Appendix

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. WILLIAM FLOYD MOORE, Defendant-Appellant.	No. 17-35986 D.C. Nos. 3:16-cv-01131-BR 3:11-cr-00375-BR-1 District of Oregon, Portland ORDER

Before: TROTT and WARDLAW, Circuit Judges.

The request for a certificate of appealability (Docket Entry Nos. 2 and 3) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018), *cert. denied*, No. 18-5022, 2018 WL 3223705 (Oct. 1, 2018).

Any pending motions are denied as moot.

DENIED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. WILLIAM FLOYD MOORE, Defendant-Appellant.	No. 17-35989 D.C. Nos. 3:16-cv-01132-BR 3:11-cr-00379-BR-1 District of Oregon, Portland ORDER

Before: TROTT and WARDLAW, Circuit Judges.

The request for a certificate of appealability (Docket Entry Nos. 2 and 3) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018), *cert. denied*, No. 18-5022, 2018 WL 3223705 (Oct. 1, 2018).

Any pending motions are denied as moot.

DENIED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff,

v.

WILLIAM FLOYD MOORE,

Defendant.

3:11-cr-00375-BR
(3:16-cv-01131-BR)
3:11-cr-00379-BR
(3:16-cv-01132-BR)

OPINION AND ORDER

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BROWN, Judge.

This matter comes before the Court on Defendant William Floyd Moore's Motion (#66) to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 filed in Case No. 3:11-cr-00375-BR and Defendant's Motion (#59) to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 filed in Case No. 3:11-cr-00379-BR. For the reasons that follow, the Court **DENIES** Defendant's Motions and **DECLINES** to issue a certificate of appealability.

BACKGROUND

On September 20, 2011, Defendant was charged in an Indictment in Case No. 3:11-cr-00375-BR with one count of Bank Robbery in violation of 18 U.S.C. § 2113(a). On September 20, 2011, Defendant was charged in an Indictment in Case No. 3:11-cr-00379-BR with one count of Felon in Possession of a Firearm in violation of 18 U.S.C. § 922(g)(1). Both Indictments related to Plaintiff's use of a firearm during his September 8, 2011, robbery of the U.S. Bank at 10830 S.E. Oak Street, Milwaukie, Oregon.

On July 16, 2012, Defendant pled guilty to the charges in both 3:11-cr-00375-BR and 3:11-cr-00379-BR.

On December 4, 2013, Senior District Court Judge Ancer Haggerty held a sentencing hearing in both 3:11-cr-00375-BR and

3:11-cr-00379-BR; adopted the sentencing calculations in the Presentence Report; and sentenced Defendant as an armed career criminal pursuant to the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e), to 151 months imprisonment in 3:11-cr-00375-BR and 180 months imprisonment in 3:11-cr-00379-BR to be served concurrently and five years of supervised release.

On February 27, 2014, the Court entered Judgments in both cases. Defendant did not appeal his convictions.

On June 20, 2016, Defendant filed identical Motions to Vacate or Correct Sentence under 28 U.S.C. § 2255 in 3:11-cr-00375-BR and 3:11-cr-00379-BR in which he asserts pursuant to the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), that he "should no longer be designated an armed career criminal because he does not have at least three prior convictions for a . . . violent felony." Defendant asserts his sentence was imposed in violation of the Constitution or laws of the United States and that his sentence exceeds the statutory maximum sentence.

On May 30, 2017, Defendant filed Memoranda in Support of his Motions to Vacate. The Court took Defendant's Motions to Vacate under advisement on September 29, 2017.

DISCUSSION

Defendant moves to modify or to set aside his sentences on

the ground that his three prior convictions for unarmed bank robbery do not qualify as crimes of violence under the ACCA because they do not involve the requisite force or specific intent.

I. The ACCA and *Johnson*

The ACCA requires a defendant to be sentenced to a mandatory minimum of 15 years to life in custody if he has three prior convictions for "a violent felony or a serious drug offense, or both." 18 U.S.C. § 924(e)(1). The ACCA defines violent felony as 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.

18 U.S.C. § 924(e)(2)(B). Courts refer to § 924(e)(2)(B)(I) as the elements clause, the first part of the disjunctive statement in § 924(e)(2)(B)(ii) as the enumerated offenses clause, and the second part of the disjunctive statement in § 924(e)(2)(B)(ii)(starting with "or otherwise") as the residual clause. *See, e.g., Johnson*, 135 S. Ct. at 2563; *United States v. Lee*, 821 F.3d 1124, 1126 (9th Cir. 2016).

In *Johnson* the Supreme Court held "imposing an increased

sentence under the residual clause of the [ACCA] violates the Constitution's guarantee of due process" on the basis that "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges." 135 S. Ct. at 2557, 2563. Subsequently in *Welch v. United States* the Supreme Court held its decision in *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. 136 S. Ct. 1257, 1268 (2016). As a result, defendants sentenced pursuant to the ACCA residual clause can collaterally attack their sentences as unconstitutional under § 2255.

II. Sentencing Pursuant to 18 U.S.C. § 924(c)(1)(A)

18 U.S.C. § 924(c)(1)(A) provides in relevant part that a person who "in relation to any crime of violence . . . uses or carries a firearm . . . shall, in addition to the punishment provided for such crime of violence . . . be sentenced to a term of imprisonment of not less than 5 years" to run consecutively with the punishment for the underlying crime of violence. 18 U.S.C. § 924(c)(3) defines a "crime of violence" as an offense that is a felony and

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

As noted, courts refer to the (A) clause of section 924(c)(3) as the "force clause" and to the (B) clause of section 924(c)(3) as the "residual clause."

III. Analysis

Defendant challenges his sentences on the ground that unarmed bank robbery in violation of 18 U.S.C. § 2113(a) is no longer a qualifying crime of violence for purposes of § 924(c)(1).

In *United States v. Wright* the Ninth Circuit held armed bank robbery under 18 U.S.C. § 2113(a) and (d) qualifies as a crime of violence under the "force" clause of § 924(c)(3)(A). 215 F.3d 1020, 1028 (9th Cir. 2000). The court explained § 2113(a) necessarily "has as an element the use, attempted use, or threatened use of physical force against the person or property of another and, therefore, 'a taking by force and violence, or by intimidation' is an element of armed bank robbery." *Id.*

In *United States v. Selfa* the Ninth Circuit held unarmed bank robbery in violation of § 2113(a) constitutes a crime of violence under the force clause of United States Sentencing Guideline § 4B1.2, which is identical to the force clause of § 924(c). 918 F.2d 749, 751 (9th Cir. 1990). Specifically, the court "defined 'intimidation' under § 2113(a) to mean 'willfully to take, or attempt to take, in such a way that would put an ordinary, reasonable person in fear of bodily harm.'" *Id.*

(quoting *United States v. Hopkins*, 703 F.2d 1102, 1103 (9th Cir. 1983)). The court concluded this definition met the requirement of a "threatened use of physical force" under the identical force clause in the Sentencing Guidelines. *Id.*

Defendant concedes the holdings in *Wright* and *Selfa* appear to foreclose his challenge to his sentences, but he asserts those cases have been undermined by the Supreme Court's subsequent decisions in *Johnson* and *Leocal v. Ashcroft*, 543 U.S. 1 (2004), in addition to the Ninth Circuit's decision in *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1123 (9th Cir. 2006). The Ninth Circuit, however, has rejected this argument in several decisions issued after *Johnson*. For example, in *United States v. Cross* the Ninth Circuit concluded *Selfa* and *Wright* remain controlling law in this Circuit even after *Johnson* and *Leocal* and rejected the defendant's assertion that unarmed bank robbery does not require violent force or intentional conduct. 691 F. App'x 312, 312 (9th Cir. 2017). The court noted "intimidation under § 2113(a) requires the necessary level of violent physical force as defined by *Johnson*," and, "as a general intent statute, conviction under § 2113(a) requires intentional use or threatened use of force and therefore does not conflict with *Leocal* . . . or *Fernandez-Ruiz*." *Id.* at 313. The Ninth Circuit concluded "no intervening higher authority is clearly unreconcilable with *Selfa* and *Wright*, and those precedents are controlling here." *Id.* (quotation omitted).

See also United States v. Pritchard, No. 15-50278, 2017 WL 2219005 (9th Cir. May 18, 2017)(rejecting the argument that *Wright* and *Selfa* were overruled by *Leocal* and/or *Johnson*); *United States v. Jordan*, 680 F. App'x 634, 634-35 (9th Cir. 2017) (holding § 2113(a) is a crime of violence and rejecting the argument that later cases overruled or displaced *Wright* and/or *Selfa*); *United States v. Howard*, 650 F. App'x 466, 468 (9th Cir. 2016)(affirming *Selfa*'s continued vitality). Although these are unpublished opinions and, therefore, not precedential, this Court, nevertheless, is bound by *Wright* and *Selfa*. In addition, the Court adopts the reasoning of *Cross*, *Pritchard*, *Johnson*, and *Howard* and concludes unarmed bank robbery satisfies the requirement of § 924(c)(3)(A). The Court, therefore, concludes § 2113(a) is a crime of violence under the force clause of § 924(c) and Defendant's sentences were not imposed in violation of the Constitution or the laws of the United States.

Accordingly, the Court denies Defendant's Motions to Vacate, Set Aside or Correct Sentence pursuant to § 2255. In addition, the Court finds Defendant has not made a substantial showing of the denial of a constitutional right, and, therefore, the Court declines to issue a certificate of appealability in either Case No. 3:11-cr-00375-BR or 3:11-cr-00379-BR.

CONCLUSION

For these reasons, the Court **DENIES** Defendant's Motion (#66) to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 filed in Case No. 3:11-cr-00375-BR and Defendant's Motion (#59) to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 filed in Case No. 3:11-cr-00379-BR and **DECLINES** to issue a certificate of appealability.

IT IS SO ORDERED.

DATED this 7th day of December, 2017.

/s/ Anna J. Brown

ANNA J. BROWN
United States Senior District Judge

18 U.S.C. § 924(e) (2011)

§ 924. Penalties

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

(A) the term "serious drug offense" means--

> **(i)** an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or
>
> **(ii)** an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, 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; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

28 U.S.C.A. § 2255 (2016)

§ 2255. Federal custody; remedies on motion attacking sentence

(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.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

> **(1)** the date on which the judgment of conviction becomes final;
>
> **(2)** the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> **(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

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(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--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the