No. _____

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IN THE SUPREME COURT
OF THE UNITED STATES

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MICHAEL BAIRD JORDAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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On Petition For Writ Of Certiorari To
The United States Court Of Appeals For The Ninth Circuit

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# PETITION FOR WRIT OF CERTIORARI

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Elizabeth G. Daily
Counsel of Record
Assistant Federal Public Defender
Email: liz_daily@fd.org
Stephen R. Sady
Chief Deputy Federal Public Defender
Email: steve_sady@fd.org
101 SW Main Street, Suite 1700
Portland, Oregon 97204
(503) 326-2123

Attorneys for Petitioner

## QUESTION PRESENTED ON REVIEW

Given this Court's holding in *Carter v. United States*, 530 U.S. 255, 268 (2000), that federal armed bank robbery under 18 U.S.C. § 2113(a) and (d) is a general intent rather than a specific intent crime, and given decades of circuit precedent holding that intimidation under the statute is judged by the reasonable reaction of the listener rather than by the defendant's intent, could reasonable jurists conclude that federal armed bank robbery by intimidation is not a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A) because the offense fails to require the intentional, or even reckless, use, attempted use, or threatened use of violent physical force?

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## Petition for Certiorari

Petitioner Michael Baird Jordan respectfully petitions for a writ of certiorari to review the final order of the United States Court of Appeals for the Ninth Circuit in Case No. 19-35577, denying a certificate of appealability from the denial of relief under 28 U.S.C. § 2255.

## Order Below

The Ninth Circuit's unpublished order denying the petitioner's motion for a certificate of appealability from the denial of his 28 U.S.C. § 2255 motion is attached at Appendix 1. The district court's unpublished order denying Mr. Moore's 28 U.S.C. § 2255 motion and declining to issue a certificate of appealability is attached at Appendix 2.

## Jurisdictional Statement

The Ninth Circuit Court of Appeals entered its final order in this case on September 16, 2019. This petition is timely under Supreme Court Rule 13.3. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## Relevant Constitutional and Statutory Provisions

The statute providing for collateral review of federal sentences is 28 U.S.C. § 2255, which is attached at Appendix 13. Under 28 U.S.C. § 2253(c), a movant cannot appeal the denial of relief under 28 U.S.C. § 2255 without a certificate of appealability:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C.A. § 2253(c).

Two statutory predicate offense definitions are at issue in this case—the "crime of violence" definition in 18 U.S.C. § 924(c), and the "violent felony" definition in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e).

Under 18 U.S.C. § 924(c)(1)(A), attached at Appendix 10, any person who uses a firearm "during and in relation to any crime of violence or drug trafficking crime" commits an enhanced crime and is subject to a mandatory consecutive sentence. The relevant portion of § 924(c) defining a "crime of violence" has two clauses, commonly referred to as the force clause and the residual clause:

(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.

In the ACCA, attached at Appendix 12, Congress prescribed a greater minimum and maximum sentence for certain firearms offenders with prior convictions for a "violent felony" or a "serious drug offense":

> (e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

18 U.S.C. § 924(e)(1). The ACCA defines "violent felony" similarly to the "crime of violence" definition in § 924(c), with a force clause and a residual clause, but adding an enumerated offenses clause as well:

> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, 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, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

18 U.S.C. § 924(e)(2)(B).

In addition to the relevant predicate offense definitions, this case involves the federal bank robbery statute, 18 U.S.C. § 2113(a) and (d), which 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.

**Summary of Reasons for Granting the Writ**

Mr. Jordan requests certiorari to bring internal consistency to federal circuit precedent interpreting the intimidation element of federal armed bank robbery under 28 U.S.C. § 2113(a) and (d) and to reconcile that precedent with this Court's interpretation of the bank robbery statute to encompass a minimal general intent requirement in *Carter v. United States*, 530 U.S. 255, 268 (2000).

Circuit courts continue to erroneously hold that federal armed bank robbery by intimidation qualifies as a crime of violence under the force clause of § 924(c) and analogous sentencing enhancement provisions. *See, e.g.*, *United States v. Watson*, 881 F.3d 782, 785 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 203 (Oct. 1, 2018) (holding federal bank robbery is a crime of violence under § 924(c)(3)(A)); *United States v. McNeal*, 818 F.3d 141, 157 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 164 (2016) (same); *United States v. Brewer*, 848 F.3d 711, 716 (5th Cir. 2017) (holding that federal bank robbery is a crime of

violence under U.S.S.G. § 4B1.2(a)(1)); *Ovalles v. United States*, 905 F.3d 1300 (11th Cir. 2018) (holding that federal carjacking by intimidation is a crime of violence under § 924(c)(3)(A)). However, "intimidation," as broadly construed by this Court and by the circuits for decades, requires no specific intent on the part of the defendant, nor does it require that the defendant communicate an intent to use violence. Thus, under the categorical lens, which considers only the least culpable conduct necessary to satisfy the offense of conviction, bank robbery does not have as an element the "use, attempted use, or threatened use of physical force against the person or property of another" within the meaning of the force clause.

This case presents a question of exceptional importance regarding federal criminal law that requires this Court's guidance. Having a clear and consistent definition of the intimidation element of federal bank robbery is crucial to both the government and the defendant in prosecutions for that offense, and it will assist the courts in efficiently administering the law. Moreover, correctly understanding the scope of the intimidation element of federal bank robbery is at the heart of determining whether the offense qualifies for numerous categorically-defined federal sentencing enhancements for crimes involving intentional violence, as illustrated by this case. The consequences, viewed from either the individual perspective or at a systemic level, are substantial. Certiorari is necessary to ensure that all circuits appropriately exclude offenses committed by "intimidation" as crimes of violence under § 924(c), and respectively, that trial courts appropriately instruct juries regarding the correct offense elements of bank robbery.

## Statement Of The Case

On July 30, 2007, a jury convicted petitioner Michael Baird Jordan on one count each of armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d) (Count 1), using a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c) (Count 2), and felon in possession of a firearm in violation of 18 U.S.C. § 922(g) (Count 3). CR 78 (Jury Verdict).[1] The underlying "crime of violence" named in Count 2 was the armed bank robbery charged in Count 1. CR 5 at 2 (Indictment).

For sentencing purposes, the district court found that Mr. Jordan's criminal history included (1) a June 20, 1966, conviction for federal armed bank robbery, (2) a June 24, 1980, conviction for federal armed bank robbery, and (3) an April 27, 1987, California conviction for 14 felony counts including armed robbery, attempted murder, and assault with a firearm. CR 89 at 3 (Supp. Statement of Reasons).

On Counts 1 and 2, the court sentenced Mr. Jordan to mandatory life imprisonment pursuant to 18 U.S.C. § 3559(c), the "three-strikes" statute. CR 87 (Judgment). Under that law, a person "who is convicted . . . of a serious violent felony shall be sentenced to life imprisonment if . . . the person has been convicted . . . on separate prior occasions" of "[two] or more serious violent felonies[.]" 18 U.S.C. § 3559(c)(1). The court determined that Mr. Jordan's convictions on Counts 1 and 2 qualified as serious violent felonies and

[1] The citation "CR" refers to the court record from the federal district court's electronic case filing system in Case No. 3:10-cr-00297-HZ (D. Or.).

that the defendant's two prior federal armed bank robbery convictions also qualified as serious violent felonies. CR 89 at 6-7. The court imposed the life sentence on Count 2 to run consecutively to the sentence on Count 1 because of the mandate in § 924(c)(1)(D)(ii) that "no term of imprisonment imposed . . . under this subsection shall run concurrently with any other term of imprisonment imposed on the person." CR 89 at 7.

On Count 3, the felon in possession charge, the court found that Mr. Jordan was subject to enhanced punishment under the ACCA because he had three previous convictions for a "violent felony." CR 89 at 3. As a result of the ACCA determination, Mr. Jordan faced a statutorily permissible sentencing range of 15 years to life in prison on Count 3 instead of zero to ten years. 18 U.S.C. § 924(e). The court varied upward from the advisory Sentencing Guidelines range to impose a third life sentence, to run concurrently with the sentence imposed on Count 1. CR 89 at 8.

The Ninth Circuit Court of Appeals affirmed Mr. Jordan's conviction and sentence on December 12, 2008. *United States v. Jordan*, 303 F. App'x 439 (9th Cir. 2008). Following that affirmance, Mr. Jordan filed his first 28 U.S.C. § 2255 motion, which the Court denied on March 11, 2011. CR 134.

Five years later, on June 26, 2015, this Court held that imposing an enhanced sentence under the residual clause of 18 U.S.C. § 924(e), the Armed Career Criminal Act (ACCA), violates the Constitution's guarantee of due process because the residual clause is void for vagueness. *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015). This Court subsequently held that *Johnson* announced a new substantive rule that applies retroactively

to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1263 (2016). In *United States v. Davis*, 139 S. Ct. 2319 (2019), the Court held that the residual clause in § 924(c) is unconstitutionally vague for the same reasons stated in *Johnson*.

On May 10, 2017, after the ruling in *Johnson*, the Ninth Circuit Court of Appeals issued an order authorizing Mr. Jordan to file a second or successive 28 U.S.C. § 2255 because he had made a prima facie showing for relief under *Johnson*. CR 149-1. In the district court proceedings, through counsel, Mr. Jordan argued that his conviction on the Count 2 § 924(c) offense should be vacated and he should be resentenced on the remaining counts because, without the residual clause, federal armed bank robbery does not qualify as a crime of violence under the force clause of § 924(c) or the ACCA. On June 26, 2019, the district court denied relief without holding a hearing, finding federal armed bank robbery to be a crime of violence and a violent felony based on the Ninth Circuit's published opinion in *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018). CR 175 at 6-7. The district court denied a certificate of appealability.

Mr. Jordan timely appealed the denial of § 2255 relief to the Ninth Circuit. CR 177. On September 16, 2019, the Ninth Circuit issued an unpublished order denying a certificate of appealability. AR 3.[2] The order states:

> The request for a certificate of appealability 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

[2] The citation "AR" refers to the appellate record from the Ninth Circuit's electronic case filing system in Case No. 18-35007 (9th Cir.).

(2003); *United States v. Watson*, 881 F.3d 782 (9th Cir.), *cert. denied*, 139 S. Ct. 203 (2018).

AR 3.

Mr. Jordan is currently serving his life sentence at USP Victorville. He is 80 years old.

**Argument**

The denial of Mr. Jordan's 28 U.S.C. § 2255 motion rested on the lower courts' conclusion that, even without the residual clause, federal armed bank robbery under 18 U.S.C. § 2113(a) and (d) satisfies the force clause in § 924(c) and the similar force clause in 18 U.S.C. § 924(e) (hereinafter "the force clause"). The district court and the Ninth Circuit denied a certificate of appealability finding that issue not reasonably debatable based on *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018). But *Watson*, like other similar circuit court authority, deviated from existing Supreme Court and circuit authority interpreting the intimidation element of federal bank robbery. As authoritatively construed by this Court in *Carter*, and as applied by the circuits for decades, intimidation need not be intentional, nor does it require a communicated intent to use violence. Thus, the bank robbery statute does not have "as an element the use, attempted use, or threatened use of physical force against the person or property of another" within the meaning of the force clause.

### A. The Categorical Approach Determines Whether An Offense Satisfies The Force Clause.

To determine if an offense qualifies as a "crime of violence" or a "violent felony" under the force clause of § 924(c) or the ACCA, 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); *see also Davis*, 139 S. Ct. at 2324 (confirming that § 924(c) requires the categorical approach). This Court first set forth the categorical approach in *Taylor v. United States*, 495 U.S. 575 (1990), and refined the analysis in *Descamps v. United States*, 570 U.S. 254 (2013), and *Mathis v. United States*, 136 S. Ct. 2243 (2016). The narrow categorical approach mandated by that precedent 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 2256.

Because the categorical approach is concerned only with what conduct the offense necessarily involves, 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 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.

### B. Intimidation Within The Meaning Of 18 U.S.C. § 2113(a) Is Not A Match For The Definition Of A Crime Of Violence In 18 U.S.C. § 924(c)(3)(A).

The least culpable conduct criminalized by federal armed bank robbery is not a match for at least two of the requirements of the force clause. First, the force clause requires purposeful violent conduct.[3] But this Court has held that bank robbery is a general intent crime, and the circuits have not applied any culpable *mens rea* to the intimidation element. Second, § 924(c)'s elements clause requires that physical force be violent in nature. But bank robbery by intimidation does not require a communicated intent to use violence.

#### *1. The Force Clause Requires A Purposeful Threat Of Physical Force, Whereas Bank Robbery By Intimidation Is A General Intent Crime That Does Not Require Any Intent To Intimidate.*

In *Leocal v. Ashcroft*, this Court held that the "use of physical force against the person or property of another" within the meaning of § 924(c) means "active employment" of force and "suggests a higher degree of intent than negligent or merely accidental conduct." 543 U.S. 1, 9 (2004). In the Ninth Circuit's *Watson* decision, the court considered and rejected the defendant's claim that the mental state for a violation of § 2113(a) is not a match for the crime of violence definition in § 924(c) because the bank robbery statute permits a defendant's conviction "if he only negligently intimidated the victim." 881 F.3d at 785. Citing *Carter*, the court concluded that federal bank robbery "must at least involve

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[3] This Court recently granted certiorari in *United States v. Walker*, No. 19-373 (2019), to decide whether the force clause's intent component encompasses reckless as well as intentional uses of force. The outcome of *Walker* will not impact the argument here because, as explained below, the mental state for "intimidation" in the federal bank robbery statute falls below the standard for recklessness.

the knowing use of intimidation, which necessarily entails the knowing use, attempted use, or threatened use of violent physical force." *Id.*

*Watson*'s conclusion that bank robbery by intimidation requires a knowing threat of force is inconsistent with the standard announced by this Court in *Carter* and with the manner in which the circuits have consistently construed the intimidation element of bank robbery outside the categorical approach context. In *Carter*, the question under consideration was whether § 2113(a) implicitly requires an "intent to steal or purloin," which is an element of the related offense of bank larceny in § 2113(b). 530 U.S. at 267. In evaluating that question, this Court emphasized that the presumption in favor of scienter would allow it to read into the statute "only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Id.* at 269. Thus, the Court recognized that § 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.* at 269. But the Court found no basis to impose a specific intent requirement on § 2113(a). *Id.* at 268-69. Instead, the Court determined that "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 (emphasis in original).

Under *Carter*, a defendant must be aware that he or she is engaging in the actions that constitute a taking by intimidation, but the government need not prove that the

defendant knew the conduct was intimidating. That reading of *Carter* finds support in circuit precedent both pre-dating and post-dating the opinion. Prior to *Carter*, the Ninth Circuit defined "bank robbery by intimidation" as "willfully to take, or attempt to take, in such a way that would put an ordinary, reasonable person in fear of bodily harm." *United States v. Selfa*, 918 F.2d 749, 751 (9th Cir. 1990). That definition attached the willful *mens rea* solely to the "taking" element of bank robbery, not the "intimidation" element.

Similarly, in *United States v. Foppe*, the Ninth Circuit rejected a jury instruction that would have required the jury to conclude that the defendant intentionally used force and violence or intimidation on the victim bank teller. 993 F.2d 1444, 1451 (9th Cir. 1993). The court never suggested that the defendant must know the actions were intimidating. *Id.* ("Whether [the defendant] specifically intended to intimidate [the teller] is irrelevant."). Similarly, in *United States v. Hopkins*, the Ninth Circuit held that the defendant used "intimidation" by simply presenting a demand note stating, "Give me all your hundreds, fifties and twenties. This is a robbery," even though he spoke calmly, was clearly unarmed, and left the bank "in a nonchalant manner" without having received any money. 703 F.2d 1102, 1103 (9th Cir. 1983). The Court approved a jury instruction that stated 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. *Id.*

Other circuit decisions reflect the same interpretation of intimidation that focuses on the objectively reasonable reaction of the victim rather than the defendant's intent. The

Fourth Circuit held in *United States v. Woodrup* that "[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." 86 F.3d 359, 363 (4th Cir. 1996) (quoting *United States v. Wagstaff*, 865 F.2d 626, 627 (4th Cir. 1989)). "[N]othing in the statute even remotely suggests that the defendant must have intended to intimidate." *Woodrup*, 86 F.3d at 364. The Eleventh Circuit held in *United States v. 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 1240, 1244 (11th Cir. 2005).

The Eighth Circuit case of *United States v. Yockel*, decided three years after *Carter*, leaves no question on the matter: there, the court expressly stated that a jury may not consider the defendant's mental state, even as to knowledge of the intimidating character of the offense conduct. 320 F.3d 818, 823-24 (8th Cir. 2003). In *Yockel*, the defendant was attempting to withdraw $5,000 from his bank account, but the teller could not find an account in his name. 320 F.3d at 820. Eventually, after searching numerous records for an account, the defendant told the teller, "If you want to go to heaven, you'll give me the money." *Id.* at 821. The teller became fearful, and "decided to give Yockel some money in the hopes that he would leave her teller window." *Id.* She gave Yockel $6,000 and asked him, "How's that?" The defendant responded, "That's great, I'll take it." *Id.*

The government filed a motion in limine seeking to preclude evidence of the defendant's mental health offered to demonstrate his lack of intent to intimidate. *Id.* at 822.

The defendant argued that the evidence was relevant because bank robbery requires knowledge with respect to the intimidation element of the crime. *Id.* The district court disagreed and decided "to exclude mental health evidence in its entirety as not relevant to any issue in the case." *Id.* The Eighth Circuit affirmed. *Id.* at 823. Citing *Foppe*, the court held that intimidation is measured under an objective standard, without regard to the defendant's intent, and is satisfied "if an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the [defendant's] acts[.]" *Id.* at 824 (internal quotation marks and alterations omitted). Accordingly, the court decided that "the *mens rea* element of bank robbery [does] not apply to the element of intimidation[.]" *Id.*

Thus, *Carter* and circuit precedent together establish that a defendant is guilty of bank robbery by intimidation within the meaning of § 2113(a) so long as the defendant engages in a knowing act that reasonably instills fear in another, without regard to the defendant's intent to intimidate. As so defined, intimidation cannot satisfy § 924(c)(3)(A)'s *mens rea* standard. In *Elonis v. United States*, this Court explained that engaging in a knowing act is not equal to knowing the character of that act. 135 S. Ct. 2001, 2011 (2015). In *Elonis*, the Court considered as a matter of statutory interpretation whether a culpable mental state is required for a threatening communication to be punishable under 18 U.S.C. § 875(c). Relying on the "basic principle" that "wrongdoing must be conscious to be criminal," the Court concluded that a culpable mental state must "apply to the fact that the communication contains a threat." *Elonis*, 135 S. Ct. at 2009, 2011.

The government in *Elonis* had argued that a defendant's statements should be punished as threats as long as "he himself knew the contents and context" of the statements and "a reasonable person would have recognized that [they] would be read as genuine threats." 135 S. Ct. at 2011. The Supreme Court made clear that this proposed mental state could not be characterized "as something other than a negligence standard" because it ultimately relied on whether a "reasonable person," not the defendant, would view the conduct as harmful:

> [T]he fact that the Government would require a defendant to actually know the words of and circumstances surrounding a communication does not amount to a rejection of negligence. Criminal negligence standards often incorporate "the circumstances known" to a defendant. . . . Courts then ask, however, whether a reasonable person equipped with that knowledge, not the actual defendant, would have recognized the harmfulness of his conduct. . . . That is a negligence standard.

*Id.* (citation omitted).

Comparing the *mens rea* standard articulated in *Foppe* and *Yockel* with *Elonis* demonstrates that the intimidation prong of bank robbery requires no more than a negligent threat of harm. As in *Elonis*, the fact that § 2113(a) requires a defendant "to actually know the words of and circumstances surrounding" the taking by intimidation "does not amount to a rejection of negligence." *Id.* Rather, a threat is committed negligently when the mental state turns on "whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks[.]" *Id.* Although § 2113(a) requires that a defendant have knowledge of his or her actions, it leaves the question of whether the actions are

intimidating to be judged solely by what a reasonable person would think, not what the defendant thinks. As in *Elonis*, "[t]hat is a negligence standard." 135 S. Ct. at 2011.

This Court should intervene to affirm the minimal mental state requirement applicable to federal bank robbery by intimidation, as confirmed by *Carter* and decades of circuit precedent. Because intimidation is satisfied when a reasonable person, not the defendant, would view the defendant's conduct as intimidating, § 2113(a) does not meet the force clause's requirement of purposeful violence.

*2. The Force Clause Requires A Threatened Use Of Violent Physical Force, Whereas Bank Robbery By Intimidation Does Not Require That A Defendant Communicate Any Intent To Use Violence.*

Even if § 2113(a) proscribed a sufficient *mens rea* for the "intimidation" element of the offense, the statute does not require a threatened use of *violent* physical force. In *Stokeling v. United States*, this Court confirmed that "physical force" within the meaning of the force clause must be "'*violent* force—that is, force capable of causing physical pain or injury to another person.'" 139 S. Ct. 544, 553 (2019) (quoting *Johnson v. United States*, 559 U.S. 133, 140 (2010) ("*Johnson 2010*")) (emphasis in original).[4] Physical force does not include mere offensive touching. *Id.* In *Watson*, the Ninth Circuit reasoned that, because "intimidation" in 18 U.S.C. § 2113(a) must be objectively fear-producing, it satisfies the degree of force required under the ACCA's force clause. 881 F.3d at 785 ("[A]

[4] *Stokeling* and *Johnson 2010* considered the meaning of "physical force" under the ACCA. The same standard has been applied to § 924(c)(3)(A). *See, e.g.*, *Watson*, 881 F.3d at 784.

'defendant cannot put a reasonable person in fear of bodily harm without threatening to use force capable of causing physical pain or injury.'" (quoting *United States v. Gutierrez*, 876 F.3d 1254 (9th Cir. 2017))). That reasoning was in error because it is the content of a communication that defines a threat, not the reaction of the victim.

As this Court recognized in *Elonis*, the common definition of threat typically requires a "*communicated* intent to inflict harm or loss on another[.]" 135 S. Ct. at 2008 (quoting BLACK'S LAW DICTIONARY 1519 (8th ed. 2004)) (emphasis added). In *United States v. Parnell*, the Ninth Circuit reasoned that an uncommunicated "willingness to use violent force is not the same as a threat to do so." 818 F.3d 974, 980 (9th Cir. 2016). Thus, the fact that conduct might provoke a reasonable fear of bodily harm does not prove that the defendant "communicated [an] intent to inflict harm or loss on another." *Elonis*, 135 S. Ct. at 2008.

Intimidation does not require a communicated threat. For purposes of § 2113(a), intimidation can be (and frequently is) accomplished by a simple demand for money, without regard to whether the bank teller is afraid. *See, e.g.*, *United States v. Nash*, 946 F.2d 679, 681 (9th Cir. 1991) ("[T]he threat implicit in a written or verbal demand for money is sufficient evidence to support [a] jury's finding of intimidation."); *Hopkins*, 703 F.2d at 1103 ("Although the evidence showed that Hopkins spoke calmly, made no threats, and was clearly unarmed, we have previously held that 'express threats of bodily harm, threatening body motions, or the physical possibility of concealed weapon[s]' are not

required for a conviction for bank robbery by intimidation." (quoting *United States v. Bingham*, 628 F.2d 548, 549 (9th Cir. 1980))).

In *United States v. Ketchum*, the defendant handed a teller a note that read: "These people are making me do this," and then orally stated, "They are forcing me and have a gun. Please don't call the cops. I must have at least $500." 550 F.3d 363, 365 (4th Cir. 2008). The defendant's statement did not evidence a threat of force by the defendant against a victim (the defendant stated that he feared violence himself), but it was still held sufficient to qualify as "intimidation" under § 2113(a). *Id.*

Similarly, in *United States v. Lucas*, a defendant's bank robbery conviction was upheld where he placed several plastic shopping bags on the counter along with a note that read: "Give me all your money, put all your money in the bag," and then repeated, "Put it in the bag." 963 F.2d 243, 244 (9th Cir. 1992). And, in *United States v. Smith*, the court found sufficient evidence to affirm the defendant's bank robbery conviction where the defendant told the teller he wanted to make a withdrawal, and when the teller asked if that withdrawal would be from his savings or checking account, he stated, "No, that is not what I mean. I want to make a withdrawal. I want $2,500 in fifties and hundreds," and then yelled, "you can blame this on the president, you can blame this on whoever you want." 973 F.2d 603, 603 (8th Cir. 1992).

Although each of these cases involved circumstances that were deemed objectively fear-producing, the defendants made no written, oral, or physical threats to use "violent" force if the tellers refused. A simple demand for money does not implicitly carry a threat

of violence because not all bank robbers are prepared to use violent force to overcome resistance. *See Parnell*, 818 F.3d at 980 (rejecting a similar argument that a purse snatching necessarily implies a threat of violent force and reasoning that, "[a]lthough some [purse] snatchers are prepared to use violent force to overcome resistance, others are not").

Nor is bank robbery by intimidation limited to those cases where a defendant makes a verbal demand for money. It also includes taking money without a demand and without physical force capable of causing any pain or injury. In *United States v. Slater*, for example, the defendant simply entered a bank, walked behind the counter, and removed cash from the tellers' drawers, but the defendant did not speak or interact with anyone beyond telling a manager to "shut up" when she asked what he was doing. 692 F.2d 107, 107-08 (10th Cir. 1982); *accord United States v. O'Bryant*, 42 F.3d 1407 (10th Cir. 1994) (Table) (affirming finding of intimidation where the defendant reached over the counter and took money from an open teller drawer after asking the teller for change). Those bank robberies involved no violence, nor any communicated intent to use violence, beyond that used in a typical purse snatching.

As the *Watson* court recognized, "intimidation" under § 2113(a) is not defined by the content of any communication, but rather by the reaction that the defendant's conduct might objectively produce. 881 F.3d at 785. However, conduct can be frightening, yet still not contain a threat. Accordingly, the circuits have strayed from precedent in concluding that intimidation requires a communicated threat to use violent force. *See, e.g.*, *Watson*, 881 F.3d at 785.

### C. The Court Need Not Address Whether The "Dangerous Weapon" Element Of Armed Bank Robbery Satisfies The Force Clause.

The element that elevates unarmed bank robbery into armed bank robbery is putting "in jeopardy the life of any person by the use of a dangerous weapon or device." 18 U.S.C. § 2113(d). The circuits have interpreted the "dangerous weapon" element broadly to include non-assaultive and non-brandishing uses of even a toy weapon. *See United States v. Martinez-Jimenez*, 864 F.2d 664, 666-67 (9th Cir. 1989) (reasoning that the apparent danger from a toy gun creates greater risk that law enforcement or bank guards may use deadly force); *United States v. Hamrick*, 43 F.3d 877, 882 (4th Cir.1995) ("[E]very circuit court considering . . . the question of whether a fake weapon that was never intended to be operable [can be a 'dangerous weapon'] has come to the same conclusion."); *see also, e.g.*, *United States v. Arafat*, 789 F.3d 839, 847 (8th Cir. 2015) (affirming toy gun as dangerous weapon for purposes of § 2113(d)); *United States v. Cruz-Diaz*, 550 F.3d 169, 175 (1st Cir. 2008) (noting a "toy gun" qualifies as dangerous weapon under § 2113(d)); *United States v. Garrett*, 3 F.3d 390, 391 (11th Cir. 1993) (same); *United States v. Medved*, 905 F.2d 935, 939 (6th Cir. 1990) (same).

However, this Court need not address the scope of the enhancing weapon element in order to grant certiorari because the decision of the lower courts was premised solely on their interpretation of "intimidation," which applies to both armed and unarmed bank robbery. If the Court concludes that "intimidation" is not coextensive with a threat to use

violent force, then the enhancing weapon element under § 2113(d) can be addressed by the lower courts on remand.

### D. The Court Of Appeals Did Not Correctly Apply This Court's Standards For Issuance Of A Certificate Of Appealability Because It Precluded Consideration Of Issues That Are Reasonably Debatable And That Warrant Full Briefing And A Decision On The Merits.

The standard for issuing a certificate of appealability (COA) requires a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In *Slack v. McDaniel*, this Court held that a COA should issue when "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." 529 U.S. 473, 478 (2000). A petitioner meets that threshold upon demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484; *accord Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003).

To meet this "threshold inquiry," *Slack*, 529 U.S. at 482, the petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983) (alteration in original) (internal quotation marks omitted). The petitioner need not show that relief must be granted. *Miller-El*, 537 U.S. at 337 (reaffirming the holding in *Slack* "that a COA does not require a showing that the appeal will succeed").

The questions raised in this petition meet the certificate of appealability threshold because they are grounded in this Court's precedent and the established precedent of the circuits regarding the mental state necessary for "intimidation" under § 2113(a). In *United States v. Dawson*, for example, the district court judge granted a certificate of appealability on virtually identical arguments to those presented here, reasoning that the Ninth Circuit's decision in *Watson* stands in tension with this Court's *mens rea* opinion in *Carter* and with earlier Ninth Circuit precedent regarding the intimidation element of bank robbery. 300 F. Supp. 3d 1207, 1210-12 (D. Or. 2018). *Dawson* demonstrates that at least one reasonable jurist has debated whether *Watson* deviated from established precedent.

Moreover, the issues presented here warranted fuller exploration in the circuit court because they address critical issues of national importance regarding the circuits' inconsistent standards for defining the elements of federal bank robbery. By denying a certificate of appealability, the Ninth Circuit inappropriately cut off viable challenges grounded in Supreme Court and circuit authority.

**Conclusion**

For the foregoing reasons, the Court should issue a writ of certiorari.

Dated this 13th day of December, 2019.

Elizabeth G. Daily
Attorney for Petitioner

FILED

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
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| UNITED STATES OF AMERICA,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>MICHAEL BAIRD JORDAN,<br><br>Defendant-Appellant. | No. 19-35577<br><br>D.C. Nos. 3:17-cv-00773-HZ<br>3:06-cr-00450-HZ-1<br>District of Oregon,<br>Portland<br><br>ORDER |

Before: M. SMITH and HURWITZ, Circuit Judges.

The request for a certificate of appealability 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.**

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICHAEL BAIRD JORDAN,

Defendant.

No. 3:06-cr-00450-HZ

OPINION & ORDER

Billy J. Williams
UNITED STATES ATTORNEY
District of Oregon
Suzanne B. Miles
ASSISTANT UNITED STATES ATTORNEY
1000 S.W. Third Avenue, Suite 600
Portland, Oregon 97204-2902

Attorneys for Plaintiff

/ / /
/ / /

Elizabeth G. Daily
ASSISTANT FEDERAL PUBLIC DEFENDER
Stephen R. Sady
CHIEF DEPUTY FEDERAL DEFENDER
101 S.W. Main Street, Suite 1700
Portland, Oregon 97204

Attorneys for Defendant

HERNANDEZ, District Judge:

In this 28 U.S.C. § 2255 motion, Defendant Michael Baird Johnson challenges his conviction for using a firearm in relation to a crime of violence under 18 U.S.C. § 924(c) and seeks resentencing as to his remaining convictions. I deny the motion.

## BACKGROUND

On July 31, 2007, a jury found Defendant guilty of three charges: (1) Count 1: armed bank robbery in violation of 18 U.S.C. § 2113; (2) Count 2: using and carrying a firearm during and in relation to the crime of armed bank robbery in violation of 18 U.S.C. § 924(c)(1); and (3) Count 3: felon in possession of a firearm in violation of 18 U.S.C. § 922(g). July 31, 2007 Jury Verdict, ECF 78. Defendant received consecutive life sentences on Courts 1 and 2. Judgment, ECF 87. He also received a life sentence on Count 3, to be served concurrently to the life sentence imposed on Count 1. *Id.* The life sentences on Counts 1 and 2 were imposed pursuant to 18 U.S.C. § 3559(c)(1)(A)(ii). Statement of Reasons, ECF 88. The life sentence on Count 3 was imposed under § 924(c).

In a Supplemental Statement of Reasons, Judge Brown found that in 1966 and again in 1980, Defendant had been previously convicted of armed bank robbery and unarmed bank robbery in violation of 18 U.S.C. § 2113. Supp'l Statement of Reasons 3-4, ECF 89. She also

found that he had been convicted of fourteen different felonies in California in 1987. *Id.* As a result, Judge Brown determined that these prior convictions qualified as violent felonies under 18 U.S.C. § 3559(c). *Id.* at 6-7. Accordingly, mandatory life sentences were required for Counts 1 and 2. *Id.* Additionally, Judge Brown explained, § 924(c)(1)(D)(ii) required that these life sentences be consecutive, not concurrent. *Id.* Finally, on Count 3, § 922(g)(1) triggered a mandatory minimum of fifteen years under § 924(e) because, Judge Brown found, Defendant "easily satisfie[d]" the criteria of having three violent felonies that were committed on occasions different from one another. *Id.* at 7-8. She then imposed the concurrent life sentence on Count 3.

Defendant's direct appeal was denied. *United States v. Jordan*, 303 F. App'x 439 (9th Cir. 2008). Defendant then filed a 28 U.S.C. § 2255 motion which was denied on March 11, 2011. ECF 134. In May 2017, after receiving authorization from the Ninth Circuit to file a second or successive 28 U.S.C. § 2255 motion based on *Johnson v. United States*, 135 S. Ct. 2551 (2015), Defendant filed the instant motion. ECF 149; *see also* ECF 149-1 (Ninth Cir. Order). Counsel was promptly appointed and after some delay, the motion was fully briefed in May 2019.

## STANDARDS

Under § 2255, a federal prisoner in custody may move the sentencing court to vacate, set aside, or correct a sentence on the basis that the sentence violates the Constitution or the laws of the United States. 28 U.S.C. § 2255(a); *United States v. Withers*, 638 F.3d 1055, 1062 (9th Cir. 2011) (citing *Davis v. United States*, 417 U.S. 333 (1974)). The petitioner must demonstrate that an error of constitutional magnitude had a substantial and injurious effect or influence on the guilty plea or the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *see also*

*United States v. Montalvo*, 331 F.3d 1052, 1058 (9th Cir. 2003) ("We hold now that *Brecht's* harmless error standard applies to habeas cases under section 2255, just as it does to those under section 2254."). A hearing is unnecessary in cases where "the files and records . . . conclusively show that the prisoner is entitled to no relief[.]" 28 U.S.C. § 2255(b). Here, because there are no facts in dispute and the questions presented raise solely legal issues, no hearing is required.

DISCUSSION

Defendant argues that his conviction under § 924(c) must be vacated because his armed bank robbery conviction under 18 U.S.C. § 2113(a) & (d) is not a "crime of violence" as that phrase is defined in § 924(c)(3). For the same reason, and based on his contention that none of the 1987 California state convictions are violent felonies, he further argues that he should be resentenced on the other two counts.

Section 924(c)(1)(A) provides a mandatory additional sentence for "any person who, during and in relation to any crime of violence . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm[.]" 18 U.S.C. § 924(c)(1)(A). Defendant's Count 2 conviction was based on his use of a firearm during and in relation to his Count 1 armed bank robbery conviction.

> For purposes of § 924(c)(1)(A),
>
> 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.

18 U.S.C. § 924(c)(3). Paragraph A is referred to as the "force clause" and paragraph B is referred to as the "residual clause." *E.g.*, *United States v. Bundy*, No. 3:16-cr-00051-BR, 2016 WL 3361490, at *1 (D. Or. June 10, 2016).

In *Johnson*, the Supreme Court found the residual clause of a similar definition for "violent felony" in the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"), unconstitutionally void for vagueness. 135 S. Ct. at 2557. In 2016, the Supreme Court concluded that *Johnson* announced a substantive rule that applied retroactively on collateral review. *Welch v. United States*, 136 S. Ct. 1257 (2016). As Defendant recognizes, *Johnson* addressed the phrase "violent felony" in the ACCA, not the phrase "crime of violence" in § 924(c). However, in a 2018 case, the Supreme Court held that the residual clause definition of the phrase "crime of violence" in 18 U.S.C. § 16(b), which is identical to the one in § 924(c), was unconstitutionally vague. *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). Based on the invalidation of the residual clauses in *Johnson* and *Dimaya*, Defendant argues that federal armed bank robbery no longer qualifies as a "violent felony" under the ACCA or as a "crime of violence" under § 924(c). Additionally, he contends that his prior California convictions no longer qualify as violent felonies under the ACCA. Therefore, he argues that his § 924(c) conviction is invalid and that he should be resentenced on the other two counts.

The Government argues that Defendant's challenge does not rely on *Johnson*'s new rule because *Johnson* was limited to the residual clause of § 924(e) and did not address similarly worded clauses in other statutes. As a result, the Government contends that Defendant's § 2255 motion does not meet the threshold requirements for a second habeas petition under § 2255(h). As to the merits, the Government argues that governing Ninth Circuit law holds that federal

armed and unarmed bank robbery are crimes of violence under § 924(c)'s force clause. Additionally, the Government cites to Ninth Circuit authority concluding that a California conviction for assault with a deadly weapon is a violent felony. Based on these Ninth Circuit cases, the Government contends that Defendant's motion must be denied. Because I agree with the Government on the merits, I decline to address the procedural invalid petition argument.

In *United States v. Davis*, No. 18-431, 2019 WL 2570623 (U.S. June 24, 2019), the Supreme Court concluded that the "crime of violence" definition in the residual clause of § 924(c)(3)(B) is unconstitutionally vague. Because the crime of violence definition in the residual clause is constitutionally invalid, the focus is then on § 924(c)(3)(A)'s force clause. Def.'s Supp'l Mem. 6, ECF 172.

Defendant acknowledges that in 2018, the Ninth Circuit held that bank robbery under § 2113 is a "crime of violence" under the force clause in § 924(c)(3)(A). *United States v. Watson*, 881 F.3d 782, 785 (9th Cir.), *cert. denied*, 139 S. Ct. 203 (2018). Defendant contends that *Watson*'s conclusion "is wrong." Def.'s Supp'l Mem. 8. But, *Watson* is controlling law in the Ninth Circuit and this Court is bound by that decision. *E.g.*, *Hasbrouck v. Texaco, Inc.*, 663 F.2d 930, 933 (9th Cir. 1981) ("District courts are bound by the law of their own circuit."). No post-*Watson* intervening authority is apparent here. *See Miller v. Gammie*, 335 F.3d 889, 893, 900 (9th Cir. 2003 (en banc) (three-judge circuit panel and district courts are bound by prior circuit decisions unless the prior decision's "reasoning or theory" is "clearly irreconcilable" with reasoning or theory of intervening higher authority). Thus, I agree with the Government that under *Watson*, Defendant's Count 1 conviction for federal armed bank robbery, as well as his prior 1966 and 1980 convictions for federal armed bank robbery, are all "crimes of violence."

Count 1, therefore, supports the § 924(c)(1)(A) conviction for using a firearm during or in relation to a crime of violence.

As to the sentencing issues, the prior federal armed bank robbery convictions from 1966 and 1980 are "violent felonies" and were properly used to support the mandatory life sentences under § 3559(c) on Counts 1 and 2 as well as the enhanced § 924(e) ACCA sentence on Count 3. *See Watson*, 881 F.3d at 785 (bank robbery requires "at least an implicit threat to use . . . violent physical force") (internal quotation marks omitted); *compare* § 924(c)(3)(A) (§ 924(c) force clause defining "crime of violence" as an offense that is a felony and "has as an element the use, attempted use, or threatened use of physical force against the person or property of another") *with* § 924(e)(2)(B)(i) (§ 924(e) force clause using identical definition for "violent felony"); *and with* § 3559(c)(2)(F) (listing robbery under § 2113 as meeting the definition of "serious violent felony" and also including "any other offense . . . that has as an element the use, attempted use, or threatened us of physical force against the person of another").

Additionally, in a 2016 case, the Ninth Circuit held that a conviction for assault with a deadly weapon under California law is also a violent felony for purposes of § 924(e). *United States v. Vasquez-Gonzalez*, 901 F.3d 1060, 1067-68 (9th Cir. 2016). Although Defendant argues that *Vasquez-Gonzalez* "misconstrued state law," Def.'s Supp'l Mem. 19, *Vasquez-Gonzalez* is binding on this Court. Thus, Defendant has three previous convictions for a violent felony committed on occasions different from one another under § 924(e)(1).

Finally, the Court declines to issue a Certificate of Appealability because Defendant has not made a substantial showing of the denial of a constitutional right pursuant to § 2253(c)(2). The *Watson* decision is binding precedent on this Court, and as the Ninth Circuit noted there, it

reached the same conclusion as "every other circuit to address the same question." *Watson*, 881 F.3d at 785. Because of the certainty of dismissal of the § 2255 motion under *Watson* and *Vasquez-Gonzalez*, the Court will not issue a Certificate of Appealability.

CONCLUSION

Defendant's § 2255 motion [149] is denied.

IT IS SO ORDERED.

Dated this 26 day of June, 2019

Marco A. Hernandez
United States District Judge

**18 U.S.C. § 924(c) (2010)**

**§ 924. Penalties**

**(c)(1)(A)** Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

**(i)** be sentenced to a term of imprisonment of not less than 5 years;

**(ii)** if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

**(iii)** if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

**(B)** If the firearm possessed by a person convicted of a violation of this subsection--

**(i)** is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

**(ii)** is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

**(C)** In the case of a second or subsequent conviction under this subsection, the person shall--

**(i)** be sentenced to a term of imprisonment of not less than 25 years; and

**(ii)** if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

**(D)** Notwithstanding any other provision of law--

**(i)** a court shall not place on probation any person convicted of a violation of this subsection; and

**(ii)** no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

**(2)** For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

**(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.

**(4)** For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

**(5)** Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section--

> **(A)** be sentenced to a term of imprisonment of not less than 15 years; and
>
> **(B)** if death results from the use of such ammunition--
>
> > **(i)** if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and
> >
> > **(ii)** if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

**18 U.S.C. § 924(e) (2011)**

**§ 924. Penalties**

**(e)(1)** In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

**(2)** As used in this subsection--

**(A)** the term "serious drug offense" means--

> **(i)** an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or
>
> **(ii)** an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

**(B)** the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, 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, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

**(C)** the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

## 28 U.S.C.A. § 2255 (2016)

### § 2255. Federal custody; remedies on motion attacking sentence

**(a)** A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

**(b)** Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

**(c)** A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

**(d)** An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

**(e)** An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

**(f)** A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

> **(1)** the date on which the judgment of conviction becomes final;
>
> **(2)** the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> **(3)** the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> **(4)** the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

**(g)** Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

**(h)** A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

> **(1)** newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> **(2)** a new rule of constitutional law, made retroactive to cases on collateral review by the