No._____

IN THE SUPREME COURT OF THE UNITED STATES

_____

MICHAEL WAYNE BLANCHE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

1. **Whether aiding and abetting armed bank robbery is a crime of violence under 18 U.S.C. § 924(c)(3)(A).**

2. **Whether the verdict and 7-year sentence on the § 924(c) charge in Count Two cannot stand without a jury finding either (1) that the armed bank robbery and/or aiding and abetting charge in Count One is a crime of violence; or (2) that petitioner "brandished" a firearm.**

LIST OF PARTIES

The parties to the proceedings below were Petitioner, Michael Wayne Blanche, and Respondent, United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Wayne Blanche respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in case number 17-17512.

OPINIONS BELOW

The unpublished Memorandum Decision of the court of appeals is unreported and available at 2020 U.S. App. Lexis 6534. App. 1-6. The district court's order denying petitioner's motion to vacate under 28 U.S.C. § 2255 is at App. 7-9. The magistrate judge's findings and recommendations are at App. 10-16.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 2020. App. 1-6. On March 19, 2020, this Court extended the deadline to file any petition for a writ of certiorari due on or after the date of the order to 150 days from the date of the lower court judgment. This Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 2

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

18 U.S.C. § 924(c)(3)(A)

> **(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 . . . .

18 U.S.C. § 2113(a), (d)

> (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 . . .
>
> Shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (d) Whoever in committing, or 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.

STATEMENT OF THE CASE

On December 22, 2005, the government filed a Superseding Indictment charging defendant Michael W. Blanche and other defendants with armed bank robbery and aiding and abetting in

violation of 18 U.S.C. § 2113(a), (d) & § 2 (count 1) and the use and carrying of a firearm during a crime of violence, i.e., the bank robbery charged in count one, in violation of 18 U.S.C. § 924(c)(1) (count 2). App. 25-28. Blanche and his co-defendant Javaris Marquez Tubbs were convicted of both counts by jury trial.

On February 2, 2007, the district court sentenced Blanche to 108 months on count 1 and 84 months on count 2, to run consecutively, for a total term of 192 months.

On June 15, 2016, Blanche filed a pro se motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255. Docket 186. He argued that his conviction on count 2 must be vacated because the predicate felony charged in count 1, armed bank robbery and aiding and abetting, is not a crime of violence following *Johnson v. United States,* 135 S. Ct. 2551 (2015) (*Johnson II*). After the court appointed counsel, Blanche filed a supplemental memorandum in support of his § 2255 motion to vacate. Docket 219. After further briefing, dockets 229, 234, the magistrate judge issued findings and recommendations that Blanche's § 2255 motion be denied. App. 10-16.

Blanche objected to the magistrate judge's findings and recommendations. Docket 259. In an order filed December 19, 2017, the district court denied Blanche's § 2255 motion, but granted a certificate of appealability on whether his conviction on count 1 is a crime of violence within the meaning of 18 U.S.C. § 924(c)(3).

On appeal, Blanche's appeal was consolidated with the appeal of his codefendant Javaris Marquez Tubbs, No. 17-17160, who also challenged the validity of his § 924(c) conviction on similar grounds. As relevant here, both defendants argued that their § 924(c) convictions on count 2 were invalid because they were based on an offense—aiding and abetting federal armed bank robbery--that was no longer a crime of violence after *Johnson II*. Blanche also asked the Court to expand the certificate of appealability to include the issue whether count 2 must be vacated because the jury did not find that the armed bank robbery and aiding and abetting charge was a crime of violence.

After oral argument, the court of appeals asked for supplemental briefing on the question whether Blanche and Tubbs were convicted of armed bank robbery both as principals and as aiders and abettors.

In its joint Memorandum Decision, the majority held that the court need not reach the question whether aiding and abetting bank robbery is a crime of violence under 18 U.S.C. § 924(c) because the jury wrote "guilty" on each verdict form that asked the jury to find each defendant guilty or not guilty of "Armed Bank Robbery and Aiding and Abetting, as charged in Count 1 of the Superseding Indictment." App. 3. Thus, according to the majority, the jury found the defendants guilty of both offenses and the court need not decide whether aiding and abetting is a crime of violence under § 924(c) because "the fact that they were convicted of armed bank robbery" means the § 924(c) consecutive sentence was properly applied under its decision in *United States v. Watson,* 881 F.3d 782, 786 (9th Cir.), *cert. denied,* 139 S. Ct. 203 (2018). *Id.*

Judge Eric D. Miller, concurring, noted that in the district court, "the government presented alternative theories that the defendants were principals or aiders and abettors." App. 4. Judge Miller explained that given the district court's jury instructions, "the jury must have understood that it should enter 'guilty' as long as it believed either defendant was guilty as a principal *or* as an aider and abettor." App. 5.

Under Judge Miller's view, however, the defendants' appeals failed because aiding and abetting federal armed bank robbery is still a crime of violence under 18 U.S.C. § 924(c)(3)(A) and he would affirm the judgment on that basis. App 5.

REASONS FOR GRANTING THE PETITION

I. Aiding and abetting federal armed bank robbery is not a crime of violence within the meaning of 18 U.S.C. § 924(c)(3)(A).

In *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Johnson II*), the Supreme Court declared the residual clause of the Armed Career Criminal Act (ACCA), which defined a "crime of violence" as "otherwise involv[ing] conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B)(ii), to be "unconstitutionally vague" because 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.

In *United States v. Davis,* 139 S. Ct. 2319 (2019), this Court applied *Johnson II* and *Sessions v. Dimaya,* 138 S. Ct. 1204 (2018), in holding that the definition of a crime of violence in 18 U.S.C. § 924(c)(3)(B) is also unconstitutionally vague. Absent its

unconstitutional residual clause, § 924(c) defines a "crime of violence" as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A) ("force prong").

To determine whether an offense is a crime of violence, courts apply the categorical approach set forth in *Taylor v. United States,* 495 U.S. 575 (1990). Courts do not look to the particular facts underlying the conviction, but "compare the elements of the statute forming the basis of the defendant's conviction with the elements" of a crime of violence. *Decamps v. United States,* 570 U.S. 254, 257 (2013). Under this analysis, an offense cannot categorically be a crime of violence if the statute of conviction punishes any conduct not encompassed by the statutory definition of a crime of violence. *Id.* In this case, Blanche's conviction on Count One for aiding and abetting a federal armed bank robbery is not a crime of violence within the meaning of § 924(c)(3).

A. In light of the pleadings, evidence, and jury instructions, the jury could have convicted Blanche under an aider and abettor theory of liability in returning a guilty verdict on count 1.

The indictment charged Blanche in the conjunctive, alleging he is guilty of the substantive offense (armed bank robbery) *and* aiding and

abetting. Federal indictments typically allege several different means by which a defendant can commit an offense using the conjunction "and." United States Attorney's Manual, Criminal Resource Manual, § 227.

The evidence presented at trial tended to show that Blanche, Tubbs, a third man named Michael Bradley, and Tubbs' girlfriend Angel Brewer, all played some role in preparing for, committing, and fleeing the April 14, 2005, bank robbery at Washington Mutual Bank in Elk Grove, California. Tubbs Excerpt of Record II, pp. 29-34. There was some testimony that Mr. Blanche used a gun and made threats, but not necessarily that he took any money. *Id.* There was some testimony that Tubbs took money, but not necessarily that he made threats. *Id.* In his closing argument, the prosecutor told the jury:

> Now, the Court will also talk about aiders and abetters *[sic]*; if you commit an act with somebody else. In this particular case, there were four individuals involved. Angel Brewer, the driver of the vehicle, and three other people who went inside the bank. If one of the individuals who goes in the bank with a real gun, and you knew about it, and you wanted to bring about the consequences of his actions inside the bank, you are equally guilty. Equally guilty. Aider and abetter *[sic]*.

Appellant's Supplemental Excerpts of Record (ASER) pp. 5-6; Clerk's Record No. 97, pp. 116-17.

In the final jury instructions, the jury was instructed not only regarding the elements of armed bank robbery but also the elements of also aiding and abetting a federal criminal offense. Jury Instruction No. 10 instructed the jury that the defendants were charged in Count One with armed bank robbery in violation of 18 U.S.C. § 2113(a),(d). The jury was told that the government had to prove beyond a reasonable doubt:

> First, the defendant took money which was in the care, custody, control, management or possession of a financial institution;
>
> Second, the defendant took the money from person or presence of one or more of the employees of that financial institution;
>
> Third, the defendant used force and violence, or intimidation in doing so;
>
> Fourth, in doing so the defendant assaulted or put in jeopardy the life of a person by use of a dangerous weapon; and
>
> Fifth, the deposits of the financial institution were then insured by the Federal Deposit Insurance Corporation.
>
> A defendant may be found to have assaulted or put in jeopardy the life of a person by use of a dangerous weapon if

he intentionally made a display of force by use of any object that reasonably caused that person to fear bodily harm.

App. 19.

Then in Jury Instruction No. 14, the jury was instructed

A defendant may be found guilty of a crime, even if the defendant personally did not commit the act or acts constituting that crime but aided and abetted in its commission. To prove a defendant guilty of a crime on the basis of aiding and abetting, the government must prove beyond a reasonable doubt:

First, the crime was committed by someone;

Second, the defendant knowingly and intentionally aided, counseled, commanded, induced or procured that person to commit the crime; and

Third, the defendant acted before the crime was completed.

It is not enough that the defendant merely associated with the person committing the crime, or unknowingly or unintentionally did things that were helpful to that person, or was present at the scene of the crime.

The evidence must show beyond a reasonable doubt that the defendant acted with the knowledge and intention of helping that person commit armed bank robbery.

The government is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted.

App. 24.

The jury was given a verdict form that provided that it could find Blanche guilty or not guilty "of a violation of Title 18 U.S.C. sections 2113(a), (d), and 2, Armed Bank Robbery and Aiding and Abetting, as charged in Count 1 of the Superseding Indictment." App. 17. The jury wrote in "guilty" for count one. *Id*.

The most reasonable interpretation of the verdict as to count one is that Blanche was found guilty of violating 18 U.S.C. § 2113(a), (d), under either a theory of liability as a principal *or* under a theory of liability as an aider and abettor. The superseding indictment charged them under both theories in the conjunctive, as is typical. The evidence at trial tended to show both of them participating in some ways in an armed bank robbery but not necessarily proof beyond a reasonable doubt that they each personally committed every element of armed bank robbery. The prosecutor explained to the jury that as long as one of the four people involved in the bank robbery went

> in the bank with a real gun, and [the defendant] knew about it, and [the defendant] wanted to bring about the consequences of his actions inside the bank, [the defendant is] equally guilty. Equally guilty. Aider and abetter *[sic]*.

ASER pp. 5-6; Clerk's Record No. 97, pp. 116-17. The prosecutor thus invited the jury to find guilt on the basis of an aiding and abetting theory.

In instructing the jury, the district judge told the jury the elements the government had to prove beyond a reasonable doubt in order for the jury to find each defendant guilty of violating 18 U.S.C. § 2113(a), (d), but also told the jury it could find the defendant guilty of the offense using an aider and abettor theory of liability. App. 24. The court explicitly told the jury that "[a] defendant may be found guilty of a crime, even if the defendant personally did not commit the act or acts constituting that crime but aided and abetted in its commission." After setting forth elements of aiding and abetting liability, the court made clarified for the jury that "[t]he government is not required to prove precisely which defendant *actually* committed the crime and which defendant *aided and abetted*." *Id*. (emphasis added).

Although the verdict form is worded in terms of "Armed Bank Robbery and Aiding *and* Abetting, as charged in Count 1" (emphasis added), the use of the conjunctive to set forth the two theories of liability is likely due to a drafting oversight. Because indictments are

typically written using the conjunctive, it is likely the drafter simply copied the indictment or used the same style as is used in indictments. Neither the parties nor the court ever suggested to the jury that it had to find Blanche (or Tubbs) acted *both* as a principal *and* as an aider and abettor in order to find guilt as to count one. Rather, the prosecutor explicitly told them that liability under an aider and abettor theory would make the defendants "equally guilty" of count one. Similarly, the court instructed the jury that Blanche could be guilty under an aider and abettor theory of liability and the government was not required to prove that any particular defendant was guilty as a principal instead of as an aider and abettor. App. 24.

Looking at the verdicts in the context of the case as a whole, it certainly appears that the jury would have believed it should enter "guilty" as to count one as long as jurors believed each defendant was guilty either as a principal *or* as an aider and abettor. There is certainly a possibility that each defendant was convicted only as an aider and abettor because the jury was told liability as an aider and abettor was adequate for a finding of guilt as to count one. Put another

way, it is not certain that the jury found either defendant guilty as a principal.

Under a categorical or modified categorical approach, a court deciding whether a predicate conviction is a "crime of violence" or "violent felony" uses an "elements-only inquiry." *Mathis v. United States*, 36 S. Ct. 2243, 2252 (2016). "'Elements' are the 'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a conviction.' Black's Law Dictionary 634 (10th ed. 2014)." *Id*. at 2248. This is consistent with 18 U.S.C. § 924(c)(3), the "crime of violence" definition at issue in this case, which defines a "crime of violence" as one that "(A) has *as an element* the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). *See Davis*, 139 S. Ct. at 2336 (only elements clause definition of "crime of violence" constitutionally valid in context of 18 U.S.C. § 924(c)(3)).

In the present case, when one examines which elements the government had to prove to convict Blanche on count one, federal armed bank robbery, it is clear that in light of the jury instructions given, the government was not required to prove beyond a reasonable doubt that

either man was guilty as a principal. In other words, the government did not have to prove that either man committed the offense by "by force and violence, or by intimidation," (18 U.S.C. § 2113(a)), the element of federal armed bank robbery that makes the offense a "crime of violence." *United States v. Watson*, 881 F.3d 782, 785 (9th Cir.) (*per curiam*), *cert. denied*, 139 S. Ct. 203, 202 L. Ed. 2d 139 (2018). Instead, the indictment, closing argument, jury instructions, and verdict form all gave the jury the option of finding both men guilty as an aider and abettor, that is one who "intentionally aided, counseled, commanded, induced or procured" another person to commit the substantive offense, but did not necessarily personally commit each element of the substantive offense. Thus, Blanche may have been convicted on count one as an aider and abettor rather than a principal.

B. Aiding and abetting an armed bank robbery is not a crime of violence under 18 U.S.C. § 924(c)(3)(A).

A defendant "can be convicted as an aider and abettor [under 18 U.S.C. § 2] without proof that he participated in each and every element of the offense." *Rosemond v. United States*, 134 S. Ct. 1240, 1246 (2014). Indeed, "[t]he quantity of assistance [is] immaterial, so long as the accomplice did something to aid the crime." *Id*. (internal quotation

marks and citation omitted; emphasis in original). An aider and abettor does not have to personally use, attempt to use, or threaten violent physical force to be convicted of aiding and abetting a federal armed bank robbery.

Importantly, an aider and abettor of bank robbery need not intend that the principal threaten or inflict violent physical force—even where such force is in fact used or threatened by the principal. For example, an aider and abettor could drive a bank robber (the principal) to a bank, knowing that the robber carries a toy gun. He thus knows the "extent and character" of the crime and can be found guilty of aiding and abetting federal armed bank robbery. *United States v. Easter*, 66 F.3d 1018, 1024 (9th Cir. 1995). But if the principal, during the course of the robbery, punches the teller, she has used physical force. In this situation, the aider and abettor can be convicted of armed bank robbery, even though the aider and abettor did not intend the use of violent physical force. The aider and abettor may have been criminally reckless as to whether force would be used in this situation, but he did not necessarily intend it. *See Borden v. United States,* No. 19-5410 (granting certiorari on whether crimes encompassing a mens rea of

mere recklessness qualify as a crime of violence within the meaning of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i)). Therefore, because the aider and abettor need not have acted with the requisite intent, liability under 18 U.S.C. § 2 does not come within the force clause. *See United States v. Dixon*, 805 F.3d 1193, 1197 (9th Cir. 2015).

Aiding and abetting a firearm offense used to be a crime of violence, but only because of the residual clause. *James v. United States*, 550 U.S. 192 (2007), supports that conclusion. *James* interpreted the "crime of violence" provision of the Sentencing Guidelines. *See* 550 U.S. at 206, *overruled on other grounds by Johnson II*. The Sentencing Guidelines' definition included both an elements clause and a residual clause, like § 924(c). *See* U.S.S.G. § 4B1.2(a). The force clause of § 4B1.2(a)(1) defined a crime of violence almost identically to 18 U.S.C. § 924(c), as an offense that "has as an element the use, attempted use, or threatened use of physical force." U.S.S.G. § 4B1.2(a)(1). The Sentencing Commission's commentary to that guideline section stated, "'Crime of violence' . . . includes the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." U.S.S.G. § 4B1.2 cmt. n.1.

In *James*, the Supreme Court clarified that the Commission included aiding and abetting, conspiracy, and attempt "based on the Commission's review of empirical sentencing data and presumably reflects an assessment that attempt crimes often pose a similar risk of injury as completed offenses." 550 U.S. at 206 (observing that the Commission is in the best position to "make an informed judgment about the relation between a particular offense and the likelihood of accompanying violence.") (internal quotation marks and citations omitted). An offense that causes a "risk" of violence is not the same as the one that includes violent force as an element. *United States v. Parnell*, 818 F.3d 974, 980 (9th Cir. 2016) ("There is a material difference between the presence of a weapon, which produces a risk of violent force, and the actual or threatened use of such force.") (emphasis in original). Only the latter falls within the force clause; offenses presenting a "risk" of violence fall within the now-void residual clause. *Id.* Indeed, courts of appeal have held that "conspiracy" to commit a crime of violence—another of the inchoate crimes included in the Commission's commentary—fell under the residual clause and is not a crime of violence after *Johnson II*. *See, e.g., United States v. Reece,* 938

F.3d 630 (5th Cir. 2019) (conspiracy to commit bank robbery); *United States v. Sims,* 914 F.3d 229, 233 (4th Cir. 2019) (conspiracy to commit Hobbs Act robbery).

The conclusion that aiding and abetting armed offenses fell under the residual clause is confirmed by another Supreme Court case, *Rosemond v. United States*, 134 S. Ct. 1240 (2014). That case considered the *mens rea* requirement of aiding and abetting liability as to a violation of 18 U.S.C. § 924(c)(1)(A). The Court spoke repeatedly of the "risks," "danger," and "perilous stakes" of assisting in a crime, knowing that the principal be armed. *See id*. at 1248, 1250, 1251; *id*. at 1253, 1254, 1256 (Alito, J., concurring in part and dissenting in part); *e.g.*, *id*. at 1251 (majority opinion) (considering the "risk of gun violence—to the accomplice himself, other participants, or bystanders" and "the best or only way to avoid that danger"). Again, such concerns fell under the residual clause. *See* 18 U.S.C. § 924(c)(3)(B) (describing offenses that "by [their] very nature, involve[] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"). Now that the residual clause is

void, aiding and abetting an armed offense, such as armed bank robbery, is no longer a crime of violence.

Blanche also recognizes that the Eleventh Circuit held in *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016), that a person who aids and abets a crime of violence can be punished as the principal under 18 § 924(c)(3)(A) because "the acts of the principal become those of the aider and abettor as a matter of law." *Accord United States v. Deiter,* 890 F.3d 1203, 1214-16 (10th Cir.), *cert. denied,* 139 S. Ct. 647 (2018). *In re Colon*, however, is wrongly decided. Under 18 U.S.C. § 924(c)(3)(A), a crime of violence is a felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." As pointed out in a dissent to *Colon*, a defendant could aid and abet a robbery "without ever using, threatening, or attempting any force at all. For example, the aider and abettor's contribution to a crime could be as minimal as lending the principal some equipment, sharing some encouraging words, or driving the principal somewhere." *Colon*, 826 F.3d at 1306 (Martin, J., dissenting). Thus, the Court should follow the better reasoned dissent

in holding that aiding and abetting a federal armed bank robbery is not a crime of violence.

II. Alternatively, Count 2 must be vacated because the jury's verdict cannot support a conviction without a jury finding that the armed bank robbery and aiding and abetting charge is a crime of violence.

After *Johnson II*, Blanche was not legally convicted of an essential element of the § 924(c) charge in count 2, i.e., a "crime of violence" as that term is defined in § 924(c)(3)(A) & (B), because the law requires that the jury finds that the alleged armed bank robbery is a crime of violence under the statutory definition. Although the Ninth Circuit did not address this uncertified issue in its Memorandum Decision, the Court may expand the certificate of appealability to reach this related issue.

At trial, the court instructed the jury in instruction no. 11 that:

> The defendants are charged in Count Two of the indictment with using and carrying a firearm during and in relation to a crime of violence in violation of § 924(c) of Title 18 of the United States Code. In order for a defendant to be found guilty of that charge, the Government must prove each of the following elements beyond a reasonable doubt:
>
> First, the defendant committed the crime of armed bank robbery as charged in Count One of the Indictment.

> Second, the defendant knowingly used and carried a firearm; and
>
> Third, the defendant knowingly used and carried the firearm during and in relation to the crime of armed bank robbery.

App. 20.

For Blanche's conviction to stand, the jury was required to compare the elements of § 2113(a), (d) to the definition of crime of violence in § 924(c)(3). *See United States v. McDaniels,* 147 F. Supp.3d 427, 432 (E.D. Va. 2015) ("The phrase 'crime of violence' is an element of § 924(c)—rather than a sentencing factor—and therefore 'must be submitted to a jury and found beyond a reasonable doubt.'") (citing *Alleyne v. United States,* 570 U.S. 99, 107 (2013)); *accord United States v. Church,* 2015 U.S. Dist. L exis 160701 (N.D. Ind. Dec. 1, 2015); *United States v. Monroe,* 158 F. Supp.3d 385 (W.D. Pa. 2016). "[T]he Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." *Fiore v. White,* 531 U.S. 225, 228-29 (2001) (citing *Jackson v. Virginia,* 443 U.S. 307, 317 (1979), and *In re Winship,* 397 U.S. 358, 364 (1970)). Because the jury was not instructed to consider whether an essential element of the crime of armed bank

robbery qualifies as a crime of violence within the meaning of § 924(c)(3), Blanche's conviction on count 2 violates due process and is invalid.

Further, § 924(c)(1), in relevant part, imposes a 5-year minimum term of imprisonment upon a person who "during and in relation to any crime of violence sues or carries a firearm." Blanche, however, was sentenced to seven years imprisonment on the § 924(c) charge in count 2 without any jury finding that he "brandished" as required for the enhanced statutory term in violation of *Alleyne*. Even if his 924(c)(1) conviction were otherwise valid, the Court should grant the petition with instructions that only a 5-year, rather 7-year, term be imposed on Count Two.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Dated: June 26, 2020

John Balazs

JOHN BALAZS
Counsel of Record

Attorney for Petitioner
MICHAEL WAYNE BLANCHE

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FILED

FEB 28 2020

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAVARIS MARQUEZ TUBBS, Petitioner-Appellant.	No. 17-17160 D.C. Nos. 2:12-cv-02987-WBS-CKD 2:05-cr-00243-WBS-CKD-1 **MEMORANDUM**[*]

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL WAYNE BLANCHE, Petitioner-Appellant.	No. 17-17512 D.C. Nos. 2:16-cv-01355-WBS-CKD 2:05-cr-00243-WBS-CKD-3

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Argued and Submitted December 6, 2019
San Francisco, California

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

Before: W. FLETCHER and MILLER, Circuit Judges, and PREGERSON,[**] District Judge.

Following a jury trial, defendants Javaris Tubbs and Michael Blanche were each convicted on two counts of (1) armed bank robbery and aiding and abetting, 18 U.S.C. § 2113(a), (d); *id.* § 2, and (2) use of a firearm during a crime of violence, 18 U.S.C. § 924(c)(1). The district court sentenced each defendant to sixteen-year terms of imprisonment: nine years for armed bank robbery, with seven years served consecutively for the firearm offense. Tubbs and Blanche petitioned for relief separately under 28 U.S.C. § 2255. In this consolidated appeal, they challenge the district court's denial of their § 2255 motions, seeking relief from their firearm sentences on the ground that armed bank robbery is not a crime of violence. We have jurisdiction under 28 U.S.C. §§ 2253(a) and 1291, and affirm.

While these appeals were pending, this court held that armed bank robbery is a crime of violence under 18 U.S.C. § 924(c). *United States v. Watson*, 881 F.3d 782, 786 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 203 (2018). *Watson* would resolve this appeal, except that Count One of the superceding indictment charged petitioners with a violation of "18 U.S.C. § 2113(a), (d), and 2—Armed Bank

[**] The Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.

Robbery, and Aiding and Abetting." Petitioners argue that *Watson* did not address Count One's aiding-and-abetting offense, and that aiding and abetting, 18 U.S.C. § 2, is not a crime of violence that supports the firearm enhancement.

We do not need to reach the question of whether aiding and abetting armed bank robbery is a crime of violence under 18 U.S.C. § 924(c). The jury forms for each of the defendants are the same. On each form, the jury was asked to find guilty or not guilty of "Armed Bank Robbery *and* Aiding and Abetting, as charged in Count 1 of the Superceding Indictment." (emphasis added). The jury in both cases wrote "guilty."

"[W]e interpret jury verdicts in light of the trial as a whole." *United States v. Hartz*, 458 F.3d 1011, 1022 n.9 (9th Cir. 2006). Reviewing the superceding indictment, the written and oral jury instructions, the trial transcript, and the jury verdict, we conclude that the jury found both Tubbs and Blanche guilty of armed bank robbery. Whether or not aiding and abetting an armed bank robbery is a crime of violence, the fact that they were convicted of armed bank robbery means that the enhancement was properly applied. *See Watson*, 881 F.3d at 786.

We decline to reach uncertified issues.

AFFIRMED.

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

United States v. Tubbs, No. 17-17160
United States v. Blanche, No. 17-17512

MILLER, J., concurring in the judgment:

Until we raised the issue by requesting supplemental briefing, the government never suggested that defendants Tubbs and Blanche were necessarily convicted of armed bank robbery as principals. And even then, the government acknowledged that "neither the parties, the court, nor the jury in this case would have thought to request an explicit finding on the theory of liability . . . . because whether [defendants] were found to have been acting as a principal or an aider and abettor, they would be treated the same." That is correct because 18 U.S.C. § 2(a) provides that anyone who aids or abets a federal offense "is punishable as a principal." Aiding and abetting is not a separate crime but simply another theory of liability for the substantive charge. *See United States v. Garcia*, 400 F.3d 816, 820 (9th Cir. 2005).

In the district court, the government presented alternative theories that the defendants were principals or aiders and abettors. The jury instructions stated that "[t]he government is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted." And the government emphasized in closing that "[i]f one of the individuals . . . goes in the bank with a real gun, and you knew about it, and you wanted to bring about the consequences

of his actions inside the bank, you are equally guilty. Equally guilty. Aider and abettor."

To be sure, the verdict forms directed the jury to find each defendant guilty or not guilty of "Armed Bank Robbery *and* Aiding and Abetting." (emphasis added). But the forms gave only two options with respect to that count: "guilty/not guilty." (capitalization omitted). So if the jury thought either defendant was guilty as an aider and abettor but not as a principal, it had no way of indicating that finding. And having been instructed that either theory of liability was sufficient, the jury would have had no reason to find the defendants guilty under both theories. To the contrary, the jury must have understood that it should enter "guilty" as long as it believed each defendant was guilty either as a principal *or* as an aider and abettor. Indeed, that was the government's position all along.

I would not resolve this case on the basis of an argument the government declined to make. Instead, because the defendants may have been convicted as aiders and abettors, I would decide the issue presented to us by the parties: whether aiding and abetting federal armed bank robbery is a crime of violence under 18 U.S.C. § 924(c)(3)(A). *See* 18 U.S.C. § 2113(a), (d). In accord with the other courts of appeals to consider the analogous issue of aiding and abetting Hobbs Act robbery under 18 U.S.C. § 1951(a), I would hold that it is and affirm the judgment on that basis. *See United States v. Richardson*, 948 F.3d 733, 742 (6th Cir. 2020);

United States v. García-Ortiz, 904 F.3d 102, 109 (1st Cir. 2018), *cert. denied*, 139 S. Ct. 1208 (2019); *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016). We have observed that "there is no material distinction between an aider and abettor and principals," and therefore aiding and abetting an offense "is the functional equivalent of personally committing that offense." *Ortiz-Magana v. Mukasey*, 542 F.3d 653, 659 (9th Cir. 2008); *see also Rosemond v. United States*, 572 U.S. 65, 75–76 (2014). It is now undisputed that armed bank robbery is a crime of violence, *see United States v. Watson*, 881 F.3d 782, 784 (9th Cir.) (per curiam), *cert. denied*, 139 S. Ct. 203 (2018), so aiding and abetting armed bank robbery must be as well.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Respondent, v. MICHAEL WAYNE BLANCHE, Movant.	Nos. 2:05-cr-0243 WBS CKD P 2:16-cv-1335 WBS CKD ORDER

Movant, a federal prisoner proceeding with counsel, 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 September 13, 2017, 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 his objections, movant presents two arguments not presented in his original § 2255 motion or his traverse. The first begins on page 12 of his objections under the heading "An Aider and Abettor Need Not Intend The Use Of Violent Force." The second begins on page 15 under the heading "Count 2 Must Be Vacated Because The Jury's Verdict Cannot Support A Conviction Without A Jury Finding Based On An Applicable Instruction That Armed Bank Robbery and

Aiding and Abetting Constitute A Crime Of Violence." Counsel for movant does not explain his failure to raise these arguments in his original motion, seek leave to add them or acknowledge to the court that they are new.

These arguments will not be considered as "allowing parties to litigate fully their case before the magistrate and, if unsuccessful, to change their strategy and present a different theory to the district court would frustrate the purpose of the Magistrates Act." Greenhow v. Secretary of Health & Human Services, 863 F.2d 633, 638 (9th Cir.1988) (overruled on other grounds). "[T]he Magistrates Act was [not] intended to give litigants an opportunity to run one version of their case past the magistrate, then another past the district court." Id.[1]

As for the arguments which were presented to the magistrate judge, and 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.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed September 13, 2017, are adopted in full;

2. Movant's November 7, 2016, amended motion for habeas corpus relief under 28 U.S.C. § 2255 (ECF No. 219) is denied;

3. The court issues the certificate of appealability referenced in 28 U.S.C. § 2253 on the question of whether movant's conviction of armed bank robbery under 18 U.S.C. § 2113(a) and (d) was a conviction of a crime of violence within the meaning of 18 U.S.C. § 924(c); and

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[1] Movant's argument concerning aiding and abetting was presented to the court by movant's co-defendant Jarvis Marquez Tubbs, ECF No. 231 at 14, and rejected. ECF. No. 249 at 6; ECF No. 253. As applicable to movant, the argument fails for the same reasons.

As for the second argument, movant asserts it was up to the jury to decide whether armed bank robbery amounts to a "crime of violence" as that term is defined in 18 U.S.C. § 924(c)(3). However, as indicated in the magistrate judge's findings and recommendations, bank robbery (not necessarily bank extortion) under 18 U.S.C. § 2113(a) is a "crime of violence" as that term is defined in § 924(c)(3) as a matter of law. When the jury found that movant committed all of the elements of armed bank robbery, the jury implicitly found that movant committed a § 924(c)(3) "crime of violence." See ECF No. 79 at 12.

4. The Clerk of the Court is directed to close the companion civil case No. 2:16-cv-1335 WBS CKD.

Dated: December 19, 2017

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

blan0243.805vac

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Respondent, v. MICHAEL WAYNE BLANCHE, Movant.	No. 2:05-cr-0243 WBS CKD P FINDINGS AND RECOMMENDATIONS

I. INTRODUCTION

Movant is proceeding with counsel with a motion for habeas corpus relief under 28 U.S.C. § 2255. Movant argues that his conviction and sentence in this action for using a firearm during a "crime of violence" in violation of 18 U.S.C. § 924(c)(1)(A),[1] with armed bank robbery as the qualifying "crime of violence," must be vacated because, following the Supreme Court's decision in Johnson v. United States, 135 S. Ct. 2551 (2015), bank robbery, armed or otherwise, no longer qualifies as a "crime of violence" for purposes of § 924(c)(1)(A). For the following reasons, the court will recommend that movant's argument be rejected.

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[1] All other statutory references are to Title 18 of the United States Code unless otherwise noted.

II. BACKGROUND

On December 22, 2005, movant was charged in a superseding indictment with one count of armed bank robbery under § 2113(a) & (d) and one count of "use of a firearm" in violation of § 924(c)(1). ECF No. 24. Movant was found guilty of both counts by a jury on May 16, 2006. ECF No. 86. On February 12, 2007, movant was ordered to serve a total sentence of 192 months imprisonment: 108 months for armed bank robbery consecutive to 84 months for use of a firearm. ECF No. 113 & 114.

III. STATUTES

Under § 2113(a), "bank robbery" is defined as follows:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny--
>
> Shall be fined under this title or imprisoned not more than twenty years, or both . . .

The applicable version of § 924(c)(1)(A) in effect until October 26, 2005[2] provides additional penalties for a defendant who "during and in relation to any crime of violence . . . uses or carries a firearm, or who, in furtherance of any such crime possess a firearm. . ." A "crime of violence" for purposes of § 924(c)(1)(A) is defined under § 924(c)(3) as a crime which "(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

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[2] Movant's crimes were committed in 2005 before October. ECF No. 24.

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

IV. ANALYSIS

In Johnson v. United States, 135 S. Ct. 2551 (2015) ("Johnson II"[3]), the Supreme Court held that imposing an increased sentence under what has become known as the "residual clause" of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2),[4] is a violation of Due Process Clause of the Fourteenth Amendment as that provision is too vague. Movant argues that the ruling in Johnson II also renders § 924(c)(3)(B) unconstitutionally vague. The court need not reach this question, however, because movant fails to show that bank robbery is not a "crime of violence" under § 924(c)(3)(A) as explained below.

1. "Intimidation" as Element of "Crime of Violence"

In Johnson v. United States, 559 U.S. 133 (2010) ("Johnson I") the Supreme Court clarified that for purposes of the definition of "crime of violence" identified in § 924(c)(3)(A), the phrase "physical force" means "violent force—that is force capable of causing physical pain or injury to another person." Id. at 140. Movant argues that bank robbery involving "intimidation," as opposed to "force and violence," cannot amount to a "crime of violence" under § 924(c)(3)(A) because the definition of intimidation in the Ninth Circuit, to "willfully . . . 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) does not require at least the threatened use of "violent physical force." But, movant does not elaborate and does not adequately explain how at least attempting to take something in a manner which places the "reasonable person in fear of bodily harm" includes conduct that does not at least amount to a threat of "force capable of causing physical pain or injury." Movant asserts that a bank teller can be intimidated under the Selfa definition with a simple demand for money. The court agrees, but this does not mean "force

[3] "Johnson II," as opposed to " Johnson I," referenced below.

[4] Under the "residual clause" found in § 924(e)(2)(B)(ii) a "violent felony" is, in part, a crime punishable by imprisonment exceeding one year that "involves conduct that presents a serious potential risk of physical injury to another."

capable of causing physical pain or injury" to the teller is not threatened. As the Ninth Circuit has found, threats of bodily harm may be implicit in a note given to a bank teller demanding money. U.S. v. Hopkins, 703 F.2d 1102, 1103 (9th Cir. 1983)

2. Intent

Next, movant argues that bank robbery is no longer a "crime of violence" as that term is defined in § 924(c)(3)(A) because law which has developed since movant was convicted now requires that the use, attempted use, or threatened use of physical force against the person or property of another be "intentional."

In Leocal v. Ashcroft, 543 U.S. 1 (2004), the Supreme Court found that the phrase "use of physical force against the person or property of another" requires a level of intent beyond mere negligence. In Fernandez-Ruiz v. Gonzales, 466 F.3d 1121, 1126-32 (9th Cir. 2006) the Ninth Circuit found that reckless conduct is also not a sufficient level of intent to establish a "use, attempted use, or threatened use of physical force against the person or property of another." Rather, a "crime of violence," as that term is defined in § 924(c)(3)(A), "must involve the intentional use," threatened use, etc., "of force." Id.

To secure a bank robbery conviction "by intimidation," "the government must prove not only that the accused knowingly took property, but also that he knew that his actions were objectively intimidating." McNeal, 818 F.3d at 155. Movant argues that because bank robbery is not a "specific intent" crime, that is a crime where "the government must prove that the defendant subjectively intended or desired the proscribed act or result," United States v. Lamont, 831 F.3d 1153, 1156 (9th Cir. 2016), Fernandez-Ruiz precludes a finding that bank robbery is a crime of violence under § 924(c)(3). However, the Ninth Circuit did not distinguish between specific and general intent in Fernandez-Ruiz. The court simply indicated that a crime of violence as that term is described in § 924(c)(3)(A) must be committed "intentionally," as opposed to recklessly or with negligence in that there must be a "volitional element." Fernandez-Ruiz, 466 F.3d at 1129. Movant fails to point to any other authority suggesting that only specific intent crimes can amount to a crime of violence under § 924(c)(3)(A).

/////

In any case, in 2000, the Ninth Circuit held that armed bank robbery qualifies as a "crime of violence," as that term is defined in § 924(c)(3)(A) because one of the elements of armed bank robbery is a taking "by force and violence or by intimidation." United States v. Wright, 215 F.3d 1020, 1028 (9th Cir. 2000). Again, in Selfa, 918 F.2d. at 751, the Ninth Circuit specifically defined "intimidation" as to "willfully . . . take, or attempt to take, in such a way that would put an ordinary, reasonable person in fear of bodily harm." Any argument that the Ninth Circuit's definition of "intimidation" somehow captures passive as opposed to intentional conduct "presents an implausible paradigm in which a defendant unlawfully obtains another person's property against his or her will by unintentionally placing the victim in fear of injury. "United States v. Watson, CR NO. 14-00751-01 DKW, 2016 WL 866298 at *7 (D. Haw. Mar. 2, 2016).

3. Extortion

Movant's final argument, raised in his reply brief, is that bank robbery cannot be a "crime of violence" under § 924(c)(3)(A) because it can be achieved through mere extortion. However, not every crime which may be committed under § 2113(a) need amount to a "crime of violence" under § 924(c)(3) in order for movant to be eligible for conviction under § 924(c)(1)(A).

As the Supreme Court noted in Mathis v. United States, 136 S. Ct. 2243, 2249 (2016) "[a] single statute may list crimes in the alternative, and thereby define multiple crimes." The court finds that there are two crimes identified in the first paragraph of § 2113(a): bank robbery and bank extortion. See Wright 215 F.3d at 1028 (Ninth Circuit finds armed bank robbery to be a "crime of violence" under § 924(c)(3) because one of the elements is taking "by force and violence, or by intimidation" and without addressing the element of § 2113(a) concerning extortion). For bank robbery, the government must prove the defendant took, or attempted to take, qualifying property from the person or presence of another by force and violence or by intimidation. For bank extortion, the defendant must obtain or attempt to obtain qualifying property by extortion which the Supreme Court has defined as "obtaining something of value from another (not necessarily from their presence or person), with his consent induced by the wrongful use of force, fear or threats." Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 409 (2003). "Unlike robbery, the threats that can constitute extortion . . . include threats to

property. . ." United States v. Becerril-Lopez, 541 F.3d 881, 892 (9th Cir. 2008). See United States v. Holloway, 309 F.3d 649, 651 (9th Cir. 2002) (Ninth Circuit recognizes that § 2113(a) is the exclusive provision for prosecuting "bank extortion").

Where, as here, a "divisible" statute delineates more than one crime by having "alternative elements," the "court looks to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of." Mathis, 136 S. Ct. at 2249. If the court determines the crime for which defendant was convicted was a "crime of violence," conviction under § 924(c)(1)(A) is not foreclosed.

Movant was charged in count one of the Indictment with armed bank robbery, not bank extortion. It is alleged in count one that movant "willfully and by force, violence and intimidation [took], from the person or presence of employees at Washington Mutual Bank, 8275 Elk Grove Boulevard, Elk Grove, . . . approximately $14,494.00. . ." ECF No. 24. Following a jury trial, movant was found guilty of count one as charged and count two, use of a firearm, with the armed bank robbery alleged in count one as the qualifying crime of violence. ECF No. 24; 79 at 11-12; and 86. There is no mention of extortion in the Indictment, the jury instructions, or in the verdict.

Accordingly, movant's convictions concern armed bank robbery involving "force and violence or intimidation," and not extortion.

4. Binding Authority not "Clearly Irreconcilable"

Finally, as argued by respondent, the court notes that under Ninth Circuit law, the court must adhere to the finding in Wright, that armed bank robbery is a "crime of violence" under § 924(c)(3) as movant has not shown that Johnson I, Johnson II, or any other subsequent Ninth Circuit or Supreme Court authority is "clearly irreconcilable" with or has overruled Wright. See Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

V. CONCLUSION

For all of these reasons, the court will recommend that movant's motion for habeas corpus relief under 28 U.S.C. § 2255 be denied.

In accordance with the above, IT IS HEREBY RECOMMENDED that:

1. Movant's November 7, 2016 amended motion for habeas corpus relief under 28 U.S.C. § 2255 (ECF No. 219) be denied; and

2. The Clerk of the Court be directed to close the companion civil case No. 2:16-cv-1335 WBS CKD.

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." 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, Federal 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). Any response to the objections shall be served and filed within fourteen days after service of the objections. The parties are advised that failure to file objections within the specified time waives the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: September 13, 2017

CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____ DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JAVARIS MARQUEZ TUBBS and MICHAEL WAYNE BLANCHE Defendants.	CR. S-05-0243-WBS VERDICT

WE, THE JURY, FIND THE DEFENDANT AT BAR, MICHAEL WAYNE BLANCHE, AS FOLLOWS:

guilty
(GUILTY/NOT GUILTY) of a violation of Title 18 U.S.C. sections 2113 (a), (d) and 2, Armed Bank Robbery and Aiding and Abetting, as charged in Count 1 of the Superseding Indictment.

guilty
(GUILTY/NOT GUILTY) of a violation of Title 18 USC section 924(c)(1), Use of a Firearm, as charged in Count 2 of the Superseding Indictment.

Trina Wood
FOREPERSON'S SIGNATURE

May 15, 2006
DATE

FILED
MAY 16 2006
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES

v.

JAVARIS TUBBS & MICHAEL BLANCHE

CASE #: **CR. S-05-243 WBS**

JURY INSTRUCTIONS GIVEN

Dated 5/15/06

Sally Hoover

Sally Hoover
Courtroom Deputy

INSTRUCTION NO. 10

The defendants are charged in Count One of the Indictment with armed bank robbery in violation of Section 2113 of Title 18 of the United States Code. In order for a defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant took money which was in the care, custody, control, management or possession of a financial institution;

Second, the defendant took the money from person or presence of one or more of the employees of that financial institution;

Third, the defendant used force and violence, or intimidation in doing so;

Fourth, in doing so the defendant assaulted or put in jeopardy the life of a person by use of a dangerous weapon; and

Fifth, the deposits of the financial institution were then insured by the Federal Deposit Insurance Corporation.

A defendant may be found to have assaulted or put in jeopardy the life of a person by use of a dangerous weapon if he intentionally made a display of force by use of any object that reasonably caused that person to fear bodily harm.

INSTRUCTION NO. 11

The defendants are charged in Count Two of the Indictment with using and carrying a firearm during and in relation to a crime of violence in violation of Section 924(c) of Title 18 of the United States Code. In order for a defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant committed the crime of armed bank robbery as charged in Count One of the Indictment;

Second, the defendant knowingly used and carried a firearm; and

Third, the defendant used and carried the firearm during and in relation to the crime of armed bank robbery.

A defendant has "used" a firearm if he has actively employed the firearm in relation to the commission of an armed bank robbery, or the attempted commission of armed bank robbery. Use includes any of the following:

(1) brandishing, displaying, striking with, a firearm;

(2) referring to a firearm in the offender's possession in order to bring about a change in the circumstances of the predicate offense;

(3) the silent but obvious and forceful presence of a firearm in plain view.

A defendant carries a firearm if the defendant knowingly possesses or carries the firearm. Carrying is not limited to carrying weapons directly on the person, but can include circumstances such as carrying in a vehicle or a locked compartment of a vehicle.

A defendant takes such action "in relation to the crime" if the firearm facilitated or played a role in the crime.

The term "firearm," as used in this instruction, means any weapon which will or is designed to expel a projectile by the action of an explosive. A fake or toy gun is not a firearm within the meaning of this instruction.

INSTRUCTION NO. 12

A person has possession of something if the person knows of its presence and has physical control of it, or knows of its presence and has the power and intention to control it.

More than one person can be in possession of something if each knows of its presence and has the power and intention to control it.

INSTRUCTION NO. 13

An act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake, or accident. The government is not required to prove that the defendant knew that his acts were unlawful. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

INSTRUCTION NO. 14

A defendant may be found guilty of a crime, even if the defendant personally did not commit the act or acts constituting that crime but aided and abetted in its commission. To prove a defendant guilty of a crime on the basis of aiding and abetting, the government must prove beyond a reasonable doubt:

First, the crime was committed by someone;

Second, the defendant knowingly and intentionally aided, counseled, commanded, induced or procured that person to commit the crime; and

Third, the defendant acted before the crime was completed.

It is not enough that the defendant merely associated with the person committing the crime, or unknowingly or unintentionally did things that were helpful to that person, or was present at the scene of the crime.

The evidence must show beyond a reasonable doubt that the defendant acted with the knowledge and intention of helping that person commit armed bank robbery.

The government is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted.

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FILED

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CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JAVARIS MARQUEZ TUBBS, MICHAEL WAYNE BLANCHE, and ANGEL LELYNN BREWER, Defendants.	CR. No. S-05-243 WBS VIOLATIONS: 18 U.S.C. §§ 2113(a), (d) and 2 - Armed Bank Robbery, and Aiding and Abetting; 18 U.S.C. § 924(c)(1) - Use of a Firearm

S U P E R S E D I N G I N D I C T M E N T

COUNT ONE: [18 U.S.C. §§ 2113 (a),(d) and 2 - Armed Bank Robbery, and Aiding and Abetting]

The Grand Jury charges: T H A T

JAVARIS MARQUEZ TUBBS,
MICHAEL WAYNE BLANCHE, and
ANGEL LELYNN BREWER,

defendants herein, on or about April 14, 2005, in the Eastern District of California, did willfully and by force, violence and intimidation take, from the person or presence of employees of Washington Mutual Bank, 8725 Elk Grove Blvd., Elk Grove, California, approximately $14,494.00, belonging to and in the care, custody,

control, management and possession of the bank, the accounts of which were then insured by the Federal Deposit Insurance Corporation, in violation of Title 18, United States Code, Sections 2113(a) and 2.

2. The Grand Jury further charges that, in committing the offense described in paragraph 1 herein, the defendants did assault and put in jeopardy the lives of said employees of the bank by use of a dangerous weapon, namely: a handgun, in violation of Title 18, United States Code, Sections 2113(a), (d), and 2.

COUNT TWO: [18 U.S.C. § 924(c)(1) - Use of a Firearm]

The Grand Jury further charges: T H A T

JAVARIS MARQUEZ TUBBS, and
MICHAEL WAYNE BLANCHE

defendants herein, on or about April 14, 2005, in the Eastern District of California, during and in relation to a crime of violence which may be prosecuted in a court of the United States, namely, the armed bank robbery charged in Count One of this Indictment, did use and carry a firearm, to wit: a handgun, in violation of Title 18, United States Code, Section 924(c)(1).

A TRUE BILL.

/s/ Signature on file w/AUSA

FOREPERSON

McGREGOR W. SCOTT
United States Attorney

SUPERSEDING INDICTMENT PENALTY SLIP

DEFENDENTS: **Javaris Marquez Tubbs**
Michael Wayne Blanche, and
Angel Lelynn Brewer

COUNT 1
VIOLATIONS: 18 U.S.C. § 2113(a) and (d) - Armed Bank Robbery;
PENALTY: Not more than 25 years in prison;
Not more than $250,000 fine, or both;
5-year term of supervised release.

DEFENDENTS: **Javaris Marquez Tubbs, and**
Michael Wayne Blanche

COUNT 2:
VIOLATION: 18 U.S.C. § 924(c)(1) - Use of a Firearm;
PENALTY: Mandatory 7 years consecutive imprisonment;
Not more than $250,000 fine, or both;
4-year term of supervised release

PENALTY
ASSESSMENT: $100.00 special assessment each count

2:05-CR-0243 WBS

No. 2:05-CR-0243 WBS

UNITED STATES DISTRICT COURT

Eastern District of California

Criminal Division

THE UNITED STATES OF AMERICA

vs.

JAVARIS MARQUEZ TUBBS,
MICHAEL WAYNE BLANCHE, and
ANGEL LELYNN BREWER

SUPERSEDING INDICTMENT

VIOLATIONS: 18 U.S.C. §§ 2113(a), (d) and 2 - Armed Bank Robbery, and Aiding and Abetting; 18 U.S.C. § 924(c)(1) - Use of a Firearm

A true bill,

/S/

Foreman.

Filed in open court this 22nd *day*

of December *, A.D. 20* 05

Clerk.

Bail, $ No Process necessary as to all Ds

GPO 863 525