

APPENDIX

United States v. Connors, CA No, 18-15461
Ninth Circuit Order Granting Summary Affirmance (Dec. 4, 2018). . App-1

United States v. Connors, 2:98-cr-0049 (ED CA)
District Court Order Denying § 2255 Relief (March 5, 2018)..... App-2

United States v. Connors, 2:98-cr-0049 (ED CA)
District Court's Findings and Recommendations (Sept. 13, 2017). . . . App-4

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

DEC 4 2018

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARTIN FITZGERALD CONNORS,

Defendant-Appellant.

No. 18-15461

D.C. Nos. 2:16-cv-01416-TLN
2:98-cr-00049-TLN

Eastern District of California,
Sacramento

ORDER

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

Appellee's motion for summary affirmance (Docket Entry No. 15) is granted. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (stating standard); *see also 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,

Respondent,

v.

MARTIN FITZGERALD CONNORS,

Movant.

No. 2:98-cr-0049 TLN CKD P

ORDER

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

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

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

An appeal may not be taken from the denial of a § 2255 motion unless a certificate of

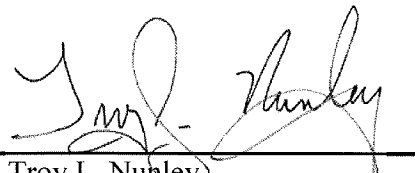
1 appealability is issued. 28 U.S.C. § 2253(c)(1). “A certificate of appealability may issue . . . only
2 if the applicant has made a substantial showing of the denial of a constitutional right.” *Id.* §
3 2253(c)(2). To obtain a certificate of appealability, Movant “must demonstrate that the issues are
4 debatable among jurists of reason; that a court could resolve the issues in a different manner; or
5 that the questions are adequate to deserve encouragement to proceed further.” *Lambright v.*
6 *Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (internal quotation marks and citations omitted).
7 The Court is also mindful of the “relatively low” threshold for granting a certificate of
8 appealability. *Jennings v. Woodford*, 290 F.3d 1006, 1010 (9th Cir. 2002).

9 Although the Court denies Movant’s § 2255 motion on the merits, the Court concludes
10 that the questions presented are adequate to proceed. Accordingly, the Court GRANTS Movant a
11 certificate of appealability.

12 Accordingly, IT IS HEREBY ORDERED that:

- 13 1. The findings and recommendations filed September 13, 2017, are adopted in full;
- 14 2. Movant’s June 22, 2016 motion for habeas corpus relief under 28 U.S.C. § 2255 (ECF
15 No. 52) is denied; and
- 16 3. The Court grants Movant a certificate of appealability for this motion referenced in 28
17 U.S.C. § 2253.

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19 Dated: March 5, 2018

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23 Troy L. Nunley
24 United States District Judge
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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Respondent,
v.
MARTIN FITZGERALD CONNORS,
Movant.

No. 2:98-cr-0049 TLN CKD P

FINDINGS AND RECOMMENDATIONS

I. INTRODUCTION

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

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

1 II. BACKGROUND

2 On June 30, 2003, movant entered pleas of guilty, pursuant to a plea agreement, to two
3 counts of armed bank robbery and two counts of using a firearm during a crime of violence.
4 ECF No. 43 & 46. On August 25, 2003, movant was sentenced pursuant to the terms of the plea
5 agreement to a total term of imprisonment of 264 months. ECF No. 45 & 46. Federal Bureau of
6 Prisons records indicate movant was released from prison in March of this year. The court
7 assumes movant is serving the term of “mandatory supervised release” imposed at sentencing.
8 ECF No. 46.

9 III. STATUTES

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

11 (a) Whoever, by force and violence, or by intimidation, takes, or
12 attempts to take, from the person or presence of another, or obtains
13 or attempts to obtain by extortion any property or money or any
14 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

15 Whoever enters or attempts to enter any bank, credit union, or any
16 savings and loan association, or any building used in whole or in
17 part as a bank, credit union, or as a savings and loan association,
18 with intent to commit in such bank, credit union, or in such savings
 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--

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

21 The applicable version of § 924(c)(1) in effect until October 10, 1996² provides additional
22 penalties for a defendant who “during and in relation to any crime of violence . . . uses or carries a
23 firearm. . .” A “crime of violence” for purposes of § 924(c)(1) is defined under § 924(c)(3) as a
24 crime which “(A) has as an element the use, attempted use, or threatened use of physical force
25 against the person or property of another, or (B) that by its nature, involves a substantial risk that
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28 ² Movant’s crimes were committed in June, 1995 and April, 1996. ECF No. 59 at 5-6.

physical force against the person or property of another may be used in the course of committing the offense.”

IV. ANALYSIS

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

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

In Johnson v. United States, 559 U.S. 133 (2010) (“Johnson I”) the Supreme Court clarified that for purposes of the definition of “crime of violence” identified in § 924(c)(3)(A), the phrase “physical force” means “violent force—that is force capable of causing physical pain or injury to another person.” Id. at 140. Movant argues that bank robbery involving “intimidation,” as opposed to “force and violence,” cannot amount to a “crime of violence” under § 924(c)(3)(A) because the definition of intimidation in the Ninth Circuit, to “willfully . . . take, or attempt to take, in such a way that would put an ordinary, reasonable person in fear of bodily harm,” United States v. Selfa, 918 F.2d. 749, 751 (9th Cir. 1990), does not require the use, attempted use, or threatened use of “violent, physical force.” As an example of an instance where a person could be “intimidated” without a defendant at least threatening “violent physical force,” movant asserts “a defendant could commit . . . bank robbery . . . by threatening to poison the teller.” ECF No. 52 at 13.

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³ “Johnson II,” as opposed to “Johnson I,” referenced below.

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

1 The court rejects movant's argument. Movant erroneously focuses on the amount of
 2 force threatened, rather than whether force was threatened, and the nature of the force, i.e.
 3 whether the force threatened "is capable of causing physical pain or injury." Those are the only
 4 things required under Johnson I. Further, the notion that no force is required in movant's
 5 poisoning hypothetical was specifically rejected by the Supreme Court in United States v.
 6 Castleman, 134 S. Ct. 1405 (2014). The Court explained that the "use of force" is "the act of
 7 employing poison knowingly as a device to cause physical harm." Id. at 1414-1415.⁵

8 2. Intent

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

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

20 To secure a bank robbery conviction "by intimidation," "the government must prove not
 21 only that the accused knowingly took property, but also that he knew that his actions were
 22 objectively intimidating." McNeal, 818 F.3d at 155. Movant argues that because bank robbery is
 23 not a "specific intent" crime, that is a crime where "the government must prove that the defendant
 24 subjectively intended or desired the proscribed act or result," United States v. Lamont, 831 F.3d
 25 1153, 1156 (9th Cir. 2016), Fernandez-Ruiz precludes a finding that bank robbery is a crime of
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27 ⁵ In United States v. McNeal, 818 F.3d 141, 156 (4th Cir. 2016) the Fourth Circuit rejected the
 28 argument movant raises here by finding that threatening a bank teller with the use of poison does
 not amount to "intimidation" under § 2113(a).

1 violence under § 924(c)(3). However, the Ninth Circuit did not distinguish between specific and
 2 general intent in Fernandez-Ruiz. The court simply indicated that a crime of violence as that term
 3 is described in § 924(c)(3)(A) must be committed “intentionally,” as opposed to recklessly or
 4 with negligence in that there must be a “volitional element.” Fernandez-Ruiz, 466 F.3d at 1129.
 5 Movant fails to point to any other authority suggesting that only specific intent crimes can amount
 6 to a crime of violence under § 924(c)(3)(A).

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

17 3. Extortion

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

22 As the Supreme Court noted in Mathis v. United States, 136 S. Ct. 2243, 2249 (2016) “[a]
 23 single statute may list crimes in the alternative, and thereby define multiple crimes.” The court
 24 finds that there are two crimes identified in the first paragraph of § 2113(a): bank robbery and
 25 bank extortion. See Wright 215 F.3d at 1028 (Ninth Circuit finds armed bank robbery to be a
 26 “crime of violence” under § 924(c)(3) because one of the elements is taking “by force and
 27 violence, or by intimidation” and without addressing the element of § 2113(a) concerning
 28 extortion). For bank robbery, the government must prove the defendant took, or attempted to

1 take, qualifying property from the person or presence of another by force and violence or by
 2 intimidation. For bank extortion, the defendant must obtain or attempt to obtain qualifying
 3 property by extortion which the Supreme Court has defined as “obtaining something of value
 4 from another (not necessarily from their presence or person), with his consent induced by the
 5 wrongful use of force, fear or threats.” Scheidler v. Nat’l Org. for Women, Inc., 537 U.S. 393,
 6 409 (2003). “Unlike robbery, the threats that can constitute extortion . . . include threats to
 7 property. . .” United States v. Becerril-Lopez, 541 F.3d 881, 892 (9th Cir. 2008). See United
 8 States v. Holloway, 309 F.3d 649, 651 (9th Cir. 2002) (Ninth Circuit recognizes that § 2113(a) is
 9 the exclusive provision for prosecuting “bank extortion”).

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

16 Movant was charged in counts one and three of the Indictment with armed bank robbery,
 17 not bank extortion. It is alleged in count one that movant “willfully and by force, violence and
 18 intimidation [took], from the person or presence of employees of CMT Federal Credit Union,
 19 4300 Sonoma Blvd., Suite 108, Vallejo . . . , approximately \$82,658.00 . . .” In count three it is
 20 alleged that movant “willfully and by force, violence and intimidation [took], from the person or
 21 presence of employees of Educational Central Federal Credit Union, 2509 Springs Road, Vallejo
 22 . . . , approximately \$4,745.00 . . .” ECF No. 5. In his plea agreement, movant agreed to plead
 23 guilty to counts one and three as charged, ECF No. 42 at 2-3, and then did so on June 30, 2003.
 24 ECF No. 43.

25 Accordingly, movant pled guilty to armed bank robbery involving “force and violence or
 26 intimidation,” and not extortion.

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1 4. Binding Authority not “Clearly Irreconcilable”

2 Finally, as argued by respondent, the court notes that under Ninth Circuit law, the court
3 must adhere to the finding in Wright, that armed bank robbery is a “crime of violence” under §
4 924(c)(3) as movant has not shown that Johnson I, Johnson II, or any other subsequent Ninth
5 Circuit or Supreme Court authority is “clearly irreconcilable” with or has overruled Wright. See
6 Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

7 V. CONCLUSION

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

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

11 1. Movant’s June 22, 2016 motion for habeas corpus relief under 28 U.S.C. § 2255 (ECF
12 No. 52) be denied; and

13 2. The Clerk of the Court be directed to close the companion civil case No. 2:16-cv-1416
14 TLN CKD.

15 These findings and recommendations are submitted to the United States District Judge
16 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
17 after being served with these findings and recommendations, any party may file written
18 objections with the court and serve a copy on all parties. Such a document should be captioned
19 “Objections to Magistrate Judge’s Findings and Recommendations.” In his objections, movant
20 may address whether a certificate of appealability should issue in the event he files an appeal of
21 the judgment in this case. See Rule 11, Federal Rules Governing Section 2255 Cases (the district
22 court must issue or deny a certificate of appealability when it enters a final order adverse to the
23 applicant). Any response to the objections shall be served and filed within fourteen days after
24 service of the objections. The parties are advised that failure to file objections within the

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1 specified time waives the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d
2 1153 (9th Cir. 1991).

3 Dated: September 12, 2017

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5 CAROLYN K. DELANEY
6 UNITED STATES MAGISTRATE JUDGE
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