

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.

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CHIEF JUSTICE ROBERTS: Thank you, Counsel.
Ms. Walker, this Court appointed you to
brief and argue this case in an amicus curiae in support
of the judgment below. You have ably discharged that
responsibility, for which we are grateful.

The case is submitted.

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

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