No. _____

IN THE SUPREME COURT OF THE UNITED STATES

TAMIM ABDUL-SAMAD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTION PRESENTED

Can the courts of appeals define the crime of federal bank robbery differently for purposes of a sufficiency-of-the-evidence challenge than for a categorical-approach challenge?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Federal Cases

Federal Statutes

IN THE SUPREME COURT OF THE UNITED STATES

TAMIM ABDUL-SAMAD,
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- v. -

UNITED STATES OF AMERICA,
Respondent.

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

Petitioner Tamim Abdul-Samad respectfully prays that the Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit entered on December 5, 2018.

OPINION BELOW

The Court of Appeals denied Mr. Abdul-Samad's petition for a writ of habeas corpus under 28 U.S.C. § 2255 in a memorandum disposition. *See United States v. Abdul-Samad,* 744 F. App'x 525 (9th Cir. 2018) (attached as Appendix to the Petition).

JURISDICTION

On December 5, 2018, the Court of Appeals denied Mr. Abdul-Samad's petition for a writ of habeas corpus. *See* Pet. App. 1a. The Court has jurisdiction under 28 U.S.C. § 1254(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Title 18 of the United States Code, Section 924(c)(3) defines "crime of violence" as:

> (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 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 PETITION

When the courts of appeals consider what qualifies as "intimidating" conduct for purposes of the federal bank robbery statute under 18 U.S.C. § 2113, the answer changes depending on the context. In the context of a sufficiency-of-the-evidence challenge, the courts set the bar low, holding that non-violent conduct such as walking into a bank and requesting money constitutes "intimidation." But in determining whether bank robbery qualifies as a "crime of violence" under the categorical approach, the same courts of appeals then set the bar high, holding that the "intimidating" act of walking into a bank and requesting money requires the threatened use of violent force. Both cannot be true. This case thus presents a question of exceptional importance—what is required to show that a person's behavior was "intimidating" for purposes of the federal bank robbery statute.

STATEMENT OF FACTS

In 2010, Mr. Abdul-Samad pleaded guilty to bank robbery under 18 U.S.C. § 2113 and brandishing a firearm in relation to a crime of violence under 18 U.S.C. § 924(c). The district court sentenced Mr. Abdul-Samad to 51 months for the bank robbery and seven years consecutive custody for the § 924(c) violation.

The following year, this Court held in *Johnson v. United States*, 559 U.S. 133 (2015), that the "residual clause" in the Armed Career Criminal Act was unconstitutional because it was void for vagueness. Within one year of *Johnson*, Mr. Abdul-Sama filed a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 arguing that a nearly-identical "residual clause" in § 924(c) was similarly void for vagueness.

In his petition, Mr. Abdul-Samad also argued that federal bank robbery did not satisfy an alternative crime of violence definition under § 924(c)(3)(A) that covered offenses requiring the "use, attempted use, or threatened use of physical force" (also known as the "force clause"). Mr. Abdul-Samad acknowledged that the Ninth Circuit had previously held in *United States v. Wright*, 215 F.3d 1020 (9th Cir. 2000), that bank robbery satisfied the force clause. But he argued that this Court's intervening precedent clarified that the force clause required "violent physical force" such that *Wright* no longer controlled.

The district court denied Mr. Abdul-Samad's Motion to Vacate in a written order, finding that no higher intervening authority had abrogated *Wright*, but it granted Mr. Abdul-Samad a certificate of appealability. Mr. Abdul-Samad then timely appealed this denial to the Ninth Circuit. On December 5, 2018, the Ninth Circuit denied this request, stating only that the Ninth Circuit's decision in United States v. Watson, 881 F.3d 782 (9th Cir. 2018), "foreclosed" this argument. *United States v. Abdul-Samad*, 744 F. App'x 525, 526 (9th Cir. 2018). This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

The Court Should Grant Certiorari to Provide a Consistent, Coherent Definition of "Intimidation" for the Federal Bank Robbery Statute.

Mr. Abdul-Samad's § 924(c) conviction and sentence rest on the district court's finding that federal bank robbery under 18 U.S.C. § 2113 is a crime of violence under the force clause. But because the minimum "intimidation" necessary for a sufficiency-of-the-evidence challenge does not qualify as the "threatened use of physical force" for purposes of the categorical approach, federal bank robbery is not a "crime of violence."

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," 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 provided further clarification in *Descamps v. United States*, 570 U.S. 254 (2013), and *Mathis v. United States*, 136 S. Ct. 2243 (2016). The categorical approach 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 2248.

In this categorical analysis, 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.

There are two requirements for "violent force." First, violent *physical* force is required for a statute to meet § 924(c)'s force clause. *Stokeling v. United States*, 139 S. Ct. 544, 553 (2019) (citing *Johnson v. United States*, 559 U.S. 133, 140 (2010) ("*Johnson* 2010")). In *Johnson* 2010, this Court defined "physical force" to mean "*violent* force—that is, force capable of causing physical pain or injury to another person." 559 U.S. at 140. In *Stokeling*, this Court recently interpreted *Johnson* 2010's "violent physical force" definition to encompass physical force that could potentially cause physical pain or injury to another. 139 S. Ct. at 552-54. Second, the use of force must also be intentional and not merely reckless or negligent. *See Leocal v. Ashcroft*, 543 U.S. 1, 12-13 (2004); *United States v. Benally*, 843 F.3d 350, 353-54 (9th Cir. 2016). Federal bank robbery fails to meet either requirement because it does not require violent physical force or specific intent.

B. Federal bank robbery does not require intentional violent physical force.

Federal bank robbery can be committed "by force and violence, or by intimidation, . . . or . . . by extortion." 18 U.S.C. § 2113(a). Applying the categorical approach, the least egregious conduct the statute covers is intimidation.

The "intimidation" decisions among the Fourth, Fifth, Ninth, and Eleventh Circuits, however, incorrectly apply the categorical analysis. These circuits broadly interpret "intimidation" for sufficiency purposes, affirming convictions including

non-violent conduct that *does not* involve the use, attempted use, or threats of violent force. Yet, notwithstanding their broad definition of "intimidation," these same circuits also find that "intimidation" *always involves* the use, attempted use, or threats of violent force for § 924(c) analysis. The circuits cannot have it both ways.

The finding that "intimidation" meets § 924(c)'s force clause is erroneous. To illustrate why, it is necessary to review the Ninth Circuit's problematic bank robbery decision that the courts below relied on to deny Mr. Abdul-Samad relief: *United States v. Watson*, 881 F.3d 782 (9th Cir.), *cert. denied*, 139 S. Ct. 203 (U.S. Oct. 1, 2018).

1. "Intimidation" under § 2113 does not require the use or threat of violent physical force.

In *Watson*, the Ninth Circuit held bank robbery by intimidation "requires 'an implicit threat to use the type of violent physical force necessary to meet the *Johnson* [*2010*] standard.'" 881 F.3d at 785 (citing *Johnson* 2010, 559 U.S. 133). But *Watson* failed to acknowledge this Court's teachings that: (1) violent force must be "capable of causing physical pain or injury" to another, *Stokeling*, 139 S. Ct. at 553; and (2) violent force must be physical force, rather than "intellectual force or emotional force," *id.* at 552 (quoting *Johnson 2010*, 559 U.S. at 138).

Intimidation for purposes of the federal bank robbery statute can be, and often is, accomplished by a simple demand for money. While a verbal request for money may have emotional or intellectual impact on a bank teller, it does not require threatening or inflicting physical pain or injury. Yet *Watson* assumed an

act of intimidation necessarily involves the willingness to use violent physical force and assumed further that a willingness to use violent physical force is the equivalent of threatening to use violent physical force. These assumptions are fallacious for at least three reasons.

First, "[a] willingness to use violent force is not the same as a threat to do so." *United States v. Parnell*, 818 F.3d 974, 980 (9th Cir. 2016). In *Parnell*, the government argued that anyone who robs a bank harbors an "uncommunicated willingness or readiness" to use violent force. *Id.* at 980. The Ninth Circuit rejected the government's position, holding "[t]he [threat of violent force] requires some outward expression or indication of an intention to inflict pain, harm or punishment," while a theorized willingness to use violent force does not. *Id.* *Watson* failed to honor or address this recognized distinction.

Second, intimidation does not require a willingness to use violent physical force. For example, this Court notes that robbery by intimidation is satisfied by "an empty threat, or intimidating bluff." *Holloway v. United States*, 526 U.S. 1, 11 (1999). While *Holloway* addressed intimidation in relation to the federal carjacking statute (18 U.S.C. § 2119), the federal bank robbery statute similarly prohibits a taking committed "by intimidation." 18 U.S.C. § 2113(a). *Watson* failed to honor or address this recognized definition.

Third, even where a defendant is willing to use violent physical force, an intimidating act does not require such willingness be communicated to the victim. A victim's reasonable fear of bodily harm does not prove that a defendant

"communicated [an] intent to inflict harm or loss on another." *Elonis v. United States*, 135 S. Ct. 2001, 2008 (2015) (defining "threat"). Indeed, an examination of bank robbery affirmances reveals numerous cases where the facts did not include any intimidation by threatened violent physical force.

For example, in *United States v. Lucas*, the defendant walked into a bank, stepped up to a teller window carrying plastic shopping bags, placed the bags on the counter with a note that read, "Give me all your money, put all your money in the bag," and then said, "Put it in the bag." 963 F.2d 243, 244 (9th Cir. 1992). The Ninth Circuit held that by "opening the bag and requesting the money," the defendant employed "intimidation." *Id.* at 248.

In *United States v. Hopkins*, the defendant entered a bank and gave the teller a note reading, "Give me all your hundreds, fifties and twenties. This is a robbery." 703 F.2d 1102, 1103 (9th 1983). When the teller said she had no hundreds or fifties, the defendant responded, "Okay, then give me what you've got." *Id.* The teller walked toward the bank vault, at which point the defendant "left the bank in a nonchalant manner." *Id.* The trial evidence showed the defendant "spoke calmly, made no threats, and was clearly unarmed." *Id.* The Ninth Circuit affirmed, holding "the threats implicit in [the defendant's] written and verbal demands for money provide sufficient evidence of intimidation to support the jury's verdict." *Id.*

Critically, if the defendants in *Lucas* and *Hopkins* were ever "willing" to use or threaten to use violent force, they did nothing to communicate or express that willingness to their victims. The defendants never threatened to use violent

physical force against any victim. *Lucas* and *Hopkins* demonstrate how bank robbery does not require the use or threatened use of "violent" physical force.

Other federal circuit affirmances of bank robbery convictions also illustrate that a threatened use of violent physical force is not required to sustain a conviction. For example, the Tenth Circuit affirmed a bank robbery by intimidation conviction where the defendant simply helped himself to the money and made neither a demand nor a threat to use violence. *United States v. Slater*, 692 F.2d 107, 107-08 (10th Cir. 1982) (defendant entered a bank, walked behind the counter, and removed cash from the tellers' drawers, but did not speak or interact with anyone beyond telling a manager to "shut up" when she asked what the defendant was doing).

The Fourth Circuit, in *United States v. Ketchum*, similarly upheld a bank robbery by intimidation conviction where the defendant affirmatively voiced no intent to use violent physical force. 550 F.3d 363, 365 (4th Cir. 2008). To the contrary, the *Ketchum* defendant gave a teller a note that read, "These people are making me do this," and then the defendant told the teller, "They are forcing me and have a gun. Please don't call the cops. I must have at least $500." *Id.* The teller gave the defendant $1,686, and he left the bank. *Id.* Paradoxically, the Fourth Circuit has *also* held for crime of violence purposes that "intimidation" necessarily requires the threatened use of violent physical force. *United States v. McNeal*, 818 F.3d 141, 157 (4th Cir. 2016)), *cert. denied*, 137 S. Ct. 164 (2016).

The Fifth Circuit does not require any explicit threat and instead permits conviction for robbery by intimidation when a reasonable person would feel afraid even where there was no weapon, no verbal or written threat, and when the victims were not actually afraid. *United States v. Higdon*, 832 F.2d 312, 315-16 (5th Cir. 1987). And yet again, the Fifth Circuit *also* inconsistently holds for crime of violence purposes that "intimidation" necessarily requires the threatened use of violent physical force. *United States v. Brewer*, 848 F.3d 711, 716 (5th Cir. 2017).

The Eleventh Circuit affirmed a robbery in *United States v. Kelley*, by analyzing whether the defendant engaged in "intimidation" from the perspective of a reasonable observer rather than the actions or threatened actions of the defendant. 412 F.3d 1240, 1244-45 (11th Cir. 2005). In *Kelley*, when a teller at a bank inside a grocery store left her station to use the phone, two men laid across the bank counter to open her unlocked cash drawer, grabbing $961 in cash. *Id.* at 1243. The men did not speak to any tellers at the bank, did not shout, and did not say anything when they ran from the store. *Id.* The tellers testified they were "shocked, surprised, and scared," but did nothing to stop the robbery. *Id.* The defendant was found guilty of bank robbery by intimidation without ever uttering a verbal threat or expressing an implied one. *Id.* at 1245. Yet, once again, the Eleventh Circuit *also* holds for crime of violence purposes that "intimidation" necessarily requires the threatened use of violent physical force. *Ovalles v. United States*, 905 F.3d 1300, 1303-04 (11th Cir. 2018). (en banc)

The Fourth, Fifth, and Eleventh, and Ninth Circuits all apply a non-violent construction of "intimidation" when determining whether to affirm a bank robbery conviction. But when determining whether bank robbery is a crime of violence, these same circuits find "intimidation" *always* requires a defendant to threaten the use of violent physical force. These inconsistent definitions of "intimidation" cannot stand.

2. Federal bank robbery is not a specific intent crime.

The § 924(c) force clause requires that the use of violent force must be intentional and not merely reckless or negligent. *Leocal*, 543 U.S. at 12-13; *Benally*, 843 F.3d at 353-54. But to commit federal bank robbery by intimidation, the defendant's conduct is not required to be intentionally intimidating.

This Court holds that § 2113(a) "contains no explicit *mens rea* requirement of any kind." *Carter v. United States*, 530 U.S. 255, 267 (2000). This Court held in *Carter* that federal bank robbery does not require an "intent to steal or purloin." *Id.* In evaluating the applicable mens rea, this Court emphasized it would read into the statute "only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Id.* at 269.

Carter recognized that bank robbery under § 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.*, but found no basis to impose a specific intent in § 2113(a), *id.* at 268-69. Instead, the Court determined "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.

This Court's classification of § 2113(a) as a general intent crime in *Carter* means the statute requires nothing more than knowledge—a lower mens rea than the specific intent required by § 924(c)'s force clause. Consistent with *Carter*, the Ninth Circuit holds that juries need not find intent in § 2113(a) cases. Rather, in the Ninth Circuit, a finding of robbery by intimidation focuses on the objective reaction of the victim, not the intent of the defendant. This is not enough to classify an offense as a crime of violence.

For example, in *United States v. Foppe*, the Ninth Circuit held that a jury need not find the defendant intentionally used force and violence or intimidation on the victim bank teller. 993 F.2d 1444, 1451 (9th Cir. 1993). The Ninth Circuit held that a specific intent instruction was unnecessary 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." *Id.* Nowhere in *Foppe* did the Ninth Circuit suggest that the defendant must know his actions are intimidating. To the contrary, *Foppe* held the "determination of whether there has been an intimidation should be guided by an objective test focusing on the accused's actions," rather than by proof of the defendant's intent. *Id.* ("Whether [the defendant] specifically intended to intimidate [the teller] is irrelevant."); *see also Hopkins*, 703 F.2d at 1103 (approving instruction stating 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).

Other circuits' decisions are in accord: bank robbery by intimidation focuses on the objective reaction of the victim, not on the defendant's intent. The Fourth Circuit holds "[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." *United States v. Woodrup*, 86 F.3d 359, 364 (4th Cir. 1996) (citation omitted). "[N]othing in the statute even remotely suggests that the defendant must have intended to intimidate." *Id.* The Eleventh Circuit similarly held in *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 at 1244. Likewise, the Eighth Circuit holds that a jury may not consider the defendant's mental state as to the intimidating character of the offense conduct. *United States v. Yockel*, 320 F.3d 818, 823-24 (8th Cir. 2003) (discussing *Foppe* with approval).

As a general intent crime, an act of intimidation can be committed negligently, which is insufficient to qualify as an intentional use of violent force. As this Court explained in *Elonis*, a threat is negligently committed when the mental state turns on "whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks[.]" 135 S. Ct. at 2011. A statute encompasses a negligence standard when it measures harm as viewed from the perspective of a hypothetical "reasonable person," without requiring subjective

awareness of the potential for harm. *Id.* For bank robbery purposes, juries find "intimidation" based on the victim's reaction, not the defendant's intent, thus intimidation can be negligently committed. Because the federal bank robbery statute does not require an intentional mens rea, the statute does not define a crime of violence.

An express threat or threatening movement is not required to demonstrate robbery by intimidation. *Hopkins*, 703 F.2d at 1103. But to satisfy § 924(c)'s force clause, a threat of physical force "requires some outward expression or indication of an intention to inflict pain, harm or punishment." *Parnell*, 818 F.3d at 980. The federal bank robbery statute has no such requirement.

Watson's sub silentio holding that bank robbery is an intentional crime cannot be squared with this Court's case law. Consequently, this Court should grant certiorari to correctly instruct circuit courts that general intent "intimidation," as used in the federal bank robbery statute, does not require an intentional threat of violent physical force, and therefore is not a crime of violence under the force clause of 18 U.S.C. § 924(c)(3)(A).

CONCLUSION

On the basis of the foregoing, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Date: February 25, 2019

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APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TAMIM ABDUL-SAMAD, a.k.a. Tamin Abdul-Samad, a.k.a. Brandon Harris, Defendant-Appellant.	No. 16-56388 D.C. Nos. 3:16-cv-01269-WQH 3:10-cr-02792-WQH MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
William Q. Hayes, District Judge, Presiding

Submitted November 27, 2018**

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

The stay issued in this appeal on January 26, 2018, is lifted.

Tamim Abdul-Samad 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).

Abdul-Samad 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).

Appellee's motion for summary affirmance is denied as moot.

AFFIRMED.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff/Respondent, v. TAMIN ABDUL-SAMAD(1), MUSTAFA AHMAD-NAUSHAD(2) Defendants/Petitioners.	CASE NO. 10cr2792 WQH CASE NO. 16cv1269 WQH CASE NO. 16cv1307 WQH **ORDER**

HAYES, Judge:

This matter comes before the Court on the motions pursuant to 28 U.S.C. § 2255 filed by Defendants/Petitioners. (ECF Nos. 146 and 148). Defendants/Petitioners move the Court to vacate their sentences based upon *Johnson v. United States*, 135 S.Ct. 2551 (2015) and *Welch v. United States*, 136 S.Ct. 1257 (2016).

BACKGROUND FACTS

On July 13, 2010, a jury returned a three count indictment charging Tamin Abdul-Samad, Mustafa Ahmad-Naushad, and Darryl Eugene Peterson in Count 1 with conspiracy to commit bank robbery, in violation of 18 U.S.C. §§ 371 and 2113(a) and (d); in Count 2 with bank robbery, in violation of 18 U.S.C. § 2113(a) and (d); and in Count 3 with brandishing a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A) and aiding and abetting in violation of 18 U.S.C. § 2. (ECF No. 16).

On September 23, 2010, Petitioner Ahmad-Naushad entered a plea of guilty to Count 2 and Count 3 of the Indictment pursuant to a plea agreement. Petitioner Ahmad-

Naushad admitted as a factual basis for his plea that he conspired with his co-defendants to rob the CitiBank in La Mesa, California; and that he planned and knew that his co-defendant would carry, use, and brandish a pistol at employees and customers during the bank robbery. Petitioner Ahmad-Naushad admitted that his co-defendant brandished the pistol at employees and customers while he jumped over the teller counter and ordered the tellers to give him money. Petitioner Ahmad-Naushad admitted that he and his co-defendants took $11,745.12 in U.S. currency from bank employees by making a display of force that reasonably caused bank employees to fear bodily harm, and fled the bank with the pistol and the currency. (ECF No. 58 at 3-4). On October 29, 2010, Petitioner Abdul-Samad entered a plea of guilty to Count 2 and Count 3 of the Indictment pursuant to a plea agreement. Petitioner Abdul-Samad admitted as a factual basis for his plea that he entered the CitiBank in La Mesa, California and brandished a pistol at employees and customers in furtherance of a bank robbery. Petitioner Abdul-Samad admitted he and his co-defendants took $11,745.12 in U.S. currency from bank employees by making a display of force that reasonably caused bank employees to fear bodily harm, and fled the bank with the pistol and the currency. (ECF No. 72 at 3).

The Presentence Investigation Report for Petitioner Abdul-Samad reported that the guideline range for the offense of armed bank robbery under 18 U.S.C. §2113(a) and (d) in Count 2 was 51-63 months and that Petitioner was subject to a mandatory seven-year sentence in Count 3 to be served consecutively to Count 2 for the offense of brandishing a firearm in relation to a crime of violence under 18 U.S.C. § 924(c)(1)(A)(ii).

The Presentence Investigation Report for Petitioner Ahmad-Naushad reported that the guideline range for the offense of armed bank robbery under 18 U.S.C. §2113(a) and (d) in Count 2 was 33-41 months and that Petitioner was subject to a mandatory seven-year sentence in Count 3 to be served consecutively to Count 2 for the offense of brandishing a firearm in relation to a crime of violence under 18 U.S.C. §

924(c)(1)(A)(ii).

On January 24, 2011, the Court sentenced Petitioner Abdul-Samad to serve a term of imprisonment of 51 months on Count 2 and 84 months on Count 3 to run consecutively for a total of 135 months. (ECF No. 88).

On March 14, 2011, the Court sentenced Petitioner Ahmad-Naushad to serve a term of imprisonment of 10 months on Count 2 and 84 months on Count 3 to run consecutively for a total of 94 months. (ECF No. 104).

On May 26, 2016, Petitioner Abdul-Samad filed a motion to vacate, set aside or correct his sentence under 28 U.S.C. § 2255. (ECF No. 146).

On May 31, 2016, Petitioner Ahmad-Naushad filed a motion to vacate, set aside or correct his sentence under 28 U.S.C. § 2255. (ECF No. 148).

APPLICABLE LAW

28 U.S.C. § 2255 provides that "[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." 28 U.S.C. § 2255. A petitioner seeking relief under § 2255 must file a motion within the one year statute of limitations set forth in § 2255(f). Section 2255(f)(3) provides that a motion is timely if it is filed within one year of "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." 28 U.S.C. § 2255(f)(3).

CONTENTIONS OF THE PARTIES

Petitioners contend that their respective pleas, convictions, and sentences for violation of 18 U.S.C. § 924(c) must be vacated because armed bank robbery is not, as a matter of law, a predicate crime of violence after *Johnson*. Petitioners contend that

the holding in *Johnson* invalidating the residual clause in the term "violent felony" of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii) applies equally to the residual clause in the term "crime of violence" set forth in 18 U.S.C. § 924(c)(3)(B). Petitioners further assert that armed bank robbery does not qualify as a crime of violence under the force/elements clause in the term "crime of violence" set forth in 18 U.S.C. § 924(c)(3)(A). Petitioners assert that armed bank robbery does not include proof of a violent physical force required by the force/elements clause "because the offense merely requires taking of property through 'intimidation'" and the offense does not require the intentional use or threatened use of physical force. (ECF No. 146 at 14; ECF 148 at 13).

Respondent contends that limited stay is appropriate because the "precise question will likely be answered by the Ninth Circuit in *United States v. Begay*, C.A. No. 14-10080 . . . which has been under submission since May 26, 2016." (ECF No. 157 at 2).[1] Respondent further asserts that *Johnson* can only be applied to invalidate the residual clause of §924(c)(3)(B) and that armed bank robbery remains a crime of violence under the force/elements clause of §924(c)(3)(A).

RULING OF THE COURT

Petitioners entered pleas of guilty to armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d), and brandishing a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A) which provides certain penalties for a person "who, during and in relation to any crime of violence..., uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm." 18 U.S.C. § 924(c)(1)(A). Under § 924(c)(3),

> ... 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

[1] In *Begay*, No. 14-10080, the defendant asserts that his second degree murder conviction does not qualify as a crime of violence under §924(c). The Court of Appeals requested supplemental briefing on whether 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague. In light of this court's resolution of this case, a stay is not necessary.

> the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3). Courts generally refer to the "(A)" clause of Section 924(c)(3) as the "force clause" or the "elements clause" and to the "(B)" clause of Section 924(c)(3) as the "residual clause."

To determine whether a predicate felony meets the definition of "crime of violence," the Court applies a three-step process: (1) the "categorical approach" compares whether the statute of conviction is a categorical match to the generic predicate offense; that is, it determines whether the statute of conviction criminalizes only as much or less conduct than the generic offense; (2) if the statute criminalizes conduct beyond the elements of the generic offense, and is therefore "overbroad," the Court next determines whether the statute is "divisible" or "indivisible"; and (3) if the statute is overbroad and divisible, the "modified categorical" approach permits the Court to examine certain documents from the record of conviction to determine what elements of the divisible statute the defendant was convicted of violating. *Lopez-Valencia v. Lynch*, 798 F.3d 863, 867-68 (9th Cir. 2015). Under the first step, the "categorical approach" set forth in *Taylor v. United States*, 495 U.S. 575 (1990), the Court must "determine whether the statute of conviction is categorically a 'crime of violence' by comparing the elements of the statute of conviction with the generic federal definition." *United States v. Sahagun-Gallegos*, 782 F.3d 1094, 1098 (9th Cir. 2015).

In this case, the Court compares the elements of armed bank robbery, 18 U.S.C. § 2113(a) and (d), with the definition of "crime of violence" in §924(c)(3) to determine whether armed bank robbery criminalizes more or less conduct. The relevant statutory language provides,

> (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.

18 U.S.C. § 2113(a) and (d).

In *United States v. Wright*, 215 F.3d 1020 (9th Cir. 2000), the Court of Appeals held that armed bank robbery was an underlying predicate offense – that is, a crime of violence – to support a conviction for using or carrying a firearm under § 924(c). The Court stated, "18 U.S.C. § 924(c)(3) defines a crime of violence for the 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 taking 'by force and violence, or by intimidation.' 18 U.S.C. § 2113(a)." *Id.* at 1028 (quoting 18 U.S.C. § 924(c)(3)(A)).

In *Johnson*, the United States Supreme Court held that the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii)[2] is unconstitutionally vague because the application of the residual clause denies fair notice

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[2] The relevant language found unconstitutionally vague in the residual clause of § 924(e)(2)(B)(ii) provides: "any crime . . . that . . . otherwise involves conduct that presents a serious potential risk of physical injury to another." Other provisions of § 924(e)(2)(B) not addressed in *Johnson* include the enumerated offenses in § 924(e)(2)(B)(ii) ("is burglary, arson, or extortion, or involves use of explosives"), and the remainder of the definition of violent felony in § 924(e)(2)(B)(i) ("has as an element the use, attempted use, or threatened use of physical force against the person of another").

to defendants and invites arbitrary enforcement by judges. 135 S.Ct. at 2557-58. The Court concluded that "[i]ncreasing a defendant's sentence under the [residual] clause denies due process of law." *Id.* at 2557.[3]

The conclusion of the Court of Appeals in *Wright* that bank robbery under §2113(a) is a crime of violence under the elements/force clause in § 924(c)(3)(A) is not affected by the decision of the Supreme Court in *Johnson* invalidating the residual clause of the definition of "violent felony." The Supreme Court in *Johnson* limited the application of its holding to the residual clause of the ACCA. *Johnson*, 135 S.Ct. at 2563. ("Today's decision does not call into question application of the Act to . . . the remainder of the Act's definition."). This court concludes that Petitioner's convictions under § 924(c) are valid pursuant to § 924(c)(3)(A) even if *Johnson* is applied to conclude that the residual clause of the "crime of violence" definition in § 924(c)(3)(B) is unconstitutionally vague. *See In re Hines*, 824 F.3d 1334 (11th Cir. 2016); *United States v. Watson*, Nos. CR 14-00751-01 DKW, CR 14-00751-02 DKW, CV 15-00313 DKW-KSC, CV 15-00390 DKW-BMK, 2016 WL 866298 (D. Haw. Mar. 2, 2016); *United States v. Inoshita*, Nos. Cr. 15-00159 JMS, Civ. 16-00032 JMS-KSC, 2016 WL 2977237 (D. Haw. May 20, 2016); *United States v. Taylor*, Nos. Criminal H-13-101, Civil Action H-16-1699, 2016 WL 3346543 (S.D. Tex. June 16, 2016); *United States v. Torres*, Case Nos. 8:10-cr-483-T-23MAP, 8:16-cv-1525-T-23MAP, 2016 WL 3536839 (M.D. Fla. June 28, 2016); *United States v. Fisher*, Criminal Action No. 5:07-41-DCR, Civil Action No. 5:16-238-DCR, 2016 WL 3906644 (E.D. Ky. July 14, 2016); *Gutierrez v. United States*, CIV. 16-5055, CR 00-50081-04, 2016 WL 4051821 (D. S.D. July 27, 2016).

In this case, Petitioners entered a plea of guilty to a charge of armed bank robbery

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[3] The Court subsequently determined that *Johnson* stated a "new substantive rule that has retroactive effect in cases on collateral review." *Welch v. United States*, – U.S. – , 136 S.Ct. 1257, 1268 (2016).

"by force and violence, or by intimidation" in violation of § 2113(a) and (d). In *United States v. Selfa*, 918 F.2d 749 (9th Cir. 1990), the Court of Appeals held that "persons convicted of robbing a bank 'by force and violence' or 'intimidation' under 18 U.S.C. § 2113(a) have been convicted of a 'crime of violence' within the meaning of Guideline Section 4B1.1." *Id.* at 751. The Court in *Selfa* applied the elements clause of the term "crime of violence," in U.S.S.G. § 4B1.2(a)(1) which applies to an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another. . . ."[4] *Id.* In *Selfa,* the Court "defined 'intimidation' under section 2113(a) to mean 'willfully to take, or attempt to take, in such a way that would put an ordinary, reasonable person in fear of bodily harm." *Id.* (quoting *United States v. Hopkins*, 703 F.2d 1102, 1103 (9th Cir. 1983)).[5] The Court found the "definition [of intimidation] is sufficient to meet the section 4B1.2(1) requirement of a 'threatened use of physical force.'" *Id. See United States v. Steppes*, 2016 WL 3212168 (9th Cir. June 10, 2016) (holding that defendant's conviction under 18 U.S.C. § 2113(a) categorically qualifies as a "crime of violence" under U.S.S.G. § 4B1.2(a)(1)). The Court concludes that armed bank robbery "by intimidation" in violation of § 2113(a) and (d) satisfies the requirement of § 924(c)(3)(A) that the underlying felony offense has "as an element the use, attempted use, or threatened use of physical force against the person or property of another."

Armed bank robbery in violation of 18 U.S.C. § 2113 (a) and (d) is a categorical

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[4] The language in the elements clause of U.S.S.G. §4B1.2(a) provides, "[t]he term 'crime of violence' means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that – (1) has as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. §4B1.2(a). In comparison, the language in the elements clause in § 924(c)(3)(A) states: "has as an element the use, attempted use, or threatened use of physical force against the person **or property** of another." (emphasis added).

[5] Petitioners admitted in the factual basis for the plea that they "intentionally made a display of force that reasonably caused the victim to fear bodily harm." (ECF No. 58 at 2, ECF No. 72 at 2).

match to the elements/force clause of §924(c)(3)(A) and requires proof of the intentional use or threatened use of physical force, "that is, force capable of causing physical pain or injury to another." *Johnson v. United States*, 559 U.S. 133, 140 (2010). Petitioners are not entitled to relief under 28 U.S.C. § 2255.

Certificates of Appealability

Rule 11(a) Governing § 2255 Cases in the U.S. Dist. Cts. provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." A petitioner is required to demonstrate only "that reasonable jurists could debate the district court's resolution or that the issues are adequate to deserve encouragement to proceed further." *Hayward v. Marshall*, 603 F.3d 546, 553 (9th Cir. 2010) (en banc) (quoting *Miller-El v. Cockrell*, 537U.S. 322, 336(2003). The Court concludes that the issues raised in this appeal are appropriate for certificate of appealability.

IT IS HEREBY ORDERED that motions to vacate, set aside, or correct the sentence pursuant to 28 U.S.C. § 2255 filed by Defendants/Petitioners are denied. (ECF Nos. 146 and 148). The Clerk is directed to close this case. Petitioners are granted a certificate of appealability.

DATED: September 21, 2016

William Q. Hayes

WILLIAM Q. HAYES
United States District Judge