Appendix

FILED

JAN 9 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE LYLE CULLETT, Jr., Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.	No. 17-56286 D.C. Nos. 2:16-cv-06346-AWT 2:92-cr-00750-AWT-1 Central District of California, Los Angeles ORDER

Before: CALLAHAN, NGUYEN, and HURWITZ, Circuit Judges.

The government'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 United States v. Blackstone*, 903 F.3d 1020, 1028 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2762 (2019); *United States v. Watson*, 881 F.3d 782 (9th Cir.), *cert. denied*, 139 S. Ct. 203 (2018); *White v. Klitzkie*, 281 F.3d 920, 922 (9th Cir. 2002) ("[W]e can affirm the district court on any ground supported by the record."). Contrary to Cullett's argument, our decision in *Blackstone* is not "clearly irreconcilable" with *United States v. Davis*, 139 S. Ct. 2319 (2019). *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

AFFIRMED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

GEORGE LYLE CULLETT, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

No. CV 16-6346-AWT

[No. CR 92-750-AWT]

ORDER DENYING PETITIONER'S MOTION UNDER 28 U.S.C. § 2255

Before the Court is George Lyle Cullett, Jr.'s Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255. Dkt. No. 1 ("Mot."). The United States filed an Opposition and Cullett replied. Dkt. Nos. 12 ("Opp."), 15 ("Reply"). Because of the issues it raised, consideration of Cullett's Motion was deferred pending the Supreme Court's decision in *Beckles v. United States*, 137 S. Ct. 886 (2017), which issued on March 6, 2017. The parties then submitted supplemental briefs. Dkt. Nos. 19, 20. Having fully considered the arguments, Cullett's Motion will be DENIED.

I. BACKGROUND

In 1993, Cullett pleaded guilty to the following: two counts of armed bank robbery, in violation

of 18 U.S.C. § 2113(a), (d); and two counts of carrying a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c). Mot., Ex. B ("Judgment and Commitment Order"); *id.*, Ex. C ("Plea Agreement"). Cullett's § 924(c) counts were predicated on his two armed robbery charges, which were deemed to be "crimes of violence" as that phrase is defined in § 924(c)(3).[1] Plea Agreement at 2. Later that same year, the court sentenced Cullett to concurrent terms of 188 months imprisonment, plus twenty-five years. Judgment and Commitment Order at 1. He received a concurrent 188-month term on each of the armed robbery charges. *Id.* For the two firearm counts, he received additional, consecutive sentences of sixty months and two-hundred forty months, respectively. *Id.*

In sentencing Cullett, the court applied the career offender enhancement, set forth at § 4B1.1 of the U.S. Sentencing Guidelines ("U.S.S.G.").[2] Dkt. No. 4 ("PSR") at ¶ 56. Pursuant to § 4B1.1, "[a] defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (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." A "crime of violence" is, in turn, defined as "any offense under federal or state law 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 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." U.S.S.G. § 4B1.2(1) (1992). This definition has three discrete parts: subsection (i) is the "elements clause"; the first half of subsection (ii) is known as the "enumerated offenses clause"; and the remainder of subsection (ii) is referred to as the "residual clause."

Before applying the career offender enhancement, the court determined that Cullett was

---

[1] Section 924(c)(3) defines a "crime of violence" as a felony offense that "(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." Subpart (A) of this definition is referred to as the "elements clause." Subpart (B) is referred to as the "residual clause."

[2] Because Cullett was sentenced on October 18, 1993, all citations to the U.S.S.G. in this order refer to the 1992 Guidelines Manual, which remained in effect until October 31, 1993.

previously convicted of seven predicate crimes of violence, including three felony convictions for first-degree burglary pursuant to California Penal Code § 459, three felony convictions for second-degree robbery pursuant to California Penal Code § 211, and one conviction for the sale of marijuana in violation of California Health and Safety Code § 11360. *See* PSR at ¶¶ 57-63. Four years into his sentence, in 1997, Cullett filed an initial § 2255 petition. Case No. CR 92-750-AWT, Dkt. No. 26. It was denied. Case No. CR 92-750-AWT, Dkt. No. 27. After the Ninth Circuit granted his motion to file a second or successive § 2255 petition, *see* Case No. CR 92-750-AWT, Dkt. No. 32, on April 29, 2016, Cullett filed the instant Motion.

II. DISCUSSION

A. Cullett's Motion and the changing legal landscape.

Cullett's Motion raises two related arguments. First, he contends that neither his convictions for first-degree burglary, under § 459, nor his convictions for second-degree robbery, under § 211, nor his instant convictions, for armed robbery in violation of § 2113(a), are crimes of violence under § 4B1.2. Mot. at 5-23. Consequently, Cullett argues, none of these convictions can serve as predicates for the career offender enhancement. Second, Cullett asserts that, for many of the same reasons, his instant convictions under § 924(c) cannot stand: because federal armed robbery is also not a crime of violence as defined in 18 U.S.C. § 924(c)(3), his instant armed robbery charges cannot support the § 924(c) counts. Mot. at 24-27.

Cullett's Motion was prompted by a sea change in how courts define crimes of violence. The genesis of this change was *Johnson v. United States*, 135 S.Ct. 2551, (2015) ("*Johnson II*"), wherein the Supreme Court voided, on vagueness grounds, the residual clause of the Armed Career Criminal Act ("ACCA"), codified at 18 U.S.C. § 924(e)(2)(B)(ii), which defined a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year . . . that . . . involves conduct that presents a serious potential risk of physical injury to another." The following year, in *Welch v. United States*, 136 S.Ct. 1257, 1268 (2016), the Court held that *Johnson II* established a "substantive rule that has retroactive effect in cases on collateral review." These cases gave rise to a number of additional, as yet,

///

unanswered questions, several of which are pending before the Supreme Court and the Ninth Circuit. *See, e.g.*, *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015) (holding § 16(b) void under *Johnson*), *certiorari granted in, Lynch v. Dimaya*, 137 S.Ct. 31 (2016) (held for re-argument until October 2017); *United States v. Begay*, No. 14-10080 (9th Cir. Mar. 29, 2017) (staying consideration of whether § 924(c)(3) is void under *Johnson* pending the Supreme Court's decision in *Dimaya*). And in *Beckles*, Justice Sotomayor noted in her concurrence that "[t]he Court's adherence to the formalistic distinction between mandatory and advisory rules at least leaves open the question whether defendants sentenced to terms of imprisonment before our decision in *United States v. Booker*, 543 U.S. 220 (2005), . . . may mount vagueness attacks on their sentences." 137 S.Ct. at 903 n.4 (Sotomayor, J., concurring).

Cullett's Motion is a natural follow-on to *Johnson*. Before reaching these issues, however, it must first be determined whether Cullett's varied convictions are "crimes of violence" under § 4B1.2's elements or enumerated offenses clauses. With one exception, they are not. Thus, we must consider whether Cullett's Motion can survive *Beckles*, and, if so, whether § 4B1.2's residual clause is void for vagueness. Despite finding that *Beckles* does not control, we conclude that – because robbery is an offense listed in the application notes to § 4B1.2 – the residual clause is not unconstitutionally vague, at least as applied to Cullett.

B. Cullett's prior convictions for second-degree robbery, under § 211, are crimes of violence under § 4B1.2(1)(ii).

1. The Elements and Enumerated Offenses Clauses

Second-degree robbery, as defined in Cal. Penal Code § 211, is not a crime of violence under either the elements or the enumerated offenses clauses of § 4B1.2. This conclusion is compelled by *United States v. Dixon*, 805 F.3d 1193 (9th Cir. 2015), wherein the Ninth Circuit considered whether § 211 was a crime of violence under the ACCA. The Circuit first held that a conviction under § 211 could not qualify under the enumerated offenses clause because the ACCA did not list robbery as an enumerated offense. *See Dixon*, 805 F.3d at 1196-97. This was problematic, the court noted, because the only other plausibly relevant enumerated offense – generic extortion – is too narrow to encompass the full breadth of § 211. *Id*. Having concluded that § 211 is not covered by § 4B1.2's enumerated

offenses clause, the court then considered whether it satisfied the elements clause. *Id.* at 1197. The court found that it did not: because an individual may violate § 211 by *accidentally* using force, it "is not a categorical match" with § 4B1.2's elements clause. *Id.* The logic of *Dixon* controls the instant case. Here, like the ACCA, § 4B1.2 lists extortion, but not robbery, as an enumerated offense. Moreover, § 4B1.2's elements clause is identical to the ACCA's. Accordingly, § 211 is not a crime of violence under § 4B1.2's enumerated offenses or element clauses.

2. The Residual Clause

If Cullett's convictions under § 211 are to remain predicate offenses for the career offender enhancement, it must be because they qualify as crimes of violence under § 4B1.2(1)'s residual clause. At the time of Cullett's conviction, § 4B1.2(1)(ii) rendered an offense a crime of violence if it was punishable by imprisonment of more than one year and it "involve[d] conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(1)(ii) (1992).

In *Beckles*, the Supreme Court considered whether *Johnson II's* invalidation of the ACCA's residual clause necessarily rendered void an identical clause in the sentencing guidelines. *See Beckles*, 137 S.Ct. at 890. Reasoning that "the advisory Guidelines are not subject to vagueness challenges under the Due Process Clause," the Court held that the residual clause in § 4B1.2(1) survived. *Id.* Undeterred, Cullett contends that *Beckles* does not control his case because it "relied on the advisory nature of the Sentencing Guidelines," which has little application to a defendant, like him, who "was sentenced at a time when the Guidelines were *mandatory*." Dkt. No. 19 at 1-2. Thus, Cullett argues, "*Beckles* does not affect [his] § 2255 petition." *Id.* at 2.

As a preliminary matter, it seems beyond dispute that the guideline's advisory nature was essential to the Supreme Court's reasoning in *Beckles*. *See, e.g.*, *Beckles*, 137 S.Ct. at 890 ("Because we hold that the *advisory* Guidelines are not subject to vagueness challenges . . . we reject petitioner's argument."); *id.* at 892 ("Unlike the ACCA, however, the *advisory* Guidelines do not fix the permissible range of sentences."); *id.* at 894 ("The *advisory* Guidelines also do not implicate the twin concerns underlying vagueness doctrine—providing notice and preventing arbitrary enforcement."); *id.* at 895 ("Accordingly, we hold that the *advisory* Sentencing Guidelines are not subject to a vagueness challenge

under the Due Process Clause and that § 4B1.2(a)'s residual clause is not void for vagueness."). All else being equal, it seems plausible that if confronted with a case where, as here, the guidelines were mandatory, the Supreme Court would likely reach a different result. Accordingly, the court accepts Cullett's argument that his case is not controlled by *Beckles*.

Having concluded that compulsory applications of the guidelines *are* susceptible to vagueness challenges, we are confronted with the dispositive question of whether the residual clause of § 4B1.2(1) is void for vagueness. As a starting point, the court notes that the language of § 4B1.2(1)'s residual clause is identical to the ACCA provision invalidated in *Johnson II*. This favors reaching the same result. On the other hand, § 4B1.2, unlike the ACCA, includes an application note that provides interpretational guidance. *See* U.S.S.G. § 4B1.2, app. n. 1-4 (1992). "[C]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative[.]" *Stinson v. United States*, 508 U.S. 36, 38 (1993). Here, application note 2 states, in relevant part, that the phrase "[c]rime of violence includes . . . robbery[.]" U.S.S.G. § 4B1.2, app. n. 2. This substantially undermines Cullett's position.

Cullett attempts to minimize the import of this application note by contending that "[w]ith the residual clause excised from the guideline, the commentary no longer serves to interpret or amplify any provision of the remaining text, but, instead, is a contrary and plainly erroneous interpretation of what remains." Mot. at 14. But this argument inverts the sequence of analysis: it excises the residual clause, and then argues that the commentary lacks interpretational value. The better approach – and, in the court's view, the only rational one – is to start by asking whether the residual clause, when read in light of the commentary, is, in fact, vague? Only if that question is answered affirmatively would the clause be excised.

Applying this latter approach, Cullett's argument fails. Cullett was convicted of second-degree robbery pursuant to § 211. Advisory note 2 expressly states that robbery is a crime of violence under § 4B1.2. Thus, there could be little doubt that a conviction under § 211 was, in fact, encompassed by this definition. As a result, Cullett's argument that § 4B1.2's residual clause is unconstitutionally vague fails. Others courts in the Ninth Circuit have reached the same conclusion. *See, e.g., United States v. Castaneda*, 2017 WL 3448192, at *2 (C.D. Cal. June 19, 2017) ("Castaneda's conduct was also clearly

proscribed by the commentary, so he has no basis for a *Johnson* due process claim."). And, in fact, Justice Ginsburg's concurrence in *Beckles* depended on the same reasoning. *See Beckles*, 137 S.Ct. at 897–98 (explaining that at the time of his conviction, Beckles' predicate offense – possessing a sawed off shotgun – was an offense listed in the commentary to § 4B1.2, and that, as a result, he "cannot . . . claim that § 4B1.2 was vague as applied to him.").

3. Conclusion as to Cullett's career offender enhancement.

Because Cullett's multiple convictions for second-degree robbery under § 211 are crimes of violence under § 4B1.2's residual clause, the court did not err in applying the career offender enhancement to Cullett. Accordingly, this aspect of his Motion is denied.

A. Cullett's instant conviction for armed bank robbery, under § 2113(a), is a crime of violence under the elements clauses of § 4B1.2(1) and § 924(c)(3).

What remains of Cullett's Motion is his argument that his immediate conviction for armed bank robbery, in violated of § 2113(a), is not a crime of violence under either § 4B1.2(1) or § 924(c)(3). If true, this undermines both the application of the career offender enhancement to Cullett, and his convictions under § 924(c). However, this facet of Cullett's Motion likewise fails. This is because two Ninth Circuit decisions foreclose Cullett's argument that his armed robbery convictions are not crimes of violence. In 1990, the Circuit held that "persons convicted of robbing a bank 'by force and violence' or 'intimidation' under 18 U.S.C. § 2113(a) have been convicted of a 'crime of violence' within the meaning of Guideline Section 4B1.1." *United States v. Selfa*, 918 F.2d 749, 751 (9th Cir. 1990) (affirming application of career offender enhancement and rejecting appellant's argument that the court should look to his particular conduct, rather than the elements of the offense, to identify predicate offenses). To reach this conclusion, the court relied on § 4B1.2(1)'s elements clause without mentioning the residual clause. *See id.* at 751 (quoting only § 4B1.2's elements clause and omitting the text of the residual clause, while clarifying how properly to apply the categorical approach – which is relevant only to an elements clause analysis).

Ten years later, the Circuit held that armed bank robbery, as defined in § 2113(a), is also a crime of violence under § 924(c)(3)'s elements clause. *See United States v. Wright*, 215 F.3d 1020, 1028 (9th

Cir. 2000) ("Armed bank robbery qualifies as a crime of violence [under § 924(c)(3)] because one of the elements of the offense is a taking 'by force and violence, or by intimidation.'"). Since then, the Circuit affirmed these holdings in several unpublished dispositions.[3] *See, e.g.*, *United States v. Cross*, 2017 WL 2080282, __ F. App'x __ (9th Cir. May 15, 2017) (unpublished) (holding that armed and unarmed bank robbery under § 2113(a) and (d) are "crimes of violence" under the elements clauses of § 4B1.2 and § 924(c)(3)); *United States v. Newsome*, 221 F. App'x 627, 628-29 (9th Cir. 2007) (unpublished) ("Because conviction under 18 U.S.C. § 2113(a) is categorically a crime of violence for career offender purposes . . . and all other prerequisites were met, the district court did not err in applying the career offender enhancement under U.S.S.G. § 4B1.1.").

Cullett contends that subsequent decisions implicitly overruled *Selfa* and *Wright*. Mot. at 15-23; Reply 27-35. Specifically, Cullett argues these decisions are inconsistent with later case law in two ways: "Armed bank robbery does not require an *intentional* threat of force, nor does it require a threat of *violent* force." Mot. at 18. Thus, according to Cullett, his "convictions under 18 U.S.C. § 2113(a), (d) are not crimes of violence for purposes of Section 924(c)." Mot. at 27. Each of these arguments fails.

As to his first argument, Cullett asserts that armed robbery under § 2113(a) cannot categorically be a crime of violence because it lacks a *mens rea* element with respect to the use of force. Mot. at 19. Cullett posits that this runs afoul of *Leocal v. Ashcroft*, 543 U.S. 1 (2004), and *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006). *See id.* at 17, 19–20.

In *Leocal*, the Supreme Court considered whether Florida's driving under the influence ("DUI") statute, which "does not require[] proof of any particular mental state," is a crime of violence under 18

[3] Ninth Circuit Rule 36-3 provides that "[u]npublished dispositions . . . of this Court are not precedent[.]" Ninth Cir. R. 36-3(a). However, that same rule also states that "[u]npublished dispositions . . . issued on or after January 1, 2007 may be cited to [by] the courts of this circuit in accordance with [Fed. R. App. P.] 32.1." Ninth Cir. R. 36-3(b). Rule 32.1, in turn, states that "[a] court may not prohibit or restrict the citation of federal judicial opinions . . . that have been . . . designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent', or the like[.]" Moreover, as the committee notes makes clear, the import of Rule 32.1 is to allow parties, and, as here, the court, to cite such unpublished dispositions for persuasive value. Under these rules, then, this decision relies on unpublished dispositions as persuasive authority.

U.S.C. § 16(a).[4] *See* 543 U.S. at 7. After emphasizing what it deemed to be "[t]he key phrase in § 16(a) – the 'use . . . of physical force against the person or property of another,'" the court concluded that an offense could meet this standard only if it requires "a higher degree of intent than negligent or merely accidental conduct." *Leocal*, 543 U.S. at 9 (citations omitted). Thus, the Court held that Florida's DUI law, because it lacked a *mens rea* requirement entirely, could not be a predicate crime of violence. *Id.* at 10.

Two years later, in *Fernandez-Ruiz*, the Ninth Circuit considered a related question with respect to an Arizona domestic violence statute. 466 F.3d at 1123. At issue in *Fernandez-Ruiz* was Arizona Revised Statute § 13-1203(A)(1), pursuant to which "[a] person commits assault by . . . [i]ntentionally, knowingly or *recklessly* causing any physical injury to another person." *Id.* at 1125. After detailing the rationale underlying *Leocal* and surveying the relevant case law interpreting the same, the Circuit concluded that "the reasoning of *Leocal*—which merely holds that using force negligently or less is not a crime of violence—extends to crimes involving the reckless use of force." *Id.* at 1129. Consequently, the Court held, "the offense underlying Fernandez-Ruiz's 2003 misdemeanor domestic violence conviction was not a categorical crime of violence under 18 U.S.C. § 16(a)." *Id.* at 1132.

According to Cullett, his conviction for armed robbery, under § 2113(a) and (d) is analogous to the Florida DUI law in *Leocal* and the Arizona domestic violence statute in *Fernandez-Ruiz*. Mot. at 19-20. As with those offenses, Cullett argues, § 2113(a) does not require the intentional use of force. *Id.* at 19 (citing *United States v. Yockel*, 320 F.3d 818, 823 (8th Cir. 2003), and *United States v. Kelley*, 412 F.3d 1240, 1244 (11th Cir. 2005)). In light of these recent decisions, then, Cullett asserts that "*Wright's* conclusion that bank robbery is a crime of violence under the [elements clause] is no longer good law." *Id.* at 20.

As to his second argument, Cullett contends § 2113(a) also cannot serve as a predicate crime of

[4] Section 16 defines a "crime of violence" as "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and 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." 18 U.S.C. § 16.

violence because it "does not require the use or threat of *violent* physical force." Mot. at 21. As a result, Cullett asserts, "[t]he contrary holding in *Wright* is clearly irreconcilable with [*Johnson v. United States*, 559 U.S. 133, 140 (2010) ("*Johnson I*")] and *Leocal*." Mot. at 23.

In *Johnson I*, the Supreme Court confronted whether Florida's felony offense of battery, which has as an element the "actual[] and intentional[] touching" of another person, is a "violent felony" under the elements clause of the ACCA, codified at § 924(e)(2)(B)(I).[5] *See* 559 U.S. at 135. The narrow question before the Court was whether the "actual[] and intentional[] touching" element of Florida's battery law, which may be satisfied even where an individual makes only "nominal contact" with another, satisfies the "physical force" requirement set forth in § 924(e)(2)(B)(I). *Id.* at 138–39. To answer this question, the Court reasoned that "in the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." *Id.* at 140. Thus, the Court held, a conviction under Florida's felony battery offense could not amount to a "violent felony" under the ACCA. *Id.* Because, according to Cullett, § 2113(a) is analogous to Florida's battery statute, *Johnson I* should control. Mot. at 23.

These arguments are unpersuasive. And, unsurprisingly, the Ninth Circuit has expressly rejected them on multiple occasions, albeit in unpublished dispositions. *See, e.g.*, *United States v. Pritchard*, 2017 WL 2219005, __ F. App'x ___ (9th Cir. May 18, 2017) (unpublished) (rejecting, specifically, the argument that *Wright* and *Selfa* were overruled by *Leocal's* heightened intent requirement and *Johnson's* "violent force" gloss); *United States v. Cross*, 2017 WL 2080282, __ F. App'x ___ (9th Cir. May 15, 2017) (unpublished) (rejecting the same because "'no intervening authority' is 'clearly irreconcilable'" with *Selfa* and *Wright*); *United States v. Jordan*, 680 F. App'x 634, 634–35 (9th Cir. 2017) (unpublished) (holding that § 2113(a) is a crime of violence, as held in *Wright* and *Selfa*, and rejecting argument that later cases have displaced these precedents); *United States v. Howard*, 650 F. App'x 466, 468 (9th Cir. 2016) (unpublished) (affirming *Selfa's* continued vitality).

[5] Section 924(e)(2)(B)(i) provides: "the term 'violent felony' means 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."

The rationale for rejecting Cullett's arguments is straightforward. Contrary to his position, § 2113(a)'s implicit *mens rea* requirement avoids the problems identified in *Leocal*. In *Carter v. United States*, 530 U.S. 255 (2000), the Supreme Court stated that the "presumption in favor of scienter demands" § 2113(a) be read as a "general intent" crime. *Id.* at 268. Thus, "the defendant [must] possess[] knowledge with respect to the *actus reus* of the crime[.]" *Id.* Instructively, the Court then explained that the *actus reus* of § 2113(a) is "the taking of property of another *by force and violence or intimidation*." *Id.* (latter emphasis added). In sum, *Carter* holds that § 2113(a) must be understood as implicitly containing a *mens rea* element that requires a defendant knowingly take the property of another *by force and violence or intimidation*. This is sufficient to avoid the issues identified in *Leocal*.

Cullett's argument as to "violent force" fares no better. This is because *Johnson I*, notwithstanding its clarification that the phrase "physical force" requires "violent force," does nothing to undermine the Ninth Circuit's reasoning in *Selfa*. There, the Ninth Circuit emphasized that § 2113(a) "requires, at the very least, either 'force and violence' or 'intimidation.'" *Selfa*, 918 F.2d at 751. Moreover, as the *Selfa* court explained, "intimidation" under § 2113(a) is interpreted to mean "willfully to take, or attempt to take, in such a way that would put an ordinary, reasonable person in fear of bodily harm." *Id.* (citation omitted). Nothing in *Johnson I's* redefinition of "physical harm" undermines the Ninth Circuit's conclusion that "intimidation," as used in § 2113(a), "is sufficient to meet the section 4B1.2(1) requirement of a 'threatened use of physical force.'" *Id.*

Accordingly, because *Selfa* and *Wright* have not been implicitly overruled, a conviction for armed robbery remains a viable predicate crime of violence under the elements causes of § 4B1.2(1) and § 924(C)(3). Therefore, the remainder of Cullet's Motion must also be denied.

CONCLUSION

In sum, Cullett's convictions for second-degree robbery under § 211 are crimes of violence under § 4B1.2's residual clause. Likewise, his instant conviction for federal armed bank robbery under § 2113(a) is a crime of violence under the elements clauses of § 4B1.2(1) and § 924(c)(3). Therefore, the court did not err in applying the career offender enhancement to Cullett, and his convictions under § 924(c) remains sound. Accordingly,

IT IS ORDERED:

1. Cullet's § 2255 motion is **DENIED.**

2. Cullet's request for a Certificate of Appealability ("COA") under 28 U.S.C. § 2253(c)(2) is **GRANTED** as to all issues decided by this Order.[6]

DATE: August 22, 2017

A. Wallace Tashima
United States Circuit Judge
Sitting by Designation

[6] In his Reply, Cullet asks that the court grant a COA in the event that his Motion is denied. Issuance of a COA requires a " substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Here, the court concludes that reasonable judges could differ with the rationale articulated in this order in support of denial of the motion.