

# Appendix

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 8 2020

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

D'ANGELO DOMINGO DAVIS, AKA  
D'Angelo Dominico Davis, AKA Deangelo  
Domingo Davis,

Defendant-Appellant.

No. 19-16966

D.C. Nos.

2:11-cv-01755-KJM-DAD  
2:98-cr-00114-KJM-AC-1  
Eastern District of California,  
Sacramento

ORDER

Before: LEAVY, PAEZ, and BENNETT, Circuit Judges.

Appellant's motion to allow late filing of his response (Docket Entry No. 13) is granted.

Appellee's motion for summary affirmance (Docket Entry No. 12) 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  
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,  
Respondent,  
v.  
D'ANGELO DAVIS,  
Movant.

No. 2:98-cr-0114 KJM AC

## ORDER

Movant, a federal prisoner proceeding through 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 April 9, 2019, the magistrate judge filed findings and recommendations, 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. ECF No. 393. Movant has filed objections to the findings and recommendations. ECF No. 396.

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 reviewed the file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

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1 Plaintiff requests the court issue a certificate of appealability, Obj., ECF No. 396,  
2 at 14, which is required before movant can appeal this decision. 28 U.S.C. § 2253(c); Fed. R.  
3 App. P. 22(b). For the court to do so, the movant must adequately demonstrate that the issues  
4 presented by this case may be “debatable among jurists of reason,” could be resolved differently  
5 by another court, or are “adequate to deserve encouragement to proceed further.” *Jennings v.*  
6 *Woodford*, 290 F.3d 1006, 1010 (9th Cir. 2002) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893  
7 (1983)).<sup>1</sup> A certificate of appealability may issue “only if the applicant has made a substantial  
8 showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The certificate of  
9 appealability must “indicate which specific issue or issues satisfy” the requirement. 28 U.S.C.  
10 § 2253(c)(3).

11 In the present case, movant has demonstrated entitlement to a certificate of  
12 appealability concerning whether the classification of his conviction for armed robbery as a crime  
13 of violence under 18 U.S.C. § 924(c) was constitutional. The court is persuaded by the reasoning  
14 of its sister court in *United States v. Dawson*, 300 F. Supp. 3d 1207 (D. Or. 2018), that a  
15 certificate of appealability is appropriate, despite the clear holding in *United States v. Watson*,  
16 881 F.3d 782 (9th Cir.), *cert. denied*, 139 S. Ct. 203 (2018), because there is “tension” between  
17 the holding in *Watson* (and the case it relies on, *Carter v. United States*, 530 U.S. 255, 268  
18 (2000)), and other Ninth Circuit precedent. *Dawson*, 300 F. Supp. 3d at 1212 (citing *United*  
19 *States v. Parnell*, 818 F.3d 974 (9th Cir. 2016)); *see also United States v. Rich*, No. 6:08-CR-  
20 60126-MC, 2018 WL 2357534, at \*2 (D. Or. May 23, 2018) (agreeing with reasoning in *Dawson*  
21 and granting certificate of appeal on same issue). As such, the issue is “debatable among jurists  
22 of reason” and movant has satisfied the requirements for a certificate of appealability. *See*  
23 *Jennings*, 290 F.3d at 1010.

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27 <sup>1</sup> Except for the requirement that appealable issues be specifically identified, the standard for  
28 issuance of a certificate of appealability is the same as the standard that applies to issuance of a  
certificate of probable cause. *Jennings*, 290 F.3d at 1010.

1 Accordingly, IT IS HEREBY ORDERED that:

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1. The findings and recommendations filed April 9, 2019 (ECF No. 393), are adopted in full;
2. The motion to vacate, set aside, or correct movant's sentence pursuant to 28 U.S.C. § 2255 (ECF No. 357) is denied;
3. A certificate of appealability is issued in the present action as discussed above; and
4. The Clerk of the Court is directed to close the companion civil case, No. 2:16-cv-1635 KJM AC, and to enter judgment.

10 DATED: September 26, 2019.

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UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,  
Plaintiff/Respondent,  
v.  
D'ANGELO DAVIS,  
Defendant/Movant.

No. 2:98-cr-00114 KJM AC

## FINDINGS AND RECOMMENDATIONS

Movant, a federal prisoner proceeding with appointed counsel, brings a challenge to his conviction and sentence under 28 U.S.C. § 2255. ECF No. 357. Movant seeks relief pursuant to Johnson v. United States, 135 S. Ct. 2551 (2015). Id. The United States opposes the motion, ECF No. 364, and movant has replied, ECF No. 365.

## I. BACKGROUND

Mr. Davis was convicted by a jury in 2002 of armed robbery of a credit union in violation of 18 U.S.C. § 2113(a) & (d) (three counts); armed robbery of a bank in violation of 18 U.S.C. § 2113(a) & (d) (one count); and using or carrying a firearm in connection with a crime of violence in violation of 18 U.S.C. § 924(c) (four counts). ECF Nos. 139, 140. He was sentenced on January 13, 2003 to a total term of 968 months imprisonment, which included 60 months consecutive on the first § 924(c) gun count and 240 months consecutive on each of the other three gun counts. ECF No. 161.

1           On appeal, the Ninth Circuit overturned the conviction on Count Four for using or  
2 carrying a firearm in relation to the First Federal Credit Union robbery. The court remanded the  
3 case for resentencing pursuant to United States v. Ameline, 409 F.3d 1073, 1085 (9th Cir. 2005)  
4 (en banc). ECF No. 185; United States v. Davis, 138 Fed. Appx. 914 (9th Cir. 2005). On  
5 remand, the district court imposed an aggregate term of 867 months. ECF No. 211. That  
6 sentence was subsequently vacated by the Ninth Circuit, which directed the district court to re-  
7 impose the original sentence minus the term originally imposed on the dismissed count. ECF No.  
8 224. On remand, the district court imposed a total sentence of 728 months, which included 60  
9 months consecutive for the first § 924(c) count and 240 months consecutive on each of the other  
10 two remaining § 924(c) counts. ECF No. 245. The sentence was affirmed on appeal. ECF No.  
11 255.

12           Mr. Davis filed a motion pursuant to 28 U.S.C. § 2255 in 2011, which was denied. ECF  
13 Nos. 339, 346. After the U.S. Supreme Court’s decision in Johnson v. United States, supra,  
14 movant was authorized by the Ninth Circuit to bring this successive § 2255 motion. ECF No.  
15 349.

16           II.     THE MOTION

17           Movant contends that his convictions under 18 U.S.C. § 924(c) cannot stand, because the  
18 statutory language defining “crimes of violence” for purposes of that section is unconstitutionally  
19 vague in violation of due process. He contends first that after Johnson, armed bank robbery no  
20 longer qualifies as a crime of violence under the statute’s “force clause,” § 924(c)(3)(A). He  
21 argues second that the statute’s “residual clause,” § 924(c)(3)(B), is void for vagueness under  
22 Johnson.

23           III.    PERTINENT STATUTORY FRAMEWORK

24           Title 18 U.S.C. § 924(c), which is the basis for Counts Two, Six and Eight in this case,  
25 provides in pertinent part as follows:

26           Whoever, during and in relation to any crime of violence or drug  
27 trafficking crime. . . uses or carries a firearm, shall, in addition to  
28 the punishment provided for such crime of violence or drug  
trafficking crime, be sentenced to imprisonment for five years. . .  
In the case of his second or subsequent conviction under this

1 subsection, such person shall be sentenced to imprisonment for  
2 twenty years. . .

3 18 U.S.C. § 924(c)(1) (1993).

4 The statute defines “crime of violence” as follows:

5 For purposes of this subsection the term “crime of violence” means  
6 an offense that is a felony and –

7 (A) Has as an element the use, attempted use, or threatened use of  
8 physical force against the person or property of another, or  
9 (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.

10 Id. § 924(c)(3). Subsection A is known as the “force clause” and subsection B is known as the  
11 “residual clause.”

12 The federal bank robbery statute, which is the basis for Counts One, Three, Five and  
13 Seven in this case, provides in pertinent part as follows:

14 (a) Whoever, by force and violence, or by intimidation, takes, or  
15 attempts to take, from the person or presence of another, or obtains  
16 or attempts to obtain by extortion any property or money or any  
17 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

18 Whoever enters or attempts to enter any bank, credit union, or any  
19 savings and loan association, or any building used in whole or in  
20 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 or such savings and loan association and  
in violation of any statute of the United States, or any larceny--

21 Shall be fined under this title or imprisoned not more than twenty  
22 years, or both.

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24 (d) Whoever, in committing, or in attempting to commit, any  
25 offense defined in subsections (a) and (b) of this section, assaults  
26 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.

27 18 U.S.C. § 2113(a), (d).

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1           IV.    ANALYSIS

2           A. Movant's Challenge to the Residual Clause of § 924(c)(3)

3           In Johnson, the Supreme Court held that the language in the residual clause of the Armed  
4           Career Criminal Act of 1984 (“ACCA”), 18 U.S.C. § 924(e), is facially void for vagueness. 135  
5           S. Ct. at 2557. The ACCA prescribes 15-to-life sentences for § 922(g) felon-in-possession  
6           convictions where there have been 3 or more prior “violent felonies.” The statute defines “violent  
7           felonies” as:

8           [A]ny crime punishable by imprisonment for a term exceeding one  
9           year, or any act of juvenile delinquency involving the use or  
10           carrying of a firearm, knife, or destructive device that would be  
11           punishable by imprisonment for such term if committed by an  
12           adult, that--

13           (i) has as an element the use, attempted use, or threatened use of  
14           physical force against the person of another; or

15           (ii) is burglary, arson, or extortion, involves use of explosives, *or*  
16           *otherwise involves conduct that presents a serious potential risk of*  
17           *physical injury to another.*

18           Id. § 924(e)(2)(B) (emphasis added). The italicized portion of the quoted statutory language is  
19           known as the residual clause. The Supreme Court found that this language cannot support an  
20           enhanced sentence consistent with due process, because it does not give sufficient notice to  
21           defendants of the conduct that will support the enhancement, and because it invites arbitrary  
22           enforcement by judges. Johnson, 135 S. Ct. at 2557. The holding of Johnson constitutes a new  
23           rule of substantive criminal procedure that applies retroactively on collateral review. Welch v.  
24           United States, 136 S. Ct. 1257, 1265 (2016).

25           Applying Johnson, the Supreme Court has also invalidated that part of the Immigration  
26           and Nationality Act’s definition of “aggravated felony” which borrows the residual clause  
27           definition of “crime of violence” from 18 U.S.C. § 16(b). Sessions v. Dimaya, 138 S. Ct. 1204,  
28           1211, 1223 (2017) (impermissibly vague to define “crime of violence” requiring deportation as  
any offense “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.”).

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1           The residual clause language of § 924(c)(3)(B) is substantially identical to that found void  
2 for vagueness in Johnson and Dimaya. Accordingly, the undersigned agrees with those district  
3 judges who have found § 924(c)(3)(B) to be impermissibly vague under Johnson. See, e.g.,  
4 United States v. Lattanaphom, 159 F. Supp. 3d 1157 (E.D. Cal. 2016) (Shubb, J.). This does not  
5 help Mr. Davis, however, because his § 924(c) convictions do not rest on the residual clause.

6           Movant’s § 924(c) convictions are predicated on the § 2113 armed bank robbery counts in  
7 this case. As explained further below, the Ninth Circuit has held since Johnson that armed bank  
8 robbery under federal law is a crime of violence for purposes of § 924(c) under the “force  
9 clause.” United States v. Watson, 881 F.3d 782, 783, 784 (9<sup>th</sup> Cir. 2018) (per curiam).  
10 Accordingly, where a § 2113 conviction provides the predicate for application of § 924(c), a  
11 Johnson challenge to the residual clause need not be reached. Watson, 881 F.3d at 784 (“We  
12 need not address the residual clause because we conclude that the relevant offense of armed bank  
13 robbery is a crime of violence under the force clause.”).

14           B. Bank Robbery and the Force Clause of § 924(c)(3)

15           In Watson, the Ninth Circuit squarely held that bank robbery in violation of § 2113(a) and  
16 (d) qualifies as a crime of violence under the force clause of § 924(c)(3)(A), and that this result  
17 comports fully with Johnson. Watson, 881 F.3d at 784-86. Watson thus forecloses movant’s  
18 argument that § 2113 cannot satisfy the force clause. Indeed, the Watson court specifically  
19 rejected some of the arguments forwarded by movant here, including the theory that § 2113’s  
20 inclusion of “intimidation” as an alternative to “force and violence” as an element of robbery  
21 takes it outside the scope of § 924(c)(3)(A). See id. at 785-86. The Ninth Circuit applied the  
22 familiar categorical approach to § 2113(a) and (d), and found that they satisfy the Johnson  
23 standard. Id. at 786. Accordingly, analysis of movant’s claim begins and ends with Watson.

24           Dimaya, supra, which was decided by the Supreme Court shortly after Watson, does not  
25 affect the validity of Watson. While Dimaya provides strong authority for the proposition that §  
26 924(c)’s residual clause is unconstitutionally vague, it does not address the question whether the  
27 elements of armed bank robbery satisfy the force clause. Because Watson answers that question,  
28 and instructs that the constitutional soundness of the residual clause is not at issue where a §

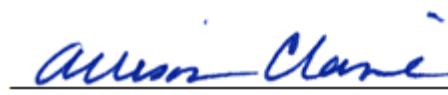
1 924(c) conviction rests on armed bank robbery, Dimaya is inapposite.

2 V. CONCLUSION

3 Based on the foregoing, it is HEREBY RECOMMENDED that the motion to vacate, set aside, or  
4 correct movant's sentence pursuant to 28 U.S.C. § 2255 (ECF No. 357) be DENIED.

5 These findings and recommendations are submitted to the United States District Judge  
6 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
7 after being served with these findings and recommendations, any party may file written  
8 objections with the court and serve a copy on all parties. Such a document should be captioned  
9 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections  
10 within the specified time may waive the right to appeal the District Court's order. Turner v.  
11 Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991). In  
12 his objections movant may address whether a certificate of appealability should issue in the event  
13 he files an appeal of the judgment in this case. See 28 U.S.C. § 2255(c)(1).

14 DATED: April 9, 2019

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16 ALLISON CLAIRE  
17 UNITED STATES MAGISTRATE JUDGE  
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