

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 5 2018

FOR THE NINTH CIRCUIT

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

UNITED STATES OF AMERICA,

No. 17-15222

Plaintiff-Appellee,

D.C. Nos. 1:16-cv-00890-LJO

1:11-cr-00448-LJO

v.

MICHAEL TORRES,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of California
Lawrence J. O'Neill, Chief 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.

Michael Torres 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.

* 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).

Torres 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.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

v.

MICHAEL TORRES,

Defendant-Petitioner.

CASE NO. 1:11-CR-0448-LJO-SKO

MEMORANDUM DECISION AND
ORDER DENYING PETITIONER'S
MOTION TO VACATE, SET ASIDE,
OR CORRECT HIS SENTENCE
PURSUANT TO 28 U.S.C. § 2255

ECF No. 53

I. INTRODUCTION

Before the Court is Petitioner Michael Torres' ("Petitioner," "Defendant," or "Torres") motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255, filed on June 22, 2016. (ECF No. 53.) On August 23, 2016, the Government filed its opposition. (ECF No. 58.) Petitioner filed a reply on October 24, 2016. (ECF No. 59.) Having considered the parties' briefing and the record in this case, the Court DENIES Petitioner's motion under § 2255.

II. BACKGROUND

Torres pled guilty, pursuant to a plea agreement, to four counts of armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d) and one count of brandishing a firearm during a crime of violence pursuant to 18 U.S.C. § 924(c)(1). (ECF No. 36.) On April 29, 2013, Petitioner was sentenced to a total term of 180 months imprisonment: 96 months for armed bank robbery, to be served consecutively with 84 months for brandishing a firearm during a crime of violence. (ECF Nos. 49 & 50.)

This is Petitioner's first motion under 28 U.S.C. § 2255. (ECF No. 53 at 2.)

III. LEGAL FRAMEWORK

A. 28 U.S.C. § 2255

Section 2255 provides four grounds upon which a sentencing court may grant relief to a petitioning in-custody defendant:

[1] that the sentence was imposed in violation of the Constitution or laws of the United States, or [2] that the court was without jurisdiction to impose such sentence, or [3] that the sentence was in excess of the maximum authorized by law, or [4] is otherwise subject to collateral attack.

28 U.S.C. § 2255(a). Generally, only a narrow range of claims fall within the scope of § 2255. *United States v. Wilcox*, 640 F.2d 970, 972 (9th Cir. 1981). The alleged error of law must be “a fundamental defect which inherently results in a complete miscarriage of justice.” *Davis v. United States*, 417 U.S. 333, 346 (1974).

B. Johnson II and Welch

Pursuant to the Armed Career Criminal Act (“ACCA”), a defendant must be sentenced to a mandatory minimum of 15 years to life in custody if he has three prior convictions for “a violent felony or a serious drug offense, or both.” 18 U.S.C. § 924(e)(1). The ACCA defines “violent felony” as any crime punishable by imprisonment for a term exceeding one year that:

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*

18 U.S.C. § 924(e)(2)(B) (emphasis added). Courts generally refer to the first clause, § 924(e)(2)(B)(i), as the “elements clause”; the first part of the disjunctive statement in (ii) as the “enumerated offenses clause”; and its second part (starting with “or otherwise”) as the “residual clause.” *Johnson v. United States*, 135 S. Ct. 2551, 2556-57, 2563 (2015) (“*Johnson II*”); *United States v. Lee*, 821 F.3d 1124, 1126 (9th Cir. 2016).

In *Johnson II*, the Supreme Court held that “imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution’s guarantee of due process,” on the basis that “the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges.” 135 S. Ct. at 2557, 2563. “Two features of the residual clause conspire to make it unconstitutionally vague.” *Id.* at 2557. First, “the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime” by “[t]he judicial assessment of risk to a judicially imagined ‘ordinary case’ of a crime, not to real-world facts or statutory elements.” *Id.* Second, “[b]y combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.” *Id.* at 2558.

Recently, the Supreme Court held that its decision in *Johnson II* announced a new substantive rule that applies retroactively to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016). “By striking down the residual clause for vagueness, [*Johnson II*] changed the substantive reach of the Armed Career Criminal Act, altering the ‘range of conduct or the class of persons that the [Act] punishes.’” *Id.* at 1265 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)). As a result, defendants sentenced pursuant to the ACCA residual clause can collaterally attack their sentences as unconstitutional under § 2255. *See, e.g., United States v. Heflin*, ___ F. Supp. 3d ___, 2016 WL 3906895 (E.D. Cal. July 18, 2016).

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

18 U.S.C. § 924(c)(1)(A) provides, *inter alia*, that any person who in relation to any “crime of violence” uses or carries a firearm, shall in addition to the punishment provided for such “crime of violence,” be sentenced to a term of imprisonment of not less than five years, to run consecutively with the punishment for the underlying “crime of violence.” If a firearm is brandished in the course of committing the “crime of violence,” the consecutive term of imprisonment shall be not less than seven

years (84 months). 18 U.S.C. § 924(c)(1)(A)(ii). If a firearm is discharged, the consecutive term of imprisonment shall be not less than ten years. *Id.* § 924(c)(1)(C)(A)(iii).

For purposes of 18 U.S.C. § 924(c)(1)(A), a “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). “Courts generally refer to the ‘(a)’ clause of section 924(c)(3) as the ‘force clause’ and to the ‘(b)’ clause of section 924(c)(3) as the ‘residual clause.’” *United States v. Bell*, 153 F. Supp. 3d 906, 910 (N.D. Cal. 2016).

IV. DISCUSSION

Petitioner challenges his sentence on the basis that armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d) can no longer be deemed a qualifying “crime of violence” for purposes of § 924(c)(1) in light of the Supreme Court’s decision in *Johnson II*. (ECF No. 53 at 2.) Although the residual clause in § 924(c)(3)(B) is not identical to the one struck down in *Johnson II*, Petitioner argues that it is very similar and therefore unconstitutionally vague. In response, the Government makes a two-pronged argument. (ECF No. 58 at 6.) First, § 924(c)(3)(B) is not unconstitutionally vague in light of *Johnson II*.¹ Second, Petitioner is not entitled to relief under 28 U.S.C. § 2255 because his conviction for federal armed bank robbery is categorically a crime of violence under the “elements” or “force” clause of § 924(c)(3)(A). Therefore, his conviction and sentence under § 924(c)(1)(A) are not affected by the Supreme Court’s decisions in *Johnson II* and *Welch*. Because the second question is dispositive in this case, the Court addresses it first.

To determine whether an offense fits the definition of a “crime of violence,” courts employ the

¹ The validity of the residual clause in § 924(c)(3)(B) is currently before the Ninth Circuit Court of Appeals in *United States v. Randy Begay*, CA No. 14-10080.

“categorical approach” set forth in *Taylor v. United States*, 495 U.S. 575 (1990). A court applying the categorical approach must “determine whether the [offense] is categorically a ‘crime of violence’ by comparing the elements of the [offense] with the generic federal definition.” *United States v. Sahagun-Gallegos*, 782 F.3d 1094, 1098 (9th Cir. 2015) (internal citations omitted). Because the categorical approach is concerned only with what conduct the offense necessarily involves, the court “must presume that the [offense] rest[s] upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense.” *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (internal quotation marks and alterations omitted). If the elements of the offense “criminalize a broader swath of conduct” than the conduct covered by the generic federal definition, the offense cannot qualify as a crime of violence, even if the particular facts underlying the defendant’s own case might satisfy that definition. *United States v. Dominguez-Maroyoqui*, 748 F.3d 918, 920 (9th Cir. 2014) (internal quotation marks omitted).

According to the Ninth Circuit, the elements of armed bank robbery are:

(1) the defendant took money belonging to a bank, credit union, or savings and loan, (2) by using force and violence or intimidation, (3) the deposits of the institution were insured by the Federal Deposit Insurance Corporation (“FDIC”), and (4) in committing the offense, the defendant assaulted any person, or put in danger the life of any person by the use of a dangerous weapon.

United States v. Wright, 215 F.3d 1020, 1028 (9th Cir. 2000) (citing 18 U.S.C. § 2113(a) & (d)²). In

² Section 2113(a) and (d) provide:

(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.

1 *Wright*, the Ninth Circuit held that armed bank robbery under 18 U.S.C. § 2113 (a) and (d) qualifies as a
 2 crime of violence under the “force” clause of § 924(c)(3)(A). 215 F.3d at 1028. Because “a taking by
 3 force and violence, or by intimidation” is an element of armed bank robbery, it necessarily “has as an
 4 element the use, attempted use, or threatened use of physical force against the person or property of
 5 another.” *Id.*; see also *United States v. Selfa*, 918 F.2d 749, 751 (9th Cir. 1990) (“[P]ersons convicted of
 6 robbing a bank ‘by force and violence’ or ‘intimidation’ under 18 U.S.C. § 2113(a) have been convicted
 7 of a ‘crime of violence’ within the meaning of Guideline Section 4B1.1.”). Similarly, in *Selfa*, the court
 8 “defined ‘intimidation’ under § 2113(a) to mean ‘willfully to take, or attempt to take, in such a way that
 9 would put an ordinary, reasonable person in fear of bodily harm.’” 918 F.2d 749, 751 (quoting *United*
 10 *States v. Hopkins*, 703 F.2d 1102, 1103 (9th Cir. 1983)). The court then concluded that this definition
 11 met the requirement of a “threatened use of physical force” under an identical force clause in the
 12 Sentencing Guidelines. *Id.*

13 Petitioner argues that *Wright* and *Selfa* have been “undermined” by subsequent Supreme Court
 14 and Ninth Circuit precedent, including *Johnson v. United States*, 130 S. Ct. 1265 (2010) (“*Johnson I*”),
 15 which held that a crime of violence requires “violent physical force.” (ECF No. 53 at 4-6.) According to
 16 Petitioner, the taking of property through “intimidation” does not satisfy the requirement of “violent
 17 physical force” outlined in *Johnson I* because intimidation concerns the perception of the victim rather
 18 than the actions or intent of the defendant. (*Id.* at 5 (citing *United States v. Torres-Miguel*, 701 F.3d 165,
 19 169 (4th Cir. 2012))). However, as two circuit courts have noted, a taking by intimidation *necessarily*
 20 “involves the threat to use” violent force. *United States v. McNeal*, 818 F.3d 141, 153 (4th Cir. 2016)
 21 (“A taking ‘by force and violence’ entails the use of physical force. Likewise, a taking ‘by intimidation’
 22 involves the threat to use such force.”); *United States v. Jones*, 932 F.2d 624, 625 (7th Cir. 1991)
 23 (“There is no ‘space’ between ‘bank robbery’ and ‘crime of violence’ . . . because violence in the broad
 24 sense that includes a merely threatened use of force is an element of every bank robbery.”). Indeed,
 25 recent Ninth Circuit cases decided after *Johnson I* affirm *Wright* and *Selfa*. See *United States v. Steppes*,

651 F. App'x 697, 698 (9th Cir. 2016) (holding federal bank robbery under § 2113(a) is a crime of violence as defined by the identical force clause language in USSG § 4B1.2); *United States v. Howard*, 650 F. App'x 466, 468 (9th Cir. 2016), *as amended* (June 24, 2016) (holding that Hobbs Act robbery qualifies as a crime of violence under 18 U.S.C. § 924(c) by comparing it to federal bank robbery under § 2113(a) and relying on *Selfa*). Therefore, Ninth Circuit case law firmly forecloses Petitioner's argument; the taking of property by intimidation necessarily entails "threatened physical force." *See id.*

Petitioner also argues that armed bank robbery does not require the use of *intentional* violent force, and therefore does not meet the *mens rea* requirement necessary to satisfy the force clause of § 924(c)(3). (ECF No. 53 at 7-8.) The Court disagrees. In *Selfa*, the Ninth Circuit explicitly held that a conviction under § 2113(a) requires *willful* conduct. 918 F.2d at 751. As the Sixth Circuit recently explained, "[i]n the context of § 2113(a), 'intimidation' means 'conduct and words . . . calculated to create the impression that any resistance or defiance . . . would be met by force.'" *United States v. McBride*, 826 F.3d 293, 296 (6th Cir. 2016). Taking by intimidation requires sufficient "general intent" to satisfy the *mens rea* requirement of the elements clause because it precludes conviction with a reckless or negligent state of mind. *Id.* Petitioner suggests that it is somehow possible to willfully take another's property in a way that puts them in fear of harm without willfully threatening the use of force. (ECF No. 53 at 5.) As an initial matter, despite some confusion in case law, a defendant cannot be convicted of taking property by intimidation if the defendant did not know that his actions were intimidating.³ *See Carter v. United States*, 530 U.S. 255, 268 (2000) (holding that § 2113 requires "proof of general intent—that is, that the defendant possessed knowledge with respect to the *actus reus*

³ Petitioner cites *United States v. Woodrup*, 86 F.3d 359 (4th Cir. 1996) for the proposition that bank robbery can be committed by recklessly engaging in intimidation. (ECF No. 59 at 3-4.) However, the Fourth Circuit later clarified in *McNeal*, that "[a] fair reading of *Woodrup* does not compel that interpretation." 818 F.3d at 155. The Court noted that the question in *Woodrup* was whether bank robbery by intimidation requires a *specific* intent to intimidate. *Id.* The defendant clearly knew that his conduct was intimidating and thus the general intent requirement was satisfied. *Id.* As the *McNeal* court concluded, in *Woodrup* the court had, "no occasion to consider whether bank robbery requires general intent (i.e., knowledge) with respect to intimidation." *Id.* The Supreme Court later ruled in *Carter v. United States*, 530 U.S. 255, 268 (2000) that only general intent – or knowledge – is required to sustain a conviction under § 2113. *Woodrup* does not support Petitioner's argument that a defendant could be convicted of bank robbery without general intent.

1 of the crime (here, *the taking of property of another by force and violence or intimidation*’’) (emphasis
 2 altered); *see also McNeal*, 818 F.3d at 155 (‘‘to secure a conviction of bank robbery ‘by intimidation,’
 3 the government must prove not only that the accused knowingly took property, but also that he knew
 4 that his actions were objectively intimidating’’); *McBride*, 826 F.3d at 296 (‘‘The defendant must at least
 5 know that his actions would create the impression in an ordinary person that resistance would be met by
 6 force. A taking by intimidation under § 2113(a) therefore involves the threat to use physical force.’’).
 7 Second, the mental contortions required to imagine such a situation suggest that it is implausible.
 8 Supreme Court precedent requires Petitioner to present a ‘‘realistic probability, not a theoretical
 9 possibility’’ that a conviction under § 2113(a) & (d) could be sustained without demonstrating
 10 intentional threatened force. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). Petitioner has
 11 not done so here.

12 Since the Supreme Court’s decision in *Johnson II* invalidating the residual clause of the ACCA,
 13 other district courts in this circuit have likewise concluded that § 2113(a) & (d) are categorically crimes
 14 of violence under the elements clause of § 924(c). *See United States v. Savage*, No. LA CR 08-00258-
 15 VBF, 2017 WL 130008, at *36 (C.D. Cal. Jan. 12, 2017), *judgment entered*, No. LA CV 16-03864-
 16 VBF, 2017 WL 120691 (C.D. Cal. Jan. 12, 2017) (‘‘a defendant properly convicted of bank robbery is
 17 guilty per se of a crime of violence, because violence in the broad sense that includes merely threatened
 18 use of force is an element of every bank robbery’’ (internal quotation marks and citations omitted));
 19 *Daniels v. United States*, Nos. 11-CR-470-H-2, 16-CV-1454-H, 2016 WL 6680038 (S.D. Cal. Nov. 14,
 20 2016); *United States v. Abdul-Samad*, No. 10CR2792 WQH, 2016 WL 5118456, at *4 (S.D. Cal. Sept.
 21 21, 2016); *United States v. Watson*, No. 14-00751-01 DKW, 2016 WL 866298, at *6-7 (D. Haw. Mar. 2,
 22 2016); *United States v. Charles*, No. 3:06-CR-00026 JWS, 2016 WL 4515923, at *1 (D. Alaska Aug.
 23 29, 2016). Other circuit courts have reached the same conclusion. *McNeal*, 818 F.3d at 153 (‘‘[B]ank
 24 robbery under 18 U.S.C. § 2113(a) is a ‘crime of violence’ within the meaning of the force clause of
 25 18 U.S.C. § 924(c)(3).’’); *McBride*, 826 F.3d at 296 (‘‘A taking by intimidation under § 2113(a) . . .

involves the threat to use physical force.”); *In re Hines*, 824 F.3d 1334, 1337 (11th Cir. 2016) (“[A] conviction for armed bank robbery clearly meets the requirement for an underlying felony offense, as set out in § 924(c)(3)(A)”). This Court is bound by *Wright* and *Selfa*, which remain good law. *See Hart v. Massanari*, 266 F.3d 1155, 1175 (9th Cir. 2001) (“A district court bound by circuit authority...has no choice but to follow it.”) Therefore, bank robbery either by “force or violence” or by “intimidation” satisfies the requirement of § 924(c)(3)(A) that the underlying felony offense have “as an element the use, attempted use, or threatened use of physical force against the person or property of another.” *Selfa*, 918 F.2d at 751.

Section 2113(a) is a crime of violence under the elements clause of § 924(c)(3)(A). Because bank robbery is a lesser-included offense of § 2113(d) armed bank robbery, armed bank robbery is also a crime of violence under the force clause. *McNeal*, 818 F.3d at 157. Therefore Petitioner’s sentence under § 924(c)(1)(A) was not imposed in violation of the Constitution or the laws of the United States. *Wright*, 215 F.3d at 1028. Accordingly, because Petitioner’s sentence is not unconstitutional, the Court need not address whether *Johnson II* invalidated the residual clause in § 924(c)(3)(B), nor whether Petitioner waived his right to collaterally attack his sentence. The Court **DENIES** Petitioner’s § 2255 motion.

V. CERTIFICATE OF APPEALABILITY

An appeal may not be taken from the denial of a § 2255 motion unless a certificate of appealability is issued. 28 U.S.C. § 2253(c)(1). “A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.” *Id.* § 2253(c)(2). To obtain a certificate of appealability, Petitioner “must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further.” *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (internal quotation marks and citations omitted). The Court is also mindful of the “relatively low” threshold for granting a certificate of appealability. *Jennings v. Woodford*, 290 F.3d 1006, 1010

(9th Cir. 2002).

Although the Court denies Petitioner's § 2255 motion on the merits, the Court concludes that reasonable jurists could find the Court's assessment of Petitioner's claims debatable and that the questions presented are adequate to proceed. Accordingly, the Court GRANTS Petitioner a certificate of appealability.

VI. CONCLUSION AND ORDERS

Accordingly, **IT IS HEREBY ORDERED** that Petitioner Michael Torres's Motion to Vacate, Set Aside, or Correct Sentence pursuant to § 2255 (ECF No. 53) is **DENIED**. However, the Court **GRANTS** to Petitioner a certificate of appealability for this motion.

IT IS SO ORDERED.

Dated: January 31, 2017

/s/ Lawrence J. O'Neill
UNITED STATES CHIEF DISTRICT JUDGE

United States District Court

Eastern District of California

UNITED STATES OF AMERICA
 v.
MICHAEL TORRES

JUDGMENT IN A CRIMINAL CASE
 (For Offenses Committed On or After November 1, 1987)
 Case Number: **1:11CR00448-001 LJO**

Jeremy S. Kroger
 Defendant's Attorney

THE DEFENDANT:

- ☒ pleaded guilty to counts: 1,2,4,5,6 of the Indictment.
☐ pleaded nolo contendere to counts(s) ___ which was accepted by the court.
☐ was found guilty on count(s) ___ after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Number(s)</u>
18 USC 2113 (a) and (d)	ARMED BANK ROBBERY	05/27/2010	1
		09/23/2010	2
		01/28/2011	4
		05/27/2011	5
18 USC 924(c)(1)	BRANDISHING A FIREARM DURING A CRIME OF VIOLENCE	05/27/2011	6

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on counts(s) ___ and is discharged as to such count(s).
☒ Count 3 of the Indictment is dismissed on the motion of the United States.
☐ Indictment is to be dismissed by District Court on motion of the United States.
☐ Appeal rights given. ☒ Appeal rights waived.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

April 29, 2013
 Date of Imposition of Judgment

/s/ Lawrence J. O'Neill
 Signature of Judicial Officer

LAWRENCE J. O'NEILL, United States District Judge
 Name & Title of Judicial Officer

May 2, 2013
 Date

CASE NUMBER: 1:11CR00448-001 LJO
 DEFENDANT: MICHAEL TORRES

Judgment - Page 2 of 7

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 96 Months on each of Counts 1,2,4,5 to be served concurrently; 84 Months on Count 6 to be served consecutively for a total term of 180 Months.

- ☐ No TSR: Defendant shall cooperate in the collection of DNA.
- ☒ The court makes the following recommendations to the Bureau of Prisons:
 The Court recommends that the defendant be incarcerated in a California facility, but only insofar as this accords with security classification and space availability. The Court recommends the defendant participate in the 500-Hour Bureau of Prisons Substance Abuse Treatment Program. Mendota, CA; Lompoc, CA or California
- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district.
☐ at ___ on ____.
☐ as notified by the United States Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
☐ before _ on ____.
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Officer.
 If no such institution has been designated, to the United States Marshal for this district.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
 at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
 Deputy U.S. Marshal

CASE NUMBER: 1:11CR00448-001 LJO
 DEFENDANT: MICHAEL TORRES

Judgment - Page 3 of 7

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 60 months on Counts 1,2,4,5,6 to be served concurrently for a total term of 60 months.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed four (4) drug tests per month.

- ☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.), as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without permission of the court or probation officer;
- 2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow instructions of the probation officer;
- 4) the defendant shall support his or her dependants and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;
- 6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere, and shall permit confiscation of any contraband observed in plain view by the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CASE NUMBER: 1:11CR00448-001 LJO
 DEFENDANT: MICHAEL TORRES

Judgment - Page 4 of 7

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall submit to the search of his person, property, home, and vehicle by a United States probation officer, or any other authorized person under the immediate and personal supervision of the probation officer, based upon reasonable suspicion, without a search warrant. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.
2. The defendant shall not dispose of or otherwise dissipate any of his assets until the fine and/or restitution order by this Judgment is paid in full, unless the defendant obtains approval of the Court or the probation officer.
3. The defendant shall provide the probation officer with access to any requested financial information.
4. The defendant shall not open additional lines of credit without the approval of the probation officer.
5. As directed by the probation officer, the defendant shall participate in an outpatient correctional treatment program to obtain assistance for drug or alcohol abuse.
6. As directed by the probation officer, the defendant shall participate in a program of testing (i.e. breath, urine, sweat patch, etc.) to determine if he has reverted to the use of drugs or alcohol.
7. The defendant shall abstain from the use of alcoholic beverages and shall not frequent those places where alcohol is the chief item of sale.
8. As directed by the probation officer, the defendant shall participate in a program of outpatient mental health treatment.
9. As directed by the probation officer, the defendant shall participate in a co-payment plan for treatment or testing and shall make payment directly to the vendor under contract with the United States Probation Office of up to \$25 per month.

CASE NUMBER: 1:11CR00448-001 LJO
 DEFENDANT: MICHAEL TORRES

Judgment - Page 5 of 7

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
Totals:	\$ 500.00	\$	\$ 113,500.00

☐ The determination of restitution is deferred until __. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
U.S. Bank 3401 Tully Road Modesto, CA 95350		\$25,000.00	
Rabobank 2190 West Monte Vista Avenue Turlock, CA 95382		\$31,900.00	
Oak Valley Community Bank 2001 Geer Road Turlock, CA 95382		\$56,600.00	
<u>TOTALS:</u>	\$ ____	\$113,500.00	

☐ Restitution amount ordered pursuant to plea agreement \$ ____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ The interest requirement is waived for the ☐ fine ☒ restitution

☐ The interest requirement for the ☐ fine ☐ restitution is modified as follows:

☐ If incarcerated, payment of the fine is due during imprisonment at the rate of not less than \$25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program.

☒ If incarcerated, payment of restitution is due during imprisonment at the rate of not less than \$25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

CASE NUMBER: 1:11CR00448-001 LJO
DEFENDANT: MICHAEL TORRES

Judgment - Page 6 of 7

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

CASE NUMBER: 1:11CR00448-001 LJO
 DEFENDANT: MICHAEL TORRES

Judgment - Page 7 of 7

SCHEDULE OF PAYMENTS

Payment of the total fine and other criminal monetary penalties shall be due as follows:

- A** ☒ Lump sum payment of \$ 114,000.00 due immediately, balance due
- ☐ not later than __, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B** ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C** ☐ Payment in equal __ (e.g., weekly, monthly, quarterly) installments of \$ __ over a period of __ (e.g., months or years), to commence __ (e.g., 30 or 60 days) after the date of this judgment; or
- D** ☐ Payment in equal __ (e.g., weekly, monthly, quarterly) installments of \$ __ over a period of __ (e.g., months or years), to commence __ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E** ☐ Payment during the term of supervised release will commence within __ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F** ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate:

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:
 PRELIMINARY ORDER OF FORFEITURE filed 01/22/2013 Adopted and incorporated into the Judgment forthwith.