APPENDIX A

NOT FOR PUBLICATION

FILED

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GARY CASDELL FITE, Defendant-Appellant.	No. 17-16937 D.C. Nos. 4:16-cv-02895-PJH 4:13-cr-00212-PJH MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, Chief Judge, Presiding

Submitted November 27, 2018**

Before: CANBY, TASHIMA, and FRIEDLAND, Circuit Judges.

Gary Casdell Fite appeals from the district court's judgment denying his 28 U.S.C. § 2255 motion to vacate. We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Fite contends that his armed bank robbery conviction under 18 U.S.C. § 2113(a), (d) does not qualify as a predicate crime of violence under 18 U.S.C. § 924(c). This argument is foreclosed. *See United States v. Watson*, 881 F.3d 782 (9th Cir.), *cert. denied*, 139 S. Ct. 203 (2018).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,
v.
GARY FITE,
Defendant.

Case No. 13-cr-00212-PJH-1

ORDER DENYING § 2255 MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE; ISSUING CERTIFICATE OF APPEALABILITY

Re: Doc. No. 62

Before the court is the represented motion of Gary Casdell Fite, II ("movant") pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. Doc. no. 62. After the court issued an order to show cause, the government filed a motion to stay, doc. no. 68, which was then withdrawn, doc. no. 69. The government then filed an opposition to the § 2255 motion, doc. no. 70, and movant timely filed a reply, doc. no. 71. The matter is submitted on the papers and is suitable for decision without oral argument. Having reviewed the record and carefully considered the parties' papers and relevant authority, the court DENIES the motion for the reasons set forth below.

BACKGROUND

Movant is currently serving a 120-month sentence imposed by this court. On March 28, 2013, a federal grand jury returned an indictment charging movant with the following counts: Count One for armed bank robbery, in violation of 18 U.S.C. § 2113(a) and (d); and Count Two for brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii). Doc. no. 11. Movant entered a plea of guilty to both counts of the indictment before this court on June 19, 2013, pursuant to a plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C), in which the

parties agreed to jointly recommend (i) a sentence of no less than a total of 96 months in prison for Counts One and Two and (ii) no greater prison term than the low end of the guideline range for an adjusted offense level of 19 and the applicable criminal history category for Count One, followed by a consecutive 84-month term for Count Two. Plea Agreement ¶ 8. The plea agreement included a waiver of movant's right to "file any collateral attack on [his] conviction or sentence" except for a claim of ineffective counsel. *Id.* ¶ 5.

On September 6, 2013, the court entered a judgment convicting movant of Counts One and Two. As calculated in the presentence report ("PSR"), with the adjustment for acceptance of responsibility, movant's guideline range as to Count One was 46-57 months imprisonment, based on a total offense level of 19 and a criminal history category of IV, plus the statutory 84-month consecutive term mandated for Count Two, for a total guideline imprisonment range of 130 to 141 months. *See* PSR ¶¶ 34, 36, 46, 72. The PSR recommended a low end guideline sentence of 130 months in light of the "unfortunate circumstances of [movant's] childhood," rather than a downward variance. PSR, Sentencing Recommendation at 2. On September 4, 2013, the court adopted the PSR's offense level recommendation, with a corresponding guideline range of 130-141 months. After considering the relevant 18 U.S.C. § 3553(a) factors, the court granted a downward variance to sentence movant to 36 months as to Count One and 84 months as to Count Two, to be served consecutively, for a total term of 120 months imprisonment; a total term of supervised release of five years; and a special assessment of $200. Movant did not appeal his conviction or sentence.

On May 31, 2016, movant filed the instant motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. The matter is fully briefed and submitted.

ISSUES PRESENTED

In his § 2255 motion, movant presents the following due process claim: that under the holding of *Johnson (Samuel) v. United States*, 135 S. Ct. 2551 (2015), the residual clause of the definition of a crime of violence under 18 U.S.C. § 924(c) is

unconstitutionally vague, rendering movant's conviction and sentence on Count Two invalid because armed bank robbery no longer qualifies as a crime of violence.

LEGAL STANDARD

Under the federal habeas statute, relief may be granted to a federal prisoner challenging the imposition or length of sentence on the following grounds: (1) if the sentence violated the Constitution or laws of the United States; (2) if the sentencing court was without jurisdiction to impose sentence; (3) if the sentence exceeded the maximum penalty allowed by law; or (4) if the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255. Despite this broad language, violations of federal law are only cognizable if they involve a "fundamental defect" causing a "complete miscarriage of justice." *Davis v. United States*, 417 U.S. 333, 346 (1974).

DISCUSSION

Movant argues that his conviction and sentence for brandishing a firearm during and in relation to a crime of violence under 18 U.S.C. § 924(c)(1)(A)(ii) violate due process because armed bank robbery does not qualify as a crime of violence following *Johnson (Samuel)*. There, the Supreme Court held that the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B), defining a "violent felony" to include any felony that "involves conduct that presents a serious potential risk of physical injury to another," is unconstitutionally vague. *Johnson (Samuel),* 135 S. Ct. at 2563. Movant was convicted and sentenced under a different statutory provision, § 924(c), which imposes a consecutive term of imprisonment for defendants who use or carry a firearm "during and in relation to any crime of violence or drug trafficking crime." 18 U.S.C. § 924(c)(1)(A). A "crime of violence" is defined in 18 U.S.C. § 924(c)(3) as a felony offense that either:

> (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.

Movant argues that the residual clause of § 924(c)(3)(B) is materially indistinguishable from the residual clause of the ACCA held void for vagueness in *Johnson (Samuel)*, and argues that *Johnson (Samuel)* announced a new rule that applies retroactively to cases on collateral review. Mot. at 14-15 (citing *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016)).

The government argues that movant is not entitled to collateral relief on the following procedural grounds: (1) by entering the plea agreement, movant waived his right to file a § 2255 motion; (2) the claim is procedurally defaulted; and (3) movant's contention that armed robbery is not a crime of violence under the "elements" or "force" clause of 18 U.S.C. § 924(c)(3)(A) is time-barred. The government further contends that § 924(c)'s residual clause is not void for vagueness under *Johnson (Samuel)*, distinguishing the residual clause of the ACCA from the residual clause of § 924(c)(3)(B). Opp. at 12-19. The government also asserts that the court need not consider whether the residual clause of § 924(c) is void for vagueness because armed bank robbery qualifies as a crime of violence under the force clause of § 924(c)(3)(A). Opp. at 9-10. In the event that movant succeeds on the merits of his due process claim, the government argues that the court should not disturb the sentence because movant is bound by the plea agreement in which he agreed to an 84-month consecutive sentence for Count Two and he does not deny that he committed the conduct underlying his sentence, that is, brandishing a firearm during a robbery. Opp. at 19.

I. Waiver

The government contends that movant waived his right to bring this post-conviction motion by entering into the plea agreement which included a provision waiving any collateral attack on his conviction or sentence. Opp. at 6-8. Under Ninth Circuit authority, "an appeal waiver will not apply if . . . the sentence violates the law." *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.* (citing *United States v. Fowler*, 794 F.2d 1446, 1449 (9th Cir. 1986)). Here, movant asserts that his

conviction and sentence violate his due process rights in light of *Johnson (Samuel)*. Accordingly, the collateral attack waiver provision in the plea agreement does not bar the instant § 2255 motion.

II. Procedural Default

The government contends that movant is barred from raising the *Johnson (Samuel)* claim on a collateral challenge to the judgment because he failed to raise the claim on direct review and has not demonstrated cause and prejudice to excuse the procedural default. Opp. at 10-12. "Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either cause and actual prejudice, or that he is actually innocent." *United States v. Ratigan*, 351 F.3d 957, 964 (9th Cir. 2003) (quoting *Bousley v. United States*, 523 U.S. 614, 622 (1998) (internal citations and marks omitted)). There is no dispute that movant did not challenge the crime of violence determination on appeal, but movant argues that his procedural default is excused by cause and prejudice and on the ground of actual innocence. Reply at 2-6.

A. Cause

"To allege cause for a procedural default, a petitioner must assert that the procedural default is due to an 'objective factor' that is 'external' to the petitioner and that 'cannot fairly be attributed to him.'" *Manning v. Foster*, 224 F.3d 1129, 1133 (9th Cir. 2000) (citing *Coleman v. Thompson*, 501 U.S. 722, 753 (1991)). Under this standard, "a showing that the factual or legal basis for a claim was not reasonably available to counsel" establishes cause for a procedural default. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). The government argues that the void for vagueness claim was not so novel that movant could be excused for failing to raise them at sentencing or on appeal. Opp. at 12 (citing *Reed v. Ross*, 468 U.S. 1, 16 (1984)). While the Supreme Court has held that "futility cannot constitute cause if it means simply that a claim was unacceptable to that particular court at that particular time," *Bousley*, 523 U.S. at 623, the legal basis for a vagueness challenge to the residual clause of § 924(c) was "not reasonably available to

counsel" in light of the Supreme Court's holdings in *James v. United States*, 550 U.S. 192 (2007) and *Sykes v. United States*, 131 S. Ct. 2267 (2011), both of which were expressly overruled by *Johnson (Samuel)*. As Justice Scalia noted in his discussion of the Court's prior rulings on the ACCA, "[i]n both *James* and *Sykes*, the Court rejected suggestions by dissenting Justices that the residual clause violates the Constitution's prohibition of vague criminal laws." *Johnson (Samuel)*, 135 S. Ct. at 2556. In light of this authority, the court finds cause for movant's failure to raise the vagueness challenges on direct appeal.

B. Prejudice

To establish the prejudice prong to excuse the failure to raise a claim on direct appeal, a defendant must show not merely "a *possibility* of prejudice," but that the alleged error "'worked to his *actual* and substantial disadvantage.'" *United States v. Braswell*, 501 F.3d 1147, 1150 (9th Cir. 2007) (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982)). To satisfy the cause and prejudice test to excuse procedural default, a defendant must demonstrate prejudice "significantly greater than that necessary under the more vague inquiry suggested by the words 'plain error.'" *Murray*, 477 U.S. at 493-94. The government contends that defendant has not demonstrated actual prejudice. Opp. at 12.

Movant argues that without the conviction on Count Two, his guideline imprisonment range as to Count One would have been 77 to 96 months based on a total offense level of 24 and criminal history category of IV. Mot. at 1. Although the government disputes his guideline recalculation, movant has demonstrated a potential discrepancy of 24 to 43 months between his actual 120-month sentence and the guideline range without the § 924(c) conviction. The court determines that the additional time in custody is sufficient to show that the alleged due process violation worked to his "actual and substantial disadvantage."

Having found cause and prejudice to excuse procedural default as to the *Johnson (Samuel)* claim, the court does not reach the question whether actual innocence as to the § 924(c) conviction also excuses procedural default.

III. Crime of Violence

A. Residual Clause

The government does not raise an argument, in light of *Welch*, challenging retroactive application of *Johnson (Samuel)* to cases on collateral review. The parties do, however, dispute whether *Johnson (Samuel)* extends to the residual clause of § 924(c) and renders it void for vagueness. Because the court determines, below, that armed bank robbery under 18 U.S.C. § 2113(a) and (d) constitutes a crime of violence as defined in the force clause of § 924(c)(3)(A), the court need not reach the constitutional issue whether the residual clause of § 924(c)(3)(B) is unconstitutionally vague under *Johnson (Samuel)*, particularly in light of the pendency of *Sessions v. Dimaya,* No. 15-1498, in which the Supreme Court is presented with a vagueness challenge to a similar residual clause in 18 U.S.C. § 16(b). *See United States v. Lamont*, 330 F.3d 1249, 1251 (9th Cir. 2003) (following the "fundamental and longstanding principle of judicial restraint [that] requires [us to] avoid reaching constitutional questions in advance of the necessity of deciding them") (quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988)).

B. Force Clause

Movant argues that federal armed bank robbery is not a crime of violence as defined under the force clause of § 924(c)(3)(A) because armed bank robbery does not require the intentional use or threatened use of violent physical force. Mot. at 7-13.

As a procedural matter, the government contends that movant's challenge to the crime of violence determination under the force clause of § 924(c) is time-barred. Opp. at 8-9 (citing 28 U.S.C. § 2255(f)). Because the § 2255 motion challenging the residual clause under *Johnson (Samuel)* is timely, movant's arguments that the force clause does not provide an alternative ground to find a crime of violence, in the absence of the residual clause, are not time-barred.

Under Ninth Circuit authority, federal armed bank robbery under § 2113(a) categorically qualifies as a crime of violence under § 924(c)(3)(A). *United States v.*

Wright, 215 F.3d 1020, 1028 (9th Cir. 2000). In *Wright,* the Ninth Circuit determined that one of the elements of federal armed bank robbery is "using force and violence or intimidation," and expressly held that armed bank robbery is a crime of violence for purposes of § 924(c):

> 18 U.S.C. § 924(c)(3) defines a crime of violence for purposes of § 924(c) as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." Armed bank robbery qualifies as a crime of violence because one of the elements of the offense is a taking "by force and violence, or by intimidation." 18 U.S.C. § 2113(a).

215 F.3d at 1028. *See also United States v. Selfa*, 918 F.2d 749, 751-52 (9th Cir. 1990) (holding that § 2113(a) "requires, at the very least, either 'force and violence' or 'intimidation,'" and satisfies the requirement in U.S.S.G. § 4B1.2(1) of a "'threatened use of physical force'").

Movant challenges the holding of *Wright* on two grounds. First, he contends that the federal offense of armed bank robbery does not require use or threatened use of *violent* physical force, as required by *Johnson (Curtis) v. United States*, 559 U.S. 133, 138 (2010). Construing the force clause in the definition of a "violent felony" under the ACCA, 18 U.S.C. § 924(e)(2)(B)(i), the Supreme Court held in *Johnson (Curtis)* that "in the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent* force - that is force capable of causing physical pain or injury to another person." 559 U.S. at 140. Movant argues that *Wright* has been overruled because armed bank robbery only requires a taking by intimidation, which does not satisfy the violent physical force required by *Johnson (Curtis).* Mot. at 8-11.

Second, movant contends that armed bank robbery has no requirement of *intentional* use or threatened use of physical force, as required by *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) and *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1132 (9th Cir. 2006) (en banc). Mot. at 11-13. In *Leocal*, the Supreme Court held that the force clause of 18 U.S.C. § 16(a) defining a "crime of violence" requires "a higher degree of intent than

negligent or merely accidental conduct," concluding that a conviction for driving under the influence and causing serious bodily injury in an accident did not qualify as a crime of violence under § 16(a). 543 U.S. at 9-10. In *Fernandez-Ruiz*, the Ninth Circuit construed *Leocal* to require "intentional use of force against the person or property of another" to constitute a crime of violence under § 16(a). 466 F.3d at 1132. Movant argues that under *Wright,* a defendant may be convicted of armed bank robbery through intimidation even without proof of intent to intimidate as required by *Leocal* and *Fernandez-Ruiz*. Mot. at 12. Movant similarly argues that the dangerous weapon element does not require proof of subjective intent to use the weapon to threaten. Mot. at 12-13. Thus, movant contends that federal armed bank robbery lacks the intentional mens rea requirement to qualify as a crime of violence under the force clause. Mot. at 13.

Although the Ninth Circuit has not issued a published opinion revisiting *Selfa* and *Wright* in light of *Johnson (Curtis)* and *Leocal*, several unpublished opinions recognize that *Selfa* and *Wright* remain controlling on the issue whether federal bank robbery constitutes a "crime of violence" under the force clause of § 924(c), or the similar force clause of U.S.S.G. § 4B1.2. In *United States v. Cross*, 691 Fed. Appx. 312, 312-13 (9th Cir. May 15, 2017), *pet. for reh'g and reh'g en banc denied* (June 26, 2017), the court held that bank robbery by "intimidation" requires violent physical force, as defined by *Johnson (Curtis),* and that § 2113(a) requires proof of general intent to establish intentional use or threatened use of force, consistent with *Leocal* and *Fernandez-Ruiz*. Similarly, in *United States v. Pritchard*, No. 15-50278, 2017 WL 2219005, at*1 (9th Cir. May 18, 2017), *pet. for reh'g and reh'g en banc denied* (July 25, 2017), the court affirmed the conviction under 18 U.S.C. § 924(c)(1)(A)(ii) based on a predicate crime of violence conviction for armed bank robbery under § 2113(a) & (d), following *Wright* and *Selfa*. *See also United States v. Jordan*, 680 Fed. Appx. 634, 635 (9th Cir. Mar. 14, 2017), *pet. for certiorari filed*, No. 16-9589 (June 13, 2017) ("Under our current case law, § 2113(a) bank robbery categorically qualifies as a 'crime of violence' under § 924(c)(3)(A).") (citing *Selfa* and *Wright*).

Several other circuit courts have considered the question whether federal bank robbery qualifies as a crime of violence in light of *Johnson (Curtis)* and *Leocal,* and have unanimously concluded that bank robbery accomplished by intimidation involves the threat of violent force and the intentional use or threatened use of force. *See United States v. Ellison*, 866 F.3d 32, 40 (1st Cir. 2017) (affirming sentence under force clause of career offender guideline § 4B1.2); *United States v. Williams*, 864 F.3d 826, 830 (7th Cir. 2017) ("Bank robbery by intimidation is a crime of violence as defined by the elements clause of § 924(c)(3)(A)."), *pet. for certiorari docketed,* No. 17-5551 (Aug 07, 2017); *United States v. McNeal*, 818 F.3d 141, 153 (4th Cir.), *cert. denied*, 137 S. Ct. 164 (2016). *See also In re Sams*, 830 F.3d 1234, 1239 (11th Cir. 2016) (bank robbery under § 2113(a) qualifies as crime of violence under § 924(c)(3)(A)); *United States v. McBride*, 826 F.3d 293, 295-96 (6th Cir. 2016) (affirming career offender determination under U.S.S.G. § 4B1.2), *cert. denied*, 137 S. Ct. 830 (2017). In *McNeal*, the Fourth Circuit held that armed bank robbery under § 2113(a) constitutes a crime of violence under the force clause of § 924(c)(3). The court in *McNeal* addressed and rejected the defendants' arguments that *Johnson (Curtis)* and *Leocal* invalidated earlier circuit authorities, including *Selfa*, 918 F.2d at 751, to hold that bank robbery by intimidation requires threatened use of violent force that is intentional. *McNeal*, 818 F.3d at 154-55.

Several judges of this court have addressed arguments similar to movant's challenging the authority of *Selfa* and *Wright* in light of *Johnson (Curtis)* and *Leocal*, and have held that bank robbery by intimidation under § 2113(a) satisfies the requirements of violent physical force and intentional use or threatened use of force. *See United States v. Akins*, CR 01-435-1 CRB, doc. no. 286 (N.D. Cal. May 5, 2017), *appeal docketed* (May 10, 2017); *United States v. Miller,* CR 10-681-2 CW, doc. no. 106 (N.D. Cal. Jan. 4, 2017), *appeal docketed* (Jan. 5, 2017); *United States v. Holmes*, No. CR 10-108 SI, 2016 WL 6947499, at *4 (N.D. Cal. Nov. 28, 2016), *appeal dismissed* (May 30, 2017). In *Akins*, Judge Breyer reasoned that under Ninth Circuit authority, bank robbery by intimidation requires a taking "in such a way that would put an ordinary, reasonable

person in fear of bodily harm," which satisfies the degree of physical force required by *Johnson (Curtis)*, 559 U.S. at 140, "that is, force capable of causing physical pain or injury to another person."

> Petitioner asserts that the Ninth Circuit recently "clarifi[ed] . . . what satisfie[s] the force clause" in *United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016), but his reliance on *Parnell* is misplaced. *See* Mot. at 10; Reply (dkt. 283) at 11-12. *Parnell* involved a Massachusetts armed robbery law in which "the degree of force is immaterial," "it is not necessary that the victim be placed in fear," and the victim need not even "be aware of the weapon's presence." *See* 818 F.3d at 978-79. Because "any force, however slight" would satisfy the Massachusetts statute, the Ninth Circuit held that the statute did not categorically satisfy the requirement of physical force under section 924(e)(2)(B)(i)—"force capable of causing physical pain or injury to another person." *Id.* at 979 (quoting *Johnson* [*Curtis*], 559 U.S. at 140). The underlying crime here is quite different. Intimidation under section 2113(a) means "willfully to take, or attempt to take, in such a way that would put an ordinary, reasonable person in fear of bodily harm." *See Selfa*, 918 F.2d at 751. Moreover, armed bank robbery pursuant to section 2113(d) involves "assault[ing] any person, or put[ting] in jeopardy the life of any person by the use of a dangerous weapon or device." 18 U.S.C. § 2113(d). Petitioner argues that a "mere reference to possessing a gun, without actually displaying it or threatening to use it, is sufficient to sustain a conviction under § 2113(d)," but that under *Parnell*, "a mere uncommunicated willingness or readiness to use such force" does not satisfy the force clause. *See* Reply at 12 (citing *United States v. Jones*, 84 F.3d 1206, 1211 (9th Cir. 1996); *Parnell*, 818 F.3d at 980). But *Jones* did involve a threat to use a gun to do harm: the defendant "told the bank tellers he had a gun, and he told them this to get them to comply with his demand for money." *See Jones*, 84 F.3d at 1211. There was no "uncommunicated willingness . . . to use force." *See id.*; *Parnell*, 818 F.3d at 980. *Parnell* therefore does not undermine *Selfa* and *Wright*.
>
> The Court further rejects Petitioner's argument that "a defendant could commit armed bank robbery through intimidation by threatening to poison the teller, but this would not constitute the threatened use of violent physical force."

> *See* Mot. at 9. A threat of poisoning is a threat of violent physical force. *Cf. United States v. Castleman*, 134 S.Ct. 1405, 1415 (2014) (holding in a different context that even poisoning involves the use of force; "[t]hat the harm occurs indirectly, rather than directly (as with a kick or a punch), does not matter."); *id.* at 1416–17 (Scalia, J., concurring in part and concurring in the judgment) ("it is impossible to cause bodily injury without using force 'capable of' producing that result."); *see also United States v. De La Fuente*, 353 F.3d 766, 771 (9th Cir. 2003) (finding that threat of anthrax poisoning is a threat of forceful conduct). Moreover, as Judge Wilken of this district recently explained, section 2113(d) "requires that a defendant assault or put another's life in jeopardy by the use of a dangerous weapon. . . . Any threat involving a weapon is by definition a threat of violent force." *United States v. Miller*, No. CR 10-681-2 CW (dkt. 106) at 6 (N.D. Cal. Jan. 4, 2017).

Akins, doc. no. 286 at 4-6. *See also McLaughlin v. United States*, 476 U.S. 16, 17-18 (1986) ("the display of a gun instills fear in the average citizen; as a consequence, it creates an immediate danger that a violent response will ensue").

Judge Breyer further held in *Akins* that armed bank robbery is a general intent crime which satisfies the requirement of intentional use or threatened use of force under *Leocal* and *Fernandez-Ruiz*.

> Second, Petitioner argues that to qualify as a crime of violence, an offense requires the intentional use or threatened use of physical force, and that armed bank robbery has no such requirement. *See* Mot. at 11-12 (citing *Leocal v. Ashcroft*, 543 U.S. 1, 9–10 (2004) (holding that the word "'use' . . . suggests a higher degree of intent than negligent or merely accidental conduct."); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1132 (9th Cir. 2006) (en banc) ("to constitute a federal crime of violence an offense must involve the intentional use of force against the person or property of another.")). The Ninth Circuit held in *United States v. Foppe*, 993 F.2d 1444, 1451 (9th Cir. 1993), that bank robbery did not require a specific intent instruction "because the jury can infer the requisite criminal intent from the fact that the defendant took the property of another by force and violence, or intimidation." That is different from holding that armed bank robbery does not require "that a defendant intentionally use or threaten force." *See* Mot. at 11. Bank robbery is a general

> intent crime. *Foppe*, 993 F.2d at 1451. "A general intent crime can satisfy the generic definition of a 'crime of violence.'" *See United States v. Laurico-Yeno*, 590 F.3d 818, 822 & n.4 (9th Cir. 2010). Thus, in *McNeal*, 818 F.3d at 155–56, the Fourth Circuit held that section 2113(a) is both a general intent crime and a crime of violence.
>
> As a general intent crime, section 2113(a) requires the government to prove "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 of intimidation)." *See Carter v. United States*, 530 U.S. 255, 268 (2000); *see also* Ninth Circuit Manual of Model Criminal Jury Instructions 8.162 ("[Third, the defendant intentionally [[struck or wounded [name of victim]] [made a display of force that reasonably caused [name of victim] to fear bodily harm] by using a [specify dangerous weapon or device]."") (emphasis added). Moreover, the Ninth Circuit's definition of "intimidation" requires wilfulness. *See Selfa*, 918 F.2d at 751 ("willfully to take, or attempt to take, in such a way that would put an ordinary, reasonable person in fear of bodily harm."). The Court therefore rejects the suggestion that one can be convicted of armed bank robbery based on "negligent or merely accidental" intimidation. *See Leocal*, 543 U.S. at 9[.] *Leocal* does not undermine *Selfa* and *Wright*.

Akins, doc. no. 286 at 6-7 (citations omitted). The court in *Akins* addressed arguments identical to those raised by movant here, and its holding is directly on point.

In light of the highly persuasive circuit court authorities on the question whether the offense of armed bank robbery requires intentional use or threatened use of violent physical force, the court adopts the well-reasoned analysis of *Akins* to hold that *Wright* is not clearly irreconcilable with *Johnson (Curtis)* and *Leocal*, and that movant's predicate conviction under § 2113(a) and (d) for armed bank robbery qualifies as a crime of violence under § 924(c)(3)(A). Accordingly, movant has not demonstrated that his conviction and sentence under § 924(c)(1)(A)(ii), for brandishing a firearm during and in relation to a crime of violence, violates due process of law.

CONCLUSION

For the reasons set forth above, the motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 is DENIED.

CERTIFICATE OF APPEALABILITY

To obtain a certificate of appealability ("COA"), a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The court finds that this standard is met by movant's claim that he was convicted under 18 U.S.C. § 924(c)(1)(A) in violation of his rights to due process based on a finding that the offense of armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d) qualified as a crime of violence, and issues a certificate of appealability on that claim.

IT IS SO ORDERED.

Dated: September 21, 2017

PHYLLIS J. HAMILTON
United States District Judge

APPENDIX C

881 F.3d 782
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Marcus Kalani WATSON, AKA Kiki Seui; Rogussia Eddie Allen Danielson, Defendants–Appellants.

No. 16-15357
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Argued and Submitted September 13, 2017, San Francisco, California
|
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Synopsis

Background: Two defendants filed motions to vacate sentence, relating to each defendant's statutory mandatory consecutive term of imprisonment for using or carrying a firearm during a crime of violence, for which the predicate crime of violence was armed bank robbery. The United States District Court for the District of Hawai'i, Nos. 1:15-cv-00313-DKW-KSC, 1:15-cv-00390-DKW-BMK, and 1:14-cr-00751-DKW, Derrick Kahala Watson, J., 2016 WL 866298 and 2016 WL 3676103, denied the motions. Defendants appealed.

[Holding:] The Court of Appeals held that under the categorical approach, armed bank robbery is a crime of violence, as an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another.

Affirmed.

West Headnotes (5)

[1] **Weapons**
Crimes of violence

To qualify as a crime of violence, as predicate for statutory mandatory consecutive term of imprisonment for using or carrying a firearm during a crime of violence, based on the crime having as an element the use, attempted use, or threatened use of physical force against the person or property of another, the element of physical force must involve "violent physical force," that is, force capable of causing physical pain or injury. 18 U.S.C.A. § 924(c)(1)(A), (c)(3)(A).

36 Cases that cite this headnote

[2] **Weapons**
Crimes of violence

Under the categorical approach, the federal offense of armed bank robbery "by force and violence, or by intimidation" qualifies as a crime of violence, i.e., an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, as predicate for statutory mandatory consecutive term of imprisonment for using or carrying a firearm during a crime of violence; bank robbery by intimidation, as the least violent form of the offense, requires that the defendant take property in such a way that would put an ordinary, reasonable person in fear of bodily harm, a defendant cannot put a reasonable person in fear of bodily harm without threatening to use force capable of causing physical pain or injury, and a defendant cannot be convicted if he only negligently intimidates the victim, because the offense must at least involve the knowing use of intimidation, which necessarily entails the knowing use, attempted use, or threatened use of violent physical force. 18 U.S.C.A. §§ 924(c)(1)(A), (c)(3)(A), 2113(a, d).

49 Cases that cite this headnote

[3] **Weapons**
Crimes of violence

Under the categorical approach for determining whether a statutory offense qualifies as predicate crime of violence for statutory mandatory consecutive term of imprisonment for using or carrying a

firearm during a crime of violence, based on the offense having as an element the use, attempted use, or threatened use of physical force against the person or property of another, the sole focus is on the elements of the relevant statutory offense, not on the facts underlying the convictions. 18 U.S.C.A. § 924(c)(1)(A), (c)(3)(A).

2 Cases that cite this headnote

[4] **Weapons**
Crimes of violence

An offense is categorically a crime of violence, as predicate for statutory mandatory consecutive term of imprisonment for using or carrying a firearm during a crime of violence, based on the offense having as an element the use, attempted use, or threatened use of physical force against the person or property of another, only if the least violent form of the offense qualifies as a crime of violence. 18 U.S.C.A. § 924(c)(1)(A), (c)(3)(A).

20 Cases that cite this headnote

[5] **Weapons**
Crimes of violence

When determining whether the statutory federal offense of bank robbery is a crime of violence, i.e., an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, as predicate for statutory mandatory consecutive term of imprisonment for using or carrying a firearm during a crime of violence, the offense is divisible with respect to at least two offenses, i.e., the offense of bank robbery "by force and violence, or by intimidation" and the offense of bank robbery by extortion. 18 U.S.C.A. §§ 924(c)(1)(A), (c)(3)(A), 2113(a).

54 Cases that cite this headnote

*783 Appeal from the United States District Court for the District of Hawaii, Derrick Kahala Watson, District Judge, Presiding, D.C. Nos. 1:15-cv-00313-DKW-KSC, 1:15-cv-00390-DKW-BMK, 1:14-cr-00751-DKW

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Before: J. Clifford Wallace and Paul J. Watford, Circuit Judges, and W. Louis Sands,* District Judge.

* The Honorable W. Louis Sands, United States District Judge for the Middle District of Georgia, sitting by designation.

OPINION

PER CURIAM:

We must decide whether armed bank robbery under federal law is a crime of *784 violence under 18 U.S.C. § 924(c). We hold that it is.

The government charged Marcus Watson and Rogussia Danielson with armed bank robbery committed "by force, violence, and by intimidation," in violation of 18 U.S.C. § 2113(a) and (d), after they robbed an American Savings Bank while armed with handguns. The government also charged them with using or carrying a firearm during a crime of violence (namely, the armed bank robbery), in violation of 18 U.S.C. § 924(c)(1)(A). Watson and Danielson pleaded guilty to both offenses. The district

court sentenced Watson to 192 months and Danielson to 182 months in prison.

Watson and Danielson did not appeal. But less than a year after entry of judgment, they filed motions under 28 U.S.C. § 2255 challenging the validity of their § 924(c) convictions. They argued that their convictions for using or carrying a firearm during a crime of violence are unlawful because the predicate offense for that charge —armed bank robbery—no longer qualifies as a crime of violence. The district court denied the motions but granted certificates of appealability. On appeal, the government does not raise any procedural barriers to our consideration of this collateral attack.

Section 924(c) imposes a mandatory consecutive term of imprisonment for using or carrying a firearm "during and in relation to any crime of violence." 18 U.S.C. § 924(c)(1)(A). The term "crime of violence" is defined as an offense that is a felony and—

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

18 U.S.C. § 924(c)(3). Clause (A) of this definition is known as the "force clause" and clause (B) is known as the "residual clause." We need not address the residual clause because we conclude that the relevant offense of armed bank robbery is a crime of violence under the force clause. *See United States v. Gutierrez*, 876 F.3d 1254, 1256 (9th Cir. 2017) (per curiam).

[1] To qualify as a crime of violence under the force clause, the element of "physical force" must involve "violent" physical force—"that is, force capable of causing physical pain or injury." *Johnson v. United States*, 559 U.S. 133, 140, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010). Although *Johnson* construed the force clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i), the *Johnson* standard also applies to the similarly worded force clause of § 924(c)(3)(A). *Gutierrez*, 876 F.3d at 1256.

[2] **[3]** **[4]** The question, then, is whether bank robbery in violation of § 2113(a) meets the *Johnson* standard and thus qualifies as a crime of violence. We use the categorical approach to make that determination. *See Mathis v. United States*, — U.S. —, 136 S.Ct. 2243, 2248, 195 L.Ed.2d 604 (2016). Under this approach, the sole focus is on the elements of the relevant statutory offense, not on the facts underlying the convictions. *Id.* An offense is categorically a crime of violence only if the least violent form of the offense qualifies as a crime of violence. *See Moncrieffe v. Holder*, 569 U.S. 184, 190–91, 133 S.Ct. 1678, 185 L.Ed.2d 727 (2013).

The federal bank robbery statute provides, in relevant part:

> Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, ***785** 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 [shall be punished according to law].

18 U.S.C. § 2113(a). [1]

[1] Section 2113(a) also prohibits entering a bank with intent to commit a felony affecting the bank. 18 U.S.C. § 2113(a) (second paragraph). Although that offense is not a crime of violence, it is irrelevant to our analysis because it is divisible from the § 2113(a) bank robbery offense of which Watson and Danielson were convicted. *See United States v. Selfa*, 918 F.2d 749, 752 n.2 (9th Cir. 1990).

Watson and Danielson argue that bank robbery "by force and violence, or by intimidation" does not constitute a crime of violence. They do not dispute that committing bank robbery "by force and violence" necessarily entails the use of violent physical force as *Johnson* requires. But they argue that the least violent form of the offense —bank robbery "by intimidation"—does not meet the requirements for a crime of violence for two reasons.

First, they contend that bank robbery by intimidation does not necessarily involve violent physical force as

required under *Johnson*. We recently confronted this exact argument in *Gutierrez* and rejected it. *See* 876 F.3d at 1256–57. In *Gutierrez*, we held that "intimidation" as used in § 2113(a) requires that the defendant take property "in such a way that would put an ordinary, reasonable person in fear of bodily harm" and that a "defendant cannot put a reasonable person in fear of bodily harm without threatening to use force capable of causing physical pain or injury." *Id.* at 1257 (internal quotation marks omitted). We concluded that bank robbery qualifies as a crime of violence because even its least violent form "requires at least an implicit threat to use the type of violent physical force necessary to meet the *Johnson* standard." *Id.* In so holding, we joined every other circuit to address the same question. *See United States v. Ellison*, 866 F.3d 32, 39–40 (1st Cir. 2017); *United States v. Brewer*, 848 F.3d 711, 715–16 (5th Cir. 2017); *United States v. McBride*, 826 F.3d 293, 296 (6th Cir. 2016); *United States v. McNeal*, 818 F.3d 141, 153 (4th Cir. 2016).

Second, Watson and Danielson argue that bank robbery by intimidation does not meet the *mens rea* requirement for a crime of violence. In *Leocal v. Ashcroft*, 543 U.S. 1, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004), the Supreme Court held that a crime of violence requires "a higher degree of intent than negligent or merely accidental conduct." *Id.* at 9, 125 S.Ct. 377. Watson and Danielson contend that a defendant who negligently intimidated a victim could be convicted of bank robbery because intimidation is defined from a reasonable victim's perspective. *See Gutierrez*, 876 F.3d at 1257. But a defendant may be convicted of bank robbery only if the government proves that he at least "possessed knowledge with respect to the ... taking of property of another by force and violence or intimidation." *Carter v. United States*, 530 U.S. 255, 268, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000); *see also Ellison*, 866 F.3d at 39. Thus, contrary to Watson and Danielson's contention, a defendant may not be convicted if he only negligently intimidated the victim. *Carter*, 530 U.S. at 269, 120 S.Ct. 2159. The offense must at least involve the knowing use of intimidation, which necessarily entails the knowing use, attempted use, or threatened use of violent physical force.

[5] The Ninth Circuit Federal Public and Community Defenders and the National Association of Criminal Defense ***786** Lawyers, as *amici curiae*, raise one additional argument. They contend that even if bank robbery "by force and violence, or by intimidation" is a crime of violence, the statutory offense of bank robbery contained in § 2113(a) still does not qualify as one. They argue that § 2113(a) prohibits one indivisible offense of bank robbery with three alternative means of committing it: (1) by force and violence; (2) by intimidation; or (3) by extortion. And, they assert, the least violent form of that offense—bank robbery by extortion—does not qualify as a crime of violence. *See Moncrieffe*, 569 U.S. at 190–91, 133 S.Ct. 1678.

Their argument fails because § 2113(a) does not contain one indivisible offense. Instead, it contains at least two separate offenses, bank robbery and bank extortion. *See United States v. Jennings*, 439 F.3d 604, 612 (9th Cir. 2006); *see also United States v. Eaton*, 934 F.2d 1077, 1079 (9th Cir. 1991); 9th Cir. Crim. Jury Instr. 8.162. Because § 2113(a) is divisible with respect to these two offenses and Watson and Danielson were convicted of the first offense, we need not decide whether bank extortion qualifies as a crime of violence.

Because bank robbery "by force and violence, or by intimidation" is a crime of violence, so too is armed bank robbery. A conviction for armed bank robbery requires proof of all the elements of unarmed bank robbery. *United States v. Coleman*, 208 F.3d 786, 793 (9th Cir. 2000); *see* 18 U.S.C. § 2113(d).[2] Thus, an armed bank robbery conviction under § 2113(a) and (d) cannot be based on conduct that involves less force than an unarmed bank robbery requires. For that reason, armed bank robbery under § 2113(a) and (d) qualifies as a crime of violence under § 924(c) as well.

2 Section 2113(d) provides:

> 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.

AFFIRMED.

All Citations

881 F.3d 782, 18 Cal. Daily Op. Serv. 1155, 2018 Daily Journal D.A.R. 1125

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