

In a Nutshell:
Johnson v. United States
(as of October 19, 2015)

“We are convinced that the indeterminacy of the wide-ranging inquiry required by the residual clause [of 18 U.S.C. § 924(e)(2)(B) -- “*or otherwise involves conduct that presents a serious potential risk of physical injury to another*”] both denies fair notice to defendants and invites arbitrary enforcement by judges. Increasing a defendant's sentence under the clause denies due process of law.” *Johnson v. United States*, 135 S. Ct. 2551, 2557, 192 L. Ed. 2d 569 (2015).

ARMED CAREER CRIMINAL ACT:

Recent cases holding *Johnson* applies retroactively to ACCA cases:

Price v. United States, 795 F.3d 731, 732 (7th Cir. 2015) (“We now conclude, consistently with the government's position, that *Johnson* announces a new substantive rule of constitutional law that the Supreme Court has categorically made retroactive to final convictions.”).

Recent cases holding *Johnson* does not apply retroactively to ACCA cases:

In re Rivero, 797 F.3d 986, 989 (11th Cir. 2015) (“Although we agree that *Johnson* announced a new substantive rule of constitutional law, we reject the notion that the Supreme Court has held that the new rule should be applied retroactively on collateral review”).

In re Gieswein, - F.3d -, 2015 WL 5534388, at *2 (10th Cir. Sept. 21, 2015) (“Under § 2255(h)(2), the Supreme Court is the only entity that can make a new rule retroactive. . . . And the Supreme Court can only make a rule retroactively applicable ... through a holding to that effect.”)(*citations and quotations omitted*).

SENTENCING GUIDELINES:

Potential Application of *Johnson* to the Sentencing Guidelines:

Sentencing Guidelines potentially affected by *Johnson* because of similar language:

- The career offender guideline, Guidelines § 4B1.2(a)(2)
- The criminal history guidelines, Guidelines § 4A1.1(e) and § 4A1.2(p)
- The firearms guideline, Guidelines § 2K2.1 & cmt. n.1.
- The explosive materials guideline, Guidelines § 2K1.3 & cmt. n.2
- The money laundering guideline, Guidelines § 2S1.1 & cmt. n.1
- The departure guideline for semi-automatic firearms, Guidelines § 5K2.17 & cmt. n.1
- The probation and supervised release guideline, Guidelines § 7B1.1(a)(1) & cmt. n.2

Recent cases holding *Johnson* does not apply to the Sentencing Guidelines:

United States v. Matchett, - F.3d -, 2015 WL 5515439, at *1 (11th Cir. Sept. 21, 2015) (“We reject Matchett's argument that the definition of “crime of violence” in the Sentencing Guidelines is unconstitutionally vague in the light of *Johnson v. United States*, – U.S. –, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015). The vagueness doctrine applies only to laws that prohibit conduct and fix punishments, not advisory guidelines.”)

Recent cases suggesting *Johnson* applies to the Sentencing Guidelines:

United States v. Collins, 799 F.3d 554, 596 (6th Cir. 2015) (“In *Johnson*, the Supreme Court struck down the Armed Career Criminal Act's residual clause as violating defendants' constitutional right to due process, and the Court has since vacated the sentences of individuals who were sentenced under the U.S.S.G.'s identical residual clause, U.S.S.G § 4B1.2(a)(2).”)

See United States v. Taylor, - F.3d -, 2015 WL 5918562, at *1 (8th Cir. Oct. 9, 2015)(remanding for a determination by the district court whether *Johnson* applies to the Sentencing Guidelines).

Recent case holding *Johnson* does not apply retroactively to Sentencing Guidelines:

In re Rivero, 797 F.3d 986, 989 (11th Cir. 2015) (“Although we agree that *Johnson* announced a new substantive rule of constitutional law, we reject the notion that the Supreme Court has held that the new rule should be applied retroactively on collateral review”).

Common qualifying Massachusetts state offenses post-*Johnson*:

I. Offenses that the First Circuit has already determined qualify categorically as violent felonies or crimes of violence

- a. Armed Robbery (Mass. Gen. Laws ch. 265, §17). *See United States v. Luna*, 659 F.3d 91, 108-09 (1st Cir. 2011).
- b. Assault with a Dangerous Weapon (Mass. Gen. Laws ch. 265, §15B(b)). *See United States v. Whindleton*, 797 F.3d 105 (1st Cir. 2015).

II. Currently on Appeal in First Circuit

- a. Assault & Battery with a Dangerous Weapon (Mass. Gen. Laws ch. 265, §15A(b)). (Currently on appeal in *United States v Fields*, No 14-2137).

III. Offenses which may be violent felonies or crimes of violence based upon *Shepard*-approved documents from the state proceedings

- a. Assault (Mass. Gen. Laws ch. 265, §13A). *See United States v. Martinez*, 762 F.3d 127, 137-38 (1st Cir. 2014).
- b. Assault & Battery (Mass. Gen. Laws ch. 265, §13A). *See United States v. Holloway*, 630 F.3d 252, 258-59 (1st Cir. 2011).
- c. Assault & Battery on a Police Officer/Correctional Officer/Court Officer (Mass. Gen. Laws ch. 265, §13D). *See United States v. Anderson*, 745 F.3d 593, 596-98 (1st Cir. 2014) (AB on a court officer), *cert. granted, vacated by* 135 S. Ct. 2925 (2015); *United States v. Jonas*, 698 F.3d 83, 87-89 (1st Cir. 2012) (AB on a correctional officer); *United States v. Dancy*, 640 F.3d 455, 467-71 (1st Cir. 2011) (ABPO).
- d. Indecent Assault & Battery (Mass. Gen. Laws ch. 265, §13H). *See United States v. Leahy*, 473 F.3d 401, 411-13 (1st Cir. 2007).
- e. Resisting Arrest (Mass. Gen. Laws ch. 268, §32(B)). *See United States v. Almenas*, 553 F.2d 27, 33 (1st Cir. 2009).
- f. Breaking & Entering (all forms, including night-time burglary of a building) (Mass. Gen. Laws ch. 266, §§16-18). *See United States v. Fish*, 758 F.3d 1, 7 (1st Cir. 2014).
- g. Manslaughter (Mass. Gen. Laws ch. 265, §13). *See United States v. Walter*, 434 F.3d 30, 39-40 (1st Cir. 2006).

(N.B. This is not an exclusive list of potentially qualifying state crimes)