



PRISON LAW OFFICE
General Delivery, San Quentin CA 94964
Telephone (510) 280-2621 • Fax (510) 280-2704
www.prisonlaw.com

Director:
Donald Specter

Managing Attorney:
Sara Norman

Staff Attorneys:
Rana Anabtawi
Steven Fama
Alison Hardy
Corene Kendrick
Margo Mendelson
Millard Murphy
Lynn Wu

Your Responsibility When Using the Information Provided Below:

When we wrote this Informational Material we did our best to give you useful and accurate information because we know that prisoners often have difficulty obtaining legal information and we cannot provide specific advice to all the prisoners who request it. The laws change frequently and are subject to differing interpretations. We do not always have the resources to make changes to this material every time the law changes. If you use this pamphlet it is your responsibility to make sure that the law has not changed and is applicable to your situation. Most of the materials you need should be available in your institution law library.

INFORMATION RE: *JOHNSON V. UNITED STATES* (recent U.S. Supreme Court case on sentencing) July 2016

We have received your letter asking for information, advice or assistance in regards to a June 2015 U.S. Supreme Court decision, *Johnson v. United States* (2015) __ U.S. __ [135 S.Ct. 2551]. We are unable to write individual responses to everyone who has contacted us about the *Johnson* case. We hope that the general information in this letter will help answer your questions.

What does the *Johnson v. United States* decision say?

In *Johnson v. United States*, the United States Supreme Court examined a federal sentencing law called the Armed Career Criminal Act (ACCA). The ACCA is a federal law that increases the punishment for people convicted of the federal crime of being a felon in possession of a firearm if they have three or more prior “strike” convictions for serious or violent felonies. The ACCA includes a “residual clause,” that says a felony counts as a strike if it “involves conduct that presents a serious potential risk of physical injury to another.” When deciding whether a defendant’s prior crime is a strike under the residual clause, courts do not consider the defendant’s actual conduct. Instead, courts decide whether a hypothetical “ordinary” version of the offense presented a serious potential risk of injury.

The U.S. Supreme Court held that the ACCA’s residual clause violates the U.S. Constitution’s guarantee of due process because it is too vague. There is too much uncertainty about how to estimate the risk posed by an “ordinary” version of a crime and about how high the risk has to be for a crime to be a strike. Thus, defendants are not on fair notice about whether their crimes count as strikes. Also, courts cannot make consistent, non-arbitrary decisions about which crimes are strikes.

Board of Directors
Penelope Cooper, President • Michele WalkinHawk, Vice President
Marshall Krause, Treasurer • Christiane Hipps • Margaret Johns
Cesar Lagleva • Laura Magnani • Michael Marcum • Ruth Morgan • Dennis Roberts

In April 2016, the U.S. Supreme Court ruled that the *Johnson* decision announced a new substantive rule of law and that *Johnson* applies retroactively on collateral review (such as habeas petitions or motions to vacate) in cases involving ACCA enhancements. (*Welch v. United States* (2016) __ U.S. __ [136 S.Ct. 1257].)

Federal courts have applied *Johnson* in other contexts. For example, some courts have indicated that the same language found to be unconstitutional in *Johnson* is void for vagueness in the context of the career offender portion of the Federal Sentencing Guidelines, § 4B1.2(a)(2); however, other courts have disagreed. (Compare *United States v. Willis* (9th Cir. 2015) 795 F.3d 986, 996; *Ramirez v. United States* (7th Cir. 2015) 799 F.3d 845, 856 [acting “on the assumption that the Supreme Court’s reasoning applies to section 4B1.2 as well”]; *United States v. Maldonado* (2d Cir. 2016) 636 Fed.Appx. 807, 810 [holding the Guidelines clause void for vagueness and collecting cases] with *United States v. Matchett* (11th Cir. 2015) 802 F.3d 1185, 1193-95 [rejecting a vagueness challenge to § 4B1.2(a)(2) of the Guidelines]; *United States v. Taylor* (8th Cir. 2015) 803 F.3d 931, 933.) Also, some federal courts have found that the same language is void for vagueness when used in defining a crime of violence in deportation and illegal reentry cases. (*Dimaya v Lynch* (9th Cir 2015) 803 F.3d 1110 [8 U.S.C. § 1101(a)(43)(F) void for vagueness]; *United States v. Hernandez-Lara* (9th Cir. 2016) 817 F.3d 65 [118 U.S.C. § 16(b) void for vagueness].)

Does *Johnson v. United States* affect any prisoners serving sentences for California convictions?

Johnson v. United States does not directly affect any California state court convictions. As of July 2016, there have not yet been any published case decisions applying *Johnson v. United States* to California convictions.

However, it is possible that some parts of the California criminal laws might be unconstitutionally vague for the reasons discussed by the U.S. Supreme Court in the *Johnson* case. In particular, some criminal justice attorneys think that California’s second-degree felony-murder law is invalid because a defendant can be convicted of second-degree murder when someone dies during commission of any felony that is “inherently dangerous to human life.” As with the “serious potential risk” clause at issue in *Johnson*, courts in second-degree felony-murder cases decide whether the underlying crime is “inherently dangerous” based on abstract, hypothetical ideas about an ordinary version of the crime, not on the actual facts of the case. Some criminal justice attorneys also think that some or all California second-degree murder convictions now can be overturned based on the reasoning in *Johnson*.

On the other hand, *Johnson* does not affect laws that allow enhanced punishment based on the riskiness of the actual conduct of an individual defendant on a particular occasion. The U.S. Supreme Court stated that “we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as ‘substantial risk’ to real-world conduct.” Given this statement, most of California’s enhancement laws probably are not unconstitutionally vague, because courts usually consider the defendant’s actual conduct when deciding if an enhancement (or a provision like the three-strikes law) applies to the case.

What should I do if I think that my federal or California conviction might be affected by *Johnson v. United States*?

If you think that your conviction might be affected by *Johnson v. United States*, you should write to your criminal trial and/or appellate attorney, asking for more information or help. This is especially important if (1) you have ever had a federal sentence enhancement under the ACCA's "residual clause" or (2) you have a California conviction for second-degree felony murder. You should try to contact the attorney who worked on that case. However, if you cannot remember who the attorney was or don't have contact information for the attorney, you can write to the public defender office for the county (for California convictions) or federal district (for federal convictions) where you were convicted.

If you want to take action on your own behalf, and your case is no longer pending in a direct appeal, you might want to file a state petition for writ of habeas corpus and/or a federal petition for writ of habeas corpus. On request, the Prison Law Office can provide free manuals with information on state and federal habeas petitions, including filing requirements and deadlines; these manuals are also available on the Resources page at www.prisonlaw.com.