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7  
8 **UNITED STATES DISTRICT COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA**  
10 **WESTERN DIVISION**

11 JOHNNIE JACKSON, JR.,  
12 Petitioner,  
13 v.  
14 UNITED STATES OF AMERICA,  
15 Respondent.

Case No. CV 16-4437

Case No. CR 05-0572-GAF

**MOTION TO VACATE, SET ASIDE,  
OR CORRECT SENTENCE UNDER  
28 U.S.C. § 2255**

**Filed Pursuant to *Johnson v. United  
States*, 135 S.Ct. 2551 (2015).**

17  
18 Petitioner Johnnie Jackson, Jr., through undersigned counsel, hereby respectfully  
19 moves this Court to vacate, set aside, or correct his sentence pursuant to 28 U.S.C.  
20 § 2255.

21 Respectfully submitted,

22 HILARY POTASHNER  
Federal Public Defender

23  
24 DATED: June 20, 2016

By /s/ Brianna Fuller Mircheff  
25 BRIANNA FULLER MIRCHEFF  
26 Deputy Federal Public Defender  
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Exhibit A: Judgment and Commitment Order (November 17, 2006, CR 134)  
Exhibit B: Plea Agreement for Defendant Johnnie Jackson, Jr. (December 13, 2005,  
CR 109)

1                   **MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE**  
2                   **UNDER 28 U.S.C. § 2255**

3                   **I. INTRODUCTION**

4                   Petitioner Johnnie Jackson, Jr., by and through his attorney, Deputy Federal  
5 Public Defender Brianna Fuller Mircheff, hereby submits this motion to vacate, set  
6 aside, or correct his sentence, based on *Johnson v. United States*, 135 S. Ct. 2551  
7 (2015). In *Johnson*, the Supreme Court held that the residual clause of the Armed  
8 Career Criminal Act, 18 U.S.C. § 924(e), is void for vagueness. *Johnson*'s reasoning  
9 applies equally to the residual clause in 18 U.S.C. § 924(c)(3)(B). Therefore, in light of  
10 *Johnson*, Mr. Jackson's seven-year mandatory consecutive sentence under 18 U.S.C.  
11 § 924(c) was imposed in violation of the Constitution or the laws of the United States  
12 and exceeded the maximum authorized by law. Petitioner therefore requests that this  
13 Court grant this motion, and strike his conviction under 924(c) and the associated  
14 sentence.

15                   **II. PROCEDURAL HISTORY**

16                   **A. Conviction and Sentencing**

17                   After evidence had been presented at his jury trial, Mr. Jackson pleaded guilty to:  
18 (1) conspiracy to commit bank robbery, in violation of 18 U.S.C. § 371 (Count 1); (2)  
19 armed bank robbery, in violation of 18 U.S.C. § 2113(a), (d) (Counts 2, 4, 5, and 6);  
20 and (3) use or carrying of a firearm during a crime of violence, in violation of 18  
21 U.S.C. § 924(c) (Count 3). (Ex. A, Judgment and Commitment Order.) On November  
22 13, 2006, he was sentenced to 192 months imprisonment under the Sentencing  
23 Guidelines—60 months on Count 1 and 108 months on each of Counts 2, 4, 5, and 6, to  
24 be served concurrently, plus a mandatory consecutive 84 months on Count 3, the  
25 Section 924(c) conviction. (Ex. A, Judgment and Commitment Order.)

26                   Relevant to this application, Count 3 of the Third Superseding Information  
27 charged Mr. Jackson with violating Section 924(c) by brandishing a firearm during and  
28



1 in relation to a crime of violence, namely the armed bank robbery of Citibank, as  
2 charged in Count 2 of the Third Superseding Information. (*See* Presentence Report  
3 (“PSR”) ¶¶ 4-5<sup>1</sup>; Ex. B, Plea Agreement at 3.<sup>2</sup>) Mr. Jackson pleaded guilty to Count 3  
4 and received a mandatory consecutive sentence of seven years for that conviction. (Ex.  
5 A, Judgment and Commitment Order.)

6 Mr. Jackson did not appeal his convictions or sentence, and this is his first  
7 motion under 28 U.S.C. § 2255.

### 8 III. ARGUMENT

9 Under 28 U.S.C. § 2255(a), a defendant is entitled to a resentencing when his  
10 original sentence was imposed “in violation of the Constitution or laws of the United  
11 States,” or is “in excess of the maximum authorized by law.” Petitioner is entitled to  
12 relief on all these grounds because under *Johnson v. United States*, 135 S. Ct. 2251  
13 (2015), he is now serving an illegal and unconstitutional Section 924(c) sentence.

#### 14 A. **Petitioner’s Section 924(c) Conviction, and the Resulting Seven-Year** 15 **Mandatory Consecutive Sentence, Must Be Vacated Because the** 16 **Predicate Offense, Armed Bank Robbery, Is Not a Crime of Violence.**

17 Section 924(c) provides for a series of graduated, mandatory consecutive  
18 sentences for using or carrying a firearm during and in relation to a “crime of violence.”  
19 18 U.S.C. § 924(c)(1)(A), (B). The term “crime of violence,” in turn, is defined as “an  
20 offense that is a felony and—”

21 (A) has as an element the use, attempted use, or threatened use of physical  
22 force against the person or property of another, or  
23  
24

---

25 <sup>1</sup> For the Court’s convenience, Petitioner’s PSR will be lodged with the Court  
26 under separate cover.

27 <sup>2</sup> Counsel has requested, but has not yet received, various documents from Mr.  
28 Jackson’s archived district court file, including the Third Superseding Information, and  
he therefore refers to the PSR and the Plea Agreement to describe the charges.

1 (B) that by its nature, involves a substantial risk that physical force against  
2 the person or property of another may be used in the course of committing  
3 the offense.

4 18 U.S.C. § 924(c)(3). As used in this brief, subsection (A) is called the “force clause”  
5 and subsection (B) is called the “residual clause.”

6 Here, the Third Superseding Information charged Petitioner with violating  
7 Section 924(c) by brandishing a firearm during and in relation to a crime of violence,  
8 namely the armed bank robbery of Citibank, as charged in Count 2 of the Third  
9 Superseding Information. (*See* PSR ¶¶ 4-5; Ex. B, Plea Agreement at 3.)

10 In a 2000 case, the Ninth Circuit held that armed bank robbery was a crime of  
11 violence under the force clause of Section 924(c)(3)(A). *United States v. Wright*, 215  
12 F.3d 1020, 1028 (9th Cir. 2000). The decision’s analysis was limited, reasoning only  
13 “[a]rmed bank robbery qualifies as a crime of violence because one of the elements of  
14 the offense is a taking ‘by force and violence, or by intimidation.’” *Id.* (citing 18  
15 U.S.C. § 2113(a)).

16 There is much water under the bridge since *Wright* was decided, however, and  
17 intervening Supreme Court and en banc Ninth Circuit decisions have undermined  
18 *Wright’s* reasoning that armed bank robbery was a crime of violence. Specifically, the  
19 Supreme Court issued a series of cases redefining the boundaries of the force clause,  
20 such that armed bank robbery no longer satisfies that clause for two independent  
21 reasons. *Johnson*, moreover, removed the alternative ground on which armed bank  
22 robbery could have been deemed a crime of violence; that armed bank robbery  
23 qualified as a predicate crime of violence under the residual clause. After *Johnson*,  
24 therefore, Petitioner no longer has a qualifying crime of violence supporting his Section  
25 924(c) conviction and sentence.

1           **1. Armed Bank Robbery No Longer Qualifies as a Crime of Violence**  
2           **Under the Force Clause.**

3           To determine whether a predicate offense qualifies as a “crime of violence”  
4 under § 924(c), this Court must use the categorical approach. *See United States v.*  
5 *Amparo*, 68 F.3d 1222, 1225 (9th Cir. 1995); *United States v. Piccolo*, 441 F.3d 1084,  
6 1086-87 (9th Cir. 2006) (“[I]n the context of crime-of-violence determinations under  
7 § 924(c), our categorical approach applies regardless of whether we review a current or  
8 prior crime.”); *see also Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013)  
9 (applying categorical approach in case under ACCA, 18 U.S.C. § 924(e)). Under  
10 *Taylor*, only the statutory definitions—i.e., the elements—of the predicate crime are  
11 relevant to determine whether the conduct criminalized by the statute, including the  
12 most innocent conduct, qualifies as a “crime of violence.” *Taylor v. United States*, 495  
13 U.S. 575, 599-601 (1990).

14           Determination of whether a criminal offense is categorically a crime of violence  
15 is done by “assessing whether the ‘full range of conduct covered by [the statute] falls  
16 within the meaning of that term.’” *United States v. Grajeda*, 581 F.3d 1186, 1189 (9th  
17 Cir. 2009) (citation omitted). To do this, courts must look “at the least egregious end of  
18 [the. . . statute’s] range of conduct.” *United States v. Baza-Martinez*, 464 F.3d 1010,  
19 1014 (9th Cir. 2006) (quoting *United States v. Lopez-Solis*, 447 F.3d 1201, 1206 (9th  
20 Cir. 2006)). In other words, under the categorical approach, a prior offense can only  
21 qualify as a “crime of violence” if all of the criminal conduct covered by a statute—  
22 “including the most innocent conduct” —matches or is narrower than the “crime of  
23 violence” definition. *United States v. Torres-Miguel*, 701 F.3d 165, 167 (4th Cir.  
24 2012). If the statute punishes some conduct that would qualify as a crime of violence  
25 and some conduct that would not, it does not categorically constitute a crime of  
26 violence. *Grajeda*, 581 F.3d at 1189. In a “narrow range of cases,” if the statute is  
27 divisible as to a material element, then the court may apply the modified categorical  
28 approach by looking beyond the statutory elements to certain documents of conviction

1 to determine whether the defendant’s conviction necessarily involved facts  
2 corresponding to the generic federal offense. *Descamps*, 133 S. Ct. at 2283-84.

3 Intervening Supreme Court and en banc Ninth Circuit precedent following  
4 *Wright* holds that to be a categorical match to the terms of the force clause in Section  
5 924(c), a state statute must require proof of both intentional conduct and violent force.  
6 As to intentional conduct, in *Leocal v. Ashcroft*, 543 U.S. 1, 9-10 (2004), the Supreme  
7 Court held that a conviction under a Florida statute prohibiting driving under the  
8 influence was not a crime of violence under the identical force clause in 18 U.S.C.  
9 Section 16(a) because the crime could be committed through mere negligence or even  
10 accidental conduct. An en banc panel of the Ninth Circuit then interpreted *Leocal* as  
11 requiring that, “to constitute a federal crime of violence an offense must involve the  
12 *intentional* use of force against the person or property of another.” *Fernandez-Ruiz v.*  
13 *Gonzales*, 466 F.3d 1121, 1132 (9th Cir. 2006) (en banc) (emphasis added); *see also*  
14 *United States v. Dixon*, 805 F.3d 1193, 1197 (9th Cir. 2015) (citing *Leocal* and holding  
15 that the almost-identically worded force clause in the ACCA requires that “the use of  
16 force must be intentional, not just reckless or negligent”); *United States v. Serafin*, 562  
17 F.3d 1105, 1108 (9th Cir. 2009) (applying *Leocal*’s gloss on 18 U.S.C. § 16 to Section  
18 924(c)(3)); *United States v. Acosta*, 470 F.3d 132, 134-35 (2d Cir. 2006) (same).

19 “Physical force” has the meaning given to it by *Leocal* and the Supreme Court’s  
20 2010 decision in *Johnson v. United States*, 559 U.S. 133, 140 (2010) (*Johnson I*). In  
21 *Leocal*, in addition to interpreting the *mens rea* requirement of Section 16(a), the  
22 Supreme Court also held that the phrase “physical force” in that section requires a  
23 “violent, active crime[.]” 543 U.S. at 11. The *Johnson I* Court expanded on that  
24 definition, holding that the phrase “physical force” in ACCA’s almost-identical force  
25 clause defining “violent felony” means “*violent* force—that is, force capable of causing  
26 physical pain or injury to another person.” *Johnson I*, 559 U.S. at 140.

27 A person violates the armed bank robbery statute if he, “by force and violence, or  
28 by intimidation, takes or attempts to take, from the person or presence of another” the

1 property of a bank and in so doing “assaults any person, or puts in jeopardy the life of  
2 any person by the use of a dangerous weapon or device.” 18 U.S.C. § 2113(a), (d).

3 Thus, the elements of the crime are

4 (1) the defendant took money belonging to a bank, credit union, or savings  
5 and loan, (2) by using force and violence or intimidation, (3) the deposits  
6 of the institution were insured by the Federal Deposit Insurance  
7 Corporation (“FDIC”), and (4) in committing the offense, the defendant  
8 assaulted any person, or put in danger the life of any person by the use of a  
9 dangerous weapon.

10 *Wright*, 215 F.3d at 1028.

11 Armed bank robbery does not require an *intentional* threat of force, nor does it  
12 require a threat of *violent* force. As such, armed bank robbery is not a crime of violence  
13 under the force clause.

14 **a. Armed Bank Robbery Does Not Require the**  
15 ***Intentional* Use or Threatened Use of Force.**

16 The first reason armed bank robbery is categorically overbroad and cannot  
17 support a finding that a defendant’s predicate offense is a crime of violence under the  
18 force clause is because the statute contains no requirement that a defendant have  
19 possessed any *mens rea* with respect to either his or her use of force and violence or  
20 intimidation, let alone that the defendant used force and violence or intimidation  
21 intentionally.

22 In *Carter v. United States*, 530 U.S. 255, 268 (2000), the Supreme Court held  
23 that bank robbery is a general intent crime. That is, the defendant must have  
24 “possessed knowledge with respect to the *actus reus* of the crime.” *Id.* As an example  
25 of a hypothetical defendant who should not be punished under the statute, the *Carter*  
26 Court wrote that “Section 2113(a) certainly should not be interpreted to apply to the  
27 hypothetical person who engages in forceful taking of money while sleepwalking[.]”  
28 *Id.* at 269. Following *Carter*, courts have held that the *actus reus* of bank robbery is the

1 taking of money and therefore, the statute requires a showing only that the defendant  
2 “knew he was physically taking money.” *See United States v. Yockel*, 320 F.3d 818,  
3 823 (8th Cir. 2003). Whether the defendant took money via an intentional use of force  
4 and violence or intimidation is “irrelevant.” *Id.*; *see also United States v. Kelley*, 412  
5 F.3d 1240, 1244 (11th Cir. 2005) (“[A] defendant can be convicted under section  
6 2113(a) even if he did not intend for an act to be intimidating.”). Thus, in *Yockel*, the  
7 Eighth Circuit affirmed the district court’s exclusion at trial of any evidence regarding  
8 whether the defendant intended to use force and violence or intimidation. 320 F.3d at  
9 823.

10 *Yockel* and *Kelley* are in accord with this Circuit’s longstanding, pre-*Carter* case  
11 law which also holds that, at least in cases involving intimidation, whether a defendant  
12 “specifically intended to intimidate . . . is irrelevant.” *United States v. Foppe*, 993 F.2d  
13 1444, 1451 (9th Cir. 1993). This holding stems from the court’s conclusion that the  
14 definition of taking, or attempting to take “‘by intimidation’ means willfully to take, or  
15 attempt to take, in such a way that would put an ordinary, reasonable person in fear of  
16 bodily harm.” *United States v. Alsop*, 479 F.2d 65, 67 n.4 (9th Cir. 1973). Because this  
17 definition focuses on the effect of the accused’s actions on the victim, “[t]he  
18 determination of whether there has been an intimidation should be guided by an  
19 objective test focusing on the accused’s actions,” *not* his or her intent. *Id.*; *see also*  
20 *United States v. Woodrup*, 86 F.3d 359, 363 (4th Cir. 1996) (“The intimidation element  
21 of § 2113(a) is satisfied if ‘an ordinary person in the [victim’s] position reasonably  
22 could infer a threat of bodily harm from the defendant’s acts,’ whether or not the  
23 defendant actually intended the intimidation.”). It makes no difference in the analysis  
24 that a defendant in an armed bank robbery case uses a dangerous weapon in the course  
25 of committing the offense: whether he intentionally used the weapon is simply not an  
26 element of the crime. In short, a defendant may be convicted of armed bank robbery  
27 even though he did not intend to put another in fear, but merely did some act involving  
28 a dangerous weapon that would put an ordinary, reasonable person in fear of bodily

1 harm. *See United States v. Martinez-Jimenez*, 864 F.2d 664, 666-67 (9th Cir. 1989)  
2 (Section 2113(d) “focuses on the harms created, not the manner of creating the harm.”).

3 As a statute must require the intentional use of force in order to match the  
4 definition of “use of force” in Section 924(c)’s force clause following *Leocal* and  
5 *Fernandez-Ruiz*, and because Section 2113(a), (d) requires no such showing, *Wright’s*  
6 conclusion that bank robbery is a crime of violence under the force clause is no longer  
7 good law. *See Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003) (en banc)  
8 (“[T]he issues decided by the higher court need not be identical in order to be  
9 controlling. Rather, the relevant court of last resort must have undercut the theory or  
10 reasoning underlying the prior circuit precedent in such a way that the cases are clearly  
11 irreconcilable.”). Following *Leocal* and *Fernandez-Ruiz*, federal armed bank robbery  
12 cannot be a crime of violence under the force clause.

13 **b. Armed Bank Robbery Does Not Require the Use or**  
14 **Threatened Use of *Violent* Force.**

15 Moreover, armed bank robbery does not require the use or threat of *violent*  
16 physical force. With respect to the use-of-force-and-violence-or-intimidation element,  
17 nothing in the term “intimidation” requires a threat of *violent* physical force.  
18 Intimidation is satisfied even where there is no explicit threat at all, let alone the threat  
19 of violent force. For example, a simple demand for money from a bank teller will  
20 support a bank robbery conviction. *See United States v. Hopkins*, 703 F.2d 1102, 1103  
21 (9th Cir. 1983) (“Although the evidence showed that Hopkins spoke calmly, made no  
22 threats, and was clearly unarmed, we have previously held that ‘express threats of  
23 bodily harm, threatening body motions, or the physical possibility of concealed  
24 weapon[s]’ are not required for a conviction for bank robbery by intimidation.”  
25 (quoting *United States v. Bingham*, 628 F.2d 548, 549 (9th Cir.1980))). But, as the  
26 Ninth Circuit recently held, an “uncommunicated willingness or readiness to use  
27 [physical] force . . . is not the same as a threat to do so.” *United States v. Parnell*, 818  
28 F.3d 974, 980 (9th Cir. 2016). A threat of physical force, as would satisfy the force

1 clause “requires some outward expression or indication of an intention to inflict pain,  
2 harm or punishment.” *Id.* Federal bank robbery has no such requirement.

3 Further, the Ninth Circuit’s definition of intimidation does not require a showing  
4 of the use or threatened use of violent physical force because placing a person “in fear  
5 of bodily harm” does not necessarily require the use or threatened use of violent  
6 physical force. On this matter, the Fourth Circuit has “recognized that, to constitute a  
7 predicate crime of violence justifying a sentencing enhancement under the Guidelines,  
8 a [predicate] offense must constitute a use or threatened use of violent force, not simply  
9 result in physical injury or death.” *Torres-Miguel*, 701 F.3d at 169; *Accord United*  
10 *States v. Cruz-Rodriguez*, 625 F.3d 274, 276 (5th Cir. 2010); *Chrzanoski v. Ashcroft*,  
11 327 F.3d 188, 194 (2d Cir. 2003) (“there is ‘a difference between causation of an injury  
12 and in injury’s causation by the “use of physical force””); *United States v. Perez-*  
13 *Vargas*, 414 F.3d 1282, 1287 (10th Cir. 2005); *Whyte v. Lynch*, 807 F.3d 463, 469-72  
14 (1st Cir. 2015). For example, a defendant could commit bank robbery through  
15 intimidation by threatening to poison the teller, but this would not constitute the  
16 threatened use of violent physical force, even though it would result in the teller being  
17 in fear of bodily harm. *Cf. Torres-Miguel*, 701 F.3d at 168-69 (holding that  
18 California’s criminal threats statute does not constitute a crime of violence because “a  
19 defendant can violate statutes like § 422(a) by threatening to poison another, which  
20 involves no use or threatened use of force.”); *Matter of Guzman-Polanco*, 26 I. & N.  
21 Dec. 713 (BIA 2016) (“Caesar’s death at the hands of Brutus and his fellow  
22 conspirators was undoubtedly violent; the death of Hamlet’s father at the hands of his  
23 brother, Claudius, by poison, was not.”) (quoting *Rummel v. Estelle*, 445 U.S. 263, 282  
24 n.27 (1980)).

25 With respect to the deadly weapon element of Section 2113(d), a defendant may  
26 be found guilty of armed bank robbery without engaging in conduct that involves the  
27 use or threat of violent physical force. For example, a defendant’s mere display of or  
28 reference to possession of a gun, without making any threat to use the gun, is sufficient



1 to sustain a conviction under section 2113(d). *See United States v. Jones*, 84 F.3d  
2 1206, 1211 (9th Cir. 1996); *McLaughlin v. United States*, 476 U.S. 16, 17-18 (1986);  
3 *Martinez-Jimenez*, 864 F.2d at 666.

4       Moreover, a defendant may be convicted of armed bank robbery even though he  
5 displays or refers only to an unloaded or inoperable firearm, or even a toy resembling a  
6 firearm. *See McLaughlin*, 476 U.S. 16, 17-18 (1986) (unloaded gun); *Martinez-*  
7 *Jimenez*, 864 F.2d at 666-67 (inoperable gun, toy gun); *see also United States v. Boyd*,  
8 924 F.2d 945, 947-48 (9th Cir. 1991) (road flare qualifies as a dangerous weapon). This  
9 conduct does not involve the use or threatened use of violent force. In *McLaughlin*, the  
10 Supreme Court reasoned that an unloaded gun qualified as a dangerous weapon within  
11 the meaning of Section 2113(d) because “a gun is an article that is typically and  
12 characteristically dangerous . . . and the law reasonably may presume that such an  
13 article is always dangerous even though it may not be armed at a particular time or  
14 place” and because “the display of a gun instills fear in the average citizen; as a  
15 consequence, it creates an immediate danger that a violent response will ensue.” 476  
16 U.S. at 17-18. In other words, the *McLaughlin* court concluded that a robber’s use of  
17 an unloaded gun could be considered to put in danger another person’s life not because  
18 the robber could actually use the gun or because the gun actually posed a threat of  
19 violence against anyone in the bank but merely because it was a reasonable position for  
20 the law to take that all guns are dangerous, since as a general matter guns often are  
21 dangerous. The Court also concluded that a robber’s use of an unloaded gun could put  
22 in danger another person’s life not because the robber actually used or threatened to use  
23 the gun in a violent, active way but only because others who saw the gun might  
24 *themselves* react in a violent way. In the words of the *Martinez-Jimenez* court, “[t]he  
25 *McLaughlin* opinion recognizes that the dangerousness of a device used in a bank  
26 robbery is not simply a function of its potential to injure people directly. Its  
27 dangerousness results from the greater burdens that it imposes upon victims and law  
28 enforcement officers.” 864 F.3d at 666. As these cases make clear, defendants can be,

1 and indeed many have been, convicted of armed bank robbery without using or  
2 threatening to use violent force.

3 For these reasons, federal armed bank robbery does not qualify as a crime of  
4 violence under the force clause of Section 924(c). The contrary holding in *Wright* is  
5 clearly irreconcilable with *Johnson I* and *Leocal*. See *Miller*, 335 F.3d at 899-900.

6 **2. Following *Johnson*, Armed Bank Robbery Does Not Qualify as a**  
7 **Crime of Violence Under the Residual Clause Because that Clause**  
8 **Is Void for Vagueness.**

9 Until *Johnson*, defendants like Petitioner had little motivation to challenge  
10 *Wright's* force clause holding, knowing that their armed bank robbery predicate would  
11 likely still be deemed a crime of violence under Section 924(c)'s residual clause.  
12 Indeed, prior to *Johnson*, the Ninth Circuit had held that various state robbery crimes  
13 were crimes of violence under the residual clause of several crime-of-violence  
14 definitions. See, e.g., *United States v. Prince*, 772 F.3d 1173, 1176 (9th Cir. 2014)  
15 (finding that California second degree robbery is a violent felony under the residual  
16 clause of ACCA, because it "certainly" is the kind of crime that presents a serious  
17 potential risk of physical injury to another); *United States v. Chandler*, 743 F.3d 648,  
18 652-55 (9th Cir. 2014) (Nevada conspiracy to commit robbery is a violent felony under  
19 the residual clause), *remanded pursuant to Johnson*, 743 F.3d 648 (9th Cir. 2015); see  
20 also *United States v. McDougherty*, 920 F.2d 569, 574 & n.3 (9th Cir. 1990) ("Clearly  
21 then, robbery as defined in California falls under 18 U.S.C. 16(b) as a felony that 'by its  
22 nature, involves a substantial risk' that physical force may be used"; interpreting an  
23 earlier version of the career-offender residual clause, but stating that the "result . . .  
24 would be no different" under the present version of the guideline). *Johnson*, however,  
25 removed this alternative ground of justifying Petitioner's sentence.

26 In *Johnson*, the Supreme Court declared the residual clause of the ACCA to be  
27 "unconstitutionally vague" because the "indeterminacy of the wide-ranging inquiry  
28 required by the residual clause both denies fair notice to defendants and invites

1 arbitrary enforcement by judges.” *Johnson*, 135 S. Ct. at 2557. Thus, the Supreme  
2 Court concluded, “[i]ncreasing a defendant’s sentence under the clause denies due  
3 process of law.” *Id.* The Supreme Court held the residual clause “vague in all its  
4 applications,” *id.* at 2561, and overruled its contrary decisions in *James v. United*  
5 *States*, 550 U.S. 192 (2007), and *Sykes v. United States*, 131 S. Ct. 2267 (2011).  
6 *Johnson*, 135 S. Ct. at 2562-63.

7 The holding in *Johnson* invalidating the residual clause of the ACCA applies  
8 equally to the residual clause of Section 924(c). In *Dimaya v. Lynch*, 803 F.3d 1110  
9 (9th Cir. 2015), the Ninth Circuit held that the identically worded definition of a “crime  
10 of violence” in the Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(43)(F),  
11 is unconstitutionally vague. *Dimaya*, 803 F.3d at 1111. The INA defines a “crime of  
12 violence” by reference to the definition in 18 U.S.C. Section 16(b). Section 16(b), like  
13 Section 924(c)(3), has a force clause and a residual clause—indeed, the provisions are  
14 identical. They each define “crime of violence” as:

15 (a) an offense that has as an element the use, attempted use, or  
16 threatened use of physical force against the person or property  
17 of another, or

18 (b) any other offense that is a felony and that, by its nature,  
19 involves a substantial risk that physical force against the  
20 person or property of another may be used in the course of  
21 committing the offense.

22 18 U.S.C. § 16; 18 U.S.C. § 924(c)(3).

23 Although the language of Section 16(b), as incorporated into the INA, is not  
24 identical to that of ACCA’s residual clause, the Ninth Circuit concluded that Section  
25 16(b) suffered from the same constitutional defects identified in *Johnson*, and was  
26 therefore unconstitutionally vague. *Dimaya*, 803 F.3d at 1114-17; *see also United*  
27 *States v. Vivas-Ceja*, 808 F.3d 719, 722-23 (7th Cir. 2015) (same). Because both  
28 statutes require a consideration of what kind of conduct the “ordinary case” of the

1 crime involves, and both statutes left uncertainty about the amount of risk required, the  
2 Ninth Circuit reasoned that Section 16(b), like ACCA’s residual clause, produced too  
3 much unpredictability and arbitrariness to comport with due process. *Dimaya*, 803 F.3d  
4 at 1116-17.

5 The same is true of the residual clause in Section 924(c)(3)(B), which the Ninth  
6 Circuit has recognized is “identical” to Section 16(b)’s residual clause. *See United*  
7 *States v. Amparo*, 68 F.3d 1222, 1226 (9th Cir. 1995); *Delgado-Hernandez v. Holder*,  
8 697 F.3d 1125, 1130 (9th Cir. 2012). For interpretive purposes, the Ninth Circuit has  
9 treated Section 16(b) as the “equivalent” of Section 924(c)(3). *See United States v.*  
10 *Mendez*, 992 F.2d 1488, 1492 (9th Cir. 1993); *Amparo*, 68 F.3d at 1226 (relying on  
11 *United States v. Aragon*, 983 F.2d 1306 (4th Cir. 1993), a Section 16(b) case, to  
12 interpret Section 924(c)(3)(B)). At least three district courts have squarely held that  
13 Section 924(c)(3)’s residual clause is unconstitutionally vague after *Johnson*. *See*  
14 *United States v. Lattanaphom*, \_\_ F. Supp. 3d \_\_, 2016 WL 393545, at \*3-6 (E.D. Cal.  
15 Feb. 1, 2016); *United States v. Bell*, 2016 WL 344749, at \*12-13 (N.D. Cal. Jan. 28,  
16 2016); *United States v. Edmunson*, \_\_ F. Supp. 3d \_\_, 2015 WL 9311983, at \*3-5 (D.  
17 Md. Dec. 30, 2015) (as amended). This Court should likewise conclude that Section  
18 924(c)(3)(B) is unconstitutionally vague and cannot be used to support Petitioner’s  
19 Section 924(c) conviction and sentence.

20 Federal armed bank robbery categorically is not a crime of violence under the  
21 force clause of Section 924(c). And *Johnson* eliminated the residual clause. As such,  
22 that provision can no longer serve as an alternative basis upon which to hold that  
23 Petitioner’s conviction is a crime of violence. In short, following *Johnson*, Petitioner’s  
24 conviction under 18 U.S.C. § 2113(a), (d) is not a crime of violence for purposes of  
25 Section 924(c).<sup>3</sup>

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27 <sup>3</sup> It should be noted that armed bank robbery is indivisible as between “force and  
28 violence” and “intimidation” because these are merely different means by which a

1 **B. Petitioner’s Collateral Attack Waiver Does Not Preclude The Relief**  
2 **Sought In This Motion.**

3 Mr. Jackson entered into an agreement not to bring a post-conviction collateral  
4 attack. (Ex. B, Plea Agreement at 18.) But Petitioner believes that *Johnson* represents  
5 a post-conviction collateral attack based on an explicitly retroactive change in the  
6 applicable Sentencing Guidelines, which constitutes one of the exceptions to his plea  
7 agreement. (*Id.*)

8 To the extent that it is not covered by that provision, moreover, the collateral  
9 attack waiver is nonetheless unenforceable. A waiver of a collateral attack on a  
10 sentence is not enforceable if the sentence imposed was “illegal.” *United States v.*  
11 *Bibler*, 495 F.3d 621, 624 (9th Cir. 2007) (so holding in the context of a direct appeal  
12 waiver); *United States v. Brizan*, 709 F.3d 864, 866-67 (9th Cir. 2013). “A sentence is  
13 illegal if it exceeds the permissible statutory penalty for the crime or violates the  
14 Constitution.” *Id.* In *Johnson*, the United States Supreme Court held that increasing a  
15 defendant’s sentence under the residual clause denies due process of law. 135 S.Ct. at  
16 2557. In light of *Johnson*, then, Mr. Jackson’s sentence was imposed in violation of the  
17 Due Process Clause of the Fifth Amendment and thus violates the Constitution.  
18 Because Mr. Jackson’s sentence was based on a sentencing enhancement that was  
19 imposed in violation of the Constitution, his collateral-attack waiver cannot be

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21 defendant can commit the offense. More specifically, the jury is not called upon to  
22 parse out and unanimously agree whether the taking was (a) by force and violence or  
23 (b) by intimidation. *See United States v. Wright*, 215 F.3d 1020, 1028 (9th Cir. 2000)  
24 (“[O]ne of the elements of the offense is a taking ‘by force and violence, or by  
25 intimidation.’” (quoting § 2113(a))); *United States v. Alsop*, 479 F.2d 65, 66 (9th Cir.  
26 1973) (“That the statute and the indictment use the disjunctive phrase ‘by force and  
27 violence, or by intimidation’ does not mean the indictment is duplicitous. Only one  
28 offense was charged.” (citation omitted)); *see also* Ninth Cir. Model Criminal Jury  
Instructions § 8.162 (2015) (stating the elements of bank robbery, which include using  
“force and violence or intimidation”). Because the statute is indivisible as to this  
required element, the modified categorical approach is inapplicable. *See Descamps*,  
133 S. Ct. 2276 (2013); *United States v. Werle*, 815 F.3d 614, 621 (9th Cir. 2016) (“If a  
statute is overinclusive and indivisible as to any required element, the modified  
categorical approach cannot be applied to that statute.”).

1 enforced. *See Order, United States v. Dean*, 13-137-SI (D. Ore. March 15, 2016)  
2 (noting USAO concession that, under *Bibler*, collateral attack waiver did not bar  
3 challenge based on *Johnson* “given the constitutional basis for his challenge”).  
4  
5

#### 6 IV. CONCLUSION

7 For the reasons set forth above, Petitioner’s sentence was “imposed in violation  
8 of the Constitution or laws of the United States,” and is “in excess of the maximum  
9 authorized by law.” Petitioner is entitled to Section 2255 relief and should be  
10 resentenced without a mandatory consecutive sentence for a violation of Section  
11 924(c).  
12

13 Respectfully submitted,

14 HILARY POTASHNER  
15 Federal Public Defender

16 DATED: June 20, 2016

17 By /s/ Brianna Fuller Mircheff  
18 BRIANNA FULLER MIRCHEFF  
19 Deputy Federal Public Defender  
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1 **PROOF OF SERVICE**

2 I, the undersigned, declare that I am a resident or employed in Los Angeles  
3 County, California; that my business address is the Office of the Federal Public  
4 Defender, 321 East 2nd Street, Los Angeles, California 90012-4202, Telephone No.  
5 (213) 894-2854; that I am over the age of eighteen years; that I am not a party to the  
6 action entitled above; that I am employed by the Federal Public Defender for the  
7 Central District of California, who is a member of the Bar of the State of California.  
8 I hereby certify that service of the foregoing Motion to Vacate will be accomplished by  
9 the procedure set out in Local Rule 4-4 and Appendix C.

10 I further certify that, pursuant to the request of the Respondent, a copy of the  
11 PACER notification of the above filing will be forwarded to Respondent's counsel by  
12 email, as follows:

13 **Cathy Ostiller**  
14 **United States Attorney's Office**  
15 **312 N. Spring Street**  
16 **Los Angeles, CA 90012**  
17 **Cathy.Ostiller@usdoj.gov**

18 This proof of service is executed at Los Angeles, California, on June 20, 2016.

19 I declare under penalty of perjury that the foregoing is true and correct to the best  
20 of my knowledge.

21 Brianna Fuller Mircheff  
22 Brianna Fuller Mircheff