

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

AARON SCOTT PRUETT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KARA HARTZLER
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

Attorneys for Petitioner

QUESTION PRESENTED

Six circuit courts currently employ six separate methods of determining whether a petitioner has satisfied the procedural and substantive requirements for relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015). The question presented in this case is whether courts should look to (1) the factual record, (2) the law at the time of sentencing, or (3) the law as it currently stands to decide whether a petitioner is eligible for *Johnson* relief.

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Petitioner Aaron Scott Pruett respectfully prays that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on January 9, 2018.

OPINION BELOW

The Court of Appeals affirmed the denial of Mr. Pruett's petition for a writ of habeas corpus under 28 U.S.C. § 2255. *See United States v. Pruett*, __ F. App'x __, 2017 WL 5897307 (9th Cir. Nov. 30, 2017) (attached here as Appendix A). Mr. Pruett then petitioned for panel rehearing and rehearing en banc. On January 9, 2018, the panel denied Mr. Pruett's petition for panel rehearing, and the full court declined to hear the matter en banc. *See* Appendix B.

JURISDICTION

On November 30, 2017, the Court of Appeals affirmed the denial of Mr. Pruett's habeas petition. *See* Appendix A. On January 9, 2018, the Court of

Appeals denied rehearing. *See* Appendix B. The Court thus has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The pertinent statute governing eligibility for habeas relief, 28 U.S.C. § 2255, states:

- (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence. . . .
- (f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of . . .
 - (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or . . .
- (h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain . . .
 - (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

STATEMENT OF FACTS

In 1996, Mr. Pruett pleaded guilty to federal bank robbery charges in the U.S. District Court in the Southern District of California. In calculating his Sentencing Guidelines range, the Presentence Report alleged that Mr. Pruett was subject to a “career offender” sentencing enhancement under U.S.S.G. § 4B1.2 on

the basis of two prior convictions for robbery under California Penal Code § 211. This enhancement raised his base offense level from 23 to 34 and resulted in a Guidelines range of 188-235 months. Without this career offender enhancement, Mr. Pruett would have only faced a Guidelines range of 70-87 months.

The Guidelines range was particularly important because, at the time of Mr. Pruett's sentencing in 1996, district courts did not have discretion to vary above or below the Guidelines range. *See Mistretta v. United States*, 488 U.S. 361, 367 (1989) (noting that the Sentencing Reform Act of 1984 "makes the Sentencing Commission's guidelines binding on the courts"). Not until this Court's decision nine years later did district courts gain the discretion to sentence a defendant above or below the calculated Guidelines range. *See United States v. Booker*, 543 U.S. 220, 245 (2005). Thus, at sentencing, the district court found Mr. Pruett to be a career offender and imposed a sentence of 235 months for the bank robbery count.

On June 26, 2015, this Court struck down the "residual clause" of the Armed Career Criminal Act ("ACCA") as void for vagueness. *See Johnson v. United States*, 135 S. Ct. 2551 (2015). Within one year of *Johnson*, Mr. Pruett filed a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 seeking relief. In this Motion, Mr. Pruett noted that the crime of violence definition in U.S.S.G. § 4B1.2(a)(2) used to calculate his 34 base offense level contained a "residual clause" identical to the one *Johnson* had struck down as void for vagueness. He thus argued that because *Johnson* applied equally to the Sentencing Guidelines, the career offender residual clause was similarly void for vagueness. And as robbery under

Cal. Penal Code § 211 had only ever qualified as a “crime of violence” under the now-defunct career offender residual clause, Mr. Pruett contended that the district court should grant his § 2255 petition.¹ The district court disagreed and denied Mr. Pruett’s habeas petition but granted him a certificate of appealability.

On appeal, a divided panel affirmed the district court’s denial of Mr. Pruett’s habeas petition. *See* Pet. App. 1a-6a. The majority found that Mr. Pruett’s petition was untimely under 28 U.S.C. § 2255(f)(3) because “his conviction and sentence did not implicate the residual clause[]” such that *Johnson* was “of no moment.” Pet. App. 3a.

The majority did not reach this conclusion by looking at the sentencing transcript—nor could it, as the decades-old transcript was not available. Rather, the majority pointed to the 1994 decision of *United States v. David H.*, 29 F.3d 489, 494 (9th Cir. 1994) (per curiam), which had held for purposes of the Federal Juvenile Delinquency Act that § 211 satisfied both the residual clause and an alternative crime of violence definition for offenses involving the “threatened use of physical force against the person of another” (also known as the “force clause” or the “elements clause”). Pet. App. 2a. Even though *David H.* involved an entirely different statute of conviction, the majority found that it represented the law at the time of Mr. Pruett’s sentencing, which controlled for purposes of determining a

¹ Mr. Pruett also relied on *Johnson* to challenge his conviction for using or carrying a firearm under 18 U.S.C. § 924(c), a claim he does not renew here.

petition's timeliness under § 2255(f)(3). Pet. App. 2a. Thus, the majority assumed that the district court had relied on *David H.* to sentence Mr. Pruett under the force clause, stating that "this is not a situation in which 'it is unclear from the record whether the sentencing court relied on the residual clause.'" Pet. App. 3a (quoting *United States v. Geozos*, 870 F.3d 890, 895 (9th Cir. 2017)).

Concurring, Judge Christen disagreed with the majority's decision to apply 1996 law, opining that "the state of the law at the time a sentence is imposed does not always bear on the timeliness of a criminal defendant's challenge to his or her sentence." Pet. App. 4a. For instance, "[w]ere the Supreme Court's jurisprudence to evolve such that a defendant's sentencing enhancement under the *pre*-Booker career offender guideline could no longer be supported by the force clause *or* the residual clause," Judge Christen would have held that a defendant "should not be precluded from § 2255 relief on account of the clause ostensibly invoked at the time of his or her sentencing." Pet. App. 4a. Thus, even where a defendant's crimes were "undoubtedly crimes of violence under the force clause *at the time of sentencing*," this does not mean that "she may not benefit from the Supreme Court's later decision invalidating the residual clause" if the case law concerning the force clause has also changed. Pet. App. 4a-5a (emphasis in original).²

² Judge Christen would have held that Mr. Pruett's convictions under California Penal Code § 211 "qualify as crimes of violence under the force clause of U.S.S.G. § 4B1.2(1) because they have 'as an element the use, attempted use, or threatened use of physical force against the person of another.'" Pet. App. 5a. But this is error, as the Ninth Circuit has held directly to the contrary. *See United*

Mr. Pruett filed a petition for panel and en banc rehearing, arguing in part that Judge Christen’s concurrence was correct in that courts must apply current precedent to determine whether a petitioner qualifies for *Johnson* relief. The Ninth Circuit denied the petition for rehearing; this petition for a writ of certiorari follows.

SUMMARY OF THE ARGUMENT

For the following reasons, this Court should grant Mr. Pruett’s petition for a writ of certiorari.

First, the six courts of appeals that have reached this issue have taken six different positions on how to determine eligibility for *Johnson* relief at the procedural and merits stages; thus, the circuits are hopelessly split and must be reconciled.

Second, this question should be swiftly resolved because it affects thousands of *Johnson* petitioners nationwide who may be serving unconstitutional sentences.

Third, Mr. Pruett’s case squarely presents this issue and provides an ideal vehicle to resolve it.

Fourth, the Ninth Circuit’s decision was incorrect because courts should apply current law to adjudicate both the procedural and substantive issues in *Johnson* claims.

States v. Dixon, 805 F.3d 1193, 1197-98 (9th Cir. 2015) (holding that § 211 does not contain an element of the “use, intentional use, or threatened use of physical force”).

REASONS FOR GRANTING THE PETITION

I.

Six Courts of Appeals Have Taken Six Different Approaches to Determining Whether a Petitioner Satisfies the Procedural and Substantive Requirements for Relief Under *Johnson*.

To date, every circuit court to have decided the issue of whether a claim implicated the residual clause has employed a different approach to this inquiry. This hodge-podge of conflicting methodologies is unsustainable and must be resolved by this Court.

Adjudicating a *Johnson* claim first requires a court to consider whether any procedural hurdles exist to granting relief. These procedural hurdles may include whether a petition is timely under 28 U.S.C. § 2255(f)(3), or whether a second or successive petition relies on a “new rule of constitutional law” under § 2255(h)(2) or § 2244(b)(2)(A).

But to adjudicate these procedural questions, the courts of appeals have looked to different sources to determine whether a claim implicates *Johnson* and the residual clause. For instance, the Fourth Circuit, the first to decide the question, looked to the *factual record*—in particular, whether the district court expressly stated that it was relying on a legal basis other than the residual clause to find the predicate offense a “violent felony.” See *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017). By contrast, the First, Tenth, and Eleventh Circuits looked, not to what happened at the sentencing hearing, but to *the law as it stood* at the time of the petitioner’s sentencing. See *Dimott v. United States*, 881 F.3d 232,

241 (1st Cir. 2018); *United States v. Taylor*, 873 F.3d 476, 481 (5th Cir. 2017); *Beeman v. United States*, 871 F.3d 1215, 1220 (11th Cir. 2017). And in the context of a second or successive habeas under § 2255(h)(2), the Ninth Circuit has looked to *both* of these sources. *See United States v. Geozos*, 870 F.3d 890, 896 (9th Cir. 2017) (holding that a claim does not rely on Johnson if “it is possible to conclude, using both the record before the sentencing court and the relevant background legal environment at the time of sentencing, that the sentencing court’s ACCA determination did not rest on the residual clause”).

The courts of appeals have come no closer to unanimity on the merits of *Johnson* claims. The Fourth and Ninth Circuits, both of which looked to the factual record on the procedural issues, switched to looking at the law as it currently stands when addressing the merits. *See Winston*, 850 F.3d at 684 (“Accordingly, we now must consider under the current legal landscape whether Virginia common law robbery qualifies as a violent felony under the ACCA’s force clause.”) (emphasis added); *Geozos*, 870 F.3d at 897 (stating that, to decide the merits, “we look to the substantive law concerning the force clause as it currently stands, not the law as it was at the time of sentencing”) (emphasis in original). On the merits, the Eleventh Circuit switches from looking at the law at the time of sentencing to the factual record. *See Beeman*, 871 F.3d at 1221. While finding that a petitioner’s assertion of *Johnson* is enough to satisfy the threshold procedural requirements, the Tenth Circuit adjudicates the merits by looking to both the factual record and the law at the time of sentencing. *See United States v. Snyder*, 871 F.3d 1122, 1126, 1128-30

(10th Cir. 2017). Meanwhile, the Fifth Circuit has yet to take a position, finding that the petitioner had met the standard under any of those tests. *See Taylor*, 873 F.3d at 481.³

As if these divergent approaches were not enough, the circuits are also split on whether a sentencing court's failure to designate the particular clause on which it relied means that the petitioner has satisfied her burden or not. The First, Tenth, and Eleventh Circuits have held that where the record is silent, a petitioner cannot meet her burden to show that the claim relied on the residual clause. *See Beeman*, 871 F.3d at 1222 (holding that petitioners cannot meet their burden to demonstrate Johnson error if "it is just as likely that the sentencing court relied on the elements or enumerated offenses clause, solely or as an alternative basis for the enhancement"). By contrast, the Fourth and Ninth Circuits hold that in adjudicating the merits, a silent record will satisfy the threshold procedural requirements. *See Winston*, 850 F.3d at 682 (declining to "penalize a movant for a court's discretionary choice not to specify under which clause of Section 924(e)(2)(B) an offense qualified as a violent felony"); *Geozos*, 870 F.3d at 895 (holding that "when it is unclear from the record whether the sentencing court relied on the residual clause," courts resolve the ambiguity in favor of the petitioner). So even where two circuits may agree on which source controls the inquiry, their approaches

³ Because it found the petitions untimely, the First Circuit in *Dimott* did not reach the merits of the claims. *See Dimott*, 881 F.3d at 243.

may nevertheless lead to inconsistent results depending on whether a silent record may establish a petitioner's eligibility for relief or not.

What's more, this widespread judicial disagreement is further evidenced by the fact that three of the six cases discussed here were accompanied by a dissent or concurrence that would have looked to a different source. For instance, Judge McHugh's concurrence to the Tenth Circuit's decision would have looked only to the factual record on procedural issues and the law at the time of sentencing on the merits, even though the majority analyzed both on the merits. *See Snyder*, 871 F.3d at 1130-32. For procedural issues, Judge Torruella's dissent in *Dimott* would have looked to the factual record, even though the majority looked to the law at the time of sentencing. *See Dimott*, 881 F.3d at 245. And the dissents in *Dimott* and *Beeman* would have both looked to current law for the merits. *See Dimott*, 881 F.3d at 246 (finding that the application of current law is "necessary to decide this case"); *Beeman*, 871 F.3d at 1229 (stating that the majority's approach "not only would be unfair, but also would nullify the retroactive effect of a change in the law pronounced by the Supreme Court") (Williams, J., dissenting).

The following chart summarizes the approaches taken by the six circuit courts and their accompanying concurrences and dissents:

Case	Factual Record	Law at Sentencing	Current Law
<i>Winston</i> - procedural	X		
<i>Winston</i> - merits			X
<i>Geozos</i> - procedural	X	X	
<i>Geozos</i> - merits			X
<i>Snyder</i> (majority) - merits	X	X	
<i>Snyder</i> (concurrency) - procedural	X		
<i>Snyder</i> (concurrency) - merits		X	
<i>Beeman</i> (majority) - procedural		X	
<i>Beeman</i> (majority) - merits	X		
<i>Beeman</i> (dissent) - merits			X
<i>Taylor</i> - procedural		X	
<i>Taylor</i> - merits		X	
<i>Dimott</i> (majority) - procedural		X	
<i>Dimott</i> (dissent) - procedural	X		
<i>Dimott</i> (dissent) - merits			X
<i>Pruett</i> (concurrency) - procedural			X

As this chart shows, it would be difficult to imagine a *more* fractured approach than that currently taken by circuit courts adjudicating the procedural and substantive issues at stake in *Johnson* claims. A grant of certiorari is thus not only necessary, but virtually inevitable.

II.

This Question Affects Thousands of *Johnson* Petitioners Nationwide Who May Be Currently Serving Unconstitutional Sentences.

The Court should grant Mr. Pruetz's petition for certiorari without delay because this case presents a recurring issue of national importance. As this Court is well aware, thousands of individuals sentenced under identical or similarly worded "residual clauses" have filed *Johnson*-based motions seeking relief in districts throughout the country. Without prompt resolution of this issue, the disparate

approaches of the circuits detailed above will lead to inconsistent and unfair results for similarly-situated individuals.

The ubiquity of these *Johnson* claims stems from the fact that for decades, the residual clause acted as a catch-all provision, reaching nearly all crimes that would have also satisfied an alternative definition contained in the “violent felony” or “crime of violence” definition. *See* 18 U.S.C. § 924(e)(2)(B) (ACCA); U.S.S.G. § 4B1.2(a) (career offender Guideline); 18 U.S.C. § 924(c)(3) (committing an offense “in furtherance of” a crime of violence). Because of the “catch-all” nature of the residual clause, sentencing courts seldom explained their rationale or legal thought processes at sentencing, since the identity of the clause upon which they relied made no difference to the outcome. And because this failure to explain made no difference to the outcome, defense counsel had no incentive to object or clarify on the record the particular legal basis for the sentencing court’s decision. As a result, inconclusive records are common—if not the norm—in *Johnson* litigation, and thousands of petitioners and reviewing courts are currently trying to make sense of ambiguous records when looking retrospectively at original sentencing proceedings.

Urgent review is also warranted because many *Johnson* movants may be serving sentences far higher than they would have otherwise received. In some cases, for instance, a grant of relief under *Johnson* would subject a petitioner to a lower statutory maximum, such as a person subject to a fifteen-year mandatory minimum under the Armed Career Criminal Act who would only face a statutory maximum of ten years if granted *Johnson* relief. *See* 18 U.S.C. § 924(e)(1). Or in

cases involving the mandatory Sentencing Guidelines that pre-dated *Booker*, 543 U.S. 220, a person may not only be subject to a lower Guidelines range in the absence of a career offender enhancement, he may also be eligible for a downward variance from that Guidelines range.⁴ Here, for instance, the application of a career offender sentencing enhancement subjected Mr. Pruett to a mandatory Guidelines range of 188-235 months. Without that enhancement, Mr. Pruett would only have faced a Guidelines range of 70-87 months and could have even received a downward variance from that range. Thus, delay in adjudicating these important cases will only cause potentially meritorious claims to stall or outright denied. “Because uniformity among federal courts is important on questions of this order,” this Court should “grant[] certiorari to end the division of authority” and resolve this six-way circuit split. *Thompson v. Keohane*, 516 U.S. 99, 106 (1995).

III.

Mr. Pruett’s Case Squarely Presents This Question.

The Ninth Circuit held as a threshold procedural issue that Mr. Pruett’s petition was untimely under § 2255(f)(3). Pet. App. 3a. To reach this conclusion, the Ninth Circuit looked to *United States v. David H.*, 29 F.3d 489, 494 (9th Cir. 1994)

⁴ In *Beckles v. United States*, 137 S. Ct. 886 (2017), the Court held that the advisory Guidelines that post-dated *Booker* were not subject to due process challenges and thus denied the petitioner’s claim for *Johnson* relief. *Beckles*, however, went out of its way to distinguish the pre-*Booker* mandatory Guidelines from its holding. See 137 S. Ct. at 892 (distinguishing the advisory Guidelines from provisions that “*fix the permissible sentences for criminal offense*”) (emphasis in original). As the Court of Appeals did not reach the question of whether the mandatory Guidelines may be void for vagueness, the Court need not decide that issue here.

(per curiam), a case that held, for purposes of the Federal Juvenile Delinquency Act, that a conviction for robbery under California Penal Code § 211 satisfied both the residual clause and the “elements clause.” Pet. App. 2a. Thus, the Ninth Circuit relied on the law at the time of Mr. Pruett’s sentencing to determine a procedural issue.

Neither Mr. Pruett nor the Government was able to obtain a copy of the 1997 sentencing transcript from his case. Given this, the Ninth Circuit found that because “[t]here is no suggestion in the record that the district court or the parties nevertheless considered the residual clause[],” this was “not a situation in which it is ‘unclear from the record whether the sentencing court relied on the residual clause.’” Pet. App. 3a (quoting *Geozos*, 870 F.3d at 895). Thus, the Ninth Circuit looked to both the law at the time of sentencing and the factual record to conclude that Mr. Pruett’s claim did not rely on the residual clause.

Had the Ninth Circuit relied *only* on the factual record to determine the procedural issue, as the Fourth Circuit does, the outcome would have been different. The fact that no transcript exists would have meant that the court would not have “penalize[d]” Mr. Pruett for a fact that was beyond his control. *See Winston*, 850 F.3d at 682. *See also Snyder*, 871 F.3d at 1126 (holding that an assertion of the right established in *Johnson* is sufficient to satisfy the procedural threshold). And while both the concurrence in *Snyder* and the dissent in *Dimott* would have also relied only on the factual record at the procedural stage, the *Snyder* concurrence would have held the absence of a transcript against Mr. Pruett, while the dissent in

Dimott would have found in his favor. *See Snyder*, 871 F.3d at 1132; *Dimott*, 881 F.3d at 245. In other words, the outcome of Mr. Pruett’s procedural issue depended on the sheer happenstance of his location.

And had Mr. Pruett raised this claim in a circuit that proceeded to the merits of the case, it would have similarly changed the outcome. Under current Ninth Circuit law, California robbery does not satisfy either elements clause or the generic definition of “robbery.” *See Dixon*, 805 F.3d at 1197-98; *United States v. Becerill-Lopez*, 541 F.3d 881, 891 (9th Cir. 2008). So if the merits of Mr. Pruett’s case were adjudicated in the Fourth or Ninth Circuits, or under the opinion of the dissents in *Beeman* or *Dimott*, he would prevail. But if the merits of Mr. Pruett’s case were adjudicated in the First, Tenth, or Eleventh Circuits, those courts would likely deny him relief. As these hypotheticals show, both the procedural and substantive questions at issue here are subject to a hopelessly conflicting array of approaches, which this Court should proceed to resolve.

IV.

Courts Should Apply Current Law to Adjudicate Both the Procedural and Substantive Issues in *Johnson* Claims.

By looking to the law at the factual record and the law at the time of the case to adjudicate the procedural requirements, the Ninth Circuit erred. The correct approach to resolving both the procedural and substantive questions involved in *Johnson* claims is to look to the law as it currently stands, which avoids:

(1) inequitable and inconsistent results between similarly-situated defendants; and

(2) the complicated task of recreating the legal landscape at the time of a defendant's case.

First, applying current law to both the procedural and substantive requirements avoids inequitable and inconsistent results between similarly-situated defendants. For instance, Mr. Pruett's conviction, like many other *Johnson* cases, is decades old, and the transcript of his sentencing hearing is no longer available through no fault of his own. But what if another defendant with the same conviction were sentenced the same day, and a transcript *were* available and happened to show the district court *did* rely on the residual clause? The net result would be that an identically-situated defendant is eligible for relief while Mr. Pruett is not. *See In re Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016) (rejecting the position that a defendant cannot show eligibility for relief "unless the sentencing judge uttered the magic words 'residual clause'"). As *Winston* held, this would "result in 'selective application'" of *Johnson* and "violat[e] 'the principle of treating similarly situated defendants the same.'" 850 F.3d at 682 (quoting *Teague v. Lane*, 489 U.S. 288, 304 (1989)).

Second, relying on the law as it currently stands avoids the complicated task of recreating the legal landscape at the time of a defendant's case. The Tenth Circuit optimistically held that the "relevant background legal environment" would provide a "'snapshot' of what the controlling law was at the time of sentencing." *Snyder*, 871 F.3d at 1129. But here, for instance the Ninth Circuit deemed *David H.*, 29 F.3d 489, to be "controlling law" even though it involved an entirely different

statute. *See* Pet. App. 2a. What’s more, later courts have reached the opposite conclusion as *David H.* in the context of an ACCA claim without ever finding it necessary to distinguish *David H.* or even mention it at all. *See Dixon*, 805 F.3d at 1197-98 (holding that § 211 is broader than the elements clause). In other words, serious questions exist as to whether *David H.* was actually “controlling law” at the time of Mr. Pruett’s sentencing, which confirms that recreating the legal landscape at a particular point in time is cumbersome, impractical, and frequently inaccurate.

Furthermore, a court’s reliance on the “relevant background legal environment” is directly at odds with this Court’s rule that “[a] judicial construction of a statute is an authoritative statement of what the statute meant *before as well as after* the decision of the case giving rise to that construction.” *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994) (emphasis added). Declining to apply changes in statutory interpretation would “not only would be unfair, but also would nullify the retroactive effect of a change in the law pronounced by the Supreme Court.” *Beeman*, 871 F.3d at 1229 (Williams, J., dissenting). For instance, the Court’s decisions in *Descamps v. United States*, 570 U.S. 254 (2013), and *Mathis v. United States*, 136 S. Ct. 2243 (2016), recently clarified that the modified categorical approach only applies when a statute contains “alternative elements.” Yet courts looking to the law at the time of sentencing would seemingly have to dig up decades-old conviction documents to apply the modified categorical approach, even though we now recognize that such an inquiry would be legally incorrect. As one district court explained, “[a]ttempting 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.” *United States v. Ladwig*, 192 F. Supp. 3d 1153, 1160 (E.D. Wash. 2016).

In sum, attempts to scour the record and recreate the law at the time of sentencing not only embarks on a tedious and improper inquiry, it will also lead to inconsistent results completely divorced from the merits of the claim. Because of this, and because “considerations of public policy weigh strongly in favor of applying current law,” *id*, courts should apply *current law* regarding statutory interpretation to decide whether a defendant’s offense is a crime of violence.

CONCLUSION

On the basis of the foregoing, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,



KARA HARTZLER
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

Attorneys for Petitioner

Date: March 28, 2018

APPENDIX A

FILED

NOV 30 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

AARON SCOTT PRUETT,

Defendant-Appellant.

No. 16-56858

D.C. Nos. 3:16-cv-01561-CAB

3:96-cr-00331-CAB-1

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Cathy Ann Bencivengo, District Judge, Presiding

Argued and Submitted October 5, 2017
Pasadena, California

Before: GRABER, MURGUIA, and CHRISTEN, Circuit Judges.

Defendant Aaron Scott Pruett timely appeals the district court's denial of his motion filed pursuant to 28 U.S.C. § 2255. Reviewing de novo, United States v. Swisher, 811 F.3d 299, 306 (9th Cir. 2016) (en banc), we affirm.

Defendant pleaded guilty, in 1996, to armed bank robbery, in violation of 18 U.S.C. § 2113(a), (d), and to using and carrying a handgun during the robbery, in

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

violation of 18 U.S.C. § 924(c)(1). Because of two previous convictions for robbery in violation of California Penal Code section 211, the court sentenced him as a career offender under U.S.S.G. § 4B1.1. He now argues that, applying Johnson v. United States, 135 S. Ct. 2551 (2015), the residual clauses of the then-applicable versions of 18 U.S.C. § 924(c)(3) and U.S.S.G. § 4B1.2(1) are unconstitutionally vague.

In 1990, we had held that a conviction for federal bank robbery qualifies as a "crime of violence" because it "has as an element the use, attempted use, or threatened use of physical force against the person of another." United States v. Selfa, 918 F.2d 749, 751 (9th Cir. 1990). And in 1994, we had held that "a violation of California Penal Code section 211 includes the element of threatened use of physical force against the person of another." United States v. David H., 29 F.3d 489, 494 (9th Cir. 1994) (per curiam) (internal quotation marks omitted). In other words, in 1996, Defendant's armed robbery conviction and his previous California robbery convictions met the definitions of "crime of violence" apart from the residual clauses that he now challenges. See 18 U.S.C. § 924(c)(3)(A) (1996) (defining "crime of violence" as a crime that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another"); U.S.S.G. § 4B1.2(1)(i) (1996) (defining "crime of violence" as a crime

that "has as an element the use, attempted use, or threatened use of physical force against the person of another"). There is no suggestion in the record that the district court or the parties nevertheless considered the residual clauses.

Accordingly, this is not a situation in which "it is unclear from the record whether the sentencing court relied on the residual clause." United States v. Geozos, 870 F.3d 890, 895 (9th Cir. 2017). Because his conviction and sentence did not implicate the residual clauses, the Supreme Court's later decisions concerning the constitutionality of a residual clause are of no moment, and Defendant cannot establish that his petition is timely under 28 U.S.C. § 2255(f)(3).

AFFIRMED.

FILED

United States v. Pruett, No. 16-56858

NOV 30 2017

CHRISTEN, Circuit Judge, concurring:

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

I concur in the result. I respectfully depart from the majority because in my view, the state of the law at the time a sentence is imposed does not always bear on the timeliness of a criminal defendant's challenge to his or her sentence. Were the Supreme Court's jurisprudence to evolve such that a defendant's sentencing enhancement under the *pre-Booker* career offender guideline could no longer be supported by the force clause *or* the residual clause, that defendant should not be precluded from § 2255 relief on account of the clause ostensibly invoked at the time of his or her sentencing. To illustrate, consider a hypothetical situation where:

The Supreme Court applies the categorical or modified categorical approach to abrogate a longstanding holding of this court that a certain crime qualifies as a crime of violence under the force clause of the career offender guideline. Although an affected criminal defendant was sentenced—before 2005—under the force clause, she does not immediately file a § 2255 motion because her crime remains a crime of violence under the residual clause. Then the Supreme Court declares the residual clause of the *pre-Booker* career offender guideline unconstitutionally vague,¹ and the defendant brings her first § 2255 motion.

I fear that the majority's holding might be taken to suggest that because the defendant's crimes of conviction were undoubtedly crimes of violence under the force clause *at the time of sentencing*, her sentence does not implicate the residual

¹ This possibility was left open by *Beckles v. United States*, 137 S. Ct. 886 (2017).

clause and she may not benefit from the Supreme Court's later decision invalidating the residual clause. As I see it, the text of § 2255(f)(3) imposes no such barrier to relief.²

I would dispose of this appeal on the grounds that Pruett has not demonstrated that his sentence was “imposed in violation of the Constitution or laws of the United States.” 28 U.S.C. § 2255(a). Pruett's convictions under California Penal Code § 211 and 18 U.S.C. § 2113(a),(d) all qualify as crimes of violence under the force clause of U.S.S.G. § 4B1.2(1) because they have “as an element the use, attempted use, or threatened use of physical force against the person of another.” *United States v. Chavez-Cuevas*, 862 F.3d 729 (2017); *United States v. Selfa*, 918 F.2d 749, 751 (9th Cir. 1990). For the same reason, his conviction under 18 U.S.C. § 2113(a),(d) satisfies the predicate for criminal liability under 18 U.S.C. § 924(c)(1). *United States v. Wright*, 215 F.3d 1020, 1028 (9th Cir. 2000). No intervening authority has undermined our holdings that California robbery and federal armed robbery are crimes of violence under U.S.S.G. § 4B1.2(1) and 18 U.S.C. § 924(c)(3)'s force clauses.

In sum, even if we assume, for the sake of argument, that the residual

² The same argument applies to a conviction that could rest on either a force clause or a residual clause.

clauses in U.S.S.G. § 4B1.2(1) and 18 U.S.C. § 924(c)(3) are indistinguishable from the one invalidated in *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015), Pruett is not entitled to relief under 28 U.S.C. § 2255(a) because his convictions under California Penal Code § 211 and 18 U.S.C. § 2113(a),(d) remain crimes of violence under this circuit's case law.

APPENDIX B

FILED

UNITED STATES COURT OF APPEALS

JAN 9 2018

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

AARON SCOTT PRUETT,

Defendant-Appellant.

No. 16-56858

D.C. Nos. 3:16-cv-01561-CAB

3:96-cr-00331-CAB-1

Southern District of California,
San Diego

ORDER

Before: GRABER, MURGUIA, and CHRISTEN, Circuit Judges.

The separate concurrence to the memorandum disposition filed November 30, 2017, is amended as follows:

On page 2, line 17 of the concurrence, change "In sum, even if we assume" to "Even if we assume"; on page 3, at the end of line 5 of the concurrence, add the citation: "*Beckles v. United States*, 137 S. Ct. 886, 897–98 (Ginsburg, J., concurring)."

With these amendments, the panel has voted to deny Appellant's petition for panel rehearing and rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellant's petition for panel rehearing and rehearing en banc is DENIED.

No further petitions for panel rehearing or for rehearing en banc may be filed.