

## APPENDIX

**FILED**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JAN 28 2019

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SERGIO RAMIREZ,

Defendant-Appellant.

No. 17-17422

D.C. Nos. 2:16-cv-01316-MCE-CKD  
2:05-cr-00456-MCE-CKD

Eastern District of California,  
Sacramento

ORDER

Before: CANBY and GRABER, Circuit Judges.

The motion for reconsideration (Docket Entry No. 8) is denied. *See* 9th Cir.  
R. 27-10.

No further filings will be entertained in this closed case.

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Eastern District of California,  
Sacramento

ORDER

Before: LEAVY and SILVERMAN, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) 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 DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,  
v.  
SERGIO RAMIREZ,  
Movant.

No. 2:05-cr-0456 MCE CKD P

ORDER

Movant, a federal prisoner proceeding with counsel, has filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On September 13, 2017, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within fourteen days. Movant has filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this Court has conducted a *de novo* review of this case. Having carefully reviewed the entire file, the Court finds the findings and recommendations to be supported by the record and by proper analysis.

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1           Accordingly, IT IS HEREBY ORDERED that:

2           1. The findings and recommendations filed September 13, 2017, (ECF No. 141) are  
3 ADOPTED in full;

4           2. Movant's June 15, 2016 motion for habeas corpus relief under 28 U.S.C. § 2255 (ECF  
5 No. 124) is DENIED;

6           3. The court declines to issue the certificate of appealability referenced in 28 U.S.C. §  
7 2253; and

8           4. The Clerk of the Court is directed to close the companion civil case, No. 2:16-cv-1316  
9 MCE CKD.

10           IT IS SO ORDERED.

11           Dated: November 27, 2017

  
\_\_\_\_\_  
MORRISON C. ENGLAND, JR.  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,  
v.  
SERGIO RAMIREZ,  
Movant.

No. 2:05-cr-0456 MCE CKD P

FINDINGS AND RECOMMENDATIONS

I. INTRODUCTION

Movant is proceeding with counsel with a motion for habeas corpus relief under 28 U.S.C. § 2255. Movant argues that his convictions and sentences in this action for two counts of using a firearm during a “crime of violence” in violation of 18 U.S.C. § 924(c)(1)(A),<sup>1</sup> both with armed bank robbery as the qualifying “crime of violence,” must be vacated because, following the Supreme Court’s decision in Johnson v. United States, 135 S. Ct. 2551 (2015), bank robbery, armed or otherwise, no longer qualifies as a “crime of violence” for purposes of § 924(c)(1)(A). For the following reasons, the court will recommend that movant’s argument be rejected.

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<sup>1</sup> All other statutory references are to Title 18 of the United States Code unless otherwise noted.

1        II. BACKGROUND

2            On February 20, 2007, movant entered pleas of guilty to seven counts of armed bank  
3 robbery and two counts of using a firearm during a crime of violence. ECF No. 51 & 70. On  
4 April 30, 2007, movant was ordered to serve a total sentence of 288 months imprisonment. ECF  
5 No. 70. As for the two counts of using a firearm during a crime of violence at issue in this  
6 action, movant was ordered to serve consecutive 84 month sentences. Id.

7        III. STATUTES

8            Under § 2113(a), “bank robbery” is defined as follows:

9                    (a) Whoever, by force and violence, or by intimidation, takes, or  
10            attempts to take, from the person or presence of another, or obtains  
11            or attempts to obtain by extortion any property or money or any  
12            other thing of value belonging to, or in the care, custody, control,  
13            management, or possession of, any bank, credit union, or any  
14            savings and loan association; or

15                    Whoever enters or attempts to enter any bank, credit union, or any  
16            savings and loan association, or any building used in whole or in  
17            part as a bank, credit union, or as a savings and loan association,  
18            with intent to commit in such bank, credit union, or in such savings  
19            and loan association, or building, or part thereof, so used, any  
20            felony affecting such bank, credit union, or such savings and loan  
21            association and in violation of any statute of the United States, or  
22            any larceny--

23                    Shall be fined under this title or imprisoned not more than twenty  
24            years, or both . . .

25                    The applicable version of § 924(c)(1)(A) in effect until October 26, 2005<sup>2</sup> provides  
26            additional penalties for a defendant who “during and in relation to any crime of violence . . . uses  
27            or carries a firearm, or who, in furtherance of any such crime possess a firearm. . .” A “crime of  
28            violence” for purposes of § 924(c)(1)(A) is defined under § 924(c)(3) as a crime which “(A) has  
29            as an element the use, attempted use, or threatened use of physical force against the person or  
30            property of another, or (B) that by its nature, involves a substantial risk that physical  
31            force against the person or property of another may be used in the course of committing the  
32            offense.”

27                    <sup>2</sup> Movant’s crimes were committed in 2005 before October. ECF No. 8.  
28

1       IV.    ANALYSIS

2       In Johnson v. United States, 135 S. Ct. 2551 (2015) (“Johnson II”<sup>3</sup>), the Supreme Court  
 3 held that imposing an increased sentence under what has become known as the “residual clause”  
 4 of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2),<sup>4</sup> is a violation of Due Process Clause  
 5 of the Fourteenth Amendment as that provision is too vague. Movant argues that the ruling in  
 6 Johnson II also renders § 924(c)(3)(B) unconstitutionally vague. The court need not reach this  
 7 question, however, because movant fails to show that bank robbery is not a “crime of violence”  
 8 under § 924(c)(3)(A) as explained below.

9       1.    “Intimidation” as Element of “Crime of Violence”

10      In Johnson v. United States, 559 U.S. 133 (2010) (“Johnson I”) the Supreme Court  
 11 clarified that for purposes of the definition of “crime of violence” identified in § 924(c)(3)(A), the  
 12 phrase “physical force” means “violent force—that is force capable of causing physical pain or  
 13 injury to another person.” Id. at 140. Movant argues that bank robbery involving “intimidation,”  
 14 as opposed to “force and violence,” cannot amount to a “crime of violence” under § 924(c)(3)(A)  
 15 because the definition of intimidation in the Ninth Circuit, to “willfully . . . take, or attempt to  
 16 take, in such a way that would put an ordinary, reasonable person in fear of bodily harm,” United  
 17 States v. Selfa, 918 F.2d. 749, 751 (9th Cir. 1990), does not require the actual use, attempted use,  
 18 or threatened use of “violent, physical force.” Respondent points to U.S. v. Martinez-Hernandez,  
 19 864 F.2d 664 (9th Cir. 1989) where the Ninth Circuit upheld a conviction for armed bank robbery  
 20 where the defendant used a toy gun. In that example, even if people inside the bank were in fear  
 21 of bodily harm by their perception that the gun defendant had was real, no actual force was  
 22 threatened since the gun was not real. However, movant fails to point to any case law suggesting  
 23 that a “crime of violence” under § 924(c)(3)(A) can only include those crimes where the  
 24 defendant had the actual ability to cause the threat of violence perceived by the victim and the

25  
 26      <sup>3</sup> “Johnson II,” as opposed to “Johnson I,” referenced below.

27      <sup>4</sup> Under the “residual clause” found in § 924(e)(2)(B)(ii) a “violent felony” is, in part, a crime  
 28 punishable by imprisonment exceeding one year that “involves conduct that presents a serious  
 potential risk of physical injury to another.”

1 court sees no reason why such a distinction should be assumed. While putting oneself in a  
2 position to cause violence is certainly the sort of act Congress may wish to criminalize in some  
3 respects, so is causing people to fear violence.

4       2.     Intent

5       Next, movant argues that bank robbery is no longer a “crime of violence” as that term is  
6 defined in § 924(c)(3)(A) because law which has developed since movant was convicted now  
7 requires that the use, attempted use, or threatened use of physical force against the person or  
8 property of another be “intentional.”

9       In Leocal v. Ashcroft, 543 U.S. 1 (2004), the Supreme Court found that the phrase “use of  
10 physical force against the person or property of another” requires a level of intent beyond mere  
11 negligence. In Fernandez-Ruiz v. Gonzales, 466 F.3d 1121, 1126-32 (9th Cir. 2006) the Ninth  
12 Circuit found that reckless conduct is also not a sufficient level of intent to establish a “use,  
13 attempted use, or threatened use of physical force against the person or property of another.”  
14 Rather, a “crime of violence,” as that term is defined in § 924(c)(3)(A), “must involve the  
15 intentional use,” threatened use, etc., “of force.” Id.

16       To secure a bank robbery conviction “by intimidation,” “the government must prove not  
17 only that the accused knowingly took property, but also that he knew that his actions were  
18 objectively intimidating.” McNeal, 818 F.3d at 155. Movant argues that because bank robbery is  
19 not a “specific intent” crime, that is a crime where “the government must prove that the defendant  
20 subjectively intended or desired the proscribed act or result,” United States v. Lamont, 831 F.3d  
21 1153, 1156 (9th Cir. 2016), Fernandez-Ruiz precludes a finding that bank robbery is a crime of  
22 violence under § 924(c)(3). However, the Ninth Circuit did not distinguish between specific and  
23 general intent in Fernandez-Ruiz. The court simply indicated that a crime of violence as that term  
24 is described in § 924(c)(3)(A) must be committed “intentionally,” as opposed to recklessly or  
25 with negligence in that there must be a “volitional element.” Fernandez-Ruiz, 466 F.3d at 1129.  
26 Movant fails to point to any other authority suggesting that only specific intent crimes can amount  
27 to a crime of violence under § 924(c)(3)(A).

28       ////

1           In any case, in 2000, the Ninth Circuit held that armed bank robbery qualifies as a “crime  
 2 of violence,” as that term is defined in § 924(c)(3)(A) because one of the elements of armed bank  
 3 robbery is a taking “by force and violence or by intimidation.” United States v. Wright, 215 F.3d  
 4 1020, 1028 (9th Cir. 2000). Again, in Selfa, 918 F.2d. at 751, the Ninth Circuit specifically  
 5 defined “intimidation” as to “willfully . . . take, or attempt to take, in such a way that would put  
 6 an ordinary, reasonable person in fear of bodily harm.” Any argument that the Ninth Circuit’s  
 7 definition of “intimidation” somehow captures passive as opposed to intentional conduct  
 8 “presents an implausible paradigm in which a defendant unlawfully obtains another person’s  
 9 property against his or her will by unintentionally placing the victim in fear of injury. “United  
 10 States v. Watson, CR NO. 14-00751-01 DKW, 2016 WL 866298 at \*7 (D. Haw. Mar. 2, 2016).

11           3.       Extortion

12           Movant’s final argument, raised in his reply brief, is that bank robbery cannot be a “crime  
 13 of violence” under § 924(c)(3)(A) because it can be achieved through mere extortion. However,  
 14 not every crime which may be committed under § 2113(a) need amount to a “crime of violence”  
 15 under § 924(c)(3) in order for movant to be eligible for conviction under § 924(c)(1)(A).

16           As the Supreme Court noted in Mathis v. United States, 136 S. Ct. 2243, 2249 (2016) “[a]  
 17 single statute may list crimes in the alternative, and thereby define multiple crimes.” The court  
 18 finds that there are two crimes identified in the first paragraph of § 2113(a): bank robbery and  
 19 bank extortion. See Wright 215 F.3d at 1028 (Ninth Circuit finds armed bank robbery to be a  
 20 “crime of violence” under § 924(c)(3) because one of the elements is taking “by force and  
 21 violence, or by intimidation” and without addressing the element of § 2113(a) concerning  
 22 extortion). For bank robbery, the government must prove the defendant took, or attempted to  
 23 take, qualifying property from the person or presence of another by force and violence or by  
 24 intimidation. For bank extortion, the defendant must obtain or attempt to obtain qualifying  
 25 property by extortion which the Supreme Court has defined as “obtaining something of value  
 26 from another (not necessarily from their presence or person), with his consent induced by the  
 27 wrongful use of force, fear or threats.” Scheidler v. Nat’l Org. for Women, Inc., 537 U.S. 393,  
 28 409 (2003). “Unlike robbery, the threats that can constitute extortion . . . include threats to

1 property. . .” United States v. Becerril-Lopez, 541 F.3d 881, 892 (9th Cir. 2008). See United  
2 States v. Holloway, 309 F.3d 649, 651 (9th Cir. 2002) (Ninth Circuit recognizes that § 2113(a) is  
3 the exclusive provision for prosecuting “bank extortion”).

4 Where, as here, a “divisible” statute delineates more than one crime by having “alternative  
5 elements,” the “court looks to a limited class of documents (for example, the indictment, jury  
6 instructions, or plea agreement and colloquy) to determine what crime, with what elements, a  
7 defendant was convicted of.” Mathis, 136 S. Ct. at 2249. If the court determines the  
8 crime for which defendant was convicted was a “crime of violence,” conviction under §  
9 924(c)(1)(A) is not foreclosed.

10 Movant was charged in counts one and thirteen of the Indictment with armed bank  
11 robbery, not bank extortion. It is alleged in count one that movant “willfully and by force,  
12 violence and intimidation [took], from the person or presence of employees of Bank of the West,  
13 520 Carolyn Weston Boulevard, Stockton . . . , approximately \$9,167. . .” In count thirteen it is  
14 alleged that movant “willfully and by force, violence and intimidation [took], from the person or  
15 presence of employees of West America Bank, 255 East King Street, Tulare . . . , approximately  
16 \$6,391. . .” ECF No. 8. In his plea agreement, movant agreed to plead guilty to counts two and  
17 fourteen as charged; count two identifies the armed robbery alleged in count one as the qualifying  
18 “crime of violence” and count fourteen identifies the armed robbery alleged in count thirteen as  
19 the qualifying “crime of violence.” ECF No. 8 & 53 at 2.

20 Accordingly, movant’s convictions concern armed bank robbery involving “force and  
21 violence or intimidation,” and not extortion.

22 4. Binding Authority not “Clearly Irreconcilable”

23 Finally, as argued by respondent, the court notes that under Ninth Circuit law, the court  
24 must adhere to the finding in Wright, that armed bank robbery is a “crime of violence” under §  
25 924(c)(3) as movant has not shown that Johnson I, Johnson II, or any other subsequent Ninth  
26 Circuit or Supreme Court authority is “clearly irreconcilable” with or has overruled Wright. See  
27 Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

28 ////

1       V.     CONCLUSION

2           For all of these reasons, the court will recommend that movant's motion for habeas corpus  
3 relief under 28 U.S.C. § 2255 be denied.

4           In accordance with the above, IT IS HEREBY RECOMMENDED that:

5           1. Movant's June 15, 2016 motion for habeas corpus relief under 28 U.S.C. § 2255 (ECF  
6 No. 124) be denied; and

7           2. The Clerk of the Court be directed to close the companion civil case No. 2:16-cv-1316  
8 MCE CKD.

9           These findings and recommendations are submitted to the United States District Judge  
10 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
11 after being served with these findings and recommendations, any party may file written  
12 objections with the court and serve a copy on all parties. Such a document should be captioned  
13 "Objections to Magistrate Judge's Findings and Recommendations." In his objections, movant  
14 may address whether a certificate of appealability should issue in the event he files an appeal of  
15 the judgment in this case. See Rule 11, Federal Rules Governing Section 2255 Cases (the district  
16 court must issue or deny a certificate of appealability when it enters a final order adverse to the  
17 applicant). Any response to the objections shall be served and filed within fourteen days after  
18 service of the objections. The parties are advised that failure to file objections within the  
19 specified time waives the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d  
20 1153 (9th Cir. 1991).

21           Dated: September 12, 2017

  
CAROLYN K. DELANEY  
UNITED STATES MAGISTRATE JUDGE

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27           rami0456.257  
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