No. _____

IN THE SUPREME COURT OF THE UNITED STATES

GEORGE DJURA JAKUBEC,
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?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Federal Cases

Federal Statutes

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GEORGE DJURA JAKUBEC,
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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 George Djura Jakubec 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 March 15, 2019.

OPINION BELOW

The Court of Appeals denied Mr. Jakubec's motion for a certificate of appealability of the denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2255 in a dispositive order. *See United States v. Jakubec,* Case No. 18-55874 (9th Cir. Mar. 15, 2019) (attached here as Appendix A).

JURISDICTION

On March 15, 2019, the Court of Appeals denied Mr. Jakubec's motion for a certificate of appealability. *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 2010, Mr. Jakubec pleaded guilty to two counts of using and carrying a firearm in furtherance of a crime of violence under 18 U.S.C. § 924(c). The underlying predicate offenses were two counts of bank robbery under 18 U.S.C. § 2113. Implicitly finding that the bank robberies qualified as "crimes of violence"

under § 924(c)(1)(A), the district court imposed the mandatory, consecutive sentences for a total of 30 years in prison.

Several years later, this Court held in *Johnson v. United States*, 135 S. Ct. 2551 (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. Jakubec 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. Jakubec 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. Jakubec acknowledged that the Ninth Circuit had previously held that bank robbery satisfied the force clause. But he argued that this Court's intervening precedent had since clarified that the force clause required "violent physical force" such that the Ninth Circuit's precedent no longer controlled.

The district court denied Mr. Jakubec's Motion to Vacate in a written order, relying on the Ninth Circuit's decision in *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018). It also denied Mr. Jakubec a certificate of appealability. Mr. Jakubec then timely appealed this denial to the Ninth Circuit. On March 15, 2019, the Ninth Circuit denied this request, stating only that Mr. Jakubec had not a substantial showing of the denial of a constitutional right. *See* Appendix A. 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. Jakubec'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. Jakubec 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. at 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 cJakubecly, 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: June 10, 2019

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APPENDIX A

FILED

MAR 15 2019

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. GEORGE DJURA JAKUBEC, Defendant-Appellant.	No. 18-55874 D.C. Nos. 3:16-cv-01597-LAB 3:10-cr-04828-LAB-1 Southern District of California, San Diego ORDER

Before: CANBY and WARDLAW, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 5) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *United States v. Watson*, 881 F.3d 782 (9th Cir.), *cert. denied*, 139 S. Ct. 203 (2018).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. GEORGE DJURA JAKUBEC, Defendant.	CASE NO. 10CR4828-LAB **ORDER DENYING MOTION TO VACATE SENTENCE UNDER 28 U.S.C. § 2255**

Background

In 2011 George Jakubec plead guilty to two counts of knowingly carrying and brandishing a firearm during the commission and attempted commission of bank robbery, violations of 18 U.S.C. § 924(c). As part of the plea bargain he negotiated, he explicitly waived his rights to appeal or to collaterally attack his convictions, provided he was sentenced to no more than 30 years in custody. Although Jakubec faced a sentence of up to life imprisonment, the Court followed the plea bargain and imposed a 30 year sentence, which happened to be the statutory minimum required sentence for the two offenses.

In 2016, Jakubec filed a motion pursuant to 28 U.S.C. § 2255 to vacate his sentence. He argued that a subsequently decided case, *Johnson v. United States*, __ U.S. __, 135 S. Ct. 2551 (2015), rendered his sentence unconstitutional. *Johnson* invalidated the so-

called residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e), finding the language of the clause was too vague to give adequate notice of what conduct was prohibited. Section 924(c) also includes a residual clause with similar (but not exactly the same) language. Jakubec argued in his motion that the language of the residual clause in § 924(c) is close enough to the language condemned in *Johnson* so as to also be considered unconstitutional.

Around the same time Jakubec filed his motion to vacate, the Supreme Court agreed to consider another case, *Lynch v. Dimaya*, __ U.S. __, 2016 WL 3232911 (Sept. 29, 2016), raising a vagueness challenge to 18 U.S.C. § 16, which also contains a residual clause with language similar to that in the Armed Career Criminal Act. This court stayed resolution of Jakubec's motion pending a decision in *Dimaya*. On April 17 of this year, the Supreme Court decided *Dimaya*, and declared that the residual clause in Section 16 was also unconstitutionally vague. In consideration of *Dimaya*, Jakubec renewed his motion to vacate his convictions.

Analysis

Section 924(c) prohibits carrying or brandishing a firearm while committing a "crime of violence." The statute defines "crime of violence" two ways. Either the offense is a felony that:

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

The first clause of the definition, clause (A), is known as the "force clause," while clause (B) is known as the "residual clause." *United States v. Dawson*, __ F. Supp. __, 2018 WL 1082839 at *3 (D. Oregon, Feb. 27, 2018). Jakubec's argument is that this court implicitly relied on clause (B) when it found that armed bank robbery was "crime of violence," and that clause (B) is unconstitutionally vague. The record doesn't support the assumption that the court relied on clause (B) in accepting Jakubec's guilty pleas. But it doesn't matter

in any event because armed bank robbery is categorically a "crime of violence" under clause (A). *United States v. Watson*, 881 F.3d 782, 786 (9th Cir. 2017).

During Jakubec's plea colloquy, the court explained the nature of the § 924(c) charge to him:

> . . . . the plea agreement says you are going to be pleading guilty to using a firearm during a bank robbery on November 13, 2009. Then, again, using a firearm during a second bank robbery on – attempted bank robbery on November 13, 2009 . . . .
>
> Let me explain the nature of the charges to which you are pleading guilty.
>
> This crime of using a firearm during a crime of violence would require the government to prove that you intended on, in the case of the completed bank robbery, robbing a bank November 13.
>
> It would have to be a federal crime, so they have to prove that it was a federally insured bank and that you intended *by force* or intimidation or fear to take money from that bank, and that in the course of the bank robbery that you carried and brandished and used a firearm . . . .
>
> The second charge, Mr. Jakubec, is the same. It lists a different underlying crime. That is, attempted bank robbery. They say that that occurred on November 27, 2009.
>
> Again, if that were to go to trial, they'd have to prove the elements of attempted bank robbery. They'd have to show it was a federally insured bank and that you went in and *by force*, fear, and intimidation tried to get money that didn't belong to you. And then in the course of doing that, that you used a firearm. You carried, brandished, and used a firearm, pointed it at a teller or used it in some fashion . . . .

Reporter's Transcript of Jakubec's Guilty Pleas, March 14, 201, pp. 4-6 (emphasis added).

Jakubec's contention of unconstitutionality focuses exclusively on the residual clause of section 924(c) and ignores the force clause. That focus is inapt. The court told Jakubec during the change of plea colloquy that the government had to prove that he committed an underlying "crime of violence," distinctly referring twice to the use of *force* in its explanation of the nature of bank robbery. But even had the court relied on clause (B) of § 924(c) in accepting Jakubec's guilty pleas – and assuming that the language of clause (B) is unconstitutional vague – any error was harmless because armed bank robbery is categorically a "crime of violence" under clause (A). *Dawson*, 2018 WL 1082839 at *6 *citing Watson*, 881 F.3 at 784-85. In other words, by admitting that he committed the crimes of

bank robbery and attempted bank robbery, Jakubec explicitly admitted that he committed "crimes of violence." His convictions for violating § 924(c) were lawful and remain so under clause (A), and he has failed to demonstrate any legal basis for vacating them. Because his convictions aren't "illegal," *United States v. Torres*, 828 F.3d 1113, 1125 (9th Cir. 2016), Jakubec's valid waiver of collateral attack forecloses his challenge and compels the denial of his motion.

Jakubec's motion to vacate his convictions is **DENIED.**

IT IS SO ORDERED.

DATED: May 1, 2018

Larry A. Burns

HONORABLE LARRY ALAN BURNS
United States District Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. GEORGE DJURA JAKUBEC, Defendant.	CASE NO. 10cr4828-LAB **ORDER DENYING CERTIFICATE OF APPEALABILITY**

Three months ago, the Court denied George Jakubec's motion to vacate his 30-year sentence for armed bank robbery under 18 U.S.C. § 924(c). Jackubec can appeal that order only if he's "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253; *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997). He hasn't made such a showing for the reasons discussed in the Court's previous order. In short, Jackubec argued § 924(c)'s residual clause defined "crime of violence" in unconstitutionally vague terms. But under § 924(c)'s force clause, armed bank robbery is categorically a crime of violence. *United States v. Watson*, 881 F.3d 782, 786 (9th Cir. 2018). Since Jackubec was convicted and sentenced under the force clause, he hasn't made a substantial showing of the denial of a constitutional right. A certificate of appealability is **DENIED**.

IT IS SO ORDERED.

Dated: July 23, 2018

HONORABLE LARRY ALAN BURNS
United States District Judge