No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ASIM SHAKIR DANIELS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

KARA HARTZLER
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

Attorneys for Petitioner

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

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

Petitioner Asim Shakir Daniels 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. Daniels's petition for a writ of habeas corpus under 28 U.S.C. § 2255 in a memorandum disposition. *See United States v. Daniels,* 744 F. App'x 528 (9th Cir. 2018) (attached here as Appendix A).

JURISDICTION

On December 5, 2018, the Court of Appeals denied Mr. Daniels'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 WRIT

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 2012, Mr. Daniels pleaded guilty to multiple counts of bank robbery under 18 U.S.C. § 2113 and brandishing a firearm in relation to a crime of violence under 18 U.S.C. § 924(c). The district court sentenced Mr. Daniels to 57 months for the bank robbery and 84 months 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. Daniels 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. Daniels 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. Daniels 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. Daniels's Motion to Vacate in a written order, finding that no higher intervening authority had abrogated *Wright*, but it granted Mr. Daniels a certificate of appealability. Mr. Daniels 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. Daniels*, 744 F. App'x 528 (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. Daniels'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. Daniels 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 5, 2019

KARA HARTZLER
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

Attorneys for Petitioner

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. ASIM SHAKIR DANIELS, Defendant-Appellant.	No. 16-56707 D.C. Nos. 3:16-cv-01454-H 3:11-cr-00470-H MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Marilyn L. Huff, 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.

Asim Shakir Daniels 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).

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

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

AFFIRMED.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ASIM SHAKIR DANIELS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

CASE NO. 11-CR-470-H-2
16-CV-1454-H

ORDER:

(1) DENYING § 2255 MOTION TO VACATE, SET ASIDE, OR CORRECT THE SENTENCE; AND

[Doc. No. 163 in 11-cr-470.]

(2) GRANTING CERTIFICATE OF APPEALABILITY

On May 31, 2016, Petitioner/Defendant Asim Shakir Daniels, represented by Federal Defenders, filed in the United States District Court for the Southern District of California a motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct the sentence by a person in federal custody. (Doc. No. 163.) On August 24, 2016, the Government filed a response in opposition to Defendant's motion. (Doc. No. 185.) On August 29, 2016, Defendant filed a reply in support of his motion. (Doc. No. 186.) The Court held a hearing on the matter on October 31, 2016. Michael E. Lasater and Helen H. Hong appeared for the Government. Benjamin P. Davis and Kara Lee Hartzler

appeared for Defendant. On November 7, 2016, the Government filed an amended response in opposition to Defendant's motion. (Doc. No. 194.) On November 8, 2016, Defendant filed an amended reply in support of his motion. (Doc. No. 195.) For the reasons discussed below, the Court denies Defendant's § 2255 motion.

Background

On February 1, 2012, the Government filed a twelve-count superceding indictment charging Defendant in count 3 with aiding and abetting bank robbery in violation of 18 U.S.C. § 2113(a); in count 8 with bank robbery in violation of 18 U.S.C. § 2113(a); in counts 9 and 10 with armed bank robbery in violation of 18 U.S.C. § 2113(d); and in counts 11 and 12 with brandishing a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii). (Doc. No. 25.) On November 1, 2012, Defendant pled guilty, pursuant to a written plea agreement, to counts 8, 9, 10, and 12 of the superceding indictment. (Doc. Nos. 65, 67, 69, 76.)

On February 4, 2013, the Government filed a sentencing summary chart, recommending 70 months in custody for the bank robbery counts and the mandatory 84 months in custody for the brandishing a firearm count to run consecutive, for a total of 154 months in custody. (Doc. No. 107.) On February 5, 2013, Defendant filed a sentencing summary chart, recommending 46 months in custody for the bank robbery counts and the mandatory 84 months in custody for the brandishing a firearm count to run consecutive, for a total of 130 months in custody. (Doc. No. 109.)

On February 11, 2013, the Court held a sentencing hearing. (Doc. Nos. 111, 124.) At the hearing, the Court calculated Defendant's total offense level as 23 and his criminal history category as III, resulting in an advisory guidelines range of 57-71 months for the bank robbery counts. (Doc. No. 124 at 14, 19.) The Court sentenced Defendant to 57 months in custody for each of the bank robbery counts to run concurrently and the mandatory 84 months in custody for the brandishing a firearm count to run consecutive to the other counts, resulting in a total custodial sentence of 141 months. (Id. at 19-22.) The Court entered judgment on February 14, 2013. (Doc.

No. 112.) Defendant did not appeal his conviction or sentence.

By the present motion, Defendant moves pursuant to 28 U.S.C. § 2255 to vacate his federal prison sentence. (Doc. No. 163.) In the motion, Defendant argues that his 84-month sentence for brandishing a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii) should be vacated because under the Supreme Court's recent decision in Johnson v. United States, 135 S. Ct. 2551 (2015), armed bank robbery under 18 U.S.C. § 2113(d) no longer qualifies as a crime of violence under § 924(c)(3). (Id. at 1-2, 4-11.)

Discussion

I. Legal Standards for § 2255 Motion

A sentencing court may "vacate, set aside or correct the sentence" of a federal prisoner if it concludes that "the sentence was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255(a). Claims for relief under § 2255 must be based on a constitutional or jurisdictional error, "'a fundamental defect which inherently results in a complete miscarriage of justice,'" or a proceeding "'inconsistent with the rudimentary demands of fair procedure.'" United States v. Timmreck, 441 U.S. 780, 783-84 (1979) (quoting Hill v. United States, 368 U.S. 424, 428 (1962)). A district court may deny a § 2255 motion without holding an evidentiary hearing if "the petitioner fails to allege facts which, if true, would entitle him to relief, or the petition, files and record of the case conclusively show that he is entitled to no relief." United States v. Rodriguez-Vega, 797 F.3d 781, 792 (9th Cir. 2015); see 28 U.S.C. § 2255(b); United States v. Quan, 789 F.2d 711, 715 (9th Cir. 1986) ("Where a prisoner's [§ 2255] motion presents no more than conclusory allegations, unsupported by facts and refuted by the record, an evidentiary hearing is not required.").

II. Analysis

In Johnson, the Supreme Court considered the constitutionality of the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B)(ii). See Johnson, 135 S. Ct. at 2555. Under the residual clause, the ACCA defined the term

"violent felony" to include "any crime punishable by imprisonment for a term exceeding one year . . . that . . . involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B); accord Johnson, 135 S. Ct. at 2555–56. The Supreme Court held the provision void for vagueness, and, therefore, also held that "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 ("We are convinced that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges. Increasing a defendant's sentence under the clause denies due process of law."). Subsequently, in Welch v. United States, 136 S. Ct. 1257, 1268 (2016), the Supreme Court held that "Johnson announced a substantive rule that has retroactive effect in cases on collateral review."

In the present motion, Defendant argues that under Johnson, armed bank robbery under 18 U.S.C. § 2113(d) is no longer a "crime of violence" under 18 U.S.C. § 924(c). (Doc. No. 163 at 4-11.) 18 U.S.C. § 924(c)(3) defines the term "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.

Defendant's argument that armed bank robbery no longer qualifies as a crime of violence under § 924(c)(3) is two-part. First, Defendant argues that armed bank robbery cannot qualify as a crime of violence under the definition set forth in subdivision (B) because that clause is void for vagueness in light of the Supreme Court's decision in Johnson. (Doc. No. 163 at 4-5.) Second, Defendant argues that armed bank robbery also does not qualify as a crime of violence under the definition set forth in subdivision (A), which Defendant refers to as the "force clause" because, as Defendant contends, armed bank robbery does not require proof of violent physical

force or proof of the intentional use or threatened use of physical force. (Id. at 6-11.)

Defendant has failed to show that he is entitled to post-conviction relief because under Ninth Circuit precedent, armed bank robbery qualifies as a crime of violence under § 924(c)(3)'s force clause. In United States v. Wright, 215 F.3d 1020, 1028 (9th Cir. 2000), the Ninth Circuit held that armed bank robbery qualifies as a crime of violence under § 924(c)(3)'s force clause "because one of the elements of the offense is a taking 'by force and violence, or by intimidation.'" See also United States v. Selfa, 918 F.2d 749, 751 (9th Cir. 1990) ("[P]ersons convicted of robbing a bank 'by force and violence' or 'intimidation' under 18 U.S.C. § 2113(a) have been convicted of a 'crime of violence' within the meaning of Guideline Section 4B1.1."). This Court is bound by the Ninth Circuit's decision in Wright. See Hart v. Massanari, 266 F.3d 1155, 1175 (9th Cir. 2001) ("A district court bound by circuit authority . . . has no choice but to follow it.").

Defendant argues that intervening Supreme Court and en banc Ninth Circuit cases have overruled Wright's holding. (Doc. No. 163 at 6.) But several district courts within the Ninth Circuit have continued to follow Wright's holding post-Johnson and subsequent to the other cases cited in Defendant's motion. See, e.g., United States v. Abdul-Samad, No. 10CR2792 WQH, 2016 WL 5118456, at *4 (S.D. Cal. Sept. 21, 2016); United States v. Watson, No. 14-00751-01 DKW, 2016 WL 866298, at *6-7 (D. Haw. Mar. 2, 2016); United States v. Charles, No. 3:06-CR-00026 JWS, 2016 WL 4515923, at *1 (D. Alaska Aug. 29, 2016); United States v. Strandberg, No. 213CR00322RCJVCF1, 2016 WL 2626864, at *2 (D. Nev. May 6, 2016); see also e.g., United States v. Steppes, 651 F. App'x 697, 698 (9th Cir. 2016) (holding post-Johnson that the defendant's conviction for bank robbery in violation of § 2113(a) categorically qualifies as a crime of violence under U.S.S.G. § 4B1.2(a)). In addition, both the Fourth Circuit and the Eleventh Circuit have held post-Johnson that armed bank robbery qualifies as a crime of violence under § 924(c)(3)'s force clause. See, e.g., United States v. McNeal, 818 F.3d 141, 157 (4th Cir. 2016) ("[B]ank robbery under 18

U.S.C. § 2113(a) is a 'crime of violence' within the meaning of the force clause of 18 U.S.C. § 924(c)(3)."); In re Hines, 824 F.3d 1334, 1337 (11th Cir. 2016) ("[A] conviction for armed bank robbery clearly meets the requirement for an underlying felony offense, as set out in § 924(c)(3)(A)."); see also Allen v. United States, No. 16-2094, __ F.3d __, 2016 WL 4728038, at *1 (8th Cir. July 26, 2016) ("[B]ank robbery in violation of 18 U.S.C. § 2113(a) and (e) is a 'crime of violence' under 18 U.S.C. § 924(c)(3)(A)."). The Court finds the reasoning and conclusions set forth in these decisions persuasive. Accordingly, because armed bank robbery qualifies as a crime of violence under § 924(c)(3)'s force clause, Defendant has failed to show that his sentence was imposed in violation of the Constitution or the laws of the United States. The Court denies Defendant's § 2255 motion.[1]

VI. Certificate of Appealability

An appeal cannot be taken from the district court's denial of a § 2255 motion unless a certificate of appealability is issued. See 28 U.S.C. § 2253(c)(1); Muth v. Fondren, 676 F.3d 815, 818 (9th Cir. 2012). A certificate of appealability may issue only if the defendant "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court has denied the claims in a § 2255 motion on the merits, a defendant satisfies the above requirement by demonstrating "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Although the Court denies Defendant's § 2255 motion on the merits, the Court concludes that reasonable jurists could find the Court's assessment of Defendant's claims debatable. Accordingly, the Court grants Defendant a certificate of appealability.

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[1] Because the Court denies Defendant's § 2255 motion on the merits, the Court declines to address the Government's additional arguments that the motion should be denied because Defendant waived his right to collaterally attack his conviction and sentence and procedurally defaulted his claim. (Doc. No. 185 at 5-14; Doc. No. 194 at 4-7.) In addition, the Court denies the Government's request to stay the proceedings. (Doc. No. 185 at 1; Doc. no. 194 at 7-8.)

Conclusion

For the reasons above, the Court denies Defendant's motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. In addition, the Court grants Defendant a certificate of appealability.

IT IS SO ORDERED.

DATED: November 14, 2016

Marilyn L. Huff

MARILYN L. HUFF, District Judge
UNITED STATES DISTRICT COURT