

Appendix

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAR 18 2019

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

JERRY LOUIS HUGHES,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 17-55734

D.C. No. 2:16-cv-09619-DSF
Central District of California,
Los Angeles

ORDER

Before: LEAVY, BEA, and N.R. SMITH, Circuit Judges.

We have reviewed appellant's briefing of uncertified issues and treat those arguments as a motion to expand the certificate of appealability. So treated, the motion is denied. *See* 9th Cir. R. 22-1(e); *Hiivala v. Wood*, 195 F.3d 1098, 1104-05 (9th Cir. 1999); *see also United States v. Bankston*, 901 F.3d 1100 (9th Cir. 2018); *United States v. Watson*, 881 F.3d 782 (9th Cir.), *cert. denied*, 139 S. Ct. 203 (2018); *United States v. Gutierrez*, 876 F.3d 1254 (9th Cir. 2017). *Compare* 18 U.S.C. § 924(c)(3)(A) *with* U.S.S.G. § 4B1.2(a)(1) (2003).

Appellee's motion for summary affirmance (Docket Entry No. 29) is granted. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (stating standard); *see also Watson*, 881 F.3d 782.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MEMORANDUM

Case No. CV 16-9619 DSF
CR 02-904 DSF

Date 5/22/17

Title United States v. Jerry Louis Hughes

Present: The DALE S. FISCHER, United States District Judge
Honorable

Debra Plato

Not Present

Deputy Clerk

Court Reporter

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

Proceedings: (In Chambers) Order DENYING Motion to Vacate, Set Aside, or
Correct Sentence Under 28 U.S.C. § 2255

Defendant/Petitioner Jerry Louis Hughes brings two challenges to his sentence based on the Supreme Court's decision in Johnson v. United States, 135 S.Ct. 2551 (2015), that invalidated the residual clause of 18 U.S.C. § 924(e). The first – a challenge to his career offender sentencing enhancement under the Sentencing Guidelines – is foreclosed by Beckles v. United States, 137 S.Ct. 886 (2017). The second argument is that Defendant's mandatory consecutive sentence under 18 U.S.C. § 924(c) is invalid because Johnson applies equally to the residual clause of § 924(c) and Defendant's conviction for armed bank robbery does not satisfy the element clause of that statute, 18 U.S.C. § 924(c)(3)(A). The Court has previously rejected this argument in other cases on full briefing by the Federal Public Defender and will repeat its analysis here.

Section 924(c)(3)(A) defines a crime of violence, in part, as "a felony [that] has as an element the use, attempted use, or threatened use of physical force against the person or property of another." The Ninth Circuit has previously ruled that both federal armed bank robbery and federal bank robbery are crimes of violence under identical elements clauses of other statutes. See United States v. Wright, 215 F.3d 1020, 1028 (9th Cir. 2000) (armed bank robbery); United States v. Selfa, 918 F.2d 749 (9th Cir. 1990) (bank robbery).

Defendant argues that any use of force or threatened force is required to be

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MEMORANDUM

intentional rather than reckless and contends that armed bank robbery does not necessarily require intentional use or threat of violent force. This argument is based on Fernandez-Ruiz v. Gonzales, 466 F.3d 1121 (9th Cir. 2006), which interpreted and extended the Supreme Court's decision in Leocal v. Ashcroft, 543 U.S. 1 (2004), a decision issued after both Wright and Selfa.

Wright and Selfa are not "clearly irreconcilable" with Leocal and Fernandez-Ruiz and are, therefore, binding on this Court. See Miller v. Gammie, 335 F.3d 869, 893 (9th Cir. 2003). Even if Defendant's argument had some potential merit as applied to simple bank robbery, armed bank robbery under § 2113(d) requires that the defendant have "assault[ed] any person, or put[] in jeopardy the life of any person by the use of a dangerous weapon or device." 21 U.S.C. § 2113(d). It is difficult to see how a defendant could be convicted under this statute and not have intended to use or threaten violent physical force given the inherently threatening and dangerous nature of the "dangerous weapon or device" that the defendant would have been required to have "used." Ninth Circuit law makes clear that "use" of the firearm under § 2113(d) means that the defendant has to "knowingly ma[k]e one or more victims at the scene of the robbery aware that he had a gun." United States v. Odom, 329 F.3d 1032, 1035 (9th Cir. 2003). Secretly possessing the weapon is not enough.¹ Defendant fails to propose any scenario, plausible or not, in which a defendant would rob a bank while knowingly making a person aware of the defendant's possession of a weapon, and the defendant yet would have failed to have intentionally assaulted that person. Defendant seems to believe that if a robber tells (or shows) people in a bank that he is armed with a dangerous weapon while robbing the bank, he has not committed assault as long as he has no subjective intent to use that weapon. He provides no support for this unlikely proposition. The only plausible reason to make people in a bank aware that you have a weapon while you are robbing that bank is to intentionally provoke fear of physical harm in those people.

The motion is DENIED. A certificate of appealability is GRANTED in order to determine whether federal armed bank robbery remains a crime of violence in light of Leocal and Fernandez-Ruiz.

¹ In this important respect the federal statute differs from the Massachusetts armed robbery statute that the Ninth Circuit found not to categorically satisfy the elements clause of the crime of violence definition. United States v. Parnell, 818 F.3d 974 (9th Cir. 2016). The Massachusetts statute only requires possession of a weapon during the crime. Id. at 978. In contrast, the federal statute explicitly requires assaulting or putting in jeopardy the life of a person by use of a dangerous weapon or device.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MEMORANDUM

IT IS SO ORDERED.