No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

STANLEY NOEL AMES, et al.

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

CORRECTED PETITION FOR WRIT OF CERTIORARI

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 Petitioners

QUESTIONS PRESENTED ON REVIEW

1. Did the Ninth Circuit err in holding that federal bank robbery is a crime of violence under the force clause of 18 U.S.C. § 924(c), in light of this Court's holding in *Carter v. United States*, 530 U.S. 255, 268 (2000), that the offense 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?

2. Is this Court's opinion in *Dean v. United States*, 137 S. Ct. 1170 (2017), a substantive rule that applies retroactively on collateral review because *Dean* articulated a mandatory sentencing standard when it held that the substantive requirement of reasonableness under 18 U.S.C. § 3553(a) and 18 U.S.C. § 3584(b) applies to aggregate sentences regardless of the consecutive sentencing mandate in 18 U.S.C. § 924(c).

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. Pursuant to Supreme Court Rule 12.4, the petitioners listed below file this single petition for writ of certiorari to the Ninth Circuit Court of Appeals to cover multiple judgments below raising the same issues.

Petitioners:
Stanley Noel Ames
Eric Steven Wilcoxson
Timothy Kana Dawson
Larry James Rich
Robin Lee Knutson

TABLE OF CONTENTS

Page

APPENDIX

TABLE OF AUTHORITIES

Page

SUPREME COURT OPINIONS

FEDERAL COURT OPINIONS

UNITED STATES CODE

OTHER

Petition for Certiorari

Petitioners Stanley Noel Ames, et al., respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in their cases.

Orders Below & Jurisdiction

The Ninth Circuit and district court decisions below were all unpublished and are contained in the attached Appendix. They are joined in a single petition pursuant to Rule 12.4, in that they "involve identical or closely released questions." This petition is timely under Supreme Court Rule 13.3. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Name	Ninth Circuit Case No.	Oregon District Court Case No.	Ninth Circuit Disposition Date & Type	Appendix Page (Ninth Circuit)	Appendix Page (District Court)
Ames, Stanley Noel	18-35134	3:10-cr-00487-BR	10/21/2019 Memorandum	1	3
Wilcoxson, Eric Steven	18-35135	3:10-cr-00487-BR	10/21/2019 Memorandum	16	18
Dawson, Timothy Kana	18-35179 18-35180 18-35181	3:03-cr-00410-SI 3:04-cr-00010-SI 3:05-cr-00073-SI	10/21/2019 Memorandum	31	33
Rich, Larry James	18-35451	6:08-cr-60126-MC	11/22/2019 Order on Summary Affirmance	46	47
Knutson, Robin Lee	18-35618	6:98-cr-60019-MC	11/20/2019 Order on Summary Affirmance	52	53

Relevant Constitutional and Statutory Provisions

The statute providing for collateral review of federal sentences is 28 U.S.C. § 2255. App'x 67-68.

Under 18 U.S.C. § 924(c)(1)(A), 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. App'x 63-64. 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.

Federal bank robbery is punished under 18 U.S.C. § 2113(a) and (d), which provide:

> (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.

App'x 65-66.

Statement Of The Case

Each of the petitioners was convicted of federal bank robbery (both armed and unarmed), in violation of 18 U.S.C. § 2113(a) and (d), and using a firearm during the commission of federal bank robbery, in violation of 18 U.S.C. § 924(c).[1] The petitioners were sentenced as follows:

- On August 6, 2012, Stanley Noel Ames was sentenced to an aggregate sentence of 220 months in prison, consisting of concurrent 100-month terms on two substantive counts of armed bank robbery, a concurrent term of 60 months for one count of conspiracy to commit armed bank robbery, and the mandatory consecutive sentence of 120 months for violating 18 U.S.C. § 924(c).

- On August 20, 2012, Eric Steven Wilcoxson was sentenced to an aggregate sentence of 180 months in prison, consisting of concurrent 60-month terms on two substantive counts of armed bank robbery, a concurrent term of 60 months for one count of conspiracy to commit armed bank robbery, and the mandatory consecutive sentence of 120 months for violating 18 U.S.C. § 924(c).

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[1] The single exception is petitioner Larry James Rich, who was sentenced for violating 18 U.S.C. § 924(c) for using a firearm during an armed bank robbery, but who was not convicted of the substantive bank robbery count. Accordingly, Rich's case does not raise the second question presented regarding the retroactive application of this Court's opinion in *Dean*.

- On November 1, 2005, Timothy Kana Dawson was sentenced to an aggregate sentence of 262 months in prison, consisting of concurrent 202-month terms on four substantive counts of unarmed bank robbery and one count of armed bank robbery, a concurrent term of 60 months for one count of escape, and the mandatory consecutive sentence of 60 months for violating 18 U.S.C. § 924(c).

- On March 14, 2000, Robin Lee Knutson was sentenced to an aggregate sentence of 475 months in prison, consisting of concurrent 115-month terms on substantive counts of armed bank robbery, firearm possession, and drug trafficking, a mandatory consecutive sentence of 120 months for violating 18 U.S.C. § 924(c) by using a firearm during the bank robbery, and a further mandatory consecutive sentence of 240 months for violating 18 U.S.C. § 924(c) by using a firearm during the drug trafficking crime.

- On September 15, 2009, Larry James Rich was sentenced to 312 months for violating 18 U.S.C. § 924(c) by using a firearm during the commission of bank robbery.

On June 26, 2015, years after the petitioners were sentenced, 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*.

Within a year of the *Johnson* decision, each of the petitioners filed a 28 U.S.C. § 2255 motion attacking their § 924(c) convictions and sentences. They argued that

Johnson applied to and voided the residual clause in § 924(c)(3)(B), and that federal bank robbery is not categorically a crime of violence under the force clause in § 924(c)(3)(A).

While the petitioners' *Johnson*-based § 2255 motions were pending in the district court, this Court issued its decision in *Dean*, 137 S. Ct. 1170 (2017). In *Dean*, the Court abrogated existing Ninth Circuit precedent and held that the parsimony mandate of 18 U.S.C. § 3553(a) and 18 U.S.C. § 3584(b)—directing that sentences should be no greater than necessary to accomplish the goals of sentencing—requires sentencing courts to consider a mandatory consecutive § 924(c) sentence as part of the overall aggregate sentence when determining the appropriate sentence for related counts. Each of these petitioners argued in the district court that *Dean* is a substantive decision that has retroactive effect, requiring resentencing.

Petitioners claims were uniformly denied in the district court without hearing and affirmed on appeal to the Ninth Circuit. The Ninth Circuit denied relief in either a memorandum disposition or an order granting summary affirmance. In each case, the Ninth Circuit relied on *United States v. Watson*, 881 F.3d 782 (9th Cir.), *cert denied*, 139 S. Ct. 203 (2018), to foreclose any argument that federal bank robbery is not a crime of violence under the force clause. With respect to the requests for resentencing based on *Dean*, the Ninth Circuit relied on *United States v. Garcia*, 923 F.3d 1242 (9th Cir. 2019), to hold that *Dean* is not a substantive rule, and therefore *Dean* does not apply retroactively to cases on collateral review.

The petitioners are all in Bureau of Prisons custody serving the terms of incarceration at issue here.

Reasons for Granting the Writ

This Court should grant certiorari to resolve two questions of exceptional importance regarding the interpretation of federal criminal law.

First, circuit courts continue to erroneously hold that federal bank robbery by intimidation qualifies as a crime of violence under the force clause of 18 U.S.C. § 924(c)(3)(A) 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.), *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 in *Carter v. United States*, 530 U.S. 255, 268 (2000), 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. The courts cannot have it both ways—either bank robbery requires a threat of violent force, or it doesn't. But the same rule must apply to both sufficiency cases and to the categorical analysis. Petitioners request certiorari to bring

internal consistency to federal circuit precedent interpreting the intimidation element of federal bank robbery.[2]

Second, the circuit courts are entrenched in the incorrect view that the rule from *Dean* is procedural and therefore not retroactive. *See, e.g., Garcia*, 923 F.3d at 1245-46; *In re Dockery*, 869 F.3d 356, 356 (5th Cir. 2017); *Harper v. United States*, No. 18-1202, 2019 WL 6321329, at *6 (6th Cir. Nov. 26, 2019); *Habeck v. United States*, 741 F. App'x 953, 954 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1364 (2019). Just like in *Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016), *Dean* is substantive, and it has full retroactive effect to cases on collateral review. The rule from *Dean* establishes that all sentences, even those including § 924(c) mandatory minimums, must meet the substantive guarantee in 18 U.S.C. § 3553(a), referenced in § 3582 and § 3584(b), of being "sufficient, but not greater than necessary," to meet the purposes of sentencing. The procedural aspect of the rule—consideration of the § 924(c) sentence—merely gives effect to that substantive guarantee.

[2] Four of the petitioners' § 924(c) convictions were premised on armed bank robbery, and one was premised on unarmed bank robbery. However, this Court need not address the scope of the enhancing weapon element for armed bank robbery under § 2113(d) in order to grant certiorari because the lower court's decisions were all premised solely on the "intimidation" element that applies to both armed and unarmed bank robbery. If the Court concludes that "intimidation" does not require a threat to use violent force, then the enhancing weapon element under § 2113(d) should be addressed by the lower courts in the first instance on remand.

A. Federal Bank Robbery Is Not A Crime of Violence Under 18 U.S.C. § 924(c)(3)(A) Because, As Authoritatively Interpreted By This Court And The Circuits For Decades, "Intimidation" Does Not Require The Use Or Threatened Use Of Violent Force.

To determine if an offense qualifies as a "crime of violence" under the force clause of § 924(c), 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). 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"

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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.

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 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 "exclude[d] 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. 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." *See Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015) (interpreting federal threat statute). 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.*

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 § 924(c)'s force clause. 881 F.3d at 785 ("[A] '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

[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.

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). An uncommunicated "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). 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. 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. Because conduct can be frightening, yet still not contain a threat, bank robbery by intimidation does not require a threatened use of violent physical force. Accordingly, the circuits have strayed from precedent in concluding that intimidation requires a communicated threat to use violent force.

3. *The Correct Interpretation Of "Intimidation" Under 18 U.S.C. § 2113(a) Is An Exceptionally Important Question Because Of Its Broad Impact On Standards For Conviction And Sentencing.*

This Court should grant certiorari because the circuits have, in effect, given "intimidation" under 18 U.S.C. § 2113(a) two contradictory meanings depending on whether the issue arises in the sufficiency context or on review under the categorical approach. 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. 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, including the harsh mandatory minimum sentence required by the ACCA. Thus, the consequences viewed from either the individual perspective or at a systematic level are substantial.

B. *Dean* Is A Substantive Decision With Retroactive Effect To Cases On Collateral Review.

Under the retroactivity principles of *Teague v. Lane,* 489 U.S. 288 (1989), a Supreme Court decision applies retroactively to cases on collateral review if it announces a "new" rule that is "substantive." *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004). The circuits have gone astray from this precedent in holding that the Court's holding in *Dean* is not "substantive" for purposes of retroactivity.

In deciding whether a rule is substantive or procedural, a court must consider the function of the rule. *Welch v. United States*, 136 S. Ct. 1257, 1265-66 (2016). A rule is substantive "if it alters the range of conduct or the class of persons that the law punishes." *Summerlin*, 542 U.S. at 353; *see also Montgomery*, 136 S. Ct. at 732 (substantive rules include those that "prohibit a certain category of punishment for a class of defendants because of their status or offense," or that "alter the range of conduct or the class of persons that the law punishes"). Procedural rules, by contrast, "regulate only the manner of

determining the defendant's culpability." *Summerlin*, 542 U.S. at 353 (emphasis in original). For example, they "'allocate decisionmaking authority' between judge and jury, . . . or regulate the evidence that the court could consider in making its decision[.]" *Welch*, 136 S. Ct. at 1265 (quoting *Whorton v. Bockting*, 549 U.S. 406, 413-14 (2007)).

Contrary to the holdings of the circuits, *Dean* is substantive for the same reasons articulated in *Montgomery*. In *Montgomery*, this Court retroactively applied its holding in *Miller v. Alabama*, 567 U.S. 460 (2012), that mandatory life imprisonment imposed upon juveniles violates the Eighth Amendment unless the sentencing court first considers the offender's youth and possible redemption. 136 S. Ct. 732. In rejecting the state's argument that the decision was procedural, not substantive, the Court explicitly noted the overlap in those concepts: "There are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within the category of persons whom the law may no longer punish." *Id.* at 735. The *Miller* rule did not foreclose life imprisonment; the case had to be remanded for the exercise of discretion under the proper standard: "The hearing does not replace but rather gives effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Id.*

The Ninth Circuit in *Garcia* purported to distinguish *Montgomery* on the grounds that *Dean*'s rule "is permissive, not mandatory." 923 F.3d at 1245. But *Garcia* misapprehended the new rule at issue. *Dean* articulated a substantive (and mandatory) rule that *all* sentences, even those including § 924(c) mandatory minimums, are governed by

the "parsimony principle" from 18 U.S.C. § 3553(a) of being "sufficient, but not greater than necessary," to meet the purposes of sentencing. As in *Montgomery*, that rule can be given effect only by a hearing where the sentencing court correctly exercises its discretion, but the reasonableness standard itself is a new substantive rule.

Binding Ninth Circuit law when these petitioners were sentenced required the sentencing court to impose a parsimonious sentence that *ignored* the impact of the mandatory minimum § 924(c) sentence. *United States v. Thomas*, 843 F.3d 1199, 1205 (9th Cir. 2016) ("The troublesome issue in this case arises because the mandatory minimums must be combined with the sentence imposed on the underlying crimes, to create a very long sentence."), *opinion vacated on reh'g post-Dean*, 856 F.3d 624 (9th Cir. 2017); *United States v. Working*, 287 F.3d 801, 807 (9th Cir. 2002) ("[U]nder the Sentencing Guidelines, a mandatory consecutive sentence under 18 U.S.C. § 924(c) is an improper factor to consider in making a departure, or fashioning the extent of a departure."). Now, after *Dean*, the same sentence is substantively unreasonable in violation of § 3553(a) unless the sentencing judge finds that the sentence remains "sufficient, but not greater than necessary," to serve the purposes of sentencing after considering the impact of the consecutive sentence. *See Dean*, 137 S. Ct. at 1176 ("[T]he District Court could not reasonably ignore the deterrent effect of Dean's 30-year mandatory minimum."); *Fox v. Vice*, 563 U.S. 826, 829 (2011) ("A trial court has wide discretion when, but only when, it calls the game by the right rules."); *Koon v. United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses discretion when it makes an error of law.").

This Court should grant certiorari to remedy the circuit courts' incorrect limitation of *Dean* to prospective impact. The question of *Dean*'s retroactivity implicates not only the years of unlawful incarceration imposed by the district courts under the rule prior to *Dean*, but the existing precedent risks thwarting this Court's retroactivity jurisprudence going forward. As *Montgomery* held, a newly-announced substantive sentencing standard applies retroactively even when the implementation of the rule requires the exercise of the sentencing court's discretion.

Conclusion

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

Dated this 31st day of January, 2020.

Elizabeth G. Daily
Attorney for Petitioners

NOT FOR PUBLICATION

FILED

OCT 21 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. STANLEY NOEL AMES, Defendant-Appellant.	No. 18-35134 D.C. Nos. 3:16-cv-01246-BR 3:10-cr-00487-BR-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Anna J. Brown, District Judge, Presiding

Submitted October 15, 2019**

Before: FARRIS, LEAVY, and RAWLINSON, Circuit Judges.

Stanley Noel Ames appeals from the district court's order denying his 28 U.S.C. § 2255 motion to vacate. We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

Ames contends that his armed bank robbery conviction under 18 U.S.C.

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

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

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

Ames next contends that he is entitled to relief under *Dean v. United States*, 137 S. Ct. 1170 (2017). This contention also fails. Contrary to Ames's contention, *Dean* did not announce a substantive rule that applies retroactively to cases on collateral review. *See Garcia v. United States*, 923 F.3d 1242, 1245-46 (9th Cir. 2019). The district court correctly concluded that *Dean* does not satisfy section 2255(f)(3) and that this claim is therefore untimely. *See* 28 U.S.C. § 2255(f)(1).

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

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff,

v.

STANLEY NOEL AMES,

Defendant.

3:10-cr-00487-BR
(3:16-cv-01246-BR)

OPINION AND ORDER

BILLY J. WILLIAMS
United States Attorney
JANE H. SHOEMAKER
Assistant United States Attorney
1000 S.W. Third Avenue, Suite 600
Portland, OR 97204
(503) 727-1014

Attorneys for Plaintiff

LISA C. HAY
Federal Public Defender
STEPHEN R. SADY
Chief Deputy Federal Public Defender
ELIZABETH G. DAILY
Assistant Federal Public Defender
101 S.W. Main Street
Suite 1700
Portland, OR 97201
(503) 326-2123

Attorneys for Defendant

BROWN, Senior Judge.

This matter comes before the Court on Defendant Stanley Noel Ames's Motion (#201) to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255. For the reasons that follow, the Court **DENIES** Defendant's Motion but **GRANTS** Defendant a certificate of appealability.

BACKGROUND

On December 7, 2010, Defendant was charged in an Indictment with Conspiracy to Commit Armed Bank Robbery; two counts of Armed Bank Robbery in violation of 18 U.S.C. § 2113(a) and (d); two counts of Using, Carrying, Brandishing and Discharging a Firearm During and in Relation to a Crime of Violence in violation of 18 U.S.C. § 924(c)(1)(A); on count of Felon in Possession of a Firearm in violation of 18 U.S.C. § 922(g)(1); and one count of Felon in Possession of Body Armor in violation of 18 U.S.C. § 921(a)(35).

On March 19, 2012, Defendant pled guilty to the one count of Conspiracy to Commit Armed Bank Robbery; the two counts of Armed Bank Robbery; and one of the two counts of Using, Carrying, Brandishing and Discharging a Firearm During and in Relation to a Crime of Violence.

On August 6, 2012, Senior District Judge Garr M. King held a sentencing hearing and sentenced Defendant to a 60-month term of

imprisonment on the conspiracy count and 100-month terms of imprisonment on both of the armed bank robbery counts to be served concurrently. Judge King also imposed a mandatory minimum consecutive sentence of 120 months on the count of Using, Carrying, Brandishing and Discharging a Firearm and sentenced Defendant to five years of supervised release.

On August 8, 2012, the Court entered a Judgment. Defendant did not appeal his conviction.

On June 24, 2016, Defendant filed a Motion to Vacate or Correct Sentence Pursuant to 28 U.S.C. § 2255 in which he asserts the Court's sentence imposed as to the § 924(c) count violates the Constitution or laws of the United States because "the underlying offense of armed bank robbery no longer qualifies as a crime of violence" after the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

On December 20, 2017, Defendant's Motion to Vacate was fully briefed, and the Court took it under advisement.

DISCUSSION

Defendant moves to modify or to set aside his sentences on the ground that the underlying offense of armed bank robbery no longer qualifies as a crime of violence after the Supreme Court's decision in *Johnson*. Alternatively, Defendant asserts the Supreme Court's decision in *Dean v. United States*, 137 S. Ct.

1170 (2017), provides a separate ground for resentencing based on the correct interpretation of the sentencing provisions in 18 U.S.C. §§ 924(c), 3584(a), and 3553(a).

The government asserts Defendant was not sentenced under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), and, therefore, *Johnson* does not apply to this matter. The government also asserts *Dean* is not retroactively applicable on collateral review, and, as a result, Defendant's Motion is untimely.

I. The Law

A. AEDPA Timeliness Requirements

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), motions to vacate or to set aside sentences pursuant to § 2255 are subject to a one-year limitation period that runs from the latest of:

> (1) the date on which the judgment of conviction becomes final; [or]
>
> * * *
>
> (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.

28 U.S.C. § 2255(f)(1), (3). Defendant does not dispute his June 25, 2016, Motion to Vacate is untimely under § 2255(f)(1) because he filed it more than one year after his sentence became final. Defendant, however, asserts his Motion to Vacate is

timely under § 2255(f)(3) because of the Supreme Court's ruling in *Johnson* and/or the Supreme Court's decision in *Dean*.

B. The ACCA and *Johnson*

The ACCA requires a defendant to be sentenced to a mandatory minimum prison term of 15 years to life if he has three prior convictions for "a violent felony or a serious drug offense, or both." 18 U.S.C. § 924(e)(1). The ACCA defines a violent felony as any crime punishable by imprisonment for a term exceeding one year that:

> (I) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B). Courts refer to the first clause, § 924(e)(2)(B)(I), as the elements clause; the first part of the disjunctive statement in (ii) as the enumerated-offenses clause; and the second part of the disjunctive statement in (ii) (starting with "or otherwise") as the residual clause. *See, e.g., Johnson*, 135 S. Ct. at 2563; *United States v. Lee*, 821 F.3d 1124, 1126 (9th Cir. 2016).

In *Johnson* the Supreme Court held "imposing an increased sentence under the residual clause of the [ACCA] violates the Constitution's guarantee of due process" on the

basis that "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges." 135 S. Ct. at 2557, 2563. Subsequently in *Welch v. United States* the Supreme Court held its decision in *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. 136 S. Ct. 1257, 1268 (2016). As a result, defendants sentenced pursuant to the ACCA residual clause can collaterally attack their sentences as unconstitutional under § 2255. The Court specifically noted in *Johnson*, however, that its "decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of violent felony." 135 S. Ct. at 2653.

II. Plaintiff's Ground for Relief under *Dean*

Defendant asserts the Supreme Court's holding in *Dean* requires resentencing and satisfies the timeliness requirement of § 2253(f). As noted, the government asserts *Dean* is not retroactively applicable to cases on collateral review and, therefore, does not satisfy the requirement of § 2255(f)(3).

In *Dean* the Supreme Court held a sentencing court is not prohibited from considering the impact of the mandatory minimum sentence required under 18 U.S.C. § 924(c) when determining the appropriate sentence for the predicate offense. *Dean*, 137 S. Ct. at 1176 ("Nothing in § 924(c) restricts the authority conferred

on sentencing courts by § 3553(a) and the related provisions to consider a sentence imposed under § 924(c) when calculating a just sentence for the predicate count.").

Although the Ninth Circuit has not addressed the issue, courts that have considered this issue have concluded *Dean* is not retroactively applicable to cases on collateral review. *See, e.g., United States v. Cooley*, No. 1:09-cr-331, 2017 WL 4003355, at *2 (W.D. Mich. Sept. 12, 2017)(concluding *Dean* was not retroactively applicable to cases on collateral review and, therefore, did not satisfy the criteria of § 2255(f)(3)); *United States v. Thornbrugh*, No. 89-CR- 0067-CVE, 2017 WL 3976295, at *2 (N.D. Okla. Sept. 8, 2017)("The Supreme Court did not expressly make *Dean* retroactively applicable to cases on collateral review, and no court has found that *Dean* applies retroactively. Even if it did apply retroactively, *Dean* does not state a mandatory rule that would entitle defendant to a sentencing reduction and merely reaffirms the clearly-established proposition that a sentencing court has the discretion to depart from the sentencing guidelines absent the applicability of statutory mandatory minimum sentence."); *United States v. Taylor*, No. 7:12CR00043, 2017 WL 3381369, at *4 (W.D. Va. Aug. 4, 2017)("*Dean* does not apply retroactively to § 2255 proceedings."); *Hall v. United States*, No. 17-C-3892, 2017 WL 3235438, at *3 (N.D. Ill. July 31, 2017) ("The *Dean* Court made no mention of applying its holding

retroactively to cases on collateral review, and the United States Court of Appeals for the Seventh Circuit has yet to address whether courts should apply *Dean* as such."); *Simmons v. Terris*, No. 17-cv-11771, 2017 WL 3017536, at *2 (E.D. Mich. July 17, 2017)("[T]here is nothing in the Supreme Court's opinion in *Dean* to suggest that the holding is to be applied retroactively to cases on collateral review."); *In re Dockery*, No. 17-50367, 2017 WL 3080914, at *1 (5th Cir. July 20, 2017) (denying certification because the defendant did not make "a *prima facie* showing that *Dean* announced a new rule of constitutional law that was made retroactive to cases on collateral review"); *United States v. Adams*, No. 7:06-cr-22-1, 2017 WL 2829704, at *2 (W.D. Va. June 29, 2017)(dismissing the defendant's § 2255 motion as untimely filed because *Dean* does not apply retroactively to § 2255 proceedings); *Morban-Lopez v. United States*, 3:17-cv-237-GCM, 2017 WL 2682081, at *2 n.2 (W.D.N.C. June 21, 2017)("[T]he Supreme Court's ruling in *Dean* does not render the motion to vacate timely under Section 2255(f)(3).").

This Court adopts the reasoning of these cases. The Court, therefore, finds the Supreme Court did not indicate in *Dean* that its decision was retroactively applicable on collateral review. In addition, this Court finds *Dean* merely reaffirms the clearly-established proposition that a sentencing court has the

discretion to depart from the sentencing guidelines absent the applicability of a statutory mandatory minimum sentence. Accordingly, the Court concludes *Dean* is not retroactively applicable on collateral review and, therefore, does not satisfy the requirements of § 2255(f)(3) or render Defendant's Motion timely.

III. Plaintiff's Ground for Relief under *Johnson*

As noted, Defendant asserts armed bank robbery does not qualify as a crime of violence under 18 U.S.C. § 924(c) after the Supreme Court's decision in *Johnson*, and, therefore, his sentence should be vacated.

A. Sentencing Pursuant to 18 U.S.C. § 924(c)(1)(A)

18 U.S.C. § 924(c)(1)(A) provides in relevant part that a person who "in relation to any crime of violence . . . uses or carries a firearm . . . shall, in addition to the punishment provided for such crime of violence . . . be sentenced to a term of imprisonment of not less than 5 years" to run consecutively with the punishment for the underlying crime of violence. 18 U.S.C. § 924(c)(3) defines a "crime of violence" as an offense that is a felony and

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

As noted, courts refer to the (A) clause of section 924(c)(3) as the "force clause" and to the (B) clause of section 924(c)(3) as the "residual clause."

B. Analysis

In *United States v. Wright* the Ninth Circuit held armed bank robbery under 18 U.S.C. § 2113(a) and (d) qualifies as a crime of violence under the "force" clause of § 924(c)(3)(A). 215 F.3d 1020, 1028 (9th Cir. 2000). The court explained § 2113(a) necessarily "has as an element the use, attempted use, or threatened use of physical force against the person or property of another and, therefore, 'a taking by force and violence, or by intimidation' is an element of armed bank robbery." *Id.*

In *United States v. Selfa* the Ninth Circuit held unarmed bank robbery in violation of § 2113(a) constitutes a crime of violence under the force clause of United States Sentencing Guideline § 4B1.2, which is identical to the force clause of § 924(c). 918 F.2d 749, 751 (9th Cir. 1990). Specifically, the court "defined 'intimidation' under § 2113(a) to mean 'willfully to take, or attempt to take, in such a way that would put an ordinary, reasonable person in fear of bodily harm.'" *Id.* (quoting *United States v. Hopkins*, 703 F.2d 1102, 1103 (9th Cir. 1983)). The court concluded this definition met the requirement of a "threatened use of physical force" under the

identical force clause in the Sentencing Guidelines. *Id.*

Defendant concedes the holdings in *Wright* and *Selfa* appear to foreclose his challenge to his sentences, but he asserts those cases have been undermined by the Supreme Court's subsequent decisions in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), and *Johnson* in addition to the Ninth Circuit's decision in *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1123 (9th Cir. 2006). The Ninth Circuit, however, has rejected this argument in several decisions issued after *Johnson*. For example, in *United States v. Cross* the Ninth Circuit concluded *Selfa* and *Wright* remain controlling law in this Circuit even after *Leocal* and *Johnson* and the Ninth Circuit rejected the defendant's assertion that unarmed bank robbery does not require violent force or intentional conduct. 691 F. App'x 312, 312 (9th Cir. 2017). The court noted "intimidation under § 2113(a) requires the necessary level of violent physical force as defined by *Johnson*," and, "as a general intent statute, conviction under § 2113(a) requires intentional use or threatened use of force and therefore does not conflict with *Leocal* . . . or *Fernandez-Ruiz*." *Id.* at 313. The Ninth Circuit concluded "no intervening higher authority is clearly unreconcilable with *Selfa* and *Wright*, and those precedents are controlling here." *Id.* (quotation omitted). *See also United States v. Pritchard*, 692 F. App'x 349 (9th Cir. 2017)(rejecting

the argument that *Wright* and *Selfa* were overruled by *Leocal* and/or *Johnson*); *United States v. Jordan*, 680 F. App'x 634, 634-35 (9th Cir. 2017)(holding § 2113(a) is a crime of violence and rejecting the argument that later cases overruled or displaced *Wright* and/or *Selfa*); *United States v. Howard*, 650 F. App'x 466, 468 (9th Cir. 2016)(affirming *Selfa*'s continued vitality). Although these opinions that bolster *Wright* and *Selfa* are unpublished and, therefore, not precedential, this Court remains bound by *Wright* and *Selfa*. In addition, the Court adopts the reasoning of *Cross*, *Pritchard*, *Johnson*, and *Howard* and concludes unarmed bank robbery satisfies the requirement of § 924(c)(3)(A). The Court, therefore, concludes § 2113(a) is a crime of violence under the force clause of § 924(c) and, thus, Defendant's sentences were not imposed in violation of the Constitution or the laws of the United States.

In summary, the Court denies Defendant's Motion to Vacate, Set Aside or Correct Sentence pursuant to § 2255.

IV. Certificate of Appealability

Because the legal issues raised in Defendant's Motion are not clearly established and because Defendant's arguments have the possibility of reasonable disagreement, the Court grants Defendant a certificate of appealability.

CONCLUSION

For these reasons, the Court **DENIES** Defendant's Motion (#201) to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255 and **GRANTS** Defendant a certificate of appealability.

IT IS SO ORDERED.

DATED this 15th day of February, 2018.

Anna J. Brown

ANNA J. BROWN
United States Senior District Judge

NOT FOR PUBLICATION

FILED

OCT 21 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. ERIC STEVEN WILCOXSON, AKA Eric Wilcoxson, Defendant-Appellant.	No. 18-35135 D.C. Nos. 3:16-cv-01269-BR 3:10-cr-00487-BR-3 MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Anna J. Brown, District Judge, Presiding

Submitted October 15, 2019**

Before: FARRIS, LEAVY, and RAWLINSON, Circuit Judges.

Eric Steven Wilcoxson appeals from the district court's order denying his 28 U.S.C. § 2255 motion to vacate. We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

Wilcoxson contends that his armed bank robbery conviction under 18 U.S.C.

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

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

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

Wilcoxson next contends that he is entitled to relief under *Dean v. United States*, 137 S. Ct. 1170 (2017). This contention also fails. Contrary to Wilcoxson's contention, *Dean* did not announce a substantive rule that applies retroactively to cases on collateral review. *See Garcia v. United States*, 923 F.3d 1242, 1245-46 (9th Cir. 2019). The district court correctly concluded that *Dean* does not satisfy section 2255(f)(3) and that this claim is therefore untimely. *See* 28 U.S.C. § 2255(f)(1).

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

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff,

v.

ERIC STEVEN WILCOXSON,

Defendant.

3:10-cr-00487-BR
(3:16-cv-01269-BR)

OPINION AND ORDER

BILLY J. WILLIAMS
United States Attorney
JANE H. SHOEMAKER
Assistant United States Attorney
1000 S.W. Third Avenue, Suite 600
Portland, OR 97204
(503) 727-1014

Attorneys for Plaintiff

LISA C. HAY
Federal Public Defender
STEPHEN R. SADY
Chief Deputy Federal Public Defender
ELIZABETH G. DAILY
Assistant Federal Public Defender
101 S.W. Main Street
Suite 1700
Portland, OR 97201
(503) 326-2123

Attorneys for Defendant

BROWN, Senior Judge.

This matter comes before the Court on Defendant Eric Steven Wilcoxson's Motion (#204) to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255. For the reasons that follow, the Court **DENIES** Defendant's Motion but **GRANTS** Defendant a certificate of appealability.

BACKGROUND

On December 7, 2010, Defendant was charged in an Indictment with Conspiracy to Commit Armed Bank Robbery; two counts of Armed Bank Robbery in violation of 18 U.S.C. § 2113(a) and (d); and two counts of Using, Carrying, Brandishing and Discharging a Firearm During and in Relation to a Crime of Violence in violation of 18 U.S.C. § 924(c)(1)(A).

On March 28, 2012, Defendant pled guilty to the one count of Conspiracy to Commit Armed Bank Robbery; the two counts of Armed Bank Robbery; and one of the two counts of Using, Carrying, Brandishing and Discharging a Firearm During and in Relation to a Crime of Violence.

On August 20, 2012, Senior District Judge Garr M. King held a sentencing hearing; sentenced Defendant to concurrent 60-month terms of imprisonment on the conspiracy count and the two armed robbery counts; imposed a mandatory minimum consecutive sentence of 120 months on the count of Using, Carrying, Brandishing and

Discharging a Firearm; and sentenced Defendant to five years of supervised release.

On August 21, 2012, the Court entered a Judgment. Defendant did not appeal his conviction.

On June 24, 2016, Defendant filed a Motion to Vacate or Correct Sentence Pursuant to 28 U.S.C. § 2255 in which he asserts the Court's sentence imposed as to the § 924(c) count violates the Constitution or laws of the United States because "the underlying offense of armed bank robbery no longer qualifies as a crime of violence" after the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

On December 20, 2017, Defendant's Motion to Vacate was fully briefed, and the Court took it under advisement.

DISCUSSION

Defendant moves to modify or to set aside his sentences on the ground that the underlying offense of armed bank robbery no longer qualifies as a crime of violence after the Supreme Court's decision in *Johnson*. Alternatively, Defendant asserts the Supreme Court's decision in *Dean v. United States*, 137 S. Ct. 1170 (2017), provides a separate ground for resentencing based on the correct interpretation of the sentencing provisions in 18 U.S.C. §§ 924(c), 3584(a), and 3553(a).

The government asserts Defendant was not sentenced under the

Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), and, therefore, *Johnson* does not apply to this matter. The government also asserts *Dean* is not retroactively applicable on collateral review, and, as a result, Defendant's Motion is untimely.

I. The Law

A. AEDPA Timeliness Requirements

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), motions to vacate or to set aside sentences pursuant to § 2255 are subject to a one-year limitation period that runs from the latest of:

> (1) the date on which the judgment of conviction becomes final; [or]
>
> * * *
>
> (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.

28 U.S.C. § 2255(f)(1), (3). Defendant does not dispute his June 25, 2016, Motion to Vacate is untimely under § 2255(f)(1) because he filed it more than one year after his sentence became final. Defendant, however, asserts his Motion to Vacate is timely under § 2255(f)(3) because of the Supreme Court's ruling in *Johnson* and/or the Supreme Court's decision in *Dean*.

B. The ACCA and *Johnson*

The ACCA requires a defendant to be sentenced to a

mandatory minimum prison term of 15 years to life if he has three prior convictions for "a violent felony or a serious drug offense, or both." 18 U.S.C. § 924(e)(1). The ACCA defines a violent felony as any crime punishable by imprisonment for a term exceeding one year that:

> (I) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B). Courts refer to the first clause, § 924(e)(2)(B)(I), as the elements clause; the first part of the disjunctive statement in (ii) as the enumerated-offenses clause; and the second part of the disjunctive statement in (ii) (starting with "or otherwise") as the residual clause. *See, e.g., Johnson*, 135 S. Ct. at 2563; *United States v. Lee*, 821 F.3d 1124, 1126 (9th Cir. 2016).

In *Johnson* the Supreme Court held "imposing an increased sentence under the residual clause of the [ACCA] violates the Constitution's guarantee of due process" on the basis that "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges." 135 S. Ct. at 2557, 2563. Subsequently in *Welch v. United States* the Supreme Court held its decision in *Johnson* announced a new

substantive rule that applies retroactively to cases on collateral review. 136 S. Ct. 1257, 1268 (2016). As a result, defendants sentenced pursuant to the ACCA residual clause can collaterally attack their sentences as unconstitutional under § 2255. The Court specifically noted in *Johnson*, however, that its "decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of violent felony." 135 S. Ct. at 2653.

II. Plaintiff's Ground for Relief under *Dean*

Defendant asserts the Supreme Court's holding in *Dean* requires resentencing and satisfies the timeliness requirement of § 2253(f). As noted, the government asserts *Dean* is not retroactively applicable to cases on collateral review and, therefore, does not satisfy the requirement of § 2255(f)(3).

In *Dean* the Supreme Court held a sentencing court is not prohibited from considering the impact of the mandatory minimum sentence required under 18 U.S.C. § 924(c) when determining the appropriate sentence for the predicate offense. *Dean*, 137 S. Ct. at 1176 ("Nothing in § 924(c) restricts the authority conferred on sentencing courts by § 3553(a) and the related provisions to consider a sentence imposed under § 924(c) when calculating a just sentence for the predicate count.").

Although the Ninth Circuit has not addressed the issue, courts that have considered this issue have concluded *Dean* is not

retroactively applicable to cases on collateral review. *See, e.g., United States v. Cooley*, No. 1:09-cr-331, 2017 WL 4003355, at *2 (W.D. Mich. Sept. 12, 2017)(concluding *Dean* was not retroactively applicable to cases on collateral review and, therefore, did not satisfy the criteria of § 2255(f)(3)); *United States v. Thornbrugh*, No. 89-CR- 0067-CVE, 2017 WL 3976295, at *2 (N.D. Okla. Sept. 8, 2017)("The Supreme Court did not expressly make *Dean* retroactively applicable to cases on collateral review, and no court has found that *Dean* applies retroactively. Even if it did apply retroactively, *Dean* does not state a mandatory rule that would entitle defendant to a sentencing reduction and merely reaffirms the clearly-established proposition that a sentencing court has the discretion to depart from the sentencing guidelines absent the applicability of statutory mandatory minimum sentence."); *United States v. Taylor*, No. 7:12CR00043, 2017 WL 3381369, at *4 (W.D. Va. Aug. 4, 2017)("*Dean* does not apply retroactively to § 2255 proceedings."); *Hall v. United States*, No. 17-C-3892, 2017 WL 3235438, at *3 (N.D. Ill. July 31, 2017) ("The *Dean* Court made no mention of applying its holding retroactively to cases on collateral review, and the United States Court of Appeals for the Seventh Circuit has yet to address whether courts should apply *Dean* as such."); *Simmons v. Terris*, No. 17-cv-11771, 2017 WL 3017536, at *2 (E.D. Mich. July 17, 2017)("[T]here is nothing in the Supreme Court's opinion

in *Dean* to suggest that the holding is to be applied retroactively to cases on collateral review."); *In re Dockery*, No. 17-50367, 2017 WL 3080914, at *1 (5th Cir. July 20, 2017) (denying certification because the defendant did not make "a *prima facie* showing that *Dean* announced a new rule of constitutional law that was made retroactive to cases on collateral review"); *United States v. Adams*, No. 7:06-cr-22-1, 2017 WL 2829704, at *2 (W.D. Va. June 29, 2017)(dismissing the defendant's § 2255 motion as untimely filed because *Dean* does not apply retroactively to § 2255 proceedings); *Morban-Lopez v. United States*, 3:17-cv-237-GCM, 2017 WL 2682081, at *2 n.2 (W.D.N.C. June 21, 2017)("[T]he Supreme Court's ruling in *Dean* does not render the motion to vacate timely under Section 2255(f)(3).").

This Court adopts the reasoning of these cases. The Court, therefore, finds the Supreme Court did not indicate in *Dean* that its decision was retroactively applicable on collateral review. In addition, this Court finds *Dean* merely reaffirms the clearly-established proposition that a sentencing court has the discretion to depart from the sentencing guidelines absent the applicability of a statutory mandatory minimum sentence. Accordingly, the Court concludes *Dean* is not retroactively applicable on collateral review and, therefore, does not satisfy the requirements of § 2255(f)(3) or render Defendant's Motion

timely.

III. Plaintiff's Ground for Relief under *Johnson*

As noted, Defendant asserts armed bank robbery does not qualify as a crime of violence under 18 U.S.C. § 924(c) after the Supreme Court's decision in *Johnson*, and, therefore, his sentence should be vacated.

A. Sentencing Pursuant to 18 U.S.C. § 924(c)(1)(A)

18 U.S.C. § 924(c)(1)(A) provides in relevant part that a person who "in relation to any crime of violence . . . uses or carries a firearm . . . shall, in addition to the punishment provided for such crime of violence . . . be sentenced to a term of imprisonment of not less than 5 years" to run consecutively with the punishment for the underlying crime of violence. 18 U.S.C. § 924(c)(3) defines a "crime of violence" as an offense that is a felony and

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

As noted, courts refer to the (A) clause of section 924(c)(3) as the "force clause" and to the (B) clause of section 924(c)(3) as the "residual clause."

B. Analysis

In *United States v. Wright* the Ninth Circuit held armed

bank robbery under 18 U.S.C. § 2113(a) and (d) qualifies as a crime of violence under the "force" clause of § 924(c)(3)(A). 215 F.3d 1020, 1028 (9th Cir. 2000). The court explained § 2113(a) necessarily "has as an element the use, attempted use, or threatened use of physical force against the person or property of another and, therefore, 'a taking by force and violence, or by intimidation' is an element of armed bank robbery." *Id.*

In *United States v. Selfa* the Ninth Circuit held unarmed bank robbery in violation of § 2113(a) constitutes a crime of violence under the force clause of United States Sentencing Guideline § 4B1.2, which is identical to the force clause of § 924(c). 918 F.2d 749, 751 (9th Cir. 1990). Specifically, the court "defined 'intimidation' under § 2113(a) to mean 'willfully to take, or attempt to take, in such a way that would put an ordinary, reasonable person in fear of bodily harm.'" *Id.* (quoting *United States v. Hopkins*, 703 F.2d 1102, 1103 (9th Cir. 1983)). The court concluded this definition met the requirement of a "threatened use of physical force" under the identical force clause in the Sentencing Guidelines. *Id.*

Defendant concedes the holdings in *Wright* and *Selfa* appear to foreclose his challenge to his sentences, but he asserts those cases have been undermined by the Supreme Court's subsequent decisions in *Leocal v. Ashcroft*, 543 U.S. 1 (2004),

and *Johnson* in addition to the Ninth Circuit's decision in *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1123 (9th Cir. 2006). The Ninth Circuit, however, has rejected this argument in several decisions issued after *Johnson*. For example, in *United States v. Cross* the Ninth Circuit concluded *Selfa* and *Wright* remain controlling law in this Circuit even after *Leocal* and *Johnson* and the Ninth Circuit rejected the defendant's assertion that unarmed bank robbery does not require violent force or intentional conduct. 691 F. App'x 312, 312 (9th Cir. 2017). The court noted "intimidation under § 2113(a) requires the necessary level of violent physical force as defined by *Johnson*," and, "as a general intent statute, conviction under § 2113(a) requires intentional use or threatened use of force and therefore does not conflict with *Leocal* . . . or *Fernandez-Ruiz*." *Id.* at 313. The Ninth Circuit concluded "no intervening higher authority is clearly unreconcilable with *Selfa* and *Wright*, and those precedents are controlling here." *Id.* (quotation omitted). *See also United States v. Pritchard*, 692 F. App'x 349 (9th Cir. 2017)(rejecting the argument that *Wright* and *Selfa* were overruled by *Leocal* and/or *Johnson*); *United States v. Jordan*, 680 F. App'x 634, 634-35 (9th Cir. 2017)(holding § 2113(a) is a crime of violence and rejecting the argument that later cases overruled or displaced *Wright* and/or *Selfa*); *United States v. Howard*, 650 F. App'x 466, 468 (9th Cir. 2016)(affirming *Selfa*'s continued

vitality). Although these opinions that bolster *Wright* and *Selfa* are unpublished and, therefore, not precedential, this Court remains bound by *Wright* and *Selfa*. In addition, the Court adopts the reasoning of *Cross*, *Pritchard*, *Johnson*, and *Howard* and concludes unarmed bank robbery satisfies the requirement of § 924(c)(3)(A). The Court, therefore, concludes § 2113(a) is a crime of violence under the force clause of § 924(c) and, thus, Defendant's sentences were not imposed in violation of the Constitution or the laws of the United States.

In summary, the Court denies Defendant's Motion to Vacate, Set Aside or Correct Sentence pursuant to § 2255.

IV. Certificate of Appealability

Because the legal issues raised in Defendant's Motion are not clearly established and because Defendant's arguments have the possibility of reasonable disagreement, the Court grants Defendant a certificate of appealability.

CONCLUSION

For these reasons, the Court **DENIES** Defendant's Motion (#204) to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255 and **GRANTS** Defendant a certificate of

appealability.

IT IS SO ORDERED.

DATED this 15th day of February, 2018.

ANNA J. BROWN
United States Senior District Judge

NOT FOR PUBLICATION

FILED

OCT 21 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. TIMOTHY KANA DAWSON, Defendant-Appellant.	No. 18-35179 D.C. Nos. 3:16-cv-01284-SI 3:03-cr-00410-SI-1 No. 18-35180 D.C. Nos. 3:16-cv-01285-SI 3:04-cr-00010-SI-1 No. 18-35181 D.C. Nos. 3:16-cv-01287-SI 3:05-cr-00073-SI-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Michael H. Simon, District Judge, Presiding

Submitted October 15, 2019**

Before: FARRIS, LEAVY, and RAWLINSON, Circuit Judges.

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

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

In these consolidated appeals, Timothy Dawson appeals from the district court's orders denying his 28 U.S.C. § 2255 motions to vacate. We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

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

Dawson next contends that he is entitled to relief under *Dean v. United States*, 137 S. Ct. 1170 (2017). This contention also fails. Contrary to Dawson's contention, *Dean* did not announce a substantive rule that applies retroactively to cases on collateral review. *See Garcia v. United States*, 923 F.3d 1242, 1245-46 (9th Cir. 2019). *Dean*, therefore, does not satisfy section 2255(f)(3), and Dawson's claim was untimely. *See* 28 U.S.C. § 2255(f)(1).

Appellee's motions for summary affirmance are denied as moot.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, v. **TIMOTHY KANA DAWSON,** Petitioner-Defendant.	Case No. 3:03-cr-410-SI 3:04-cr-010-SI 3:05-cr-073-SI **OPINION AND ORDER**

Billy J. Williams, United States Attorney and Jennifer Martin, Assistant United States Attorney, District of Oregon, 1000 S.W. Third Avenue, Suite 600, Portland, OR 97204. Of Attorneys for Plaintiff.

Stephen R. Sady, Chief Deputy Federal Defender and Elizabeth G. Daily, Assistant Federal Public Defender, FEDERAL PUBLIC DEFENDER'S OFFICE FOR THE DISTRICT OF OREGON, 101 SW Main Street, Suite 1700, Portland, OR 97204. Of Attorneys for Defendant.

Michael H. Simon, District Judge.

Before the Court is Timothy Kana Dawson's motion for relief under 28 U.S.C. § 2255, seeking to vacate his 60-month mandatory consecutive sentence imposed for possessing a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A). (Count 2, Case No. 3:03-cr-410). For the reasons given below, his motion is denied.

STANDARDS

Section 2255 permits a prisoner in custody under sentence to move the court that imposed the sentence to vacate, set aside, or correct the sentence on the ground that:

> [T]he 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 . . . .

28 U.S.C. § 2255(a).

Under Section 2255, "a district court must grant a hearing to determine the validity of a petition brought under that section '[u]nless the motions and the files and records of the case *conclusively show* that the prisoner is entitled to no relief.'" *United States v. Baylock*, 20 F.3d 1458, 1465 (9th Cir. 1994) (emphasis in original) (quoting 28 U.S.C. § 2255). A motion pursuant to § 2255 must be filed within one year from the date on which a petitioner's conviction becomes final, unless an exception applies. *Id.* § 2255(f)(1). One exception provides that a motion is timely if (1) it "assert[s] . . . [a] right . . . newly recognized by the Supreme Court," *id.* § 2255(f)(3), (2) it is filed within one year from "the date on which the right asserted was initially recognized by the Supreme Court," *id.* § 2255(f)(3), and (3) the Supreme Court or controlling Court of Appeals has declared the right retroactively applicable on collateral review, *Dodd v. United States*, 545 U.S. 353, 358-59 (2005). Only the Supreme Court may "recognize" a new right under § 2255(f)(3). *Dodd*, 545 U.S. at 357-59. In order to show that his or her claim relies on a new rule of constitutional law, a movant must show that "(1) he or she was sentenced in violation of the Constitution and that (2) the particular constitutional rule that was violated is 'new,' [and] was 'previously unavailable'" *United States v. Geozos*, 870 F.3d 890, 895 (9th Cir. 2017).

BACKGROUND

On February 24, 2005, Dawson pleaded guilty to one count of armed bank robbery, in violation of 18 U.S.C. § 2113(a) and (d) (Count 1 in Case No. 3:04-cr-010), four counts of unarmed bank robbery, in violation of 18 U.S.C. § 2113(a) (Counts 2 through 4 in Case No. 3:04-cr-010 and Count 1 in Case No. 3:03-cr-410), one count of possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(a) (Count 2 in Case No. 3:03-cr-410), and one count of escape, in violation of 18 U.S.C. § 751(a) (Count 1 of the information in Case No. 3:05-cr-073). On November 1, 2005, Dawson was sentenced to five concurrent sentences of 202 months for each of the substantive robbery offenses, a concurrent 60-month sentence for the escape charge, and a mandatory consecutive sentence of 60 months for the § 924(c) violation.

DISCUSSION

Dawson argues that he is entitled to resentencing on two independent grounds. First, Dawson argues that the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Johnson II*), invalidated his mandatory consecutive sentence under § 924(c). Second, Dawson argues that the Supreme Court's decision in *Dean v. United States*, 137 S. Ct. 1170 (2017), entitles him to a new sentencing hearing in which the sentencing judge has discretion to consider the suitability of his aggregate sentence.

A. Relief under *Johnson II*

Dawson argues that the 60-month mandatory consecutive sentence under § 924(c) is unconstitutional after the Supreme Court's decision in *Johnson II*. In June 2015, the Supreme Court struck down as unconstitutionally vague the "residual clause" of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(A)(iii). *Johnson II*, 135 S. Ct. at 2563. The residual clause defined a "violent felony," in part, as one that "involves conduct that presents a

serious potential risk of physical injury to another." In *Johnson II*, the Court observed that the residual clause required courts "to picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury" in determining whether certain crimes were "violent felonies." *Id.* at 2557 (2015). The Court found that the "indeterminacy of th[is] wide-ranging inquiry . . . denies fair notice to defendants and invites arbitrary enforcement by judges." *Id.* As such, imposing a mandatory increase in a defendant's sentence under the clause was an unconstitutional denial of due process. *Id.* The next year, in *Welch v. United States*, the Court held that *Johnson II* had announced a new substantive rule that applies retroactively on collateral appeal. 136 S. Ct. 1257, 1268 (2016).

Dawson, however, was not sentenced under the residual clause of the ACCA. Instead, he was sentenced under § 924(c), which defines a "violent felony" as an offense that is a felony and:

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3). Clause (A) of this definition is known as the "force clause," and clause (B) is known as the "residual clause." Dawson argues that under the new rule announced in *Johnson II*, the residual clause of § 924(c) must also be struck down as unconstitutionally vague. Because he filed his claim within one year of this new rule being announced, Dawson argues, his claim is not time-barred. The government responds that Dawson's § 2255 claim is time-barred under 28 U.S.C. § 2255(f)(3) because it was filed more than one year after his sentence became final, and the constitutional rule that he asserts is not the same rule that was recognized in *Johnson II*.

The government further argues that, even if Dawson's claim is not time-barred, his sentence was proper because unarmed bank robbery under 18 U.S.C. § 2113(a) is a crime of violence under the force clause of § 924(c)(3)(A). Thus, any reliance by the sentencing court on § 924(c)(3)(B) was harmless error. Indeed, in *United States v. Watson*, the Ninth Circuit held that "bank robbery 'by force and violence, or by intimidation' is a crime of violence." 881 F.3d 782, 786 (2017). Although *Watson* specifically considered whether *armed* bank robbery is a crime of violence under § 924(c), the holding rested on the conclusion that unarmed bank robbery is also a crime of violence. Because "[a] conviction for armed bank robbery requires proof of all the elements of unarmed bank robbery," the court reasoned, armed bank robbery cannot involve less force than unarmed bank robbery and is therefore a crime of violence. *Id.* Thus, any attempt to distinguish unarmed bank robbery from armed bank robbery under *Watson* would be artificial. Because Dawson's petition must fail on the merits, this Court need not consider whether his petition was timely filed.

There is, however, some tension in the *Watson* opinion's claim that "a defendant may not be convicted [of bank robbery] if he only negligently intimidated the victim," *id.* at 785 (citing *Carter v. United States*, 530 U.S. 255, 269 (2000)), and previous Ninth Circuit opinions on the mens rea requirement for a bank robbery conviction. The defendant in *Watson* argued, as Dawson argues in this case, that a defendant who merely negligently intimidated a victim could be convicted of bank robbery. Such negligent conduct, Dawson argues, does not rise to the Supreme Court's requirement that a crime of violence involve "a higher degree of intent than negligence or merely accidental conduct" with regard to the "force" element. *See Leocal v. Ashcroft*, 543 U.S. 1 (2004). If a conviction for bank robbery by intimidation includes conduct of lesser culpability than a felony committed by the "threatened use of physical force," then under

the categorical approach, bank robbery cannot be considered a crime of violence. *See Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013).

The *Watson* opinion responded to this argument by citing a line of dicta from *Carter v. United States*, which notes that a conviction under § 2113(a) requires a finding that the defendant "possessed knowledge with respect to . . . the taking of property of another by force and violence or intimidation."881 F.3d at 785 (quoting 255 U.S. at 268). Thus, the Ninth Circuit concluded, "[t]he offense must at least involve the knowing use of intimidation." *Id.* at 785.

In *United States v. Selfa*, however, 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." 918 F.2d 749, 751 (9th Cir. 1990). This definition contemplates the defendant's mens rea with regard to only the "taking" element of bank robbery, but not with regard to the "intimidation" element. Similarly, in *United States v. Foppe*, the Ninth Circuit held that the trial court "should not instruct the jury on specific intent" because "[t]he determination of whether there has been an intimidation should be guided by an objective test focusing on the accused's actions." 993 F.2d 1444, 1451 (9th Cir. 1993) (quoting *United States v. Alsop*, 479 F.2d 65, 67 n.4 (9th Cir. 1973)) (quotation marks omitted). As defined in *Selfa* and *Foppe*, the intimidation element is met by any conduct "that would put a . . . reasonable person in fear of bodily harm" and is evaluated objectively, without regard to the defendant's actual mental state. Under *Elonis v. United States*, such conduct could be satisfied by only a negligent threat. 135 S. Ct. 2001, 2011 (2015) (concluding that 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"). Although *Foppe* and *Selfa* both pre-date *Carter*, the Eighth Circuit relied on *Foppe* in a case decided after *Carter* to hold that "the mens rea element of bank

robbery [does] not apply to the element of intimidation." *United States v. Yockel*, 320 F.3d 818, 824 (8th Cir. 2003). In addition, the Ninth Circuit's model jury instructions as of February 2018 continue not to recommend an instruction on the defendant's "knowing use of intimidation" but rather propose only that the jury find that the defendant took the bank's money "through . . . intimidation." Manual of Model Criminal Jury Instruction § 8.162 (Ninth Circuit Jury Instruction Comm. 2017).

In the Ninth Circuit, and other circuits, a simple demand for money is sufficient to establish intimidation under § 2113(a). *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."); *United States v. Hopkins*, 703 F.2d 1102, 1103 (9th Cir. 1983) (upholding a conviction where "the evidence showed that [the defendant] spoke calmly, made no threats, and was clearly unarmed" because "'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."). The Fourth Circuit upheld a conviction for robbery by intimidation where the defendant handed a teller a note that read: "These people are making me do this," and then stated, "They are forcing me and have a gun. Please don't call the cops. I must have at least $500." *United States v. Ketchum*, 550 F.3d 363, 365 (4th Cir. 2008). The Tenth Circuit upheld a conviction for bank robbery where a 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 bank manager to 'shut up.'" *United States v. Slater*, 692 F.2d 107, 107-08 (10th Cir. 1982); *accord United States v. O'Bryant*, 42 F.3d 1407 (10th Cir. 1994) (Table) (affirming a finding of intimidation where the defendant merely reached over the counter and took money from an open teller drawer after asking the teller for change).

It may be that any demand for money in the course of a bank robbery, regardless of any explicitly threatening statement or conduct, always carries an implicit threat of violence. The Ninth Circuit's decision in *United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016), however, seems to reject the premise that an implicit threat is sufficient to render an armed robbery a crime of violence. In *Parnell*, the Ninth Circuit considered whether a defendant's prior conviction for armed robbery in Massachusetts was a crime of violence under the force clause of the ACCA, and held that it was not. *Id.* at 980. The court was "not persuaded a simple [purse] snatching necessarily entails an implied threat to use violent force to overcome a victim's potential resistance. Although some snatchers are prepared to use violent force to overcome resistance, others are not." *Id.* The court elaborated that a threat to use violent force cannot be implicit but rather "requires some outward expression or indication of an intention to inflict pain, harm or punishment." *Id.* This principle may apply equally to bank robbery. Although some bank robbers are prepared to use violent force to overcome resistance, others are not. The answer may be that in *demanding* either a purse or a bank's money, a defendant makes an outward manifestation of "an intention to inflict pain, harm or punishment" if the victim does not comply, and by simply *taking* the purse or money, the defendant makes no such outward manifestation. Such a distinction could lead to the surprising conclusion that a demand for another person's property is a crime of violence, while the forcible taking of that property is not.[1] Nevertheless, the

[1] The Ninth Circuit has held that several state robbery crimes are nonviolent because the amount of physical force involved is not necessarily "violent," even where the physical force must be sufficient to overcome the victim's resistance. *See, e.g., United States v. Geozos*, 870 F.3d 890, 900-01 (2017) (Florida robbery and armed robbery offense is nonviolent, even where the victim must resist and be overcome by defendant's physical force); *United States v. Strickland*, 860 F.3d 1224, 1227 (9th Cir. 2017) (Oregon robbery statute offense is nonviolent because the "physical force" requirement "doesn't require physically violent force.").

disposition of this case appears to be dictated by *Watson*. Given the tension between *Carter* and the case law described above, however, it is appropriate to issue a certificate of appealability.

B. Relief under *United States v. Dean*

Dawson argues that, in the alternative, he is eligible for resentencing under *Dean v. United States*, 137 S. Ct. 1170 (2017). When Dawson was sentenced, the rule in the Ninth Circuit was that sentencing courts could not take into consideration the mandatory consecutive sentence imposed under § 924(c) when calculating the length of the prison term for the predicate crime. In *Dean*, the Supreme Court held that neither 18 U.S.C § 3553(a), which specifies the factors that courts are to consider in imposing a sentence, nor § 924(c) itself bars sentencing courts from considering mandatory consecutive sentences when calculating the duration of the predicate sentence. Thus, for example, a sentencing court may sentence a defendant to one day (for the predicate crime) plus 60 months (for the mandatory consecutive sentence under § 924(c)) if that sentencing judge finds, taking into consideration all § 3553(a) factors, such an aggregate sentence is the just one.

Because Dawson was sentenced under § 924(c) in the pre-*Dean* regime under which the Ninth Circuit restricted sentencing courts' discretion, and because he filed his § 2255 motion within one year of *Dean* being announced, Dawson argues that he is entitled to a resentencing hearing. The government responds that *Dean* does not apply retroactively because it did not announce a new substantive constitutional rule.

Neither party argues that *Dean* did not announce a new rule. Instead, the specific question in this case is whether *Dean* announced a new procedural rule or a new substantive rule. A new procedural rule is presumptively not retroactive, and would thus not apply to Dawson's conviction, which became final before the rule was announced. *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004). A new substantive rule is presumptively retroactive and would thus potentially

be grounds for sentencing relief. *Id.* at 352. "[R]ules that regulate only the *manner of determining* the defendant's culpability are procedural." *Id.* at 353. Rules that "alter[] the range of conduct or the class of persons that the law punishes" are substantive. *Id.*

In *Schriro*, the Supreme Court held that the rule announced in *Ring v. Arizona*, 536 U.S. 584, 609 (2002)——that "a sentencing judge, sitting without a jury, [may not] find an aggravating circumstance necessary for imposition of the death penalty"—was procedural. *Id.* (citation omitted) (alteration in original). The Court described the rule as "alter[ing] the range of permissible methods for determining whether a defendant's conduct is punishable by death," and reasoned that "[r]ules that allocate decisionmaking authority in this fashion are prototypical procedural rules." *Id.* The Ninth Circuit later relied on this reasoning to hold that the rule announced in *Booker*—that the United States Sentencing Guidelines are advisory and not mandatory—was a procedural rule. *United States v. Cruz*, 423 F.3d 1119, 1121 (9th Cir. 2005) (citing *Schriro* to hold that rules that allocate decisionmaking between judges and juries are procedural). *Schriro* and *Booker* both specifically considered the allocation of decisionmaking between judges and juries.[2] The *Dean* rule, however, does not—it clarifies that judges have the discretion, but are not required, to consider mandatory minimums when calculating the appropriate length of a predicate sentence. Such a distinction, however, does not alter the fact that the *Dean* rule, like the rules in *Schriro* and *Booker*, altered only "the range of permissible methods for determining whether a defendant's conduct is punishable" by a specific sentence length, but did not "alter[] the range of conduct or class of persons that the law punishes." Also,

[2] Although best remembered for its remedy—that the Guidelines are advisory and not mandatory—the holding in *Booker* was that the mandatory Guidelines regime violated the Sixth Amendment's guarantee that "[a]ny fact . . . necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict" must be found by a jury and not a judge. 543 U.S. 220, 244 (2005). *Booker*, like *Schriro*, thus dealt with the allocation of decisionmaking between the judge and jury.

like the rules in *Schriro* and *Booker*, the *Dean* rule "merely raises the possibility that someone convicted"—or, here, sentenced—"with use of the invalidated procedure might have been acquitted"—or, here, sentenced less harshly. *Schriro*, 542 U.S. at 352.

Dawson relies on the Supreme Court's decision in *Montgomery v. Louisiana* to argue that a rule may be substantive even if it does not forbid a certain punishment for a certain class of people, but only alters the degree of a sentencing judge's discretion. In *Montgomery*, the Supreme Court held that its rule in *Miller*—that mandatory life sentences without the possibility of parole are unconstitutional for minor defendants—was retroactive. 136 S.Ct. 718, 735 (2016). Dawson argues that "*Miller* did not forbid life sentences," but merely imposed a requirement that judges consider a defendant's immaturity and potential for rehabilitation at sentencing. It may be true that the original *Miller* opinion did not appear to impose such a categorical bar,[3] but *Montgomery* made clear that "States [are not] free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment." *Id.* at 735. *Montgomery* explicitly relied on this characterization of *Miller* to distinguish the rule in *Miller* from other cases that held that "the processes in which States must engage before sentencing a person to death" were not retroactive. *Id.* at 736 ("The processes [in other cases] may have had some effect on the likelihood that capital punishment would be imposed, but none of those decisions rendered a certain penalty unconstitutionally excessive for a category of offenders.").

[3] Justice Scalia, dissenting in *Montgomery*, agreed with the position urged by Dawson that *Miller* did not categorically bar any class of punishment and for this reason, among others, wrote that the rule in *Miller* could not be applied retroactively on collateral appeal. 136 S.Ct. 718, 744 (Scalia, J. dissenting) ("It is plain as day that the majority is not applying *Miller*, but rewriting it.").

In *Montgomery*, the Court emphasized the distinction between the procedural component of the rule announced in *Miller*—the requirement that "youth and its attendant characteristics" be considered as sentencing factors—and the actual substantive rule that mandated that *Miller* apply retroactively—that "children whose crimes reflect transient immaturity" may not be sentenced to life without parole under the Eighth Amendment. *Montgomery* recognized that the requirement for courts to consider a defendant's youth was a procedural rule, but reasoned that it was a procedural mechanism necessary to implement the substantive rule announced in *Miller* that the Eight Amendment bars certain defendants from a sentence of life without parole. *Id.* at 735 ("[The procedural element] does not replace but rather gives effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity."). The rule in *Dean* resembles the procedural component of the rule in *Montgomery*, insofar as it alters sentencing judges' discretion. Unlike in *Montgomery*, however, there is no attendant substantive rule that the procedural mechanism was created to achieve. *Dean* was about a sentencing judge's discretion, which is a procedural concern. *Miller* was about the unusual cruelty of sentencing children to life in prison without the possibility of parole for crimes arising from their immaturity, which is a substantive concern. Thus, because *Miller* did place certain "punishment beyond the State's power to impose," *Montgomery* does not stand for the proposition that a rule may be substantive where it affects only a sentencing judge's exercise of discretion. Because the rule in *Dean* affects only the sentencing judge's discretion in calculating a sentence, it is procedural under *Schriro*, not substantive, and does not retroactively apply to Dawson's case. Because the Ninth Circuit has not yet ruled on the retroactivity of *Dean*, however, a certificate of appealability is appropriate.

CONCLUSION

Defendant's motion to vacate, correct, or set aside his sentence (ECF 62) is DENIED. The Court grants, however, a Certificate of Appealability on the issues of whether unarmed bank robbery in violation of 18 U.S.C. § 2113(a) is a crime of violence under U.S.C. § 924(c)(3)(A), and whether the rule announced in *United States v. Dean* is retroactive for purposes of collateral appeal.

IT IS SO ORDERED.

DATED this 27th day of February, 2018.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge

FILED

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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. LARRY JAMES RICH, Defendant-Appellant.	No. 18-35451 D.C. Nos. 6:16-cv-01271-MC 6:08-cr-60126-MC-1 District of Oregon, Eugene ORDER

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

Appellee's motion for summary affirmance (Docket Entry No. 19) is granted. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (stating standard); *see also United States v. Watson*, 881 F.3d 782 (9th Cir.), *cert. denied*, 139 S. Ct. 203 (2018). Notwithstanding appellant's assertion that *Watson* was wrongly decided, *Watson* is controlling as to the outcome of this appeal. *See United States v. Boitano*, 796 F.3d 1160, 1164 (9th Cir. 2015) ("[A]s a three-judge panel we are bound by prior panel opinions and can only reexamine them when the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority.") (internal quotation marks omitted).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA

Case. No. 6:08-cr-60126-MC

v.

OPINION AND ORDER

LARRY JAMES RICH,

Defendant.

MCSHANE, Judge:

Pursuant to 28 U.S.C. § 2255, defendant Larry James Rich moves to vacate or correct his 312 month sentence under 18 U.S.C. § 924(c)(1)(C). Rich argues that his underlying offense of armed bank robbery no longer qualifies as a "crime of violence" and his sentence must be vacated. Because armed bank robbery remains a crime of violence, Rich's motion is DENIED.

DISCUSSION

Nearly three years ago, the Supreme Court struck down as unconstitutionally vague the residual clause of the Armed Career Criminal Act (the "ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii). *Johnson v. United States*, 135 S.Ct. 2551 (2015). The ACCA imposes a15 year mandatory minimum sentence for the crime of felon in possession of a firearm if the defendant has three prior predicate convictions that meet the definition of "violent felony." 18 U.S.C. § 924(e)(1).

The ACCA defines "violent felony" as follows:

> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . . that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

§ 924(e). The final portion of the statue ("otherwise involves conduct that presents a serious potential risk of physical injury to another") is known as the "residual clause" and has been found unconstitutionally vague by the *Johnson* court. The Supreme Court later concluded *Johnson* was retroactive. *Welch v. United States*, 136 S. Ct. 1257 (2016).

There are two federal firearm statutes that impose mandatory minimum sentences. The ACCA, the subject of the *Johnson* decision, focuses on a defendant's prior criminal history; specifically, convictions involving drugs and crimes of violence. 18 USC 924(c), on the other hand, attaches irrespective of criminal history when a firearm is used or possessed in the furtherance of another crime of drug trafficking or violence. Rich was sentenced under 18 U.S.C. § 924(c), not the ACCA. Rich, however, argues that because the language in § 924(c) essentially mirrors that of the ACCA, the holding of *Johnson* renders his own sentence unconstitutional. Similar to the ACCA, § 924(c)(3) contains certain sentence enhancements for any "crime of violence." Like the ACCA, § 924(c)(3) contains a "force clause" and a "residual clause." Section 924(c)(3) provides an enhancement for "a crime of violence" 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 that physical force against the person or property of another may be used in the course of committing the offense.

Rich argues that under the reasoning of *Johnson*, the residual clause of § 924(c)(3)(B) is unconstitutional. With the residual clause inapplicable, he next argues that because his underlying offense of armed bank robbery does not have "as an element the use, attempted use, or threated use of physical force against the person or property of another," his sentence under the force clause of § 924(c) is unconstitutional.

The relevant federal bank robbery statute provides that "Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, . . . any property or money . . . in the care, custody, control, management, or possession of, any bank . . ." shall be imprisoned up to twenty years. 18 U.S.C. § 2113(a). The statute provides a maximum 25 year sentence for one, like Rich, who robs a bank and "assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device[.]" § 2113(d).

After Rich filed his memorandum in support, but before the government filed its response, the Ninth Circuit issued a published opinion holding the federal crime of carjacking is a "crime of violence" under the "force clause" of § 924(c). *United States v. Gutierrez*, 876 F.3d 1254, 1256 (9th Cir. 2017) (*per curiam*). The carjacking statute, like the bank robbery statute, requires that the taking be "by force and violence or by intimidation[.]" *Id.* (quoting 18 U.S.C. § 2119). Like Rich, Gutierrez argued that because carjacking can be committed by intimidation, it does not qualify as a crime of violence following *Johnson*. In rejecting Guitierrez's argument, the Court agreed with other circuits and stated:

> We, too, have held that "intimidation" as used in the federal bank robbery statute requires that a person take property "in such a way that would put an ordinary, reasonable person in fear of bodily harm," which necessarily entails the "threatened use of physical force." *United States v. Selfa*, 918 F.2d 749, 751 (9th Cir. 1990) (citation omitted). As a result, in our court, too, federal bank robbery constitutes a crime of violence. *Id.* We have not addressed in a published decision whether *Selfa's* holding remains sound after *Johnson*, but we think it does. A defendant cannot put a reasonable person in fear of bodily harm without

> threatening to use "force capable of causing physical pain or injury." *Johnson*, 559 U.S. at 140; *see United States v. Castleman*, 134 S. Ct. 1405, 1417 (2014) (Scalia, J. concurring) (bodily injury necessarily involves the use of violent force.). Bank robbery by intimidation thus requires at least an implicit threat to use the type of violent physical force necessary to meet the *Johnson* standard.

Id. at 1257.

After the government filed its response, but before Rich filed his reply, the Ninth Circuit held that the federal bank robbery statute Rich challenges here remains a "crime of violence" under § 924(c)'s "force clause." *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018) (*per curiam*). Watson argued that committing bank robbery via intimidation does not require the violent physical force "capable of causing physical pain or injury" required under *Johnson*. *Id.* at 784-85 (quoting *Johnson*, 559 U.S. at 140). The court noted that *Gutierrez* recently rejected "this exact argument." *Id.* at 785. The court next rejected Watson's argument that bank robbery is not a crime of violence because one could commit it via negligent intimidation. Pointing to *Carter v. United States*, 530 U.S. 255, 268-69 (2000), the court concluded that "contrary to Watson and Danielson's contention, a defendant may not be convicted [of federal bank robbery] if he only negligently intimidated the victim. *Carter*, 530 U.S. at 269. The offense must at least involve the knowing use of intimidation, which necessarily entails the knowing use, attempted use, or threatened use of violent physical force." *Watson*, 881 F.3d at 785.

Rich acknowledges that *Watson* forecloses his argument that bank robbery is not a crime of violence, but seeks a certificate of appealability, arguing that *Watson's* holding that negligent intimidation will not support a bank robbery conviction is at odds with Supreme Court and Ninth Circuit precedent. Judge Simon recently noted "some tension" between *Watson* and *Carter* on the same issue Rich raises here. *United States v. Dawson*, 2018 WL 1082839 at *3-4 (D. Or. February 27, 2018 Opinion). After noting *Watson* controlled the outcome, Judge Simon noted

that "Given the tension between *Carter* and the case law described above, however, it is appropriate to issue a certificate of appealability." *Id.* at *4. I agree.

CONCLUSION

Because federal bank robbery remains a crime of violence, Rich's Motion under 28 U.S.C. § 2255, ECF No. 27, is DENIED. Mr. Rich is entitled to a certificate of appealability as to his argument that armed bank robbery is not a crime of violence under § 924(c).

IT IS SO ORDERED.

DATED this 23rd day of May, 2018.

/s/ Michael McShane
Michael McShane
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROBIN LEE KNUTSON, Defendant-Appellant.	No. 18-35618 D.C. Nos. 6:16-cv-02415-MC 6:98-cr-60019-MC-1 District of Oregon, Eugene ORDER

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

Appellee's motion for summary affirmance (Docket Entry No. 16) is granted. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (stating standard); *see also United States v. Watson*, 881 F.3d 782 (9th Cir.), *cert. denied*, 139 S. Ct. 203 (2018); *Brown v. Muniz*, 889 F.3d 661 (9th Cir. 2018), *cert. denied sub nom. Brown v. Hatton*, 139 S. Ct. 841 (2019). Notwithstanding appellant's assertion that *Watson* was wrongly decided, *Watson* is controlling as to whether federal bank robbery qualifies as a crime of violence. *See United States v. Boitano*, 796 F.3d 1160, 1164 (9th Cir. 2015) ("[A]s a three-judge panel we are bound by prior panel opinions and can only reexamine them when the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority.") (internal quotation marks omitted).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

v.

ROBIN LEE KNUTSON,

Defendant/Petitioner.

No. 6:98-cr-60019-MC

OPINION AND ORDER

MCSHANE, Judge:

Petitioner Robin Lee Knutson is currently serving an aggregate 475-month sentence stemming from an armed bank robbery he committed in 1998. His sentence consists in part of mandatory 120- and 240-month consecutive sentences imposed under 18 U.S.C. § 924(c). Mr. Knutson now moves to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. He argues that, following the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), the federal armed bank robbery offense underlying his two § 924(c) convictions no longer qualifies as a "crime of violence" and therefore cannot form the basis for those mandatory consecutive sentences. He also argues that he is entitled to resentencing for the bank robbery offense based on the Supreme Court's decision in *Dean v. United States*, 137 S. Ct. 1170 (2017). Because federal armed bank robbery remains a crime of violence, and the Supreme Court has yet to make *Dean* retroactive to cases on collateral review, Mr. Knutson's motion is DENIED.

BACKGROUND

In 1999, a jury found Mr. Knutson guilty of one count of armed bank robbery, in violation of 18 U.S.C. § 2113(a) and (d) (Count 1), one count of using or carrying a firearm

during a "crime of violence," in violation of 18 U.S.C. § 924(c)(1)(B)(i) (Count 2), one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) (Count 3), one count of possession with intent to distribute methamphetamine, in violation of 21 U.S.C. § 841(a)(1) (Count 4), and one count of using or carrying a firearm in relation to a "drug trafficking crime," in violation of 18 U.S.C. § 924(c)(1)(B)(i) (Count 5). On March 14, 2000, Mr. Knutson was sentenced to three concurrent sentences of 115 months for Counts 1, 3, and 4, a mandatory consecutive sentence of 120 months for Count 2, and a mandatory consecutive sentence of 240 months for Count 5.[1]

DISCUSSION

Mr. Knutson argues that he is entitled to resentencing on two different grounds. First, he argues that the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), invalidated his two mandatory consecutive sentences under 18 U.S.C. § 924(c)(1)(B)(i) because one of his predicate convictions, federal armed bank robbery, no longer qualifies as a "crime of violence." Second, Mr. Knutson argues that the Supreme Court's later decision in *Dean v. United States*, 137 S. Ct. 1170 (2017), entitles him to a new sentencing hearing in which the sentencing judge has discretion to consider the impact of his mandatory consecutive sentences on his aggregate sentence. I address each claim in turn.

I. Mr. Knutson's *Johnson* Claim.

Mr. Knutson first argues that his 120- and 240-month mandatory consecutive sentences under § 924(c)(1)(B)(i) are unconstitutional because, after the Supreme Court struck down as

[1] The 240-month mandatory consecutive sentence for Count 5 was imposed under 18 U.S.C. 924(c)(1)(C)(i) (1994) because it constituted a "second or successive" conviction for using or carrying a firearm during a crime of violence or drug trafficking crime under 18 U.S.C. § 924(c)(1). For offenses committed on or after November 23, 1998, the mandatory consecutive sentence for a second or successive conviction increased to 300 months. 18 U.S.C. § 924(c)(1)(C)(i) (2012). Mr. Knutson committed his underlying bank robbery offense on February 6, 1998, when the mandatory consecutive sentence was still 240 months.

unconstitutionally vague the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), in *Johnson*, the predicate armed bank robbery offense underlying those two convictions is no longer a "crime of violence." The ACCA imposes a 15-year mandatory minimum sentence for the crime of felon in possession of a firearm if a defendant has three prior predicate convictions that meet the definition of "violent felony." 18 U.S.C. § 924(e)(1). The ACCA defines "violent felony" as follows:

> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . . that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

18 U.S.C. § 924(e)(2)(B). The final portion of the statue (i.e., "otherwise involves conduct that presents a serious potential risk of physical injury to another") is known as the "residual clause" and was found unconstitutionally vague by the *Johnson* court. The Supreme Court later concluded *Johnson* was retroactive. *Welch v. United States*, 136 S. Ct. 1257 (2016).

There are two federal firearm statutes that impose mandatory minimum sentences. The ACCA, the subject of the *Johnson* decision, focuses on a defendant's prior criminal history; specifically, convictions involving drugs and crimes of violence. On the other hand, 18 U.S.C. § 924(c) attaches irrespective of criminal history when a firearm is used or possessed in the furtherance of another "drug trafficking crime" or "crime of violence." Mr. Knutson was sentenced under § 924(c), not the ACCA. However, he argues that, because the language in § 924(c) essentially mirrors that of the ACCA, the holding of *Johnson* renders his own sentence unconstitutional. Similar to the ACCA, § 924(c) contains certain sentence enhancements for any "crime of violence." Like the ACCA, 18 U.S.C. § 924(c)(3), which defines the term "crime of

violence" as it is used throughout subsection (c), contains a "force clause" and a "residual clause." Under § 924(c)(3), a "crime of violence" includes any 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.

Mr. Knutson argues that under the reasoning of *Johnson*, the residual clause of § 924(c)(3)(B) is unconstitutional. With the residual clause inapplicable, he next argues that because his underlying offense of armed bank robbery does not have "as an element the use, attempted use, or threated use of physical force against the person or property of another," his two mandatory consecutive sentences under § 924(c) are unconstitutional.

The relevant federal bank robbery statute provides that, "[w]hoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, . . . any property or money . . . in the care, custody, control, management, or possession of, any bank . . ." shall be imprisoned up to twenty years. 18 U.S.C. § 2113(a). The statute provides a maximum 25 year sentence if, like Mr. Knutson, one robs a bank and "assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device[.]" § 2113(d).

After Mr. Knutson filed his memorandum in support of his motion, but before the Government filed its response, the Ninth Circuit issued a published opinion holding the federal crime of carjacking is a "crime of violence" under the "force clause" of § 924(c). *United States v. Gutierrez*, 876 F.3d 1254, 1256 (9th Cir. 2017) (per curiam). The carjacking statute, like the bank robbery statute, requires that the taking be "by force and violence or by intimidation[.]" *Id.* (quoting 18 U.S.C. § 2119). Like Mr. Knutson, Mr. Gutierrez argued that because carjacking

can be committed by intimidation, it does not qualify as a crime of violence following *Johnson*. In rejecting Mr. Gutierrez's argument, the court agreed with other circuits and stated:

> We, too, have held that "intimidation" as used in the federal bank robbery statute requires that a person take property "in such a way that would put an ordinary, reasonable person in fear of bodily harm," which necessarily entails the "threatened use of physical force." *United States v. Selfa*, 918 F.2d 749, 751 (9th Cir. 1990) (citation omitted). As a result, in our court, too, federal bank robbery constitutes a crime of violence. *Id.* We have not addressed in a published decision whether *Selfa's* holding remains sound after *Johnson*, but we think it does. A defendant cannot put a reasonable person in fear of bodily harm without threatening to use "force capable of causing physical pain or injury." *Johnson*, 559 U.S. at 140; *see United States v. Castleman*, 134 S. Ct. 1405, 1417 (2014) (Scalia, J. concurring) (bodily injury necessarily involves the use of violent force). Bank robbery by intimidation thus requires at least an implicit threat to use the type of violent physical force necessary to meet the *Johnson* standard.

Id. at 1257.

After Mr. Knutson filed his reply, the Ninth Circuit held that the federal armed bank robbery statute remains a "crime of violence" under § 924(c)'s "force clause." *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018) (per curiam). Mr. Watson argued that committing bank robbery via intimidation does not require the violent physical force "capable of causing physical pain or injury" required under *Johnson*. *Id.* at 784-85 (quoting *Johnson*, 559 U.S. at 140). The court noted that *Gutierrez* recently rejected "this exact argument." *Id.* at 785. The court next rejected Mr. Watson's argument that bank robbery is not a crime of violence because one could commit it via negligent intimidation. Pointing to *Carter v. United States*, 530 U.S. 255 (2000), the court concluded that "contrary to Watson and Danielson's contention, a defendant may not be convicted [of federal bank robbery] if he only negligently intimidated the victim." *Id.* (citing *Carter*, 530 U.S. at 269). "The offense must at least involve the knowing use of intimidation, which necessarily entails the knowing use, attempted use, or threatened use of violent physical force." *Watson*, 881 F.3d at 785.

In a supplemental memorandum, Mr. Knutson acknowledges that the Ninth Circuit's holding in *Watson* forecloses his argument that federal armed bank robbery is not a crime of violence, but nevertheless seeks a certificate of appealability, arguing that *Watson*'s holding that negligent intimidation will not support a bank robbery conviction is at odds with Supreme Court and Ninth Circuit precedent. Judge Simon recently noted "some tension" between *Watson* and *Carter* on the same issue Mr. Knutson raises here. *United States v. Dawson*, 300 F. Supp. 3d 1207, 1210-12 (D. Or. 2018). After holding that *Watson* controlled the outcome, Judge Simon added that, "[g]iven the tension between *Carter* and the case law described above, . . . it is appropriate to issue a certificate of appealability." *Id.* at 1212. I agree.[2]

II. Mr. Knutson's *Dean* Claim.

Mr. Knutson argues in the alternative that the Supreme Court's decision in *Dean v. United States*, 137 S. Ct. 1170 (2017), which was decided after he filed the instant motion, entitles him to a new sentencing hearing in which the sentencing judge has discretion to consider the impact of his mandatory consecutive sentences when determining the appropriate sentences for his predicate armed bank robbery (Count 1) and drug trafficking (Count 4) offenses.

The Government contends that the authorization Mr. Knutson received from the Ninth Circuit to file a second or successive § 2255 motion does not encompass the *Dean* claim and that the Court therefore lacks jurisdiction to consider the claim.[3] To file a second or successive § 2255 motion in district court, a federal prisoner must receive authorization from the appropriate court of appeals. 28 U.S.C. § 2255(h) (incorporating by reference the requirements 28 U.S.C. §

[2] Since Mr. Knutson's *Johnson* claim fails on the merits, I need not address the Government's argument that the claim is time barred under § 2255(f) and does not satisfy the requirements of § 2255(h)(2) for a second or successive petition because it does not rely on the same "new rule of constitutional law" announced in *Johnson*.

[3] Mr. Knutson correctly points out that the Government's argument mistakenly relies on the "certificate of appealability" rules in 28 U.S.C. § 2253(c)(2), which apply only to review by an appellate court of a "final order" by the district court in a § 2255 proceeding. Section 2244, as expressly incorporated by § 2255(h), governs pre-filing authorization for "second or successive" § 2255 applications.

2244). Here, because Mr. Knutson had already filed one § 2255 motion in 2002, he sought and received authorization to file the instant second application from the Ninth Circuit. *Knutson v. United States*, No. 16-72112 (9th Cir. Mar. 14, 2017). That authorization, however, was based only on his *Johnson* claim. It was not until more than a year later, after *Dean* was decided, that Mr. Knutson added his second claim for relief based on the holding in *Dean*.

Although allowing prisoners to add new claims to a previously authorized second or successive application would seem to undermine the gatekeeping function assigned to appellate courts, there is a colorable argument that such authorization does not prohibit prisoners from adding new claims. To obtain appellate authorization, for example, only requires a *prima facie* showing by the prisoner that at least *one of the claims* contained in her application satisfies the statutory requirements for a second or successive application—it is irrelevant whether the other claims meet the applicable standards. 28 U.S.C. § 2244(b)(3)(C); *Cooper v. Woodford*, 358 F.3d 1117, 1123 (9th Cir. 2004) (en banc) ("A prima facie showing on one claim in a second or successive application permits an applicant to proceed upon his entire application in the district court."). The task of later sorting through these claims and disposing of those which do not satisfy the statutory requirements for a second or successive application is specifically assigned to the district court. 28 U.S.C. § 2244(b)(4); *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1164-65 (9th Cir. 2000). Since the appellate court is concerned only with identifying one viable claim, and adding other claims has no bearing on that determination, allowing post-authorization claims would seem to work little harm to the gatekeeping process.

Moreover, at least where the application pending before the district court is the prisoner's first, any later-in-time claims must be treated as motions to amend the existing petition and are governed by the liberal amendment policy of Fed. R. Civ. P. 15(a). *Woods v. Cary*, 525 F.3d

886, 888-890 (9th Cir. 2008); *see also Ching v. United States*, 298 F.3d 174, 176-177 (2d Cir. 2002) ("[I]n general, when a § 2255 motion is filed before adjudication of an initial § 2255 motion is complete, the district court should construe the second § 2255 motion as a motion to amend the pending § 2255 motion."). The Ninth Circuit has yet to address whether this principle holds true where the pending petition is an already-authorized second or successive application and the new claim is unrelated to the original claim. There is reason to believe that, based on the policies underlying AEDPA's treatment of second and successive petitions, the result could be different. This is a close question and, since Mr. Knutson's *Dean* claim fails on other grounds, I assume without deciding that the Ninth Circuit authorization does not prevent Mr. Knutson from amending his initial application to include the *Dean* claim.

Still, even with that assumption, Mr. Knutson's *Dean* claim fails to satisfy the statutory requirements for consideration as part of a second or successive application. To avoid AEDPA's bar on second or successive applications, Mr. Knutson's claim must rely "on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2). Under *Teague v. Lane*, 489 U.S. 288 (1989), if a claim relies on a "new rule" of constitutional law, that rule must be "substantive" in nature for it to apply retroactively to cases on collateral review (i.e., § 2255 proceedings). In addition, AEDPA, separate from *Teague*, requires that the Supreme Court—not a district or appellate court—be the first to hold that the applicable "new rule" is substantive and therefore retroactively applicable to cases on collateral review. 28 U.S.C. § 2255(h)(2); *Tyler v. Cain*, 533 U.S. 656, 662 (2001) ("[Section 2255(h)(2)] is satisfied only if this Court has held that the new rule is retroactively applicable to cases on collateral review."). This requires at least two Supreme Court cases—one announcing the new rule and another declaring it retroactive to cases

on collateral review. 533 U.S. at 666. The Supreme Court has yet to hold or otherwise indicate through a series of decisions that the rule announced in *Dean*—if, in fact, substantive—is retroactively applicable. As such, even were I to find that the new rule from *Dean* is substantive, as Mr. Knutson urges, AEDPA would prevent me from reaching the merits of his claim because § 2255(h)(2) mandates that the Supreme Court be the first one to make that holding.[4]

Mr. Knutson attempts to circumvent the requirements of § 2255(h)(2) by characterizing his *Dean* claim as exempt from AEDPA on equitable grounds.[5] He argues that, although he previously filed a § 2255 motion in 2002 and received authorization to file his *Johnson* claim as a second application in 2016, the *Dean* claim should be characterized as a "second-in-time" application, rather than a "second or successive" application within the meaning of § 2255(h). He cites to *United States v. Lopez*, 577 F.3d 1053 (9th Cir. 2009), for the proposition that not every second-in-time petition is a second or successive petition subject to the restrictions of § 2255(h). In *Lopez*, the Ninth Circuit left open the possibility that second-in-time claims for *Brady* violations may fall outside of AEDPA's bar on second or successive applications because applying § 2255(h) would foreclose review of "some meritorious claims" and reward "prosecutorial misconduct." 557 F.3d at 1064-65. The court did not, however, decide the issue and strongly hinted that AEDPA would likely still apply even to meritorious *Brady* claims because § 2255(h)(1) expressly governs claims raising "newly discovered evidence" and not every second-in-time *Brady* claim is barred by § 2255(h)(1). *Id.* at 1065.

The same reasoning applies here, where § 2255(h)(2) makes clear that Congress intended claims relying on new substantive rules of constitutional law to face additional procedural

[4] Further, as Judge Brown recently observed, "courts that have addressed this issue have concluded that *Dean* is not retroactively applicable to cases on collateral review." *United States v. McGowan*, No. 3:10–cr–00487–BR, 2018 WL 1938432, at *3 (D. Or. Apr. 24, 2018) (collecting cases from the District of Oregon and across the country).
[5] This argument would also moot the issue of whether Mr. Knutson's *Dean* claim is covered by the original Ninth Circuit authorization.

hurdles and left open a well-defined avenue for certain claims to be considered on the merits. *Cf. also Panetti v. Quarterman*, 551 U.S. 930, 945-46 (2007) (suggesting that courts may not disregard AEDPA's second or successive restrictions where Congress clearly intended to foreclose review). The equitable considerations which gave the *Lopez* court pause are also not present since the fundamental fairness of the prosecution is not in dispute. Indeed, the exception sought by Mr. Knutson, which would allow second-in-time petitions to circumvent AEDPA when based on a holding announced after a prisoner had been convicted and exhausted her appeals, would swallow the rule enacted by Congress. Nevertheless, given the unsettled nature of which second-in-time claims are exempt from AEDPA's gatekeeping requirements, the Court grants Mr. Knutson's request for a certificate of appealability as to that issue specifically.

CONCLUSION

For the forgoing reasons, Mr. Knutson's motion under 28 U.S.C. § 2255 is DENIED. Mr. Knutson is granted a certificate of appealability as to his claim that federal armed bank robbery is not a crime of violence under 18 U.S.C. § 924(c) and as to the issue of whether his *Dean* claim is a second or successive application within the meaning of § 2255(h).

IT IS SO ORDERED.

DATED this 18th day of July, 2018.

/s/ Michael McShane
Michael J. McShane
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. § 2113 (2019)

§ 2113. Bank robbery and incidental crimes

(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.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value which has been taken or stolen from a bank, credit union, or savings and loan association in violation of subsection (b), knowing the same to be property which has been stolen shall be subject to the punishment provided in subsection (b) for the taker.

(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.

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or if death results shall be punished by death or life imprisonment.

(f) As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, including a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the

International Banking Act of 1978), and any institution the deposits of which are insured by the Federal Deposit Insurance Corporation.

(g) As used in this section the term "credit union" means any Federal credit union and any State-chartered credit union the accounts of which are insured by the National Credit Union Administration Board, and any "Federal credit union" as defined in section 2 of the Federal Credit Union Act. The term "State-chartered credit union" includes a credit union chartered under the laws of a State of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States.

(h) As used in this section, the term "savings and loan association" means--

(1) a Federal savings association or State savings association (as defined in section 3(b) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b))) having accounts insured by the Federal Deposit Insurance Corporation; and

(2) a corporation described in section 3(b)(1)(C) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)(C)) that is operating under the laws of the United States.

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