No. _____

IN THE SUPREME COURT OF THE UNITED STATES

NAM NHAT NGO,
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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IN THE SUPREME COURT OF THE UNITED STATES

NAM NHAT NGO,
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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 Nam Nhat Ngo 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. Ngo's petition for a writ of habeas corpus under 28 U.S.C. § 2255 in a memorandum disposition. *See United States v. Ngo,* 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. Ngo'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 1998, a jury convicted Mr. Ngo of two counts of bank robbery under 18 U.S.C. § 2113 and two counts of using and carrying a firearm in relation to a crime of violence under 18 U.S.C. § 924(c). The district court sentenced Mr. Ngo to 70

months concurrent for the bank robberies and consecutive terms of five and twenty years for the § 924(c) counts.

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. Ngo 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. Ngo 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. Ngo 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. Ngo's Motion to Vacate in a written order, finding that no higher intervening authority had abrogated *Wright*, but it granted Mr. Ngo a certificate of appealability. Mr. Ngo 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. Ngo*, 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. Ngo'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. Ngo 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: February 28, 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. NAM NHAT NGO, Defendant-Appellant.	No. 17-55169 D.C. Nos. 3:16-cv-01555-GPC 3:97-cr-03397-GPC MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Gonzalo P. Curiel, 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.

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

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

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

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

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

AFFIRMED.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

NAM NHAT NGO, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	Case No. 16-CV-1555-GPC 97-CR-3397-GPC **ORDER DENYING PETITIONER'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255 AND GRANTING CERTIFICATE OF APPEALABILITY** [Dkt. No. 46.]

INTRODUCTION

Petitioner Nam Nhat Ngo ("Petitioner"), a federal prisoner proceeding with counsel, filed a motion to vacate, set aside, or correct his federal sentence pursuant to 28 U.S.C § 2255. (Dkt. No. 46.) Respondent filed an opposition. (Dkt. No. 51.) The Petitioner then filed a reply. (Dkt No. 52.) For the following reasons, the Court DENIES Petitioner's § 2255 Petition.

BACKGROUND

On January 15, 1998, a grand jury returned a superseding indictment charging the

Petitioner with four counts. (Dkt. No. 9.) Counts One and Three charged federal armed bank robberies in violation of 18 U.S.C §§ 2113(a) and (d)[1]. (*Id.*) Counts Two and Four charged the Petitioner with using and carrying a firearm in furtherance of a "crime of violence" in violation of 18 U.S.C. § 924(c)(1)(A). (*Id.*) On April 17, 1998, a jury trial found the Petitioner guilty on all four counts. (Dkt. No. 28.)

On July 13, 1998, former District Judge Irma E. Gonzalez[2] sentenced Petitioner to 370-months in prison. (Dkt. No. 32.) For Counts One and Three of armed bank robbery in violation of § 2113(a) and (d), the Court imposed concurrent, 70-months in prison sentences for both charges. (*Id.*) Count Two, the first violation of § 924(c)(1)(A), included a mandatory minimum sentence of 60-months, consecutive to any other counts. *See* 18 U.S.C. § 924(c)(1)(A)(i). Count Four, the second violation of § 924(c)(1)(A), carried a minimum sentence of 240-months in prison. (*Id.*) Altogether, the Petitioner was sentenced to 370-months in prison. (Dkt. No. 32.) The Petitioner appealed his conviction. (Dkt. No. 34.) On December 7, 1999, the Ninth Circuit affirmed the conviction. *United States v. Ngo*, 203 F.3d 833 (9th Cir. 1999) (unpublished).

On June 20, 2016, the Petitioner filed a motion asking this Court to re-sentence

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[1] "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; . . . shall be fined under this title or imprisoned not more than twenty years, or both. 18 U.S.C. § 2113(a). "Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both." 18 U.S.C. § 2113(d).

[2] The case was transferred to the undersigned judge on June 20, 2016. (Dkt. No. 48.)

him under the recent United States Supreme Court's ruling in *Johnson v. United States*, in which the Court held the residual clause of 18 U.S.C. § 924(e) void for vagueness. *Johnson v. United States*, 135 S. Ct. 2551, 2555 (2015).

LEGAL STANDARD

Under 28 U.S.C. § 2255(a), a federal prison may seek to vacate, set aside, or correct his sentence "on the ground that the sentence was imposed in violation of the Constitution or the laws of the United States, or that the court 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). To justify relief under § 2255, a federal prisoner must assert a constitutional or jurisdictional violation, or a "fundamental defect which inherently results in complete miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure." *United States v. Timmreck*, 441 U.S. 780, 783 (1979) (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)).

DISCUSSION

Petitioner argues he should not have been convicted of, or sentenced for the two gun charges under 18 U.S.C. § 924(c)(1)(A) because his conviction of armed bank robbery in violation of 18 U.S.C. §§ 2113(a) and (d) is no longer a "crime of violence" as defined under 18 U.S.C. § 924(c). Specifically, Petitioner contends federal armed bank robbery in violation of §§ 2113 (a) and (d), cannot be classified as a "crime of violence" under the "elements clause" based on intervening Supreme Court and Ninth Circuit

authority. Next, Petitioner argues that armed bank robbery is not a crime of violence under the residual clause of § 924(c) because *Johnson* held that a similar clause under the Armed Career Criminal Act is void for vagueness. Thus, Petitioner asks the Court to conclude that the residual clause of § 924(c)(3) is unconstitutionally vague.

Respondent first argues that Petitioner has procedurally defaulted on his claim. Next, Respondent asks for a limited stay because the Ninth Circuit is considering the constitutionality of the residual clause of § 924(c) in *United States v. Begay*, No. 14-10080.[3] Furthermore, Respondent argues that the holding in *Johnson* does not apply and even if *Johnson* applied to § 924(c), only the "residual clause" of § 924(c)(3)(B) is invalidated and armed bank robbery still remains a crime of violence under the "elements clause" of § 924(c)(3)(A).

In *Johnson v. United States*, the United States Supreme Court held that imposing an increased sentence under the residual clause of the Armed Career Criminal Act of 1984 ("ACCA") for "any crime punishable by imprisonment for a term exceeding one year . . . that – (ii) otherwise involves conduct that presents a serious potential risk of physical injury to another", 18 U.S.C. § 924(e)(2)(B)(ii), violates the constitutional right to due process. *Johnson,* 135 S. Ct. at 2555. The ACCA "imposes a special mandatory fifteen year prison term upon felons who unlawfully possess a firearm and who also have three or more previous convictions for committing certain drug crimes or 'violent

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[3] In *United States v. Begay*, the Ninth Circuit is considering whether 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague under *Johnson*.

felon[ies].'" *Begay v. United States*, 128 S.Ct. 1581, 1583 (2008). The ACCA's defines a "violent felony" as follows:

> [A]ny 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[4], or otherwise involves conduct that presents a serious potential risk of physical injury to another.[5]

18 U.S.C. § 924(e)(2)(B).

In *Johnson*, the Court held the ACCA's residual clause, is void for vagueness and "imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process." *Johnson,* 135 S. Ct. at 2563. The Court expressly stated the decision does not apply to the remainder of the ACCA's definition of violent felony or the four enumerated offenses. *Id.* Therefore, notwithstanding the unconstitutionality of the residual clause, a defendant may still be classified as a career offender under the ACCA if his/her conviction is a crime of violence under the "elements clause." *See id.*

Petitioner's enhanced sentence under § 924(c)(1)(A) was implicitly predicated on the finding of federal bank robbery, in violation of §§ 2113(a) and (d), as a "crime of violence" under § 924(c)(3). § 924(c)(1)(A) provides for additional mandatory minimum

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[4] This section is referred to as the "enumerated offenses clause." *See Johnson*, 135 S. Ct. at 2559, 2563.
[5] This section has become known as the "residual clause." *Id.* at 2556.

sentences for a defendant "who during or in relation to any crime of violence . . . uses or carries a firearm, or who in the furtherance of any such crime, possesses a firearm . . . ." 18 U.S.C. § 924(c)(1)(A). "Crime of violence" is defined under 18 U.S.C. § 924(c)(3) 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).[6]

To determine whether armed bank robbery, the predicate offense, is a crime of violence under § 924(c)(3), courts apply the "categorical approach." *See Taylor v. United States*, 495 U.S. 575, 600 (1990); *see also United States v. McNeal*, 818 F.3d 141, 152 (4th Cir. 2016) (applying categorical approach to whether armed bank robbery is a crime of violence). The court must "determine whether the statute of conviction is categorically a 'crime of violence' by comparing the elements of the statute of conviction with the generic federal definition." *United States v. Sahagun-Gallegos*, 782 F.3d 1094, 1098 (9th Cir. 2015). Courts look "only to the statutory definitions of the prior offense, and not to the particular facts underlying those convictions." *Taylor*, 495 U.S. at 600. The court asks whether the elements of the offense criminalizes "a broader swath of conduct" than

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[6] Courts have referred to subsection (A) as the "elements" or "force" clause and subsection (B) as the "residual clause." *United States v. Abdul-Samad*, No. 10-CR-2792 WQH, 2016 WL 5118456, at *3 (S.D. Cal. Sept. 21, 2016).

the conduct covered by the definition of crime of violence; if it does, the offense cannot qualify as a crime of violence, even if the facts underlying the defendant's own conviction might satisfy the definition. *United States v. Dominguez-Maroyoqui*, 748 F.3d 918, 920 (9th Cir. 2014).

Armed bank robbery requires the following elements:

> (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.

Wright, 215 F.3d at 1028.

Petitioner argues that armed bank robbery is not a crime of violence as it does not require the use or threatened use of "violent physical force" as defined by *Johnson v. United States*, 559 U.S. 133, 140 (1910) (*Johnson I*) because "intimidation" falls short of this definition. Respondent contends that *Johnson I* has not altered the Ninth Circuit's holding in *Wright* that armed bank robbery is a crime of violence.

In *Wright*, the Ninth Circuit held that armed bank robbery by "force, violence, or intimidation" under 18 U.S.C. § 2113(a) & (d), constitutes a crime of violence under the elements clause, 18 U.S.C. § 924(c)(3), since it has as an element the use, attempted use or threatened use of force. *United States v. Wright*, 215 F.3d 1020, 1028 (9th Cir. 2000) (holding armed bank robbery was a crime of violence and thus an underlying predicate

offense for conviction of using or carrying a firearm under § 924(c)); *United States v. Selfa*, 918 F.2d 749, 751 (9th Cir. 1990) (bank robbery under § 2113(a) is a "crime of violence" under the elements clause of USSG § 4B1.2(a)[7]). In *Selfa*, the Ninth Circuit held that robbery under 18 U.S.C. § 2113(a) is a crime of violence within the meaning of USSG § 4B1.2(a) because intimidation means "willfully to take, or attempt to take, in such a way that would put an ordinary, reasonable person in fear of bodily harm." *Selfa*, 918 F.2d at 751. Courts in other circuits have held that taking "by intimidation" involves the threat to use violent force. *United States v. McNeal*, 818 F.3d 141, 153 (4th Cir. 2016) (citing to *Selfa* in support); *United States v. Jones*, 932 F.2d 624, 625 (7th Cir. 1991) ("There is no 'space' between 'bank robbery' and 'crime of violence.' A defendant properly convicted of bank robbery is guilty per se of a crime of violence, because violence in the broad sense that includes a merely threatened use of force is an element of every bank robbery."). Therefore, "by force and violence", an element of armed bank robbery, requires the use of physical force, an element of the definition of crime of violence, and "by intimidation", an element of armed bank robbery, requires the threatened use of physical force, an element of the definition of crime of violence. *McNeal,* 818 F.3d at 153. Accordingly, the predicate crime of federal armed bank robbery is categorically a crime of violence under § 924(c)(3) since it includes as an

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[7] USSG 4B1.2(a) defines "crime of violence" in the same exact language as § 924(c)(3).

element "the use, attempted use, or threatened use of physical force." *See Wright*, 215 F.3d at 1028; *McNeal*, 818 F.3d at 153.

Post-*Johnson*, courts in the Ninth Circuit have continued to hold that the "by intimidation" language in 18 U.S.C. § 2113(a), satisfies the definition of "crime of violence" under § 924(c)(3)(A)'s elements clause. *See United States v. Steppes*, 651 Fed. App'x 697 (9th Cir. June 10, 2016) (holding bank robbery and attempted bank robbery are categorically crimes of violence under USSG § 4B1.2(a)(1)); *United States Inoshita*, Cr. No. 15-159-JMS, 2016 WL 2977237, at *5 (D. Haw. May 20, 2016); *United States v. Howard*, 650 Fed. App'x. 466, 468 (9th Cir. 2016) ("Because bank robbery by 'intimidation'– which is defined as instilling fear of injury-qualifies as a crime of violence, Hobbs Act robbery by means of 'fear of injury' also qualifies as crime of violence."). Therefore, Petitioner's argument that *Johnson I* undermined the holding in *Wright* that armed robbery is a crime of violence is without merit.

Next, Petitioner contends that armed bank robbery is no longer a crime of violence because it does not require the intentional use or threatened use of physical force as announced in *Leocal v. Ashcroft*, 543 U.S. 1, 9-10 (2004). In *Leocal*, the Supreme Court held that a Florida DUI offense causing serious bodily injury was not a crime of violence under the force clause of 18 U.S.C. § 16[8] because the offense could be committed through negligent or accidental conduct. *Id.* at 9. Because state DUI statutes lack a mens

[8] The force clause under 18 U.S.C. § 16 defines "crime of violence" with the same language as § 924(c)(3).

rea requirement or require only a showing of negligence, it cannot quality as a crime of violence under the force clause of 18 U.S.C. § 16. *Id.* at 6. Subsequently, the Ninth Circuit extended the holding of *Leocal* to reckless or grossly negligent use of force and held that a state misdemeanor domestic violence assault was not a crime of violence under 18 U.S.C. § 16(a) warranting removal because it could be committed recklessly. *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1129-32 (9th Cir. 2006) (en banc). However, bank robbery under § 2113(a) requires "proof of *general intent*—that is that the defendant possessed knowledge with respect to the *actus reus* of the time (here, the taking of property of another by force and violence or intimidation)." *Carter v. United States*, 530 U.S. 255, 268 (2000) (emphasis in original); *see Selfa*, 918 F.2d at 951 (bank robbery by intimidation requires a willful taking). Therefore, Petitioner's argument that armed bank robbery does not require intent is not legally supported.

Even after the ruling in *Johnson,* district courts in the Ninth Circuit have held that bank robbery still remains a crime of violence under 18 U.S.C. § 924(c)(3)'s elements clause. *See Daniels v. United States*, No. 11-CR-470-H-2, 2016 WL 6680038, at *3 (S.D. Cal. Nov. 14, 2016) (holding armed bank robbery qualifies as a crime of violence under § 924(c)(3)'s force clause); *United States v. Weilburg*, 10cr75-RCJ-RAM, 2017 WL 62522, at *2 (D. Nev. Jan. 4, 2017); *Abdul-Samad*, 2016 WL 5118456, at *5 (holding armed 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)); *United States v. Charles*, 006cr26 JWS, 2016 WL 4515923, at *1 (D. Ala. Aug. 29, 2016); *Inoshita*, 2016 WL 2977237, at

*5 (holding bank robbery under § 2113(a) remains a crime of violence after *Johnson*); *United States v. Watson*, Cr. Nos., 14-751-01, -02 DKW, 2016 WL 866298, *7 (D. Haw. March 2, 2016) (holding § 2113(a) and (d) remain a "crime of violence" under § 924(c)(3)(A) after *Johnson*).

Various circuit court decisions have also affirmed this holding. *See In re Sams*, 830 F.3d 1234, 1238-39 (11th Cir. 2016); *In re Hines*, 824 F.3d 1334, 1337 (11th Cir. 2016) ("As noted, *Johnson* rendered the residual clause of § 924(e) invalid. It spoke not at all about the validity of the definition of a crime of violence found in § 924(c)(3)."); *Holder v United States*, 836 F.3d 891, 892 (8th Cir. 2016); *United States v. Armour*, 840 F.3d 904, 907 (7th Cir. 2016); *United States v. McBride*, 826 F.3d 293, 296 (6th Cir. 2016); *United States v. McNeal*, 818 F.3d 141, 152-53 (4th Cir. 2016).

Wright remains clear precedent that armed bank robbery is a crime of violence under § 924(c)(3)(A). For this reason, Petitioner's conviction for armed bank robbery under §§ 2113(a) and (d) is a crime of violence under the elements clause and is not affected by *Johnson*.[9]

CERTIFICATE OF APPEALABILITY

Rule 11 of the Federal Rules Governing Section 2255 Cases, "[t]he district court

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[9] Since the Court denies the Petitioner's §2255 motion based on the conclusion that armed bank robbery under §§ 2113(a) and (d) is a crime of violence under § 924(c)(3)(A), the Court declines to address Petitioner's additional challenge that the residual clause of § 924(c)(3)(B) is unconstitutionally vague. The Court also declines to address Respondent's additional argument that Petitioner procedurally defaulted his claim. Moreover, based on the Court's ruling, the Court also DENIES the government's motion to stay the proceedings pending resolution by the Ninth Circuit in the case of *United States v. Begay* since Petitioner was not sentenced under the residual clause.

must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." A certificate of appealability should be issued only where the petition presents "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A certificate of appealability "should issue when the prisoner shows . . . that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Although the Court denies the Petitioner's § 2255 motion on merits, the Court recognizes a reasonable jurists could find the Court's assessment of the Petitioner's claim debatable. Thus, the Court **GRANTS** a certificate of appealability.

CONCLUSION

The Court DENIES Petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C § 2255. The Court GRANTS Petitioner a certificate of appealability.

IT IS SO ORDERED.

Dated: February 8, 2017

Hon. Gonzalo P. Curiel
United States District Judge