GUIDO CALABRESI, *Circuit Judge*, with whom Peter W. Hall, *Circuit Judge*, joins, concurring:

I believe Judge Walker's opinion states the law correctly, and I concur in its reasoning and in its result. I write separately because that result, while mandated by the law, seems to me to be highly unjust, and little short of absurd. To explain why I think so, let me give the facts and procedural history of this case in a way that is slightly different from the majority opinion—which, however, is also correct, and in which, as noted above, I join, fully.

A. Background

Corey Jones is a now-39-year-old man with an I.Q. of 69.[1] While at a residential reentry center ("RRC"), finishing a nearly eight-year sentence for felony possession of a firearm, (he was five months' shy of his scheduled release), Jones allegedly grumbled a threat and was insolent to a staff member. The staff members called the federal marshals to take custody of Jones, who resisted arrest. The marshals conceded that, during his resistance, Jones never stepped towards, kicked, or punched them. Nonetheless, as they were trying to lower his head to the ground, the hand of the marshal who was apprehending Jones slipped down Jones' face, and Jones bit him, causing the finger to bleed. Shortly thereafter, Jones said, "I give," and was arrested and taken away. The marshal provided a sworn affidavit indicating that he suffered no loss because of the injury and that he did not request damages. At trial, the bite was described by the prosecutor as "not the most serious wound you'll ever see."

[1] This I.Q. score is considered to be in the "mentally deficient" range of intellectual functioning, below the generally accepted range for "intellectual disability," which is an I.Q. score of approximately 70-75. *See* Dist. Ct. Dkt. 46–1 at 5, Jones Sentencing Memorandum, Exhibit A, "Sentencing Memo Letter of Dr. Sanford L. Drob", at 5.

Pursuant to a single-count indictment for assaulting a federal officer, Jones was found guilty in violation of 18 U.S.C. § 111(a)(1)–(b). Under the Guidelines as they were then calculated, and as described in Judge Walker's opinion, Jones faced a sentence of between 210–240 months, (seventeen-and-one-half to twenty years), with the high end being the statutory maximum. This calculation was based on Jones' designation as a career offender, a status that was triggered by two earlier convictions: (i) an assault in which the then twenty-year-old Jones shot a man in the leg, which later needed to be amputated, and (ii) a conviction for first-degree robbery in New York, a crime Jones committed when he was sixteen years old.[2]

The district court, applying what it believed was the law of this circuit as it stood at that time, found that Jones' robbery conviction constituted a "crime of violence" under the categorical approach to the Sentencing Guidelines. *See United States v. Spencer*, 955 F.2d 814, 820 (2d Cir. 1992) (holding that, under the law of New York, the crime of attempted third-degree robbery constitutes a "crime of violence" for the purposes of the "force clause" of the Sentencing Guidelines), *abrogated by Johnson v. United States*, 559 U.S. 133 (2010) (*Johnson I*); *see also United States v. Reyes*, 691 F.3d 453 (2d Cir. 2012) (per curiam).[3] Given this

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[2] A defendant's youthful offender adjudications are, for the purposes of the relevant Guidelines calculations, deemed "'adult convictions' [where the defendant] (1) pleaded guilty to both felony offenses in an adult forum and (2) received and served a sentence of over one year in an adult prison for each offense." *See United States v. Jones*, 415 F.3d 256, 264 (2d Cir. 2005).

[3] A crime of violence, along with other factors, serves as a predicate requiring a district court to sentence a defendant as a "career offender" subject to an increased sentencing spectrum. *See* U.S. Sentencing Guidelines Manual § 4B1.1(a) (U.S. Sentencing Comm'n Nov. 2014) (U.S.S.G.) (defining "career offender" as a defendant who is (1) "at least eighteen years old at the time [he] committed the instant offense of conviction;" (2) his "instant offense of

holding, and because Jones' prior conviction for assault certainly constituted a crime of violence, the district court determined that the career offender status applied. Absent Jones' designation as a career offender, his Guidelines sentence

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conviction is a felony that is . . . a crime of violence;" and (3) he "has at least two prior felony convictions of . . . a crime of violence.") .

As described in Judge Walker's opinion, there were, at the time of Jones' sentencing, two clauses in the Sentencing Guidelines, either of which could define a "crime of violence." These two clauses are referred to as the "force clause," and the "residual clause." The "force clause" specifies that a crime of violence is a felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 4B1.2(a)(1). The "residual clause" comes at the end of a second set of enumerated offenses, and provides that a crime of violence also includes any offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id*. § 4B1.2(a)(2).

In *Spencer*, we had held that, under the force clause, third-degree robbery, as defined by New York law, was a crime of violence. After the Supreme Court's analysis of the force clause in *Johnson I*, however, we held that battery, as defined by the state of Florida, was not a crime of violence. *Reyes*, 691 F.3d 453. In *Reyes*, we noted *Johnson I*'s dictate that, to constitute a "crime of violence" under the categorical approach, a crime must involve the "use of physical force," and found that battery did not meet that definition. *Id*. at 460. Even after *Spencer*, it was an open question whether first-degree robbery was a crime of violence. After *Reyes*, that question depended on whether the use of physical force was, indeed, present in the New York definition of that crime.

Judge Garaufis held that the reasoning of *Spencer* meant that first degree robbery was a crime of violence. In our former, withdrawn opinion, we held, for reasons similar to those given in *Reyes*, that first-degree robbery was not. *Cf.*, *United States v. Yates*, No. 16-3997, 2017 WL 3402084 (6thCir. Aug 9, 2017) (finding in analogous circumstances that the force clause does not apply). All of that analysis, however, was with respect to the force clause, not the co-extant – and here essential – residual clause.

range would have been between 36 and 48 months (or three to four years), instead of the range of 210-240 months, or the seventeen-and-one-half years to twenty years that the court deemed applicable.

Departing downward significantly from the Guidelines, Judge Garaufis sentenced Jones to fifteen years.

B. Doctrinal Developments and Impact on Sentencing

Judge Garaufis' opinion rested on his interpretation of the application of the force clause to New York State's definition of robbery. Because Judge Garaufis was of the view that first-degree robbery was a crime of violence under the force clause even after *Johnson I*, Judge Garaufis did not address the additional possible determinant of a crime of violence now at issue before us: the "residual clause."

After Jones' initial sentencing, but before we heard Jones' appeal, the Supreme Court found language in the Armed Career Criminal Act ("ACCA") which was identical to the language used in the residual clause of the Guidelines—the lynchpin clause undergirding the authority of Jones' current sentence—to be unconstitutionally vague. *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015) (*Johnson II*). Subsequent to *Johnson II*, most federal courts of appeals to decide the issue found that, given the Supreme Court's decision, the residual clause was also unconstitutionally vague. *See United States v. Pawlak*, 822 F.3d 902, 907-11 (6th Cir. 2016); *United States v. Hurlburt*, 835 F.3d 715, 725 (7th Cir. 2016); *United States v. Calabretta*, 831 F.3d 128, 137 (3d Cir. 2016); *United States v. Madrid*, 805 F.3d 1204, 1210 (10th Cir. 2015); *but see United States v. Matchett*, 802 F.3d 1185, 1193-96 (11th Cir. 2015).

As a result—with the application of the force clause to Jones in doubt as a result of *Johnson I*, and with the residual clause struck down across several

circuits as a result of *Johnson II*—any number of defendants were found *not* to have committed crimes of violence, either as a matter of first instance, or on appeal, for purposes of determining their career offender status under the Guidelines. Accordingly, they were resentenced (or sentenced in the first instance) to lower sentences. We are told the government is not challenging these lower sentences.

C. Removal of the Residual Clause from the Guidelines

The Sentencing Commission, in light of the decisions of several courts of appeals grounded on the Supreme Court's decision in *Johnson II*, revised the Guidelines and removed the residual clause as a basis for future sentencing. (*See* Majority Opinion, n.1).

D. Procedural History in this Court

We heard Jones' appeal after *Johnson II*, and we held: (i) that, under *Johnson I*, the force clause was not applicable to him; (ii) (like several of our sister circuits) that the other possible ground for Jones' career offender status, the residual clause, was unconstitutional, pursuant to *Johnson II*; and, (iii) that, as a result, Jones' robbery conviction did not qualify as a predicate violent offense under the Guidelines. We therefore ordered Jones' sentence vacated and sent the case back for resentencing. We expressly instructed the district court that, in resentencing Jones, it should not treat him as a career offender.

Before the district court resentenced Jones, however, the Supreme Court granted *certiorari* in *Beckles v. United States*, 137 S. Ct. 886 (2017), to consider whether the language that, in *Johnson II* it had deemed unconstitutionally vague *in a statute*, was also void for vagueness when the identical language was employed in the Guidelines. In view of the Supreme Court's action, we withdrew our opinion, and suspended resentencing pending the *Beckles* decision.

Interestingly, at least one district court, in an independent case, had already granted a motion for resentencing in light of our now-recalled decision. *Miles v. United States*, No. 11-cr-581, 2016 WL 4367958 (S.D.N.Y. Aug 15, 2016).

In *Beckles*, the Supreme Court held the relevant clause of the Guidelines *not* to be unconstitutionally vague.[4] Hence, the clause remained applicable to cases like the one before us.

As a result, we are bound to consider Jones' earlier convictions on the basis of the revived (but no longer extant, since it has been removed by the Sentencing Commission) residual clause. Under that clause, we today correctly find that Jones' robbery conviction constituted a crime of violence and, as such, served as a predicate offense which—together with his assault convictions—categorically renders Jones a career offender. He was, therefore, correctly subject to the sentencing guidelines of 210–240 months on the basis of which the district court—albeit, perhaps incorrectly relying on the force clause rather than the residual clause— had imposed his original sentence of fifteen years.

Because that sentence was correctly based on the Guidelines as we now hold they stood when the district court sentenced Jones, we now affirm that sentence. We also hold that, given the applicable Guidelines, the sentence

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[4] The Supreme Court held as it did based on the history of discretion in sentencing before the Guidelines and the discretionary nature of the Guidelines themselves. My concern with our holding today does not dispute the correctness of the Court's decision. That the Court's decision was unexpected, however, cannot be doubted. Between *Johnson II* and *Beckles*, courts of appeals, prosecutors, and the Sentencing Commission took actions which assumed a different result. Indeed, the Justice Department had taken the position that *Johnson II* governed *Beckles*, and the Supreme Court had to appoint special counsel to present the opposite view. It is that unexpectedness and what happened between *Johnson II* and *Beckles* that is, in significant part, responsible for making today's result so troubling to me.

imposed—which departed significantly downward from these applicable Guidelines—was not substantively unreasonable.

E. DISCUSSION

I agree that the sentence is not substantively unreasonable; but I believe the result to be close to absurd.

Jones was about to be released when he committed a crime whose full nature and significance the district court is better able to evaluate than we. The district court decided on a fifteen-year sentence. Perhaps this sentence was based on its view of Jones' prior criminal activity, and on Jones' dangerousness. Perhaps the sentence, departing downward notably from the Guidelines, was, however, imposed because the district court believed that, given those Guidelines, it had gone down as much as it felt it reasonably could.

The fact is that we do not know what sentence the district court would have deemed appropriate if Jones had been subject to different Guidelines. Had our opinion come down slightly earlier, as did those of most other circuits dealing with similar issues, Jones would have been resentenced pursuant to a substantively lower Guidelines range. We would, then, know what sentence would have seemed appropriate to the district court in those circumstances. Had that sentence been lower—as it apparently was in any number of other cases in other circuits—the Government apparently would not have objected to it. Had Jones committed his crime under the currently existing Guidelines, (*i.e.*, in which the residual clause has been removed by the Sentencing Commission), and assuming that we would have read the force clause not to apply (as we did in our earlier, now-retracted opinion), the district court would have had, again, the opportunity to gauge Jones' degree of dangerousness under a very different set of Guidelines than those we, today, finally conclude it correctly applied at sentencing.

Because we (advisedly) withdrew our earlier opinion in light of the Supreme Court's grant of *certiorari* in *Beckles*, and because of the Supreme Court's ultimate decision in *Beckles*, I agree that we now are bound to affirm Jones' original sentence. This means that, as a result of timing quirks (his appeal to us was slightly too late, leading to our decision to pull our earlier opinion; his crimes too early so that the now-removed, but no longer unconstitutional, residual clause was in effect when he committed them), Jones receives a very, very high sentence in contrast with almost every similarly situated defendant.

What is more—and this may be the true source of my sense of absurdity—there appears to be no way in which we can ask the district court to reconsider the sentence it ordered in view of the happenstances that have worked against Jones, *and* in view of its assessment of Jones' crimes and of its downward departure.

Were this a civil case, there would be any number of ways of letting the lower court revisit matters.[5] But, as far as I have been able to discern, there is no way for us to send this back to the district court and ask it to tell us what I believe should determine Jones' sentence:

> In the light of sentences that other similarly guilty defendants have received, and in the light of Jones' own situation, *both of which you, as a district judge, are best suited to determine*, what is the sentence that you deem appropriate in this case?

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[5] For example: Federal Rule of Civil Procedure 60(b)(6) provides a court with the power to entertain a motion to relieve a party from a final judgment for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). To similar effect, Rule 60(d) states that a court has the power to "entertain an independent action to relieve a party from a judgment, order, or proceeding." *Id.* 60(d)(1).

I find our inability to learn this to be both absurd and deeply troubling. I believe our affirmance is correct, and that we can do no other. I hope, however, that somewhere, somehow, there exists a means of determining what would, in fact, be an appropriate sentence for Jones.