No. _____

IN THE

SUPREME COURT OF UNITED STATES

CHRISTOPHER PARKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Heather E. Williams
Federal Defender
Ann C. M^cClintock*
Assistant Federal Defender
801 I Street, 3rd Floor
Sacramento, CA 95814
ann_mcclintock@fd.org
(916) 498-5700

Attorneys for Petitioner
CHRISTOPHER PARKER
*Counsel of Record

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FILED

DEC 12 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. CHRISTOPHER PARKER, AKA Chris Parker, Defendant-Appellant.	No. 18-17168 D.C. Nos. 2:16-cv-03063-TLN-EFB 2:97-cr-00202-TLN-EFB-1 Eastern District of California, Sacramento ORDER

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

Appellee's motion for summary affirmance (Docket Entry No. 15) 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.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JUDGMENT ON MOTION UNDER 28 USC 2255

USA,

v.

CASE NO: **2:97−CR−00202−TLN−EFB**

CASE NO: **2:16−cv−03063−TLN−EFB**

CHRIS PARKER,

Decision by the Court:
The issues have been tried or heard in this case and IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF 10/3/2018

Marianne Matherly
Clerk of Court

ENTERED: **October 3, 2018**

by: /s/ M. York
Deputy Clerk

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Respondent, v. CHRISTOPHER PARKER, Movant.	No. 2:97-cr-00202-TLN-EFB **ORDER**

Christopher Parker has filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On June 29, 2018, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within fourteen days. Movant has filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this Court has conducted a *de novo* review of this case. Having carefully reviewed the entire file, the Court finds the findings and recommendations to be supported by the record and by proper analysis. However, the Court concludes that reasonable jurists could find Movant's claims debatable and that the questions presented are adequate to proceed. *United States v. Newton*,

1:94-cr-05036-LJO, (ECF No. 114 at 11) (citing *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (a movant "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further."); *Jennings v. Woodford*, 290 F.3d 1006, 1010 (9th Cir. 2002) (the standard for granting a certificate of appealability is "relatively low")). Accordingly, the Court GRANTS Movant a certificate of appealability.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed June 29, 2018, are **ADOPTED**; and

2. Movant's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (ECF No. 448) is **DENIED**.

3. The Court **GRANTS** to Movant a certificate of appealability for this motion.

IT IS SO ORDERED.

Dated: October 3, 2018

Troy L. Nunley
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Respondent, vs. CHRISTOPHER PARKER Movant.	No. 2:97-cr-0202-TLN-EFB P FINDINGS AND RECOMMENDATIONS

Christopher Parker (movant) has filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.[1] ECF No. 448. He argues that, in light of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015) (*Johnson II*)[2], armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d) is no longer a 'crime of violence' within the meaning of 924(c)(3). In *Johnson II*, the Supreme Court held that the residual clause[3]

[1] This motion was assigned, for statistical purposes, the following civil case number: 2:16-cv-3063-TLN-EFB.

[2] In recent years the Supreme Court has issued two *Johnson* decisions which are commonly referred to as *Johnson I* and *Johnson II*. *Johnson I* refers to *Johnson v. United States*, 559 U.S. 133 (2010) wherein the court held that the term 'physical force' contained in the Armed Career Criminal Act (ACCA) definition of 'violent felony' "means violent force – that is force, capable of causing physical pain or injury to another person." *Id*. at 559 U.S. at 140. Unlike its successor, *Johnson I* did not substantively address the ACCA's residual clause.

[3] 18 U.S.C. § 924(c)(3)(B) defines "violent felony" in the context of the ACCA and provides that such an act includes one that is "burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury*

of the Armed Career Criminal Act ("ACCA") – 18 U.S.C. § 924(e)(2)(B) – was void for vagueness. *Johnson*, 135 S. Ct. at 2554. Movant now contends that, in light of *Johnson II*, an armed bank robbery in violation of 18 U.S.C. §§ 2113(a), (d) is no longer a "crime of violence" under the 'force clause' of 18 U.S.C. § 924(c)(3)(A) because it does not require the intentional use or threat of violent physical force insofar as it may be accomplished with unintentional or non-violent intimidation. He also argues that the holding in *Johnson II* renders the residual clause contained in 18 U.S.C. § 924(c)(3)(B) unconstitutionally vague and, thus, armed bank robbery cannot qualify as a "crime of violence" under that clause, either.

The government has filed an opposition to the motion (ECF No. 453) and movant has submitted a reply (ECF No. 454). The court, for the reasons stated hereafter, recommends that movant's motion be denied.

I. Law Applicable to Motions Pursuant to 28 U.S.C. § 2255

A federal prisoner making a collateral attack against the validity of his or her conviction or sentence must do so by way of a motion to vacate, set aside or correct the sentence pursuant to 28 U.S.C. § 2255, filed in the court which imposed sentence. *United States v. Monreal*, 301 F.3d 1127, 1130 (9th Cir. 2002). Under § 2255, the federal sentencing court may grant relief if it concludes that a prisoner in custody was sentenced in violation of the Constitution or laws of the United States. *Davis v. United States*, 417 U.S. 333, 344-45 (1974); *United States v. Barron*, 172 F.3d 1153, 1157 (9th Cir. 1999). To warrant relief, a petitioner must demonstrate the existence of an error of constitutional magnitude which had a substantial and injurious effect or influence on the guilty plea or the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *see also United States v. Montalvo*, 331 F.3d 1052, 1058 (9th Cir. 2003) ("We hold now that *Brecht's* harmless error standard applies to habeas cases under section 2255, just as it does to those under section 2254.") Relief is warranted only where a petitioner has shown "a fundamental defect which inherently results in a complete miscarriage of justice." *Davis*, 417 U.S. at 346. *See also United States v. Gianelli*, 543 F.3d 1178, 1184 (9th Cir. 2008).

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to another." The Supreme Court noted that the closing words, emphasized above, have become known as the residual clause. *Johnson*, 135 S. Ct. at 2555-56.

Claims or arguments raised on appeal are not cognizable in a § 2255 motion. *See United States v. Redd*, 759 F.2d 699, 701 (9th Cir. 1985) (claims previously raised on appeal "cannot be the basis of a § 2255 motion."); *United States v. Currie*, 589 F.2d 993, 995 (9th Cir. 1979) ("[i]ssues disposed of on a previous direct appeal are not reviewable in a subsequent § 2255 proceeding."). *See also Davis v. United States*, 417 U.S. 333, 342 (1974) (issues determined in a previous appeal are not cognizable in a § 2255 motion absent an intervening change in the law). Conversely, claims that could have been, but were not, raised on appeal are not cognizable in § 2255 motions. *United States v. Frady*, 456 U.S. 152, 168 (1982((a collateral challenge is not a substitute for an appeal); *Sunal v. Large*, 332 U.S. 174, 178 (1947) ("So far as convictions obtained in the federal courts are concerned, the general rule is that the writ of habeas corpus will not be allowed to do service for an appeal"); *Unites States v. Dunham*, 767 F.2d 1395, 1397 (9th Cir. 1985) ("Section 2255 is not designed to provide criminal defendants repeated opportunities to overturn their convictions on grounds which could have been raised on direct appeal"). Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, "the claim may be raised in habeas only if the defendant can first demonstrate either "cause" and actual "prejudice," or that he is "actually innocent." *Bousley v. United States*, 523 U.S. 614, 622 (1998) (citations omitted); *United States v. Braswell*, 501 F.3d 1147, 1149 (9th Cir. 2007) (same). "Ineffective assistance of counsel constitutes 'cause' for failure to raise a challenge prior to section 2255 collateral review." *United States v. De la Fuente*, 8 F.3d 1333, 1337 (9th Cir. 1993).

Claims challenging the sufficiency of the evidence are not cognizable in § 2255 motions. *See United States v. Berry*, 624 F.3d 1031, 1038 (9th Cir. 2010) (movant's "evidence-based" claim that "called into doubt the overall weight of the evidence against him" was not cognizable in § 2255 motion); *Barkan v. United States*, 362 F.2d 158, 160 (7th Cir. 1966) ("a collateral proceeding under section 2255 cannot be utilized in lieu of an appeal and does not give persons adjudged guilty of a crime the right to have a trial on the question of the sufficiency of the evidence or errors of law which should have been raised in a timely appeal"); *United States v. Collins*, 1999 WL 179809 (N.D. Cal. Mar. 25, 1999) (insufficiency of the evidence is not a cognizable attack under section 2255).

II. Analysis

As noted, movant argues that his sentences under §924(c) must be vacated because armed bank robbery as defined in § 2113 does not, after *Johnson II*, qualify as a crime of violence under either the force clause of § 924(c)(3)(A) or the residual clause of §924(c)(3)(B). At the time movant's motion was filed, this was an unsettled question in this circuit. That is no longer the case. In *United States v. Watson*, the United States Court of Appeals for the Ninth Circuit explicitly held that federal armed bank robbery remained a crime of violence within the meaning of 18 U.S.C. § 924(c). 881 F.3d 782 (2018). This holding is obviously binding on this court and forecloses any further argument on this issue.

III. Conclusion

Accordingly, it is RECOMMENDED that:

1. Movant's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (ECF No. 448) be denied; and

2. The Clerk be directed to close the companion civil case, No. 2:16-cv-3063-TLN-EFB.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within fourteen days after service of the objections. Failure to file objections within the specified time may waive the right to appeal the District Court's order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991). In his objections movant may address whether a certificate of appealability should issue in the event he files an appeal of the judgment in this case. *See* Rule 11, Rules Governing Section 2255 Cases (the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant).

DATED: June 28, 2018.

EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE