No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DOMINIQUE DONTAE LASKER,
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?

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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 Dominique Dontae Lasker 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. Lasker's petition for a writ of habeas corpus under 28 U.S.C. § 2255 in a memorandum disposition. *See United States v. Lasker*, 744 F. App'x 532 (9th Cir. 2018) (attached as Appendix to the Petition).

JURISDICTION

On December 5, 2018, the Court of Appeals denied Mr. Lasker'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 2011, Mr. Lasker pleaded guilty to bank robbery under 18 U.S.C. § 2113 and possessing a firearm in relation to a crime of violence under 18 U.S.C. § 924(c). The district court sentenced Mr. Lasker to 37 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. Lasker 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. Lasker 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. Lasker 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. Lasker's Motion to Vacate in a written order, finding that no higher intervening authority had abrogated *Wright*, but it granted Mr. Lasker a certificate of appealability. Mr. Lasker 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. Lasker*, 744 F. App'x 532 (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. Lasker'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. Lasker 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).

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: March 1, 2019

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APPENDIX

NOT FOR PUBLICATION

FILED

DEC 5 2018

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DOMINIQUE DONTAE LASKER, Defendant-Appellant.	No. 17-55305 D.C. Nos. 3:16-cv-01384-DMS 3:10-cr-04732-DMS MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Dana M. Sabraw, 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.

Dominique Dontae Lasker 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).

Lasker 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

SOUTHERN DISTRICT OF CALIFORNIA

DOMINIQUE DONTAE LASKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Criminal Case No. 10-cr-4732 DMS
Civil Case No. 16-cv-1384 DMS

ORDER DENYING (1) MOTION TO STAY AND (2) MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255

Pending before the Court is Petitioner Dominique Dontae Lasker's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255. Petitioner moves to vacate his sentence pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Welch v. United States*, 136 S. Ct. 1257 (2016). Respondent United States of America opposes and also moves to stay proceedings pending a decision by the United States Court of Appeals for the Ninth Circuit in *United States v. Begay*, No. 14-10080. For the reasons set out below, the Court denies Respondent's motion to stay and Petitioner's motion to vacate.

I.

BACKGROUND

On July 19, 2011, Petitioner pleaded guilty to count one, armed bank robbery, in violation of 18 U.S.C. §§ 2 and 2113(a) and (d), and count two, knowingly using,

carrying, and brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §§ 2 and 924(c)(1)(A).

The probation department prepared a Presentence Report and calculated a guideline range of 30 to 37 months as to count one. It also determined Petitioner was subject to a mandatory 84-month sentence for count two to be served consecutive to count one. At the sentencing hearing on December 16, 2011, the Court sentenced Petitioner to a total sentence of 121 months, consisting of 37 months as to count one and 84 months as to the count two, followed by three years of supervised release.

On June 1, 2016, Petitioner filed the present motion, challenging his sentence in light of the recent Supreme Court decision in *Johnson*. Petitioner argues *Johnson* renders the residual clause in 18 U.S.C. § 924(c)(3) unconstitutional, and further argues *Johnson* applies retroactively on collateral review pursuant to *Welch*. Thus, Petitioner contends he is entitled to relief because his conviction for armed bank robbery no longer qualifies as a crime of violence because it could only qualify as a crime of violence under the residual clause, which is now unconstitutional pursuant to *Johnson*.

Respondent initially asserts this case should be stayed pending the Ninth Circuit's decision in *Begay*. In opposition to Petitioner's motion, Respondent argues Petitioner is not entitled to relief for the following reasons: (1) Petitioner waived his right to collaterally attack his sentence in his plea agreement, (2) Petitioner procedurally defaulted his claims by failing to raise it on direct appeal,[1] (3) *Johnson* does not invalidate the residual clause in § 924(c)(3), and (4) Petitioner's conviction for armed bank robbery remains a crime of violence even if the residual clause in § 924(c) is rendered unconstitutional pursuant to *Johnson*.

---

[1] The Court declines to address Respondent's arguments on waiver and procedural default because, for the reasons stated in this Order, Petitioner's motion fails on the merits.

II.

DISCUSSION

A. Motion to Stay

In support of its motion to stay this case, Respondent argues the Ninth Circuit is likely to address whether *Johnson* invalidates the residual clause of 18 U.S.C. § 924(c)(3) in *Begay*. Although *Begay* certainly raises that issue, this Court finds a stay is inappropriate here. As stated in *Yong v. I.N.S.*, 208 F.3d 1116, 1120 (9th Cir. 2000), "habeas proceedings implicate special considerations that place unique limits on a district court's authority to stay a case in the interests of judicial economy." In habeas cases, "[s]pecial solicitude is required because the writ is intended to be a 'swift and imperative remedy in all cases of illegal restraint or confinement.'" *Id.* (quoting *Fay v. Noia*, 372 U.S. 391, 400 (1963)). In light of this reasoning, the Court denies Respondent's motion to stay.

B. Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255

1. Legal Standard

A prisoner in custody may move the federal court that imposed a sentence upon him to vacate, set aside, or correct that sentence on 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[.]

28. U.S.C. § 2255(a). If the court determines that relief is warranted under § 2255, it must "vacate and set the judgment aside" and "discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." *Id.* at § 2255(b).

2. Analysis

In *Johnson*, the Supreme Court found unconstitutionally vague the residual clause of the Armed Career Criminal Act ("ACCA"). *Johnson*, 135 S. Ct. at 2551.

The residual clause defined a "violent felony" as one that is "'punishable by imprisonment for a term exceeding one year' and 'is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.'" *Id.* at 2555–56 (quoting 18 U.S.C. § 924(e)(2)(B)). In finding the residual clause unconstitutional, the Court first reasoned the clause left "grave uncertainty about how to estimate the risk posed by a crime" because "[i]t ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." *Id.* at 2557. The Court also reasoned the clause left "uncertainty about how much risk it takes for a crime to qualify as a violent felony" because it forced courts to determine potential risk "in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives[, which] are 'far from clear in respect to the degree of risk each poses.'" *Id.* at 2558 (quoting *Begay v. United States*, 553 U.S. 137, 143 (2008)). Accordingly, the Court concluded "imposing an increased sentence under the residual clause of the [ACCA] violates the Constitution's guarantee of due process." *Id.* at 2563.

Petitioner argues armed bank robbery is no longer a "crime of violence" under 18 U.S.C. § 924(c) in light of *Johnson*. Section 924(c) defines "crime of violence" 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). Specifically, Petitioner contends armed bank robbery does not qualify as a crime of violence under subdivision (A), the "force" clause, because it does not require proof of intentional use or threatened use of violent physical force.

Petitioner further argues armed bank robbery also does not qualify as a crime of violence under subdivision (B), the "residual" clause, because *Johnson* has rendered the clause unconstitutionally vague. In *Johnson*, however, the Supreme Court considered the constitutionality of ACCA's residual clause, not § 924(c)(3)(B). *Johnson*, 135 S. Ct. at 2551. Moreover, the Court was clear in limiting the reach of its decision. *Id.* at 2554 ("Holding the residual clause void for vagueness does not put other criminal laws that use terms such as 'substantial risk' in doubt").

Currently, the Ninth Circuit has yet to address the issues of whether *Johnson* applies to the residual clause in § 924(c)(3), and whether challenges to § 924(c)(3)(B) are cognizable on collateral review. Several circuit courts, however, have held *Johnson* does not render § 924(c)(3)(B) unconstitutionally vague because several factors distinguish ACCA's residual clause from § 924(c)(3)(B). *See, e.g.*, *United States v. Hill*, 832 F.3d 135, 144–50 (2d Cir. 2016); *United States v. Davis*, No. 16-10330, 2017 WL 436037, at *2 (5th Cir. Jan. 31, 2017); *United States v. Taylor*, 814 F.3d 340, 376–79 (6th Cir. 2016); *United States v. Prickett*, 839 F.3d 697, 698–700 (8th Cir. 2016). The Court finds the reasoning of these circuit decisions persuasive.

First, unlike ACCA's residual clause, § 924(c)(3)(B) does not leave "grave uncertainty about how to estimate the risk posed by a crime" because its statutory language is distinctly narrower. *See Taylor*, 814 F.3d at 376–77; *Prickett*, 839 F.3d at 699; *Hill*, 832 F.3d at 148. Whereas ACCA's residual clause "requires conduct 'that presents a serious potential risk of physical injury to another,' § 924(c)(3)(B) requires the risk 'that *physical force* against the person or property of another may be used *in the course of* committing the offense.'" *Taylor*, 814 F.3d at 376 (citations omitted) (emphasis in original). The risk of physical force against a victim that § 924(c)(3)(B) requires is much more definite than the risk of physical injury to a victim that ACCA's residual clause required. *See Prickett*, 839 F.3d at 699. Moreover, because § 924(c)(3)(B) requires "the risk of physical force arise 'in the

course of' committing the offense," the person who may potentially use physical force must necessarily be the offender. *Taylor*, 814 F.3d at 376.

Second, the Supreme Court in *Johnson* noted the distinction between the "serious potential risk" standard of ACCA's residual clause and the "substantial risk" standard in other criminal statutes, such as § 924(c)(3)(B). *See Johnson*, 135 S. Ct. at 2554 ("Holding the residual clause void for vagueness does not put other criminal laws that use terms such as 'substantial risk' in doubt, because those laws generally require gauging the riskiness of an individual's conduct on a particular occasion, not the riskiness of an idealized ordinary case of the crime."). ACCA's residual clause required "application of the 'serious potential risk' standard to an idealized ordinary case of the crime." *Id.* at 2561. As a result, the residual clause compelled courts to engage in abstract inquiry "to picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury." *Id.* at 2557. On the other hand, § 924(c)(3)(B) requires application of the substantial risk standard, "a qualitative standard," to real-world conduct. *Id.* at 2561. Section 924(c)(3)(B) "simply covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing the offense." *Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004).[2] Indeed, § 924(c)(3)(B) requires the felony be one that "by its nature, involves a substantial risk" that the offender will use physical force against a victim. *See Taylor*, 814 F.3d at 376.

Third, unlike ACCA's residual clause, § 924(c)(3)(B) "does not complicate the level-of-risk inquiry by linking the 'substantial risk' standard, through the word

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[2] The Supreme Court in *Leocal* interpreted the breadth of 18 U.S.C. 16(b), which is in all relevant aspects identical to § 924(c)(3)(B). Section 16(b)'s residual clause defines "crime of violence" as "any other offense that is a felony and 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."

otherwise, 'to a confusing list of examples.'" *Taylor*, 814 F.3d at 377 (quoting *Johnson*, 135 S. Ct. at 2561). The use of the word "otherwise" in the ACCA's residual clause forced "courts to interpret 'serious potential risk' in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives." *Id.* (quoting *Johnson*, 135 S. Ct. at 2561). In contrast, § 924(c)(3)(B) contains "no mystifying list of offenses and no indeterminate 'otherwise' phraseology" as found in the ACCA's residual clause. *Hill*, 832 F.3d at 146. As a result, § 924(c)(3)(B) does not leave any "uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Johnson*, 135 S. Ct. at 2558.

Fourth, the Supreme Court was clear in limiting the reach of *Johnson*. The Court emphasized that "its reasoning did not control other statutes that refer to predicate crimes." *Taylor*, 814 F.3d at 378; *see Johnson*, 135 S. Ct. at 2554 ("Holding the residual clause void for vagueness does not put other criminal laws that use terms such as 'substantial risk' in doubt, because those laws generally require gauging the riskiness of an individual's conduct on a particular occasion, not the riskiness of an idealized ordinary case of the crime"); *United States v. Moreno-Aguilar*, No. RWT 13-CR-0496, 2016 WL 4089563, at *8 (D. Md. Aug. 2, 2016) ("Unmooring *Johnson* from this reasoning would potentially invalidate countless statutes. *See, e.g.*, 18 U.S.C. § 3559(c)(2)(F); 18 U.S.C. § 16(b); 18 U.S.C. §§ 3142(f)(1)(A) and (g)(1); 18 U.S.C. § 521(d)(3)(C)."). Indeed, the Court expressly stated, "As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct[.]" *Johnson*, 135 S. Ct. at 2561.

Lastly, "the Supreme Court reached its void-for-vagueness conclusion only after struggling mightily for nine years to come up with a coherent interpretation of the [ACCA's residual clause]." *Taylor*, 814 F.3d at 376. The Court explained in *Johnson* "the failure of 'persistent efforts ... to establish a standard' can provide evidence of vagueness." *Johnson*, 135 S. Ct. at 2258 (quoting *United States v. L.*

Cohen Grocery Co., 255 U.S. 81, 91). However, no such history has occurred with respect to § 924(c)(3)(B). Therefore, in light of the material differences between ACCA's residual clause and § 924(c)(3)(B), the Court finds the reasoning of *Johnson* neither applies to nor renders § 924(c)(3)(B) unconstitutionally vague.

Nevertheless, Petitioner argues *Johnson* should invalidate § 924(c)(3)(B), because the Ninth Circuit has found unconstitutionally vague the identically worded definition of "crime of violence" in 16 U.S.C. § 16(b), as incorporated in the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101(a)(43)(F). *Dimaya v. Lynch*, 803 F.3d 1110, 1120 (9th Cir. 2015).[3] *Dimaya*, however, did not hold that *Johnson* renders the definition of crime of violence in § 16(b) unconstitutionally vague. The Court held unconstitutional the definition of aggravated felony in § 1101(a)(43)(F), which includes §16(b)'s crime of violence definition. *Id.* at 1114–20. Indeed, the Court made clear its decision "does not reach the constitutionality of applications of 18 U.S.C. § 16(b) outside of 8 U.S.C. § 1101(a)(43)(F) or cast any doubt on the constitutionality of 18 U.S.C. § 16(a)'s definition of a crime of violence." *Id.* at 1120 n.17. Therefore, *Dimaya* does not compel the Court to hold § 924(c)(3)(B) unconstitutional. *See Averhart v. United States*, No. 11-CR-1861 DMS (S.D. Cal. Nov. 21, 2016).

In any event, even if *Johnson* renders the residual clause of § 924(c)(3)(B) unconstitutional, armed bank robbery under § 2113(a) and (d), however, remains a crime of violence under the force clause without reference to the residual clause. In *United States v. Wright*, 215 F.3d 1020 (9th Cir. 2000), the Ninth Circuit held that armed bank robbery qualifies as a crime of violence, and thus, may serve as a predicate offense to support a conviction for using or carrying a firearm under § 924(c). *Id.* at 1028. The Court reasoned that "18 U.S.C. § 924(c)(3) defines a

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[3] The Supreme Court recently granted a petition for writ of certiorari in *Dimaya* on September 29, 2016. *See Lynch v. Dimaya*, No. 15-1498, 2016 WL 3232911 (U.S. Sept. 29, 2016).

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.'" *Id.* (quoting 18 U.S.C. § 2113(a)); *see United States v. Selfa*, 918 F.2d 749, 751 (9th Cir. 1990) (finding that § 2113(a)'s "requirement that property be taken either 'by force and violence' or 'by intimidation' requires proof of force or threat of force as an element of the offense.") (internal quotation marks and citation omitted); *United States v. Steppes*, 651 F. App'x 697, 698 (9th Cir. 2016) (citing *Selfa* and holding § 2113(a) categorically qualifies as a crime of violence under the force clause in § 4B1.2(a)).

Following *Wright*, many district courts in the Ninth Circuit have held armed bank robbery constitutes a crime of violence under the force clause. *See, e.g.*, *United States v. Howard*, No. 16CV1538 JM, 2017 WL 634674, at *5 (S.D. Cal. Feb. 16, 2017) ("notwithstanding the fate of section 924(c)'s residual clause, armed bank robbery is a crime of violence under section 924(c)'s elements clause."); *United States v. Jones*, No. 16CV1563 WQH, 2017 WL 432895, at *10 (S.D. Cal. Jan. 31, 2017) ("bank robbery in violation of 18 U.S.C. § 2113 (a) and (d) is a categorical match to the elements/force clause of § 924(c)(3)(A) and requires proof of the intentional use or threatened use of physical force."); *Daniels v. United States*, No. 11-CR-470-H-2, 2016 WL 6680038, at *3 (S.D. Cal. Nov. 14, 2016) ("armed bank robbery qualifies as a crime of violence under § 924(c)(3)'s force clause"). The Court finds the reasoning of these courts persuasive and finds that armed bank robbery is a crime of violence under the force clause in § 924(c)(3).[4]

Accordingly, regardless of whether *Johnson* applies, armed bank robbery

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[4] Because the Court finds that armed bank robbery remains a crime of violence under the force clause, it need not address the parties' argument regarding whether armed bank robbery is also a crime of violence under the enumerated offenses clause.

under § 2113(a) and (d) remains a crime of violence under § 924(c)(3). As a result, Petitioner is not entitled to relief.

III.

CONCLUSION

For the foregoing reasons, Respondent's motion to stay and Petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 are denied. The Court grants Petitioner a certificate of appealability. The Clerk is directed to close the associated civil case.

IT IS SO ORDERED.

Dated: March 6, 2017

Hon. Dana M. Sabraw
United States District Judge