No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 2019

ROBERT HENDRICKS,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Court of Appeals agreed that the District Court erred when at petitioner's trial for credit union robbery it permitted over objection one of the credit union employees to testify that her presence during the robbery left her with a "fear of groups of black men." 921 F.3d 320, 330 (2d Cir. 2019). The Court of Appeals correctly recognized that such testimony "carried a substantial risk of evoking racial bias," its relevance was minimal and its admission was therefore erroneous. *Id.* Nevertheless, the Court of Appeals applying the harmless error rule for non-constitutional errors refused to reverse petitioner's conviction concluding that petitioner had failed to demonstrate that the error was not harmless. *Id.*

"[V]iolations of certain constitutional rights are not, and should not be, subject to harmless error analysis because those rights protect important values that are unrelated to the truth-seeking function of the trial." *Rose v. Clark*, 478 U.S. 570, 587 (1986) (Stevens, J., concurring). One Circuit Court and one state court of last resort agree. *Miller v. North Carolina*, 583 F.2d 701, 708 (4th Cir. 1978); *State v. Thompson*, 233 So.3d 529, 562-563 (La. 2017). Moreover, even if a harmless error analysis applies, the harmless error rule applicable to constitutional violations should apply.

This Court should grant review to decide this question of constitutional import over which the United States courts and state courts of last resort are divided:

> Isn't the erroneous admission of racially charged prejudicial evidence a structural error requiring automatic reversal or, at a minimum, one that requires analysis under a constitutional harmless error rule and not the traditional harmless error rule?

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The decision of the United States Court of Appeals for the Second Circuit affirming petitioner's judgment of conviction is reported as *United States v. Hendricks,* 921 F.3d 320 (2d Cir. 2019) (Cabranes, Pooler and Droney, Circuit Judges), a copy of which is annexed hereto as Appendix A.

The unreported order of the United States Court of Appeals for the Second Circuit, dated July 9, 2019, denying petitioner's petition for rehearing with a suggestion for rehearing *en banc* is annexed hereto as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals sought to be reviewed was entered on April 11, 2019, and the order of that court denying petitioner's petition for rehearing was entered on July 9, 2019. Justice Ginsburg extended petitioner's time to file a petition for certiorari until December 6, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The following constitutional provisions are implicated in this case:

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law . . .

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . an impartial jury of the State and district wherein the crime shall have been committed . . .

United States Constitution, Amendment XIV:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. There was no dispute that on August 19, 2013 the Hendricks brothers, Shakeal and Taiquan, participated in the armed robbery of the Access Federal Credit Union along with a third individual and that Charles Robinson drove the getaway car. The government contended that the third participant was Shakeal's and Taiquan's great uncle, petitioner Robert Hendricks, a claim petitioner challenged at trial. Based on the foregoing conduct petitioner was charged in a two-count indictment. Count One of the Second Superseding Indictment charged Shakeal, Taiquan, Robinson and petitioner with violating the federal bank robbery statute in that on August 19, 2013, in Oneida County, the defendants "by force, violence and intimidation" took from the person and presence of another, $24,400 belonging to the Access Federal Credit Union, a credit union insured by the National Credit Union Administration Board, in violation of 18 U.S.C. §2113(a). A12.[1] Count Two charged that the three Hendricks defendants aided and abetted each other in the use, carrying and brandishing of a handgun in connection with a "crime of violence," the robbery charged in Count One, in violation of 18 U.S.C. §924(c)(1)(A)(ii). A12-A13.

2. Shakeal and Taiquan pled guilty prior to trial and petitioner and Robinson were tried together. Trial lasted five-days during which the government called 10 witnesses including, *inter alia*, three bank employees (Williams, Reppard and Reader) and a customer (Rossi) all of whom were present in the credit union at the

[1] "A" refers to the Appendix filed by Petitioner in the Court of Appeals; "PSR" refers to the Pre-Sentence Report filed in the Court of Appeals under seal; and "Gov't C.A. Br." refers to the Government's Opposition Brief dated August 16, 2018.

time of the robbery but none of whom identified petitioner when first showed a photo array. The government also called a bystander (Bassi) standing outside of the credit union who observed the participants fleeing the credit union but who not only failed to identify the 55-year old petitioner as a participant but indicated that he saw "two kids" jump into the getaway car. A78. Other government witnesses included petitioner's nephew (Shakeal) who implicated petitioner in the robbery, as well as a detective who testified requiring certain inculpatory and exculpatory statements made by petitioner during the various interviews he had given to the authorities. The jury convicted petitioner on both counts and acquitted co-defendant Robinson on Count One (the only count in which Robinson was charged). Because of petitioner's career offender status, the district court imposed a virtual life-sentence of 360 months even though the more culpable Shakeal and Taiquan were sentenced to 99 and 125 months, respectively. PSR at 2.

3. On appeal petitioner challenged, *inter alia*, the admission over objection of victim-impact testimony, including one particularly egregious instance where one of the credit-union employee victims (Reader) was permitted to give prejudicial and racially charged victim impact testimony. Thus, despite defense objection the district court permitted Reader to testify that as a result of the robbery she was

> [v]ery leery of unfamiliar situations. If I walk around and there's a group of black men, it bothers me a little bit. I would avoid—if they were like all standing in front of a store, I would avoid going in the store or go around them.

921 F.3d at 324, 329.

The government's position on appeal was also troubling. The government neither acknowledged error in its brief nor acknowledged that appeals to racial bias are problematic. On the contrary, the government brazenly defended its conduct suggesting that Reader's testimony to a predominantly white jury may have benefited petitioner since it rendered the victim "less sympathetic as a witness." Govt. C.A. Br. 41 n. 18.

The Second Circuit agreed with petitioner that the district court abused its discretion when it permitted over objection Reader's racially charged testimony. Nevertheless, despite its finding of error, the Court of Appeals affirmed based on its conclusion that any error was harmless. 921 F.3d at 331. The Second Circuit rejected petitioner's argument that such an error was structural and should not be subject to any harmless error analysis. Instead, applying the harmless error rule enunciated in *Kotteakos v. United States*, 328 U.S. 750, 765 (1946), i.e., for non-constitutional errors, the Second Circuit concluded that it was enough to uphold petitioner's conviction so long as it held a "fair assurance that the jury's judgment was not substantially swayed by the error." 921 F.3d at 330.

REASONS FOR GRANTING THE WRIT

Justice Sotomayor concluded her statement concurring in the denial of certiorari in *Calhoun v. United States*, 568 U.S. ___, 133 S.Ct. 1136, 1138 (2013) (Sotomayor, J., respecting denial of certiorari), a petition challenging the erroneous admission of racially and prejudicially charged evidence, with the admonition that she hopes "never to see a case like this again." This case demonstrates that admonitions alone are an inadequate safeguard to prevent the improper injection of

racial bias into a case, particularly when it could conflict with the natural inclination of many a prosecutor to win at any cost. Unless such improper conduct is met with real consequences there is a "serious risk [of] systemic injury to the administration of justice." *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017).

The prejudicial admission of racially charged evidence implicates a number of constitutional protections. Those prohibitions include the Fifth Amendment right to a fair trial, the Sixth Amendment right to an impartial jury as well as the Fourteenth Amendment right to due process and equal protection. *See Peña-Rodriguez*, 137 S. Ct. at 869 (Sixth Amendment is implicated "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant"); *United States v. Cabrera*, 222 F.3d 590, 594 (9th Cir. 2000) ("Appeals to racial, ethnic, or religious prejudice during the course of a trial violate a defendant's Fifth Amendment right to a fair trial"); *United States v. Runyon*, 707 F.3d 475, 494 (4th Cir. 2013) (statements or evidence "capable of inflaming jurors' racial or ethnic prejudices" can "violate a defendant's rights to due process and equal protection of the laws"). Indeed, "[d]iscrimination on account of race was the primary evil at which the Amendments adopted after the War Between the States, including the Fourteenth Amendment, were aimed." *Rose v. Mitchell*, 443 U.S. 545, 554 (1979); *see also McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) ("[T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States.").

In *Chapman v. California*, 386 U.S. 18, 23 (1967) this Court recognized that even though harmless-error could apply to federal constitutional violations those

errors cannot be deemed harmless when they "affect [the] substantial rights" of a defendant. As Justice Stevens noted in his concurring opinion in *Rose v. Clark*, 478 U.S. 570, 587 (1986), "violations of certain constitutional rights are not, and should not be, subject to harmless error analysis because those rights protect important values that are unrelated to the truth-seeking function of the trial."; *see also Tankleff v. Senkowski*, 135 F.3d 235, 248 (2d Cir. 1998) (holding that *Batson* claims are not amenable to harmless error review "because exclusion of jurors on the basis of race is a structural error that can never be harmless").

Indeed, because the effect of the erroneous admission of racially charged evidence is "simply too hard to measure;" it will always result in "fundamental unfairness." *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1908 (2017). Discrimination on the basis of race in the trial setting affects fundamental rights and has no place in the judicial system. *Wayte v. United States*, 470 U.S. 598, 608 (1985) (prohibiting the exercise of prosecutorial discretion on the basis of race); *cf. United States v. Jacobson,* 15 F.3d 19, 23 (2d Cir. 1994) ("a defendant could not be said to have waived his right to appellate review of a sentence . . . based on a constitutionally impermissible factor such as race").

Regardless of whether the introduction of racially biased testimony leads to an erroneous conviction, the violation of an individual's Fifth and Fourteenth Amendment rights to due process and equal protection will always result in fundamental unfairness. This is because "statements that are capable of inflaming jurors' racial or ethnic prejudices 'degrade the administration of justice.'" *Runyon*, 707 F.3d at 494 (*citing Battle v. United States,* 209 U.S. 36, 39 (1908)). As a result,

this Court has recently reiterated that the problem of racial bias in the jury system "if left unaddressed, would risk systemic injury to the administration of justice." *Peña-Rodriguez,* 137 S. Ct. at 868. Because "racial bias implicates unique historical, constitutional, and institutional concerns" efforts to "address the most grave and serious statements of racial bias" ensures "that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy." *Id.* Moreover, this Court noted that "[t]he duty to confront racial animus in the justice system is not the legislature's alone." *Id.* at 867. Indeed, it is "much too late in the day to treat lightly the risk that racial bias may influence a jury's verdict in a criminal case." *United States v. Doe*, 903 F.2d 16, 21 (D.C. Cir. 1990).

Based on the foregoing, petitioner submits that the prejudicial admission of racially charged evidence is of a kind that should not be subject to the traditional harmless error relating to the erroneous admission of evidence. The Court of Appeals should have found that the error was structural in nature requiring automatic reversal. Such a conclusion is consistent with this Court's prior precedents in the context of equal protection violations. *See Vasquez v. Hillery*, 474 U.S. 254, 266 (1986) (conviction reversed where African Americans were improperly excluded from the grand jury, even though petit jury reached valid verdict).

The Fourth Circuit agrees. *Miller v. North Carolina, supra.* In *Miller*, the Fourth Circuit reviewed the convictions of three African American defendants convicted of raping a white woman. During summation the prosecutor argued that there could not have been consent since no white woman would consent to having

sex with an African American. In reversing the defendants' convictions the Fourth Circuit determined that it was unnecessary to consider whether the error was harmless since

> we incline to the view that the instant case falls into the category of constitutional violations to which, as *Chapman* recognizes, the harmless error rule does not apply. . . Where the jury is exposed to highly prejudicial argument by the prosecutor's calculated resort to racial prejudice on an issue as sensitive as consent to sexual intercourse in a prosecution for rape, we think that the prejudice engendered is so great that automatic reversal is required. In such a case, the impartiality of the jury as a fact-finder is fatally compromised. Because that contamination may affect the jury's evaluation of all of the evidence before it, speculation about the effect of the error on the verdict is fruitless. Reversal must be automatic.

Miller, 583 F.2d at 708. Likewise, the Supreme Court of Louisiana has reached the same conclusion. *State v. Thompson*, 233 So.3d 529, 562-563 (La. 2017).

In *Thomson*, the defendant Mayor was convicted with malfeasance of office and he argued that the prosecution had improperly injected race into the case when in questioning a witness it stated "there's been an allegation made ... [that] the Mayor has been harried by various conservative and or white people...." The trial court overruled defense counsel's objection and request for a mistrial. After the court of appeals affirmed, the Louisiana Supreme Court reversed. Noting that although this Court

> has not expressly ruled that an appeal to racial prejudice during the presentation of evidence or argument to the jury constitutes structural error, in our view, such an appeal carries the indicia of structural error in that racial bias implicates the defendant's right to trial before an impartial jury.

233 So.3d at 562. As a result, *Thompson* concluded that the court of appeals erred when it employed a harmless error analysis.

> The right to a fair trial that is free from improper racial implications is one that serves not only to protect the defendant from a conviction founded on prejudice, but also to protect the public's confidence in the integrity of the judicial process and the administration of justice. Where the jury is improperly exposed to an appeal to racial prejudice, the impartiality of the jury as a factfinder is compromised.

Id. at 563; *compare State v. Cabrera,* 700 N.W.2d 469, 475 (Minn. 2005) (prosecutor's improper injection of race into case required reversal of defendant's conviction "in the interest of justice and in the exercise of our supervisory powers" notwithstanding the strength of the state's evidence and Court's conclusion that "it would be difficult for us not to conclude that the prosecutor's comments were harmless beyond a reasonable doubt" since an affirmance "would undermine our strong commitment to routing out bias, no matter how subtle, indirect, or veiled").

Moreover, because automatic reversal will not deprive the prosecution of a chance to obtain a valid conviction this Court and the government should welcome the opportunity to determine petitioner's guilt or innocence at a prosecution that is free of constitutional violations. By ensuring that a defendant's constitutional rights in this weighty area are honored the respect and confidence of the judicial system is restored.

Even if the Second Circuit was correct in concluding that the error was not structural, it erred when it applied the *Kotteakos* harmless error test. At a minimum, the Court of Appeals should have applied the harmless error test for

constitutional violations. *See, e.g., Neder v. United States,* 527 U.S. 1, 8 (1999) (a court must conclude "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"). "The test for harmless constitutional error is stricter than its statutory counterpart." *United States v. Lane*, 474 U.S. 438, 460-62 (1986) (Brennan, J., concurring in part and dissenting in part). A number of courts have applied the constitutional harmless error test when race is improperly injected. *See, e.g., State v. Monday*, 257 P.3d 551 (Wash. 2011) (vacating conviction where prosecutor improperly injected race into case by pronouncing "police" as "po-leese" while conducting examination of reluctant African-American witnesses and concluding that the state was unable to prove beyond a reasonable doubt that the error was harmless); *United States v. Cabrera*, 222 F.3d 590, 596-97 (9th Cir. 2000) (reversing conviction on plain error grounds, "[a]lthough we find that the evidence was sufficient to convict [the defendants]" the Detective's "repeated references" to the defendant "Cuban origin and his generalizations about the Cuban community prejudiced [defendant] in the eyes of the jury"); *United States v. Vue*, 13 F.3d 1206, 1213 (8th Cir. 1994) (reversing conviction despite sufficient evidence to sustain the convictions because "the injection of ethnicity into the trial clearly invited the jury to put the [defendants'] racial and cultural background into the balance of determining their guilt," the error was "of constitutional dimension" and thereby undermining the bedrock principle of "[f]ormal equality before the law").

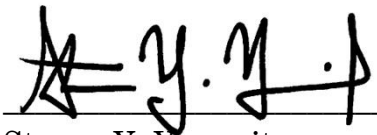
Because this case presents both a question of exceptional constitutional importance and an issue over which the United States courts of appeals and the state courts of last resort are divided, this Court should grant certiorari and

ultimately vacate petitioner's conviction in favor of a retrial at which all racially charged evidence is excluded. Sup. Ct. R. 10(a) and (c).

CONCLUSION

In view of the important constitutional rights at stake, and the split in authority petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,



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921 F.3d 320
United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee,
v.
Robert HENDRICKS, Defendant-Appellant,
Shakeal Hendricks, Taiquan Howard, aka Taiquan Hendricks, Charles E. Robinson, Jr., Defendants.

No. 15-2525-cr
|
August Term 2018
|
Argued: December 5, 2018
|
Decided: April 11, 2019

Synopsis

Background: Defendant was convicted in the United States District Court for the Northern District of New York, Norman A. Mordue, J., of credit union robbery and using a firearm during a crime of violence, and was sentenced to 360 months' imprisonment followed by 5 years of supervised release. Defendant appealed.

Holdings: The Court of Appeals, José A. Cabranes, Circuit Judge, held that:

[1] credit union robbery by force and violence, or by intimidation categorically constituted predicate "crime of violence" for purposes of conviction for using a firearm during a crime of violence;

[2] district court did not plainly err in admitting victim impact testimony;

[3] district court's error in admitting credit union customer service representative's testimony regarding her fear of groups of black men following robbery was harmless;

[4] district court did not err in excluding photograph of individual who defendant contended actually committed robbery; and

[5] district court did not err in sentencing defendant as career offender under the sentencing guidelines.

Affirmed.

West Headnotes (22)

[1] Criminal Law
Review De Novo

Court of Appeals reviews legal questions underlying a challenge to a criminal conviction de novo.

Cases that cite this headnote

[2] Criminal Law
Reception and Admissibility of Evidence

District court's evidentiary rulings are reviewed for abuse of discretion to the extent that they were objected to below.

Cases that cite this headnote

[3] Criminal Law
Reception and Admissibility of Evidence

To find an abuse of discretion, Court of Appeals must conclude that the trial judge's evidentiary rulings were arbitrary and irrational.

Cases that cite this headnote

[4] Criminal Law
Authentication and Foundation

District court has considerable discretion in deciding whether an adequate foundation has been laid for the introduction of relevant documents.

Cases that cite this headnote

[5] Criminal Law
Evidence

Court of Appeals accords great deference to a district court's analysis under rule providing for exclusion of relevant evidence based on

potential for unfair prejudice. Fed. R. Evid. 403.

Cases that cite this headnote

[6] **Criminal Law**
Evidence in general

Even where Court of Appeals concludes that a district court erred in admitting evidence under rule providing for exclusion of relevant evidence based on potential for unfair prejudice, the error will nonetheless be deemed harmless if Court of Appeals concludes with fair assurance that the jury's judgment was not substantially swayed by the error. Fed. R. Evid. 403.

Cases that cite this headnote

[7] **Criminal Law**
Sentencing and Punishment

Where a defendant challenges his or her sentence on a basis not raised before the district court, Court of Appeals reviews for plain error.

Cases that cite this headnote

[8] **Weapons**
Crimes of violence

Federal credit union robbery by force and violence, or by intimidation categorically constituted predicate "crime of violence" for purposes of conviction for using a firearm during a crime of violence, where credit union robbery conviction required proof of knowledge of the crime, namely, taking of property of another by force and violence or intimidation, and that defendant at least knew that his actions would create impression in an ordinary person that resistance would be met by force. 18 U.S.C.A. §§ 924(c)(1)(A)(ii), 2113(a).

1 Cases that cite this headnote

[9] **Weapons**
Crimes of violence

To determine whether a crime is a crime of violence under statute penalizing use of firearm during and in relation to crime of violence, Court of Appeals applies the so-called "categorical approach." 18 U.S.C.A. § 924(c)(3)(A).

1 Cases that cite this headnote

[10] **Weapons**
Crimes of violence

Under categorical approach for determining whether offense constitutes "crime of violence" under statute penalizing use of firearm during and in relation to crime of violence, court evaluates whether the minimum criminal conduct necessary for conviction under a particular statute necessarily involves violence; in doing so, court focuses only on the elements of the offense and does not consider the particular facts of the underlying crime. 18 U.S.C.A. § 924(c)(3)(A).

Cases that cite this headnote

[11] **Criminal Law**
Particular Evidence

District court did not plainly err in admitting victim impact testimony of two credit union tellers regarding whether they returned to work following robbery, and testimony of credit union customer service representative regarding how robbery affected her, in prosecution for credit union robbery by force and violence, or by intimidation, where testimony regarding how the credit union employees felt after the robbery was relevant because the lingering effects of the robbery tended to show that witnesses were intimidated at the time of the robbery, and tellers' brief answers that they were unable to return to work did not carry a substantial risk of unfair prejudice. 18 U.S.C.A. §§ 924(c)(1)(A)(ii), 2113(a); Fed. R. Evid. 403.

Cases that cite this headnote

[12] **Criminal Law**
Discretion of Lower Court

Abuse of discretion is a nonpejorative term of art that implies no misconduct on the part of the district court; term merely describes circumstances in which a district court bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or renders a decision that cannot be located within the range of permissible decisions.

Cases that cite this headnote

[13] **Criminal Law**
Evidence calculated to create prejudice against or sympathy for accused

Testimony regarding a crime's impact on a victim is admissible at trial if it is relevant to prove an element of the charged offense and is subject to the normal tests for relevancy and unfair prejudice. Fed. R. Evid. 401, 403.

Cases that cite this headnote

[14] **Criminal Law**
Evidence calculated to create prejudice against or sympathy for accused

When evaluating the admissibility of victim impact testimony during trial, a district court should carefully consider the prejudicial potential of such testimony. Fed. R. Evid. 403.

Cases that cite this headnote

[15] **Robbery**
Putting in fear

Robbery
Force and putting in fear

A defendant acts "by intimidation" within the meaning of federal credit union robbery statute when defendant knowingly engages in conduct from which an ordinary person in the teller's position reasonably could infer a threat of bodily harm; although standard is objective, evidence that the teller felt threatened is probative of whether a reasonable person would have been afraid under the same circumstances. 18 U.S.C.A. § 2113(a).

Cases that cite this headnote

[16] **Criminal Law**
Evidence calculated to create prejudice against or sympathy for accused

District court abused its discretion in admitting credit union customer service representative's testimony regarding her fear of groups of black men following robbery, in prosecution for credit union robbery and using a firearm during a crime of violence, where testimony carried a substantial risk of evoking racial bias. Fed. R. Evid. 403.

Cases that cite this headnote

[17] **Criminal Law**
Particular Offenses and Prosecutions

Criminal Law
Burglary, robbery, larceny, and embezzlement;stolen property

District court's error in admitting credit union customer service representative's testimony regarding her fear of groups of black men following robbery, in prosecution for credit union robbery and using a firearm during a crime of violence, was harmless, where government's evidence against defendant, including detailed testimony of robbery participant regarding defendant's involvement in planning and executing the crime, cellular telephone data, and defendant's statements admitting that he participated in robbery, was overwhelming, and wrongly admitted testimony was limited in scope.

Cases that cite this headnote

[18] **Criminal Law**
Incriminating others

Criminal Law
Pictures of accused or others; identification evidence

District court did not err in excluding photograph of individual who defendant contended actually committed federal credit union robbery, where codefendant's testimony that he and individual were close friends, eye-witness account describing "two kids" running away from robbery, even though defendant was 55 years old at the time, and records showing phone calls between codefendant's phone and individual's phone before and after the robbery was insufficient evidence to establish required nexus between individual and the robbery.

Cases that cite this headnote

[19] Criminal Law
Incriminating others

A criminal defendant generally has the right to introduce at trial evidence tending to show that another person committed the crime, so long as the evidence sufficiently connects the other person to the crime.

Cases that cite this headnote

[20] Criminal Law
Incriminating others

Trial court must be sensitive to the special problems presented by alternative perpetrator evidence, and must ensure that the defendant shows a sufficient nexus between the crime charged and the asserted alternative perpetrator.

Cases that cite this headnote

[21] Sentencing and Punishment
Particular offenses

District Court did not err in sentencing defendant convicted of credit union robbery and using a firearm during a crime of violence as a career offender under the sentencing guidelines, where defendant's prior felony New York conviction for burglary in the second degree constituted crime of violence for purposes of career offender Guidelines. N.Y. Penal Law § 140.25; U.S.S.G. §§ 4B1.1, 4B1.2(a)(2).

1 Cases that cite this headnote

[22] Constitutional Law
Sentencing guidelines
Sentencing and Punishment
Retroactive Operation

Court of Appeals generally applies the version of the United States Sentencing Guidelines in effect at the time of sentencing, unless doing so would violate the Ex Post Facto Clause. U.S. Const. art. 1, § 9, cl. 3; U.S.S.G. § 1B1.1 et seq.

Cases that cite this headnote

***323** On Appeal from the United States District Court for the Northern District of New York

Attorneys and Law Firms

RAJIT S. DOSANJH, Assistant United States Attorney, for Grant C. Jaquith, United States Attorney for the Northern District of New York, Syracuse, NY, for Appellee.

STEVEN Y. YUROWITZ, New York, NY, for Defendant-Appellant.

Before: Cabranes, Pooler, and Droney, Circuit Judges.

Opinion

José A. Cabranes, Circuit Judge:

Defendant-Appellant Robert Hendricks ("Robert") appeals from an August 4, 2015 judgment of the United States District Court for the Northern District of New York (Norman A. Mordue, *Judge*) convicting him, following a jury trial, of (1) credit union robbery, in violation of 18 U.S.C. §§ 2113(a), 2; and (2) using a firearm during a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii), 2. The District Court sentenced Robert principally to 360 months' incarceration to be followed by 5 years of supervised release. On appeal, Robert challenges the validity of his conviction for using a firearm during a crime of violence, arguing that federal credit union robbery does not qualify as a "crime of violence" for

the purposes of § 924(c). He further contends that the District Court abused its discretion and denied him a fair trial by (1) excluding a photograph of the individual Robert claims actually robbed the credit union, and (2) admitting testimony of victim witnesses regarding the robbery's impact on them in the aftermath of the crime. Finally, Robert challenges his sentence and argues that the District Court plainly erred by sentencing him as a career offender under the residual clause of the 2014 edition of United States Sentencing Guidelines § 4B1.2(a)(2).

I. BACKGROUND

A. The Access Federal Credit Union Robbery

On the morning of August 19, 2013, Robert Hendricks ("Robert"), Shakeal Hendricks ("Shakeal"), Taiquan Howard ("Taiquan"), and a fourth man drove to Camden, New York, where they intended to rob a credit union. [1] Deeming the operation in Camden too risky, the four moved on to another target—the Access Federal Credit Union ("AFCU") in Rome, New York.

On reaching the AFCU at approximately 12:25 p.m., the four men parked in a nearby lot. Shakeal entered the credit union lobby first while the other three men remained in the car. Shakeal approached the two tellers on duty and requested information regarding the credit union's financial services. The tellers directed him to a customer service representative's cubicle.

***324** Shortly thereafter, at approximately 12:30 p.m., Taiquan and Robert entered the credit union brandishing handguns. Taiquan vaulted the teller's counter and pointed his handgun at the first teller, while Robert approached the second teller, who was assisting a customer. Robert shoved the customer, grabbed him by the neck, pushed him down into a chair, and warned that he would "blow [him] away." [2] At the same time, Shakeal forced the customer service representative to exit her cubicle and then left the credit union. Robert pointed a gun at the customer service representative and told her to sit on the floor.

Meanwhile, Taiquan, his gun still pointed at the first teller, asked who could open the vault. The first teller responded that he could, so Taiquan forced him to do so. Robert then threw a backpack he was carrying to Taiquan to fill with money from the vault. While the first teller filled the backpack with cash, Robert remained in the lobby with his gun drawn, observing the other AFCU employees and its lone customer.

Once the backpack was full, Taiquan and Robert left the credit union. The four men then drove to a Dunkin' Donuts in East Syracuse, New York, before going their separate ways.

B. The Government's Case at Trial

In an indictment filed on March 13, 2014, Robert, Taiquan, and Charles E. Robinson, Jr. were charged with credit union robbery, in violation of 18 U.S.C. §§ 2113(a), 2. Robert and Taiquan were also charged with using a firearm during a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii), 2. Taiquan pleaded guilty to both counts, but Robert and Charles E. Robinson, Jr. proceeded to trial. Shakeal testified as a government witness pursuant to a plea agreement.

At trial, the Government elicited testimony from, among others, the three credit union employees who were present for the robbery. The Government asked these witnesses (1) how they felt during the robbery, and (2) how the robbery impacted them in the aftermath of the crime.

With respect to the latter inquiry, the Government asked the first teller whether he was "able to return to work" after the robbery. [3] He responded: "No. I tried to go to a different branch and I didn't make it behind the teller line. I walked in the back door and ... Just a lot of fear and there's just—I couldn't do anything but just think about what happened and, no, I wasn't able to go back to work, no." [4]

The Government asked the second teller the same question. She testified that she did not return to work after the robbery because she "couldn't bring [herself] to go back in that credit union." [5]

Finally, the Government asked the customer service representative how the "experience affect[ed her]." [6] She responded: "Very leery of unfamiliar situations. If I walk around and there's a group of black men, it bothers me a little bit. I would avoid—if they were like all standing in front of a store, I would avoid going in the store or go around them. I'm getting better about that, but it was a very scary situation. I didn't know what they were going to

do, didn't know who they were going to hurt. My second family, you know, they were hurting our own. I see what it ***325** did to the tellers. I don't have nightmares or anything." [7]

Robert objected to the Government's question to the first teller and customer service representative based on irrelevance. He further objected to the testimony of the customer service representative as "potentially prejudicial" and "introduced for no purpose other than to inflame the jury." [8] The District Court overruled each objection.

C. Robert's Defense

At trial, Robert did not testify and called no witnesses. Instead, he relied on cross-examination of the Government's witnesses to suggest that he was mistakenly identified as a participant in the robbery.

In support of his misidentification defense, Robert sought to implicate a third party, Jamar Sesum, a.k.a. "Bam" ("Bam"). [9] While cross-examining one of the Government's witnesses, Robert sought to admit into evidence a photograph of Bam. The Government objected, but the District Court admitted the photograph "subject to connection," requiring Robert to later demonstrate its relevance. [10] At the close of trial, the Government renewed its objection, arguing that Robert had failed to show the photograph was relevant and that introducing it would confuse the jury. The District Court found Robert's contention that Bam was a third-party perpetrator "really, really, speculative" and excluded the photograph. [11]

D. Jury Verdict and Sentencing

After deliberating for less than five hours, the jury found Robert guilty of both credit union robbery and using a firearm during a crime of violence. [12]

At sentencing, the District Court found that Robert was a "career offender" under the 2014 edition of United States Sentencing Guidelines § 4B1.1 because of his prior felony convictions for burglary in the second degree, in violation of New York Penal Law § 140.25(2), and criminal sale of a controlled substance in the third degree, in violation of New York Penal Law § 220.39(1). [13] As a result of Robert's status as a "career offender," his advisory Guidelines range was 360 months' to life imprisonment. On July 23, 2015, the District Court sentenced Robert to 240 months' imprisonment on the credit union robbery charge and 120 months' imprisonment on the § 924(c) charge, to run consecutively, for a total effective sentence of 360 months' imprisonment. This appeal followed.

II. DISCUSSION

This case presents four questions:

***326** (1) Whether federal credit union robbery, in violation of 18 U.S.C. § 2113(a), is categorically a "crime of violence" for the purposes of a conviction for using a firearm during a crime of violence under 18 U.S.C. § 924(c)(1)(A)(ii);

(2) Whether the District Court abused its discretion when it admitted testimony from victims of the credit union robbery regarding the robbery's impact on them in the aftermath of the crime;

(3) Whether the District Court abused its discretion by excluding a photograph of a third party that Robert claims actually committed the robbery; and

(4) Whether the District Court plainly erred in sentencing Robert as a career offender under the residual clause of the 2014 edition of United States Sentencing Guidelines § 4B1.2(a)(2).

A. Standard of Review

[1] We review legal questions underlying a challenge to a criminal conviction *de novo*. [14] Because Robert did not challenge the validity of his conviction under § 924(c) before the District Court, we review his conviction for plain error. [15]

[2] [3] [4] [5] [6] The District Court's evidentiary rulings, in turn, are reviewed for abuse of discretion to the extent that they were objected to below. [16] "To find such abuse, we must conclude that the trial judge's evidentiary rulings were arbitrary and irrational." [17] A district court "has considerable discretion in deciding whether an adequate foundation has been laid for the introduction of relevant documents." [18] This Court "accord[s] particular

deference to the trial court's rulings as to foundation and relevance." [19] Similarly, we "accord great deference" to a district court's analysis under Federal Rule of Evidence 403. [20] Even where we conclude that a district court erred in admitting evidence under Rule 403, the error will nonetheless be deemed harmless if we conclude with "fair assurance that the jury's judgment was not substantially swayed by the error." [21]

[7] Finally, where, as here, a defendant challenges his or her sentence on a basis not raised before the District Court, we review for plain error. [22]

B. Credit Union Robbery as a "Crime of Violence"

[8] Robert contends that his conviction for using a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii), is invalid because federal credit union robbery under ***327** 18 U.S.C. § 2113(a) is not a "crime of violence" within the meaning of § 924(c).

We begin our analysis with the relevant statutory text. Section 924(c)(1) provides that:

> (A)... any person who, during and in relation to any crime of violence ... for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence ...
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years ... [23]

Section 924(c)(3) defines a "crime of violence" as "an offense that is a felony" and:

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. [24]

We refer to subparagraph (A) of § 924(c)(3) as the "force clause" and to subparagraph (B) as the "risk-of-force clause." [25]

[9] **[10]** To determine whether a crime is a "crime of violence" under § 924(c)(3)(A), we apply the so-called "categorical approach." [26] Under this "approach," we evaluate whether "the minimum criminal conduct necessary for conviction under a particular statute" necessarily involves violence. [27] In doing so, we focus only on the elements of the offense and do not consider the particular facts of the underlying crime. [28] In this case, then, we inquire whether the elements of credit union robbery necessarily involve physical force.

We have recently held that § 2113(a) is a "divisible" statute because it contains two separate paragraphs that "delineate[ ] two methods of committing" credit union robbery. [29] In this case, there is no dispute that Robert was charged with, and convicted of, the first method of committing credit union robbery—namely, "by force and violence, or by intimidation." [30] We therefore must determine whether credit union robbery "by force and violence, or by intimidation" categorically constitutes a "crime of violence." Perhaps unsurprisingly, we conclude that it does.

***328** Robert argues that his conviction under § 2113(a) does not categorically constitute a "crime of violence" because one might be convicted under this statute by *negligently* intimidating a victim. Because a "crime of violence" generally does not "encompass accidental or negligent conduct," [31] Robert contends the minimum criminal conduct necessary for a conviction under § 2113(a) does not necessarily involve the use or threatened use of force.

This argument is unavailing. The Supreme Court has held that § 2113(a) requires proof of "knowledge with respect to the *actus reus* of the crime (here, the taking of property of another by force and violence or intimidation)." [32] With respect to the "intimidation" element, a defendant "must at least *know* that his actions would create the impression in an ordinary person that resistance would be met by force." [33] In short, *knowledge*, not merely negligence, is required.

We recently observed that "this circuit, in a summary order, and our sister circuits, in published opinions, have consistently held that federal bank robbery by intimidation is a crime of violence under the force

clause of various sentence enhancement Guidelines and statutes." [34] Indeed, every circuit to have addressed the issue has held that bank robbery "by intimidation" under § 2113(a) involves the threatened use of physical force and thus constitutes a crime of violence within the meaning of § 924(c)(3)(A) or the career offender guideline, U.S.S.G. § 4B1.2(a). [35]

We thus have little difficulty in holding that bank robbery committed "by intimidation" categorically constitutes a crime of violence for the purposes of § 924(c)(1)(A), and, therefore, that Robert's conviction for using a firearm during a crime of violence under § 924(c)(1)(A)(ii) does not constitute error, much less "plain error." [36]

C. Victim Impact Testimony

[11] **[12]** Robert next argues that the District Court abused its discretion or erred by allowing the Government to question three credit union employee witnesses about the robbery's impact on them in the aftermath of the crime. [37] The Government ***329** counters that such evidence was relevant to prove that Robert committed the robbery "by intimidation." Though we agree that the District Court erred, we conclude that the error was, in the circumstances presented here, harmless.

[13] **[14]** Testimony regarding a crime's impact on a victim is admissible at trial if it is relevant to prove an element of the charged offense and is subject to the normal tests for relevancy and unfair prejudice under Federal Rules of Evidence 401 and 403, respectively. [38] When evaluating the admissibility of victim impact testimony during trial, a district court should carefully consider the prejudicial potential of such testimony.

[15] Here, Robert was charged with committing credit union robbery "by force and violence, or by intimidation." [39] A defendant acts "by intimidation" when he knowingly engages in conduct from which "an ordinary person in the teller's position reasonably could infer a threat of bodily harm." [40] Although this standard is objective, "evidence that the teller felt threatened is probative of whether a reasonable person would have been afraid under the same circumstances." [41]

Evidence regarding how the three credit union employees felt *during* the robbery is certainly relevant to whether Robert acted "by intimidation." Testimony regarding the robbery's impact on the victims in the *aftermath* of the crime may also be relevant to intimidation at the time of its commission. However, where—as here—the testimony concerns impact weeks and months after the crime had undisputedly ended, it likely is only minimally probative of whether Robert acted "by intimidation" *during* the robbery. Moreover, such testimony raises the specter of unfair prejudice.

We conclude that the District Court did not abuse its discretion or plainly err in determining that, for the purposes of Rule 401, the Government could ask the two tellers whether they could return to work and ask the customer service representative how the experience affected her. [42] ***330** Testimony regarding how the credit union employees felt after the robbery was relevant because the lingering effects of the robbery may tend to show that they were intimidated at the time of the robbery.

We further conclude that the District Court did not plainly err in admitting the testimony of the two tellers that they could not return to work under Rule 403. [43] The tellers' brief answers that they were unable to return to work did not carry a substantial risk of unfair prejudice.

[16] We reach a different conclusion, however, regarding the District Court's treatment of the customer service representative's testimony. Her testimony regarding her fear of groups of black men carried a substantial risk of evoking racial bias. Accordingly, the District Court should have stricken this testimony or issued a curative instruction pursuant to Federal Rule of Evidence 403, and its failure to do so was an "abuse of discretion." [44]

[17] That said, the record here permits us to conclude with "fair assurance that the jury's judgment was not substantially swayed by the error," and that the error is therefore harmless. [45] To determine whether an error is harmless, we consider "(1) the overall strength of the prosecution's case; (2) the prosecutor's conduct with respect to the improperly admitted evidence; (3) the importance of the wrongly admitted evidence; and (4) whether such evidence was cumulative of other properly admitted evidence." [46] The strength of the prosecution's case is the most important factor. [47]

In this case, the Government's evidence against Robert was overwhelming. Shakeal Hendricks, one of the robbery participants, provided detailed testimony regarding Robert's involvement in planning and executing the crime. Laverne Hendricks, Robert's relative, testified regarding his actions on the day of the robbery and described his clothing, which was also captured in surveillance footage of the robbery. Additionally, the prosecution presented cellular telephone data placing a cell phone associated with Robert in the vicinity of the initial target in Camden, the AFCU in Rome, and the Dunkin' Donuts in East Syracuse. Finally, Detective Bolton of the Rome Police Department testified regarding Robert's statements during two interviews that took place on October 18, 2013 and November 22, 2013. These statements include Robert's admission that he participated in the robbery and that he disposed of clothing worn during the robbery at the Dunkin' Donuts. Detective Bolton's testimony also revealed that Robert repeatedly made false claims that he later admitted were untrue. Taken together, this overwhelming evidence of guilt assures us that the jury was not substantially swayed by the improper testimony.

We are further assured that the error is harmless because the wrongly admitted testimony was limited in scope. The improper testimony of post-incident fear or trauma was not especially important to the Government's case. All three witness properly testified regarding the fear and intimidation they experienced during the robbery, and Robert never disputed that the robbery was conducted in an objectively intimidating manner.

***331** Accordingly, we conclude that, although the District Court abused its discretion in admitting the customer service representative's testimony regarding the robbery's impact on her in the aftermath of the crime, in the totality of circumstances presented in this record the error was harmless.

D. Third-Party Photograph

[18] Robert also argues that the District Court erred in excluding a photograph of Bam, who Robert contends actually committed the robbery. We disagree.

[19] **[20]** A criminal defendant generally has the right to introduce at trial evidence tending to show that another person committed the crime, so long as the evidence "sufficiently connect[s] the other person to the crime." [48] But "[t]he potential for speculation into theories of third-party culpability to open the door to tangential testimony raises serious concerns." [49] A court "must be sensitive to the special problems presented by 'alternative perpetrator' evidence" and must ensure that the defendant shows a "sufficient ... nexus between the crime charged and the asserted 'alternative perpetrator.' " [50]

Robert contends that he laid a sufficient foundation to support the introduction of Bam's photograph. He points to the following evidence: (1) Shakeal's testimony that he (Shakeal) and Bam were close friends; (2) an eye-witness account describing "two kids" running away from the robbery, even though Robert was 55 years old at the time; (3) records showing phone calls between Shakeal's phone and Bam's phone before and after the robbery; and (4) Shakeal's testimony that he went shopping for sneakers with Bam after the robbery.

Like the District Court, we conclude that this evidence is insufficient to show the required nexus between Bam and the robbery. Although the evidence Robert cites might tend to show that Bam knew about the robbery, none of the evidence places Bam anywhere near the robbery scene or suggests that he was otherwise involved in the crime. Accordingly, the District Court did not err in excluding Bam's photograph.

E. Application of the Career Offender Guidelines

[21] **[22]** Finally, Robert contends that the District Court erred in finding that he was subject to sentencing as a "career offender" under the 2014 edition of United States Sentencing Guidelines § 4B1.1. [51] Specifically, he argues that his prior felony conviction for burglary in the second degree, in violation of New York Penal Law § 140.25, does not constitute a "crime of violence" for the purposes of the career offender Guidelines. We are not persuaded.

Section 4B1.1 provides that:

> (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant

> offense of conviction is a felony that is either a crime of violence ***332** or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. [52]

The 2014 Sentencing Guidelines Manual defines "crime of violence" to mean any state or federal offense, punishable by imprisonment for a term exceeding one year, that:

> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is a burglary of a dwelling, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*. [53]

Robert contends that his conviction for second-degree burglary under New York law does not qualify as a "crime of violence" because the "residual clause" is void for vagueness. But this argument is foreclosed by the Supreme Court's recent decision in *Beckles v. United States*, —— U.S. ——, 137 S.Ct. 886, 197 L.Ed.2d 145 (2017), in which the Court concluded that the Sentencing Guidelines are not subject to void-for-vagueness challenges and upheld the career offender Guidelines.

We have already held that third-degree burglary under New York law qualifies as a "crime of violence" under the residual clause of § 4B1.2(a)(2). [54] In light of *Beckles*, it is clear that this holding remains good law. [55] Because, under New York law, third-degree burglary defines the lesser-included offense of burglary, [56] we have no difficulty extending this holding to Robert's second-degree burglary conviction. [57] Accordingly, the District Court did not err, much less plainly err, in sentencing Robert as a career offender pursuant to § 4B1.2(a)(2).

III. CONCLUSION

To summarize, we hold as follows:

(1) Credit union robbery, in violation of 18 U.S.C. § 2113(a), qualifies as a "crime of violence" under the "force clause" of § 924(c)(3)(A) for the purposes of Robert's conviction under 18 U.S.C. § 924(c)(1)(A)(ii);

(2) While the District Court erred or "abused its discretion" in admitting certain victim impact testimony, the error was harmless in this particular case in light of the substantial evidence of Robert's guilt;

***333** (3) The District Court did not err or "abuse its discretion" in excluding a photograph of an alleged third-party perpetrator because Robert failed to establish a sufficient nexus between the third party and the crime; and

(4) The District Court did not err, much less plainly err, in sentencing Robert as a career offender under the 2014 edition of United States Sentencing Guidelines § 4B1.2(a)(2).

For the foregoing reasons, we **AFFIRM** the August 4, 2015 judgment of the District Court.

All Citations

921 F.3d 320

Footnotes

1 Because Robert appeals from a judgment of conviction entered after a jury trial, we "draw the facts from the evidence presented at trial, viewed in the light most favorable to the government." *United States v. Thompson*, 896 F.3d 155, 159 (2d Cir. 2018) (internal quotation marks omitted). The Government alleged that Charles Robinson, Jr. was the fourth man, but he was acquitted of all charges at trial.

2 App. 70.

3 *Id.* at 54.

4 *Id.*
5 *Id.* at 57.
6 *Id*. at 65.
7 *Id*.
8 *Id.*
9 The record reflects inconsistent spelling of this individual's name. We adopt the spelling used by the parties in their briefs on appeal.
10 App. 86.
11 *Id*. at 175.
12 The jury acquitted Charles E. Robinson, Jr. of credit union robbery, the sole crime with which he was charged.
13 U.S.S.G. § 4B1.1 provides that:

> (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

14 *United States v. Sampson*, 898 F.3d 287, 298 (2d Cir. 2018).
15 *See United States v. Vilar*, 729 F.3d 62, 70 (2d Cir. 2013) (explaining "plain error" review).
16 *United States v. Gupta*, 747 F.3d 111, 137 (2d Cir. 2014).
17 *United States v. White*, 692 F.3d 235, 244 (2d Cir. 2012) (internal quotation marks omitted).
18 *Gupta*, 747 F.3d at 137.
19 *Id.*
20 *Id.* at 132 (internal quotation marks omitted).
21 *United States v. Padilla*, 548 F.3d 179, 190 (2d Cir. 2008) (internal quotation marks omitted).
22 *United States v. Pereira-Gomez*, 903 F.3d 155, 161 (2d Cir. 2018) (describing plain error review in the sentencing context).
23 18 U.S.C. § 924(c)(1)(A).
24 *Id.* § 924(c)(3).
25 *United States v. Hill*, 890 F.3d 51, 54 (2d Cir. 2018).
26 The Supreme Court has described the categorical approach in a series of cases involving the Sentencing Guidelines and the Armed Career Criminal Act. *See Taylor v. United States*, 495 U.S. 575, 600, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990) (holding that the categorical approach should be applied to the Armed Career Criminal Act); *see also Stokeling v. United States*, —— U.S. ——, 139 S.Ct. 544, 554-55, 202 L.Ed.2d 512 (2019) (applying the categorical approach in evaluating Florida robbery under the force clause of the Armed Career Criminal Act); *United States v. Hill*, 890 F.3d 51, 55 (2d Cir. 2018) (applying the categorical approach to determine whether a federal crime qualified as a "crime violence" under § 924(c)(3)(A)).
27 *Hill*, 890 F.3d at 55 (internal quotation mark omitted).
28 *Id.*
29 *United States v. Moore*, 916 F.3d 231, 238 (2d Cir. 2019).
30 18 U.S.C. § 2113(a); App. 12 (operative indictment); Appellant Br. 4.
31 *Leocal v. Ashcroft*, 543 U.S. 1, 11, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004) (discussing 18 U.S.C. § 16).
32 *Carter v. United States*, 530 U.S. 255, 268, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000).
33 *United States v. McBride*, 826 F.3d 293, 296 (6th Cir. 2016) (emphasis added) (rejecting argument that negligent "intimidation" can support a conviction under § 2113(a)).
34 *Moore*, 916 F.3d at 239 n.5. (citing *Killion v. United States*, 728 F. App'x 19, 21-22 (2d Cir. 2018)); *see also Johnson v. United States*, 779 F.3d 125, 128-29 (2d Cir. 2015) (stating without elaboration that bank robbery under § 2113(a) constitutes a "crime of violence" for the purposes of conviction under § 924(c)(1)(A)).
35 *See United States v. McCranie*, 889 F.3d 677, 681 (10th Cir. 2018) (§ 4B1.2(a)); *United States v. Wilson*, 880 F.3d 80, 85-86 (3d Cir. 2018) (same); *United States v. Ellison*, 866 F.3d 32, 35 (1st Cir. 2017) (same); *United States v. Williams*, 864 F.3d 826, 830 (7th Cir. 2017) (§ 924(c)(3)(A)); *United States v. Brewer*, 848 F.3d 711, 714-16 (5th Cir. 2017) (§ 4B1.2(a)); *Allen v. United States*, 836 F.3d 894, 894-95 (8th Cir. 2016) (§ 924(c)(3)(A)); *In re Sams*, 830 F.3d 1234, 1239 (11th Cir. 2016) (same); *McBride*, 826 F.3d at 296 (§ 4B1.2(a)); *United States v. McNeal*, 818 F.3d 141, 153 (4th Cir. 2016) (§ 924(c)(3)(A)).

36 Because we conclude that credit union robbery "by intimidation" is a crime of violence within the meaning of the "force" clause, § 924(c)(3)(A), we need not address the parties' arguments regarding whether it also is a crime of violence under the "risk-of-force" clause, § 924(c)(3)(B).

37 We note that " 'abuse of discretion' is a nonpejorative term of art; it implies no misconduct on the part of the district court." *United States v. Bove*, 888 F.3d 606, 607 n.1 (2d Cir. 2018) (citing *In re City of New York*, 607 F.3d 923, 943 n.21 (2d Cir. 2010)). The term merely describes circumstances in which a district court "base[s] its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or render[s] a decision that cannot be located within the range of permissible decisions." *In re Sims*, 534 F.3d 117, 132 (2d Cir. 2008) (internal quotation marks and citation omitted).

38 *Cf. United States v. Copple*, 24 F.3d 535, 545-46 (3d Cir. 1994) (victim testimony regarding financial losses in criminal fraud trial was proper insofar as it was relevant to prove specific intent, but further victim impact testimony had little probative value and was unfairly prejudicial).

39 18 U.S.C. § 2113(a).

40 *United States v. Kelley*, 412 F.3d 1240, 1244 (11th Cir. 2005) (internal quotation marks omitted); *see also* 3 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS – CRIMINAL¶ 53-12 (2018) (requiring that defendant have "act[ed] in an intimidating manner," which "means that the defendant did or said something that would make an ordinary reasonable person fear bodily harm"); *United States v. Fleury*, 38 F. App'x 50, 51 (2d Cir. 2002) (non-precedential summary order) (observing that district court used similar instruction).

41 *United States v. Gilmore*, 282 F.3d 398, 403 (6th Cir. 2002) (internal quotation marks omitted); *cf. United States v. Walker*, 835 F.2d 983, 987 (2d Cir. 1987) (noting that a victim's subjective state of mind can be relevant to the question of whether a defendant's behavior would inspire fear in a reasonable person for the purposes of 18 U.S.C. § 111).

42 Robert objected to the Government's questions to the first teller and customer service representative based on relevance, App. 54, but did not object to the Government's question to the second teller, App. 57.

43 Robert did not object to the admission of either teller's testimony based on Rule 403.

44 *See supra* note 37.

45 *Padilla*, 548 F.3d at 190 (internal quotation marks omitted).

46 *United States v. McCallum*, 584 F.3d 471, 478 (2d Cir. 2009) (internal quotation marks and brackets omitted)

47 *Id.*

48 *White*, 692 F.3d at 246 (internal quotation marks omitted).

49 *Wade v. Mantello*, 333 F.3d 51, 61 (2d Cir. 2003).

50 *Id.* at 61-62 (quoting *United States v. McVeigh*, 153 F.3d 1166, 1191 (10th Cir. 1998)).

51 We generally apply the version of the United States Sentencing Guidelines in effect at the time of sentencing, unless doing so would violate the Ex Post Facto Clause. *United States v. Riggi*, 649 F.3d 143, 146 n.2 (2d Cir. 2011).

52 U.S.S.G. § 4B1.1(a).

53 U.S.S.G. § 4B1.2(a) (emphasis added). The italicized text is generally referred to as the "residual clause."

54 *United States v. Brown*, 514 F.3d 256, 268 (2d Cir. 2008).

55 We had previously stated that this holding was abrogated by *Johnson v. United States*, —— U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), which held that the similarly-worded residual clause of the Armed Career Criminal Act was unconstitutional. *See United States v. Welch*, 641 F. App'x 37, 43 (2d Cir. 2016) (non-precedential summary order). In light of *Beckles*, however, it is clear that the residual clause of the Guidelines is not unconstitutionally vague. *See also Massey v. United States*, 895 F.3d 248, 251 n.6 (2d Cir. 2018). (noting that after *Beckles*, the Second Circuit's earlier precedent that robbery under New York law is a crime of violence under the ACCA's force clause was "reinstate[d]").

56 *People v. Barney*, 99 N.Y.2d 367, 371, 756 N.Y.S.2d 132, 786 N.E.2d 31 (2003) (holding that, under New York law, "one cannot commit burglary in the second degree ... without also committing burglary in the third degree").

57 *Cf. Pereira-Gomez*, 903 F.3d at 166 (holding that because the pertinent component of robbery "is common to all degrees of robbery under New York law ... robbery in any degree is a crime of violence").

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of July, two thousand nineteen.

United States of America,

Appellee,

v.

Shakeal Hendricks, Taiquan Howard, AKA Taiquan Hendricks, Charles E. Robinson, Jr.,

Defendants,

Robert Hendricks,

Defendant - Appellant.

ORDER

Docket No: 15-2525

Appellant, Robert Hendricks, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk