2013).

The majority also appears to disregard the wide effect its application of retroactivity will have on the Guidelines and on the courts. Section 4B1.2(a)(2)'s definition of crime of violence is not merely a standalone definition that is contained to its corner of the Guidelines. Rather, it is weaved into the very fabric of many other Guidelines provisions. *See* USSG §§ 2K1.3 & cmt. (n.2), 2K2.1 & cmt. (n.1), 2S1.1 & cmt. (n.1), 4A1.1(e) & cmt. (n.5), 4A1.2(p), 5K2.17 & cmt. (n.1), 7B1.1(a)(1) & cmt. (n.2).

B. *Barnes's Sentence was Appropriate under the Guidelines*

Since *Johnson* should not apply retroactively, I believe that the Eleventh Circuit's decision in *United States v. Hall*, 714 F.3d 1270 (11th Cir. 2013), is persuasive authority to reverse the district court's decision.

In *Hall*, our sister circuit decided that possession of an unregistered sawed-off shotgun, as defined by 26 U.S.C. § 5861(d), qualifies as a "crime of violence" under § 4B1.2(a), based on the commentary to that guideline provision. *Hall*, 714 F.3d at 1273. The court explained that the commentary was controlling over *Begay* and *McGill*, because the commentary did not violate the Constitution or a federal statute, and was not inconsistent with, or a plainly erroneous reading

of, the guideline text. *Id*. at 1273–74. Further, the majority even concedes the "binding nature" of *Hall* on this court. Therefore, since I find that *Johnson* should not apply retroactively, *Hall* must control Barnes's appeal, and compels affirmance of the district court's decision to deny Barnes's Motion to Vacate his sentence.

For the foregoing reasons, I respectfully dissent.