No. _____

In The Supreme Court of The United States

DANIEL ARTHUR CARTER, *Petitioner*.

v.

UNITED STATES OF AMERICA, *Respondent*,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED ON REVIEW

1. Given this Court's holding in *Carter v. United States*, 530 U.S. 255, 268 (2000), that federal armed bank robbery under 18 U.S.C. § 2113(a) and (d) is a general intent rather than a specific intent crime, and given decades of circuit precedent holding that intimidation under the statute is judged by the reasonable reaction of the listener rather than by the defendant's intent, could reasonable jurists conclude that federal armed bank robbery by intimidation is not a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A) because the offense fails to require any intentional use, attempted use, or threatened use of violent physical force?

2. Could reasonable jurists conclude that this Court's decision in *United States v. Dean*, 137 S.Ct. 1170 (2017), in which the Court held that sentencing courts may consider the mandatory minimum and consecutive nature of the sentence under 18 U.S.C. § 924(c) in imposing the sentence on related counts, is a new substantive rule of sentencing that may be applied retroactively to cases on collateral review?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Daniel Arthur Carter respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Orders Below

The Ninth Circuit's unpublished order denying the petitioner's motion for a certificate of appealability from the denial of his 28 U.S.C. § 2255 motion is attached in the Appendix at App-1. The district court's unpublished order denying Mr. Carter's 28 U.S.C. § 2255 motion and declining to issue a certificate of appealability is attached at App-2.

Jurisdictional Statement

The Ninth Circuit Court of Appeals entered its final order in this case on November 7, 2018. This petition is timely under Supreme Court Rule 13.3. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Relevant Constitutional and Statutory Provisions

The statute providing for collateral review of federal sentences is 28 U.S.C. § 2255, which is attached in the Appendix at App-10. Under 28 U.S.C. § 2253(c), a movant cannot appeal the denial of relief under 28 U.S.C. § 2255 without a certificate of appealability:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C.A. § 2253.

Under 18 U.S.C. § 924(c)(1)(A), attached at App-14, any person who uses a firearm during and in relation "to any crime of violence or drug trafficking crime" is subject to an enhanced mandatory consecutive sentence. The relevant portion of § 924(c) defining a "crime of violence" has two clauses, commonly referred to as the elements or force clause and the residual clause:

> (3) For purposes of this subsection, the term "crime of violence" means 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.

The federal armed bank robbery statute at 18 U.S.C. § 2113(a) and (d) reads as follows:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—
>
> Shall be fined under this title or imprisoned not more than twenty years, or both.
>
> * * *
>
> (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

Reasons For Granting The Writ

Mr. Carter requests certiorari to bring internal consistency to federal circuit precedent interpreting the intimidation element of federal armed bank robbery under 28 U.S.C. § 2113(a) and (d) and to reconcile that precedent with this Court's interpretation of the bank robbery statute to encompass a minimal general intent requirement in *Carter v. United States*, 530 U.S. 255, 268 (2000).

Circuit courts continue to erroneously hold that federal armed bank robbery by intimidation qualifies as a crime of violence under § 924(c)'s elements clause and analogous sentencing enhancement provisions. *See, e.g.*, *United States v. Watson*, 881 F.3d 782, 785 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 203 (Oct. 1, 2018) (holding federal bank robbery is a crime of violence under § 924(c)(3)(A)); *United States v. McNeal*, 818 F.3d 141, 157 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 164 (2016) (same); *United States v. Brewer*, 848 F.3d 711, 716 (5th Cir. 2017) (holding that federal bank robbery is a crime of violence under U.S.S.G. § 4B1.2(a)(1)); *Ovalles v. United States*, 905 F.3d 1300 (11th Cir. 2018) (holding that federal carjacking by intimidation is a crime of violence under § 924(c)(3)(A)). However, "intimidation," as broadly construed by this Court and by the circuits for decades, requires no specific intent on the part of the defendant, nor does it require that the defendant communicate an intent to use violence. Thus, under the categorical lens, which considers only the least culpable conduct necessary to satisfy the offense of conviction, bank robbery does not have as an element the "use, attempted use, or threatened use of physical force against the person or property of another" within the meaning of § 924(c)'s elements clause.

This case presents a question of exceptional importance regarding federal criminal law that requires this Court's guidance. Having a clear and

consistent definition of the intimidation element of federal bank robbery is crucial to both the government and the defendant in prosecutions for that offense, and it will assist the courts in efficiently administering the law. Moreover, correctly understanding the scope of the intimidation element of federal bank robbery is at the heart of determining whether the offense qualifies for numerous categorically-defined federal sentencing enhancements for crimes involving intentional violence, including the harsh mandatory consecutive sentences required by 18 U.S.C. § 924(c)(1)(A). Thus, the consequences viewed from either the individual perspective or at a systematic level are substantial. Certiorari is necessary to ensure all circuits appropriately exclude offenses committed by "intimidation" as crimes of violence under § 924(c), and respectively, that trial courts appropriately instruct juries regarding the correct offense elements of bank robbery.

Certiorari is warranted also to resolve whether this Court's decision in *Dean* announced a new substantive rule regarding sentencing that may be applied retroactively to cases on collateral review.

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Statement of the Case

A. In 2014, Mr. Carter Was Sentenced to a 84-Month Mandatory, Consecutive Sentence For Use of a Firearm During the Commission of a Federal Armed Bank Robbery

Defendant was charged by Indictment with two counts of Armed Bank Robbery in violation of 18 U.S.C. § 2113(a) and (d). (Counts One and Three). (CR 26).[1] Each count alleged separate robberies occurring on November 21, 2012 (Count One) and on October 22, 2012 (Count Three). Counts Two and Four each alleged the offense of Using a Firearm During a Crime of Violence, 18 U.S.C. § 924(c)(1)(A)(ii), with the alleged "crime of violence" corresponding to the preceding odd numbered robbery count. On September 30, 2013, defendant entered guilty pleas to Counts One, Two and Three of the Indictment. (CR 37). The plea was pursuant to a plea agreement. (CR 38). Defendant received a sentence of 186 months on Count One. On Count Two, Defendant received a mandatory minimum sentence of 84 months, consecutive to the sentence imposed on Count One. On Count Three, defendant received a sentence of 186 months concurrent to Count One. (CR 44). Thus, defendant received a total sentence of 270 months imprisonment. Mr. Carter did not appeal his conviction or sentence.

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[1] "CR" refers to the court record from the district court's electronic case filing system in Case Number 3:13-CR-00335-HZ.

B. Mr. Carter Sought Relief Under 28 U.S.C. § 2255 Following This Court's Decisions in *Johnson v. United States* and *Dean v. United States*

On June 26, 2015, this Court held that imposing an enhanced sentence under the "residual clause" definition of "violent felony" of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), violates the Constitution's guarantee of due process. *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015). This Court subsequently held that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257 (2016).

Represented by counsel, on June 23, 2016, Mr. Carter filed a Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255. (CR 46). Mr. Carter argued that, in light of *Johnson*, § 924(c)(3)(B)'s residual clause is now void-for-vagueness, and federal armed bank robbery does not qualify as a crime of violence under § 924(c)(3)(A)'s elements clause because the offense does not have an element of violent force.

On September 29, 2017, Mr. Carter filed an Amended Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255. (CR 56). The amended motion was based on *Dean v. United* States, 137 S.Ct. 1170 (2017), in which this Court reversed circuit precedent and held that the mandatory and consecutive sentencing scheme of Section 924(c)

does not limit a court's discretion to consider the mandatory minimum sentence when determining the total sentence to impose on multiple related counts. Mr. Carter argued that, because of *Dean*, he was entitled to re-sentencing.

On March 9, 2018, the district court denied relief, finding federal armed bank robbery to be a crime of violence under § 924(c)'s elements or force clause. (App-6). The district court also rejected Mr. Carter's claim that he should be re-sentenced following the *Dean* decision. The court determined that Mr. Carter had waived his right to seek collateral relief when he changed his plea to guilty, and that, even if he had not waived that right, the Court's *Dean* decision announced a new procedural rule that cannot be applied retroactively. (App-7 – App-8). The district court denied a certificate of appealability as to both issues. (App-9).

Mr. Carter timely appealed to the Ninth Circuit from the denial of § 2255 relief and filed a motion for certificate of appealability in the appellate court. (CR 65; AR 2).[2] On April 17, 2018, this Court held that the residual clause in the Immigration and Nationality Act's "crime of violence" definition, 18 U.S.C. § 16(b), is void for vagueness and violates due process for the same reasons articulated in *Johnson*. *Sessions v. Dimaya*, 138 S. Ct.

[2] The citation "AR" refers to the appellate record from the Ninth Circuit's electronic case filing system in Case No. 18-35397 (9th Circuit).

1204, 1215 (2018). The residual clause in § 16(b) is identical to the residual clause in § 924(c)(3)(B).[3]

On November 7, 2018, the Ninth Circuit issued an unpublished order denying a certificate of appealability. (AR 6) (App-1). The order states: "The request for a certificate of appealability (Docket Entry No. 2) is denied because the underlying 28 U.S.C. § 2255 motion fails to state any federal constitutional claims debatable among jurists of reason. *See* 28 U.S.C. § 2253(c)(2) – (3) * * * ." (App-1).

Argument

I. The Court Should Issue a Writ of Certiorari to Address Whether Federal Bank Robbery is a Crime of Violence under the Force or Elements Clause

The denial of Mr. Carter's 28 U.S.C. § 2255 motion asserting innocence of his 18 U.S.C. § 924(c) conviction and sentence rested on the

[3] Following *Dimaya*, the government has argued that the residual clause in § 924(c)(3)(B) can be saved from vagueness by jettisoning the categorical approach in favor of a conduct-specific approach. *See, e.g.*, Petition for a Writ of Certiorari, *United States v. Davis*, No. 18-431 (S. Ct.) (filed Oct. 3, 2018). On January 4, 2019, this Court granted certiorari in *Davis* to decide whether the residual clause in § 924(c)(3)(B) is unconstitutionally vague. However, when Mr. Carter was convicted, Ninth Circuit law required application of the categorical approach for the crime of violence determination. *See United States v. Piccolo*, 441 F.3d 1084 (9th Cir. 2006) ("[I]n the context of crime-of-violence determinations under § 924(c), our categorical approach applies regardless of whether we review a current or prior crime.") (citing *United States v. Amparo*, 68 F.3d 1222, 1224-26 (9th Cir. 1995)). In any event, because the district court and the lower court decided this case on the grounds of the elements clause alone, that is the sole issue presented in this petition for certiorari.

district court's finding that, even without the residual clause, federal armed bank robbery under 18 U.S.C. § 2113(a) and (d) is a crime of violence. The Ninth Circuit denied a certificate of appealability finding that issue not reasonably debatable based on its opinion in *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018). But *Watson*, like other similar circuit court authority, deviated from existing Supreme Court and circuit authority interpreting the intimidation element of federal bank robbery. As authoritatively construed by this Court in *Carter*, and as applied by the circuits for decades, intimidation need not be intentional, nor does it require a communicated intent to use violence. Thus, the bank robbery statute does not have "as an element the use, attempted use, or threatened use of physical force against the person or property of another" within the meaning of § 924(c)'s elements clause.

A. The Categorical Approach Determines Whether An Offense Is A Crime Of Violence Under 18 U.S.C. § 924(c).

To determine if an offense qualifies as a "crime of violence" under § 924(c), courts must use the categorical approach to discern the "minimum conduct criminalized" by the statute at issue through an examination of cases interpreting and defining that minimum conduct. *Moncrieffe v. Holder*, 569 U.S. 184 (2013). This Court first set forth the categorical approach in *Taylor v. United States*, 495 U.S. 575 (1990), and refined the

analysis in *Descamps v. United States*, 570 U.S. 254 (2013), and *Mathis v. United States*, 136 S. Ct. 2243 (2016). The narrow categorical approach mandated by this precedent requires courts to "disregard[] the means by which the defendant committed his crime, and look[] only to that offense's elements." *Mathis*, 136 S. Ct. at 2256.

Because the categorical approach is concerned only with what conduct the offense necessarily involves, courts "must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized." *Moncrieffe*, 569 U.S. at 190-91 (alterations omitted). If the statute of conviction criminalizes some conduct that does involve intentional violent force and some conduct that does not, the statute of conviction does not categorically constitute a crime of violence. *Mathis*, 136 S. Ct. at 2248.

B. Intimidation Within The Meaning Of 18 U.S.C. § 2113(a) Is Not A Match For The Definition Of A Crime Of Violence In 18 U.S.C. § 924(c)(3)(A).

The least culpable conduct criminalized by federal armed bank robbery is not a match for at least two of the requirements of § 924(c)'s elements clause. First, § 924(c)'s elements clause requires *purposeful* violent conduct. But this Court has held that bank robbery is a general intent crime, and the circuits have not applied any culpable mens rea to the intimidation element. Second, § 924(c)'s elements clause requires that

physical force be *violent* in nature. But bank robbery by intimidation does not require a communicated intent to use violence.

1. Section 924(c)(3)(A) Requires A Purposeful Threat Of Physical Force, Whereas Bank Robbery By Intimidation Is A General Intent Crime That Does Not Require Any Intent To Intimidate.

In *Leocal v. Ashcroft*, this Court held that the "use of physical force against the person or property of another" within the meaning of § 924(c) means "active employment" of force and "suggests a higher degree of intent than negligent or merely accidental conduct." 543 U.S. 1, 9 (2004). In the Ninth Circuit's *Watson* decision, the court considered and rejected the defendant's claim that the mental state for bank robbery is not a match for the crime of violence definition in § 924(c) because the statute permits a defendant's conviction "if he only negligently intimidated the victim." *Watson*, 881 F.3d at 785. Citing *Carter*, the court concluded that federal bank robbery "must at least involve the knowing use of intimidation, which necessarily entails the knowing use, attempted use, or threatened use of violent physical force." *Ibid.*

Watson's conclusion that bank robbery by intimidation requires a knowing threat of force is inconsistent with the standard announced by this Court in *Carter* and with the manner in which the circuits have consistently construed the intimidation element of bank robbery outside the

categorical approach context. In *Carter*, the question under consideration was whether § 2113(a) implicitly requires an "intent to steal or purloin," which is an element of the related offense of bank larceny in § 2113(b). 530 U.S. at 267. In evaluating that question, this Court emphasized that the presumption in favor of scienter would allow it to read into the statute "only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Id.* at 269. Thus, the Court recognized that § 2113(a) "certainly should not be interpreted to apply to the hypothetical person who engages in forceful taking of money while sleepwalking (innocent, if aberrant activity)." *Id.* at 269. But the Court found no basis to impose a specific intent requirement on § 2113(a). *Id.* at 268-69. Instead, the Court determined that "the presumption in favor of scienter demands only that we read subsection (a) as requiring proof of *general intent*—that is, that the defendant possessed knowledge with respect to the *actus reus* of the crime (here, the taking of property of another by force and violence or intimidation)." *Id.* at 268 (emphasis in original).

Under *Carter*, a defendant must be aware that he or she is engaging in the actions that constitute a taking by intimidation, but the government need not prove that the defendant knows the conduct is intimidating. That reading of *Carter* finds support in circuit precedent both pre-dating and post-dating the opinion. Prior to *Carter*, the Ninth Circuit defined "bank

robbery by intimidation" as "willfully to take, or attempt to take, in such a way that would put an ordinary, reasonable person in fear of bodily harm." *United States v. Selfa*, 918 F.2d 749, 751 (9th Cir. 1990). This definition attached the willful mens rea solely to the "taking" element of bank robbery, not the "intimidation" element.

Similarly, in *United States v. Foppe*, the Ninth Circuit rejected a jury instruction that would have required the jury to conclude that the defendant intentionally used force and violence or intimidation on the victim bank teller. 993 F.2d 1444, 1451 (9th Cir. 1993). The court never suggested that the defendant must know the actions are intimidating. *Id.* ("Whether [the defendant] specifically intended to intimidate [the teller] is irrelevant."). Similarly, in *United States v. Hopkins*, the Ninth Circuit held that the defendant used "intimidation" by simply presenting a demand note stating, "Give me all your hundreds, fifties and twenties. This is a robbery," even though he spoke calmly, was clearly unarmed, and left the bank "in a nonchalant manner" without having received any money. 703 F.2d 1102, 1103 (9th Cir. 1983). The Court approved a jury instruction that stated intimidation is established by conduct that "would produce in the ordinary person fear of bodily harm," without requiring any finding that the defendant intended to, or knew his conduct would, produce such fear. *Id.*

Other circuit decisions reflect the same interpretation of intimidation that focuses on the objectively reasonable reaction of the victim rather than the defendant's intent. The Fourth Circuit held in *United States v. Woodrup* that "[t]he intimidation element of § 2113(a) is satisfied if 'an ordinary person in the [victim's] position reasonably could infer a threat of bodily harm from the defendant's acts,' whether or not the defendant actually intended the intimidation." 86 F.3d 359, 363 (4th Cir. 1996) (quoting *United States v. Wagstaff*, 865 F.2d 626, 627 (4th Cir. 1989)). "[N]othing in the statute even remotely suggests that the defendant must have intended to intimidate." *Woodrup*, 86 F.3d at 364. The Eleventh Circuit held in *United States v. Kelley* that "a defendant can be convicted under section 2113(a) even if he did not intend for an act to be intimidating." 412 F.3d 1240, 1244 (11th Cir. 2005).

The Eighth Circuit case of *United States v. Yockel*, decided three years after *Carter*, leaves no question on the matter: there, the court expressly stated that a jury may not consider the defendant's mental state, even as to knowledge of the intimidating character of the offense conduct. 320 F.3d 818, 823-24 (8th Cir. 2003). In *Yockel*, the defendant was attempting to withdraw $5,000 from his bank account, but the teller could not find an account in his name. 320 F.3d at 820. Eventually, after searching numerous records for an account, the defendant told the teller, "If

you want to go to heaven, you'll give me the money." *Id.* at 821. The teller became fearful, and "decided to give Yockel some money in the hopes that he would leave her teller window." *Id.* She gave Yockel $6,000 and asked him, "How's that?" The defendant responded, "That's great, I'll take it." *Id.*

The government filed a motion in limine seeking to preclude evidence of the defendant's mental health offered to demonstrate his lack of intent to intimidate. *Id.* at 822. The defendant argued that the evidence was relevant because bank robbery requires knowledge with respect to the intimidation element of the crime. *Id.* The district court disagreed and decided "to exclude mental health evidence in its entirety as not relevant to any issue in the case." *Id.* The Eighth Circuit affirmed. *Id.* at 823. Citing *Foppe*, the court held that intimidation is measured under an objective standard, without regard to the defendant's intent, and is satisfied "if an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the [defendant's] acts[.]" *Id.* at 824 (internal quotation marks and alterations omitted). Accordingly, the court decided that "the *mens rea* element of bank robbery [does] not apply to the element of intimidation[.]" *Id.*

Thus, *Carter* and circuit precedent together establish that a defendant is guilty of bank robbery by intimidation within the meaning of § 2113(a) so long as the defendant engages in a knowing act that reasonably

instills fear in another, without regard to the defendant's intent to intimidate. As so defined, intimidation cannot satisfy § 924(c)(3)(A)'s mens rea standard. In *Elonis v. United States*, this Court explained that engaging in a knowing act is not equal to knowing the character of that act. 135 S. Ct. 2001, 2011 (2015). In *Elonis*, the Court considered as a matter of statutory interpretation whether a culpable mental state is required for a threatening communication to be punishable under 18 U.S.C. § 875(c). Relying on the "basic principle" that "wrongdoing must be conscious to be criminal," the Court concluded that a culpable mental state must "apply to the fact that the communication contains a threat." *Elonis*, 135 S. Ct. at 2009, 2011.

The government in *Elonis* had argued that a defendant's statements should be punished as threats as long as "he himself knew the contents and context" of the statements and "a reasonable person would have recognized that [they] would be read as genuine threats." 135 S. Ct. at 2011. The Supreme Court made clear that this proposed mental state could not be characterized "as something other than a negligence standard" because it ultimately relied on whether a "reasonable person," not the defendant, would view the conduct as harmful:

> [T]he fact that the Government would require a defendant to actually know the words of and circumstances surrounding a communication does not amount to a rejection of negligence. Criminal negligence

> standards often incorporate "the circumstances known" to a defendant. . . . Courts then ask, however, whether a reasonable person equipped with that knowledge, not the actual defendant, would have recognized the harmfulness of his conduct. . . . That is a negligence standard.

Id. (citation omitted).

Comparing the mens rea standard articulated in *Foppe* and *Yockel* with *Elonis* demonstrates that the intimidation prong of bank robbery requires no more than a negligent threat of harm. As in *Elonis*, the fact that § 2113(a) requires a defendant "to actually know the words of and circumstances surrounding" the taking by intimidation "does not amount to a rejection of negligence." *Id.* Rather, a threat is committed only negligently when the mental state turns on "whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks[.]" *Id.* Although § 2113(a) requires that a defendant have knowledge of his or her actions, it leaves the question of whether the actions are intimidating to be judged solely by what a reasonable person would think, not what the defendant thinks. As in *Elonis*, "[t]hat is a negligence standard." 135 S. Ct. at 2011.

This Court should intervene to affirm the minimal mental state requirement applicable to federal bank robbery by intimidation, as confirmed by *Carter* and decades of circuit precedent. Because intimidation is satisfied when a reasonable person, not the defendant, would view the

defendant's conduct as intimidating, § 2113(a) does not meet § 924(c)(3)(A)'s requirement of purposeful violence.

2. Section 924(c)(3)(A) Requires A Threatened Use Of Violent Physical Force, Whereas Bank Robbery By Intimidation Does Not Require That A Defendant Communicate Any Intent To Use Violence.

Even if § 2113(a) proscribed a sufficient mens rea for the "intimidation" element of the offense, the statute does not require a threatened use of *violent* physical force. In *Stokeling v. United States*, this Court confirmed that "physical force" within the meaning of § 924(c)(3)(A) must be "'*violent* force—that is, force capable of causing physical pain or injury to another person.'" 139 S. Ct. 544, 553 (2019) (quoting *Johnson v. United States*, 559 U.S. 133, 140 (2010) ("*Johnson 2010*")) (emphasis in original).[4] Physical force does not include mere offensive touching. *Id.* In *Watson*, the Ninth Circuit reasoned that, because "intimidation" in 18 U.S.C. § 2113(a) must be objectively fear-producing, it satisfies the degree of force required under the ACCA's force clause. 881 F.3d at 785 ("[A] 'defendant cannot put a reasonable person in fear of bodily harm without threatening to use force capable of causing physical pain or injury.'" (quoting *United States v. Gutierrez*, 876 F.3d 1254 (9th Cir. 2017))). That

[4] *Stokeling* and *Johnson 2010* considered the meaning of "physical force" under the Armed Career Criminal Act, 18 U.S.C. § 924(e), but the same standard has been applied to § 924(c)(3)(A). *See, e.g.*, *Watson*, 881 F.3d at 784.

reasoning was in error because it is the content of a communication that defines a threat, not the reaction of the victim.

As this Court recognized in *Elonis*, the common definition of threat typically requires a "*communicated* intent to inflict harm or loss on another[.]" 135 S. Ct. at 2008 (quoting BLACK'S LAW DICTIONARY 1519 (8th ed. 2004)) (emphasis added). In *United States v. Parnell*, the Ninth Circuit reasoned that an uncommunicated "willingness to use violent force is not the same as a threat to do so." 818 F.3d 974, 980 (9th Cir. 2016). Thus, a threat depends on the content of a communication, not the victim's reaction. The fact that conduct might provoke a reasonable fear of bodily harm does not prove that the defendant "communicated [an] intent to inflict harm or loss on another." *Elonis*, 135 S. Ct. at 2008.

Intimidation does not require a communicated threat. For purposes of § 2113(a), intimidation can be (and frequently is) accomplished by a simple demand for money, without regard to whether the bank teller is afraid. *See, e.g.*, *United States v. Nash*, 946 F.2d 679, 681 (9th Cir. 1991) ("[T]he threat implicit in a written or verbal demand for money is sufficient evidence to support [a] jury's finding of intimidation."); *Hopkins*, 703 F.2d at 1103 ("Although the evidence showed that Hopkins spoke calmly, made no threats, and was clearly unarmed, we have previously held that 'express threats of bodily harm, threatening body motions, or the physical possibility

of concealed weapon[s]' are not required for a conviction for bank robbery by intimidation." (quoting *United States v. Bingham*, 628 F.2d 548, 549 (9th Cir. 1980))).

In *United States v. Ketchum*, the defendant handed a teller a note that read: "These people are making me do this," and then orally stated, "They are forcing me and have a gun. Please don't call the cops. I must have at least $500." 550 F.3d 363, 365 (4th Cir. 2008). The defendant's statement did not evidence a threat of force by the defendant against a victim (the defendant stated that he feared violence himself), but it was still held sufficient to qualify as "intimidation" under § 2113(a). *Id.*

Similarly, in *United States v. Lucas*, a defendant's bank robbery conviction was upheld where he placed several plastic shopping bags on the counter along with a note that read: "Give me all your money, put all your money in the bag," and then repeated, "Put it in the bag." 963 F.2d 243, 244 (9th Cir. 1992). And, in *United States v. Smith*, the court found sufficient evidence to affirm the defendant's bank robbery conviction where the defendant told the teller he wanted to make a withdrawal, and when the teller asked if that withdrawal would be from his savings or checking account, he stated, "No, that is not what I mean. I want to make a withdrawal. I want $2,500 in fifties and hundreds," and then yelled, "you

can blame this on the president, you can blame this on whoever you want." 973 F.2d 603, 603 (8th Cir. 1992).

Although each of these cases involved circumstances that were deemed objectively fear-producing, the defendants made no written, oral, or physical threats to use "violent" force if the tellers refused. A simple demand for money does not implicitly carry a threat of violence because not all bank robbers are prepared to use violent force to overcome resistance. *See Parnell*, 818 F.3d at 980 (rejecting a similar argument that a purse snatching necessarily implies a threat of violent force and reasoning that, "[a]lthough some [purse] snatchers are prepared to use violent force to overcome resistance, others are not").

Nor is bank robbery by intimidation limited to those cases where a defendant makes a verbal demand for money. It also includes taking money without a demand and without physical force capable of causing any pain or injury. In *United States v. Slater*, for example, the defendant simply entered a bank, walked behind the counter, and removed cash from the tellers' drawers, but the defendant did not speak or interact with anyone beyond telling a manager to "shut up" when she asked what he was doing. 692 F.2d 107, 107-08 (10th Cir. 1982); *accord United States v. O'Bryant*, 42 F.3d 1407 (10th Cir. 1994) (Table) (affirming finding of intimidation where the defendant reached over the counter and took money from an open teller

drawer after asking the teller for change). Those bank robberies involved no violence, nor any communicated intent to use violence, beyond that used in a typical purse snatching.

As the *Watson* court recognized, "intimidation" under § 2113(a) is not defined by the content of any communication, but rather by the reaction that the defendant's conduct might objectively produce. 881 F.3d at 785. However, conduct can be frightening, yet still not contain a threat. Accordingly, the circuits have strayed from precedent in concluding that intimidation requires a threat of violent force. *See, e.g.*, *Watson*, 881 F.3d at 785.

C. The "Dangerous Weapon" Element Of Armed Bank Robbery Does Not Satisfy The Force Clause.

The element that elevates unarmed bank robbery into armed bank robbery—putting "in jeopardy the life of any person by the use of a dangerous weapon or device"—does not transform the crime in a manner that satisfies § 924(c)'s elements clause. The circuits have interpreted the "dangerous weapon" element broadly to include non-assaultive and non-brandishing uses of even a toy weapon. *See United States v. Martinez-Jimenez*, 864 F.2d 664, 666-67 (9th Cir. 1989) (reasoning that the apparent danger from a toy gun creates greater risk that law enforcement or bank guards may use deadly force); *United States v. Hamrick*, 43 F.3d 877, 882

(4th Cir.1995) ("[E]very circuit court considering . . . the question of whether a fake weapon that was never intended to be operable [can be a 'dangerous weapon'] has come to the same conclusion."); *see also, e.g.*, *United States v. Arafat*, 789 F.3d 839, 847 (8th Cir. 2015) (affirming toy gun as dangerous weapon for purposes of § 2113(d)); *United States v. Cruz-Diaz*, 550 F.3d 169, 175 (1st Cir. 2008) (noting a "toy gun" qualifies as dangerous weapon under § 2113(d)); *United States v. Garrett*, 3 F.3d 390, 391 (11th Cir. 1993) (same); *United States v. Medved*, 905 F.2d 935, 939 (6th Cir. 1990) (same).

The defendant in *Martinez-Jimenez* held a toy gun during a bank robbery. His codefendant testified that neither of the two perpetrators "wanted the bank employees to believe that they had a real gun, and that they did not want the bank employees to be in fear for their lives." 864 F.2d at 665. The defendant testified that he held the gun because it made him feel secure, but he held it toward his leg during the crime in an attempt to hide it from view. *Id.* The Court held that this conduct constituted the use of a dangerous weapon within the meaning of § 2113(d). The weapon qualified as dangerous, although just a toy, because it could still "instill fear" and "create[] an immediate danger that a violent response will ensue." *Id.* at 666 (quoting *McLaughlin v. United States*, 476 U.S. 16, 17-18 (1986)). Focusing on the reactions of others, the court held that "the potential of an

apparently dangerous article to incite fear" satisfies the statutory requirement in § 2113(d). *Id.* at 667; *see also id.* ("Section 2113(d) is not concerned with the way that a robber displays a simulated or replica weapon. The statute focuses on the harms created, not the manner of creating the harm.").

In *United States v. Jones*, the Ninth Circuit clarified that something more than mere possession of a "dangerous weapon" is required to constitute the "use" of a weapon under § 2113(d), but the court did not limit the use to a threatening or assaultive use. 84 F.3d 1206, 1211 (9th Cir. 1996). Instead, the court explained that "use" includes "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm." *Id.* (quoting *Bailey v. United States*, 516 U.S. 137 (1995)); *see also Martinez-Jimenez*, 864 F.2d at 667 ("A bank robber's use of a firearm during the commission of the crime is punishable even if he does not make assaultive use of the device. He need not brandish the firearm in a threatening manner."). The court in *Jones* held that a defendant's mere reference to possessing a gun, without actually displaying the gun or making any threat to use the gun, is sufficient to sustain a conviction under § 2113(d). 84 F.3d at 1211.

A mere reference to possessing a potential weapon does not necessarily communicate an intent to inflict harm as required to constitute

a threatened use of violence. A statute does not have "as an element" the use, attempted use, or threatened use of force when the force can be deployed by someone other than the defendant. Given the broad definition of a "dangerous weapon or device," armed bank robbery does not satisfy the § 924(c) elements clause.

II. The Court Should Issue a Writ of Certiorari to Address Whether *Dean* Announced a New Substantive Rule that May be Applied Retroactively

On April 3, 2017, the Supreme Court held in *Dean* that 18 U.S.C. § 924(c) does not require sentencing courts to ignore the mandatory consecutive sentence imposed under that provision when determining the appropriate sentence for a related offense. 137 S. Ct. at 1178. *Dean* reversed prior Ninth Circuit precedent that incorrectly required § 924(c) sentences to be imposed independently of sentences for any other count. *Compare Dean*, 137 S. Ct. at 1176 (§ 924(c) sentence is "relevant in determining the total length of imprisonment") *with United States v. Thomas*, 843 F.3d 1199, 1205 (9th Cir. 2016) [*vacated on reh'g post-Dean*, 856 F.3d 624 (9th Cir. 2017)] ("We have held that the district court must impose a mandatory minimum sentence even if doing so makes it impossible for the judge to impose a total sentence that the court considers reasonable." (internal quotation marks omitted)).

Prior to *Dean*, Ninth Circuit precedent forbade sentencing courts from considering a mandatory consecutive § 924(c) sentence when sentencing a defendant for the predicate offense. In *United States v. Working*, 287 F.3d 801 (9th Cir. 2002), the sentencing court sentenced the defendant to the five-year mandatory consecutive sentence pursuant to § 924(c) and to one day for the predicate offense, assault with intent to commit first degree murder. *Working*, 287 F.3d at 805-06. The sentencing court explained that its sentence of one day for the predicate offense was based on its consideration of the defendant's total exposure under § 924(c). *Id.* The government appealed the one-day sentence for the predicate offense. *Id.* The Ninth Circuit reversed, holding that "under the Sentencing Guidelines, a mandatory consecutive sentence under 18 U.S.C. § 924(c) is an improper factor to consider in making a departure, or fashioning the extent of a departure." *Working*, 287 F.3d at 807; *see also Thomas*, 843 F.3d at 1205 ("The troublesome issue in this case arises because the mandatory minimums must be combined with the sentence imposed on the underlying crimes, to create a very long sentence.")

Working thus required sentencing courts in the Ninth Circuit to ignore the mandatory minimum sentence under § 924(c) in determining the sentence for the predicate offense. Contrary to *Working,* the Supreme Court in *Dean* interpreted the consecutive sentence provision in § 924(c) to

simply require that the sentences "run one after the other," and held that it "does not affect a court's discretion to consider a mandatory minimum when calculating each individual sentence." 137 S. Ct. at 1177. The Court criticized the government's argument as "read[ing] an additional limitation into § 924(c)," which the Court explained would be "drawing meaning from silence." *Id.* at 1177. The Court found no Congressional intent evidenced in § 924(c) to prevent district courts from mitigating the sentences for predicate offenses to accommodate a harsh consecutive mandatory minimum. *Id.* at 1178.

Dean applies retroactively to these proceedings for two independent reasons. First, the bar on retroactivity announced in *Teague v. Lane*, 489 U.S. 288 (1989), does not apply to this collateral challenge because the rationale of comity supporting *Teague* is inapplicable to collateral challenges of federal convictions. See *Welch,* 136 S. Ct. at 1264 (reserving judgment on whether *Teague* applies to federal § 2255 proceedings).

Second, even if *Teague* applies, *Dean* falls within an exception to the *Teague* doctrine because it is substantive, just like the substantive ruling in *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016). In *Montgomery*, the Supreme Court held that its decision in *Miller v. Alabama*, 567 U.S. 460 (2012), prohibiting mandatory life sentences without parole for juvenile offenders, was a new substantive rule. The Court rejected Louisiana's

argument that "*Miller* is procedural because it did not place any punishment beyond the State's power to impose; it instead required sentencing courts to take children's age into account before condemning them to die in prison." *Montgomery*, 136 S. Ct. at 734. The Court explained that *Miller* did not merely impose a procedural requirement for courts to consider the juvenile status of an offender during sentencing; the procedure gives effect to the "substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Montgomery*, 136 S. Ct. at 735.

Dean's substantive holding is directly analogous to *Montgomery*. Just as juvenile offenders did not receive consideration for parole, Mr. Carter received no consideration of his mandatory term in deciding whether the aggregate Guidelines sentence to be imposed was excessive. Section 924(c) does not contain the implied limitation previously advocated by the government—precluding consideration of the Section 924(c) sentence when imposing any other sentence.

Dean can also be seen as substantive under the reasoning of *Welch*, which held that *Johnson* changed the substantive reach of the Armed Career Criminal Act by altering "the range of conduct or the class of persons that the [Act] punishes." 136 S. Ct. at 1264-65. Likewise, *Dean* altered the "substantive reach" of § 924(c) by making clear that the

consecutive mandatory minimum sentence imposed under its terms is not limited to solely punishing the § 924(c) offense, but constitutes part of the total reasonable sentence imposed for multiple offenses as required by 18 U.S.C. § 3584(a), which incorporates the § 3553(a) rule of parsimony. The *Dean* error in this case warrants resentencing. See *Hicks v. United States*, No. 16-7806, 2017 WL 2722869 (U.S. June 26, 2017) (Gorsuch, J., concurring) ("[T]he lone peril in the present case seems to me the possibility that we might permit the government to deny someone his liberty longer than the law permits only because we refuse to correct an obvious judicial error.").

III. The Court of Appeals Did Not Correctly Apply This Court's Standards For Issuance Of A Certificate of Appealability Because It Precluded Consideration Of Issues That Are Reasonably Debatable And That Warrant Full Briefing And A Decision On The Merits

The standard for issuing a certificate of appealability (COA) requires a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In *Slack v. McDaniel*, this Court held that a COA should issue when "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." 529 U.S. 473, 478 (2000). A petitioner meets that threshold upon demonstrating that "reasonable jurists would find the district court's assessment of the

constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484; *accord Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003).

To meet this "threshold inquiry," *Slack*, 529 U.S. at 482, the petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983) (alteration in original) (internal quotation marks omitted). The petitioner need not show that relief must be granted. *Miller-El*, 537 U.S. at 337 (reaffirming the holding in Slack "that a COA does not require a showing that the appeal will succeed").

The questions raised in this petition meet the certificate of appealability threshold, and, moreover, warranted fuller exploration in the circuit court because they address critical issues of national importance regarding the circuits' inconsistent standards for defining the elements of federal bank robbery. By denying a certificate of appealability, the Ninth

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Circuit inappropriately cut off viable challenges grounded in Supreme Court and circuit authority.[5]

Respectfully submitted,

HOEVET OLSON HOWES, PC

s/ Per C. Olson
Per C. Olson, OSB #933863
Counsel of Record for Petitioner

[5] Petitioner notes that another judge in the same district as Mr. Carter's case, while denying relief, granted a certificate of appealability as to both the *Johnson* and the *Dean* issues raised in this matter. *United States v. Dawson*, 300 F. Supp. 3d 1207, 1210-12 (D. Or. 2018). This different ruling on a COA alone illustrates that "the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Barefoot*, 463 U.S. at 893 n.4.

APPENDIX

APPENDIX

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 App-1

FILED

NOV 7 2018

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. DANIEL ARTHUR CARTER, Defendant-Appellant.	No. 18-35397 D.C. Nos. 3:16-cv-01196-HZ 3:13-cr-00335-HZ-1 District of Oregon, Portland ORDER

Before: TROTT and WARDLAW, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because the underlying 28 U.S.C. § 2255 motion fails to state any federal constitutional claims debatable among jurists of reason. *See* 28 U.S.C. § 2253(c)(2)-(3); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) ("When ... the district court denies relief on procedural grounds, the petitioner seeking a COA must show both 'that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'") (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)); *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

PORTLAND DIVISION

UNITED STATES OF AMERICA ,

Plaintiff,

v.

DANIEL ARTHUR CARTER,

Defendant.

No. 3:13-cr-00335-HZ-1

OPINION & ORDER

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HERNÁNDEZ, District Judge:

Defendant moves to vacate or to correct his sentence pursuant to 28 U.S.C. § 2255. ECF 56. Because Defendant's claims have no merit or have been waived, the Court denies

Defendant's Motion. Because the Motion and record conclusively show Defendant is not entitled to relief, no evidentiary hearing is required.

FACTUAL & PROCEDURAL BACKGROUND

On July 16, 2013, a grand jury charged Defendant with two counts of armed bank robbery in violation of 18 U.S.C. § 2113(a), (d) (Counts One and Three) and two counts of using a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1) (Counts Two and Four). ECF 26 (Indictment). The Indictment stemmed from two separate armed bank robberies on October 22, 2012, and November 21, 2012, in the Portland metropolitan area.

On September 30, 2013, Defendant pleaded guilty to the two armed bank robbery counts (Counts One and Three) and one count of using a firearm during a crime of violence (Count Two). ECF 26 (Indictment), ECF 38 (Plea Agreement), ECF 39 (Plea Petition). On January 13, 2014, pursuant to a Plea Agreement that the parties entered into pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), this Court sentenced Defendant to 186 months imprisonment on Count One, a mandatory minimum sentence of 84 months imprisonment on Count Two to be served consecutively to the sentence on Count One, and 186 months imprisonment on Count Three to be served concurrently with the sentence imposed on Count One. ECF 44 (Judgment and Commitment). Pursuant to the Plea Agreement, the Court dismissed Count Four. As part of his Plea Agreement, Defendant waived his right to appeal or to collaterally attack his conviction or sentence. Accordingly, Plaintiff did not appeal his conviction or his sentence.

STANDARDS

Under § 2255, a federal prisoner in custody may move the sentencing court to vacate, set aside, or correct a sentence on the basis that the sentence violates the Constitution or the laws of

the United States. 28 U.S.C. § 2255(a); *United States v. Withers*, 638 F.3d 1055, 1062 (9th Cir. 2011) (citing *Davis v. United States*, 417 U.S. 333 (1974)).

The petitioner must demonstrate that an error of constitutional magnitude had a substantial and injurious effect or influence on the guilty plea or the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *see also United States v. Montalvo*, 331 F.3d 1052, 1058 (9th Cir. 2003) ("We hold now that *Brecht's* harmless error standard applies to habeas cases under section 2255, just as it does to those under section 2254.").

A district court must grant a hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief[.]" 28 U.S.C. § 2255(b). In determining whether a § 2255 motion requires a hearing, "the standard essentially is whether the movant has made specific factual allegations that, if true, state a claim on which relief could be granted." *Withers*, 638 F.3d at 1062 (brackets and internal quotation marks omitted). A district court may dismiss a § 2255 motion based on a facial review of the record "only if the allegations in the motion, when viewed against the record, do not give rise to a claim for relief or are 'palpably incredible or patently frivolous.'" *Id.* at 1062–63 (quoting *United States v. Schaflander*, 743 F.2d 714, 717 (9th Cir. 1984)); *see United States v. Hearst*, 638 F.2d 1190, 1194 (9th Cir. 1980) (conclusory statements in a § 2255 motion are insufficient to require a hearing).

Habeas review is not an alternative to direct appeal. *Bousley v. United States*, 523 U.S. 614, 621 (1998) ("Habeas review is an extraordinary remedy and will not be allowed to do service for an appeal.") (internal quotation marks omitted). Absent a showing of cause and prejudice, a habeas petitioner procedurally defaults all claims that were not raised in his direct appeal, other than claims asserting ineffective assistance of counsel. *Massaro v. United States*,

538 U.S. 500, 504 (2003). "[T]o obtain collateral relief based on trial errors to which no contemporaneous objection was made, a convicted defendant must show both (1) 'cause' excusing his double procedural default, and (2) 'actual prejudice' resulting from the errors of which he complains." *United States v. Frady*, 456 U.S. 152, 167-68 (1982). To demonstrate "cause," the defendant must establish that "'some objective factor external to the defense impeded his adherence to the procedural rule." *United States v. Skurdal*, 341 F.3d 921, 925 (9th Cir. 2003) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). For "prejudice," the defendant must show "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Frady*, 456 U.S. at 170. The district court does not need to address both prongs if the defendant fails to satisfy one. *Id.* at 168.

A defendant who fails to show cause and prejudice to excuse a procedural default, may still obtain review on a § 2255 collateral attack by demonstrating the likelihood of his actual innocence. *United States v. Braswell*, 501 F.3d 1147, 1150 (9th Cir. 2007). To establish actual innocence, the defendant must demonstrate that in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him. *Alaimalo v. United States*, 645 F.3d 1042, 1047 (9th Cir. 2011); *see also Bousley*, 523 U.S. at 623 ("'actual innocence' means factual innocence, not mere legal insufficiency").

DISCUSSION

In his § 2255 Motion, Defendant raises two grounds for relief. First, Defendant contends his sentence on Count Two should be vacated because armed robbery as charged in Count One is not a "crime of violence" within the meaning of § 924(c)(1)(A)(ii). Second, in the alternative, Defendant contends his sentence should be vacated and this Court should re-sentence Defendant

because, pursuant to since-overruled Ninth Circuit Court of Appeals precedent, the Court did not consider at sentencing the effect of the mandatory-minimum sentence on Count Two when it issued its sentences on Counts One and Three.

I. Armed Bank Robbery as a "Crime of Violence" under § 924(c)

As noted, in his first ground for relief Defendant contends armed bank robbery as charged in Count One is not a "crime of violence" and, therefore, it cannot serve as the predicate offense for the Count Two charge of using a firearm during a crime of violence under 18 U.S.C. § 924(c)(1)(A)(ii). Accordingly, Defendant contends his conviction and sentence on Count Two should be vacated.

The government contends Defendant's first ground for relief (1) is time barred by the one-year statute of limitations in § 2255(f); (2) was waived by Defendant when he pleaded guilty pursuant to a plea agreement that contained a waiver of Defendant's right to collaterally attack any aspect of his conviction or sentence except on grounds of ineffective assistance of counsel; (3) is procedurally defaulted; and (4) fails on the merits.

The Court need not consider the government's procedural arguments as to Defendant's first ground for relief because the merits analysis is straightforward. Since Defendant filed his Motion, the Ninth Circuit held in a published decision that armed bank robbery under § 2113(a), (d) is a "crime of violence" under the "force clause" of § 924(c)(3)(A), which defines "crime of violence" for purposes of § 924(c)(1)(A)(ii). *United States v. Watson*, ___ F.3d ___, 2018 WL 650990, at *2–*3 (9th Cir. Feb. 1, 2018).

Accordingly, on this record the Court concludes Defendant is not entitled to relief on his first ground for relief.

II. Consideration of Mandatory-Minimum Sentence on Counts One and Three

In his second ground for relief Defendant contends the Court should vacate his sentence and re-sentence him on the basis that the Court, pursuant to since-overruled Ninth Circuit precedent, did not consider the effect of the mandatory-minimum sentence required by Count Two when the Court determined whether the parties' stipulated sentences on Counts One and Three were reasonable under 18 U.S.C. § 3553(a). In particular, Defendant contends this Court sentenced him pursuant to the Ninth Circuit's direction in *United States v. Working*, 287 F.3d 801, 806–09 (9th Cir. 2002), not to consider the effect of the mandatory-minimum sentences under § 924(c) when fashioning appropriate sentences on the predicate armed-robbery counts. Defendant argues the Supreme Court overruled *Working* when it held "[n]othing in § 924(c) restricts the authority conferred on sentencing courts by § 3553(a) and the related provisions to consider a sentence imposed under § 924(c) when calculating a just sentence for the predicate count." *Dean v. United States*, 137 S. Ct. 1170, 1176–77 (2017).

Defendant, however, waived the right to collaterally attack his sentence on this basis. As noted, at the time that he pleaded guilty Defendant waived his right to appeal and to collaterally attack his conviction or sentence. Paragraph 17 of the Plea Agreement provided:

> **Waiver of Appeal/Post-Conviction Relief**: Defendant knowingly and voluntarily waives the right to appeal from any aspect of the conviction and sentence on any grounds, except for a claim that the sentence imposed exceeds the statutory maximum. Should defendant seek an appeal, despite this waiver, the USAO may take any position on any issue on appeal. Defendant also waives the right to file any collateral attack, including a motion under 28 U.S.C. § 2255, challenging any aspect of the conviction or sentence on any grounds, except on grounds of ineffective assistance of counsel, and except as provided in Fed. R. Crim. P. 33 and 18 U.S .C. § 3582(c)(2).

ECF 38, at 8.

The only argument Defendant makes in opposition to the government's contention that Defendant waived his right to bring this Motion under § 2255 is that such waivers will not be

enforced if "the sentence violates the law." *See United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007). "A sentence is illegal if it exceeds the permissible statutory penalty for the crime or violates the Constitution." *Id.*

Neither circumstance applies to this case. Defendant's concurrent 186-month sentences on the armed bank robbery counts were well below the 25-year maximum sentence for each count. Accordingly, Defendant's sentence does not exceed the permissible statutory penalty.

Moreover, the Ninth Circuit's holding in *Working* and the Supreme Court's holding in *Dean* were grounded in those courts' respective interpretations of the interaction between the mandatory-minimums set out in § 924(c) and the general authority of the court to fashion an appropriate sentence for the predicate crime(s) under § 3553(a). Neither case was grounded in constitutional principles. Nothing in *Dean*, therefore, rendered Defendant's sentence or sentencing proceedings to be in violation of the constitution.

On this record, therefore, the Court concludes Defendant waived his right to collaterally attack his sentence on this basis and, therefore, concludes Defendant is not entitled to relief on his second ground for relief. In any event, even if Defendant had not waived his right to collaterally attack his sentence on this basis, the Court notes Defendant's second ground for relief would fail on the merits because the rule that the Supreme Court announced in *Dean* is not retroactive because it is a new procedural rule "designed to enhance the accuracy of a conviction or sentence by regulating 'the manner of determining the defendant's culpability.'" *Montgomery v. Louisiana*, 136 S. Ct. 718, 730 (2016) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)) (emphasis omitted).

III. Certificate of Appealability

The Court also denies a Certificate of Appealability ("COA"). Issuance of a COA requires a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2255(c)(2). As noted, *Watson* forecloses Defendant's argument that armed bank robbery is not a "crime of violence" under § 924(c), and Defendant waived his right to collaterally attack his sentence on the basis that the Court was permitted to consider the effect of his mandatory-minimum sentence pursuant to § 924(c) when it determined whether the parties' stipulated sentences for the armed bank robbery convictions were reasonable under § 3553(a). The Court finds reasonable judges would not differ with the reasoning expressed in this Opinion on those issues. Thus, the Court denies a COA.

CONCLUSION

For these reasons, the Court denies Defendant's Amended Motion to Vacate, Set Aside or Correct Sentence [56].

IT IS SO ORDERED.

DATED this 9 day of March, 2018.

MARCO A. HERNÁNDEZ
United States District Judge

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part VI. Particular Proceedings
Chapter 153. Habeas Corpus (Refs & Annos)

28 U.S.C.A. § 2255

§ 2255. Federal custody; remedies on motion attacking sentence

Effective: January 7, 2008
Currentness

(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 Supreme Court, that was previously unavailable.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, § 114, 63 Stat. 105; Pub.L. 104-132, Title I, § 105, Apr. 24, 1996, 110 Stat. 1220; Pub.L. 110-177, Title V, § 511, Jan. 7, 2008, 121 Stat. 2545.)

Notes of Decisions (5948)

28 U.S.C.A. § 2255, 28 USCA § 2255
Current through P.L. 115-281. Also includes P.L. 115-283 to 115-333, and 115-335 to 115-338. Title 26 current through P.L. 115-442.

End of Document

KeyCite Red Flag - Severe Negative Treatment
Enacted LegislationAmended by PL 115-391, December 21, 2018, 132 Stat 5194,

KeyCite Red Flag - Severe Negative TreatmentUnconstitutional or Preempted

KeyCite Yellow Flag - Negative TreatmentProposed Legislation

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 44. Firearms (Refs & Annos)

18 U.S.C.A. § 924

§ 924. Penalties

Effective: October 6, 2006
Currentness

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever--

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(l); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly--

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922,

shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if--

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)--

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection--

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall--

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law--

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable 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.

(3) For purposes of this subsection the term "crime of violence" means 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.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section--

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition--

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(l), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions

of this chapter: *Provided,* That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are--

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title;

(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(l), 922(n), or 924(b) of this title; and

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.

(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.

(f) In the case of a person who knowingly violates section 922(p), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

(g) Whoever, with the intent to engage in conduct which--

(1) constitutes an offense listed in section 1961(1),

(2) is punishable 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,

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)),

travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(i)(1) A person who knowingly violates section 922(u) shall be fined under this title, imprisoned not more than 10 years, or both.

(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this subsection.

(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall--

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

(k) A person who, with intent to engage in or to promote conduct that--

(1) is punishable 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;

(2) violates any law of a State relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802); or

(3) constitutes a crime of violence (as defined in subsection (c)(3)),

smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

(l) A person who steals any firearm which is moving as, or is a part of, or which has moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(m) A person who steals any firearm from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall be fined under this title, imprisoned not more than 10 years, or both.

(n) A person who, with the intent to engage in conduct that constitutes a violation of section 922(a)(1)(A), travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.

(o) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

(p) Penalties relating to secure gun storage or safety device.--

(1) In general.--

(A) Suspension or revocation of license; civil penalties.--With respect to each violation of section 922(z)(1) by a licensed manufacturer, licensed importer, or licensed dealer, the Secretary may, after notice and opportunity for hearing--

(i) suspend for not more than 6 months, or revoke, the license issued to the licensee under this chapter that was used to conduct the firearms transfer; or

(ii) subject the licensee to a civil penalty in an amount equal to not more than $2,500.

(B) Review.--An action of the Secretary under this paragraph may be reviewed only as provided under section 923(f).

(2) Administrative remedies.--The suspension or revocation of a license or the imposition of a civil penalty under paragraph (1) shall not preclude any administrative remedy that is otherwise available to the Secretary.

CREDIT(S)

(Added Pub.L. 90-351, Title IV, § 902, June 19, 1968, 82 Stat. 233; amended Pub.L. 90-618, Title I, § 102, Oct. 22, 1968, 82 Stat. 1223; Pub.L. 91-644, Title II, § 13, Jan. 2, 1971, 84 Stat. 1889; Pub.L. 98-473, Title II, §§ 223(a), 1005(a), Oct. 12, 1984, 98 Stat. 2028, 2138; Pub.L. 99-308, § 104(a), May 19, 1986, 100 Stat. 456; Pub.L. 99-570, Title I, § 1402, Oct. 27, 1986, 100 Stat. 3207-39; Pub.L. 100-649, § 2(b), (f)(2)(B), (D), Nov. 10, 1988, 102 Stat. 3817, 3818; Pub.L. 100-690, Title VI, §§ 6211, 6212, 6451, 6460, 6462, Title VII, §§ 7056, 7060(a), Nov. 18, 1988, 102 Stat. 4359, 4360, 4371, 4373,

4374, 4402, 4403; Pub.L. 101-647, Title XI, § 1101, Title XVII, § 1702(b)(3), Title XXII, §§ 2203(d), 2204(c), Title XXXV, §§ 3526, 3527, 3528, 3529, Nov. 29, 1990, 104 Stat. 4829, 4845, 4857, 4924; Pub.L. 103-159, Title I, § 102(c), Title III, § 302(d), Nov. 30, 1993, 107 Stat. 1541, 1545; Pub.L. 103-322, Title VI, § 60013, Title XI, §§ 110102(c), 110103(c), 110105(2), 110201(b), 110401(e), 110503, 110504(a), 110507, 110510, 110515(a), 110517, 110518(a), Title XXXIII, §§ 330002(h), 330003(f)(2), 330011(i), (j), 330016(1)(H), (K), (L), Sept. 13, 1994, 108 Stat. 1973, 1998, 1999, 2000, 2011, 2015, 2016, 2018, 2019, 2020, 2140, 2141, 2145, 2147; Pub.L. 104-294, Title VI, § 603(m)(1), (n) to (p)(1), (q) to (s), Oct. 11, 1996, 110 Stat. 3505; Pub.L. 105-386, § 1(a), Nov. 13, 1998, 112 Stat. 3469; Pub.L. 107-273, Div. B, Title IV, § 4002(d)(1)(E), Div. C, Title I, § 11009(e)(3), Nov. 2, 2002, 116 Stat. 1809, 1821; Pub.L. 109-92, §§ 5(c)(2), 6(b), Oct. 26, 2005, 119 Stat. 2100, 2102; Pub.L. 109-304, § 17(d)(3), Oct. 6, 2006, 120 Stat. 1707.)

AMENDMENT OF SECTION

<Pub.L. 100-649, § 2(f)(2)(B), (D), Nov. 10, 1988, 102 Stat. 3818, as amended Pub.L. 101-647, Title XXXV, § 3526(b), Nov. 29, 1990, 104 Stat. 4924; Pub.L. 105-277, Div. A, § 101(h) [Title VI, § 649], Oct. 21, 1998, 112 Stat. 2681-528; Pub.L. 108-174, § 1, Dec. 9, 2003, 117 Stat. 2481; Pub.L. 113-57, § 1, Dec. 9, 2013, 127 Stat. 656, provided that, effective 35 years after the 30th day beginning after Nov. 10, 1988 [see section 2(f)(1) of Pub.L. 100-649, set out as a note under 18 U.S.C.A. § 922], subsec. (a)(1) of this section is amended by striking "this subsection, subsection (b), (c), or (f) of this section, or in section 929" and inserting "this chapter"; subsec. (f) of this section is repealed; and subsecs. (g) through (o) of this section are redesignated as subsecs. (f) through (n), respectively.>

VALIDITY

<The United States Supreme Court has held that the imposition of an increased sentence under the residual clause of the Armed Career Criminal Act (18 U.S.C.A. § 924 (e)(2)(B)(ii)), violates the Constitution's guarantee of due process, see Johnson v. U.S., U.S.2015, 135 S.Ct. 2551, 192 L.Ed.2d 569. >

Notes of Decisions (3957)

18 U.S.C.A. § 924, 18 USCA § 924
Current through P.L. 115-281. Also includes P.L. 115-283 to 115-333, and 115-335 to 115-338. Title 26 current through P.L. 115-442.

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