19-6418

ORIGINAL

CASE No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

WAYNE NEVILLE MORRIS ——PETITIONER

vs.

THE UNITED STATES OF AMERICA ——RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Wayne Neville Morris
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LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

QUESTION(S) PRESENTED

1. Whether, a conviction based on an erroneous legal theory, interpretation or a mistake about the law, can continue to be sustained, once the petitioner has presented "clear and convincing" evidence, that at the time of trial, the accused, his trial attorney, his sentencing attorney, the District Court, the goverment's attorneys, and the Appellate Court, did not correctly understand the essential elements of the crimes with which the accused was charged; to the extent that the court's jury instructions so confused the jury, its convictions ended being the product of either a "Constructive Amendment of the Indictment" or a "Fatal Variance," as a substantial violation of the petitioner's Fifth & Sixth Amendment rights?

2. Whether, after the Ninth Circuit declared 18 U.S.C. §2113(a) to be a "divisible" statute, did the District Court and the Ninth Circuit violate the petitioner's substantive Fifth Amendment's "Due Process" rights by refusing to apply the "modified categorical approach," in violation of this Honorable Supreme Court holdings in Taylor, 495 U.S. 575, 600, 110 S.Ct. 2143, 109 L.Ed. 2d 607 (1990); Descamps, 133 S.Ct. 2276, 186 L.Ed. 2d 438 (2013); and Mathis, 195 L.Ed. 2d 604; 2016, U.S. LEXIS 4060 (2016), as well as a long line of Ninth Circuit case law regarding "divisible" statutes, in order to avoid correcting a substantial violation of the petitioner's Constitutional rights, where the jury instructions clearly resulted in a "Constructive Amendment of the Indictment," or a "Fatal Variance" by directing the jury to find the defendant guilty of two §924(c)(1)(A)'s in relation to a single charge of armed bank robbery, §2113(a)(d), and where the jury was so confused, the verdit form reflects the jury convicted the defendant of a third uncharged §924(c) in relation to a generic §111 assault, pursuant to §924(c)(1)(C)(ii), where the "conviction documents" (indictment, jury instructions, jury verdict, and verdict form) provides "clear and convincing evidence" of violations of the defendant's substantive Constitutional rights under the Fifth and Sixth Amendments?

3. Whether the Ninth Circuit violated the "Certificate of Appealability" (COA) Due Process" established in Slack v. McDaniel, 579 U.S. 473 (2000), by denying a "COA" without comment, after the petitioner provided "clear and convincing" evidence by presenting a substantial showing of several violations of his Fifth & Sixth Amendment rights, and jurist of reason would find the district court's refusal to apply the "modified categorical approach," debateable in light of the appellate court's declaring 18 U.S.C. §2113(a) to be a "divisible" statute, because the modified categorical approach would have reveal a Constructive Amendment of the Indictment, or fatal variance, and that neither the accused attorneys, the District Court, the government and the patitioner's direct appeal panel did not correctly understand the essential elements of the crimes charged?

4. Does the "Rule of Lenity" apply to cases where "clear & convincing" evidence is presented that, neither the accued, his trial and sentencing attorneys, nor the government and the District Court did not correctly understand the essential elements of the crimes charged, and therefore, a fortior of failing to provide "fair warning?"

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix "A" to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix "B" to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was December 21, 2018.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: July 22, 2019, and a copy of the order denying rehearing appears at Appendix "C".

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

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Supreme Court Case Law:

Ninth Circuit Case Law:

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STATEMENT OF THE CASE

A. Conviction and Sentencing: United States v. Morris, CR99-00174C (W.D. Was. 2000):

On December 10, 1999, Mr. Morris was convicted, following a jury trial, of: one count of conspiracy to commit armed bank robbery, in violation of 18 U.S.C. §371 (Count 1); one count of armed bank robbery, in violation 18 U.S.C. §2113(a)(d) (Count 2); two counts of using or carrying firearm during a crime of violence, in violation of 18 U.S.C. §924(c)(Counts 3 and 5); and one count of assault on a federal officer in violation of 18 U.S.C. §111 (Count 4). Note: Mr. Morris's conviction and sentence as the unarmed get-away driver is based on the "aid & abet" statute, 18 U.S.C. §2.

On July 14, 2000, petitioner was sentenced to 528 months imprisonment under the then-mandatory Sentencing Guidelines—"108 months on counts 1, 2 and 4 to be served consecutively to one hundred twenty (120) months on count 3 and three hundred (300) months on count 5. The total sentence imposed is five hundred twenty eight (528) months.", a total of forty four (44) years as a first time offender. (EX "A", Page 2).

Relevant to this application, Count 3 of the Second Superseding Indictment charged Mr. Morris with violating Section 924(c), "did carry and use, specifically by brandishing a firearm and did aid and abet the carrying and use, specifically by brandishing a firearm, during and in relation to a crime of violence, to wit: bank robbery," in violation of 18 U.S.C. §2113(a)(d). Likewise, Count 5 of the Second Superseding Indictment charged Mr. Morris with violating Section 924(c), "did use, carry and discharge, and did aid and abet the use, carrying of and discharging of, a firearm during and in relation to a crime of violence, to wit: an assault on an officer..." in violation of 18 U.S.C. §111. By operation of law, those two §924(c) convictions carried a mandatory consecutive sentence of 420 months, ten years for the first count, and twenty-five years for the subsequent count. However, the jury instructions reflects that the district court directed the jury to apply both, §924(c)'s brandishing and discharge in relation to the indictment's single charge of bank robbery.

B. Appeal: United States v. Morris, 43 Fed. Appx. 150 (9th Cir. 2002):

Mr. Morris timely appealed his conviction and sentence. His court appointed counsel challeged each of the counts based on an insufficiency of the evidence. He also, in relation to Count three raised "plain error" contending that

> 'Count 3 must be vacated because the jury's verdict finding him guilty of "discharging" a firearm under 18 U.S.C. §924(c)(1)(A)(iii) does not conform to the second superseding indictment, which charges him with "brandishing" a firearm in violation of 18 U.S.C. §924(c)(1)(A)(ii). Morris assrts this variance in proof abrogated his Fifth Amendment right to be tried on the crime which he was indicted..." Id., at 156. [Appellate Court stayed opinion upon Supreme Court issuing writ of Certiorari in Harris v. United States, 153 L.Ed. 2d 524, 122 S.CT. 2406]. Here, however, the variance between the indictment and proof at trial did not abrogate Morris' Fifth Amendment rights, because the variance did not affect a crime element of 924(c). Instead, "brandishing and discharging are sentencing factors to be found by the judge, not offense elements to be found by the jury." Harris v. United States, 153 L.Ed. 2d 524, 122 S.Ct. 2406, 2414 (2002). These factors therefore, "need not be alleged in the indictment..." The second superseding indictment's allegation of "brandishment" was merely surplusage." Id., at 43 Fed. Appx. 157. [Ninth Circuit affirmed the convictions and Sentence in toto based on Harris].

C. Section 2255 Motion: District Court No. CV-04-00266-JCC; Appeals No. 05-35579:

In late January 2004, Mr. Morris filed a motion pursuant to 28 U.S.C. §2255, challenging that the U.S. District Court for the Western District of Washington, lacked subject-matter juridiction and that the court misapplied 18 U.S.C. §3231, in violation of the "Exclusive Legislation" Clause of the Federal Constitution. In September 2004, the district court denied Mr. Morris's Section 2255 motion and after Mr. Morris filed a motion for reconsideration, the district court denied that motion in early March 2005 (date unknown) and also denied certificate of appealability in approximate June 2005, and Ninth Circuit denied certificate of appealability shortly thereafter. (Date unknown).

D. Subsequent Filings:

On May 29, 2014, Mr. Morris filed Petition for Writ of Habeas Corpus into the U.S. District Court for the District of Oregon, at Portland, regarding the Supreme Court's reversal and overruling Harris v. United States, 153 L.Ed. 2d 524 (2002) in Alleyne v. United States, 186 L.Ed. 2d 314 (2013), holding that §924(c)

terms such as "brandishing" and "discharge" were not sentencing factors, but instead, are elements of the crime. Accordingly, Mr. Morris asserted that Alleyne was a new rule of substantive law regarding the interpretaion of 18 U.S.C. §924(c)(1)(A)(i)(iii), and therefore should have been retroactive. After several filings by both the government and Mr. Morris, the district court denied the writ citing Ninth Circuit's holding that Alleyne was not retroactive in Hughes v. United States, 770 F.3d 814 (9th Cir. 2014). Id., Morris v. Feather, Warden, at 3:14-CV-00884-AA (D.C. Or. 2015). Mr. Morris filied a timely notice of appeal and an appeal citing that the district court erred in applying Hughes to his case, where Hughes cited a sentencing error and the instant petitioner, in re; Mr. Morris suffered at trial a conviction error regarding a fatal variance and constructive amendment of the indictment, that in light of Alleyne declaring "brandishing" and "discharge" to be elements of the crime and not sentencing factors, that his "plain error" review, raised on direct appeal, should have been reinstated vacating, in the least, Count 3. Once again, after several filings, the Ninth Circuit denied the appeal on November 02, 2015, re: Morris v. Feather, Warden, Case No. 15-35438. Mr. Morris timely filed a Petition for Writ of Certiorari to the Supreme Court of the United States, re: Morris v. Feather, Warden, Case No. 15-8863, on January 31, 2016. The Supreme Court denied Certiorari without comment on May 16, 2016.

E. The Instant Claims:

To be convicted and sentenced under 18 U.S.C. §924(c), a defendant's instant offense must be a crime of violence. Here, the district court found that petitioner's convictions for 18 U.S.C. §2113(a)(d), and §111 were crimes of violence under Section 924(c). After Johnson, and for reasons set out more fully in the attached §2255 petition and incorporated herein, Petitioner's instant offenses no longer satisfies the definition of "crime of violence" in Section 924(c), and such, he should be resentenced without the mandatory consecutive sentences mandated by Section 924(c). Moreover, the petitioner has not raised these claims in any prior habeas petition.

After the Ninth Circuit in Dimaya, 803 F.3d 1110 (2015) declared 18 U.S.C. §16(b) to be "unconstituionally vague", based on this Court's holding §924(e)(2)(B)(ii) to be facially unconstitutional for "vagueness;" Johnson (II),135 S.Ct. 2551, 192 L.Ed. 2d 569 (2015), and after this Honorable Supreme Court in Welch, 136 S.Ct. 1257, 194 L.Ed. 2d 387; 2016 U.S. LEXIS 2451 (2016), declare Johnson (II) to be retroactive, the petitioner submitted a timely petition to the Ninth Circuit to submit a second §2255 Motion, pursuant to 28 U.S.C. §2255(h)(2). As such, applying "a straightforward application of Johnson II's new rule of constitutional law, made retroactive by Welch v. U.S., 136 S.Ct. 1257, 194 L.Ed. 2d 387 (2016), to Title 18 U.S.C. §924(c)(3)(B), the same as this Supreme Court did to 18 U.S.C. §16(b) in Sessions v. Dimaya, Docket No. 15-1498, the petitioner can further show that (1) he was sentenced in violation of the constitution; and that, (2) the particular constitutional rule that was violated is "new," was "previously unavailable," and was "made retroactive to cases on collateral review by the Supreme Court. Moreover, the petitioner will show that the Ninth Circuit's ruling in Watson, 881 F.3d 782 (9th Cir. 2018) does not cure the constitutional violations in Morris's case.

The petitioner's §2255 brief, starting at pages 5 - 13, presents a litany of interpretations from the least to the worst, showing that 18 U.S.C. §2113(a)(d), as an "indivisible" statute did not meet §924(c)(3)(A)'s "force clause" under the Categorical Approach. See also petitioner's §2255 pages 18 - 20, citing cases that "armed bank robbery under 18 U.S.C. §2113(d) is an aggravated form of unarmed bank robbery under §2113(a)," and therefore, "§2113(a) is merely a lesser-included offense of §2113(d).

In fact, the law in the Ninth Circuit, ranging from as far back as 1983 to the latest decision in 2016, holds that the minimum conduct that suffices to prove intimidation for federal robbery offenses consists of nothing more than calmly and apologetically demanding money. United States v. Hopkins, 703 F.2d 1102 (9th Cir. 1983), set that baseline long ago in this circuit, holding that Hopkins' "demands

for money provided sufficient evidence of intimidation," even though "the evidence showed that Hopkins spoke calmly, made no threats, and was clearly unarmed." Hopkins, 703 F.2d at 1103. Other cases in this circuit confirm that low baseline. In United States v. Jennings, 439 F.3d 604, 613 (9th Cir. 2006), this Court remarked that merely "threatening...to tie a bank teller up and lock him in a room...would certainly suffice for robbery by intimidation" under §2113(a). And in United States v. Friedman, 1988 WL 109117 (9th Cir. Oct. 11, 1988) the Ninth Circuit reaffimed that, "in this circuit, an unequivocal written or verbal demand for money may qualify as intimdation; there is no requirement of more overt evidence, such as express threats of bodily harm, threatening body motions, or the physical possibility of concealed weapons." A naked child walking into a bank ... and telling a teller or clerk, "give me money (so I can get some clothes), "is all it takes to sustain a conviction for bank robbery in the Ninth Circuit. Indeed, the child could even be apologetic about it all. See, e.g., United States v. Inoshita, No. 16-15931 (9th Cir.), DktEntry 13 at pp. 2-3, and DktEntry 21 at pp. 20.

REASONS FOR GRANTING THE PETITION

Accordingly, at the time of the petitioner's trial and sentencing, the court would have been forced to apply §924(c)(3)(B)'s "residual clause" in order to enhance Morris's sentence for an additional 10 years under Count 3, and 25 more years under Count 5, consecutively.

But of course, the court never stated which §924(c)(3)'s subsection (A) or (B), it used at sentencing. To resolve this, the Ninth Circuit, in a binding published opinion, in United States v. Geozos, 2017 U.S. App LEXIS 16515 (9th Cir. August 29, 2017), states:

> 'Had the sentencing court stated that the...convictions at issue were convictions for "violent felonies" only under the residual clause, it would have been, in effect, specifying the legal theory on which its [§924(c)(3)(B)'s] determination rested. We would know that Defendant's sentence was imposed under an invalid-indeed, unconstitutional-legal theory, and that Defendant was, therefore, sentenced in violation of the Constitution.' Id., Geozos, LEXIS 16515.

> [W]hen it is unclear from the record whether the sentencing court relied on the residual clause, it necessarily is unclear whether the court relied on a constitutionally valid or a constitutionally invalid legal theory. Defendant argues that this situation is analogous to that of a defendant who has been convicted, in a general verdict, by a jury that was instructed on two theories of liability, one of which turns out to have been unconstitutional. The rule in such a situation is clear: "Where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground." Griffin v. United States, 502 U.S. 46, 53, 112 S.Ct. 466, 116 L.Ed. 2d 371 (1991). The case usually cited as the origin of that rule is Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931),...the rule is...referred to as "Stromberg princple." 'We are persuaded that a rule analogous to the Stromberg principle should apply in the sentencing context....[W]hen a judge makes a finding that a defendant qualifies for an enhanced sentence, and that finding may rest on an unconstitutional ground, the finding should[n't] be treated any differently than a finding made by a jury for the purpose of conviction. Indeed, treating those findings differently because one involves sentencing and the other involves conviction would be contrary to the principle that any "fact increasing either end of a sentencing range produces a new penalty and constitutes an ingredient of the offense." Alleyne v. United States, 133 S.Ct. 2151, 2160, 186 L.Ed. 2d 314 (2013). We therefore, hold that, when it is unclear whether a sentencing court relied on the residual clause in finding that a defendant qualified as an armed...criminal, but it may have, the defendant's §2255 claim "relies on" the constitutional rule announced in Johnson II. Id., Geozos, LEXIS 16515 (9th Cir. 2017).

Accordingly, under Geozos, the Ninth Circuit has premised, if a defendant was charged and enhanced under §924(c), it is, fortior, a violation of the Due Process clause under the "void-for-vagueness doctrine. Therefore, before addressing the Ninth Circuit's decision in Watson, 881 F.3d 782, Morris will attempt to resolve the "residual clause" argument first because that is where the constitutional violation began. The Supreme Court in Welch v. United States, 136 S.Ct.1257, 194 L.Ed. 2d 387, 2016 U.S. LEXIS 2451 (2016), citing Johnson II, at 135 S.Ct. 2551, 2556, 192 L.Ed. 2d 569, stated:

> '[T]he residual clause [is] unconstitutional under the void-for-vagueness doctrine, a doctrine that is mandated by the Due Process Clause[] of the Fifth Amendment (with respect to the Federal Government).... The void-for-vagueness doctrine prohibits the government from imposing sanctions "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."id., at ____, 135 S.Ct. 2551, 2556, 192 L.Ed. 2d 569, 577. Johnson determined that the residual clause could not be reconciled with that prohibition.' Id., 136 S.Ct. 1261-1262.

'The vagueness of the residual clause rests in large part on its operation under the categorical approach. The categorical approach in the framework the Court has applied in deciding whether an offense qualifies as a violent felony... 135 S.Ct. 2557...Under the categorical approach, "a court assesses whether a crime qualifies as a violent felony 'in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.'" Ibid.(quoting Begay, supra, at 141, 128 S.Ct. 1581, 170 L.Ed. 2d 490). For purposes of the residual clause, then, courts were to determine whether a crime involved a "serious potential risk of physical injury" by considering not the defendant's actual conduct but an "idealized ordinary case of the crime."... 135 S.Ct. 2551, 2561, 192 L.Ed. 2d 569, 583.' Id., Welch, at 136 S.Ct. 1262.

'The Court's analysis in Johnson thus cast no doubt on the many laws that "require gauging the riskiness of conduct in which an individual defendant engages on a particular occasion." Ibid. The residual clause failed not because it adopted a "serious potential risk" standard but because applying that standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense. In the Johnson Court's view, the indeterminacy of the wide-ranging inquiry" made the residual clause more unpredictable and arbitrary in its application than the Constitution allows. id., at ___, 135 S.Ct. 2551, 2557, 192 L.Ed. 2d 569, 579, "Invoking so shapeless a provision to condemn someone to prison for 15 years to life," [an extra 35 years in the instant case], the Court held, "does not comport with the Constitution's guarantee of due process." Id.,..at 135 S.Ct. 2551, 2560, 192 L.Ed. 2d 569, 581).' Id., at Welch,136 S.Ct. 1257, 1262.

To be sure, after Johnson II rendered §924(e)(2)(B)(ii) unconstitutional, the Ninth Circuit forecasted that both §16(b) and §924(c)(3)(B) would be declared "unconstitutionally vague," and in so doing, would render every armed bank robbery enhancement "void"; because, from its enactment §2113(a)(d) was interpreted as being an "indivisible" statute and therefore, dependant upon the categorical approach and the residual clause for §924(c)(1)(A) with its own separate criminal elements to enhance an armed bank robber's sentence. See petitioner's §2255 motion pages 5 - 13, and 18 - 20 to confirm this. In fact, this Honorable Supreme Court affirmed this judicial reasoning in United States v. Davis, 139 S.Ct. 2319, 204 L.Ed. 2d757, 2019 U.S. LEXIS 4210 (2019), where it states:

> Only...Congress [has] the power to write new federal criminal laws. And when Congress exercises that power, it has to write statutes that give ordinary people fair warning about what the law demands of them. Vague laws trangress both of those constitutional reguirements. They hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges, and they leave people with no sure way to know what consequences will attach to their conduct. When Congress passes a vague law, the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again.
>
> Today we apply these principles to 18 U.S.C. §924(c). That statute threatens long prison sentences for anyone who uses a firearm in connection with certain other federal crimes. But which other federal crimes? The statute's residual clause points to those felonies "that by their nature, involve a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." §924(c)(3)(B). Even the government admits that this language, read in the way nearly everyone (including the government) has long understood it, provides no reliable way to determine which offenses qualify as crimes of violence and thus is unconstitutionally vague. Id., Davis, 139 S.Ct. 2319 (2019).

Accordingly, during Morris' trial in December 1999 and Sentencing in July of 2000, the petitioner was confronted with an "unconstitutionally vague" §924(c)(3)(B), a vague §924(c)(1)(A), where the district court erroneously believed subsections (ii) brandishing a firearm, (iii) discharging a firearm, and §924(c)(1)(C)(i) were merely sentencing factors, when in fact, they were criminal elements of separate offenses that also had to be listed in the indictment and presented to the jury. This Honorable Supreme Court in Bousley v. United States, 523 U.S. 614, 140 L.Ed. 2d 828, 118 S.Ct. 1604 (1998), held that:

> [I]t was held that the accused will be entitled to a hearing on the merits of his misinformation claim, if, on remand, the accued makes the necessary showing of actual innocence to relieve his procedural default in failing to contest his §924(c)(1) guilty plea in his prior direct appeal, as (1) if the record discloses that at the time of the plea, neither the accused, nor his counsel, nor the District Court [and in the instant claim, neither the government] correctly understood the essential elements of the crime with which he was charged, then the plea was invalid under the Federal Constitution. Id., at 140 L.Ed.831.

If Bousley was entitled to relief after having overcome his procedural default for failing to contest his §924(c)(1) guilty plea in his prior direct appeal, then how much greater is Morris entitled to relief when he never waived his rights at

trial, and furthermore, continued to protect and assert his substantive constitutional rights by raising the Fifth & Sixth Amendment violations regarding "the variance between the indictment and proof at trial;" only to be denied relief because, as it turned out, the Ninth Circuit, also, along with the District Court, the government and the trial counsel clearly misunderstood the essential elements of the crime with which he was charged. The petitioner even tried again to protect his substantive constitutional rights by filing a Petition for Habeas Corpus, 28 U.S.C. §2241, to the District Court for the District of Oregon, at Portland, in light of this Court's ruling in Alleyne v. United States, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed. 2d 314; U.S. LEXIS 4543 (2013). which was denied "without prejudice" claiming no remedy. Id., at Morris v. Feather, Case No. 3:14-CV-00884-AA (D.C. Or. 2015).

Returning to the Ninth Circuit's Geozos, and from there to this Court's holding in Griffin v. United States, 502 U.S. 46 (1991), regarding a defendant's conviction based on "legal error," this Court held:

> '"In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground. but not on another, and it is impossible to tell which ground the jury selected. Stromberg v. California, 283 U.S. 359, 367-368..."'. Id., at 502 U.S. 52.
>
> '"It follows that instead of its being permissible to hold,... that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld." Id., at 368, 75 L.Ed. 1117, 51 S.Ct. 32, 73 ALR 1484.' Id., at 502 U.S. 53.
>
> '"Legal error" occurs when a jury, properly instructed as to the law, convicts on the basis of evidence that no reasonable person could regard as sufficient. But in another sense-a more natural and less artful sense-the term "legal error" means a mistake about the law, as opposed to a mistake concerning the weight or the factual import of the evidence....
>
> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law-whether, for example, the action in question is protected by the Constitution,... or fails to come within the statutory definition of the crime. when, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true.' Id., at 502 U.S. 59.

As such, in the instant case, the jury was not properly instructed as to the law; instead, the court, based on an erroneous theory of law, instructed them to find the petitioner guilty of two completely separate and different offenses (crimes), "brandishing" a firearm under Count 3, and "discharging" a firearm under Count 5, 18 U.S.C. §924(c)(1)(A)(ii) & §924(c)(1)(A)(iii), respectively, in relation to a single Count 2 for armed bank robbery, 18 U.S.C. §2113(a)(d).

Accordingly, the jury was not equipped to determine that the court erred and that the Federal Constitution would protect and preclude the defendant from their convicting him of the discharge in relation to the bank because the indictment's Count 3 only charged "brandishing" in relation to the bank; nor were they equipped to know that once they had found him guilty of two §924(c)(1)(A) offenses for the one bank robbery, albeit, the second one being in error, they could not convict him of a third §924(c)(1)(C)(i), warranting an additional 25 years because they had already attributed the two §924(c)'s to the bank, but also, the indictment never charged the defendant with violating §924(c)(1)(C)(i). In fact, the jury was so confused, there was no way for them to even know or acknowledge that three §924(c) convictions, when the indictment only listed two, by its very nature, abrogated both the Fifth and Sixth Amendments of the Federal Constitution. In returning to this Court's holding in Bousley, at 140 L.Ed. 2d 829:

> "[i]f the record discloses that at the time of the plea [in the instant case, at the time of trial] neither the accused, nor his counsel, nor the District Court [or the government] correctly understood the essential elements of crime with which he was charged, then the plea [the convictions] w[ere] invalid under the Federal Constitution.";

then, to be sure, at the time of trial in 1999, not only was the District Court, the accused Morris, his trial counsel and sentencing counsel, and the government misunderstood that §924(c)(3)(B) was unconstitutionally vague, but that they also misunderstood that §924(c)(1)(A)(ii), §924(c)(1)(A)(iii), & §924(c)(1)(C)(i).

presented three completely separate crimes where "the core crimes and the fact triggering the mandatory minimum sentence together constitute a new, aggragated crime, each element of which must be submitted to the jury," Alleyne, at 570 U.S. 99, 114, or that 18 U.S.C. §2113(a) is a "divisible" statute, instead of being "indivisible!" All of which were invalid under the Federal Constitution.

In fact, there was only one legal professional expert who fully understood the law in 1999, and that person was Morris' direct appeal counsel, Attorney Calfo, who preserved the defendant's substantive rights by raising the "variance argument."

During the petitioner's reseach and preparation of his petition for and second §2255, the petitioner, after reading the Ninth Circuit's rulings in United States v. Juvenille Female, 566 F.3d943 (9th Cir. 2009) and United States v. Dominguez-Maroyoqui, 748 F.3d 918 (9th Cir. 2014), forecasted within his own mind that the Ninth Circuit might declare 18 U.S.C. §2113(a) to be a "divisible," statute, that's why he raised the issue, not only challenging the lawful application of a genaric §111 being divisible, but also raised the issue regarding declaring §2113(a) as being a "divisible' statute. See §2255 Motion citing the Ninth Circuit's case, United States v. Dixon, 805 F.3d 1193 (9th Cir. 2015), 'To be divisible, a statute must contain "multiple, alternative elements of functionally separate crimes." Id., and applying the "modified categorical approach" to §2113(a) and to §924(c)(1)(A)(ii)(iii), and §924(c)(1)(C)(i), before applying Dixon to §111, and also realizing that a "divisible" §2113(a) would not cure the Federal Constitutional violations; because with §2113(a) being a "divisible" statute, the "modified categorical approach will narrow down to discover either a "Constructive Amendment of the Indictment" or "fatal variance," warranting a vacation of Counts 3, 4, & 5. As such, the petitioner, herein, will cite from the transcript of the Jury instructions and provides proof that the district court, after telling the jury there is "a separate crime in each count, and that the jury's verdict on one count should not influence their verdict on any other count," proceeded to instruct the jury regarding Count Three, §924(c)(1)(A)(ii) in relation

to Count Two, §2113(a)(d), and later instructed the jury regarding Count Five §924(c)(1)(A)(iii), not in relation to Count Four, 18 U.S.C. §111, but Count Five was also directed in relation to Count Two, the armed bank robbery offense, §2113(a)(d). In other words, the court directed the jury to find the defendant guilty of both Counts 3 and 5, (2 x §924(c))'s for the one bank robbery in contradiction to the court's beginning instructions given on Page 722. This error will further reveal itself where the petitioner presents the courts instructions to the trial jury, herein, in relevant part; starting with Volume 5, Page 722: Lines 11-21:

> You are here only to determine whether the defendant is guilty or not guilty of the charges in the indictment. Your determination must be made only from the evidence in the case. The defendant is not on trial for any conduct or offense not charged in the indictment. You should consider evidence about the acts, statements and intentions of others or evidence about other acts of the defendant only as they relate to the charges against this defendant.
>
> A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count. [Exhibit "C"]

Pursuant to the transcripts of the Jury Instructions, pages 730-731, shows that the court instructed the jury as to what constitutes "aiding and abetting" an armed bank robbery and "aiding and abetting" the use and carry of a firearm; and, allegedly, did the same on pages 732-733 for assault on a federal officer and use and carry of a firearm in relation to that crime as well. However, the petitioner asserts "allegedly" because that is not what happened. See Page 730: Lines 19-25"

> To convict the defendant of aiding and abetting an armed bank robbery, you must find beyond a reasonable doubt that the defendant knew that his co-defendant was armed with and intended to use a firearm or dangerous weapon during the robbery.
>
> To convict the defendant of aiding and abetting the use and carrying of a firearm during and in relation to a crime of violence in violation of Section 924(c) of Title 18 of the [Exhibit "D"]

Page 731: lines 1-20:

United States Code, as charged in Count 3 of the indictment, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant committed, or aided and abetted in the commission of the crime of bank robbery as charged in Count 2 of the indictment;

Second, the defendant knowingly used and carried, or aided and abetted in the use and carrying of, a handgun; and

Third, the defendant used and carried, or aided and abetted in the use and carrying of, the handgun during and in relation to the crime.

A defendant has used a firearm if he has actively employed the firearm inrelation to armed bank robbery. Use includes any of the following:

(a) brandishing and displaying a firearm;

(b) referring to a firearm in the offender's possession in order to bring about a change in the circumstances of the predicate offense;

(c) the silent but obvious and forceful presence of a firearm in plain view. [Exhibit "D"]

The petitioner asks the court to pay special attention to and compare the language of the above cite with the language of the below cite. Page 732: lines 23-25:

To convict the defendant of aiding and abetting the use and carrying of a firearm during and in relation to a crime of violence in violation of Section 924(c) of Title 18 of the

Page 733: lines 1-25:

United States Code, as charged in Count 5 of the indictment, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant committed, or aided and abetted in the commission of, the crime of assault on a federal officer as charged in Count 4 of the indictment;

Second, the defendant knowingly used and carried, or aided and abetted in the use and carrying of, a handgun; and

Third, the defendant used and carried, or aided and abetted in the use and carrying of, the handgun during and in relation to the crime.

A defendant has used a firearm if he has actively employed the firearm in relation to armed bank robbery. Use includes any of the following: [Bolded letters for emphasis by petitioner].

(a) discharged a firearm;

(b) referring to a firearm in the offender's possession in order to bring about a change in the circumstances of the predicate offense;

(c) the silent but obvious and forceful presence of a firearm in plain view.

A defendant aids and abets the use and carrying of a firearm when he acts with specific intent to facilitate, aid, counsel, command, induce or procure his co-defendant's use and carrying of a firearm.

When you retire, [Exhibit "E"]

Moreover, the jury's verdict futher reflects the trial court's errors, i.e., a constructive amendment or variance of the second superseding indictment; where, the jury, after a finding of guilt for Count 3 in relation to Count 2, and a finding of guilt for Count 5 in relation to Count 4, which was in opposition to the trial court's jury instructions which directed the jury to a finding of guilt of Count 5 be in relation to Count 2, the jury then attributed both "brandishing," Count 3 and "discharging," Count 5 to Count 2; clearly an unlawful conviction. See Jury Verdict, VOl. 5: pages 787: lines 19-25 and page 788: lines 1-17 herein cited for convenience of the court:

THE CLERK: "United States of America verses Wayne N. Morris, cause number CR99-174C. Verdict. We, the jury, find as follows: As to Count 1, charging the defendant with conspiracy, we find defendant Wayne N. Morris guilty. As to Count 2, charging the defendant with armed bank robbery, we find defendant Wayne N. Morris guilty. As to Count 3, charging the defendant with using and carrying a firearm during and in

Jury Verdict, Vol. 5: Page788: lines 1-17:

relation to armed bank robbery, we find defendant Wayne N. Morris guilty. As to Count 4, charging the defendant with assault of a federal officer, we find defendant Wayne N. Morris guilty. As to Count 5, charging the defendant with using and carrying a firearm during and in relation to assult on a federal officer, we find defendant Wayne N. Morris guilty.

"You are to unanimously answer the following questions if you find that the charge against the defendant in Counts 2, 3 and 5 have been proven deyond a reasonable doubt. During and in relation to the armed bank robbery charged in Count 2, was a firearm brandished? The term 'brandished' means a display of all or part of the firearm or otherwise making the presence of the firearm known to another person in order to intimidate that person, regardless of whether the firearm is directly visible to that person. Answer: Yes. During aand in relation to the armed bank robbery charged in Count 2, was a firearm discharged? Answer: Yes." Id.,

Accordingly, reasonable jurists would ask, how did the district court complete the final categorical approach to determine which alternative element violated under §2113(a)(d) & §924(c)(1)(A), that the petitioner was convicted of? Did the district court determined that the brandishing in relation to the "armed bank robbery" met the

condition or did the district court determine that the discharge in relation to the armed bank robbery (an unindicted charge for the bank robbery) met the conditions, both being separate legal offenses? or, since the transcripts of the jury's verdict and the verdict form shows, that in reality, the jury actually convicted Morris of six crimes, three of which were §924(c) charges, an act doubtful as to whether the grand jury, based on the facts, could have indicted the petitioner for three §924(c) charges. See United States v. Adamson, 291 F.3d 606 (9th Cir. 2002) held:

> The Fifth Amendment guarantees a criminal defendant "the right to stand trial only on charges made by a grand jury in its indictment." After an indictment has been returned and criminal proceedings are underway, the indictment's charges may not be broadened by amendment, either literal or constructive, except by the grand jury itself. (internal cites omitted).
>
> "An amendment of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by...a court after the grand jury has last passed upon them." "A constructive amendment 'involves a change whether literal or in effect in the terms of the indictment." A variance, on the other hand, "occurs when the evidence offered at trial proves facts materially different from those alleged in the indictment" (internal cites omitted).
>
> The line between a constructive indictment and a variance is at times difficult to draw. "A rather shadowy distinction has been drawn between amendment and variance"; "the distinction between an amendment to an indictment and a variance is blurred". Nevertheless, the line is significant because, whereas a constructive amendment always requires reversal, "a variance requires reversal only if it prejudices a defendant's substantial rights." (internal cites omitted)
>
> In our efforts to draw this line, we have found constructive amendment of an indictment where (1) "there is a complex of facts presented at trial distinctly different from those set forth in the charging instrument," or (2) "the crime charged in the indictment was substantially altered at trial, so that it was impossible to know whether the grand jury would have indicted for the crime actually proved." (internal cites omitted). Id., at 291 F.3d 615.
>
> We reject, however , the government's contention that the variance was nonfatal. Here, the variance was fatal because it affected the substantial rights of the defendant. "A variance between indictment and proof does not require reversal unless it affects the substantial rights of the parties." One primary purpose of an indictment is to inform a defendant of "what he is accused of doing in violation of the criminal law, so that he can prepare his defense."...observing that requirement that proof remain true to the indictment "serves notice related-functions of protecting against unfair surprise, enabling the defendant to prepare for trial and

> the indictment as a bar to later prosecutions". This purpose was not served here. If the indictment had not specified a different particular [criminal element, brandishing], one might say the variance was benign, Having specified a different particular [criminal element, brandishing], however, the indictment not only affirmatively misled the defendant and obstructed his defense at trial....In accordance with the foregoing, we reverse Richard Adamson's conviction and remand for a new trial. (internal cites omitted). Id., at 291 F.3d 616-617.

See Also, United States v. Atul-Bhagat, 436 F.3d 1140 (9th Cir. 2005), citing Adamson, stated:

> A material variance exists if a materially different set of [criminal elements] from those alleged in the indictment is presented at trial, and if that variance affects the defendant's "sustantial rights." Adamson, 291 F.3d at 615-16. Id., at 436 F.3d 1146.

The Atul-Bhagat Court continued, where in citing United States v. Choy, 309 F.3d 602 (9th Cir. 2002), held:

> We found a fatal variance because the "facts upon which Choy was convicted cannot constitute the crime of bribery." We concluded that the jury instructions and clarification enabled the jury to base a finding of guilt on a fact other than the element stated in the indictment. As in Adamson, in Choy we focused on the extent to which the jury was steered toward a finding at variance with the indictment. Id., at 436 F.3d 1146.

As such, the petitioner has tried his best to show this Honorable Ninth Circuit that reasonable jurists, in light of the above evidence and case law, would in the least, find that the district court's failure to apply the modified categorical approach and conduct an adequate review of the charging documents (indictment) and conviction documents (jury instructions, jury verdict, and verdict form) to be debatable if not wrong. In addition, to be sure, those jurist who issued the opinion in Geozos, would agree that Alleyne is settled current law applicable to the instant case, and therefore, when the district court instructed the jury to find Morris guilty of Count 3, §924(c)(1)(A)(ii), and Count 5, §924(c)(1)(A)(iii), discharge, both in relation to Count 2, §2113(a)(d), it committed constitutional error that affected his "substantial rights," regarding the Fifth Amendment "right to stand trial only on charges made by the grand jury in its indictment"

Even before Geozos made the Stromberg Rule or Principle binding, in United States v. Ladwig, 192 F.Supp. 3d 1153 (E.D. Wa. 2016), presented the same principle as a powerful analogy. Because Ladwig's argument parallels and matches the error in Morris's case, the appellant, herein, cites Ladwig, with bracketed inserts of his own case specifics.

> In so arguing, Mr. [Morris] makes a powerful analogy to habeas petitions based on unconstitutional jury instructions. In such cases, a "general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground." See Zant v. Stephens, 462 U.S. 862,...(1983). Mr. [Morris] asserts that the Court should apply a similar principle here, where the record is unclear whether the Court relied on the residual clause or the remaining, constitutional clauses of the [§924(c)], and the Court's finding-that Mr. [Morris]'s convictions for [brandishing under Count 3, & discharge under Count 5, both, in relation to the one Count 2, bank robbery] were violent felonies-may have rested exclusively on the unconstitutional residual clause. Id., at 192 F.Supp 3d 1158.
> Mr. [Morris]'s analogy is powerful because of the unique nature of the Johnson based claims. As he astutely points out, with most claims of constitutional error there is no dispute about what action a district court took the only question is whether the law deems that action unconstitutional. [As in Ladwig], Here, however,...the district court [in re: 2:17-CV-00268-JCC] never made explicit findings about which of the [§924(c)]'s three clauses [§924(c)(1)(A)(ii), §924(c)(1)(A)(iii), and/or §924(c)(1)(C)(i)] qualified those convictions as predicate felonies. Utilizing the apt analogy to Zant, Mr. [Morris] has successfully demonstrated constitutional error simply by showing that the Court might have reiledon an unconstitutional alternative when it found that Mr. [Morris' Counts 3 & 5] convictions[were based on unindicted crimes]. That Mr. [Morris'] right to due process is at stake lends additional weight to this conclusion. In the context of a potential deprivation of such a critically important right, a showing that the sentencing court might have relied on an unconstitutional alternative ought to be enough to trigger inquiry into whether the sentencing court's consideration of that alternative [unindicted elements] was ultimately harmless. Following the analogy to jury instructions, however, requires a determination of whether the error was harmless. See Hedgpeth v. Pulido, 555 U.S. 57... (2008). Pursuant to Hedgpeth, an error in this context is harmless unless the error "had substantial and injurious effect or influence in determining the jury's verdict." Id., at 192 F.Supp. 3d 1159.

Of course, the Ninth Circuit, pursuant to United States v. Atul-Bhagat, 436 F.3d 1140 (9th Cir. 2005), citing United States v. Choy, 309 F.3d 602 (9th Cir. 2002), citing United States v. Adamson, 291 F.3d 606 (9th Cir. 2002), inter alia, states, "We found a fatal variance because...the jury instructions and clarification enabled the jury to base a finding of guilt on a fact other than the element stated in the indictment....[to] the extent to which the jury was steered toward a finding at variance with the indictment." Id., at 436 F.3d 1146. For the same reasons in Morris' case, Counts 3 and 5 should be vacated and set aside.

Moreover, just as in Ladwig, there is no dispute from the government nor from the court regarding what action the district court took, i.e., steering the jury to convict Morris for unindicted crimes. To be sure, the record provides "clear and convincing evidence," under the Federal Rules of Civil Procedure, or "proof beyond a reasonable doubt" under the Federal Rules of Criminal Procedure, and Rule 12 Governing Section 2255 Proceedings. The only question reasonable jurists would debate, is whether the law deems that action (steering the jury to convict the appellant for unindicted crimes) is unconstitutional? Instead of disputing the appellant's claims, the government's argument was a quick brush-off saying Morris is mis-applying the Modified Categorical Approach, But the appellant asserts that the reasonable jurist in Walton, Werle, Dixion, Geozos, and the reasonable Justices in Mathis would disagree with the U.S. Attorney's Office for the Western District of Washington; and since the District Court, in re: 2:17-CV-00268-JCC (W.D. Wa. 2018), never conducted a "Modified Categorical Approach" there's no way to determine which elements of armed bank robbery were determined to be violent crimes; unless, reasonable jurists turn to the Judgment and Commitment (J&C) Order; then they would see that the "discharge," §924(c)(1)(A)(iii) was attributed to Count 3 and a second or successive §924(c)(1)(C)(i) was attributed to Count 5, both of which were and are at variance with the indictment which affected Morris' "substantial rights"

under the Fifth Amendment's "right to stand trial only on charges made by the grand jury in its indictment;" the Sixth Amendment's "fair notice" under the "to be informed of the nature and cause of the accusations" clause, and the Fifth Amendment's "due process" to insure these other rights are properly adhered to.

The appellant has already cited Geozos in his initial filing, in re: 18-35739, as binding authority, which held that once an application to submit a second or successive §2255 is granted by the appellate court, "The habeas petitioner filing a second or successive petition who claims to have been convicted of a crime that was not a crime is at no less risk of being erroneously imprisoned than a habeas petitioner filing a first petition or motion." Id., at Geozos U.S. App. LEXIS 16515, Morris v. United States, 18-35739, pg. 8; therefore, the only remaining argument that reasonable jurists might debate, is whether the appellant can apply Johnson II, Descamps, Alleyne, Mathis, Werle, Walton and Geozos to show Morris' claims are nonharmless, and therefore, warrant a vacation and set aside of Counts 3 & 5. Even in that, it appears that several reasonable jurists have already debated the issue in Ladwig, supra, 192 F.Supp. 3d 1153, stating:

> Because these decisions are not retroactive, the government claims, the Court should not consider their holdings when determining whether Mr. Ladwig was prejudiced. Despite the argument's appealing simplicity, the Court does not agree. To begin, there is existing precedent for appling current case law when determining whether a constitutional error was harmless in the context of a motion under 28 U.S.C. §2255. See Lockhart v. Fretwell, 506 U.S. 364, 371-72, 113 S.Ct. 838, 122 L.Ed. 2d 180 (1993) (concluding that the prejudice prong of a Strickland-based §2255 claim may be made with the benetfit of the law at the tiem the claim is litigated); see Mosby v. Senkowski, 470 F.3d 515, 524 (2d Cir. 2006)("[T]he Supreme Court has held that current law should be applied retroactively for purposes of determining whether a party has demonstrated prejudice under Strickland's second prong."). Moreover, and perhaps more importantly, considerations of public policy weigh strongly in favor of applying current law. Attempting to recreate the legal landscape at the time of a defendant's conviction is difficult enough on its own. But in the context of Johnson claims, the inquiry is made more difficult by the complicated nature of the legal issues involved. This area of the law has accurately been described as a "hopeless tangle," Murray v. United States, 2015 U.S. Dist. LEXIS 156853(W.D. Wash. November 19, 2015), and has stymied law clerks and judges alike in a morass of inconsistent case law.

An inquiry that requires judges to ignore intervening decisions that, to some degree, clear the mire of decisional law seems to beg courts to reach inconsistent results. Current case law has clarified the requisite analysis and applying that law should provide greater uniformity, helping to ensure that like defendants receive like relief. Because there is precedent for doing so, and in consideration of the aforementioned problems raised by applying old law, the Court will apply current case law to determine whether Mr. Ladwig's convictions quality as predicate felonies without the residual clause. Id., at 192 F.Supp. 3d 1160-1161. See Lee v. United States, 2017 U.S. Dist. LEXIS 11801 (W.D. Wa. 2017) citing Ladwig; see also, Doriety, supra, U.S. Dist. LEXIS 166337 (W.D. Wa. 2016), where at note 4, the Honorable U.S. District Judge John C. Coughenour, acknowledged the application of intervening and interim case law to create a remedy.

More recently the Ninth Circuit in Ramirez-Contreras v. Sessions, 858 F.3d 1298 (9th Cir. 2017); and United States v. Ocampo-Estrada, 2017 U.S. App. LEXIS 16511 (9th Cir. 2017) held:

'That conclusion is not necessarily determinative of the issue of moral turpitude, because in some situations we may look beyond the statutory terms to the actual conduct underlying the conviction. We do this if the statute is divisible. Lopez-Valencia v. Lynch, 798 F.3d 863, 867-68 (9th Cir. 2015). A statute is divisible if it provides "multiple alternative elements, and so effectively creates several different crimes." Descamps v. United States, 133 S.Ct. 2276, 2285, 186 L.Ed. 2d 438 (2013)...If divisible, we move to the "modified categorical approach," in which we "examine certain documents from the defendant's record of conviction to determine what elements of the divisible statute he was convicted of violating." Lopex-Valencia, 798 F.3d at 868.' Id., at Ramirez-Contreras v. Sessions, 858 F.3d 1298, 1306-1307 (9th Cir. 2017)(Petition GRANTED).

The panel held that California Health & Safety Code §11376 is a divisible statute that is susceptible to the modified categorical approach. The panel held that using the modified categorical approach, the government failed to demonstrate that the defendant's §11378 conviction was based on a guilty plea to a controlled-substance element that is included within the "felony drug offense" definition set forth in 21 U.S.C. §802(44). The panel therefore concluded that the defendant's prior conviction does not qualify as a felony drug offense that would enhance his statutory mandatory minimum sentence under 21 U.S.C. §841(b)(1)(A). Id., at United States v. Ocampo-Estrada, 2017 U.S. App. LEXIS 16511 (9th Cir. 2017) (conviction affirmed, sentence vacated remanded for resentencing).

In fact, when conducting a statutory interpretation, Lopez-Valencia v. Lynch, 798 F.3d 863 (9th Cir. 2015), citing Descamps's "three-step process" to determine whether a prior conviction is an aggravated felony, step one is to determine whether the categorical appoach applies; step two determines whether the statute is either "indivisible" or "divisible" which the Ninth Circuit, in re: Watson has already made those determinations, which leaves step three to the district court to delve back into the criminal record Case No. CR99-0174-JCC. To clarify step three, the Lopez-Valencia Court stated:

> 'Following Descamps, in Rendon we clarified how to distinguish truly divisible from indivisible statutes. 764 F3d at 1084-90. There, we held that divisiblity hinges on whether the jury must unanimously agree on the fact critical to the federal statute. Id., at 1085 ("A jury faced with a divisible statute must unanimously agree on the particulr offense of which the petitioner has been convicted..."). By contrast, a statute is indivisble if "the jury may disagree" on the fact at issue "yet still convict." id. at 1086.' Id., at 798 F.3d 868-869.

The Watson Court, 16-15357, cited the United States Supreme Court's Mathis v. United States, 579 U.S. ____, 136 S.Ct. ____, 195 L.Ed. 2d 604, 2016 US LEXIS 4060 (2016), in declaring §2113(a)(d), to be "divisible." Accordingly, the Mathis Court, citing Descamps v. United States, 570 U.S. ____, 133 S.Ct. 2276, 186 L.Ed. 2d 438, (2013), held:

> 'Some statutes, however, have a more complicated (sometimes called "divisible") structure, making the comparison of elements harder. Id., at ____, 133 S.Ct. 2276, 186 L.Ed. 2d 438. A single statute may list elements in the alternative, and thereby define multiple crimes. Suppose, for example, that the California law noted...had prohibited "the lawful entry or the unlawful entry" of a premises with intent to steal, so as to create two different offenses, one more serious than the other.... [then,] [a] sentencing court thus requires a way of figuring out which of the alternative elements listed...was integral to the defendant's conviction (that is, which was necessarily found or admitted). See id., at 133 S.Ct. 2276, 186 L.Ed. 2d 438. To address that need, this Court approved the "modified categorical approach" for use with statutes having multiple elements. See e.g., Sheppard v. United States, 544 U.S. 13, 26, 125 S.Ct. 1254, 161 L.Ed. 2d 205 (2005). Under that approach, a sentencing court looks to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and cologuy) to determine what crime, with what elements, a defendant was convicted of. See ibid.: Taylor, 495 U.S., at 602, 110 S.Ct. 2143, 109 L.Ed. 2d 607. The court can then compare that crime, as the categorical approach commands,....Id., at 195 L.ed. 2d 611-612.

Although the primary focus of the petitioner's §2255 was that §2113(a)(d) was "indivisible," to be sure, the petitioner's brief was not limited to arguing Title 18 U.S.C. §924(c)(3)(B)'s "residual clause" as being unconstitutionally vague; but also, by citing the Ninth Circuit's case, United States v. Dixon, 805 F.3d 1193 (2015), did acknowledge that if §2113(a)(d), were interpreted as be "divisible" the "modified Categorical approach" would apply. See Morris v. United States, 2:17-CV-00268-JCC, where the Dixon court held:

> To be divisible, a...statute must contain "multiple, alternative elements of functionally separate crimes." Rendon, 764 F.3d at 1085 (emphasis omitted). A statute is not divisible merely becaue it is worded in the disjunctive. id. at 1086. Rather, a court must determine whether a disjunctively worded phrase supplies "alternative elements," which are essential to a jury's finding of guilt, or "alternative means," which are not. Id. at 1085-86. That is, if a statute contains alternative elements, a prosecutor "must generally select the relevant element from its list of alternatives. And the jury, as instructions in the case will make clear, must then find that element, unanimously and beyond a reasonable doubt." Id. at 1085 (quoting Descamps, 133 S.Ct. at 2290). But if a statute contains only alternative means, a jury need not agree as to how the statute was violated, only that it was. Id. (Id., at Dixon, 805 F.3d 1198).

In his initial §2255, starting at page 20, (CV-17-00268-JCC), "[t]he petitioner; herein, presents what he believe[d] [were] three possible reasons Count 5 of the second superseding indictment is an unconstitutional conviction and sentence." As such, due to Watson's declaring §2113(a)(d) to be "divisible," at least one, if not two of those possible reasons also apply to the bank robbery statute under the "modified categorical approach." Accordingly, the petitioner challenged 18 U.S.C. §111 and the second §924(c)(1)(A), beginning on page 20, Item 4, which stated:

> 4. Count Five of the Indictment Charging the Defendant with Aiding and Abetting the Discharge of a firearm, 18 U.S.C. §924(c)(1)(A)(iii), in Relation to Count Four, Assault on a Federal Officer, 18 U.S.C. §111, Must Be Vacated and Set Aside for Several Reasons.

In light of the above, where both 18 U.S.C. §111 & §2113(a)(d) are "divisible" statutes, the evidence presented as attached exhibits are "fact critical" documents warranting review under the "modified categorical approach," will challenge both the validity and constitutionality of the §111; the second §924(c); Counts 4 & 5 of

the second superseding indictment, and the term of imprisonment for the first §924(c)(1)(A); Count 3 of the second superseding indictment. See CV-17-268-JCC, pg. 21, where the petitioner cites Dominguez-Maroyoquit, 748 F.3d 918, 920 (9th Cir. 2014), and United States v. Bell, 158 F.Supp. 3d 906, 2016 U.S. Dist. LEXIS 11035 N.D. Ca., 2016). Moreover, now that the Ninth Circuit has declared §2113(a)(d) & §111 to be "divisible" statutes, the petitioner's claims in re: CV-17-268-JCC, pg. 22, is further supported, where he states:

> 'It appears to the petitioner...that Congress constructed 18 U.S.C. §111(a) and (b), in a similar manner as it constructed 18 U.S.C. §2113(a) and (d). In fact, there is binding Ninth Circuit case law which holds that §2113(d)'s aggravating behavior, "assaults and any person," committed either in the bank or during the "escape"/"hot pursuit" that is coterminus with the bank robbery, would preclude a conviction for assault under §111 (possibly a Double Jeopardy violation under the Fifth Amendment.' Id., pg.22.

In light of the above, the petitioner now turns to those "fact critical" documents the courts have said should be reviewed pursuant to "modified categorical approach." The initial indictment charged two crimes: Count One: Armed Bank robbery; 18 U.S.C. §2113(a)(d), and Use of a firearm in futherance of the bank robbery; 18 U.S.C. §924(c). In September 1999, the government sought the grand jury to supersede the indictment by adding Count One: Conspiracy; 18 U.S.C. §371, Count Two was changed to the Bank Robbery; 18 U.S.C. §2113(a)(d), Count Three was the first Use of Firearm; §924(c), but changed from "brandishing" to "discharge", Count Four was added Assault on a Federal Officer, 18 U.S.C. §111, and Count Five as a second use of a Firearm in relation to the Assault; 18 U.S.C. §924(c). See [Exhibit "A"].

The first error, with the exception of the bank robbery charge, the Assault and both firearm charges are not specific enough for a petit jury to accurately convict the defendant of a crime. Counts 3 and 5, cite a generic §924(c), instead of the specific criminal elements of §924(c)(1)(A)(iii) for "discharge" (Count 3); and §924(c)(1)(A)(iii), for "discharge" (Count 5), and Count 4 cites a generic §111, instead of §111(a) or §111(b). In other words, the government failed, where the Ninth Circuit in Holder v. Rendon, 764 F3d 1077, states:

'"a prosecutor charging a violation of a divisible statute must generally select the relevant element from its list of alternatives. And the jury, as instructions in the case will make clear, must then find that element, unanimously and beyond a reasonable doubt."' Id., at 764 F3d 1085.

To be sure, the government's request for a fact or conduct-based approach of interpreting §924(c)(3)(B) by the district court, opened the door to other constitutional violations that Dimaya raised such as "fair notice" under the Sixth Amendment's "informed nature and cause of accusations" as well. The Ninth Circuit in Geozos, LEXIS 16515 (9th Cir. August 29, 2017), raised this issue under "interim law." Moreover, now that the Ninth Circuit has declared §2113(a)(d) to be a "divisible" statute warranting a review of court documents under the "Modified Categorical Approach", the courts should expect some cases rife with error. But, at least there won't be a wholesale release of every armed bank robber, only those with indictment and jury instructions errors like the instant case. In United States v. Walton, 881 F.3d 768 (9th Cir. Jan. 8, 2018), twenty-four days before the Watson Court issued it ruling regarding §2113(a)(d) being "divisible", clarified the process.

'If a statute is "divisible" - that is, if it "lists alternative sets of elements, in essence several different crimes" - we apply the "modified categorical approach," under which we "consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction," and then apply the categorical approach to the subdivison under which the defendant was convicted. United States v. Werle, 815 F.3d 614, 619 (9th Cir. 2016) (quoting Descamps v. United States, 570 U.S. 254...(2013)). If the government fails to produce those documents, courts determine whether the "least of the acts" described in the statute can serve as a predicate offense. Johnson v. United States, ("JohnsonI"), 559 U.S. 133, 137, 130 S.Ct. 1265, 176 L.Ed. 2d 1 (2010).'

The Ninth Circuit in United States v. Werle, 815 F.3d 614 (9th Cir. 2016), addressed the Sixth Amendment violations in conjunction with conducting the "modified categorical approach stating:

'In a "narrow range of cases," when the...statute is divisible, that is, it "list alternative sets of elements, in essence 'several crimes'" ...a court needs a way to find out which the defendant was convicted of." Pamirez v. Lynch, 810 F.3d 1127, 2016 U.S. App. LEXIS 901, at 6 (9th Cir. Jan. 20, 2016). Only in such a case may the sentencing court review the conviction using the modified categorical approach.... The modified categorical approach permits sentencing courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction." Descamps, 133 S.Ct. at 2281.' Id., at 815 F.3d 619. 'The more limited application of the modified approach are rooted in

> the statutory language, the Sixth Amendment's requirement that facts that increase a defendant's maximum penalty be proven to a jury beyond a reasonable doubt, and practical concerns.... Moreover, the Sixth Amendment requires that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprndi v. New Jersey, 530 U.S. 466,490,...(2000) Because the [§924(c)(1)(A)(ii)(iii)] sentencing enhancement increases the mandatory minimum beyond the ordinary [20 years] maximum penalty for [armed bank robbery], Sixth Amendment principles "counsel against allowing a sentencing court to 'make a disputed' determination 'about what the defendant and...judge must have understood as the factual basis,: descamps, 133 S.Ct. at 2288 (quoting Shepard v. United states, 544 U.S. 13, 25, 125 S.Ct. 1254, 161 L.Ed. 2d 205 (2005). Id., 815 F.3d 620.

Accordingly, when the defendants plead guilty, reasonable jurists of the Ninth Circuit have held that there is no need for sentencing courts to narrow through the conviction documents. See Marcia-Acosta, at 780 F.3d 1255, where the court stated:

> 'Courts remain restricted to the modified categorical approach's "focus on the elements, rather than the facts, of a crime." Thus in a case like this one - in which there is no narrowing through the indictment, information, or other charging document, and no narrowing of the offense of conviction through the actual conviction documents...a sentencing court may not rely on an extraneous factual-basis statement...' Id., at 780 F.3d 1255.

However, to be sure, when a defendant has exercised his right to go to trial those same reasonable jurists citing the Supreme Court in Descamps, 133 S.Ct. at 2283-84:

> clarified that the modified categorical approach serves a "limited function," "effectuating the categorical analysis when a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction." To determine whether a statute is divisible, we consider whether "an element of the crime of conviction contains alternative, one of which is an element...[The Acosta Jurist citing Rendon, 764 F.3d 1077, 1086 (9th Cir. 2014)] recently held that a disjunctive statute is divisible "only if it contains multiple alternative elements,.."More specifically, under Rendon, "only when [the] law requires that in order to convict the defendant the jury must unanimously agree that he committed a particular substantive offense contained within the disjunctively worded statute are we able to conclude that the statute contains alternative elements..." Id., at 780 F.3d 1249-50.

Accordingly, by applying Johnson II, Descamps, Alleyne,Mathis, Werle, Walton, Watson, and Geozos as intervening and interim case law, the appellant believes that reasonable jurists would agree that Morris is entitled to the same remedy afforded to Atul-Bhagat, supra, 436 F.3d 1140 (9th Cir. 2005) the court "found a fatal variance because...the jury instructions and clarification enabled the jury to base a finding of guilt on a fact other than the lement stated in the indictment."

Moreover, because it is highly unlikely that the courts' applying the "modified categorical approach" in light of Watson, would discover many similar "hopeless tangle[d]" cases like Morris's; to protect §2113(a)(d) and §924(c)(1)(C)(i), this Honorable Ninth Circuit could envoke and apply the "Rule of Lenity" to Morris' case. He raised this issue in his motion to amend his pro se response to the government's opposition brief.

The Ninth Circuit seems to acknowledge the use of the "Rule of Lenity," in three circumstances" (1) when a criminal statute is ambiguous; (2) when the government's position is ambiguous; and, (3) when the defendant did not have "fair warning." Justice Gorsuch alluded to this in his concurring opinion, where he states, "Perhaps the most basic of due process's customary protections is the demand of fair notice." Justice Gorsuch continued:

> '"From the inception of Western culture, fair notice has been recognized as an essential element of the rule of law". Criminal indictments at common law had to provide "precise and sufficient certainty" about the charges involved...Unless an "offence was set forth with clearness and certainty," the indictment risked being held void in court...."It seems to have been anciently the common practice, where an indictment appeared to be insufficient, either for its uncertainty or the want of proper legal words, not to put the defendant to answer it."' Id., at Dimaya, 138 S.Ct. 1204, Justice Gorsuch's concurring opinion.

Accordingly, the "Rule of Lenity" is applicable under these circumstances, where the Ninth Circuit in United States v. Kelly, 874 F.3d 1037 (9th Cir. 2018), states:

> '"The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them."...It derives from the fundamental principle that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

'The rule of lenity "only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended."..."In these circumstances—where text, structure, and history fail to establish that the Government's position is unambiguously correct --we apply the rule of lenity and resolve the ambiguity in the defendant's favor...("Only where the defendant's interpretation is unreasonable does the rule of lenity not apply.").' Id., at 874 F.3d 1037, internal quotes omitted.

See also United States v. Thompson, 728 F.3d 1011 (9th Cir. 2013), and United States v. Cabaccang, 332 F.3d 622 (9th Cir. 2002), holding:

'The application of the rule of lenity is required because the defendants did not have "fair warning" that their conduct was subjected to the enhanced penalty of §844(h)(1)....The "touchstone" of this question "is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." United States v. Lanier, 520 U.S. 259, 267. 117 S.Ct. 1219, 137 L.Ed. 2d 432 (1997).' Id., at 728 F.3d 1020.

'[T]o the extent that any doubt remains, the scope of the statute is sufficiently ambiguous to invoke the rule of lenity. "in these circumstances --where text, structure and history fail to establish that the Government's position is unambiguously correct--we resolve the ambiguity in the defendant's favor."' id., at 332 F.3d 635.

CONCLUSION

WHEREFORE, the foregoing reasons where the petitioner has made a substantial showing of the denail of the petitioner's Constitutional rights under the Fifth and Sixth Amendments; and in so doing, has further shown that jurist of reason would find it debatable whether the District Court was correct in not applying the "modified categorical approach" after the Ninth Circuit declared 18 U.S.C. §2113(a) to be a "divisible" statute, herein, "prays" this Honorable Supreme Court of the United States will overrule the Ninth Circuit's denial, vacate Counts 3, 4, & 5, and remand back to the District Court for resentencing.

Respectfully submitted,

Date: October 20, 2019.

Wayne Neville Morris, petitioner, pro se.