APPENDIX D

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Devon Mitchell, Movant-Appellant, vs. United States of America, Respondent-Appellee.	No: 20-15665 D.C. No. CV 16-04592-PHX-DGC D.C. No. CR 05-00886-PHX-DGC District of Arizona, Phoenix MOTION FOR A CERTIFICATE OF APPEALABILITY

COMES NOW the Movant-Appellant, Devon Mitchell, by and through the undersigned attorney, and, pursuant to FRAP 22 and Circuit Rule 22-1, hereby moves this court for a certificate of appealability, all for the reasons set forth in the accompanying memorandum of points and authorities.

RESPECTFULLY SUBMITTED this 20th day of May, 2020, by

MICHAEL J. BRESNEHAN, P.C.

s/ Michael J. Bresnehan

Attorney for Movant-Appellant

MEMORANDUM OF POINTS AND AUTHORITIES

On June 20, 2006, a federal grand jury returned a superseding indictment charging Mitchell and his co-defendant with one count of conspiracy in violation of 18 U.S.C. § 371; three counts of bank robbery in violation of 18 U.S.C. §§ 2113(a), (d) and 2; one count of armed bank robbery in violation of 18 U.S.C. §§ 2113(a), (d) and 2; and one count of possession of a firearm during a crime of violence in violation of 18 U.S.C. § § 924(c)(1)(A)(i) and 2. (CR 05-886-PHX-EHC, Dkt. 41.)

On March 5, 2008, following a seven-day jury trial, Mitchell was convicted of three counts of bank robbery, one count of armed bank robbery, and one count of possession of a firearm during a crime of violence (CR 05-886-PHX-EHC, Dkt. 233.) The jury found no verdict on the conspiracy count. The district court sentenced Mitchell to concurrent terms of 162 months' imprisonment on the bank robbery counts, and to a consecutive term of 60 months' imprisonment on the § 924(c) count. (CR 05-886-PHX-EHC, Dkt. 278.)

Mitchell filed a direct appeal to the Ninth Circuit Court of Appeals raising the following issues: (1) Whether the district court erred by denying Mitchell's Rule 29 motion for judgment of acquittal; (2) whether the district court violated Mitchell's right to a fair trial when it admitted evidence that Mitchell was a drug dealer, and Mitchell's statements about his criminal history; (3) whether the district court abused its discretion when it admitted expert testimony on handwriting without holding a *Daubert* hearing; (4) whether the district court abused its discretion when

it denied Mitchell's objections to the jury instructions and the court's answers to the jury's questions; and (5) whether the court erred in enhancing Mitchell's sentence based on his role as a leader or organizer in the offenses, and a prior state-court sentence, and whether the district court abused its discretion in denying Mitchell's request for a downward departure based on a state-court sentence he had previously served. (C.A. No. 08-10323, Dkt. 15) The Ninth Circuit affirmed Mitchell's conviction and sentence on October 2, 2009. (C.A. No. 08-10323, Dkt. 41)

Mitchell thereafter filed a petition for panel rehearing and rehearing *en banc*, which the Ninth Circuit denied on November 23, 2009. (C.A. No. 08-10323, Dkt. 46.) The United States Supreme Court denied Mitchell's petition for writ of certiorari on March 29, 2010. (C.A. No. 08-10323, Dkt. 50.)

On March 28, 2011, Mitchell filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. (CV 11-580-PHX-DGC Dkts. 1, 2.) In his motion, Mitchell alleged six grounds of relief: (1) Constructive amendment of Count 6 of the indictment; (2) insufficient evidence that the banks robbed in Counts 2, 3, 5 and 6 were, at the time of the robberies, insured by the Federal Deposit Insurance Corporation; (3) insufficient evidence to sustain the conviction of the bank robbery of the National Bank of Arizona on August 5, 2005; (4) the court failed to give an alibi instruction; (5) the court abused its discretion in failing to promptly respond to jury notes seeking clarification of legal issues; and (6) ineffective assistance of counsel. (CV 11-580-PHX-DGC, Dkts. 1, 2.) On May 17,

2012, the district court denied Mitchell's § 2255 motion. (CV 11-580-PHX-DGC, Dkt. 18.)

On December 5, 2013, Mitchell filed a *pro se* application for leave to file a second or successive § 2255 petition, which the Ninth Circuit denied on January 23, 2014. (C.A. No. 13-74204, Dkts. 1, 2.) On April 8, 2014, Mitchell filed another *pro se* application for leave to file a second or successive § 2255 petition, which the Ninth Circuit denied on May 29, 2014. (C.A. No. 14-71036, Dkts. 1, 2.)

On June 27, 2016, Mitchell filed yet another application for leave to file a second or successive § 2255 motion. (C.A. No. 16-72115, Dkt. 1.) The Ninth Circuit granted the application on February 22, 2017. (C.A. No. 16-72115, Dkt. 12.) On March 17, 2017, Mitchell filed an amended motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255, contending that his possession of a firearm conviction under 18 U.S.C. § 924(c) is invalid under *Johnson v. United States*, 135 S. Ct. 2551 (2015) ("*Johnson 2015*") (Dkt. 21.)

In his second amended § 2255 motion, Mitchell asserted his conviction under 18 U.S.C. 18 § 924(c) is invalid because bank robbery under 18 U.S.C. § 2113(a) no longer qualifies as a crime of violence after *Johnson 2015*. (Dkt. 21) Essentially, Mitchell posited that by invalidating the residual clause of the ACCA, the Supreme Court also invalidated the residual clause of § 924(c); thus it cannot serve as a basis for his § 924(c) conviction. Mitchell further asserted that bank robbery can be accomplished without the attempted use, or threatened use of violent physical force,

and because it is indivisible and does not categorically have as an element the use, attempted use, or threatened use of violent force as defined in *Johnson v. United States*, 559 U.S. 133 (2010) ("*Johnson 2010*"), it does not qualify as a "crime of violence" under the elements clause of § 924(c)(3). (CR 21 at 5-7.)

Mitchell moved the district court to dismiss the gun count, or, alternatively, to grant him a new trial on that count, as the jury instruction declaring bank robbery to be a "crime of violence" was no longer legally correct under *Johnson 2015*.

MAGISTRATE JUDGE'S RULING

In her Report and Recommendation (Dkt. 59) (see Exhibit "1" hereto), the Magistrate Judge ("MJ") recommended to the District Court that it deny relief, dismiss Mitchell's §2255 motion, and deny a Certificate of Appealability, all because Mitchell's motion was without merit, and Mitchell failed to make a substantial showing of the denial of a constitutional right.

Specifically, the MJ found that *United States v. Gutierrez*, 876 F.3d 1254 (9th Cir. 2017) and *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018) (*per curiam*), cert. denied, 139 S.Ct. 203 (2018), foreclosed the relief Mitchell sought, as both cases affirmed that federal bank robbery is a "crime of violence" under the "elements clause" of 18 U.S.C. § 924(c). In her analysis, the MJ rejected Mitchell's argument that *Gutierrez* and *Watson* could not be reconciled with *United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016) and *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017), and, instead, found that *Parnell* and *Geozos* were inapposite because

they analyzed state robbery statutes rather than 18 U.S.C. § 2113, and that *Geozos* has been abrogated by *Stokeling v. United States*, 139 S.Ct. 544 (2019) and *Ward v. United States*, 936 F.3d 914 (2019).

Mitchell filed objections to the MJ's Report and Recommendations, noting that in *Gutierrez*, the sole question presented by the panel was whether the federal offense of *carjacking* is a "crime of violence" under 18 U.S.C. § 924(c). There, the Court focused on whether carjacking by "intimidation", as that term is used in the statute, constitutes a use of force sufficient to satisfy the requirements articulated in *Johnson 2010*. The Court held, in pertinent part, as follows:

> To be guilty of carjacking "by intimidation", the defendant must take a motor vehicle through conduct that would put an ordinary, reasonable person in fear of bodily harm, which necessarily entails the threatened use of violent physical force. It is particularly clear that "intimidation" in the federal carjacking statute requires a contemporaneous threat to use force that satisfies *Johnson* because the statute requires that the defendant act with "the intent to cause death or serious bodily harm". 18 U.S.C. § 2119; see *Holloway v. United States*, 526 U.S. 1, 12, 119 S.Ct. 966, 143 L.Ed. 2d 1 (1999) ("*The intent requirement of § 2119 is satisfied when the government proves that at the moment the defendant demanded or took control over the driver's automobile the defendant possessed the intent to seriously harm or kill the driver if necessary to steal the car"). As a result, the federal offense of carjacking is categorically a crime of violence under § 924(c).* (emphasis added)

Mitchell argued that because the federal bank robbery statute does not require that the perpetrator act with "the intent to cause death or serious bodily harm", *Gutierrez* is inapposite.

Mitchell noted that in *Watson*, the defendants, like Mitchell in this case, were convicted of armed bank robbery under 18 U.S.C. § 2113(a), (d), and using or carrying a firearm during a "crime of violence" under 18 U.S.C. § 924(c)(1)(A). *Id.* at 784. The defendant in *Watson* argued that because the federal bank robbery statute criminalizes robbery "by force and violence, or by intimidation", the least violent form of the offense – bank robbery by intimidation – did not necessarily involve the violent physical force required by *Johnson 2010*. *Id.* at 785. The Ninth Circuit disagreed. It cited *Gutierrez* in holding that "intimidation" requires the defendant to "take property 'in such a way that would put an ordinary, reasonable person in fear of bodily harm'", which cannot be done "without threatening to use force capable of causing physical pain or injury". *Id.* (quoting *Gutierrez*, 876 F.3d at 1257). Mitchell noted that the *Watson* panel came to that conclusion notwithstanding *Gutierrez's express* reliance on the requirement, under the carjacking statute, that the perpetrator act with the intent to seriously harm or kill the driver/victim – a requirement not present in the federal bank robbery statute.

Mitchell posited that the holding in *Watson* cannot be reconciled with that in *Johnson 2010*, or certain other Ninth Circuit precedent, and, therefore, relief should be granted based on the Supreme Court's holding in *Johnson 2015*. He noted that in *Johnson 2010*, the Supreme Court held that the definition of "crime of violence" that is predicated on the "force clause" means "violent force – that is force capable of causing physical pain or injury to another person". *Id.* at 140. However, bank

robbery – even armed bank robbery – can be effectuated with no more force than is necessary for a purse snatching, which is a form of robbery under Massachusetts's law that was determined by the Ninth Circuit as *not* satisfying the "force clause" of the ACCA (18 U.S.C. § 924(e)(2)(B)(i)). *United States v. Parnell*, 818 F.3d at 979. (the snatching of a purse from a victim's hand does not constitute force capable of causing physical pain or injury to another person).

Robbery, under Mass.Gen.Laws. Ann. Ch 265 §19(b) is described as follows:

> "Whoever, not being armed with a dangerous weapon, *by force and violence*, or by assault and putting in fear, robs, steals or takes from the person of another, or from his immediate control, money or other property which may be the subject of larceny, shall be punished by imprisonment in the state prison for life or for any term of years". (Emphasis added).

Mitchell argued that under that statute, purse snatching was deemed to require sufficient force to constitute robbery, but not sufficient force to satisfy the "force clause" of the ACCA. *Both the Massachusetts robbery statute, and the federal bank robbery statute use/used the phrase "by force and violence*".

Parnell also held that *armed* robbery, under Massachusetts law, likewise, does not satisfy the "force clause" of the ACCA, as the crime can be committed despite the victim having no knowledge that the perpetrator was armed. *Id.* at 981.

Mitchell argued that merely snatching cash from a bank teller's hand where there was little or no resistance would, arguably, constitute bank robbery under

§ 2113(a) because some level of "force and violence" would be required in the process. Mitchell also cited, *United States v. Strickland*, 860 F.3d 1224, 1227 (9th Cir. 2017), an Oregon robbery case in which "the victim and the thief had a tug-of-war over a purse" as an example of a robbery case involving something less than "violent force" within the meaning of *Johnson 2010*. The force required to snatch money from the hand of a bank teller would be no greater (and possibly less) than that required for a robbery by way of a purse snatching. Mitchell noted that the Court in *Watson* did not *expressly* overturn *Parnell* or *Strickland*. He noted that the appellant in *Watson conceded* that committing federal bank robbery "by force and violence" necessarily entails the level of violent physical force that *Johnson 2010* requires. Thus, the *Watson* panel focused *exclusively* on whether the "by intimidation" clause within § 2113(a) met the requirements of a "crime of violence" under 18 U.S.C. § 924(c)(3), and found that it did. Because bank robbery can be committed in a manner no more violent than purse snatching, the decision in *Watson* cannot be reconciled with those in *Parnell* and *Strickland*, except to say that the *Watson* panel was *not* asked to decide whether bank robbery by "force and violence" was a "crime of violence" because the defendant had conceded same. In *Watson* the panel also assumed, without expressly finding, that robbery "by intimidation" was the least violent form of that offense in arriving at its decision – *an assumption that is arguably untrue*. Mitchell posited that *Watson* left unresolved the narrow question that *Parnell* and *Strickland* seem to have answered: Can federal

bank robbery "by force and violence" be committed using less force than necessary to constitute a violation of § 924(c)(3)(A) in light of *Johnson 2010*? The answer appears to be yes.

Thus, Mitchell argued, because federal bank robbery under the "force clause" is overinclusive, in that it criminalizes some conduct that would qualify as a predicate offense, and other conduct that would not (e.g., snatching cash from the hand of a bank teller), neither federal armed bank robbery nor federal unarmed bank robbery is categorically a "violent felony". Moreover, the modified categorical approach is inapplicable because the "by force or violence" prong of § 2113(a) is arguably indivisible.

In her Report and Recommendation, the MJ held that the Supreme Court's recent decision in *Stokeling v. United States*, *supra*, has abrogated the holding in *Geozos*. In *Stokeling*, the Supreme Court held that the same Florida robbery statute analyzed in *Geozos* was a "violent felony" under the ACCA's elements clause. *Id.* at 555. Mitchell responded by pointing out that the five-to-four decision in *Stokeling* was decided in the context of the ACCA (specifically 18 U.S.C. § 924(e)(B)(i)), not 18 U.S.C. § 924(c), and did not address 18 U.S.C. § 2113 at all. The same goes for the holding in *Ward v. United States*, *supra*, also cited by the MJ; though in all fairness, *Parnell*, *Geozos* and *Strickland* were all decided in the context of the ACCA.

Mitchell argued that the dissent in *Stokeling* left open the door for a different result under § 2113(a) and § 924(c), given the dissenters' ardent belief that *Johnson 2010* applies to robbery, as well as battery, statutes. In *Stokeling*, the Supreme Court relied heavily on the Florida courts' *own* interpretation of its robbery statute to arrive at its (the Supreme Court's) conclusion that one can violate that statute by employing just enough force to overcome resistance, and then declared that the ACCA required no more. *Id.* at 555. Thus, Mitchell argued, *Stokeling* is two steps removed from foreclosing relief in this case – different robbery statute, and different sentencing enhancement statute with different definitional terms.

In summary, Mitchell argued that he is entitled to relief under *Johnson 2015*, *Johnson 2010*, *Parnell* and *Strickland*. Because federal bank robbery (armed and unarmed) "by force and violence" can be undertaken with no more force or violence than a purse snatching, or grabbing money from a bank teller's hand, § 2113(a) and (b) are not "crimes of violence" as defined in § 924(c)(3)(A). Moreover, the residual clause of § 924(c)(3)(B) has, effectively, been deemed unconstitutionally vague under *Johnson 2015*, and, more recently, under *United States v. Davis*, 139 S.Ct. 2319 (2019).

On April 6, 2020, the district court adopted the Magistrate Judge's Report and Recommendation, including the MJ's factual and legal findings, and denied relief with prejudice. The district court further denied a certificate of appealability, ruling that Mitchell had not made a substantial showing of the denial of a constitutional

right as required by 28 U.S.C. § 2253(c)(2) and had not demonstrated that "reasonable jurists would find the [Court's] assessment of the constitutional claims debatable or wrong," citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). (See the district court's Order denying relief attached hereto, as Exhibit "2".)

ARGUMENT

Neither *Watson* nor *Gutierrez* forecloses the relief Mitchell seeks. Nor does *Stokeling*.

In *Gutierrez*, the only question addressed by the panel was whether the federal offense of *carjacking* is a crime of violence under 18 U.S.C. § 924(c). There, the Court focused on whether carjacking by "intimidation", as that term is used in the statute, constitutes a use of force sufficient to satisfy the requirements articulated in *Johnson 2010*. However, that statute requires that the perpetrator act with "the intent to cause death or serious bodily harm". Because the federal bank robbery statute does not require the same *mens rea*, *Gutierrez* is clearly inapposite.

As noted earlier herein, the panel in *Watson* did not *expressly* overturn *Parnell* or *Strickland*. Importantly, the appellant in *Watson conceded* that committing federal bank robbery "by force and violence" *necessarily* entails the level of violent physical force that *Johnson 2010* requires. Thus, the *Watson* panel focused only on whether the "by intimidation" clause within § 2113(a) met the requirements of a crime of violence under 18 U.S.C. § 924(c)(3), and found that it did.

Moreover, neither *Watson* nor *Gutierrez* can be reconciled with *United States v. Walton*, 881 F.3d 768 (9th Cir. 2018) (where the Ninth Circuit held that neither the defendant's prior convictions for first-degree robbery under Alabama law, nor second-degree robbery under California law was a violent felony under the ACCA; *Watson* made no mention of *Walton*. Other Circuits have held similarly. See, e.g., *United States v. Bell*, 840 F.3d 963, 966 (8th Cir. 2016)(Missouri robbery not a violent crime because it had been committed by a defendant who "bumped" the victim's shoulder and "yanked" her purse away); *United States v. Winston*, 850 F.3d 677, 685 (4th Cir. 2017)(Virginia robbery not a violent felony because a conviction was affirmed when "the victim was carrying her purse tucked under her arm when the defendant approached the victim from behind, tapped her on the shoulder, and jerked her around by pulling her shoulder, took her purse and ran").

Because bank robbery can be committed in a manner no more violent than grabbing cash from a teller's hand and/or purse snatching, the decision in *Watson* cannot be reconciled with those in *Parnell*, *Walton* or *Strickland*, except to say that the *Watson* panel was *not* asked to decide whether bank robbery by "force and violence" was a "crime of violence" because the defendant had conceded same. In *Watson* the panel assumed *without expressly finding*, that robbery "by intimidation" was the *least* violent form of that offense in arriving at its decision – *an assumption that is arguably untrue*.

Finally, the panel in *Ward*, citing *Stokeling*, held that the defendant's prior Minnesota conviction for aiding and abetting simple robbery qualified as a predicate "violent felony" under the ACCA because the perpetrator had to use force sufficient to overcome the *resistance* of the victim in the process of taking property from the victim. However, neither *Ward* nor *Stokeling* dealt with 18 U.S.C. § 2113(a) – a statute that arguably could be violated with the use of some force in the absence of any real resistance.

The Minnesota robbery statute addressed in *Ward* is defined as the use or threatened use of force "to overcome the person's *resistance or powers of resistance*." Minn.Stat.Ann. § 609.24 (1986). That statute is similar to the Florida robbery statute at issue in *Stokeling*, which is also defined as the taking of property with the use of force to overcome the victim's *resistance*. However, the federal robbery statute (§ 2113(a)) does not expressly require that the "force" used to take… from the person or presence of another be great enough to overcome the resistance of the victim. Federal robbery, it would seem, may occur in the absence of any real resistance on the part of the victim. Thus, while *Stokeling* may have abrogated certain cases interpreting robbery statutes that expressly require the overcoming of resistance on the part of the victim, it does not necessarily speak to all robberies under § 2113(a).

Because federal bank robbery under the "force clause" is overinclusive, in that it criminalizes some conduct that would qualify as a predicate offense, and other

conduct that would not (i.e., snatching cash from the hand of a bank teller, or purse snatching), neither federal armed bank robbery nor federal unarmed bank robbery is categorically a "violent felony," or "crime of violence." Moreover, the modified categorical approach is inapplicable because the "by force or violence" prong of § 2113(a) is arguably indivisible.

CONCLUSION

Because the robbery statute addressed in *Parnell* is functionally similar, if not identical, to 18 U.S.C. § 2113, and neither *Watson* nor *Gutierrez* expressly or necessarily overturned *Parnell*, *Walton* or *Strickland*, and it is unclear what impact, if any, *Stokeling* and *Ward* have had on the issues raised herein, reasonable jurists could find the district court's assessment of Mitchell's constitutional claims debatable or wrong, and, therefore, this Court should grant Mitchell's request for a certificate of appealability.

RESPECTFULLY SUBMITTED this 20th day of May, 2020, by

MICHAEL J. BRESNEHAN, P.C.

s/ Michael J. Bresnehan
Attorney for Movant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of May, 2020, I electronically filed the foregoing motion and related declaration in support of same with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users (Karla Hotis Delord, Esq.) will be served by the appellate CM/ECF system.

I further certify that the defendant-appellant is not a registered CM/ECF user. I have caused one copy of the Motion to be mailed, postage prepaid, to: Devon Mitchell., Inmate Number 85738-008, Federal Correction Institution- Phoenix, 37900 North 45th Avenue, Phoenix, AZ 85086

MICHAEL J. BRESNEHAN, P.C.

s/ Michael J. Bresnehan

Attorney for Movant-Appellant

Exhibit 1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Devon Mitchell, Movant/Defendant, vs. United States of America, Respondent/Plaintiff.	No. CV 16-4592-PHX-DGC (MHB) (CR 05-00886-2-PHX-DGC) **REPORT AND RECOMMENDATION**

TO THE HONORABLE DAVID G. CAMPBELL, UNITED STATES DISTRICT JUDGE:

Movant was convicted after a jury trial of one count of armed bank robbery, in violation of 18 U.S.C. § 2113(a) and (d), three counts of unarmed bank robbery, in violation of 18 U.S.C. § 2113(a), and one count of possessing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(I). (CRDocs.[1] 41, 226.) On July 16, 2008, Movant was sentenced to a total of 222 months in prison, consisting of concurrent terms of 162 months on the bank robbery counts, followed by 60 months on the 924(c) count. (CRDoc. 278.) Movant appealed his judgment and sentence, and on October 2, 2009, the Ninth Circuit Court of Appeals affirmed. (CRDoc. 325-1.) The mandate issued on December 1, 2009. (CRDoc. 325.)

[1]Docket entries reference in the underlying criminal case, CR 05-0886, will be referred to as "CRDoc."

On March 28, 2011, Movant filed a motion to vacate, set aside or correct sentence under 28 U.S.C. § 2255. (CRDoc. 327; 11-cv-00580[2], Doc. 1.) On April 1, 2011, Movant filed a motion for permission to amend. (11-cv-00580, Doc. 4.) On April 5, 2011, the Court denied Movant's first 2255 motion with leave to amend, and denied his motion for permission to amend as moot. (11-cv-00580, Doc. 5.) Movant filed an amended 2255 motion to vacate, set aside, or correct sentence on May 17, 2011. (11-cv-00580, Doc. 6.) In his amended 2255 motion, Movant raised the claims of (1) constructive amendment of the indictment, (2) the government's failure to prove each essential element of the offenses charged in Counts 2, 3, 5, and 6, (3) insufficient evidence to sustain the charge in Count 4, (4) prejudice resulting from the trial court's failure to give an alibi instruction, (5) abuse of discretion by the trial court in failing to respond promptly to jury notes requesting clarification of legal issues, and (6) ineffective assistance of counsel. On May 17, 2012, the trial court denied and dismissed Movant's amended 2255 motion. (Id. at 18, 29.) Movant did not appeal the denial.

Thereafter, Movant filed a request with the Ninth Circuit Court of Appeals to file a successive 2255 motion, which was denied on May 29, 2014. (11-cv-00580, Doc. 25.) On June 26, 2016, Movant, through counsel, filed a successive 2255 motion, asserting that his conviction pursuant to 924(c) is now illegal pursuant to the intervening United States Supreme Court case, Johnson v. United States, __U.S. __; 135 S.Ct. 2551(2015). (Doc. 13 at 2-14.) The Ninth Circuit granted Movant's application to file this successive 2255 motion, and deemed the date of his 2255 motion filing as June 27, 2016. (Doc. 13-1.) Thereafter, Movant filed a First Amended 2255 motion. (Doc. 21.)

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[2]That 2255 proceeding was assigned civil case number 11-cv-00580.

On May 8, 2017, this Court granted Respondent's motion for a stay of the proceedings pending the United State Supreme Court decision in Lynch v. Dimaya, __ U.S.__; 137 S. Ct. 31 (2018). Thereafter, on July 31, 2017, Respondent filed its Limited Answer[3], asserting therein that Movant's 2255 motion was untimely, and his claim pursuant to Johnson is procedurally defaulted without excuse. (Doc. 28.) The Court granted Movant's several unopposed motions for extensions to file his Reply, as the Supreme Court had decided Dimaya, but the Ninth Circuit was yet due to decide United States v. Begay. (Docs. 30, 32, 34, 36, 38.) On June 26, 2018, Movant filed his Reply. (Doc. 45.) On September 19, 2018, Respondent filed a Notice of Supplemental Authority. (Doc. 48.)

On November 5, 2018, Movant filed an unopposed Motion to Stay Proceedings, pending the possible rehearing of United States v. Blackstone, 2018 WL 4344096 (9th Cir. 2018), and a decision in United States v. Begay, No. 14-10080. (Doc. 49.) This Court granted the stay. The Ninth Circuit issued its decision in Begay, 934 F.3d 1033 (9th Cir. 2016) (finding that the defendant's conviction for second-degree murder in Indian country did not qualify as a categorical crime of violence). Thereafter, Respondent filed an Amended Response, and Movant filed a Reply to the Amended Response. (Docs. 57, 58.)

ISSUES

Movant asserted, initially, in his 2255 motion that the Supreme Court's decision in Johnson rendered his bank robbery conviction pursuant to § 2113(a) no longer a crime of violence, and thus rendering his conviction for possession of a firearm during a crime of violence unlawful. In Respondent's initial answer, Respondent argued that Movant's 2255 motion was untimely because, although it was filed within one year of the Supreme Court's decision in Johnson, the decision did not invalidate the residual clause of § 924(c). Respondent also claimed that Movant's Johnson claim is procedurally defaulted without excuse, as Movant did not raise the issue on appeal. In his initial Reply, Movant asserted that the Johnson decision has been made retroactive to cases final on direct review, and, because

[3]As permitted by the Court, Respondent limited its Answer to affirmative defenses.

his 2255 motion was filed within a year of that decision, the motion was timely filed. Movant also asserted that his failure to raise the issue on appeal is excused, as any attempt to raise the issue would have been futile, given the current Supreme Court precedent.

During the time this case was stayed for the second time, Respondent filed a notice of supplemental authority to support Respondent's argument that Movant's 2255 motion was untimely filed. See, Blackstone, 903 F.3d 1020, 1026-28 (9th Cir. 2018) (agreeing with other circuit courts that Johnson did not recognize a new right relating to 924(c)'s residual clause as a new right applicable on collateral review). After the stay was lifted, Respondent filed its Amended Response to Movant's amended 2255 motion. Respondent reiterated its initial timeliness and procedural default arguments, but additionally addressed two Ninth Circuit decisions that had been rendered subsequent to its initial answer. See, United States v. Gutierrez, 876 F.3d 1254 (9th Cir. 2017); United States v. Watson, 881 F.3d 782 (9th Cir. 2018) (per curiam), cert. denied, 139 S.Ct. 203 (2018) (both affirming that federal bank robbery is a crime of violence under the elements clause of § 924(c)).

In his Reply to Respondent's Amended Response, Movant reiterates his assertion that his failure to raise the issue on appeal is excused because of the "absence of the decision in Johnson 2015 during [his] prior appellate and collateral proceedings." (Doc. 58 at 5.) He also claims actual innocence as an excuse for procedural default. And, Movant posits that the Watson and Gutierrez decisions are distinguishable and "cannot be reconciled with [] Johnson 2010, or other Ninth Circuit precedent." (Id. at 8.)

ANALYSIS

Habeas relief under 28 U.S.C. § 2255 is only available to a person in custody in violation of the Constitution or laws of the United States. Under § 2255, "a district court may grant a hearing to determine the validity of a petition brought under that section, [u]nless the motions and the files and records of the case conclusively show that the prisoner is entitled to no relief." United States v. Blaylock, 20 F.3d 1458, 1465 (9th Cir. 1994). "The standard essentially is whether the movant has made specific factual allegations that, if true, state a claim on which relief could be granted." United States v. Withers, 638 F.3d 1055, 1062 (9th

Cir. 2011). A district court may dismiss a § 2255 motion based on a facial review of the record "only if the allegations in the motion, when viewed against the record, do not give rise to a claim for relief or are palpably incredible or patently frivolous." Id. at 1062-63. Because this Court finds that Movant's 2255 motion does not give rise to a claim for relief, for the reasons set forth herein, this Court will recommend that Movant's 2255 motion be denied and dismissed with prejudice.

The Ninth Circuit, in Gutierrez, affirmed prior precedent, holding that "bank robbery by intimidation . . . requires at least an implicit threat to use the type of violent physical force necessary to meet the *Johnson* [I] standard." 876 F.3d at 1257. Shortly thereafter, the Ninth Circuit decided Watson, in which the Court held that armed bank robbery is a crime of violence under the elements clause of § 924(c). 881 F.3d at 786 ("Because bank robbery 'by force and violence, or by intimidation' is a crime of violence, so too is armed bank robbery."). In a subsequent unpublished opinion, United States v. Swanson, the Ninth Circuit made clear the argument that bank robbery is not a crime of violence under the elements clause of United States Sentencing Guidelines § 4B1.2, is "foreclosed" by Watson, 744 Fed. App'x 527 (9th Cir. 2018).

Movant attempts to distinguish the decisions in Guittierez and Watson by the holdings in United States v. Parnell, 818 F.3d 974 (9th Cir. 2016), United States v. Geozos, 870 F.3d 890 (2017), and United States v. Strickland, 860 F.3d 1224 (9th Cir. 2017). The decision in Parnell, however, pre-dates both Guittierez and Watson, and involves the analysis of a Massachusetts statute, not the federal bank robbery statute, and is thus not applicable. See, United States v. Dixon, 16 CV-04590-SRB, Doc. 28 (December 6, 2018), cert. of app. den., United States v. Dixon, No. 18-17344 (March 18, 2019) (appellant has not made a "substantial showing of the denial of a constitutional right."); United States of America v. Sterling, 16 CV-04602-DLR, Docs. 30, 2018 WL 4963341 (October 15, 2018), cert. of app. den., United States v. Sterling, No. 18-1790 (December 4, 2018).

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Similarly, the Ninth Circuit in Geozos analyzed a Florida robbery statute, Fla. Stat. § 812.13, in reaching its conclusion. The holding in Geozos was called into question in Ward v. United States, 936 F.3d 914, 919 (9th Cir. 2019) ("Our prior distinction between 'substantial' and 'minimal' force in the ACCA robbery context in such cases as *Molinar* and *Geozos* cannot be reconciled with the Supreme Court's clear holding in *Stokeling*."[4]) In Strickland, the Ninth Circuit analyzed an Oregon first-degree robbery statute[5] in the context of the ACCA, finding that the crime could be committed without physically violent force. That Oregon statute is substantially dissimilar to the federal bank robbery statute, and thus its holding is inapplicable here. See, Watson, 881 F.3d at 785 (the knowing use of intimidation, "necessarily entails the knowing use, attempted use, or threatened use of violent physical force."). Because the cases cited by Movant are either called into question or are not applicable, Movant's argument that the "force and violence" clause of the federal bank robbery statute does not meet the violent physical force standard set forth in Johnson also fails.

Additionally, Movant was convicted of armed bank robbery pursuant to 18 U.S.C. 2113 (a) and (d), the same statutory provisions addressed in Watson. The Court in Watson made clear that bank robbery pursuant to 2113(a) was a crime of violence, as the "least violent form" of committing the offence necessarily involves the type of violent physical force to meet the Johnson standard. 881 F.3d at 787. Thus, bank robbery by "force and violence" necessarily involves more violent physical force than bank robbery by intimidation. The Watson Court then concluded that armed bank robbery pursuant to 18 U.S.C. 2113(d) is also a crime of violence. Id. a 786.

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[4]The Supreme Court in Stokeling held that robbery under the same Florida statute analyzed in Geozos, Fla. Stat. § 812.13, was a violent felony under the ACCA's elements clause. Stokeling v. United States, __ U.S. __, 139 S.Ct. 544 (2019).

[5]"A person commits the crime of robbery in the third degree if . . . the person uses or threatens the immediate use of physical force upon another person . . ." Or. Rev. Stat. § 164.395(1).

Controlling Ninth Circuit precedent has established that bank robbery and armed bank robbery are categorically crimes of violence under the elements clause of 18 U.S.C. 924 § (c)(3), and thus Movant's claim in his 2255 motion is without merit. As this Court finds Movant's 2255 motion without merit, it declines to address Respondent's affirmative defenses of timeliness and procedural default.

CONCLUSION

Movant's claims fail on the merits, and therefore Movant's 2255 motion should be denied and dismissed with prejudice.

IT IS THEREFORE RECOMMENDED that Movant's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. §2255, (CVDoc. 21), be denied and dismissed with prejudice.

IT IS FURTHER RECOMMENDED that the Court deny a Certificate of Appealability and leave to proceed in forma pauperis on appeal because Movant has not made a substantial showing of the denial of a constitutional right.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment. The parties shall have fourteen days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. See 28 U.S.C. § 636(b)(1); Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen days within which to file a response to the objections. Pursuant to Rule 7.2, Local Rules of Civil Procedure for the United States District Court for the District of Arizona, objections to the Report and Recommendation may not exceed seventeen (17) pages in length. Failure timely to file objections to the Magistrate Judge's Report and Recommendation may result in the acceptance of the Report and Recommendation by the district court without further review. See United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure timely to file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to appellate review of the findings of fact in an order

or judgment entered pursuant to the Magistrate Judge's recommendation. See Rule 72, Federal Rules of Civil Procedure.

DATED this 8th day of January, 2020.

Michelle H. Burns
United States Magistrate Judge

Exhibit 2

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Devon Mitchell, Movant/Defendant, vs. United States of America, Respondent/Plaintiff.	No. CV-16-04592-PHX-DGC (MHB) No. CR-05-00886-02-PHX-DGC **ORDER**

Devon Mitchell is confined in federal prison. Pursuant to 28 U.S.C. § 2255, he moves to vacate his sentence in Case No. CR-05-00886. Doc. 21.[1] Magistrate Judge Michelle Burns issued a report recommending that the motion be denied ("R&R"). Doc. 59. Mitchell filed an objection to which the government responded. Docs. 62, 65. For reasons stated below, the Court will accept the R&R and deny the motion.

I. Background.

Following a seven-day jury trial in 2008, Mitchell was convicted of four counts of bank robbery and one count of possessing a firearm during a crime of violence.

[1] Citations to documents in the criminal case are denoted "CR Doc." Citations are to page numbers attached to the top of pages by the Court's electronic filing system.

CR Doc. 226. On July 16, 2008, he was sentenced to 222 months in prison. CR Doc. 278. The Ninth Circuit affirmed the convictions and sentence. CR Doc. 325.

Mitchell later moved to vacate his sentence under § 2255. Docs. 1, 6 (No. CV-11-00580). On May 17, 2012 the Court denied and dismissed the motion. Doc. 18 (No. CV-11-00580). Mitchell thereafter submitted a request with the Ninth Circuit to file a successive § 2255 motion, which was denied on May 20, 2014. Doc. 25 (No. CV-11-00580).

On June 27, 2016, the Ninth Circuit granted Mitchell's second request to file a successive § 2255 motion, which asserts that his firearm possession conviction pursuant to 18 U.S.C. § 924(c) is illegal based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). *See* Docs. 13, 21. The motion was stayed several times pending decisions in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and *United States v. Begay*, 934 F.3d 1033 (9th Cir. 2016). *See* Docs. 27, 30, 32, 34, 36, 38, 50. Judge Burns now recommends that the motion be denied. Doc. 59.

II. R&R Standard of Review.

This Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). The Court "must review the magistrate judge's findings and recommendations de novo if objection is made, but not otherwise." *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). The Court is not required to conduct "any review at all . . . of any issue that is not the subject of an objection." *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *see* § 636(b)(1); Fed. R. Civ. P. 72(b)(3).

III. Judge Burns's R&R.

Citing *United States v. Gutierrez*, 876 F.3d 1254 (9th Cir. 2017), and *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018), Judge Burns found that Ninth Circuit authority categorically establishes bank robbery as a crime of violence under § 924(c). Doc. 59 at 5. Judge Burns noted that armed and unarmed bank robbery pursuant to §§ 2113(a) and (d), the provisions under which Mitchell was convicted, are both crimes

of violence because they necessarily involve the type of violent physical force needed to meet the *Johnson* standard. *Id.* at 6 (citing *Watson*, 881 F.3d at 768 ("armed bank robbery under § 2113(a) and (d) qualifies as a crime of violence under § 924(c)")). Finding the cases cited by Mitchell unpersuasive, Judge Burns concluded that "[c]ontrolling Ninth Circuit precedent has established that bank robbery and armed bank robbery are categorically crimes of violence under the elements clause of 18 U.S.C. § 924(c)(3), and thus [Mitchell's] claim in his 2255 motion is without merit." *Id.* at 7.[2]

IV. Mitchell's Objections.

Mitchell argues that bank robbery is not categorically a crime of violence under § 924(c) and that *Gutierrez* and *Watson* are inapposite. Doc. 62 at 2-5. He contends that *Stokeling v. United States*, 139 S. Ct. 544 (2019), "left open the door for a different result under § 2113(a) and § 924(c)." *Id.* at 6.

The federal bank robbery statute provides that:

> Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, 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 [shall be punished according to law].

§ 2113(a). As Judge Burns correctly concluded, the Ninth Circuit has categorically established both armed and unarmed bank robbery as a crime of violence under the elements clause of § 924(c). *See Gutierrez*, 876 F.3d at 1257; *Watson*, 881 F.3d at 785.

Mitchell argues that Judge Burns's reliance on *Gutierrez* is unpersuasive because the federal bank robbery statute does not require that a perpetrator act with "the intent to

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[2] Section 924(c) imposes a mandatory consecutive term of imprisonment for using or carrying a firearm "during and in relation to any crime of violence." 18 U.S.C. § 924(c)(1)(A). The term "crime of violence" is defined as an offense that is a felony and "(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." § 924(c)(3).

cause death or serious bodily harm" like the federal carjacking statute, which was at issue in *Gutierrez*. Doc. 62 at 2-3; *see Halloway v. United States*, 526 U.S. 1, 12 (1999) ("The intent requirement of [the carjacking statute] is satisfied when the Government proves that at the moment the defendant demanded or took control over the driver's automobile the defendant possessed the intent to seriously harm or kill the driver if necessary to steal the car."). But the Ninth Circuit held that even "intimidation," the statute's least violent form, "requires at least an implicit threat to use the type of violent physical force necessary to meet the *Johnson* standard." *Gutierrez*, 876 F.3d at 1257.[3]

Mitchell further argues that the holding in *Watson* cannot be reconciled with *Johnson*, 135 S. Ct. at 2551, in light of *United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016), *United States v. Gezos*, 870 F.3d 890 (9th Cir. 2017), and *United States v. Strickland*, 860 F.3d 1224 (9th Cir. 2017). Doc. 62 at 3. The Court does not agree.

Parnell is inapposite because it pre-dated both *Gutierrez* and *Watson* and involved a Massachusetts statute, not the federal bank robbery statute. Doc. 59 at 5; *see Dixon v. United States*, No. CR-99-00516-PHX-SRB, 2018 WL 6381209, at *2 (D. Ariz. Dec. 6, 2018) ("*Parnell* pre-dates both *Gutierrez* and *Watson*, portending that whatever conflict Movant seeks to tease out is now in the law moot."). Likewise, Judge Burns correctly found that *Gezos*, which analyzed a Florida robbery statute, was called into question by a recent Ninth Circuit decision, *Ward v. United States*, 936 F.3d 914, 919 (9th Cir. 2019) ("Our prior distinction between 'substantial' and 'minimal' force in the ACCA robbery context in such cases as *Molinar* and *Gezos* cannot be reconciled with the Supreme Court's clear holding in *Stokeling*."). In *Strickland*, 860 F.3d at 1226, the Ninth Circuit analyzed an Oregon robbery statute in the context of the Armed Career Criminal Act ("ACCA"). The Oregon statute provided that "[a] person commits the crime of robbery in the third

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[3] The Ninth Circuit held that "intimidation" as used in § 2113(a) requires that the defendant take property "in such a way that would put an ordinary, reasonable person in fear of bodily harm" and that a "defendant cannot put a reasonable person in fear of bodily harm without threatening to use force capable of causing physical pain or injury." *Id.* (internal quotation marks omitted).

degree if . . . the person uses or threatens the immediate use of physical force upon another person[.]" Or. Rev. Stat. § 164.395(1). Because Oregon courts did not interpret the statute as requiring the use or threatened use of violent force, the Ninth Circuit concluded that a conviction for third degree robbery under Oregon law was not a predicate offense under the ACCA. *Strickland*, 860 F.3d at 1227. This Oregon-specific holding does not cast doubt on *Watson*.

Nor is Mitchell's reliance on *Stokeling* helpful. Mitchell contends that the dissent "left open the door for a different result under § 2113(a) and § 924(c)." Doc. 62 at 6. But the controlling opinion in *Stokeling* unequivocally found Florida's robbery statute to be a "violent felony" under ACCA's elements clause. 139 S. Ct. at 555.

Mitchell does not otherwise refute the Ninth Circuit's conclusion that "bank robbery qualifies as a crime of violence because even its least violent form 'requires at least an implicit threat to use the type of violent physical force necessary to meet the *Johnson* standard.'" *Watson*, 881 F.3d at 785 (quoting *Guttierez*, 876 F.3d at 1257). His challenge to his conviction and sentence under § 924(c) thus runs directly contrary to controlling Ninth Circuit authority. *Watson* is binding precedent. And as the Ninth Circuit has noted, it reached the same conclusion as "every other circuit to address the same question." *Id.* (citing *United States v. Ellison*, 866 F.3d 32, 39-40 (1st Cir. 2017); *United States v. Brewer*, 848 F.3d 711, 715-16 (5th Cir. 2017); *United States v. McBride*, 826 F.3d 293, 296 (6th Cir. 2016); *United States v. McNeal*, 818 F.3d 141, 153 (4th Cir. 2016)); *see also Hoagland v. United States*, No. CV-16-00806-TUC-DCB, 2019 WL 1325912, at *2 (D. Ariz. March 25, 2019) (concluding that federal bank robbery is a crime of violence under § 924(c)); *Dixon*, 2018 WL 6381209, at *2 ("Because *Gutierrez* and *Watson* are binding authority . . . [t]he Court further denies and dismisses Movant's § 2255 Motion with prejudice.").

IT IS ORDERED:

1. Judge Burns's R&R (Doc. 59) is **accepted**.

2. Mitchell's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (Doc. 21) is **denied** with prejudice.

3. A certificate of appealability is **denied** because Mitchell has not made a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c)(2) and because Mitchell has not demonstrated that "reasonable jurists would find the [Court's] assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

4. The Clerk is directed to enter judgment and **terminate** this action.

Dated this 6th day of April, 2020.

David G. Campbell
Senior United States District Judge