APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v.

CIV 16-0563 MV/KBM
CR 09-0900 MV

MARTIN MICHAEL YBARRA,

Defendant.

PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

THIS MATTER comes before the Court on Defendant Martin Michael Ybarra's ("Defendant's") Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255.[1] *Doc. 1.* Defendant seeks to have his conviction and sentence set aside pursuant to the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Johnson II*), which invalidated the residual clause of the Armed Career Criminal Act ("ACCA") as unconstitutionally vague under the Fifth Amendment Due Process Clause.[2] The Court has satisfied itself that Defendant's Motion is limited to only matters of law, and its disposition requires no further factual development or evidentiary hearing.

[1] Citations to "Doc." refer to docket numbers filed in Civil Case No. 16-0563 MV/KBM. Citations to "CR Doc." refer to the attendant criminal docket in Criminal Case No. 09-0900 MV. For filings made on both dockets, only the civil docket number is given.

[2] In *Johnson v. United States*, 559 U.S. 133 (2010) (*Johnson I*), by contrast, the Court held that the Florida felony offense of battery by "[a]ctually and intentionally touch[ing]" another person does not have "as an element the use . . . of physical force against the person of another," § 924(e)(2)(B)(i), and thus does not constitute a "violent felony" under § 924(e)(1).

Having reviewed the pleadings and record before the Court, as well as the relevant law, the Court recommends that Defendant's § 2255 Motion be **denied**.

I. Background

On June 24, 2008, pursuant to a Plea Agreement under Federal Rule of Criminal Procedure 11(c)(1)(C), Defendant pled guilty to an Indictment charging him with being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). *CR Doc. 17 & 18.* According to Defendant's Presentence Report, his base offense level was determined to be 33, because he was found to qualify as an armed career criminal under the ACCA. *Doc. 2,* Ex. 1 ¶ 48. After a three-level reduction for acceptance of responsibility, his total offense level was calculated at 30. *Id*. ¶ 49-51. With a criminal history category of V and the ACCA's fifteen-year mandatory minimum of incarceration, his guideline range became 180-188 months. *Id*. ¶ 98-99.

According to the Presentence Report, Defendant qualified as an armed career criminal based upon three prior convictions in the United States District Court for the District of California for federal bank robbery in case number CR 87-0373. *Doc. 2*, Ex. 1 ¶¶ 36, 48, 68. Defendant had also previously been convicted of aggravated assault with a deadly weapon, *id*. ¶ 36, but his Presentence Report suggests that it was his federal bank robbery convictions alone that qualified him as an armed career criminal. *Id.* ¶ 48.

The indictment issued in Defendant's 1987 District of California federal bank robbery case, attached to the Government's response brief, reveals that Defendant was charged with nine counts of federal bank robbery in violation of 18 U.S.C. § 2113(a). *See Doc. 7*, Ex. 1. Each count charged him with federal bank robbery "by force, violence, *and* intimidation." *Doc. 7*, Ex. 1 at 1-9 (emphasis added). According to the

judgment issued by the United States District Court for the District of California, Defendant ultimately pled guilty to Counts 1, 2, and 3 of the indictment and was sentenced to eighteen years custody as to each count to be served concurrently. *Doc. 7*, Ex. 2.

In the instant case, Defendant entered into a Plea Agreement on June 24, 2009, in which he and the Government agreed, pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C) and U.S.S.G. § 6B1.2(c)(2), that "the appropriate sentence in this case is 180 months." *CR Doc. 17* at 4. Defendant agreed in his Plea Agreement to waive his right to appeal or to collaterally attack his conviction under § 2255, except on the issue of ineffective assistance of counsel. *CR Doc.* 17 at 5. While the language of the Agreement does not explicitly mention application of the ACCA, the parties do expressly acknowledge in the Agreement that Defendant was subject to "imprisonment for a period of not less than fifteen (15) years nor more than life." *CR Doc. 17*.

On April 13, 2010, the Honorable Martha Vazquez of this District accepted the parties' Plea Agreement and sentenced Defendant to the stipulated sentence of 180 months imprisonment. *CR Doc. 21*. The Court filed its Judgment in this case on April 21, 2010. *See CR Doc. 22*. Defendant, having waived his right to do so, did not appeal his sentence. *See CR Doc. 17* at 5.

The instant Motion is Defendant's first attempt to collaterally attack his sentence. Initially, he argued that his predicate offenses for "three prior California state convictions for bank robbery," were "likely classified as violent felonies by the district court under the unconstitutionally vague residual clause of the definition of 'violent felony, 18 U.S.C. § 924(2)(2)(B)(ii).[']" *Doc. 1* at 1-3. After the Government clarified in its response brief

that the relevant predicate offenses were convictions for *federal* bank robbery under 18 U.S.C. § 2113(a), Defendant revised his argument in his reply brief to comport with the Presentence Report. *See Doc. 9.* Defendant now argues that following the invalidation of the Act's residual clause, *federal* bank robbery, 18 U.S.C. § 2113(a), is categorically not a violent felony under the ACCA. *See id.*

II. Discussion

A. The ACCA

The ACCA provides that a person convicted of violating § 922(g) who has three prior convictions for a "violent felony" or "serious drug offense" is subject to a minimum term of imprisonment of fifteen years. 18 U.S.C. § 924(e)(1). Prior to the demise of the residual clause in *Johnson II*, the ACCA defined "violent felony" as follows:

> any crime punishable by imprisonment for a term exceeding one year . . . that –
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*.

18 U.S.C. § 924(e)(2)(B) (emphasis added to denote the now-invalidated residual clause). Subpart (i) of § 924(e)(2)(B) is often referred to as its "force clause," while the initial, unitalicized portion of subpart (ii) is known as the "enumerated clause." *See Johnson*, 135 S. Ct. at 2556. It is the final italicized clause within subpart (ii) that the Supreme Court found to be unconstitutionally vague in *Johnson II. See id*. at 2557, 2563. Notably, the Court left intact both the force clause and the enumerated clause.

In *Welch v. United States*, 136 S. Ct. 1257 (2016), the Supreme Court announced that *Johnson II* applies retroactively to ACCA cases on collateral review, reasoning that the decision announced a new substantive rule. *Id*. at 1264-65. As a result, individuals whose predicate convictions qualified as "violent felonies" under only the ACCA's invalidated residual clause are now entitled to relief under 28 U.S.C. § 2255. In contrast, those individuals whose predicate offenses qualify as "violent felonies" under either the ACCA's force clause or enumerated clause are not entitled to relief.

Here, the Government insists that Defendant's federal bank robbery convictions are violent felonies under the ACCA's force clause – that is, these offenses have "as an element the use, attempted use, or threatened use of physical force against the person of another." *See* 18 U.S.C. § 924(e)(2)(B)(i). Defendant contends otherwise.

B. Effect of Waiver in Plea Agreement

Neither Defendant nor the Government broaches the issue of the waiver of the right to collaterally attack the conviction and sentence contained in the parties' Plea Agreement. Typically, when considering whether to enforce the waiver of appellate or collateral attack rights, a court must determine: (1) whether the disputed appeal or motion falls within the scope of the waiver; (2) whether the defendant knowingly and voluntarily waived his rights; and (3) whether enforcing the waiver would result in a miscarriage of justice. *See United States v. Hahn*, 359 F.3d 1315, 1325-27 (10th Cir. 2004). A miscarriage of justice occurs "[1] where the district court relied on an impermissible factor such as race, [2] where ineffective assistance of counsel in connection with the negotiation of the waiver renders the waiver invalid, [3] where the

sentence exceeds the statutory maximum, or [4] where the waiver is otherwise unlawful." *Id*. at 1327 (quoting *United States v. Elliott*, 264 F.3d 1171, 1173 (10th Cir. 1998)).

Recently, in *United States v. Frazier-Lefear*, No. 16-6128, 2016 WL 7240134, *3 (10th Cir. Dec. 15, 2016) (unpublished), the Tenth Circuit held that the waiver provision in a plea agreement was enforceable, compelling dismissal of a *Johnson II*-based challenge to a sentence, albeit in a case involving a sentencing guidelines enhancement rather than the ACCA. *Id*. at *3. Judges in this District have reached the same conclusion, both before and after *Frazier-Lefear*. *See, e.g., Mount v. United States*, 16cv0657 JAP/KBM, *Doc. 8* (D.N.M. Jan. 17, 2017) (determining that the waiver in the movant's 11(c)(1)(C) plea agreement was enforceable in a § 2255 motion under *Johnson* in the career offender context); *Valdez v. United States*, 16cv0727 JB/GBW, *Doc. 10* (D.N.M. Dec. 6, 2016) (recommending the same conclusion); *United States v. Sosa*, 16cv0653 RB/LF (D.N.M. Dec. 2, 2016), adopted by presiding District Judge Brack, *Doc. 15*, on Dec. 29, 2016 (distinguishing the concept of forfeiture from that of waiver and determining that a defendant who waived his right to collaterally attack a sentence intentionally relinquished his right to collaterally attack his sentence based upon an unconstitutionally vague sentencing guideline).

Moreover, at least two judges in this District have enforced waivers contained in Rule 11(c)(1)(C) plea agreements in § 2255 motions under *Johnson II* where the movants, when sentenced, were facing a mandatory minimum under the ACCA. *See, e.g., Puckett v. United States*, No. 16cv0511 WJ/WPL, *Doc. 2* (D.N.M. June 6, 2016); *Pam v. United States*, No. 16cv0358 LH/GBW, *Doc. 4* (D.N.M. June 8, 2016). In these

decisions, Judge Johnson and Judge Hansen reasoned that the movants, who qualified under the ACCA but entered into 11(c)(1)(C) plea agreements, were not entitled to relief under *Johnson II* because they were "not sentenced under the provisions of the ACCA but, instead, [were] sentenced to a stipulated and agreed term." *Pucket*, 16cv0511 WJ/WPL, *Doc. 2*; *Pam*, 16cv0358 LH/GBW, *Doc. 4*. Judge Johnson and Judge Hansen concluded that enforcement of the respective movant's waiver would not result in a miscarriage of justice because the sentence imposed "did not exceed the [] statutory maximum." *Pucket*, 16cv0511, at 6; *Pam*, 16cv0358, at *7. In other words, because the agreed sentences in the movants' plea agreements did not exceed the statutory maximum *at the time the plea agreement was entered*, no miscarriage of justice resulted. The undersigned takes a different view, however.

If Defendant is correct that *Johnson II* renders his 15-year sentence an unauthorized and thereby illegal punishment, he arguably demonstrates that enforcement of the waiver of his collateral attack rights would result in the "miscarriage of justice." Indeed, the undersigned has previously recommended in a § 2255 case premised on *Johnson II*, that the Court decline to enforce the waiver provision in a plea agreement. In that case, a defendant agreed to the fifteen-year *mandatory minimum* prison sentence required by the ACCA pursuant to a Rule 11(c)(1)(C) plea agreement, but actually faced a *maximum* penalty of ten years without the unconstitutional ACCA enhancement. *See United States v. Mata*, 16cv0581, *Doc. 7* (D.N.M. Aug. 26, 2016), adopted by presiding District Judge Gonzalez, *Doc. 9*, on Sept. 6, 2016.

Persuaded by the rationale of judges in the Eastern District of Tennessee, the undersigned's view is that defendants who were previously found to qualify under the

ACCA and who entered into plea agreements may, as a result of *Johnson II*, be subject to sentences exceeding the congressionally-authorized maximum punishment for non-ACCA violations. In other words, with the invalidation of the ACCA's residual clause, sentences for some defendants with plea agreements who previously qualified under the ACCA now "exceed the statutory maximum," resulting in a miscarriage of justice. *See Hahn*, 359 F.3d at 1327.

Furthermore, the Government has not specifically sought to enforce the waiver contained in Defendant's plea agreement in this case, opting to focus its arguments on the issue of whether federal bank robbery constitutes a crime of violence under the ACCA. *See Doc. 7.* This alone may be reason not to enforce the waiver. *See United States v. Calderon*, 428 F.3d 928, 930-31 (10th Cir. 2005) ("the waiver is waived when the government utterly neglects to invoke the waiver in this Court"); *United States v. Evans*, 361 F. App'x 4, 7 (10th Cir. 2010) (unpublished) ("we will only enforce an appeal waiver when the government invokes the waiver against the defendant").

Given the undersigned's view of the enforceability of waivers in ACCA cases, and because the government has not specifically sought to enforce the waiver, the Court recommends that it not be enforced and therefore proceeds to the merits of Defendant's *Johnson II* claims.

C. Whether Federal Bank Robbery Satisfies the ACCA's Force Clause

The parties agree that whether or not Defendant's federal bank robbery convictions qualify as violent felonies hinges on the application of the ACCA's force clause, which includes offenses that have "as an element the use, or threatened use of physical force against the person or property of another." *See Doc.* 7 at 6; Doc*. 9* at 1.

When determining whether an offense is a violent felony under the ACCA, courts generally apply the "categorical approach," considering only the offense's statutory elements and not the actual facts underlying the prior conviction. *United States v. Smith*, 652 F.3d 1244, 1246 (10th Cir. 2011). Under this approach, it is unnecessary that "every conceivable factual offense" contemplated by the statute fall within the ACCA. *Id.* at 1246. Instead, courts consider whether the "conduct encompassed by the elements of the offense, in the ordinary case, qualifies under the ACCA as a violent felony." *Id*.

When a statute contains a divisible set of elements in the alternative, only some of which would constitute violent felonies, courts may employ the "modified categorical approach." *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013). Under this approach, courts "look[] to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of." *Mathis*, 136 S. Ct. 2243, 2249 (2016). This approach does not apply to statutes which "enumerate[] various factual means of committing a single element." *Id*. at 2249.

Here, the federal statute at issue provides as follows:

> 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; or
>
> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny –

> Shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 2113(a). In addition to bank robbery "by force and violence, or by intimidation," the statute also criminalizes obtaining or attempting to obtain property from a bank by extortion as well as entering or attempting to enter a bank with the intent to commit a felony affecting the bank. *See id*. As such, § 2113(a) seems to contain a divisible set of elements in the alternative: (1) taking property from a bank by force and violence or intimidation; (2) obtaining or attempting to obtain property from a bank by extortion, or (3) entering a bank intending to commit a felony affecting the bank. *See United States v. McBride*, 826 F.3d 293, 296 (6th Cir. 2016) (suggesting that § 2113(a) is a divisible statute because it also criminalizes entering a bank intending to commit a felony affecting the bank); *United States v. McGuire*, No. 16cv1166 JTM, 2016 WL 4479129, at *2 (D. Kan. Aug. 25, 2016) (noting that § 2113(a) contains "essentially a separate extortion offense."). In any event, applying the modified-categorical approach to Defendant's conviction here, it is clear that he was convicted of federal bank robbery "by force, violence, and intimidation" and not of bank robbery by extortion or entering a bank with intent to commit a felony. *See Doc. 7*, Ex. 1, at 1-9, Ex. 2.

Defendant argues that § 2113(a) does not qualify as a violent felony under the force clause because it does not require: (1) proof of violent physical force as required by *Johnson I*; (2) proof that the use, attempted use, or threatened use of physical force was directed at the person of another; or (3) proof that that bank robbery by intimidation was intentional. *Doc. 9.* For these reasons, and because he finds the authority cited by the Government to be unpersuasive when applied to this case, Defendant maintains

that his sentence should be vacated and that he should be resentenced without application of the ACCA.

The crime of federal bank robbery has three elements: (1) the defendant intentionally took from the person or presence of the person money or property; (2) the money or property belonged to or was in the possession of a federally-insured bank at the time of the taking; and (3) the defendant took the money or property by means of force and violence or intimidation. *See* Tenth Circuit Pattern Jury Instructions No. 2.77.

First, Defendant maintains that federal bank robbery does not comport with *Johnson I*, which requires, for purposes of the ACCA's force clause, an element of "physical force," meaning "*violent* force – that is, force capable of causing physical pain or injury to another person." *See Johnson*, 559 U.S. at 140 (emphasis in original). According to Defendant, § 2113(a) "does not require that any particular quantum of force be used, attempted or threatened." *Doc. 9* at 4.

True, the Tenth Circuit has found sufficient evidence of bank robbery by intimidation in situations that did not involve actual force or violence or even *explicit* threats of such. For instance, it upheld a conviction under § 2113(a), finding sufficient evidence of intimidation, when a defendant walked "unhesitatingly" behind a bank counter, began removing cash from a tellers' drawer, and instructed a bank manager to "shut up" when asked what he was doing. *United States v. Slater*, 692 F.2d 107, 107-09 (10th Cir. 1982). The Tenth Circuit reasoned that although the defendant did not have a weapon, his quiet but purposeful and aggressive behavior "created a dangerous situation" and an "expectation of injury . . . in the context of an incident of this kind where a weapon and a willingness to use it are not uncommon." *Id*. at 109. Similarly, in

United States v. Lewis, 628 F.2d 1276 (10th Cir. 1980), the Tenth Circuit upheld a § 2113(a) conviction where the defendant entered a bank, unarmed, and presented a note reading: "This is a bank robbery. Put the money in the bank bag and keep your foot off the button." *Id*. at 1277.

Even so, the Tenth Circuit Criminal Pattern Jury Instruction 2.77 helpfully expands upon the offense of bank robbery by intimidation, explaining:

> To take "by means of intimidation" is to say or do something in such a way that a person of ordinary sensibilities would be fearful of bodily harm. It is not necessary to prove that the alleged victim was actually frightened, and neither is it necessary to show that the behavior of the defendant was so violent that it was likely to cause terror, panic, or hysteria. However, a taking would not be by "means of intimidation" if the fear, if any, resulted from the alleged victim's own timidity rather than some intimidating conduct on the part of the defendant. The essence of the offense is the taking of money or property accompanied by intentional, intimidating behavior on the part of the defendant.

Id. The Tenth Circuit has defined intimidation in the context of § 2113(a) as "an act by defendant 'reasonably calculated to put another in fear,' or 'conduct and words . . . calculated to create the impression that any resistance or defiance by the [individual] would be met by force.'" *United States v. Lajoie*, 942 F.2d 699, 701 n.5 (10th Cir. 1991) (internal citations omitted).

Given that intimidation occurs in the context of a bank robbery when a defendant says or does something "in such a way that a person of ordinary sensibilities would be fearful of bodily harm," the Court is satisfied that federal bank robbery by intimidation has as an element the threatened use, albeit sometimes implicit, of physical force against the person of another. Actions which would cause a reasonable victim to be intimidated during the course of a bank robbery necessarily implicate the threatened

use of physical force. As such, the Court declines to adopt the proposition advanced by Defendant that federal bank robbery may occur even without the use, attempted use, or threatened use of physical force of the type contemplated in *Johnson I*.

Next, Defendant suggests that federal bank robbery does not necessitate that physical force, or threats of physical force, be directed "against the person of another," as required by the language of § 924(e)(2)(B)(i). For this proposition, Defendant relies upon *United States v. Ford*, 613 F.3d 1263 (10th Cir. 2010) in which the Tenth Circuit found that discharging a firearm at an occupied building or vehicle did not qualify under the ACCA's force clause because "[t]he Kansas statute requires force against a building or vehicle, but not against the person inside." *Doc. 9* at 5 (quoting *Ford*, 613 F.3d at 1271). The Court, however, is not persuaded that § 2113(a) is analogous to the Kansas offense of discharging a firearm at an occupied building. Both the express elements of § 2113(a) and the applicable pattern jury instruction contemplate that federal bank robbery involves the intentional taking "from the person or presence of [a] person . . . by means of force and violence or intimidation." *See* § 2113(a); Tenth Circuit Pattern Jury Instructions No. 2.77. In contrast to the crime of shooting at a building, the Court has little difficulty finding that federal bank robbery involves something more than force against property that "a person happens to occupy at the time." *See Doc. 9* at 5.

Defendant next contends that federal bank robbery cannot be a crime of violence because a person may be convicted under § 2113(a) without *intending* to threaten the use of force. He argues that intimidation in this context need not be intentional "because it depends on whether a reasonable person would be intimidated by the defendant's conduct and not on whether the defendant intended to intimidate." *Doc. 9* at

6. Defendant relies upon the rationale in *United States v. Woodrup*, 86 F.3d 359 (4th Cir. 1996), in which the Fourth Circuit reasoned that "nothing in [§ 2113(a)] even remotely suggests that the defendant must have intended to intimidate." *Doc. 9* at 7 (citing *Woodrup*, 86 F.3d at 364). It follows, he argues, that § 2113(a) cannot constitute a crime of violence under the force clause. *Id.* at 6 (quoting *Culp v. United States*, No. 16-672 TS, 2016 WL 5400395, at *9 (D. Utah 2016), in which the court concluded that "the threatened use of physical force against the person of another requires 'both the intent to use force and a communication of that threat'").

Underlying Defendant's argument is the premise that crimes of violence under the ACCA require a *mens rea* higher than recklessness or negligence. The Court agrees with this underlying premise. After all, the Tenth Circuit explained in *United States v. Zuniga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2008), that "a *mens rea* of recklessness does not satisfy [the] use of physical force requirement under [U.S.S.G.] § 2L1.2's definition of 'crime of violence,'" which, like the force clause in the ACCA, included offenses that have as "an element the use, attempted use, or threatened use of physical force against the person of another." *Id*. at 1124; *see also Leocal v. Ashcroft,* 543 U.S. 1, 11 (2004) (holding that a Florida drunk driving statute did not meet 18 U.S.C. § 16's use of physical force requirement because an individual could be convicted under the statute for negligence or accidental conduct). The Court's agreement with Defendant's underlying premise, however, does not lead it to the conclusion that a person may be convicted of federal bank robbery by intimidation absent knowledge that his conduct constitutes a threat of physical force.

Recently, the Fourth Circuit rejected a *Woodrup*-based argument similar to the one advanced by Defendant. In *United States v. McNeal*, 818 F.3d 141 (4th Cir. 2016), the defendant made a *Johnson II* challenge to a conviction under 18 U.S.C. § 924(c), relying in part upon the circuit court's prior holding in *Woodrup*. The court explained its rejection of an intent requirement in *Woodrup* by suggesting that it had only determined that federal bank robbery by intimidation did not require the *specific* intent to intimidate. *Id*. at 155. It explained that, in contrast, it did *not* determine in *Woodrup* whether bank robbery required general intent – that is, knowledge – with respect to intimidation. *Id*. at 155. More importantly, it emphasized that following *Woodrup*, the United States Supreme Court held in *Carter v. United States*, 530 U.S. 255, 268 (2000), that § 2113(a) requires proof of general intent or knowledge regarding taking by force and violence or intimidation. *Id*. In other words, regardless of the holding in *Woodrup*, the Supreme Court's *post-Woodrup* decision in *Carter* clarified that a conviction under § 2113(a) requires that a defendant know the facts that "ma[de] his conduct fit the definition of the offense." *Id*. (quoting *United States v. Elonis*, 135 S. Ct. 2001, 2009 (2015)).

Ultimately concluding that federal bank robbery, even by intimidation, is a crime of violence within the meaning of the force clause of § 924(c)(3), the Fourth Circuit in *McNeal* reasoned as follows:

> [T]o secure a conviction of bank robbery "by intimidation," the government must prove not only that the accused knowingly took property, but also that he knew that his actions were objectively intimidating. Bank robbery under § 2113(a) therefore satisfies the criterion . . . that, to qualify as a crime of violence, an offense must require either specific intent or knowledge with respect to the use, threatened use, or attempted use of physical force.

818 F.3d at 155; *accord Kucinski v. United States*, No. 16cv201-PB, 2016 WL 4444736 (D.N.H. Sept. 23, 2016) ("[E]ven assuming that § 2113(a) does not require specific intent to intimidate, the statute demands more than accidental, negligent, or reckless conduct."); *United States v. Inoshita*, No. 15-0159 JMS, 2016 WL 2977237, at *6 (D. Haw. May 20, 2016) ("Simply put, negligent or reckless conduct isn't enough" to satisfy § 2113(a).); and *United States v. Mitchell*, No. 15-CR-47, 2015 WL 7283132, at *3 (E.D. Wis. Nov. 17, 2015) ("Section 2113(a) may be a general intent statute, . . . but taking money by force, violence, or intimidation involves a higher degree of culpability than accidental, negligence, or reckless conduct."). This Court finds persuasive the Fourth Circuit's most recent articulation of § 2113(a)'s *mens rea* requirement. It therefore agrees that taking money or property from the presence of bank personnel, even by intimidation, requires something more than recklessness. Indeed, this understanding of § 2113(a)'s requisite *mens rea* comports with the applicable pattern jury instruction and Tenth Circuit case law.

Following *Johnson II*, both the Sixth and the Eleventh Circuit have held that federal bank robbery is a crime of violence under the career offender sentencing guideline's nearly identical force clause. *See United States v. McBride*, 826 F.3d 293, 295-96 (6th Cir. 2016); *United States v. Johnson*, 2016 WL 6775916, at *5 (11th Cir. Nov. 16, 2016); *United States v. Jenkins*, 651 F. App'x 920 (11th Cir. 2016). Numerous federal district courts have followed suit. *See, e.g., McGuire*, 2016 WL 4479129 (noting that courts have almost unanimously held that even taking by intimidation qualifies as threatened use of force under U.S.S.G. § 4B1.2(1)(i)'s force clause).

In this District, Judge Browning has held that armed federal bank robbery qualifies as a crime of violence under § 924(c)'s force clause, which requires "as an element the use, or threatened use of physical force against the person or property of another." *Lloyd v. United States*, 16cv0513 JB/WPL, *Doc. 8* at 9 (D.N.M. Aug. 31, 2016). In *Lloyd*, he noted that the "Courts of Appeals have uniformly ruled that federal crimes involving takings 'by force and violence, or by intimidation,' have as an element the use, attempted use, or threatened use of physical force." *Id*. at 10 (citing *United States v. Boman*, 25 F. App'x 761 (10th Cir. 2001), in which the court held that robbery under § 2111 satisfies the ACCA's force clause, and citing *United States v. Moore*, 43 F.3d 568, 572-73 (11th Cir. 1994) and *United States v. Mohammed*, 27 F.3d 814, 819 (2d Cir. 1994), which reached the same conclusion with respect to the carjacking statute, 18 U.S.C. § 2119). Judge Browning also emphasized that the movant there, like Defendant here, pled guilty to bank robbery "by force and violence, and intimidation," suggesting that he "was thus charged and convicted" of a crime that satisfied the force clause, even if bank robbery by intimidation did not have as an element the threatened use of force. *Id*. at 11. Nevertheless, he went on to explicitly find that federal bank robbery under § 2113(a), "by intimidation," requires the threatened use of physical force." *Id*. at 11.

There is only one federal district court of which this Court is aware that has reached a contrary conclusion. In both *Doriety v. United States*, 16cv0924, *Doc. 12* (W.D. Wash. Nov. 10, 2016) (unpublished) and *Knox v. United States*, No. C16-5502BHS, 2017 WL 347469, at *2 (W.D. Wash. Jan. 24, 2017), the Western District of Washington held that federal bank robbery is not a crime of violence under the career

offender sentencing guideline. In the first case, *Doriety*, the court reasoned that the statute does not explicitly require that a defendant intentionally use force, violence, or fear of injury. *Doriety*, 16cv0924, *Doc. 12* at 9. Noting that federal bank robbery may be committed through "intimidation," which the Ninth Circuit previously determined did not require a threat of violent physical force, the court found that § 2113(a) did not satisfy the force clause. *Id*. (citing *United States v. Hopkins*, 703 F.2d 1102, 1103 (9th Cir. 1983) for the proposition that intimidation does not require a threat of violent physical force). The court explained that the "minimum culpable conduct" of § 2113(a) "does not even require the presence of another person, let alone the threat of "violent force" against that person. *Id*. at 9 (referencing the portion of § 2113(a), which provides that a defendant may be convicted of federal bank robbery for "entering 'any bank . . . with intent to commit in such bank . . . any felony affecting such bank . . . or any larceny.'"). In *Knox*, another judge within the same district simply adopted the rationale set forth in *Doriety*. *See Knox*, 2017 WL 347469, at 2.

In contrast to the Western District of Washington, this Court is not bound by Ninth Circuit law; nor does it agree that bank robbery by intimidation does not necessarily involve a threat of violent physical force. Further, given that § 2113(a) is a divisible statute and the modified categorical approach is implicated, it is of no consequence to the present analysis that a defendant may also be convicted under § 2113(a) by entering a bank with the intent to commit a felony even without threatening violence. Here, the defendant was, without question, instead convicted of federal bank robbery "by force, violence, *and* intimidation." *See Doc. 7*, Ex. 1, at 1-9 (emphasis added).

For these reasons, the Court rejects the reasoning set forth by the Western District of Washington. Rather, the sound rationale of the other courts to address the issue weighs in favor of a determination that that federal bank robbery constitutes a crime of violence under the ACCA's force clause. Simply put, Defendant has offered an inadequate basis for this Court to go against the heavy weight of authority.

III. Conclusion

For all of these reasons, the Court finds that federal bank robbery, 18 U.S.C. § 2113(a), is a crime of violence under the Armed Career Criminal Act's force clause and that Defendant is, therefore, not entitled to relief following *Johnson II*.

Wherefore,

IT IS HEREBY RECOMMENDED that Defendant's § 2255 Motion be denied and that his claims be dismissed with prejudice.

THE PARTIES ARE FURTHER NOTIFIED THAT WITHIN 14 DAYS OF SERVICE of a copy of these Proposed Findings and Recommended Disposition they may file written objections with the Clerk of the District Court pursuant to 28 U.S.C. § 636(b)(1). **A party must file any objections with the Clerk of the District Court within the fourteen-day period if that party wants to have appellate review of the proposed findings and recommended disposition. If no objections are filed, no appellate review will be allowed.**

Karen B. Molzen

UNITED STATES CHIEF MAGISTRATE JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v.

CIV 16-0563 MV/KBM
CR 09-0900 MV

MARTIN MICHAEL YBARRA,

Defendant.

ORDER OVERRULING DEFENDANT'S OBJECTIONS AND ADOPTING THE CHIEF MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

THIS MATTER comes before the Court on the Chief Magistrate Judge's Proposed Findings and Recommended Disposition ("PF&RD") (*Doc. 10*)[1], filed February 15, 2017, and on Defendant's Objections to that PF&RD ("Defendant's Objections") (*Doc. 11*), filed on March 1, 2017. The Court has also considered the United States' Response to Defendant's Objections (*Doc. 12*), which was filed on March 8, 2017.

In her PF&RD, the Chief Magistrate Judge recommended that Defendant Martin Michael Ybarra's ("Defendant's") Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 be denied and that his claims be dismissed with prejudice. *See Doc. 10.* She reasoned that, following *Johnson v. United States*, 135 S. Ct. 2551 (2015) ("*Johnson II*"), Defendant's prior convictions for federal bank robbery under 18 U.S.C. § 2113(a) remain "violent felonies" under the Armed Career Criminal Act's ("ACCA's") force clause. *See id*. Defendant now asks this Court to reject the

[1] Citations to "Doc." refer to docket numbers filed in Civil Case No. 16-0563 MV/KBM.

recommendation by the Chief Magistrate Judge and to hold, instead, that federal bank robbery does not satisfy the ACCA's force clause and, therefore, does not qualify as a "violent felony" under the Act. *Doc. 11.*

When a party files timely-written objections to a magistrate judge's recommendation, the district court will conduct a *de novo* review and "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(C). *De novo* review requires the district judge to consider relevant evidence of record and not merely to review the magistrate judge's recommendation. *In re Griego*, 64 F.3d 580, 583-84 (10th Cir. 1995). "[A] party's objections to the magistrate judge's [PF&RD] must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review." *United States v. One Parcel of Real Prop., with Buildings, Appurtenances, Improvements, & Contents*, 73 F.3d 1057, 1060 (10th Cir. 1996).

Here, the Court conducts a *de novo* review of the record and considers Defendant's objections to the PF&RD, of which there are three: 1) that "[f]ederal bank robbery does not necessarily require proof of violent physical force"; 2) that "[f]ederal bank robbery does not require proof that any use, attempted use, or threatened use of physical force was directed at the person of another"; and 3) that "[t]he cases relied upon by the Court are not persuasive." *See Doc. 11* at 3-9.

First, noting that the phrase "physical force" in the ACCA's force clause has been defined as "violent force . . . capable of causing physical pain or injury," Defendant insists that a robbery statute that requires proof of *de minimus* or even no physical force cannot be considered a "violent felony" under the ACCA. *Doc. 11* at 3 (quoting *Johnson*

v. United States, 559 U.S. 133 (2010) ("*Johnson I*")). Of course, a defendant may be convicted under § 2113(a) if his taking is by force and violence *or by intimidation*, *see* § 2113(A), and Defendant concedes, as he must, that the Tenth Circuit has "defined intimidation in the context of § 2113(a) as an act by defendant 'reasonably calculated to put another in fear, or conduct and words calculated to create the impression that any resistance or defiance by the individual would be met by force." *Id.* at 6 (quoting *United States v. Lajoie*, 942 F.2d 699, 701 n.5 (10th Cir. 1991)). Nevertheless, Defendant maintains that the offense of federal bank robbery "does not necessarily require that the implied threat *involve physical force*." *Doc. 11* at 6 (emphasis added).

Defendant relies upon *United States v. Rodriguez-Enriquez*, 518 F.3d 1191 (10th Cir. 2008) for the proposition that "[o]ffenses that merely require the threat or causation of bodily harm have been held to lack an element of use of force." *Doc. 11* at 6. In *Rodriguez-Enriquez*, the Tenth Circuit held that a conviction for assault by drugging a victim was not a "crime of violence" under U.S.S.G. § 2L1.2's force clause, which, like the ACCA's force clause, includes offenses that have "as an element the use, attempted use or threatened use of physical force against the person of another." *Rodriguez-Enriquez*, 518 F.3d at 1195 (quoting U.S.S.G. § 2L1.2, application note, cmt. N. 1(B)(iii)). Defendant emphasizes the court's conclusion that "drugging by surreptitious means does not involve the use of physical force." *Doc. 11* at 6 (quoting *Rodriguez-Enriquez*, 518 F.3d at 1195).

Defendant likewise relies upon *United States v. Torres-Miguel*, 701 F.3d 165 (4th Cir. 2012), in which the Fourth Circuit determined that the California offense of willfully threatening to commit a crime which "will result in death or great bodily injury to another"

was also not a "crime of violence" under U.S.S.G. § 2L1.2. *See Doc. 11* at 6. There, the Fourth Circuit explained that "a crime may result in death or serious injury without involving *use* of physical force," observing that threatening to poison a person might contravene the state statute without involving the use or threatened use of physical force. *Id*. at 168-69.

In short, Defendant refers the Court to *Rodriguez-Enriquez* and *Torres-Miguel* to invoke an unlikely scenario – whereby a hypothetical defendant could commit a federal bank robbery by threatening to poison or drug a bank teller – in support of his argument that bank robbery by intimidation does not necessarily require the threat to use physical force. Besides being more theoretical than realistic,[2] Defendant's argument fails for other reasons.

Four years after its decision in *Torres-Miguel*, the Fourth Circuit, in *United States v. McNeal*, 818 F.3d 141, 156 (4th Cir. 2016), concluded that "*Torres-Miguel* [did] not alter [its] conclusion that § 2113(a) bank robbery is a crime of violence under the § 924(c)(3) force clause." The Fourth Circuit reasoned that federal bank robbery by intimidation, unlike the California offense of threatening to commit a crime that would result in death or great bodily injury, "entails a threat to use violent physical force, and not merely a threat to cause bodily injury." *Id*. at 157.

Moreover, following the Tenth Circuit's decision in *Rodriquez-Enriquez*, the Supreme Court, in *Johnson I*, examined the phrase "physical force" as used in the ACCA's force clause. While the Court determined that "physical force" meant "violent force" or "force capable of causing physical pain or injury to another person," it also

[2] When construing the minimum culpable conduct for an offense, such conduct only includes that in which there is a "realistic probability, not a theoretical possibility" that the statute would apply. *United States v. Harris*, 844 F.3d 1260, 1264 (2017).

separately considered the meaning of each of the terms, "physical" and "force." *Id*. at 134. It defined "physical" as a "force exerted by and through concrete bodies – distinguishing physical force from, for example, intellectual force or emotional force." *Id.* at 138; *United States v. Harris*, 844 F.3d 1260, 1264 (10th Cir. 2017) (quoting *Johnson I*). It defined "force" in a number of ways, including "[p]ower, violence, compulsion, or constraint exerted upon a person." *Id*. at 139. In the Court's view, these definitions, particularly the definition of "physical," suggest that while mere offensive touching will not suffice under the ACCA's definition of "physical force," the Supreme Court has not necessarily foreclosed the inclusion of offenses that involve the use of "physical force" through *indirect* means.

Later, in *United States v. Castleman*, 134 S. Ct. 1405 (2014), the Supreme Court again examined the phrase "physical force," this time in the context of 18 U.S.C. § 921(a)(33)(A). *Id*. at 1414. The Court rejected the notion that "deceiving the victim into drinking a poisoned beverage" did not constitute "physical force." *Id.* at 1414-15. It explained that "[t]he use of force . . . is not the act of sprinkling the poison; it is the act of employing poison knowingly as a device to cause physical harm. That the harm occurs indirectly, rather than directly (as with a kick or punch), does not matter." *Id*. at 1415. The Court posited that a contrary conclusion might permit defendants to argue "that pulling the trigger on a gun is not a 'use of force' because it is the bullet, not the trigger, that actually strikes the victim." *Id*.

While *Castleman* dealt with a different statutory provision,[3] and even distinguished the meaning of "physical force" there from the meaning of "physical force"

[3] In *Castleman*, the issue was whether a particular offense fell within 18 U.S.C.

under the ACCA, *see id.* at 1409-13, courts have nevertheless drawn upon *Castleman's* rationale and concluded that the differences between the statute at issue there and the ACCA are not material on the issue of what it means to "use" physical force. *See, e.g., Kucinski v. United States*, No. 16-CV-201-PB, 2016 WL 4444736, at *4–5 (D.N.H. Aug. 23, 2016) (concluding that the logic used in *Castleman* to define the "use of physical force" extended to the ACCA's force clause); *see also United States v. Williams*, No. 15cr0069 JDL, 2016 WL 1555696, at *8 n.13 (D. Me. Apr. 15, 2016); *United States v. Bell*, No. 15cr0258 WHO, 2016 WL 344749, at *8 (N.D. Cal. Jan. 28, 2016). This Court agrees that the Supreme Court's analysis of what it means to *use* physical force in *Castleman* is helpful even in the ACCA context.

Contrary to Defendant's position, the Court finds that *Johnson I* and *Castleman*, taken together, instruct that a threat to use *indirect* physical force during a bank robbery, such as a threat to use poison, still qualifies as a threat to use violent, physical force under the ACCA. After all, the administration of poison would, no doubt, have a harmful, violent effect on the body of the one who ingests it. *See United States v. Pena*, 161 F. Supp. 3d 268, 282 (reasoning, in the context of § 924(c), that poisoning a person

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§ 922(g)(9), which prohibits a person who has been convicted of a "misdemeanor crime of domestic violence" from possessing a firearm or ammunition. *See* § 922(g)(9). With exceptions not applicable, a "misdemeanor crime of domestic violence" is defined as an offense that (1) is a misdemeanor under Federal, State, or Tribal law, and (2) which "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of a victim . . ." § 921(a)(33)(A). The defendant in *Castleman* argued that his predicate offense did not have as an element the "use of physical force." *Castleman*, 134 S. Ct. at 1409. The district court agreed with him based upon the theory that one could commit the offense at issue by causing bodily injury without "violent contact," for example by poisoning their victim. *Id*. The Supreme Court ultimately disagreed with the defendant, however, concluding that in contrast to the ACCA, Congress incorporated the common-law meaning of "force" – that is, even offensive touching – into § 921(a)'s definition of a "misdemeanor crime of domestic violence." *Id.* at 1410. The Court explained that "'[d]omestic violence' is not merely a type of 'violence'; it is a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context." *Id.* at 1411.

would constitute the use of *Johnson I* physical force, as "poison can certainly be a strong enough force to cause physical pain or injury to another person"). Furthermore, given the Tenth Circuit's recent acknowledgement that even a "slap in the face," may rise to the level of violent, physical force, *see Harris*, 844 F.3d at 1265, it would be incongruous to hold that the administration of poison would not also satisfy *Johnson I* physical force.

In his Objections, Defendant refers the Court to *United States v. Eason*, 829 F.3d 633 (8th Cir. 2016), in which the Eighth Circuit determined that Arkansas robbery did not constitute a violent felony under the ACCA, even though the state statute required a defendant to employ or threaten to immediately employ "physical force upon another person." *Id*. at 640-41. There, the Eighth Circuit explained that Arkansas law defined physical force as "[b]odily impact, restraint, or confinement" or the threat thereof. *Id.* Defendant argues that, like the Arkansas robbery statute, § 2113(a) "does not require that any particular quantum of force be used, attempted or threatened." *Doc. 11* at 4.

Similarly, in a Notice of Supplemental Authority filed on May 2, 2017, Defendant advised that the Tenth Circuit had recently issued an Order and Judgment in *United States v. Nicholas*, No. 16cv3043, 2017 WL 1429788 (10th Cir. Apr. 24, 2017) (unpublished) employing similar rationale and finding that Kansas robbery did not constitute a violent felony under the ACCA. *See Doc. 13*. In *Nicholas*, the Tenth Circuit concluded that Kansas robbery -- that is, "the taking of property from the person or presence of another by force or by threat of bodily harm to any person" -- requires "nothing more than de minimis physical contact or the threat of physical contact, which is insufficient to satisfy the ACCA's force requirement." *Nicholas,* 2017 WL 1429788 at

*3. In reaching this conclusion, the Tenth Circuit relied primarily upon *State v. McKinney*, 961 P.2d 1 (Kan. 1998), in which the Kansas Supreme Court found that snatching a purse from a victim's arm, without more, satisfied the threat of bodily harm element of the Kansas robbery statute. *Id*. at *3-4.

In contrast to its decision in *Nicholas* and to the Eighth Circuit's decision in *Eason*, the Tenth Circuit previously held that Colorado robbery *does* satisfy the force clauses of the ACCA and the career offender sentencing guideline. *See Harris*, 844 F.3d 1260 (Colorado robbery is a "violent felony" under the ACCA); *United States v. Crump*, No. 15-1497, 2017 WL 33530 (10th Cir. Jan. 4, 2017) (unpublished) (Colorado robbery is a "crime of violence" under U.S.S.G. § 4B1.2(a)(1)). In *Harris*, the Tenth Circuit reasoned that Colorado robbery "tracks the elements of common law robbery" which emphasize the "violent nature of the taking" as the "gravaman of the offense." *Harris*, 844 F.3d at 1266-67. Ultimately, the court concluded: "robbery in Colorado requires a 'violent taking,' which we believe is consistent with the physical force required by the ACCA's element's clause." *Id.* at 1266-67.

The Tenth Circuit's contrasting treatment of Kansas and Colorado robbery offenses illustrates a phenomenon which the court acknowledged in *Harris* – that is, "circuit-level decisions have reached varying results" on the question of whether particular state robbery offenses qualify under the ACCA's force clause. *See id.* at 1262 (explaining that at that time, "five courts have found no violent felony and six have found a violent felony"). Significantly, however, while circuit-court decisions addressing state robbery offenses vary widely, every circuit court to address the issue thus far agrees

that federal bank robbery satisfies the force clause of the ACCA or similar provisions of federal law.

Further, Kansas robbery, which can be committed by snatching a purse from the arm of an individual on the street, is distinguishable from the offense of federal bank robbery, though the language of the statutes may be similar in some respects. For one thing, federal bank robbery includes an additional and significant statutory element: that the money or property taken *belong to or is in the control or possession of a banking institution*. *See* § 2113(a). Banking institutions, in contrast to private individuals, are known to employ security guards, surveillance, and substantial protections to thwart would-be robbers. And while the modified-categorical approach counsels against consideration of the underlying facts in a particular case, it does not necessitate dispensing with common sense or context.

In the context of a bank robbery, it may actually take very little to communicate a threat of violent, even deadly, force to a reasonable bank teller. Even a statement such as, "You better hand over the money!" communicates an "or else" component when it is delivered to a bank teller absent any conduct or language to allay her fears that she may be subject to physical force. Placing bank employees in fear of the use of violent or deadly force is, uniquely, the operative element that facilitates the taking of a bank's money. *See United States v. Slater*, 692 F.2d 107 (10th Cir. 1982) (holding that a jury could conclude that the elements of § 2113(a) were met, even though the defendant accomplished the taking without a weapon or an explicit threat of the use of physical force, given that "a weapon and a willingness to use it are not uncommon" in the context of a bank robbery).

This Court is simply unwilling to agree with Defendant that the sometimes-implicit nature of threats made during a bank robbery dictates that § 2113(a) therefore lacks an element of the use or threatened use of violent, physical force. Instead, the Court finds persuasive the rationale of the District of New Hampshire in *Kucinski*, 2016 WL 4444736:

> § 2113(a) does not require "an explicit threat of force . . . to establish intimidation." A demand note can therefore constitute intimidation, because the note is an implied threat to use force if the teller refuses the robber's demands. Indeed, the threat of physical force is what makes the demand effective – the teller gives the robber money "because she reasonably fear[s] that the robber would use force if [she] did not satisfy his demands." . . . The same is true of the ACCA. Nothing in the ACCA's text requires an explicit threat of physical force.

Id. at *4 (internal citations and parentheticals omitted).

Common sense, context, and the applicable jury instruction requiring that a bank robber's conduct cause "a person of ordinary sensibilities [to] be fearful of bodily harm" dictate that federal bank robbery involves at least the threatened use of "force capable of causing physical pain or injury to another person." Ultimately, the Court agrees with the Chief Magistrate Judge that federal bank robbery, even by intimidation, has as an element the threatened use of force of the type contemplated in *Johnson I*. *See United States v. Enoch*, No. 15cr66, 2015 WL 6407763, at *3 (N.D. Ill. Oct. 21, 2015) ("Because intimidation requires a threat, albeit in some cases an implied threat, of violent physical force, robbery [under § 2113(a)] is a crime of violence within the meaning of section 924(c) even though it can be committed by intimidation rather than actual violence."). As such, the Court rejects Defendant's first objection.

Second, Defendant objects on the basis that federal bank robbery does not require proof that any use, attempted use, or threatened use of physical force was

directed at the person of another. The Chief Magistrate Judge addressed similar arguments and Defendant's reliance on *United States v. Ford*, 613 F.3d 1263 (10th Cir. 2010) in her PF&RD. *See Doc. 10* at 13. She concluded that the state statute at issue in *Ford*, a statute prohibiting the discharge of a weapon at an unoccupied building or vehicle, was distinguishable from federal bank robbery. *Id*. She reasoned as follows: "In contrast to the crime of shooting at a building, the Court has little difficulty finding that federal bank robbery involves something more than force against property that 'a person happens to occupy at the time.'" *Id*.

Now, in his Objections, Defendant asserts that the Chief Magistrate Judge has "read[] language into the statute that simply is not there." *Doc. 11* at 8. He insists that § 2113(a) "does not require that any threatened force or violence be directed *at* a person, only that the taking be *from* a person or presence of a person." *Id*. But Defendant's hypertechnical reading of the statute defies common sense. For, to whom or against what would a defendant's threat of force, violence, or intimidation be directed but to the human gatekeeper of the bank's money? According to the applicable jury instruction, federal bank robbery requires a taking "from the person [or] the presence of the person . . . by means of force and violence or intimidation." Tenth Circuit Pattern Jury Instruction No. 2.77 (brackets omitted). Giving the ordinary and common meaning to the phrase "by means of," the Court reads this jury instruction to require that the taking be from a person or a person's presence *by using against that person* "force and violence or intimidation." Whereas the statute in *Ford* required force against a building or vehicle, § 2113(a) requires the use or threatened use of physical force against a person. The Court rejects Defendant's argument to the contrary.

Defendant's final objection is that the cases cited by the Chief Magistrate Judge are not persuasive "because they do not consider all the foregoing arguments." *Doc. 11* at 9. Among the cases relied upon by the Chief Magistrate Judge were *United States v. McBride*, 826 F.3d 293 (6th Cir. 2016), *United States v. Jenkins*, 651 F. App'x 920 (11th Cir. 2016), and *Lloyd v. United States*, 16cv0513 JB/WPL (D.N.M. Aug. 31, 2016). Notably, the Tenth Circuit found these very same cases persuasive in a recently-issued opinion denying a habeas petitioner's application for a certificate of appealability. In *United States v. McGuire*, No. 16-3282, 2017 WL 429251 (10th Cir. Feb. 1, 2017) (unpublished), the Tenth Circuit held that "[e]ven construing the movant's application liberally, no reasonable jurist would debate the district court's denial of habeas relief." *Id*. at *2. When McGuire was pending before the District of Kansas, in a case referenced by the Chief Magistrate Judge in her PF&RD, *see Doc. 10* at 16, District Judge Thomas Marten premised his denial of § 2255 relief upon the rationale that, even following *Johnson II*, federal bank robbery satisfies the force clause of the career offender guideline. *McGuire*, 2016 WL 4479129, at *2-3. The Tenth Circuit, in turn, denied the defendant's application for a certificate of appealability as to Judge Marten's decision, concluding that "[a]lthough § 2113(a) includes a taking 'by intimidation,' courts have stated that 'intimidation' involves the threat of physical force." *McGuire*, 2017 WL 429251, at *2 (citing *McBride*, 826 F.3d at 295-96 and *Lloyd v. United States*, 16cv0513, 2016 WL 5387665, at *5 (D.N.M. Aug. 31, 2016)). It explained that "courts have consistently held that federal bank robbery qualifies as a predicate offense under the Guidelines' [force] clause." *Id.* (citing *McBride*, 826 F.3d at 295-96, *United States v. Jenkins*, 651 F. App'x 920, 925 (11th Cir. 2016), and *United States v. Selfa*, 918 F.2d

749, 751 (9th Cir. 1990)). Significantly, the language of the force clause in the career offender guideline is identical to the language of the force clause in the ACCA. *Compare* U.S.S.G. § 4B1.2(a)(1) *with* 18 U.S.C. § 924(e)(2)(B)(ii). Thus, it appears that the Tenth Circuit, like the Chief Magistrate Judge, has adopted the majority view on this issue and would find that federal bank robbery constitutes a "violent felony" under the ACCA's identical force clause.

For all of these reasons, and following its *de novo* review of the record, the Court overrules Defendant's objections and adopts the Chief Magistrate Judge's recommendation to deny Defendant's § 2255 Motion and to dismiss his claims with prejudice.

IT IS THEREFORE ORDERED that Defendant's Objections to the Proposed Findings and Recommended Disposition (*Doc. 11*) are hereby **OVERRULED;**

IT IS FURTHER ORDERED that the Chief Magistrate Judge's Proposed Findings and Recommended Disposition (*Doc. 10*) is hereby **ADOPTED**;

IT IS FURTHER ORDERED that Defendant's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 is hereby **DENIED**, and his claims are dismissed with prejudice.

IT IS FURTHER ORDERED that a certificate of appealability is **GRANTED**.

UNITED STATES DISTRICT JUDGE

APPENDIX C

2018 WL 1750547
Only the Westlaw citation is currently available.
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 10th Cir. Rule 32.1.
United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Martin Michael YBARRA, Defendant-Appellant.

No. 17-2131
|
Filed April 12, 2018

Synopsis

Background: Defendant was convicted upon guilty plea in the United States District Court for the District of New Mexico, Martha Vazquez, J., of possessing a firearm after being convicted of a felony, and sentenced to 15 years' imprisonment pursuant to Armed Career Criminal Act (ACCA). Defendant filed motion to vacate. The District Court, 2017 WL 3189555, adopting proposed findings and recommended disposition of Karen B. Molzen, United States Chief Magistrate Judge, 2017 WL 3189554, denied motion. Defendant appealed.

[Holding:] The Court of Appeals, Robert E. Bacharach, Circuit Judge, held that defendant's prior convictions for federal bank robbery were for violent felonies as defined under ACCA.

Affirmed.

West Headnotes (1)

[1] Sentencing and Punishment

Federal bank robbery by force and violence, or by intimidation requires the use, attempted use, or threatened use of physical force against the person of another, and thus is a violent felony as defined under the Elements Clause of the Armed Career Criminal Act (ACCA). 18 U.S.C.A. §§ 924(e)(2)(B)(i), 2113(a).

Cases that cite this headnote

West Codenotes

Recognized as Unconstitutional
18 U.S.C.A. § 924(e)(2)(B)(ii)

(D.C. Nos. 2:16-CV-00563-MV-KBM) and 2:09-CR-00900-MV-1 (D. New Mexico)

Attorneys and Law Firms

James Robert Wolfgang Braun, Office of the United States Attorney, District of New Mexico, Albuquerque, NM, for Plaintiff-Appellee

Jane Greek, Office of the Federal Public Defender, District of New Mexico, Las Cruces, NM, for Defendant-Appellant

Before BRISCOE, HARTZ, and BACHARACH, Circuit Judges.

ORDER AND JUDGMENT *

* We have determined that oral argument would not materially aid our consideration of the appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). Thus, we have decided the appeal based on the briefs.

This order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But our order and judgment may be cited for its persuasive value under Fed. R. App. P. 32.1(a) and 10th Cir. R. 32.1(A).

Robert E. Bacharach, Circuit Judge

***1** Mr. Martin Ybarra pleaded guilty to possessing a firearm after being convicted of a felony. *See* 18 U.S.C. § 922(g). In determining the sentence, the district court found that Mr. Ybarra had three prior convictions for violent felonies, triggering the Armed Career Criminal Act's establishment of a minimum term of fifteen years'

imprisonment. 18 U.S.C. § 924(e)(1). With the finding of three prior convictions for violent felonies, the court imposed a fifteen-year sentence.

Mr. Ybarra moved under 28 U.S.C. § 2255 to vacate his sentence, alleging that the fifteen-year minimum did not apply because federal bank robbery (18 U.S.C. § 2113(a)) did not constitute a violent felony. The district court denied relief, and we affirm.

I. Application of the Fifteen-Year Minimum Sentence Under the Armed Career Criminal Act

Under the Armed Career Criminal Act, Mr. Ybarra would be subject to a fifteen-year minimum sentence if he had three or more past convictions for violent felonies. The issue here is whether Mr. Ybarra's three prior convictions for federal bank robbery involved violent felonies.

The Armed Career Criminal Act contains three clauses defining the term "violent felony":

1. Elements Clause: The statute of conviction contains "as an element the use, attempted use, or threatened use of physical force" against another person. 18 U.S.C. § 924(e)(2)(B)(i).

2. Enumerated-Offense Clause: The conviction is for burglary, arson, extortion, or another crime involving the use of explosives. 18 U.S.C. § 924(e)(2)(B)(ii).

3. Residual Clause: The conviction otherwise involved conduct creating a serious potential risk of physical injury to another person. *Id.*

The parties agree that Mr. Ybarra's convictions for federal bank robbery did not satisfy the Enumerated-Offense Clause. And the Supreme Court held in *Johnson v. United States* that the Residual Clause is unconstitutionally vague. —— U.S. ——, 135 S.Ct. 2551, 2556-63, 192 L.Ed.2d 569 (2015). Mr. Ybarra invokes *Johnson*, arguing that the fifteen-year minimum is no longer applicable because his convictions for federal bank robbery would constitute violent felonies only under the unconstitutional Residual Clause. But the district court relied on a different clause, the Elements Clause, concluding that it applied to federal bank robbery. We agree.

II. Standard of Review

The district court denied Mr. Ybarra's § 2255 motion as a matter of law, and we engage in de novo review. *See United States v. Harris*, 844 F.3d 1260, 1263 (10th Cir. 2017), *cert. denied*, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2018 WL 1568033 (Apr. 2, 2018).

III. Elements Clause

We use the categorical approach to decide whether federal bank robbery constitutes a violent felony under the Elements Clause. *United States v. Hammons*, 862 F.3d 1052, 1054 (10th Cir. 2017). Under the categorical approach, we compare the elements of federal bank robbery to the statutory definition of a "violent felony." *See United States v. Titties*, 852 F.3d 1257, 1265-66 (10th Cir. 2017). The statutory definition of a "violent felony" is a crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i); *see* p. 2, above.

***2** The parties agree that the federal bank-robbery statute is divisible and that Mr. Ybarra was convicted under the section stating:

> Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another,... 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 ... [s]hall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 2113(a). Thus, we must decide whether bank robbery "by force and violence, or by intimidation" requires "the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. §§ 924(e)(2)(B)(i), 2113(a).

A. The Bank-Robbery Statute and the Definition of "Violent Felony"

We held in *United States v. McGuire* that the statute for federal bank robbery (18 U.S.C. § 2113(a)) has " 'as an element the use, attempted use, or threatened use of physical force against the person of another.' " 678 Fed.Appx. 643, 645 (10th Cir. 2017) (unpublished)

(quoting 18 U.S.C. § 924(e)(2)(B)(i)). *McGuire* was based on the sentencing guidelines rather than the Armed Career Criminal Act. But case law interpreting the guideline term "Crime of Violence" is persuasive in interpreting the phrase "Violent Felony" under the Armed Career Criminal Act. *See United States v. Moyer*, 282 F.3d 1311, 1315 (10th Cir. 2002). Though *McGuire* is unpublished, it is persuasive.

We consider not only our unpublished opinion in *McGuire* but also the consensus of other federal appellate courts. Nine circuit courts have considered whether the federal bank-robbery statute (18 U.S.C. § 2113(a)) constitutes a "crime of violence" or a "violent felony," and all of these courts have answered "yes." *See United States v. Watson*, 881 F.3d 782 *passim* (9th Cir. 2018) (per curiam) (holding that federal bank robbery is a crime of violence under 18 U.S.C. § 924(c)(3)); *United States v. Williams*, 864 F.3d 826, 827, 830 (7th Cir. 2017) (same); *Holder v. United States*, 836 F.3d 891, 892 (8th Cir. 2016) (per curiam) (same); *In re Sams*, 830 F.3d 1234, 1238-39 (11th Cir. 2016) (per curiam) (same); *United States v. McNeal*, 818 F.3d 141, 153, 157 (4th Cir. 2016) (same); *United States v. Wilson*, 880 F.3d 80, 84-85 (3d Cir. 2018) (holding that federal bank robbery is a crime of violence under U.S.S.G. § 4B1.2); *United States v. Ellison*, 866 F.3d 32 *passim* (1st Cir. 2017) (same); *United States v. Brewer*, 848 F.3d 711, 716 (5th Cir. 2017) (same); *United States v. McBride*, 826 F.3d 293, 296 (6th Cir. 2016) (same).

Based on *McGuire* and the uniform body of case law in other circuits, we conclude that the federal bank-robbery statute requires "the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i).

B. Mr. Ybarra's Arguments

Mr. Ybarra presents four arguments against characterizing his federal bank-robbery convictions as violent felonies:

1. Federal bank robbery does not require proof of violent physical force because the robbery can be accomplished with de minimis force or no force at all.

***3** 2. "Intimidation" does not inherently include a threat of violent physical force because physical injury can be caused without the use of physical force.

3. Federal bank robbery does not require proof that the use, attempted use, or threatened use of physical force be directed against the person of another.

4. The test for intimidation is inherently speculative.

These arguments fail.

First, Mr. Ybarra contends that the federal bank-robbery statute can be violated without the necessary degree of physical force. Under the Armed Career Criminal Act, "physical force" means "*violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010) (emphasis in original). Invoking this definition, Mr. Ybarra argues that the federal bank-robbery statute does not require violent force. We disagree.

In determining whether the federal bank-robbery statute requires violent force, we consider the least serious of the acts criminalized by the statute. *See United States v. Harris*, 844 F.3d 1260, 1264 (10th Cir. 2017), *cert. denied*, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2018 WL 1568033 (Apr. 2, 2018). Here, the least culpable conduct is intimidation. *See United States v. Brewer*, 848 F.3d 711, 715 (5th Cir. 2017). Thus, we must decide whether robbery by intimidation requires the statutorily mandated degree of force.

The Tenth Circuit's pattern jury instructions explain that to take "by means of intimidation" requires the defendant to say or do something that would cause "a person of ordinary sensibilities [to] be fearful of bodily harm." Tenth Circuit Pattern Jury Instruction Criminal § 2.77 at 259-60 (2011). And we have said that taking by intimidation requires conduct and words "reasonably calculated to put another in fear, or conduct and words ... calculated to create the impression that any resistance or defiance by the [individual] would be met by force." *United States v. Lajoie*, 942 F.2d 699, 701 n.5 (10th Cir. 1991) (internal quotations and citations omitted). Thus, intimidation under the federal bank-robbery statute could exist only if the defendant had intentionally acted in a way that would cause "a person of ordinary sensibilities" to fear bodily harm. Tenth Circuit Pattern Jury Instruction Criminal § 2.77 at 259-60 (2011); *see United States v. Lewis*, 628 F.2d 1276, 1279 (10th Cir. 1980) (stating that bank robbery by intimidation is " 'unambiguously dangerous to others'

" (quoting *United States v. DeLeo*, 422 F.2d 487, 491 (1st Cir. 1970))). In these circumstances, we conclude that federal bank robbery has as an element the use, attempted use, or threatened use of physical force.

Second, Mr. Ybarra complains that bank robbery by intimidation focuses on bodily harm rather than on physical force. *See* Tenth Circuit Pattern Jury Instruction Criminal § 2.77 at 259-60 (2011) (defining "take by intimidation" to require the defendant to say or do something to cause "a person of ordinary sensibilities [to] be fearful of bodily harm"). Mr. Ybarra faults the district court for equating the fear of bodily harm with the required use of violent physical force. In our view, however, the district court's approach was consistent with the Supreme Court's approach in *United States v. Castleman*, —— U.S. ——, 134 S.Ct. 1405, 188 L.Ed.2d 426 (2014).

***4** There, the Supreme Court explained that "the knowing or intentional causation of bodily injury necessarily involves the use of physical force." *Castleman*, 134 S.Ct. at 1414. We applied *Castleman* in *United States v. Ontiveros*, 875 F.3d 533 (10th Cir. 2017), *petition for cert. filed* (U.S. Apr. 4, 2018) (No. 17-8367). In *Ontiveros*, we explained that *Castleman* had "specifically rejected the contention that 'one can cause bodily injury without the use of physical force.' " 875 F.3d at 536 (quoting *Castleman*, 134 S.Ct. at 1409). We went on to apply *Castleman* to violent felonies under the Armed Career Criminal Act. *Id.* at 538. Under *Ontiveros,* we reject Mr. Ybarra's argument that the threat of bodily harm does not include as an element the threat of physical force. [1]

1 Mr. Ybarra contends that *Ontiveros* was wrongly decided. But we are obligated to follow *Ontiveros* in the absence of en banc consideration or a superseding Supreme Court decision. *United States v. Caiba-Antele*, 705 F.3d 1162, 1165 (10th Cir. 2012). Thus, our panel must follow *Ontiveros*.

Third, Mr. Ybarra observes that a crime of violence exists only if the force is directed against a person. *See United States v. Ford*, 613 F.3d 1263, 1271 (10th Cir. 2010). Based on this observation, Mr. Ybarra opposes characterization of federal bank robbery as a crime of violence, arguing that physical force need not be directed at another person. We disagree.

The federal bank-robbery statute requires that the taking be from the person or presence of a person by means of force and violence or intimidation. *See* 18 U.S.C. § 2113(a). This requirement confines the force to the person controlling the property. Thus, even the least serious act criminalized (taking by intimidation) necessarily entails a threat of bodily harm to the person controlling the property. *See* Tenth Circuit Pattern Jury Instruction Criminal § 2.77 at 259-60 (2011) ("To take 'by means of intimidation' is to say or do something in such a way that a person of ordinary sensibilities would be fearful of bodily harm."); *accord United States v. Ellison*, 866 F.3d 32, 37 (1st Cir. 2017) (concluding "that proving 'intimidation' under [the federal bank-robbery statute] requires proving that a threat of bodily harm was made"); *United States v. Kelley*, 412 F.3d 1240, 1244 (11th Cir. 2005) (stating that " 'intimidation' " under the federal bank-robbery statute takes place only if an " 'ordinary person in the teller's position reasonably could infer a threat of bodily harm' " (quoting *United States v. Cornillie*, 92 F.3d 1108, 1110 (11th Cir. 1996) (per curiam))).

Finally, Mr. Ybarra contends that the test for intimidation is inherently speculative. Mr. Ybarra forfeited this argument by failing to raise it in district court. *See United States v. Wright*, 848 F.3d 1274, 1280-81 (10th Cir. 2017), *petition for cert. filed*, —— U.S. ——, 138 S.Ct. 115, 199 L.Ed.2d 187 (2017). And on appeal, Mr. Ybarra did not ask for plain error review, which " 'surely marks the end of the road for an argument for reversal not first presented to district court.' " *United States v. Lamirand*, 669 F.3d 1091, 1100 n.7 (10th Cir. 2012) (quoting *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1127-28 (10th Cir. 2011)). Thus, we decline to consider Mr. Ybarra's new argument.

IV. Conclusion

[1] Mr. Ybarra's prior convictions for federal bank robbery involved "the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). Thus, the district court correctly concluded that Mr. Ybarra's prior convictions involved violent felonies as defined under the Elements Clause. These prior convictions triggered the statutory 15-year minimum applied, so we affirm the denial of relief under § 2255.

All Citations

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