Cost-Benefit Analysis and Retroactivity

The brief for respondent in 'Beckles v. U.S.'

Steven G. Sanders

New Jersey Law Journal, October 10, 2016

In late June, the Supreme Court granted certiorari in *Beckles v. United States*, 136 S.Ct. 2510 (2016). *Beckles* actually raises three questions, but only two of them are pertinent here: (1) is the "residual clause" of the U.S. Sentencing Guidelines' career offender provision void for vagueness under *Johnson v. United States*, 135 S.Ct. 2551 (2014); and (2) can a defendant whose Guidelines sentence became final before *Johnson* issued nonetheless invoke *Johnson*'s new rule in a motion filed under 28 U.S.C. §2255. In its recently filed merits brief, the government argues that the answer to question (1) is "yes," but that Beckles and thousands like him have no legal remedy because the answer to question (2) is "no."

The government's non-retroactivity argument in *Beckles* represents a total reversal of the position it took before the en banc Eleventh Circuit only one month before *Johnson* issued. And that reversal seems to stem from the government's concern about the costs the justice system would incur from conducting resentencings for prisoners who very likely would receive lower sentences were they afforded a remedy. The government's belief that the costs of dispensing justice outweigh the benefits (i.e., less prison time for thousands of people the government acknowledges have been over-sentenced) is eye-opening, to say the least. That it has broadcast that belief in a Supreme Court brief is downright disturbing.

To put in proper context the government's merits brief in *Beckles*, one must start with *Johnson*. *Johnson* involved a challenge to the Armed Career Criminal Act (ACCA), 18 U.S.C. §924(e). *SeeJohnson*, 135 S.Ct. at 2555. The ACCA raises the statutory minimum and maximum sentence for any defendant who is convicted of illegal firearm possession and who has three qualifying convictions for a "violent felony." In *Johnson*, the Supreme Court invalidated, on vagueness grounds, one of the ACCA's three "violent felony" definitions. 135 S.Ct. at 2556-57. Known as the "residual clause," it covered any crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. §924(e)(2)(B)(ii).

In early 2016, the Supreme Court granted certiorari in *Welch v. United States* to decide whether *Johnson*'s new rule applied retroactively on collateral attack. 136 S.Ct. 1257, 1263 (2016). The government conceded in *Welch* that *Johnson*'s new rule was "substantive"—and, thus, retroactive—because it categorically rendered ineligible for an ACCA sentence prisoners whose sentences had been enhanced using the facially invalid residual clause. The Supreme Court accepted the government's concession and held that *Johnson'*s new rule applied retroactively on collateral review.

Meanwhile, after *Johnson* but before *Welch*, numerous defendants who had been (or were about to be) sentenced under the advisory Sentencing Guidelines began invoking *Johnson* to attack an identically worded residual clause in career offender provision of the U.S. Sentencing Guidelines. *See* U.S.S.G. §4B1.2(a)(2) (2014). The government conceded that point as well, and most circuits accepted that concession. *See*United States v. Calabretta, __ F.3d __, 2016 WL 3997215, at *4 n.6 (3d Cir. July 26, 2016) (citing cases). The Eleventh Circuit, however, did not, *see**United States v. Matchett,* 802 F.3d 1185 (11th Cir. 2015), *reh'g en banc denied*, 2016 WL 4757211 (Sept. 13, 2016), which precluded §2255 relief for Beckles. *Beckles v. United States*, 616 F. App'x 415, 416 (11th Cir. 2015) (unreported), *cert. granted*, 136 S.Ct. 2510 (2016).

Now, suddenly, the government changes course in its merits brief in *Beckles*.In it, the government argues that *Johnson*'s new rule does not apply retroactively to defendants sentenced under the Guidelines because it is a "procedural" rule for *Teague*purposes. *See* Brief for the United States, *Beckles v. United States*, at 20-21, No. 15-8544 (U.S. Sept. 19, 2016). "The advisory Guidelines range … 'inform[s] and instruct[s] the district court's determination of an appropriate sentence,' but it does not cabin the district court's discretion to impose any sentence within the statutorily authorized range." *Id.* at 22 (quoting *Molina-Martinez v. United States*, 136 S.Ct. 1338, 1346 (2016)). Thus, erroneous reliance on an intolerably vague Guideline, according to the government, merely affects the *process* by which a district court calculates the sentence, but does not invalidate the sentence itself, much less place certain sentences off-limits for an entire category of defendants. *Id.* at 23-24, 27-28.

Only a few pages later, however, the United States argues that *Johnson*'s constitutional holding nonetheless applies to and invalidates the career offender provision's residual clause. *Id.* at 31, 44-45. Why? Because despite their advisory nature, the Sentencing Guidelines are the starting

point for sentencing; because the Guidelines are sufficiently law-like to merit ex post facto scrutiny (as the Supreme Court held in 2013, over the government's objection); and because an error in calculating the Guidelines range is presumptively prejudicial without more (as the Supreme Court held in 2016, again over the government's objection). *Id.* (citing *Molina-Martinez*, 136 S.Ct. at 1346;*Peugh v. United States*, 133 S.Ct. 2072, 2078, 2084 (2013)).

According to the government, then, the Guidelines are sufficiently substantive to merit void-for-vagueness scrutiny but are insufficiently substantive for retroactivity purposes. Perhaps this attempt to thread what looks like a very thin needle will pass muster with the Supreme Court. And perhaps the two arguments are legally reconcilable. But the tension in these two positions suggests that one of them is wrong and that something is amiss.

Consider these four realities. *First*, effective Aug. 1, the U.S. Sentencing Commission deleted the residual clause from the career offender provision. That means that the government's concession on question (1) in *Beckles* benefits an ever-diminishing class of defendants, i.e., those who were sentenced before Aug. 1, and whose convictions had not achieved finality by the time *Johnson* issued. *Second*, and relatedly, there are tens of thousands of prisoners whose convictions were already final when *Johnson* issued and whose sentences were calculated (if not significantly enhanced) under a residual clause we now know is facially invalid. *Third*, "[w]hen a defendant is sentenced under an incorrect Guidelines range … the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Molina-Martinez*, 136 S.Ct. at 1345. Thus, a significant fraction of the prisoners I just described likely would receive a substantially lower sentence if they were afforded a remedy.

Fourth, the government initially conceded that a new substantive rule that merely narrowed the scope of the residual clause applied retroactively on collateral attack regardless of whether the defendant had been sentenced under ACCA or the Sentencing Guidelines. Just two years ago, the government told the Eleventh Circuit that a new rule's "status as a substantive rule is fixed" and "does not fluctuate based on whether the prisoner is challenging an ACCA enhancement, a mandatory guidelines enhancement, or, as here, an advisory guidelines enhancement." Supplemental Brief for United States on Rehearing *En Banc*, *Spencer v. United States*, at 15 No. 10-10676 (11th Cir. 2014). At least as of 2014, the government was "not aware of any such chameleon-like rules" that "were substantive for some purposes and procedural for others." *Id.* Rather, "a rule either is or is not substantive." *Id.*

Two years later, the government *has* discovered a "chameleon-like rule[]"—*Johnson*'s new rule—which it now claims is "substantive for [ACCA] purposes and procedural for" Guidelines purposes. What explains this rather dramatic reversal of what seemed like a carefully considered retroactivity position? One need only read a few pages further in the government's *Beckles* brief to find the answer.

In opposing retroactivity, the government cites the costs associated with conducting new sentencing hearings for those prisoners who would benefit from *Johnson*. Courts and prosecutors would have to expend resources digging up old transcripts and files and—*say it isn't so!*—evaluating the bona fides of claims by defendants of post-sentencing rehabilitation. Brief for the United States, *Beckles v. United States*, at 33-37. (Never mind that the Bureau of Prisons maintains meticulous records on federal prisoners' disciplinary histories.)

The government also fears that affording relief (i.e., lower sentences) could lead to the immediate (or earlier) release of prisoners who, according to the government's statistics, are most likely to recidivate. *Id.* at 36-37.

But none of those concerns prevented the government from conceding in *Welch* that *Johnson*'s new rule should apply retroactively to defendants whose ACCA sentences had already become final. To the contrary, when the court-appointed amicus highlighted the same costs, the government responded that, "Those costs are justified where, as in the case of a defendant whose ACCA sentence depends upon the residual clause, 'the criminal process [has come] to rest at a point where it ought properly never to repose.'" Reply Brief for United States, *United States v. Welch*, at 19, No. 15-6418 (U.S. Mar. 23, 2016) (citation omitted). So, too, here.

In sum, the government's retroactivity position in *Beckles* seems more like a belated attempt at damage control than a principled effort to apply the law consistently across a set of similarly situated defendants. The government would do well to heed Solicitor General Frederick Lehmann's powerful observation—now inscribed on the walls of the Department of Justice—that "[t]he United States wins its point whenever justice is done its citizens in the courts." *SeeBrady v. Maryland*, 373 U.S. 83, 87 & n.2 (1963).•