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MARCUS KALANI WATSON (01)

IN THE UNITED STATE DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff-Respondent, v. MARCUS KALANI WATSON (01), Defendant-Petitioner.	1:14-cr-00751-DKW-1 Defendant-Petitioner's Memorandum in Support of §2255 Motion; Certificate of Service

DEFENDANT-PETITIONER'S
MEMORANDUM IN SUPPORT OF §2255 MOTION

This memorandum supports defendant-petitioner Marcus Kalani Watson's 28 U.S.C. §2255 motion. His motion urges this Court to vacate his judgment, set aside his guilty plea, conviction, and sentence on Count 6, and resentence him on Counts 1 through 5. Mr. Watson's habeas claim is that his plea, conviction, and sentence for violating 18 U.S.C. §924(c) are unconstitutional because his federal conviction for armed bank robbery on Count 5 is not, as a matter of law, a redicate

crime of violence under §924(c). He is, accordingly, legally and actually innocent on Count 6. Whatever else brandishing a firearm while committing armed bank robbery may be, it is not brandishing a firearm while committing *a crime of violence*. Alaimalo v. United States, 645 F.3d 1042, 1047 (9th Cir. 2011) (change of law regarding what constituted importation gave rise to habeas innocence claim; citing with approval Reyes-Requena v. United States, 243 F.3d 893, 904 (5th Cir. 2001) (reaffirming that a claim of actual innocence lies when subsequently decided caselaw establishes that the defendant was convicted for "a nonexistent offense")).

1. Determining whether a predicate offense is a "crime of violence" is accomplished by way of categorical (and, in some cases but not here, modified categorical) analysis. Taylor v. United States, 495 U.S. 575 (1990); United States v. Brown, 417 F.3d 1077, 1079–1080 (9th Cir. 2005). When the statute defining the predicate offense sets out only a single crime (and, thus, is not "divisible" into two or more crimes), modified categorical analysis does not apply, so the question is simply whether or not the predicate offense categorically qualifies as a crime of violence. Descamps v. United States, 133 S.Ct. 2276, 2282 (2013). Under categorical analysis, this Court assesses whether the predicate crime qualifies as a crime of violence "in terms of how the law defines the [predicate] offense and not in terms of how an individual offender might have committed it on a particular occasion." Johnson v. United States, 135 S.Ct. 2551, 2557 (2015) (quoting Begay

v. United States, 553 U.S. 137, 141 (2008) (quotation marks omitted)). The "specific facts" underlying the predicate conviction, that is, do not matter. Kawashima v. Holder, 132 S.Ct. 1166, 1172 (2012); United States v. Sullivan, ___ F.3d ___, 2015 WL 4547498 at *8 (9th Cir. 2015) ("[t]he Taylor categorical approach requires us to look only to the statutory definition of the prior offense and not to the facts underlying that conviction" (citations omitted)).

2. Armed bank robbery is defined by 18 U.S.C. §2113(a) and (d). Subsection (a) prohibits taking bank money from someone "by force and violence, or by intimidation," and subsection (d) further prohibits assaulting anyone or putting "in jeopardy the life of any person" by the use of a dangerous weapon or device. The indivisible elements of armed bank robbery are, accordingly, four: (1) taking money belonging to a bank, (2) by using force and violence or by intimidation, (3) with the bank being federally insured, and (4) while using a dangerous weapon or device to assault someone or put her life in jeopardy. United States v. Davis, 437 F.3d 989, 993 (10th Cir. 2006); United States v. Pullam, 1994 WL 661214 at *2 (9th Cir. Nov. 23, 1994) (unpublished) (same). Count 5 alleged that Mr. Watson and two codefendants committed armed bank robbery "by force, violence, and by intimidation" and that the three of them put tellers' and others' lives in jeopardy by using two handguns during the offense (there was no allegation of any actual assault as part of the fourth element).

"By force and violence" and "by intimidation" are alternative means by which the second element may be committed; they do not render armed bank robbery divisible into two different offenses. United States v. Wright, 215 F.3d 1020, 1028 (9th Cir. 2000) ("one of the elements of the offense is taking 'by force and violence, or by intimidation'"); United States v. Alsop, 479 F.2d 65, 66 (9th Cir. 1973) ("[t]hat the statute and indictment use the disjunctive phrase 'by force and violence, or by intimidation' does not mean the indictment is duplicitous[;] … [o]nly one offense was charged"); United States v. Sahagun-Gallegos, 782 F.3d 1094, 1098 n. 3 (9th Cir. 2015) (under Descamps, courts determine whether a disjunctively worded statute is divisible or not by looking to whether … the parts of the statute on opposite sides of the 'or' [are] alternative elements or alternative means" (quotation marks omitted; citing Rendon v. Holder, 764 F.3d 1077, 1088 (9th Cir. 2014))). The same is true of the fourth element (but not of any import here even if it were not, given the lack of an assault allegation in Count 5), which can be committed either by using a dangerous weapon to assault someone or, alternatively, to put their life in jeopardy. Simpson v. United States, 435 U.S. 6, 12 n. 6 (1978) (abrogated by statute on other grounds).

The means of "by intimidation" requires only that the robber take bank money "in such a way that would put an ordinary, reasonable person in fear of bodily harm." United States v. Selfa, 918 F.2d 749, 751 (9th Cir. 1990). This can

be (and frequently is) done without the use, attempted use, or threatened use of violent physical force. A simple demand for money, for example, suffices to establish that the offense was committed by means of intimidation. United States v. Hopkins, 703 F.2d 1102, 1103 (9th Cir. 1983) ("Although the evidence showed that Hopkins spoke calmly, made no threats, and was clearly unarmed, we have previously held that 'express threats of bodily harm, threatening body motions, or the physical possibility of concealed weapon[s]' are not required for a conviction for bank robbery by intimidation. United States v. Bingham, 628 F.2d 548, 549 (9th Cir. 1980). We believe that the threats implicit in Hopkins' written and verbal demands for money provide sufficient evidence of intimidation to support the jury's verdict.").

Subsection (d)'s additional element, requiring (as charged in Count 5) that the use of a dangerous weapon or device "put[] in jeopardy the life of any person," does not require the use, attempted use, or threatened use of violent physical force either (notwithstanding the Ninth Circuit's model instruction, paraphrasing the statute's life-jeopardizing language as requiring a "display of force" as an alternative to an assault, Manual of Model Criminal Jury Instructions §8.162 (9th Cir. 2015)). Subsection (d)'s element is satisfied, as is the intimidation element, simply by the fact that a dangerous weapon or device "instills fear" all on its own, without the defendant actually doing anything (much less doing, attempting, or

threatening anything violently, physically forceful) beyond its mere display. McLaughlin v. United States, 476 U.S. 16, 17–18 (1986); United States v. Arafat, 789 F.3d 839, 847 (8th Cir. 2015) (use of toy gun sufficient to prove subsection (d)'s element); United States v. Martinez-Jimenez, 864 F.2d 664 (9th Cir. 1989) (same). Subsection (d) turns on the *result* of seeing a dangerous weapon, not on what the defendant does, attempts, or threatens to do with it. Martinez-Jimenez, 864 F.2d at 667 ("Section 2113(d) is not concerned with the way that a robber displays a simulated or replica weapon. The statute focuses on the harms created, not the manner of creating the harm."). Because subsection (d)'s element is focused on the result and the fear seeing a weapon instills, it does not require (as Martinez-Jimenez attests) that the defendant actually use, attempt to use, or threaten to use the weapon at all.

3. It is §924(c)(3)'s definition of "crime of violence" that pertains under Count 6. Count 6 alleges a violation of §924(c)(1)(A)(ii), which prohibits brandishing a firearm in a crime of violence. Section 924(c)(3) defines "crime of violence" to mean any felony that either "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" (the elements clause) or, "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" (the residual clause). Count 6 identified Count 5's armed bank

robbery offense as the predicate crime of violence. But neither the indictment nor the presentence report identified whether Count 5's armed bank robbery offense was being counted as a crime of violence under the elements clause or instead under the residual clause.

The cases discussed in this memorandum involve various definitions of "crime of violence" or "violent felony" under sundry provisions of federal law — sometimes statutory (typically under 18 U.S.C. §16, or 18 U.S.C. §924(e), or 18 U.S.C. §924(c)), sometimes regulatory (typically under USSG §2L1.2 or USSG §4B1.2). Due to the similarity of the pertinent language at issue here and in the cases cited in this memorandum with regard to both the elements clause and the residual clause, the particular guideline or statute involved in any particular case does not really matter. These cases are fungible authority in this particular niche of federal criminal law (so saying, as the government might, that such-and-such-a-case involved USSG §4B1.2's definition of "crime of violence" or involved §924(e)'s "violent felony" definition does not work to provide a basis for ignoring what that case has to teach in a case, like Mr. Watson's, that involves §924(c)'s "crime of violence" definition). United States v. Spencer, 724 F.3d 1133, 1138 (9th Cir. 2013) ("we make no distinction between the terms 'violent felony' and 'crime of violence'" (brackets and quotation marks omitted; quoting United States v. Crews, 621 F.3d 849, 852 n. 4 (9th Cir. 2010))).

4. Section 924(c)(3)'s residual clause can no longer be used to find that any crime, including armed bank robbery, is a crime of violence. It is unconstitutionally vague on its face and, therefore, has been a nullity since enacted. In Johnson, the Supreme Court held that the residual clause of §924(e)'s "violent felony" definition was unconstitutionally vague on its face. The vagueness came from having to assess the "risk" posed in an "ordinary case" under the statute defining the predicate offense. Johnson, 135 S.Ct. at 2557–2558; James v. United States, 550 U.S. 192, 208 (2007) (adopting "ordinary case" standard for assessing residual clause risk). Section 924(c)'s residual clause similarly turns on the "risk" posed in the "ordinary case" of the predicate offense. Since (as cited above), cases involving §924(e) are equally applicable to cases arising under §924(c), Johnson's reasoning compels ruling that §924(c)'s residual clause is just as unconstitutionally vague as is §924(e)'s residual clause. Because §924(c)'s residual clause is unconstitutionally vague on its face, it may not be used to find that armed bank robbery is a crime of violence.

5. The categorical question under §924(c)(3)'s elements clause is whether armed bank robbery "criminalizes only as much (or less) conduct than" that the elements clause encompasses. Medina-Lara v. Holder, 771 F.3d 1106, 1112 (9th Cir. 2014). If armed bank robbery is "overbroad" (because it can be committed in a way that does not involve the use, attempted use, or threatened use

of physical force), the "inquiry ends, because a conviction under an indivisible, overbroad statute can *never* serve as a predicate offense." Medina-Lara, 771 F.3d at 1112 (Ninth Circuit's emphasis; citing Descamps, 133 S.Ct. at 2286).

In Johnson v. United States, 559 U.S. 133, 140 (2010) (yes, another Johnson case), the Supreme Court construed §924(e)'s elements clause. Section 924(e)'s elements clause is phrased just like §924(c)(3)'s elements clause — both require that the predicate offense have "as an element the use, attempted use, or threatened use of physical force[.]" The Supreme Court held that this language requires the use, attempted use, or threatened use of "*violent* force — that is, force capable of causing physical pain or injury to another person." Johnson, 559 U.S. at 140 (Supreme Court's emphasis).

Both bank robbery simpliciter and armed bank robbery, however, can be committed by nothing more than "intimidation," which merely requires robbing a bank "in such a way that would put an ordinary, reasonable person in fear of bodily harm." Selfa, 918 F.2d at 751. Armed bank robbery's life-jeopardizing element, moreover, is not concerned with the way that a robber uses, attempts to use, or threatens to use a weapon; it is concerned only with the result of seeing the weapon and the fear seeing the weapon instills in someone seeing it, rather than the manner in which the robber uses it. Martinez-Jimenez, 864 F.2d 666–667.

Prior to Johnson (2010), courts had little trouble asserting (as the Ninth Circuit routinely did in cases such as Selfa and United States v. Wright, 215 F.3d 1020 (9th Cir. 2000)), that armed bank robbery qualified as a crime of violence under the elements clause, without undertaking much analysis to back the assertion up. That seems excusable, so intuitive is such a conclusion. But the Supreme Court's 2010 Johnson decision belies that intuition (especially once paired up with Descamps' prohibition against using modified categorical analysis when the predicate crime is defined, as is armed bank robbery, in an indivisible way). Because armed bank robbery requires nothing more than fear and does not require the use, attempted use, or threatened use of violent physical force, the armed bank robbery statute is overbroad and armed bank robbery can never be a crime of violence. Descamps, 133 S.Ct. at 2286; Medina-Lara, 771 F.3d at 1112.

6. In sum, Johnson (2010) and Descamps disallow reliance on §924(c)(3)'s elements clause to make federal bank robbery a crime of violence, and Johnson (2015) disallows reliance on §924(c)(3)'s residual clause to do so. That means that Mr. Watson is legally and actually innocent on Count 6, because armed bank robbery is not a §924(c)(3) crime of violence, and his Count 6 conviction is, therefore, for a non-existent offense. Defendant-petitioner Marcus Kalani Watson urges this Court to grant his §2255 motion, vacate the judgment in

his criminal case, set aside his guilty plea, conviction, and sentence on Count 6, and resentence him on Counts 1 through 5.

DATED: Honolulu, Hawaii, August 10, 2015.

/s/ Peter C. Wolff, Jr.
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MARCUS KALANI WATSON (01)

CERTIFICATE OF SERVICE

I, PETER C. WOLFF, JR., hereby certify that on the date noted below, a true and correct copy of the foregoing was served electronically through CM/ECF on:

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Attorney for Plaintiff
UNITED STATES OF AMERICA

DATED: Honolulu, Hawaii, August 10, 2015.

/s/ Peter C. Wolff, Jr.
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