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3 **NOT FOR PUBLICATION**

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8
9 Julius Darnell Dixon,
10 Movant/Defendant,
11 v.
12 United States of America,
13 Respondent/Plaintiff.
14

No. CV-16-04590-PHX-SRB
CR-99-00516-PHX-SRB
ORDER

15 Pending before the Court is Respondent United States of America's ("Respondent")
16 Motion to Vacate Stay and Motion to Dismiss Movant's § 2255 Motion ("Mot.") (Doc.
17 15). Respondent filed the instant Motion on April 5, 2018, asserting that the previously
18 imposed stay of proceedings concerning Movant's armed robbery conviction under 18
19 U.S.C. § 924(c)(1) is no longer necessary. (Mot. at 1.) Movant filed his Response ("Resp.")
20 (Doc. 16) on April 14, 2018.

21 The Magistrate Judge issued a Report and Recommendation on August 15, 2018,
22 recommending that the previously imposed stay be lifted, and that Movant's Motion to
23 Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 be denied and dismissed
24 with prejudice. (See Doc. 25, R. & R.) The Report and Recommendation further
25 recommended that the Court deny a certificate of appealability and leave to proceed in
26 forma pauperis because Movant failed to make a substantial showing of the denial of a
27 constitutional right. Movant filed his Objections to the Report and Recommendation on
28 August 24, 2018. (See Doc. 26, Obj. to R. & R. ("Obj.")). Having reviewed the record de

1 novo, the Court overrules Movant’s Objections and grants Respondent’s Motion.

2 **I. LEGAL STANDARDS**

3 A federal prisoner may seek relief under 28 U.S.C. § 2255 if his sentence was
4 “imposed in violation of the United States Constitution or the laws of the United States, . .
5 . was in excess of the maximum authorized by law, or is otherwise subject to collateral
6 attack.” 28 U.S.C. § 2255(a). When a prisoner moves for post-conviction relief, the court
7 “may accept, reject, or modify, in whole or in part, the findings or recommendations made
8 by the magistrate.” 28 U.S.C. § 636(b)(1). If a movant files timely objections to the report
9 and recommendation, the district court must make a de novo determination of those
10 portions of the report or specified proposed findings or recommendations to which
11 objection is made. *Id.*

12 **II. DISCUSSION**

13 In the underlying criminal matter, Movant pleaded guilty to one count of bank
14 robbery in violation of 18 U.S.C. § 2113(a), five counts of armed bank robbery in violation
15 of § 2113 (a) and (d), and one count of use of a firearm during and in relation to a crime of
16 violence – armed bank robbery in violation of § 924(c)(1). (CRDocs. at 70, 76.)¹ Movant
17 was sentenced to a total of 300 months’ imprisonment. (*Id.* at 74.)

18 In his § 2255 Motion, Movant claims that his § 924(c) conviction must be vacated
19 as his predicate bank robbery offenses no longer qualify as crimes of violence within the
20 meaning of § 924(c)(3)(A) and (B), and the residual clause of § 924(c)(3)(B) is
21 unconstitutionally vague under *Johnson v. United States*.² (Doc. 3, Mot. to Authorize
22 Successive Appl. for Relief Under 28 U.S.C. § 2255 (“§ 2255 Mot.”) at 7; CRDoc. at 134.)
23 Before addressing the merits of Movant’s claim, Respondent argues that the previously
24 imposed stay to await the Supreme Court’s decision in *Lynch v. Dimaya* (now *Sessions v.*

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26 ¹ The documents in the underlying criminal matter will be referred to as “CRDoc.”
27 ² 135 S. Ct. 2551 (2015). The *Johnson II* Court held that imposing an increased sentence
28 U.S.C. § 924(e), violated the Constitution’s guarantee of due process by denying fair
notice to defendants and inviting arbitrary enforcement by judges. *See id.* at 2557–58.
(*Johnson I* was decided in 2010; *Johnson II*, cited by Movant, was decided in 2015.)

1 *Dimaya*) and *United States v. Begay* is no longer required.³ (Mot. at 3.) Respondent is
2 correct. *Dimaya* has been decided and does not form a basis for relief. And a continued
3 stay to await a decision by the Ninth Circuit in *Begay* is unnecessary, as there is now
4 binding Ninth Circuit precedent directly addressing Movant’s claims. The Ninth Circuit,
5 in *United States v. Gutierrez*, recently reaffirmed prior precedent holding that “bank
6 robbery by intimidation . . . requires at least an implicit threat to use the type of violent
7 physical force necessary to meet the *Johnson* [I] standard.”⁴ Shortly thereafter, in *United*
8 *States v. Watson*, the Ninth Circuit held that armed bank robbery is a crime of violence
9 under § 924(c). 881 F. 3d 782, 786 (9th Cir. 2017), *reh’g en banc denied*, No. 16-15357
10 (Mar. 29, 2018) (“Because bank robbery ‘by force and violence, or by intimidation’ is a
11 crime of violence, so too is armed robbery.”).

12 In response, Movant misguidedly relies on *United States v. Parnell*, which fails to
13 rescue his argument in favor of continuing the stay for two reasons.⁵ (Resp. at 2.) *Parnell*
14 pre-dates both *Gutierrez* and *Watson*, portending that whatever conflict Movant seeks to
15 tease out is now in the law moot. Second, *Parnell* does not analyze the federal bank robbery
16 statute, but instead analyzes a Massachusetts robbery statute in conjunction with the
17 ACCA. *See* 818 F.3d at 979. *Parnell* explains that with respect to the actual force prong of
18 robbery under Massachusetts law, the degree of force used is immaterial (so long as the
19 victim is aware of it). *See id.* at 978. Such force, therefore, does not satisfy the requirement
20 of physical force under the ACCA. *Id.* at 981; *see also id.* at 979.

21 In the alternative, Movant requests that the Court grant a certificate of appealability
22 for the reasons set forth in *United States v. Dawson*.⁶ (Mot. at 3.) In *Dawson*, the District
23 Court found a tension between the Ninth Circuit’s holding in *Watson* [that when a
24 defendant negligently intimidates a victim, he may not be convicted of bank robbery], and

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26 ³ 138 S. Ct. 1204 (2018); No. 14-10080 (9th Cir. filed Feb. 20, 2014).

27 ⁴ 876 F.3d 1254, 1257 (9th Cir. 2017), *reaff’g*, *United States v. Selfa*, 918 F.2d 749 (9th
28 Cir. 1990). “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.* (quoting
Johnson v. United States, 559 U.S. 133, 140 (2010)).

⁵ 818 F.3d 974 (9th Cir. 2016).

⁶ *See* 300 F. Supp. 3d 1207, 1210 (D. Or. 2018).

1 previous Ninth Circuit opinions on the mens rea requirement for a bank robbery conviction.
2 300 F. Supp. 3d at 1210. However, both cases cited in *Dawson* (and referenced by Movant),
3 *United States v. Foppe* and *United States v. Yockel*, were decided long before *Johnson*,
4 *Gutierrez*, or *Watson*. And, more importantly, both cases do not directly speak to the
5 question presented in Movant’s § 2255 Motion, namely, whether bank robbery constitutes
6 a crime of violence under the “force clause” of § 924(c).

7 **III. CONCLUSION**

8 Because *Gutierrez* and *Watson* are binding authority, the Court concludes that the
9 question motivating the continued stay in Movant’s underlying criminal proceedings is no
10 longer pending. The Court overrules Movant’s Objection and grants Respondent’s Motion.
11 The Court further denies and dismisses Movant’s § 2255 Motion with prejudice.

12 Additionally, because this Court denies and dismisses Movant’s constitutional
13 claims on the merit, and because Movant has not demonstrated that “reasonable jurists
14 would find the [Court’s] assessment of the constitutional claims debatable or wrong,” the
15 Court overrules Movant’s Objections and denies his request for a certificate of
16 appealability.⁷ *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

17 **IT IS ORDERED** overruling Movant’s Objections to Magistrate Judge’s Report
18 and Recommendation (Doc. 26).

19 **IT IS FURTHER ORDERED** adopting the Report and Recommendation of the
20 Magistrate Judge (Doc. 25).

21 **IT IS FURTHER ORDERED** that the previously imposed Order staying this
22 matter be lifted. (Doc. 12.)

23 **IT IS FURTHER ORDERED** denying and dismissing Movant’s Motion to
24 Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 with prejudice (Doc. 3).

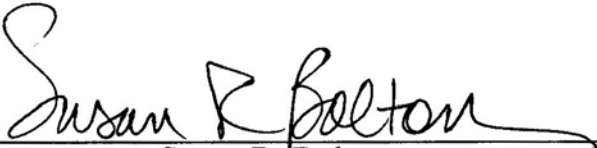
25 **IT IS FURTHER ORDERED** denying a Certificate of Appealability and leave to
26 proceed in forma pauperis on appeal because Movant has not made a substantial showing

27 ⁷ Although Movant cites to several pre-*Watson* cases to imply tension between *Watson*
28 and in-Circuit, out-of-Circuit, and Supreme Court case law, such citations are not
ultimately persuasive, most significantly, because *Watson* directly addresses the question
at issue. (Obj. at 7–15.)

1 of the denial of a constitutional right.

2 **IT IS FURTHER ORDERED** directing the Clerk to enter judgment.

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4 Dated this 6th day of December, 2018.

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9 Susan R. Bolton
10 United States District Judge
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