

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

OCT 1 2020

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL ALVAREZ,

Defendant-Appellant.

No. 20-16632

D.C. Nos. 1:16-cv-00918-AWI
1:03-cr-05014-AWI-1

Eastern District of California,
Fresno

ORDER

Before: HAWKINS and FRIEDLAND, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 4) is denied because appellant has not made a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *United States v. Watson*, 881 F.3d 782 (9th Cir.), *cert. denied*, 139 S. Ct. 203 (2018).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MICHAEL ALVAREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CASE NO. 1:03-CR-5014 AWI
(Civil Case No. 1:16-CV-0918 AWI)

ORDER LIFTING STAY, DENYING
PETITION AND DENYING
CERTIFICATE OF APPEALABILITY

(Doc. Nos. 136, 140)

This is a petition for relief from sentence under 28 U.S.C. § 2255. Petitioner, Michael Alvarez, through his counsel seeks relief based on the recent Supreme Court decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015). Pursuant to a suggestion from the Ninth Circuit in similar cases, the Court stayed this matter in July 2016 pending resolution of three cases before the Ninth Circuit. See Doc. No. 138. On June 23, 2020, Petitioner filed an amended § 2255 petition to raise issues related to *United States v. Davis*, 139 S.Ct. 2319 (2019). See Doc. No. 140. The amended petition states that Petitioner does not ask the Court or the United States to take any action at this time. See id. Although Petitioner does not request that the Court act at this time, a review of the petition and amended petition indicates that action is currently warranted. Therefore, the Court will lift the stay, deny the petition, and deny a certificate of appealability.

Background

On February 7, 2005, Petitioner pled guilty to armed bank robbery in violation of 18

1 U.S.C. § 2113(a) and (d) and carrying a firearm during a crime of violence in violation of 18
 2 U.S.C. § 924(c)(1). See Doc. Nos. 94, 95. Petitioner was sentenced to 188 months imprisonment
 3 for the violation of § 2113 and 120 months imprisonment for the violation of § 924(c)(1). See
 4 Doc. No. 95. The sentences ran consecutively, resulting in a total term of imprisonment of 308
 5 months. See Doc. Nos. 95, 101. Judgment was entered on April 27, 2005. See Doc. No. 101.

6 Pursuant to the plea bargain, Petitioner appealed the denial of a motion to suppress. See
 7 Doc. Nos. 94, 97. On March 17, 2010, the Ninth affirmed the denial of the motion to suppress.
 8 See Doc. No. 133. Petitioner did not appeal his sentence or, except for this pending petition, file
 9 any petitions for habeas corpus relief.

10 On June 24, 2016, Petitioner filed this petition seeking relief under *Johnson*. See Doc. No.
 11 136. On June 23, 2020, Petitioner filed his amended petition invoking *Davis*. See Doc. No. 140.

12 § 2255 Framework

13 28 U.S.C. § 2255 provides, in pertinent part: “A prisoner in custody under sentence of a
 14 court established by Act of Congress claiming the right to be released upon the ground that the
 15 sentence was imposed in violation of the Constitution or laws of the United States ... may move
 16 the court which imposed the sentence to vacate, set aside or correct the sentence.” Under § 2255,
 17 a district court must grant a prompt hearing to a petitioner in order to determine the validity of the
 18 petition and make findings of fact and conclusions of law, “[u]nless the motions and the files and
 19 records of the case conclusively show that the prisoner is entitled to no relief” 28 U.S.C. §
 20 2255(b). The court may deny a hearing if the movant’s allegations, viewed against the record, fail
 21 to state a claim for relief or are so palpably incredible or patently frivolous as to warrant summary
 22 dismissal. United States v. Withers, 638 F.3d 1055, 1062-63 (9th Cir. 2011); Baumann v. United
 23 States, 692 F.2d 565, 571 (9th Cir. 1983). A petitioner is not required to allege facts in detail, but
 24 he “must make factual allegations” and cannot rest on conclusory statements. Baumann, 692 F.2d
 25 at 571; United States v. Hearst, 638 F.2d 1190, 1194 (9th Cir.1980). Accordingly, an evidentiary
 26 hearing is required if: (1) a petitioner alleges specific facts, which, if true would entitle him to
 27 relief; and (2) the petition, files, and record of the case cannot conclusively show that the
 28 petitioner is entitled to no relief. United States v. Howard, 381 F.3d 873, 877 (9th Cir. 2004).

1 Petitioner's Argument

2 Petitioner argues that § 924(c)(1)(A) provides that anyone convicted of using and carrying
 3 a firearm during and in relation to a crime of violence must be sentenced to a term of
 4 imprisonment of seven to ten years if a firearm is brandished or discharged, to run concurrently to
 5 any other sentence imposed. A “crime of violence” is defined by § 924(c)(3) through either the
 6 “elements clause” of § 924(c)(3)(A) or the residual clause of § 924(c)(3)(B). Under the reasoning
 7 of *Johnson* (and now the express holding of *Davis*), the § 924(c)(3)(B) residual clause is
 8 unconstitutionally vague. Armed bank robbery under § 2113(a) and (d), the predicate offense for
 9 Petitioner’s § 924 conviction, is not a crime of violence under the § 924(c)(3)(A) elements clause.
 10 Because Petitioner did not commit a “crime of violence” for purposes of § 924, his conviction for
 11 violating § 924(c)(1) and the corresponding 120 month consecutive sentence cannot stand.

12 Discussion

13 Initially, the Court notes that even though Petitioner’s conviction became final in 2010,
 14 this petition is timely. 28 U.S.C. § 2255(f) sets a one-year limitations period to file a § 2255
 15 petition. As relevant here, one of the starting dates for the one-year period is the “date on which
 16 the right asserted was initially recognized by the Supreme Court, if that right has been newly
 17 recognized by the Supreme Court and made retroactively applicable to cases on collateral review.”
 18 28 U.S.C. § 2255(f)(3). As discussed above, Petitioner seeks relief under *Johnson*, which was
 19 decided by the Supreme Court on June 26, 2015, and *Davis*, which was decided by the Supreme
 20 Court on June 24, 2019. *Johnson* applies retroactively. See Welch v. United States, 136 S.Ct.
 21 1257, 1268 (2016); Ward v. United States, 936 F.3d 914, 916 (9th Cir. 2019). Although the Ninth
 22 Circuit has yet to address the issue, other circuits have concluded that *Davis* applies retroactively.
 23 See United States v. Reece, 938 F.3d 630, 635 (5th Cir. 2019); United States v. Bowen, 936 F.3d
 24 1091, 1097 (10th Cir. 2019); In re Hammond, 931 F.3d 1032, 1038 (11th Cir. 2019). The Court
 25 will follow the holdings of these circuits. Since Petitioner filed his petition on June 24, 2016, his
 26 petition is timely in relation to *Johnson*. Further, because Petitioner filed his amended petition on
 27 June 23, 2020, his petition is timely in relation to *Davis*. The petitions comply with the one-year
 28 limitation period of § 2255(f)(3).

With respect to the merits of Petitioner’s arguments, no relief is appropriate. Section 924(c)(1) prohibits in relevant part the using or carrying of a firearm “during and in relation to a crime of violence.” 18 U.S.C. § 924(c)(1); United States v. Routon, 25 F.3d 815, 817 (9th Cir. 1994). A “crime of violence” for purposes of § 924(c)(1) is defined in one of two ways, through either the “elements clause” of 18 U.S.C. § 924(c)(3)(A) or the “residual clause” of 18 U.S.C. § 924(c)(3)(B). See 18 U.S.C. § 924(c)(3); United States v. Watson, 881 F.3d 782, 784 (9th Cir. 2018). *Davis* declared that § 924(c)(3)(B), the “residual clause,” was unconstitutionally vague. *Davis*, 139 S.Ct. at 2336; United States v. Burke, 943 F.3d 1236, 1238 (9th Cir. 2019). If Petitioner’s conviction and sentence were dependent on the application of § 924(c)(3)(B), his arguments and reliance on *Davis* would have merit. However, the “crime of violence” that supports Petitioner’s conviction is armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d). Petitioner contends that armed bank robbery under § 2113(a) and (d) is not a crime of violence under § 924(c)(3)(A). Petitioner is wrong. The Ninth Circuit has expressly held that armed bank robbery under § 2113(a) and (d) is a crime of violence pursuant to the elements clause of § 924(c)(3)(A). *Watson*, 881 F.3d at 784-86; see also United States v. Ali, 789 F. App’x 653, 654 (9th Cir. 2020) (following *Watson* and holding that armed bank robbery under § 2113(a) and (d) is a crime of violence under § 924(c)(3)(A)). *Davis* does not impact the § 924(c)(3)(A) elements clause. United States v. Nikolla, 950 F.3d 51, 53 n.4 (2d Cir. 2020). Thus, *Watson* forecloses Petitioner’s argument. In light of *Watson*, the Court must deny the petition.

Certificate of Appealability

28 U.S.C. § 2253 provides in pertinent part:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention

complained of arises out of process issued by a State court; or
(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

The Supreme Court has found that a court should issue a certificate of appealability when the petitioner shows that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. Slack v. McDaniel, 529 U.S. 473, 483-84 (2000).

In the present case, the Court finds there is an insufficient indication that Petitioner has suffered the denial of a constitutional right which would justify the issuance of a certificate of appealability. See 28 U.S.C. § 2253(c); Slack, 529 U.S. at 483-84. Given the *Watson* decision and the Ninth Circuit decisions that post-date *Davis* and follow *Watson*'s holding, reasonable jurists would not debate that Petitioner is not entitled to federal habeas corpus relief. Therefore, the Court will deny a certificate of appealability.

ORDER

Accordingly, IT IS HEREBY ORDERED that:

1. The stay issued on July 6, 2016 is LIFTED;
2. Petitioner's 28 U.S.C. § 2255 petition (Doc. No. 136) and amended petition (Doc. No. 140) are DENIED; and
3. The Court DECLINES to issue a certificate of appealability.

IT IS SO ORDERED.

Dated: June 24, 2020



SENIOR DISTRICT JUDGE

United States District Court

Eastern District of California

UNITED STATES OF AMERICA
 v.
MICHAEL ALVAREZ

JUDGMENT IN A CRIMINAL CASE
 (For Offenses Committed On or After November 1, 1987)
 Case Number: **1:03-CR-05014-01**

MARIO DiSALVO, 1060 Fulton Mall, #1005,
 93721
 Defendant's Attorney

THE DEFENDANT:

- ☒ pleaded guilty to count(s): TWO, THREE and FOUR of the Indictment.
☐ pleaded nolo contendere to counts(s) ___ which was accepted by the court.
☐ was found guilty on count(s) ___ after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 2113(a) and (d)	ARMED BANK ROBBERY (Class B Felonies)	07/16/2002 and 07/29/2002	2 and 4
18 USC 924(c)(1)	CARRYING a FIREARM DURING a CRIME of VIOLENCE (Class C Felony)	07/16/2002	3

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on counts(s) ___ and is discharged as to such count(s).
☒ Count(s) 1, 5, 6, 7, 8 of the Indictment (is)(are) dismissed on the motion of the United States.
☐ Indictment is to be dismissed by District Court on motion of the United States.
☒ Appeal rights given. ☐ Appeal rights waived.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

APRIL 21, 2005

Date of Imposition of Judgment

/s/ Anthony W. Ishii

Signature of Judicial Officer

ANTHONY W. ISHII, United States District Judge

Name & Title of Judicial Officer

April 27, 2005

Date

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DEFENDANT: MICHAEL ALVAREZ

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IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 188 MONTHS and 120 MONTHS.

Defendant is committed to the custody of Bureau of Prisons for terms of 188 months as to Counts 2 and 4, to be served concurrently for a total of term of 188 months. A term of 120 months is imposed as to Count 3, to be served consecutively to the terms imposed on Counts 2 and 4.

☒ The court makes the following recommendations to the Bureau of Prisons:
The Court recommends that the defendant be incarcerated in a California facility at either Fresno, Atwater or Taft, but only insofar as this accords with security classification and space availability.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district.

☐ at ___ on ___.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before _ on _.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Officer.

If no such institution has been designated, to the United States Marshal for this district.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

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SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 60 Months on Counts 2 and 4, to be served concurrently for for a total term of 60 months.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow instructions of the probation officer;
- 4) the defendant shall support his or her dependants and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;
- 6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere, and shall permit confiscation of any contraband observed in plain view by the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

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DEFENDANT: MICHAEL ALVAREZ

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SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall submit to the search of his person, property, home, and vehicle by a United States Probation Officer, or any other authorized person under the immediate and personal supervision of the probation officer, based upon reasonable suspicion, without a search warrant. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.
2. As directed by the probation officer, the defendant shall participate in a correctional treatment program (inpatient or outpatient) to obtain assistance for drug or alcohol abuse.
3. As directed by the probation officer, the defendant shall participate in a program of testing (i.e. breath, urine, sweat patch, etc.) to determine if he has reverted to the use of drugs or alcohol.
4. As directed by the probation officer, the defendant shall participate in a co-payment plan for treatment or testing and shall make payment directly to the vendor under contract with the United States Probation Office of up to \$25 per month.
5. The defendant shall cooperate in the collection of DNA as directed by the probation officer.

AO 245B-CAED (Rev. 3/04) Sheet 5 - Criminal Monetary Penalties
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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
Totals:	\$ 300	\$	\$ 48,894

☐ The determination of restitution is deferred until __. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
CAL FED BANK - Fresno (Citi Group)	15,562.00	15,562.00	100%
CAL FED BANK - Visalia (Citi Group)	33,332.00	33,332.00	100%
TOTALS:	\$ 48,894.00	\$ 48,894.00	100%

☐ Restitution amount ordered pursuant to plea agreement \$ __

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived for the ☐ fine ☐ restitution

☐ The interest requirement for the ☐ fine ☐ restitution is modified as follows:

☒ Restitution is to be sent to the Clerk of the Court, who shall forward it to the victim(s) as described in the Victim Impact section.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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 DEFENDANT: MICHAEL ALVAREZ

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SCHEDULE OF PAYMENTS

Payment of the total fine and other criminal monetary penalties shall be due as follows:

- A ☒ Lump sum payment of \$ 300.00 due immediately, balance due
- ☐ not later than __, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal __ (e.g., weekly, monthly, quarterly) installments of \$ __ over a period of __ (e.g., months or years), to commence __ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal __ (e.g., weekly, monthly, quarterly) installments of \$ __ over a period of __ (e.g., months or years), to commence __ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within __ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate:

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States: