

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RONALD DAVID JONES, JR.,
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

To establish both procedural and substantive eligibility for habeas relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015), a petitioner must show that a claim relies on the legal holding of *Johnson*—i.e., that the petitioner’s sentence implicated the “residual clause” of the Armed Career Criminal Act. But the courts of appeals are mired in a six-way split on the issue of *how* one must show that a claim relied on the residual clause. Thus, the question presented is whether courts should look to (1) the factual record, (2) the law at the time of sentencing, (3) the law as it currently stands, or (4) a combination of these factors to decide whether a petitioner’s claim relies on *Johnson* such that she or he is eligible for relief?

TABLE OF CONTENTS

QUESTION PRESENTED.....	<i>prefix</i>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT	1
OPINION BELOW	1
JURISDICTION	1
STATUTORY PROVISION INVOLVED.....	2
STATEMENT OF FACTS	2
SUMMARY OF THE ARGUMENT	6
REASONS FOR GRANTING THE PETITION	7
I. Six Courts of Appeals Have Taken Six Different Approaches to Determining Whether a Petitioner Satisfies the Procedural and Substantive Requirements for Relief Under <i>Johnson</i>	7
II. This Question Affects Thousands of <i>Johnson</i> Petitioners Nationwide Who May e Currently Serving Unconstitutional Sentences	12
III. Mr. Jones’s Case Squarely Presents This Question.....	14
IV. Court’s Should Apply Current Law to Adjudicate Both the Procedural and Substantive Issues in <i>Johnson</i> Claims.....	16
CONCLUSION	18
APPENDIX A	
PROOF OF SERVICE	

TABLE OF AUTHORITIES

	<i>Page</i>
Federal Cases	
<i>Beeman v. United States</i> , 871 F.3d 1215 (11th Cir. 2017)	<i>passim</i>
<i>In re Chance</i> , 831 F.3d 1335 (11th Cir. 2016)	16
<i>Descamps v. United States</i> , 570 U.S. 254 (2013)	17
<i>Dimott v. United States</i> , 881 F.3d 232 (1st Cir. 2018)	<i>passim</i>
<i>Johnson v. United States</i> , 135 S. Ct. 2551 (2015)	<i>passim</i>
<i>Mathis v. United States</i> , 136 S. Ct. 2243 (2016)	17
<i>Ramirez v. Lynch</i> , 810 F.3d 1127 (9th Cir. 2016)	15
<i>Rivers v. Roadway Express</i> , Inc., 511 U.S. 298 (1994)	17
<i>Teague v. Lane</i> , 489 U.S. 288 (1989)	17
<i>United States v. Becerril-Lopez</i> , 541 F.3d 881 (9th Cir. 2008)	15
<i>United States v. Chan-Xool</i> , 716 F. App'x 274 (5th Cir. 2017)	15
<i>United States v. David H.</i> , 29 F.3d 489 (9th Cir. 1994)	15, 16
<i>United States v. Dixon</i> , 805 F.3d 1193 (9th Cir. 2015)	5, 13, 15, 16
<i>United States v. Geozos</i> , 870 F.3d 890 (9th Cir. 2017)	8, 9, 10, 11

<i>United States v. Heflin</i> , 195 F. Supp. 3d 1134 (E.D. Cal. 2016)	15
<i>United States v. Howard</i> , 2017 WL 634674 (S.D. Cal. Feb. 16, 2017) (quotations omitted)	15
<i>United States v. Jones</i> , 714 F. App'x 721 (9th Cir. 2018)	1
<i>United States v. Ladwig</i> , 192 F. Supp. 3d 1153 (E.D. Wash. 2016)	18
<i>United States v. McDougherty</i> , 920 F.2d 569 (9th Cir. 1990)	15, 16
<i>United States v. Snyder</i> , 871 F.3d 1122 (10th Cir. 2017)	9, 10, 11
<i>United States v. Taylor</i> , 873 F.3d 476 (5th Cir. 2017)	8, 9, 11
<i>United States v. Winston</i> , 850 F.3d 677 (4th Cir. 2017)	<i>passim</i>
Federal Statutes	
18 U.S.C. § 924(c)	12
18 U.S.C. § 924(e)	<i>passim</i>
18 U.S.C. § 2113	2
28 U.S.C. § 1254	1
28 U.S.C. § 2244	7
28 U.S.C. § 2255	<i>passim</i>
Armed Career Criminal Act	<i>passim</i>
State Statutes	
Cal. Penal Code § 211	<i>passim</i>
Cal. Penal Code § 12022	5, 15
Advisory Guidelines	
U.S.S.G. § 4B1.2	12

IN THE SUPREME COURT OF THE UNITED STATES

RONALD DAVID JONES, JR.,
Petitioner,

- v. -

UNITED STATES OF AMERICA,
Respondent.

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

Petitioner Ronald David Jones, Jr., 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 March 1, 2018.

OPINION BELOW

The Court of Appeals affirmed the denial of Mr. Jones's petition for a writ of habeas corpus under 28 U.S.C. § 2255 in an unpublished memorandum. *See United States v. Jones*, 714 F. App'x 721 (9th Cir. 2018) (attached here as Appendix A).

JURISDICTION

On March 1, 2018, the Court of Appeals affirmed the denial of Mr. Jones's habeas petition. *See* Pet. App. 2a-3a. The Court thus has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The pertinent statute, 18 U.S.C. § 924(e)(2)(B) states:

(B) The term “violent felony” means any crime punishable by imprisonment for a term exceeding one year . . . that –

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
- (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

STATEMENT OF FACTS

In 1994, a jury found Mr. Jones guilty of federal criminal charges for bank robbery, use and carrying of a firearm, and felon in possession of a firearm. While a conviction for felon in possession of a firearm normally carries a ten-year statutory maximum, the Presentence Report (“PSR”) contended that Mr. Jones qualified for a sentencing enhancement under the Armed Career Criminal (“ACCA”). This enhancement carries a mandatory minimum of fifteen years and a statutory maximum of life in prison for defendants who have previously been convicted of three “violent felonies.” *See* 18 U.S.C. § 924(e)(1).

At the time of his sentencing, Mr. Jones had three prior convictions that could potentially qualify as ACCA predicates: two convictions for robbery and attempted robbery under California Penal Code § 211 and a conviction for federal bank robbery under 18 U.S.C. § 2113(a). Under the ACCA “violent felony” definition, these prior convictions would qualify as predicates if the statute of conviction categorically satisfied either the “force clause” (in that it had an element

of the “use, attempted use, or threatened use of physical force against the person of another”) or the “residual clause” (in that it involved “conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B).

At sentencing, defense counsel began by arguing that attempted robbery did not satisfy the risk-based language of the residual clause, after which the following exchange occurred:

Court: But – but, no. Wait a minute. This is where I have a problem, as to why there isn’t a *risk*, to the extent that if in fact you have a crime that is punishable by imprisonment for a term exceeding one year, that the (b) section involves conduct that presents a *serious potential risk of physical injury to another*. That is a violent felony.

Defense: Right.

Court: Now, basically under California law, an attempted robbery – I don’t see why that doesn’t involve a *serious threat of potential risk of physical injury to another, a serious potential risk of physical injury to another*. . . .

Defense: Right. Right. The thing is that – is that it’s a situation where we have some kind of – what is the degree of *risk* here that’s sufficient to show that there really is a sufficient *risk* to – to penalize someone under the armed career criminal statute? I mean, is the *risk* great enough to be the *risk* that was designed to be protected against under the armed career criminal statute

Court: A *risk* is a *risk*.

Defense: . . . a *risk* is a *risk*, but a *risk* of a *risk* is not enough of a *risk*.

Supplemental Excerpt of Record (“SER”) 76-77 (emphases added). The district court and defense counsel then continued this “risk-based” discussion for the next six pages of the transcript, SER 77-83, after which the district court stated:

Court: And then it has an element – the use, attempted use, or threatened use of physical force against the person of another or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Personally, I think that attempted robbery under California [law] meets both one or two. I suppose *it's safer to say it presents a serious potential risk of physical injury to another* because you're talking about an attempt. But the way they define it, I think attempted robbery is an attempted use of physical force against the person of another or threatened use of physical force against the person of another sufficient to withstand either (1) or (2).

As [defense counsel] mentioned, [case law] says:

“A *risk* of a *risk* is not enough of a *risk*.”

And that is so catchy but, honestly, when you try to apply that, it's very difficult to apply.

SER 83 (emphases added). After discussing the risk issue for another four pages, the district court then concluded:

Court: And when you combine that, the fact that it's in motion but it fails because it's interrupted or prevented or fails, and what fails or is interrupted or prevented is in fact the taking against the will by force, violence, fear, or intimidation of the property of another, I think it's clear that that's a *risk* and not a *risk* of a *risk*.

So I hold that attempted robbery under – as California defines it is in fact a predicate violent felony under 18 USC 924(e) either (1) or (2).

SER 87 (emphases added). In other words, while the parties spent the vast majority the hearing discussing the residual clause, the district court then concluded—citing no authority or rationale—that California robbery would satisfy “either” the force or the residual clause. The district court then imposed the ACCA enhancement and

sentenced Mr. Jones to a total of 322 months in prison and five years of supervised release.

On June 26, 2015, this Court in *Johnson v. United States* struck down the “residual clause” of the Armed Career Criminal Act (“ACCA”) as void for vagueness. 135 S. Ct. 2551 (2015). Within one year of *Johnson*, Mr. Jones timely filed a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 seeking to overturn his ACCA enhancement. In this Motion, Mr. Jones pointed to the Ninth Circuit’s decision in *United States v. Dixon*, 805 F.3d 1193 (9th Cir. 2015), which held in the ACCA context that Cal. Penal Code § 211 lacked the necessary mens rea to satisfy the force clause. Because § 211 could not satisfy the force clause, Mr. Jones contended that as a matter of law his ACCA enhancement must have relied on the residual clause. And since *Johnson* had found the residual clause unconstitutional, Mr. Jones argued that the district court must vacate his sentence.

In its response, the Government disputed that the residual clause had played a role in Mr. Jones’s sentence, for three reasons. First, it claimed that the record did not reflect that the sentencing court necessarily relied on the residual clause, as opposed to the force clause. Second, the Government argued that at the time of Mr. Jones’s sentencing, the Ninth Circuit had held in two non-ACCA cases that similarly-worded statutes satisfied both the force clause and the residual clause. And finally, the Government contended that because Mr. Jones’s robbery convictions both involved sentencing enhancements for use of a firearm or deadly weapon under California Penal Code §§ 12022(b) and 12022.5, these enhancements

would have transformed even a non-force clause robbery into a force clause robbery because use of a weapon constituted the “threatened use of force.” In a written reply, Mr. Jones disputed these arguments.

The district court denied Mr. Jones’s § 2255 Motion. Specifically, it agreed with the Government’s third argument that the addition of a deadly weapon transformed § 211 into a force-clause offense but did not address the Government’s first two arguments. The district court also granted Mr. Jones a certificate of appealability on this issue.

On appeal, a panel of the Ninth Circuit affirmed the district court’s denial. *See* Pet. App. 2a-3a. In a memorandum disposition, the panel looked solely to the record of Mr. Jones’s sentencing hearing to determine that his claim did not rely on *Johnson*. Specifically, the panel quoted the sentencing judge’s statement that while “it’s safer to say [that attempted robbery] presents a serious potential risk of physical injury to another,” the judge “in the end” relied on the fact that § 211 was a violent felony under “either [the force clause] or [the residual clause].” *See* Pet. 2a-3a. This petition for a writ of certiorari follows.

SUMMARY OF THE ARGUMENT

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

First, six circuit courts have taken six different approaches to determining whether a claim implicates the residual clause by looking to (1) the factual record, (2) the law at the time of sentencing, (3) the law as it currently stands, or (4) a

combination of these factors. Thus, the circuits are hopelessly split on this issue 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. Jones'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 interpreting the elements of the offense to adjudicate both the procedural and substantive issues in *Johnson* claims.

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) and 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 interpreting the crime’s elements *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 interpreting the crime’s elements *as it currently stands* when addressing the merits of the claim. *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”). 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. And the First Circuit has yet to decide what controls on the merits of the claim because it has so far found the petitions untimely. *See Dimott*, 881 F.3d at 243.

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 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”)

(Torruella, J., joining part and dissenting in part); *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> (concurrence) - procedural	X		
<i>Snyder</i> (concurrence) - 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

As this chart shows, it would be difficult to imagine a *more* fractured approach than that currently taken by circuit courts adjudicating the 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. Jones’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.

This is precisely what happened in Mr. Jones's case. During Mr. Jones's hearing, the sentencing court and the parties discussed the residual clause for approximately fifteen pages of the transcript. SER 72-87. But the sentencing court then concluded in passing—citing no authority or rationale—that it believed § 211 was a violent felony under “either [the force clause] or [the residual clause].” *See* Pet. App. 2a-3a. So the sentencing court never actually stated which of the two clauses it ultimately relied on, nor did it need to, as this would have made no difference to the outcome of Mr. Jones's case. And even if the sentencing court *had* relied on the force clause, we now know that reliance would have been incorrect. *See Dixon*, 805 F.3d at 1197-98. Accordingly, it makes no sense for the critical liberty interests of defendants like Mr. Jones to turn solely on an irrelevant legal distinction that a sentencing judge had no incentive to decide correctly in the first place.

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). Here, for instance, the application of an ACCA enhancement catapulted Mr. Jones's felon-in-

possession sentence from a maximum sentence of 120 months to a sentence of 262 months—a nearly 12-year swing. Thus, any delay in adjudicating these important cases will unquestionably lead many defendants to continue to serve unconstitutional sentences.

III.

Mr. Jones’s Case Squarely Presents This Question.

As previously explained, courts have looked to a variety of factors to determine whether a sentence “relied on” *Johnson*, including (1) the factual record, (2) the law at the time of sentencing, (3) the law as it currently stands, or (4) a combination of these factors. Here, the Ninth Circuit looked solely to the factual record, specifically the sentencing transcript, to determine the question of whether Mr. Jones was procedurally eligible for relief. *See* Pet. App. 2a-3a.

But had the Ninth Circuit looked to current law, as other circuits and jurists have urged, the outcome would have been different. *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.”); *see also Dimott*, 881 F.3d at 246 (Torruella, J., joining part and dissenting in part); *Beeman*, 871 F.3d at 1229 (Williams, J., dissenting). Indeed, had the Ninth Circuit been deciding Mr. Jones’s petition on the merits, rather than on a procedural issue, it would have reached the opposite conclusion, since current law

holds that § 211 could only be a “violent felony” under the residual clause. *See Dixon*, 805 F.3d at 1197-98.¹

And the Ninth Circuit would have come to a different conclusion even if it had looked to the law at the time of Mr. Jones’s sentencing. The Government argued below that the law at the time of Mr. Jones’s sentencing held that § 211 was a violent felony under the force clause, citing two non-ACCA cases that involved different statutory language: *United States v. McDougherty*, 920 F.2d 569, 573 (9th Cir. 1990), and *United States v. David H.*, 29 F.3d 489, 494 (9th Cir. 1994). But the Ninth Circuit has clarified that these cases involved the residual clause, rather than the force clause. *See United States v. Becerril-Lopez*, 541 F.3d 881, 889 (9th Cir. 2008) (stating that “McDougherty’s legal conclusion clearly rested on the language in [18 U.S.C.] § 16(b),” a residual clause); *see also id.* at 893 n.5 (stating that in *David H.*, “we turned, again, to § 16(b) to supply the definition of ‘crime of violence’”). And when *Dixon*, an ACCA case, held that § 211 did not satisfy the force

¹ Below, the district court found that because Mr. Jones’s robbery convictions both involved sentencing enhancements for use of a firearm or deadly weapon under California Penal Code §§ 12022(b) and 12022.5, these enhancements would have transformed even a non-force clause robbery into a force clause robbery and thus not implicated the residual clause. But as Mr. Jones pointed out to the Ninth Circuit, at least two circuits and several district have held that a § 12022 sentencing enhancement is not an “element” of a California robbery that could transform it into a force-clause crime of violence. *See United States v. Chan-Xool*, 716 F. App’x 274, 278 (5th Cir. 2017) (holding that none of the government’s cases “shows that enhancements can qualify as elements for the purpose of transforming what is not a crime of violence into a crime of violence”); *Ramirez v. Lynch*, 810 F.3d 1127, 1130 (9th Cir. 2016) (declining to examine the sentence enhancement, “which is not a ‘crime’ of which Ramirez was ‘convicted’”); *United States v. Heflin*, 195 F. Supp. 3d 1134 (E.D. Cal. 2016) (holding that a § 12022(b) enhancement cannot be an “element” of § 211 as a matter of law); *United States v. Howard*, 2017 WL 634674, at *4 (S.D. Cal. Feb. 16, 2017) (“[S]ection 12022 enhancements are punishments for a crime, not elements of it.”) (quotations omitted). Not surprisingly, then, the Ninth Circuit did not adopt this as a basis for denying Mr. Jones’s § 2255 petition.

clause, it never mentioned *McDougherty* or *David H*, as it would have been required to do if those cases controlled. *See Dixon*, 805 F.3d at 1196-98. Because the law at the time of sentencing did not hold that § 211 satisfied the force clause, Mr. Jones would have been procedurally eligible to apply for *Johnson* relief if he had been convicted in the First, Fifth, or Eleventh Circuits. In other words, the outcome of Mr. Jones's § 2255 petition depended on the sheer happenstance of his location, and the Court should resolve these inconsistencies as expeditiously as possible.

IV.

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

By looking to the factual record to determine whether Mr. Jones's petition relied on *Johnson*, 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 interprets the elements of an offense, 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, had another defendant with the same conviction as Mr. Jones been sentenced the same day before a judge who did *not* mention the force clause in passing, as Mr. Jones's judge did, that defendant would have been eligible for relief. *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, 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 the law 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.

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 also leads to inconsistent results completely divorced from the merits of the claim. Because of

this, “considerations of public policy weigh strongly in favor of applying current law.” *United States v. Ladwig*, 192 F. Supp. 3d 1153, 1160 (E.D. Wash. 2016). Thus, the Ninth Circuit erred in looking to the factual record and the law at the time of sentencing to determine whether Mr. Jones is eligible for *Johnson* relief.

CONCLUSION

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

Respectfully submitted,



Date: May 10, 2018

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

Attorneys for Petitioner

APPENDIX A

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAR 1 2018

FOR THE NINTH CIRCUIT

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RONALD DAVID JONES, JR.,

Defendant-Appellant.

No. 17-55131

D.C. Nos. 3:16-cv-01563-WQH
3:94-cr-00023-WQH-1

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
William Q. Hayes, District Judge, Presiding

Argued and Submitted February 12, 2018
Pasadena, California

Before: McKEOWN and WARDLAW, Circuit Judges, and QUIST,** District Judge.

Defendant, Ronald David Jones, Jr., appeals from the district court's order denying his motion pursuant to 28 U.S.C. § 2255. We have jurisdiction under 28 U.S.C. § 1291. We review the denial of a section 2255 motion de novo, *United*

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

** The Honorable Gordon J. Quist, United States District Judge for the Western District of Michigan, sitting by designation.

States v. Reves, 774 F.3d 562, 564 (9th Cir. 2014), and we affirm.

In 1994, following convictions of armed bank robbery, in violation of 18 U.S.C. § 2113(a) and (d), knowing use of a firearm during the bank robbery, in violation of 18 U.S.C. § 924(c), and felon in possession of a firearm, in violation of 18 U.S.C. § 924(g), the district court sentenced Jones as an armed career criminal pursuant to the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 922(e).

Jones’s three ACCA predicate convictions included robbery and attempted robbery in violation of California Penal Code §§ 211 and 611/211. Jones argues that after *Johnson v. United States*, — U.S. —, 135 S. Ct. 2551 (2015), and *Welch v. United States*, — U.S. —, 136 S. Ct. 1257 (2016), he no longer has three qualifying convictions required to trigger the enhanced sentence under the ACCA. Jones further argues that federal armed bank robbery is not a “crime of violence” under the force/elements clause in 18 U.S.C. § 924(c)(3)(A).

Jones may not rely on the rule announced in *Johnson* to attack his California robbery convictions as ACCA predicates because the district court relied “on a constitutionally valid legal theory” in sentencing Jones. *United States v. Geozos*, 870 F.3d 890, 895 (9th Cir. 2017). Although the district court “suppose[d] [that] it’s safer to say [that attempted robbery] presents a serious potential risk of physical injury to another because you’re talking about an attempt,” in the end, the court held that “attempted robbery . . . is in fact a predicate violent felony under 18

U.S.C. 924(e) either (1) or (2).” The district court’s reliance on an invalid ground as well does not undermine its finding of a violent felony because a predicate conviction need only meet one of the ACCA’s definitions of “violent felony.”

Finally, our recent decision in *United States v. Watson*, — F.3d —, 2018 WL 650990 (9th Cir. Feb. 1, 2018), forecloses Jones’s argument that armed bank robbery is not a “crime of violence” under the force/elements clause of 18 U.S.C. § 924(c)(3).

AFFIRMED.