Appendix "A"

Order of the United States Court of Appeals for the Fourth Circuit

FILED: July 23, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6084
(1:14-cr-00023-LCB-1)
(1:16-cv-00806-LCB-LPA)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RANDALL GRAY WEBB

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6084

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RANDALL GRAY WEBB,

Defendant - Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Loretta C. Biggs, District Judge. (1:14-cr-00023-LCB-1, 1:16-cv-00806-LCB-LPA)

Submitted: July 21, 2020 Decided: July 23, 2020

Before AGEE, DIAZ, and HARRIS, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Randall Gray Webb, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Randall G. Webb seeks to appeal the district court's order accepting the recommendation of the magistrate judge and denying relief on Webb's 28 U.S.C. § 2255 (2018) motion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(B) (2018). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2018). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the motion states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Webb has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

Appendix "B"

Order of the Magistrate Judge and District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

RANDALL GRAY WEBB,	)	
	)	
Petitioner,	)	
	)	
v.	)	1:14CR23-1
	)	1:16CV806
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Court (per now-retired United States District Judge James A. Beaty, Jr.) entered a Judgment against Petitioner imposing consecutive prison sentences of 84 and 300 months upon his guilty plea to Counts Three and Five of his Indictment, which each charged him with carry and use, by brandishing, a firearm, during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii) ("Section 924(c)"). (Docket Entries 39, 77; see also Docket Entry 1 (Indictment); Docket Entry 24 (Plea Agt.).)[1] Petitioner did not appeal (see Docket Entry 78, ¶ 8), but later did file a Letter Motion referencing "the Johnson case/Welch case" (Docket Entry 63 at 1). The Court construed that Letter Motion as collaterally challenging Petitioner's convictions based on Johnson v. United States, ___ U.S. ___, 135 S. Ct. 2551 (2015), and, "pursuant to the General Order Governing Claims Related to Johnson

[1] Parenthetical citations refer to Petitioner's above-captioned federal criminal case.

. . ., the Office of the Federal Public Defender [wa]s appointed to represent [Petitioner] and the [Letter M]otion [wa]s STAYED for a period of 45 days . . . to permit review by counsel" (Text Order dated July 27, 2016). Following the expiration of that stay, Petitioner (through counsel) filed a form Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence ("Section 2255 Motion") (Docket Entry 78), as well as a "Motion to Accept [the Section 2255 Motion] as Timely Filed" (Docket Entry 79). The Section 2255 Motion lists one "ground on which [Petitioner] claim[s] that [he is] being held in violation of the Constitution, laws, or treaties of the United States" (Docket Entry 78, ¶ 12): "As a result of the decision in Johnson . . ., the predicate offense relied upon by the government for conviction is no longer a 'crime of violence.'" (Id., ¶ 12(Ground One); see also id., ¶ 12(Ground One)(a) ("Each count of conviction alleges that Petitioner brandished a weapon in connection with the offense of Interference with Commerce by Threats or Violence in violation of 18 U.S.C. § 1951(a) (Hobbs Act Robbery). After Johnson, a Hobbs Act Robbery is not categorically a crime of violence.").)

Subsequently, "[i]n accordance with the Supplemental Order entered in In re: Motions Related to Claims under Johnson . . . this case [wa]s STAYED pending the decision of the Supreme Court of the United States in Dimaya v. Lynch . . . ." (Text Order dated Nov. 15, 2016.) The Court (per the undersigned Magistrate Judge)

thereafter extended the stay "pending the Fourth Circuit's decision[] in . . . United States v. Mathis, 16-4633(L)" (Text Order dated May 8, 2018; accord Text Order dated July 12, 2019), as well as the Supreme Court's decision in "United States v. Davis, No. 18-431" (Text Order dated Feb. 14, 2019). Following decisions in those cases, the parties filed a Joint Status Report "request[ing] that this case be released from abeyance" (Docket Entry 86 at 3) and the Court (per the undersigned Magistrate Judge) granted that request (see Text Order dated Nov. 21, 2019).

With the stay lifted, the Court should deny collateral relief. To begin, as set out above (and like many other defendants convicted of Section 924(c) crime-of-violence-related firearm offenses), Petitioner filed the Section 2255 Motion "seeking relief based on Johnson, in which the Supreme Court held that the 'residual clause' of 18 U.S.C. § 924(e)(2)'s definition of 'violent felony' [wa]s unconstitutionally vague," Dorsey v. United States, No. 1:99CR203-2, 1:16CV738, 2019 WL 3947914, at *1 (E.D. Va. Aug. 21, 2019) (unpublished) (internal citation and full case name omitted). The Section 2255 Motion (again, as set out above and akin to such motions filed by many other defendants) contends that Johnson's reasoning invalidates the similar "residual clause" portion of the definition of "crime of violence" under Section 924(c)(3), such that Petitioner's "[Section] 924(c) conviction[s]

should be vacated because the predicate offense no longer qualifies as a crime of violence," id. (internal parenthetical omitted)).

Consistent with the first premise of the Section 2255 Motion, "[o]n June 24, 2019, the Supreme Court held that the residual clause of [Section] 924(c)(3)'s definition of 'crime of violence' is also unconstitutionally vague." Id. (citing United States v. Davis, ___ U.S. ___, ___, 139 S. Ct. 2319, 2336 (2019)). That holding by the Supreme Court establishes that Section 924(c)'s residual clause "cannot be used to support [a Section] 924(c) conviction. What remains is the question whether the predicate offense underlying . . . [Petitioner's Section 924(c) convictions] qualifies as a 'crime of violence under [Section] 924(c)'s force clause. If it so qualifies, [those] conviction[s] remain[] valid . . . ." Id. at *2.[2] The Court need not solicit briefing from the parties on that remaining question, because - as they already have acknowledged (see Docket Entry 86 at 2-3) - the Fourth Circuit "[has] conclude[d] that Hobbs Act robbery constitutes a crime of

[2] The Section 2255 Motion does not allege that any ambiguity exists as to the "crime of violence" predicates for Petitioner's Section 924(c) convictions. (See Docket Entry 78, ¶ 12(Ground One)(a) (acknowledging that "Hobbs Act Robbery" served as predicate for each of Petitioner's Section 924(c) convictions, but arguing that "Hobbs Act Robbery is not categorically a crime of violence"); see also Docket Entry 1 at 2 (charging Petitioner in Count Two with Hobbs Act robbery corresponding to Section 924(c) charge in Count Three), 3-4 (charging Petitioner in Count Four with Hobbs Act robbery corresponding to Section 924(c) charge in Count Five); Docket Entry 86 at 2 ("Petitioner's [Section] 924(c) conviction[s] w[ere] . . . predicated on Hobbs Act robber[ies] . . . .").)

violence under the force clause of Section 924(c)," United States v. Mathis, 932 F.3d 242, 266 (4th Cir. 2019).

Accordingly, as "it plainly appears from the [Letter Motion and the Section 2255 M]otion . . . and the record of prior proceedings that [Petitioner] is not entitled to relief, the [Court] must dismiss the [Letter Motion and the Section 2255 M]otion . . . ." Rule 4(b), Rules Governing Section 2255 Proceedings ("Section 2255 Rules"); see also Lloyd v. United States, Nos. 1:12CR449-2, 1:16CV627, 2019 WL 4600211, at *1 (M.D.N.C. Sept. 23, 2019) (unpublished) ("find[ing] that [analogous] claim fail[ed] on the merits" in light of Mathis).

IT IS THEREFORE RECOMMENDED that (A) the "Motion to Accept [the Section 2255 Motion] as Timely Filed" (Docket Entry 79) be denied as moot, and (B) the Letter Motion (Docket Entry 63) and the Section 2255 Motion (Docket Entry 78) be dismissed pursuant to Section 2255 Rule 4(b), without issuance of a certificate of appealability.

/s/ L. Patrick Auld
L. Patrick Auld
United States Magistrate Judge

November 21, 2019

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

RANDALL GRAY WEBB,	)	
	)	
Petitioner,	)	
	)	1:16CV806
v.	)	1:14CR23-1
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER

The Recommendation of the United States Magistrate Judge was filed with the Court in accordance with 28 U.S.C. § 636(b) and, on November 22, 2019, was served on the parties in this action. (ECF Nos. 90, 91.) Plaintiff filed pro se objections to the Magistrate Judge's Recommendation. (ECF No. 93.) The Court has appropriately reviewed the Magistrate Judge's Recommendation and has made a *de novo* determination in accord with the Magistrate Judge's Recommendation. The Court therefore adopts the Magistrate Judge's Recommendation.

IT IS THEREFORE ORDERED that that Petitioner's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (ECF No. 63) and Amended Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (ECF No. 78) are DENIED, that Petitioner's Motion to Accept Corrected Motion for Relief Under 28 U.S.C. § 2255 as Timely Filed (ECF No. 79) is DENIED as moot, and that this action is dismissed with prejudice. A Judgment dismissing this action will be entered contemporaneously with this Order.

Finding neither a substantial issue for appeal concerning the denial of a constitutional right affecting the conviction nor a debatable procedural ruling, a certificate of appealability is DENIED.

This, the 2nd day of January, 2020.

/s/ Loretta C. Biggs
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

RANDALL GRAY WEBB,	)	
	)	
Petitioner,	)	
	)	1:16CV806
v.	)	1:14CR23-1
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

JUDGMENT

For the reasons set forth in the Order filed contemporaneously with this Judgment,

IT IS HEREBY ORDERED AND ADJUDGED that that Petitioner's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (ECF No. 63) and Amended Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (ECF No. 78) are DENIED, that Petitioner's Motion to Accept Corrected Motion for Relief Under 28 U.S.C. § 2255 as Timely Filed (ECF No. 79) is DENIED as moot, and that this action is dismissed with prejudice.

Finding neither a substantial issue for appeal concerning the denial of a constitutional right affecting the conviction nor a debatable procedural ruling, a certificate of appealability is DENIED.

This, the 2nd day of January, 2020.

/s/ Loretta C. Biggs
United States District Judge

Appendix "C"

Cases that present Contrary views with the Fourth Circuits ruling in Mathis,.

IN THE
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
ROCK ISLAND DIVISION

STACY M. HAYNES,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 4:16-cv-4106
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION & ORDER

This matter is before the Court on the Amended Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence (Doc. 3) filed by Stacy M. Haynes (the "Petitioner"). The motion has been fully briefed and is ready for decision. For the reasons discussed below, the motion is GRANTED in Part and DISMISSED in Part. Mr. Haynes will be resentenced.

I. PRELIMINARY PROCEDURAL CONSIDERATIONS

The instant § 2255 motion (Doc. 3) is an amended successive motion. Petitioner filed an original § 2255 motion in April 2000 that this Court heard and denied. (*See* Doc.1, *Haynes v. United States*, No. 4:00-cv-4044 (C.D. Ill.)). Petitioner's first successive § 2255 motion (Doc. 1) only contained two claims that were presented to the Seventh Circuit for authorization to proceed in this court. Petitioner has since amended his first successive § 2255 motion to include two additional claims. Since they were not presented to the Seventh Circuit panel, the Government argues that they are unauthorized claims. Paragraph (4) of subsection

(b) of 28 U.S.C. § 2244 clearly states that a district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section. The term "application" is taken to refer to the habeas relief petition itself, but in this case the term refers to the § 2255 motion. *See* 2-28 *Federal Habeas Corpus Practice and Procedure* § 28.3. Nevertheless, a convicted prisoner is allowed to bring a successive attempt at habeas relief when such a prisoner's claim is based upon either a new rule of constitutional law or newly discovered evidence. 28 U.S.C. §§ 2244(b)(4), 2255(h)(2).

Before addressing the issue of whether these two additional claims are unauthorized, there is another ancillary issue to be decided, which is whether this amended motion is even properly before the Court. The Amended Motion (Doc. 3) was made without leave of Court and without the written consent of the Government. Counsel for Petitioner was appointed in this matter pursuant to Administrative Order 15-mc-1016 (available at http://www.ilcd.uscourts.gov/court-info/local-rules-and-orders/general-orders (last visited January 24, 2017)). That Order does not state that amendments to the initial motion are presumptively allowed although one might assume that the amendment of a *pro se* prisoner's application for habeas corpus, which is what the § 2255 motion really is, would always naturally follow the appointment of counsel. Given the significance of the motion and the hurdles a petitioner must face if she leaves out a viable claim and tries to bring it up later in a subsequent action, there is great peril in leaving the

pro se petitioner's pleading to stand without the input of the attorney appointed in the case.

But 28 U.S.C. § 2242 provides that the application for habeas corpus "may be amended or supplemented as provided in the rules of procedure applicable to civil actions." Rule 12 of the Rules Governing Section 2255 Proceedings for the United States District Courts provides that the "Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." Moreover, the Federal Rules of Civil Procedure themselves also provide that they apply to proceedings for habeas corpus. Fed. R. Civ. P. 81(a)(4). The Seventh Circuit has specifically held that "[t]he rules governing § 2255 do not deal with amendments for collateral review and therefore proposed amendments to § 2255 motions are governed by Fed. R. Civ. P. 15(a)." *Rodriguez v. United States*, 286 F.3d 972, 980 (7th Cir. 2002); *see also Mayle v. Felix*, 545 U.S. 644 (2005) (holding the same).

Rule 15(a)(1) of the Federal Rules of Civil Procedure allows a party to amend its pleading once as a matter of course within either twenty-one days after serving it, or if the pleading is one to which a responsive pleading is required, twenty-one days after service of a responsive pleading or twenty-one days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier. The first successive § 2255 motion (Doc. 1) was "served" upon Respondent on June 9, 2016 at the latest, which is when the Clerk added a specific Assistant United States Attorney to this action despite adding the United States of America as a party on June 6, 2016 when the

action was opened and docketed. *See* Fed. R. Civ. P. 5; CDIL-LR 5.3. The Amended Motion (Doc. 3) was not filed within twenty-one days of June 9, 2016, but rather more than three months later on September 30, 2016.

Despite that, Rule 15(a)(2) also provides that in all other cases, a party may amend its pleading only with the opposing party's written consent or leave of court. The docket does not reveal that the Government consented to the amendment and leave of court was not sought. However, the rule provides further that the Court is to freely give leave to amend a pleading when justice so requires. Given this permissive standard and the unique significance of the habeas application discussed above, the Court finds it would be manifestly unfair to disallow the Amended Motion at this point in time, especially when the Court arguably acquiesced to the Amended Motion by entering an order directing the Government to respond to it. In the future though, proper leave of court should be sought. With that out of the way, the Court now turns to the issue of whether these two additional claims are indeed unauthorized and thus not capable of being heard by this Court.

Petitioner's first supplemental claim that he is actually innocent of the convictions for violating 18 U.S.C. § 1952 cannot be heard by this Court. The Seventh Circuit authorized Petitioner to move for relief for *Johnson*-related issues, not this stand-alone actual legal innocence claim. Because the Court sees little utility in forcing Petitioner to pursue this claim in a § 2241 petition in front of a court unfamiliar with the case—the court in the district where he is in custody—it has engaged in extensive research into whether it can retain jurisdiction over the claim. Alas, the Court has found no applicable exceptions. This claim does not fit

into the exceptions carved out in §§ 2244(b) and 2255(h) because it clearly does not rely on a new rule of constitutional law nor does it rely on newly discovered evidence.

The Court was tempted to turn to its own inherent ability to prevent miscarriages of justice in order to reach the claim. However, in *United States v. Williams*, 790 F.3d 1059, the Tenth Circuit thoroughly and convincingly explained why a district court lacks the authority to reach this type of unauthorized actual innocence claim in light of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (the "AEDPA"). That court explained that in *McQuiggin v. Perkins*, 133 S. Ct. 1924 (U.S. 2013)—a case where the Supreme Court held that in extremely rare circumstances, an actual innocence claim can overcome 28 U.S.C. § 2244(d)(1)'s one year statute of limitations—the Supreme Court recognized that where Congress had explicitly limited petitioners to evading certain procedural bars in certain statutory provisions of the AEDPA, "Congress clearly intended that courts may no longer invoke their common law miscarriage of justice authority to allow petitioners to bypass the relevant procedural bar" and the "courts must apply the exception as modified by Congress." 790 F.3d at 1076 citing *McQuiggin*, 133 S. Ct. at 1934. The *Williams* court found that the AEDPA clearly modified the common law miscarriage of justice exception by imposing a clear and convincing burden of proof and by requiring preauthorization of successive applications for habeas relief from the appropriate courts of appeals. *Id.* at 1076. This Court finds the *Williams* court's explanation to be persuasive and concludes

that it may not utilize the miscarriage of justice exception to reach Petitioner's actual innocence claim. The claim is hereby dismissed.

Petitioner's second supplemental claim—that his robbery convictions under 18 U.S.C. § 1951 do not qualify as crimes of violence under post-*Johnson* 18 U.S.C. § 924(c)—was also not included in the first successive § 2255 motion (Doc. 1) given to the Seventh Circuit for authorization. However, it is clearly predicated upon *Johnson* and thus the Court believes it is based upon a new rule of constitutional law and well within the scope of the claims the Seventh Circuit authorized this Court to reach. The Court will hear it.

II. LEGAL STANDARDS

Section 2255 of Title 28 of the United States Code provides that a sentence may be vacated, set aside, or corrected "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." "Relief under § 2255 is an extraordinary remedy because it asks the district court essentially to reopen the criminal process to a person who already has had an opportunity for full process." *Almonacid v. United States*, 476 F.3d 518, 521 (7th Cir. 2007). Thus, § 2255 relief is limited to correcting errors of constitutional or jurisdictional magnitude or errors constituting fundamental defects that result in complete miscarriages of justice. *E.g.*, *Kelly v. United States*, 29 F.3d 1107, 1112 (7th Cir. 1994), overruled on other grounds by *United States v. Ceballos*, 26 F.3d 717 (7th Cir. 1994). "A § 2255 motion is not a substitute for a direct appeal."

Coleman v. United States, 318 F.3d 754, 760 (7th Cir. 2003) (citing *Doe v. United States*, 51 F.3d 693, 698 (7th Cir. 1995)). Generally, a § 2255 motion must be filed within one year of the date the judgment against the petitioner became final. 28 U.S.C. § 2255(f)(1); *Clay v. United States*, 537 U.S. 522, 527 (2003) ("Finality attaches when this Court... denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires."). However, sub-paragraph (f)(3) provides that a § 2255 motion may be timely if it is brought within one year of the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review. 28 U.S.C. § 2255(f)(3).

III. FACTUAL BACKGROUND

Petitioner, Stacy M. Haynes, was convicted of several crimes after committing several armed robberies in the Quad Cities area of Iowa and Illinois in the mid-nineties. Specifically, Petitioner was convicted of three counts of Hobbs Act robbery in violation of 18 U.S.C. § 1951, three counts of interstate travel in aid of racketeering in violation of 18 U.S.C. § 1952, and six counts of using and carrying a firearm in furtherance of a crime of violence under 18 U.S.C. § 924(c). The Government timely filed a notice of intent to seek a mandatory life sentence under 18 U.S.C. § 3559(c)(1) on each of the Hobbs Act robbery counts and the interstate travel in aid of racketeering counts. This Court found that Petitioner had the requisite number of prior serious violent felonies because he had twice been convicted of residential burglary in Illinois on two prior separate occasions. So it

sentenced him accordingly after a jury convicted him. The following table will help keep straight what count corresponded to what offense and what sentence.

Count	Offense of Conviction	Sentence	§ 3559 Applies
1	Robbery of Illinois Hy-Vee in violation of 18 U.S.C. § 1951	Life	Yes
2	Use of a firearm in relation to Count 1 in violation of 18 U.S.C. §924(c)	5 years consecutive to life and each and every other 924(c) conviction	No
3	Travel in Violation of 18 U.S.C. § 1952 for robbing Eagle Food Centers in Iowa	Life	Yes
4	Use of a firearm in relation to Count 3 in violation of 18 U.S.C. §924(c)	20 years consecutive to life and each and every other 924(c) conviction	No
5	Travel in Violation of 18 U.S.C. § 1952 for robbing Jewel Food Store in Iowa	Life	Yes
6	Use of a firearm in relation to Count 5 in violation of 18 U.S.C. §924(c)	20 years consecutive to life and each and every other 924(c) conviction	No
8[1]	Robbery of Illinois K-Mart in violation of 18 U.S.C. § 1951	Life	Yes
9	Use of a firearm in relation to Count 8 in violation of 18 U.S.C. §924(c)	20 years consecutive to life and each and every other 924(c) conviction	No
10	Travel in Violation of 18 U.S.C. § 1952 for robbing Venture in Iowa	Life	Yes
11	Use of a firearm in relation to Count 10 in violation of 18 U.S.C. §924(c)	20 years consecutive to life and each and every other 924(c) conviction	No
12	Robbery of Illinois Hy-Vee in violation of 18 U.S.C. § 1951	Life	Yes
13	Use of a firearm in relation to Count 12 in violation of 18 U.S.C. §924(c)	20 years consecutive to life and each and every other 924(c) conviction	No

Years passed and then in 2015 the Supreme Court held in *Johnson v. United States*, 135 S. Ct. 2551, that the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii) was void for vagueness and later held in *Welch v. United States*, 136 S. Ct. 1257 (U.S. 2016), that *Johnson* applies retroactively to cases on collateral review. *Johnson* announced a new rule of constitutional law and *Welch* explicitly made it retroactive

[1] In case one is curious, the jury failed to convict Petitioner of Count 7 of the Indictment; it too was a Hobbs Act robbery charge.

to cases on collateral review. *Johnson*'s rule was not announced until June 2015 and thus was previously unavailable to Petitioner for use in his initial § 2255 motion filed several years ago. Since *Johnson* was decided, the Seventh Circuit has held that the "residual clause" of 18 U.S.C. § 16(b) is unconstitutionally vague, *United States v. Vivas-Ceja*, 808 F.3d 719, 723 (7th Cir. 2015), the pre-August 1, 2016 Amendment "residual clause" of the United States Sentencing Guidelines § 4B1.2(a)(2) was unconstitutionally vague, *United States v. Hurlburt*, 835 F.3d 715, 721 (7th Cir. Aug. 29, 2016), and that 18 U.S.C. § 924(c)'s "residual clause" is also unconstitutionally vague. *United States v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016).

IV. DISCUSSION

A. 18 U.S.C. § 3559(c)(1) Enhanced Mandatory Life Sentence Applied to Counts 1, 3, 5, 8, 10, and 12.

Recognizing the handwriting on the wall, Petitioner now moves to vacate his mandatory life sentence under 18 U.S.C. § 3559(c)(1) because that statute's definition of the term "serious violent felony" utilizes language almost identical to language that has been held to be unconstitutionally vague. *See* 18 U.S.C. § 3559(c)(2)(F)(ii). The Court found that Petitioner qualified for the enhanced sentence under 18 U.S.C. § 3559 because he had Illinois residential burglary convictions that qualified as "serious violent felonies" but residential burglary is not one of the enumerated offenses in 18 U.S.C. § 3559(c)(2)(F)(i). Thus, they only qualified as "serious violent felonies" under 18 U.S.C. § 3559(c)(2)(F)(ii)'s "residual clause". The Government concedes that if 18 U.S.C. § 3559(c)(2)(F)(ii)'s "residual

clause" is found to be unconstitutional then Petitioner's residential burglaries could not qualify as serious violent felonies. It offers no meaningful opposition to Petitioner's claim as it recognizes both that the language at issue is almost identical to the language in the clauses that have been found unconstitutionally vague and that the Court is bound to follow circuit precedent.[2]

Accordingly, the Court sees no reason to not follow circuit precedent and therefore finds that 18 U.S.C. § 3559(c)(2)(F)(ii)'s "residual clause" is so similar to the "residual clauses" at issue in *Vivas-Ceja*, *Hurlburt* and *Cardena* that this Court is compelled to conclude that it too is unconstitutionally vague. The Court's application of 18 U.S.C. § 3559(c) to Petitioner cannot stand. He must be resentenced on Counts 1, 3, 5, 8, 10, and 12. The Pre-sentence Investigation Report prepared for Petitioner calculated a total offense level of 37 and a criminal history category of VI, which placed Petitioner in the range of 360 months to life for Counts 1, 3, 5, 8, 10, and 12.

B. Use and Carry of a Firearm 18 U.S.C. § 924(c) Offenses in relation to the Convictions for Violating 18 U.S.C. §§ 1951 and 1952: Counts 2, 4, 6, 9, 11, and 13.

Petitioner's next claim is that his § 924(c) convictions for Counts 4, 6, and 11, which related to his interstate travel in support of racketeering convictions under 18 U.S.C. § 1952, must be overturned as well because of *Johnson* and subsequent cases applying *Johnson*'s holding.

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[2] The Government did briefly recount the reasons it believes these precedential cases were wrong in order to preserve the issues upon appeal. There is little reason for this Court to discuss them as this Court cannot overrule the Seventh Circuit. The Court notes that such objections have been made and are part of the record.

Section 924(c) states in relevant part that "any person who, during and in relation to any crime of violence... 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" be subjected to some very severe penalties. "Crime of violence" was defined 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.

18 U.S.C. § 924(c)(3). *Cardena* held that 18 U.S.C. § 924(c)'s residual clause is unconstitutionally vague under the principles set forth in *Johnson*. 842 F.3d at 996 ("we hold that the residual clause in 18 U.S.C. § 924(c)(3)(B) is also unconstitutionally vague."). Thus, a crime of violence under § 924(c) can only be a felony that has as an element the use, attempted use, or threatened use of physical force against the person or property of another.

Petitioner argues that the definition of "crime of violence" utilized in 18 U.S.C. § 1952 in his trial is the definition provided for in § 16(b) as it existed before *Johnson* and *Vivas-Ceja* were decided and thus includes the phrase "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." Petitioner argues further that the presence of this residual clause renders it broader than the post-*Johnson*, post-*Cardena* version of § 924(c)(3) and renders the two statutes incapable of matching up under the familiar

categorical approach originally espoused in *Taylor v. United States*, 495 U.S. 575, 600 (1990) and later elucidated in *Mathis v. United States*, 136 S. Ct. 2243 (2016). In other words, viewing the definition of crime of violence as an element of the § 1952 offense, that element is broader than the definition of the 924(c) offense because the § 1952 offense encompassed the pre-*Vivas-Ceja* version of §16(b). Therefore, the two statutes do not match up under the categorical approach as explained by the Supreme Court in *Mathis*.

The Government responds that *Mathis* is not properly applicable to this case. This is so because in *Mathis*, the court was concerned with whether a sentencing judge had properly determined whether the defendant had qualifying convictions for an enhanced sentence under 18 U.S.C. § 924(e). Whereas here, in contrast, a jury found that Petitioner had engaged in a crime of violence under 18 U.S.C. § 924(c), the underlying offense being a Hobbs Act robbery that has the use of physical force against a person or property as an element. Moreover, each of Counts 1, 3, 5, 8, and 10 contained language that accused Petitioner of displaying a firearm while committing the offense.

The Court sees no meaningful distinction between whether the sentencing judge or the jury made the finding. As most recently observed in *Cardena*, the categorical approach is utilized to determine whether a statute qualifies as a crime of violence under § 924(c). 842 F.3d at 997. The categorical approach is the same whether one is dealing with § 924(c), as here, or with § 924(e), as in *Mathis*. A finding was made that resulted in a penalty being assessed against the Petitioner.

The only relevant inquiry is whether or not the finding was made with a proper definition of the "crime of violence" element.

The Government explains that to convict Petitioner on the § 924(c) Counts 4, 6, and 11, the jury had to find beyond a reasonable doubt that he violated § 1952 by travelling interstate and committing the Hobbs Act robberies alleged in Counts 3, 5, and 10, each of which alleged that the crime of violence at issue was a "robbery" as that term is defined in 18 U.S.C. § 1951(b)(1). (Doc. 7 at 17-18; *see also United States v. Haynes*, No. 96-cr-40034, Doc. 5 at 2-4, 7).

So now, the discussion segues into Counts 3, 5, and 10 and the statutory definition of the term "robbery." Petitioner also claims that his § 924(c) violations in relation to his three Hobbs Act robbery convictions under 18 U.S.C. § 1951, Counts 2, 9, and 13, must be overturned because of the voiding of the residual clause and the fact that a Hobbs Act robbery can be accomplished without the use of physical force. Rather than discuss them separately, the discussion will now focus on all six § 924(c) counts because in the Court's opinion, they all ultimately hinge to varying degree on the definition of "robbery" in 18 U.S.C. § 1951(b)(1).

The Government concedes that the Petitioner's jury was instructed that the robberies at issue required the taking or obtaining of property from a person "by means of actual or threatened force, or violence or fear of injury, immediate or future, to his person or property." (Doc. 7 at 19). The Hobbs Act defines the term "robbery" to mean "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or

property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining." 18 U.S.C. § 1951(b)(1). If the Hobbs Act robbery can be accomplished without the use of physical force, then its elements are too broad to match up with the appropriate "crime of violence" term in § 924(c) under the categorical approach as explained by the Supreme Court in *Mathis*, 136 S. Ct. 2243. This is so because the crime of violence is an indivisible element of the § 924(c) offense. As far as this Court has researched, no jury—certainly not the Petitioner's—was ever asked to unanimously decide on whether they concluded a § 924(c) offense was warranted under the elements clause or the now-defunct residual clause, regardless of whatever language was included in the counts of the charging instrument.

Moreover, the parties agree that when applying the categorical approach a court presumes "the conviction rested on the least serious acts that could satisfy the statute," *United States v. Armour*, 840 F.3d 904, 908 (7th Cir. 2016), and that the "least serious act" would be fear of injury to property. Rather than recapitulate the Petitioner's argument further, the Court will quote him directly:

> Indeed, under the Hobbs Act's definition of robbery, the fear of injury need not even be immediate but can be in the future, and the property need not even belong to the immediate victim as the property can belong to someone else. *See id.* This alone prevents Hobbs Act robbery from qualifying as a crime of violence under § 924(c)'s force clause, because as just explained, that clause requires violent (i.e., strong) physical force against a person or property. But property can quite obviously be injured without the use of violent force – or even any force at all. As a means of compelling a victim to surrender valuable property against his will, a threat to deface a victim's Picasso painting with a magic marker pen, to black out lines in rare documents, or to

> flush drugs down the toilet is likely to be as or more effective as a threat to punch the victim in the face. Each involves a clear "threat of injury" and thus each would satisfy the elements of Hobbs Act robbery, but only the threat to punch the victim in the face involves the use of violent physical force.In short, although the threats to property described above involve physical actions, they do not involve physical force within the meaning of *Johnson v. United States*, 559 U.S. 133, 140 (2010) ("physical force" means "violent force" – that is "strong physical force," which is "capable of causing physical pain or injury to another person.").

(Doc. 3 at 19 (emphasis added)). The Petitioner's argument has merit. The Government responds by citing cases for the proposition that the Hobbs Act "fear of injury" is equivalent to the threatened use of physical force. *See United States v Duncan*, 833 F.3d 751, 755 (7th Cir. 2016); *Armour*, 840 F.3d at 907. The Court finds these cases and their holdings are either not applicable, or not persuasive, as the case may be, for the following two reasons.

First, those Seventh Circuit cases cited by the Government dealt exclusively with the fear of bodily injury. The plain language of the statute provides that a Hobbs Act robbery can be accomplished by causing a victim to have "fear of injury" to property, and "damage" to property can be accomplished without any force whatsoever. The language of the term "fear of injury" seems broad enough to encompass instances of the loss of economic value rather than only a physical destruction brought about through the use of physical force. A case the Government cites in its opposition brief makes this point clearly. "Hobbs Act robbery under § 1951, however, prohibits 'the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will' by various different methods. The statute thus does not punish behavior that merely results in physical

injury." *United States v. Wheeler*, No. 15-CR-216, 2016 WL 783412, at *4 (E.D. Wis. Jan. 6, 2016), report and recommendation adopted, No. 15-CR-216-PP, 2016 WL 799250 (E.D. Wis. Feb. 29, 2016). Mere touching alone is not enough to show physical force. *Duncan*, 833 F.3d at 754. There are items in this world that possess some value simply because no one else has touched them; rare baseball cards devoid of fingerprints, rare comic books wrapped in thick plastic that have never been opened, for example. These items would lose value if slightly handled directly in a loving fashion, let alone in a haphazard or forceful manner calculated to physically harm the item, and the owners fear the resulting injury—the loss of pecuniary value—so they take great measures to protect these items from normal wear and tear of handling. Given that recognition—that the statute punishes conduct that does not merely result in physical injury—it is difficult for this Court to understand how it can conclude "robbery by fear of injury... necessarily involves a threat to use physical force if the robber's demands are not met" as the Government argues. *See Wheeler*, 2016 WL 783412 at *4-5.

Second, the Court disagrees with the Government that the term "fear of injury" that appears in the definition of Hobbs Act "robbery" is the equivalent of the threatened use of physical force as a matter of statutory interpretation. This Court reads the statute to mean that a robbery is effectuated when either force, violence or fear of injury to the person or property of another are utilized to take a possession. 18 U.S.C. § 1951(b)(1). The statute would not include these three terms "force", "violence", "fear of injury" disjunctively as alternate means of violating the statute if they all meant the same thing. The Court will spare the reader from

another table however, the reader should understand that the language of the statute provides several distinct definitional combinations that explain the different ways in which one can violate this statute. For example, one could use immediate actual force, or future threatened force, or future fear of injury, or immediate fear of injury, all to effectuate an unlawful taking. In short, the statute utilizes these three terms to bring within its purview a broader range of conduct than it could have done otherwise if the terms all meant the same thing. The Court believes this reading of the statute better comports with the familiar canon of statutory interpretation that a court should not interpret a statute in such a way that renders any part of it superfluous or otherwise ineffective. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Very recently, this Court concluded that a crime of violence used in a § 924(c) conviction was sound under *Mathis* (and the cases that preceded *Mathis*) because the underlying crime was ultimately one where the jury was compelled to find that the defendant had engaged in the use of violent force. *See DeSilva v. United States*, No. 4:16-CV-4134, 2016 WL 6495393 (C.D. Ill. Nov. 2, 2016). *DeSilva* is distinguishable from this case because there, the nature of the ultimate crime was such that there had to have been an element of physical force in order for the jury to find DeSilva guilty of the 924(c) offense. *See id.* at *6 (underlying offense was attempted Illinois aggravated battery with a firearm which obviously fit as the use or carrying of a firearm while committing a crime of violence). Here, the jury could have found that the Hobbs Act robbery occurred without finding that physical force was utilized and therefore, these § 924(c) convictions predicated on the Hobbs Act

robberies directly under § 1951 cannot stand, nor can the § 924(c) convictions predicated on the Hobbs Act robberies indirectly as § 1952 underlying offenses.

Next, the Government relies on the harmless error doctrine as to the § 924(c) convictions predicated on the § 1952 offenses and argues that Petitioner cannot establish that he was harmed by the inclusion of the residual clause in the instruction to the jury essentially because the facts demonstrate that he used actual threatened force to effectuate the robberies. (Doc. 7 at 20). Petitioner replies that because the crime of violence definition is indivisible, there is no alternative instruction under which Petitioner could have been convicted and so there is no way Petitioner can be found to not have been harmed. The Court agrees with Petitioner.

On collateral review, the harmless-error doctrine standard to be applied is whether the error had a "substantial and injurious effect or influence in the jury's verdict." *Sorich v. United States*, 709 F.3d 670, 674 (7th Cir. 2013) (citing *Brecht v. Abrahmson*, 507 U.S. 619, 623 (1993). The Government argues that since we know without a doubt Petitioner used real threatened force and violence—pointing a gun at the robbery victims to rob stores—the jury would have concluded a crime of violence occurred regardless of the presence of the residual clause, so Petitioner was not harmed. Haynes used a gun to scare his victims into giving them money; period. Since it is clear that he used threatened real force to effectuate his robberies, the Court should ignore that the statute he violated punishes conduct that encompasses more than physical force. This is a common sense approach but the Court believes this argument ignores the whole point of *Mathis* and the correct application of the categorical approach.

In *Mathis*, the criminal engaged in a black and white textbook generic burglary but the Supreme Court held that he could not be subjected to the ACCA enhancement under § 924(e) because the statute the burglar was convicted under had broader elements than the generic burglary statute to which the ACCA applied. 136 S. Ct. at 2250. Thus, the primary lesson one takes away from *Mathis* is that when applying the categorical approach, courts have to ignore the actual facts underlying the offense and apply theoretical boundaries embodied by the elements of the offense. That is the law as explained in *Mathis*, 136 S. Ct. at 2248 that originated in *Taylor*, 495 U.S. at 599-602; it cannot be circumvented.

Here, Petitioner was found to have used a firearm while engaged in a "crime of violence" as used in 18 U.S.C. § 1952(a)(2), which at the time meant "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 a felony "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." (Doc. 7 at 18 referencing 18 U.S.C. § 16; *see United States v. Haynes*, Given Jury Instructions filed as Exhibit A attached hereto). Those clauses communicate two different ways an offense can be deemed a crime of violence, not two separate crimes of violence from which a factfinder could pick and choose. Because part of the definition was void at the time, the definition was too broad. The jury was never called upon to specify which clause of the "crime of violence" definition they were concluding applied. Thus, the error here is much more like a structural error rather than a mere trial error. *See Arizona*

v. Fulminante, 499 U.S. 279, 307–08 (1991) (discussing difference between structural and trial errors).

C. Procedural Default

Generally courts must decide whether a petitioner procedurally defaulted a claim before reaching the merits of the claim. The Court discusses procedural default here because the substance of the claims and why they are meritorious sheds light on whether one of the exceptions offered to excuse the procedural default is legitimate.

The Government asserts that Petitioner procedurally defaulted both his claim that his three § 924(c) counts predicated on his § 1952 offenses violate *Johnson* and his claim that his three § 924(c) counts predicated on his § 1951 offenses violate *Johnson*. Petitioner failed to pursue either claim on direct appeal. A petitioner may not generally pursue a claim on collateral review that he failed to raise on direct appeal unless he demonstrates cause and prejudice or that he is actually innocent. *Massaro v. United States*, 538 U.S. 500, 504 (2003). The rule is prudential in nature; it does not originate from any statutory or constitutional source. *Id.* The goal of the rule, which originated in the context of § 2254 petitions, is to ensure finality of convictions and reservation of scarce federal judicial resources. *See McClesky v. Zant*, 499 U.S. 467, 490-91 (1991).

Petitioner primarily argues that he is actually innocent of the § 924(c) offenses related to his § 1952 convictions. The Court disagrees. The actual innocence standard enquires into whether "in light of all the evidence, it is more likely than not that no reasonable juror would have convicted [petitioner]." *Bousley v. United*

States, 523 U.S. 614, 623 (1998). It is clear that Petitioner was convicted of overbroad statutory definitions, but these convictions were the result of legal developments not factual deficiencies. There is ample evidence that the Petitioner committed six crimes of violence under the elements clause of §924(c) in that he indisputably robbed stores at gunpoint and threatened use of physical force against several persons by threatening to shoot them if they did not comply with him. The Court does not have much doubt that had the jurors been given the proper versions of § 924(c) and §16(b) in their deliberations, they could, and probably would, have still found Petitioner guilty. So, the Court cannot find that Petitioner is actually innocent of the underlying offenses for the purpose of excusing procedural default.[3]

Petitioner clearly asserts that actual innocence precludes a finding of procedural default. (Doc. 8 at 4-6). And the Court does not agree. However, the Court interprets Petitioner's brief discussion of the evolution of the categorical approach and the rationale of *Johnson* (Doc. 8 at 6-7) as an argument that the novelty of his claims also excuses his procedural default.

A petitioner can establish cause for his procedural default by demonstrating that there was no reasonable basis in existing law for him to bring the claim on direct appeal. *Reed v. Ross*, 468 U.S. 1, 14-15 (1984) (cited in *Bousley*, 523 U.S. at 622). This is not the same argument as futility. *Bousley*, 523 U.S. at 622 (noting that the petitioner there also raised the issue of futility in addition to novelty). Petitioner argued his appeal in 1998. This Court was unable to find a single case in

[3] No one should construe this discussion to relate to Petitioner's stand-alone actual innocence claim that was dismissed. (*See supra* at 4-5).

the legal databases it searched that dealt with voidness of the residual clause before 2000. Thus, this is a far cry from the situation in *Bousley*, where "the Federal Reporters were replete with cases involving" the issue there when the petitioner presented his direct appeal and the novelty argument was rejected on that basis. 523 U.S. at 622. Moreover, the issues of the residual clause's "shoddy draftsmanship" and possible vagueness did not even come before the Supreme Court until 2007 in *James v. United States*, 550 U.S. 192, 229 (2007) (Scalia, J., dissenting). In short, this is one of those rare cases where the petitioner has demonstrated cause for his procedural default by demonstrating that there was no reasonable basis in existing law for him to bring the claim on direct appeal.

A petitioner still needs to establish that he was prejudiced for his procedural default to be excused. The prejudice that a petitioner must establish in these sorts of claims was articulated in *United States v. Frady*, 456 U.S. 152, 168-70 (1982), which requires a showing of actual and substantial disadvantage. Petitioner's § 924(c) crimes netted him a total of 105 consecutive years so it is obvious that he suffered an actual and substantial disadvantage from these convictions. *Frady* also instructs that courts are to assess "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Id.* at 169 (internal quotations and citations omitted). As the Court explained earlier in rejecting the harmless error argument, utilizing a crime of violence definition that was overbroad rendered the convictions untenable. That analysis is equally applicable here.

Although it is easy to say that the jury could have still found Petitioner guilty of these offenses had they had the proper definition of crime of violence before them, there is no way to be absolutely sure. Moreover, taking this position would be the functional equivalent of forcing the petitioner to prove that his jury concluded his crimes of violence fell under the elements clause of § 924(c) rather than the now defunct residual clause. Clearly, he has no feasible way of accomplishing that feat. Furthermore, the Court has found no basis in the law to impose such an onerous standard. *See In re Chance*, 831 F.3d 1335, 1340-41 (11th Cir. 2016) (explaining, albeit in dicta, why it is incorrect to make a § 2255 petitioner prove that he was sentenced under the residual clause in order to secure relief on a *Johnson* claim).

In short, just as the mismatch of elements saved Mathis from an ACCA sentence, the mismatch of elements brought on by the presence of constitutionally void clauses in the jury instructions here saves Petitioner from the § 924(c) convictions. Petitioner is receiving a uniquely rare chance that this Court believes is required by law. The seriousness of his conduct is not lost upon the Court. Should he be resentenced in such a manner that he is freed from the custody of the Bureau of Prisons, the Court sincerely hopes the Petitioner makes good use of this rare opportunity and lives a productive life rather than revert to his past criminal conduct.

D. Evidentiary Hearing

Rule 8 of the Rules Governing Section 2255 Proceedings for the United States District Courts requires courts to determine whether evidentiary hearings are required in instances where the § 2255 motion has survived screening. The Court

does not find that such a hearing is necessary here. However, because both the parties and the Court referenced the jury instructions given in the underlying criminal case, *United States v. Haynes*, No. 96-cr-40034, and such instructions are not accessible via the Court's EM/ECF system, the Court obtained a copy from the Clerk of Court and attaches them as an exhibit to this Opinion & Order. If the parties have an objection to the authenticity of the jury instructions, they may file an appropriate motion.

V. CONCLUSION

Petitioner, Stacy M. Haynes's Amended Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence (Doc. 3) is GRANTED in part and DISMISSED in Part; the Court passes no judgment on Petitioner's claim that he is actually innocent of his convictions for violating 18 U.S.C. § 1952. Petitioner's sentence in *United States v. Haynes*, No. 96-cr-40034 (C.D. Ill.) is VACATED for resentencing. His convictions for violating 18 U.S.C. § 924(c) are VACATED as well.

Also before the Court is Petitioner's original Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence (Doc. 1). That document is moot because the Court accepts the Amended Motion as properly filed. The Clerk shall terminate it from the electronic docket. This civil action is now TERMINATED.

Entered this 25th day of January, 2017.

s/ Joe B. McDade
JOE BILLY McDADE
United States Senior District Judge

UNITED STATES OF AMERICA, Plaintiff, v. REY CHEA, Defendant.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA
2019 U.S. Dist. LEXIS 177651
Case Nos. 98-cr-20005-1 CW,98-cr-40003-2 CW
October 2, 2019, Decided
October 2, 2019, Filed

Counsel {2019 U.S. Dist. LEXIS 1}For USA, Plaintiff (4:98-cr-20005-CW-1): Jeffrey David Nedrow, LEAD ATTORNEY, United States Attorney's Office, San Jose, CA; Julie Cybelle Reagin, San Francisco, CA; Thomas Anthony Colthurst, U.S. Attorneys Office, San Francisco, CA.

For USA, Plaintiff (4:98-cr-40003-CW-2): Robert David Rees, LEAD ATTORNEY, Thomas Anthony Colthurst, U.S. Attorneys Office, San Francisco, CA; Raven Marie Norris, US Attorneys Office, San Francisco, CA.

Judges: CLAUDIA WILKEN, United States District Judge.

Opinion

Opinion by: CLAUDIA WILKEN

Opinion

ORDER GRANTING MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255

Dkt. No. 340, 98-cr-20005-1

Dkt. No. 453, 98-cr-40003-2.

Rey Chea, who is represented by counsel, moves under 28 U.S.C. § 2255 to vacate, set aside, or correct his sixty-five-year sentence for convictions under 18 U.S.C. § 924(c) on the ground that the four counts of Hobbs Act robbery that served as predicates are not categorically "crimes of violence" under § 924(c)(3).1 The government opposes the motion. In light of United States v. Davis, 139 S. Ct. 2319 (2019), which invalidated the residual clause of § 924(c)(3), Chea's sentence under § 924(c) can be upheld only if Hobbs Act robbery is categorically a crime of violence under the elements clause of § 924(c)(3). For the reasons set forth below, the Court concludes that Hobbs Act robbery is not categorically{2019 U.S. Dist. LEXIS 2} a crime of violence under the elements clause of § 924(c)(3), because the offense can be committed by causing fear of future injury to property, which does not require "physical force" within the meaning of § 924(c)(3). Accordingly, the Court GRANTS Chea's motion.

BACKGROUND

I. Procedural history

In 1998, a grand jury returned indictments against **Chea** in two cases: case number 98-cr-20005, and case number 98-cr-40003. Juries in two trials found **Chea** guilty of each of the counts on which he was indicted. Chea's aggregate sentence in both cases was 880 months, or slightly over

seventy-three years, with sixty-five of those years being for the § 924(c) convictions and sentence at issue here.

A. Case No. 98-cr-20005

In case number 98-cr-20005, the operative indictment charged **Chea** with one count of conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) (Count One); three counts of Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) (Counts Two, Four, and Six); and three counts of using, carrying, or brandishing a firearm in violation of 18 U.S.C. § 924(c) (Counts Three, Five, and Seven), with the predicate offenses being the three counts of Hobbs Act robbery in Counts Two, Four, and Six. Indictment, Case No. 98-cr-20005, Docket No. 113; Docket No. 340 1,**{2019 U.S. Dist. LEXIS 3}** Ex. B.

After a trial, a jury convicted **Chea** on all seven counts on April 1, 1999. Verdict, Case No. 98-cr-20005, Docket No. 244; Docket No. 340-1, Ex. C.

District Judge Ronald M. Whyte sentenced **Chea** to 188 months as to Count One; a combined 188 months as to Counts Two, Four, and Six to run concurrently to the sentence for Count One; five years as to Count Three; twenty years as to Count Five; and twenty years as to Count Seven, with the sentences for Counts Three, Five, and Seven to be served consecutively to each other and to the other sentences. Case No. 98-cr-20005, Docket No. 280. Judge Whyte also sentenced **Chea** to two years of supervised release and to pay a special assessment of $350 and restitution. Id.

Judge Whyte entered judgment on August 25, 1999. Case No. 98-cr-20005, Docket No. 282.

Chea filed a notice of appeal on August 26, 1999. Case No. 98-cr-20005, Docket No. 283. The Ninth Circuit affirmed Chea's conviction but remanded for resentencing. Case No. 98-cr-20005, Docket Nos. 306, 307; United States v. **Chea**, 231 F.3d 531, 540 (9th Cir. 2000). The reasons for the remand for resentencing are not relevant to the issues now before the Court.

On remand, Judge Whyte resentenced **Chea** on June 13, 2001, to seventy-two months as to Count**{2019 U.S. Dist. LEXIS 4}** One; a combined seventy-two months as to Counts Two, Four, and Six, with the term to be served concurrently to the sentence for Count One; five years as to Count Three; twenty years as to Count Five; and twenty years as to Count Seven, with the terms for Counts Three, Five, and Seven to be served consecutively to each other and to the other sentences. Judgment, Case No. 98-cr-20005, Docket No. 317; Docket No. 340-1, Ex. D. Judge Whyte also sentenced **Chea** to twenty-four months of supervised release, and to pay restitution. Id.

This action was reassigned to the undersigned on September 26, 2016. Case No. 98-cr-20005, Docket No. 346.

B. Case No. 98-cr-40003

In case number 98-cr-40003, **Chea** was indicted on one count of conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) (Count One); one count of Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) (Count Two); and one count of using, carrying, or brandishing a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c) (Count Three), with the predicate crime being the Hobbs Act robbery in Count Two. Indictment, Case No. 98-cr-40003, Docket No. 1; see also Case No. 98-cr-20005, Docket No. 340-1, Ex. F.

After a trial, on April 29, 1999, a jury found **Chea{2019 U.S. Dist. LEXIS 5}** guilty as to all three counts. Verdict, Case No. 98-cr-40003, Docket No. 206; see also Case No. 98-cr-20005, Docket No. 340-1, Ex. G (Verdict) & H (Judgment).

The Court sentenced **Chea** to 100 months as to Counts One and Two, to be served concurrently to

each other and to the term of imprisonment imposed in Case No. 98-cr-20005; and to twenty years as to Count Three, to be served consecutively to the prison term for Counts One and Two and to the term of imprisonment imposed in Case No. 98-cr-20005 for the § 924(c) counts. Judgment, Case No. 98-cr-40003, Docket No. 244; see also Case No. 98-cr-20005, Docket No. 340-1, Ex. H (Judgment). The Court also sentenced **Chea** to thirty-six months of supervised release, and to pay restitution. Id.

Chea filed a notice of appeal on September 17, 1999. Case No. 98-cr-40003, Docket No. 245. The Ninth Circuit affirmed on December 5, 2000. Case No. 98-cr-40003, Docket No. 294.

II. Prior § 2255 motions

On January 4, 2005, **Chea** moved under § 2255 to vacate his convictions and sentence in Case No. 98-cr-40003, Docket No. 327, on the grounds of ineffective assistance of counsel and that his convictions and sentence violated his Sixth Amendment rights. The Court denied the motion on June 22, 2005,**{2019 U.S. Dist. LEXIS 6}** on the grounds that it was untimely and lacked merit. Case No. 98-cr-40003, Docket No. 332.

On April 16, 2012, **Chea** filed an identical motion under § 2255 in both cases. See Case No. 98-cr-20005, Docket No. 336; Case No. 98-cr-40003, Docket No. 435. The motion was predicated on the argument that his convictions and resulting sentence violated the Ninth and Tenth Amendments. The Court dismissed the motion in case number 98-cr-40003 on May 24, 2012, on the ground that it was a successive § 2255 motion not authorized by the court of appeals. Case No. 98-cr-40003, Docket No. 438. The Court denied the motion in case number 98-cr-20005 on the grounds that it was untimely and lacked merit. Case No. 98-cr-20005, Docket No. 338.

III. Present § 2255 motion

On May 11, 2016, **Chea** filed an identical § 2255 motion in both cases, seeking to vacate his convictions and sentence under § 924(c). Case number 98-20005, Docket No. 340; Case Number 98-cr-40003, Docket No. 453.2

Section 924(c)(1) "authorizes heightened criminal penalties for using or carrying a firearm 'during and in relation to,' or possessing a firearm 'in furtherance of,' any federal 'crime of violence or drug trafficking crime.'" Davis, 139 S. Ct. at 2324 (citing 18 U.S.C. § 924(c)(1)(A)).

"The statute proceeds to define the term 'crime of violence' in two subparts - the**{2019 U.S. Dist. LEXIS 7}** first known as the elements clause, and the second as the residual clause." Id.

According to § 924(c)(3), a crime of violence is 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.

Id. (citation and internal quotation marks omitted).

On September 19, 2016, the Ninth Circuit authorized Chea's successive § 2255 motion on the ground that it makes a prima facie showing under Johnson v. United States, 135 S. Ct. 2551 (2015) (Johnson II).

In his initial brief in support of his present § 2255 motion, **Chea** argues that his § 924(c) conviction and sentence must be vacated as illegal based on Johnson II. There, the Supreme Court held that the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii), which was worded similarly to the residual clause of § 924(c)(3), was unconstitutionally vague. **Chea**

contends that Johnson II's holding also applies to the residual clause of § 924(c)(3) and renders it unconstitutionally vague. **Chea** further argues that, post-Johnson II, his § 924(c) sentence can be upheld only if Hobbs Act robbery is a crime**{2019 U.S. Dist. LEXIS 8}** of violence under the elements clause3 of § 924(c)(3), which he contends is not the case, because Hobbs Act robbery does not involve the requisite degree of physical force required for a conviction under § 924(c)(3).

The government opposes the motion. The government argues that Chea's motion must be denied because his sentence is valid under the elements clause of § 924(c)(3). The government also argues that Chea's motion is procedurally barred because he failed to assert his current challenge to his § 924(c) conviction and sentence on direct appeal, and that the motion is untimely, because **Chea** filed it more than a year after his § 924(c) conviction and sentence became final.

The Court stayed its determination of Chea's § 2255 motion pending the final disposition of several Ninth Circuit cases involving issues that could be determinative of it. Docket Nos. 351, 375. The parties filed supplemental briefs addressing these cases. Docket Nos. 369, 370.

On July 8, 2019, the Court ordered the parties to file supplemental briefs specifically addressing the impact on Chea's § 2255 motion of Davis, 139 S. Ct. at 2319, and United States v. Blackstone, 903 F.3d 1020 (9th Cir. 2018), cert. denied, 139 S. Ct. 2762 (2019). Docket No. 377.

In Davis, the Supreme Court considered whether the residual clause of § 924(c)(3) is unconstitutionally vague and on June 24, 2019, held**{2019 U.S. Dist. LEXIS 9}** that it is. 139 S. Ct. at 2319. The Supreme Court reasoned that the residual clause of § 924(c)(3) is unconstitutional for the same reasons that it previously held that other, similarly-worded residual clauses in other statutes defining violent crimes were unconstitutional, namely because it requires judges to employ the "categorical approach" to determine whether an offense qualifies as a crime of violence. See id. at 2325-27 (discussing similarities between residual clause in § 924(c)(3) and residual clause in the ACCA, which was held to be unconstitutionally vague in Johnson II, and residual clause in 18 U.S.C. § 16(b), which was held to be unconstitutionally vague in Sessions v. Dimaya, 138 S. Ct. 1204 (2018)). Employing the categorical approach in the context of the residual clause of § 924(c)(3) is constitutionally problematic because it requires judges to disregard how the defendant actually committed the crime and instead to "imagine the idealized ordinary case of the defendant's crime and then guess whether a serious potential risk of physical injury to another would attend its commission." Id. at 2326 (citations and internal quotation marks omitted). This produces "more unpredictability and arbitrariness when it comes to specifying unlawful conduct than the Constitution allows." Id. at 2326 (citations and internal quotation**{2019 U.S. Dist. LEXIS 10}** marks omitted).

In Blackstone, which was issued before Davis, the Ninth Circuit held that § 2255 motions challenging § 924(c) convictions or sentences under the residual clause of § 924(c)(3) cannot be considered to be timely by virtue of being filed within one year of Johnson II because the "Supreme Court has not recognized that § 924(c)(3)'s residual clause is void for vagueness in violation of the Fifth Amendment." 903 F.3d at 1028. The Supreme Court denied certiorari in Blackstone on June 24, 2019. See 139 S. Ct. at 2762. No party disputes that Davis abrogated the holding in Blackstone that a § 2255 motion challenging a conviction or sentence under the residual clause of § 924(c)(3) is not rendered timely by filing it within a year of Johnson II.4

The parties filed supplemental briefs addressing these cases. See Docket Nos. 378, 379.

LEGAL STANDARD

A prisoner in custody under sentence of a federal court, making a collateral attack against the validity of his or her conviction or sentence, must do so by way of a motion to vacate, set aside, or correct the sentence pursuant to 28 U.S.C. § 2255 in the court that imposed the sentence. Tripati v.

Henman, 843 F.2d 1160, 1162 (9th Cir. 1988). Section 2255 was intended to alleviate the burden of habeas corpus petitions filed by federal prisoners in the district of confinement by providing an equally broad remedy in the{2019 U.S. Dist. LEXIS 11} more convenient jurisdiction of the sentencing court. United States v. Addonizio, 442 U.S. 178, 185 (1979). Under § 2255, a federal sentencing court may grant relief if it concludes that a prisoner in custody was sentenced in violation of the Constitution or laws of the United States. United States v. Barron, 172 F.3d 1153, 1157 (9th Cir. 1999).

ANALYSIS

I. Procedural barriers to the consideration of Chea's motion

A. Timeliness

A motion to vacate, set aside, or correct a sentence under § 2255 must be filed within one year of the latest of the date on which: (1) the judgment of conviction became final; (2) an impediment to making a motion created by governmental action was removed, if such action prevented the movant from making a motion; (3) the right asserted was recognized by the Supreme Court, if the right was newly recognized by the Supreme Court and made retroactive to cases on collateral review; or (4) the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence. 28 U.S.C. § 2255(f). A federal prisoner's judgment becomes final for purposes of the one-year statute of limitations when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition of certiorari elapsed or a petition for certiorari finally denied." Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987).

Chea contends{2019 U.S. Dist. LEXIS 12} that his § 2255 motion is timely because he filed it on May 11, 2016, within one year of Johnson II, which was decided on June 26, 2015.

The government argues that the motion is untimely because **Chea** did not file it within one year of the date on which his conviction under § 924(c) became final. The government further contends that Johnson II did not extend the limitations period because Johnson II did not create a new right with respect to the elements clause of § 924(c)(3), which the government argues is the clause that governs the determination of Chea's § 2255 motion.

The Court concludes that Chea's § 2255 motion is timely because any issues of timeliness are resolved in a § 2255 movant's favor in light of Davis where, as here, the movant initially challenged his § 924(c) sentence based on Johnson II.5

Chea's § 2255 motion has, from the outset, challenged his § 924(c) convictions and sentence based on the argument that the residual clause of § 924(c)(3) is unconstitutionally vague under Johnson II.6 **Chea** filed his motion within one year of Johnson II. Davis, which holds that the residual clause of § 924(c)(3) is unconstitutionally vague and cites Johnson II in support of that holding. This confirms that **Chea** was timely in filing his § 2255 motion within{2019 U.S. Dist. LEXIS 13} one year of the date on which Johnson II was decided. Further, the government does not dispute that Davis's holding with respect to the unconstitutionality of the residual clause of § 924(c)(3) abrogated Blackstone's holding with respect to the untimeliness of § 2255 motions based on Johnson II. Accordingly, Chea's motion is not barred as untimely. See 28 U.S.C. § 2255(f)(3) (providing that a § 2255 motion is timely if it is filed within one year of the date on which a right is newly recognized by the Supreme Court and is retroactively applicable to cases on collateral review).

B. Procedural default

The government argues that Chea's motion is procedurally barred because he failed to challenge his § 924(c) convictions and sentence on direct appeal.

Chea argues that his failure to challenge his § 924(c) convictions and sentence earlier is excused because his claim that the residual clause of § 924(c)(3) is unconstitutionally vague did not become viable until after Johnson II was issued. **Chea** also argues that his procedural default is excused because he is actually innocent as to his § 924(c) convictions.

As a general rule, "claims not raised on direct appeal may not be raised on collateral review unless the petitioner**{2019 U.S. Dist. LEXIS 14}** shows cause and prejudice," Massaro v. United States, 538 U.S. 500, 504 (2003), or that he is "actually innocent" as to the count of conviction he seeks to vacate, Vosgien v. Persson, 742 F.3d 1131, 1134 (9th Cir. 2014).

Cause is found when "the factual or legal basis for a claim was not reasonably available to counsel" at the time a direct appeal was or could have been filed. Murray v. Carrier, 477 U.S. 478, 488 (1986). Accordingly, the failure to file a direct appeal when the appeal "would have been futile, because a solid wall of circuit authority" precluded the appeal, does not constitute procedural default. English v. United States, 42 F.3d 473, 479 (9th Cir. 1994) (internal quotation marks and citations omitted).

Prejudice requires showing that the alleged error "worked to [the movant's] actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" United States v. Braswell, 501 F.3d 1147, 1150 (9th Cir. 2007) (citation omitted). The Supreme Court has not defined the level of prejudice necessary to overcome procedural default but it has held that the level is "significantly greater than that necessary under the more vague inquiry suggested by the words 'plain error.'" Murray, 477 U.S. at 493-94 (citation omitted). To show prejudice under the plain error standard, a defendant must "show her substantial rights were affected, and to do so, must establish that the probability of a different result is sufficient to undermine confidence**{2019 U.S. Dist. LEXIS 15}** in the outcome of the proceeding." United States v. Bonilla-Guizar, 729 F.3d 1179, 1187 (9th Cir. 2013) (internal quotation marks omitted).

Here, **Chea** has satisfied the cause requirement. Chea's argument that his § 924(c) convictions and sentence are illegal because the residual clause of § 924(c)(3) is unconstitutionally vague was not reasonably available to him at the time he was sentenced. Johnson II, which was issued in 2015, expressly overruled James v. United States, 550 U.S. 192 (2007), and Sykes v. United States, 131 S. Ct. 2267 (2011), which had upheld the analogous residual clause in the ACCA. Accordingly, Chea's residual-clause challenge would have been futile prior to Johnson II.

Chea also has satisfied the prejudice requirement. **Chea** has shown that a failure to recognize at his sentencing that the residual clause of § 924(c)(3) was unconstitutionally vague worked to his actual and substantial disadvantage, because it resulted in the imposition of a sixty-five-year sentence under § 924(c). As explained in more detail in the next section, Hobbs Act robbery is not categorically a crime of violence under the elements clause of § 924(c)(3), so **Chea** could not have received a constitutionally valid sentence under the elements clause of § 924(c)(3) at the time he was sentenced.

Because **Chea** has shown cause and prejudice, his failure to file a direct appeal challenging his § 924(c) convictions and sentence**{2019 U.S. Dist. LEXIS 16}** does not preclude his present § 2255 motion.

II. **Chea** is entitled to relief under 28 U.S.C. § 2255

The Court now turns to the merits of Chea's § 2255 motion. No party disputes that, after Davis, Chea's sentence under § 924(c), with four counts of Hobbs Act robbery under 18 U.S.C. § 1951(a) as the predicate offenses7, cannot be upheld based on the now-void residual clause of § 924(c)(3). Accordingly, the Court now must determine whether Hobbs Act robbery can serve as a predicate

crime of violence under the elements clause of § 924(c)(3), which is the only clause of § 924(c)(3) that survived Davis. See Geozos, 870 F.3d at 897 (in the context of the analogous ACCA, 18 U.S.C. § 923(e), and Johnson II, holding that when reviewing a § 2255 motion on the merits, a court must determine whether there are offenses that support a ACCA sentencing enhancement under one of the clauses that survived Johnson II). If so, then **Chea** is not entitled to § 2255 relief. Id.

To determine whether Chea's prior convictions for Hobbs Act robbery qualify as predicate crimes of violence under the elements clause of § 924(c)(3), the Court must employ the categorical approach. The categorical approach requires a comparison of the elements of the prior offense with the elements of the definition of the predicate offense that can result in enhanced penalties. See**{2019 U.S. Dist. LEXIS 17}** Descamps v. United States, 570 U.S. 254, 260-61 (2013) (applying categorical approach to determine whether a prior burglary offense qualifies as a predicate "violent felony" under the ACCA, 18 U.S.C. § 924(e)(2)(B)). A prior offense categorically qualifies as a predicate offense only if the statute defining the prior offense "has the same elements" or "defines the crime more narrowly" than the predicate offense definition. Id. at 261 (citation omitted). By contrast, if the prior offense "sweeps more broadly" than the predicate offense definition, then the prior offense does not qualify as a predicate offense. Id. Under the correct application of the categorical approach, "a prior crime would qualify as a predicate offense in all cases or in none." Id. at 268.

"The key" to the categorical approach "is elements, not facts."8 Id. "Sentencing courts may look only to the statutory definitions - i.e., the elements - of a defendant's prior offenses, and not to the particular facts underlying those convictions." Id. (citation and internal quotation marks omitted) (emphasis added). Where the scope of the prior offense, based on its elements "does not correspond to" the scope of the predicate offense definition, "the inquiry is over." Id. at 265.

Here, the categorical approach requires a comparison of**{2019 U.S. Dist. LEXIS 18}** the elements of Hobbs Act robbery with the elements of the definition of "crime of violence" in the elements clause of § 924(c)(3). Only if the elements of Hobbs Act robbery are the same, or narrower, than the definition of "crime of violence" in the elements clause of § 924(c)(3) can the Court conclude that Hobbs Act robbery is categorically a crime of violence under the elements clause of § 924(c)(3).

Subsection (a) of 18 U.S.C. § 1951 defines various offenses under the Hobbs Act, including robbery and extortion; it provides that:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

Subsection (b)(1) of 18 U.S.C. § 1951 defines "robbery" as follows:

> The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody**{2019 U.S. Dist. LEXIS 19}** or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

The elements clause of § 924(c)(3) defines a "crime of violence" as an offense that is a felony and "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). Section 924(c)(3) does not define the term "physical force."

Chea contends that Hobbs Act robbery is not categorically a crime of violence under the elements clause of § 924(c)(3) because the Hobbs Act robbery statute sweeps more broadly than the elements clause's "crime of violence" definition. **Chea** argues that the plain language of § 1951(b)(1) shows that Hobbs Act robbery can be committed by causing fear of future injury to property, which does not involve the "physical force" required for it to qualify as a crime of violence under the elements clause of § 924(c)(3) in light of Johnson v. United States, 559 U.S. 133 (2010) (Johnson I).

In Johnson I, the Supreme Court held that, for a prior offense to qualify as a predicate offense under the elements clause of the ACCA, 18 U.S.C. § 924(e)(2)(B)(i), which defines a "violent felony" using statutory language similar to the elements clause of § 923(c)(3), the "physical force" used must be "violent force - that is,**{2019 U.S. Dist. LEXIS 20}** force capable of causing physical pain or injury to another person." Id. at 140 (emphasis added). The ACCA's "violent felony" definition defines the "physical force" requirement in the context of force applied against "the person of another," whereas the elements clause of § 924(c)(3) defines "physical force" more broadly, in the context of force applied against "the person or property of another" (emphasis added).9

Notwithstanding this distinction, the Ninth Circuit has held that "the Johnson I standard" for "physical force" applies to the elements clause of § 924(c)(3). United States v. Watson, 881 F.3d 782, 784 (9th Cir. 2018) (citation omitted) ("Although Johnson [I] construed the force clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i), the Johnson [I] standard also applies to the similarly worded force clause of § 924(c)(3)(A)."). The Ninth Circuit has not yet applied the Johnson I standard for "physical force" in the context of a prior offense that can be committed by using or threatening to use force against property. Nonetheless, in the context of offenses committed by actual or threatened force against property, the only reasonable way to apply the Johnson I standard is to require likewise that the offense involve "violent" physical force against the property.

Thus, Chea's argument**{2019 U.S. Dist. LEXIS 21}** that Hobbs Act robbery is not categorically a crime of violence under the elements clause of § 924(c)(3) depends on two premises: (1) that Hobbs Act robbery can be committed by causing fear of future injury to property; and (2) that Hobbs Act robbery by causing fear of future injury to property fails to meet the Johnson I standard that the prior offense involve actual or threatened physical force that is "violent."

The first premise is supported by the plain language of 18 U.S.C. § 1951(b)(1). That statute, as described above, defines "robbery" under the Hobbs Act and provides that it can be committed "by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property . . ." (emphasis added). Courts have recognized that, based on its plain language, Hobbs Act robbery can be committed by threats to property. See, e.g., United States v. O'Connor, 874 F.3d 1147, 1158 (10th Cir. 2017) (holding that "Hobbs Act robbery criminalizes conduct involving threats to property," and that "Hobbs Act robbery reaches conduct directed at 'property' because the statute specifically says so") (citing 18 U.S.C. § 1951(b)(1)).

The second premise, that Hobbs Act robbery by causing fear of future injury to property does not involve the use or threats of violent physical force**{2019 U.S. Dist. LEXIS 22}** required by Johnson I, also is supported by the statute's plain language. The phrases "fear of injury," "future," and "property" are not defined in § 1951(b)(1), so the Court gives them their ordinary meaning. See Leocal v. Ashcroft, 543 U.S. 1, 9 (2004) ("When interpreting a statute, we must give words their 'ordinary or natural' meaning.") (citation omitted). Nothing in the ordinary meaning of these phrases suggests that placing a person in fear that his or her property will suffer future injury requires the use or threatened use of any physical force, much less violent physical force. Where the property in question is intangible,10 it can be injured without the use of any physical contact at all; in that context, the use of violent physical force would be an impossibility. Even tangible property can be injured without using

violent force. For example, a vintage car can be injured by a mere scratch, and a collector's stamp can be injured by tearing it gently.

Further, the fact that § 1951(b)(1) expressly sets forth other, potentially violent alternative means of accomplishing a Hobbs Act robbery, namely by means of "actual or threatened force, or violence," further supports the notion that "fear of injury" does not require the use or threats of**{2019 U.S. Dist. LEXIS 23}** violent physical force required by Johnson I. See 18 U.S.C. § 1951(b)(1) (". . . by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property . . .") (emphasis added). Interpreting "fear of injury" as requiring the use or threat of violent physical force would render superfluous the other, potentially violent alternative means of committing Hobbs Act robbery, specifically, by threatened force or violence. See Ratzlaf v. United States, 510 U.S. 135, 140-41 (1994) ("Judges should hesitate . . . to treat statutory terms [as surplusage] in any setting, and resistance should be heightened when the words describe an element of a criminal offense."); Duncan v. Walker, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (citations and internal quotation marks omitted). If Congress had intended "fear of injury" to mean "fear of violence or violent force," it could have said so expressly. It did not.

Further still, nothing in the plain language of § 1951(b)(1) suggests that the "property" that the victim fears could be injured needs to be in the victim's physical custody or possession, or even proximity, at the time the Hobbs Act robbery is committed. This is important, because it preempts any argument**{2019 U.S. Dist. LEXIS 24}** that the fear of injury to property necessarily involves a fear of injury to the victim (or another person) by virtue of the property's proximity to the victim or another person. See United States v. Camp, 903 F.3d 594, 602 (6th Cir. 2018) (noting that Hobbs Act robbery can be committed by "threats to property alone" and that such threats "whether immediate or future-do not necessarily create a danger to the person"). Section 1951(b)(1) lists alternative scenarios in which a victim can be placed in fear of injury to property, and one of these alternatives requires only that the "fear of injury" be "to his person or property," without requiring that the property be in any particular location. See 18 U.S.C. § 1951(b)(1) (". . . fear of injury, immediate or future, to his person or property, or property in his custody or possession . . .") (emphasis added).

Thus, the plain language of § 1951(b)(1) clearly supports the notion that committing Hobbs Act robbery by causing fear of future injury to property does not require the use or threatened use of any physical force, much less the violent physical force required by Johnson I. This form of Hobbs Act robbery can be committed with threatened de minimis force or no force at all with respect to the property, and without any actual or threatened physical**{2019 U.S. Dist. LEXIS 25}** contact with a person.

No binding authority precludes this conclusion; neither the Supreme Court nor the Ninth Circuit has addressed the question of whether Hobbs Act robbery by causing fear of future injury to property satisfies the violent physical force standard of Johnson I.

At least one court of appeals that has considered the applicability of § 924(c)(3) to offenses that cover injury to property has reached a conclusion similar to the one the Court reaches here. In United States v. Bowen, the Tenth Circuit considered whether a prior offense of federal witness retaliation11 committed by damage to a victim's property could serve as a predicate crime of violence under the elements clause of § 924(c)(3). No. 17-1011,__F.3d__, 2019 WL 4146452, at *8 (10th Cir. Sept. 3, 2019). The court of appeals concluded that this offense did not meet Johnson I's standard and therefore was not a crime of violence under the elements clause of § 924(c)(3) because the offense could be committed without the use of violent physical force. Id. at *10. It reasoned that, "[a]s with force applied against or towards people, not all force applied against

property is 'inherently violent' . . . there is not inherent violence in, for example, spray-painting another's car, or 'threatening to throw paint on [another's] house**{2019 U.S. Dist. LEXIS 26}** . . . or . . . to pour chocolate syrup on his passport[.]' Nothing about those actions is inherently violent, so the mere fact that they damage property cannot make them crimes of violence under § 924(c)(3)." Id. at *10-11 (internal citations omitted).

Based on the foregoing, § 1951(b)(1) sweeps more broadly than the definition of a "crime of violence" under the elements clause of § 924(c)(3), because Hobbs Act robbery by causing fear of future injury to property can be accomplished without the use or threats of violent physical force required by Johnson I. Under the categorical approach, this "disparity" ends the inquiry and warrants vacating Chea's convictions and sentence under § 924(c)(3). See Mathis v. United States, 136 S. Ct. 2243, 2251 (2016) (holding that "the mismatch of elements saves the defendant from an ACCA sentence" where the prior offense's elements "cover a greater swath of conduct than the elements of the relevant ACCA offense").12

The government's arguments to the contrary are unavailing. The government interprets the Ninth Circuit to say in United States v. Mendez, 992 F.2d 1488 (9th Cir. 1993), that Hobbs Act robbery is a crime of violence under § 924(c)(3)(A). See Brief at 7, Docket No. 7. But that is not what Mendez holds. In Mendez, the Ninth Circuit considered whether a conspiracy to commit Hobbs Act robbery**{2019 U.S. Dist. LEXIS 27}** qualified as a crime of violence under the residual clause of § 924(c)(3) and held that it did. See 992 F.2d at 1492. The Ninth Circuit expressly declined to address whether conspiracy to commit Hobbs Act robbery qualified as a crime of violence under the elements clause of § 924(c)(3). Id. at 1491 ("We do not address whether conspiracy to rob, in violation of § 1951 is a 'crime of violence' under subsection (A) of § 924(c)(3) because we conclude that it is a "crime of violence" under subsection (B)."). The Ninth Circuit stated in dicta that robbery indisputably qualifies as a crime of violence. See id. However, it necessarily did so in connection with its analysis of the residual clause.

The holding and reasoning in Mendez are irrelevant to the resolution of Chea's motion because (1) the prior offense at issue in Mendez was conspiracy to commit Hobbs Act robbery, which has different elements than Hobbs Act robbery; and (2) Mendez's holding was limited to the residual clause of § 924(c)(3) and thus has been abrogated by Davis, which invalidated the residual clause under § 924(c) as unconstitutionally vague.

The government next argues that the Ninth Circuit held in United States v. Howard, 650 F. App'x 466, 467 (9th Cir. 2016), as amended (June 24, 2016), that Hobbs Act robbery "by fear of injury" necessarily involves violent physical force. Brief at 12-13,**{2019 U.S. Dist. LEXIS 28}** Docket No. 348. The Court disagrees.

In Howard, the Ninth Circuit considered whether Hobbs Act robbery "by putting someone in 'fear of injury'" meets the physical force requirement in the elements clause of § 924(c)(3) in light of Johnson I and held that it does. Id. at 468. The Court reasoned that "intimidation" as used the federal bank robbery statute, which "means willfully 'to take, or attempt to take, in such a way that would put an ordinary, reasonable person in fear of bodily harm,'" is equivalent to "fear of injury" in the Hobbs Act. Id. The Ninth Circuit held, "Because bank robbery by 'intimidation' - which is defined as instilling fear of injury - qualifies as a crime of violence, Hobbs Act robbery by means of 'fear of injury' also qualifies as crime of violence." Id.

Howard, which is an unpublished memorandum and is not precedent, does not impact the Court's analysis or conclusion. First, it does not address Hobbs Act robbery by causing fear of future injury to property; its reasoning and holding are limited to the context of "putting someone" in "fear of bodily harm." Nothing in the opinion suggests that its reasoning and holding would apply (or even make

sense) in the context of Hobbs Act robbery{2019 U.S. Dist. LEXIS 29} by causing fear of future injury to property, which, as discussed above, does not require any threatened or actual bodily contact, much less bodily harm.13 Second, the Ninth Circuit in Howard expressly declined to consider whether "Hobbs Act robbery may be accomplished through de minimis use of force," because the defendant in that case did not make that argument. Id. at 468 n.1. The Ninth Circuit recognized that it "has held that crimes that require only a de minimis use of force do not qualify as crimes of violence," but it took "no position on that issue or the applicability of these precedents to Hobbs Act robbery." Id. As a result of the Ninth Circuit's express declination to consider whether a form of Hobbs Act robbery that involves de minimis or no force at all (such as that by causing fear of future injury to property) can be a "crime of violence," Howard neither precludes, nor is inconsistent with, the Court's reasoning and conclusion here.

The government also cites Stokeling v. United States, 139 S. Ct. 544, 550 (2019), to counter Chea's argument that Hobbs Act robbery does not require the use of violent physical force. Brief at 3-4, Docket No. 379. But Stokeling says nothing about the Hobbs Act, and its holding and reasoning are inapposite.{2019 U.S. Dist. LEXIS 30}

There, the Supreme Court considered whether a Florida robbery statute qualifies as a "violent felony" under the ACCA's elements clause and concluded that it does. In so holding, the Supreme Court relied on the fact that "[a]s originally enacted," the ACCA specifically prescribed an enhanced sentence for prior convictions for robbery or burglary, id. at 550 (emphasis added), and that a prior version of the ACCA included a definition of robbery as a predicate offense that "mirrored the elements of the common-law crime of robbery, which has long required force or violence." Id. Although the current version of the ACCA does not enumerate robbery as a predicate offense, the Supreme Court held that, because of the ACCA's legislative history and its express inclusion of robbery as a predicate offense in its prior version, the ACCA's elements clause had to be interpreted to cover the Florida robbery statute at issue, which the Florida Supreme Court had interpreted as requiring physical force sufficient to overcome a victim's resistance. Id. at 551, 554.

Stokeling does not alter the Court's conclusions. First, Stokeling did not address whether robbery of the type at issue here, namely robbery by causing fear of injury{2019 U.S. Dist. LEXIS 31} to property, would meet Johnson I's violent physical force standard. Stokeling holds that the Florida robbery statute at issue in that case requires violent force sufficient to meet Johnson I's standard, because that offense requires physical force sufficient to overcome a victim's resistance, and thus necessarily involves the use of actual physical force against a person. See id. at 549 (citing Fla. Stat. § 812.13(1) (1995)). That Florida statute is unlike the Hobbs Act robbery statute, because it does not cover threatened future injury to property divorced from actual or threatened physical contact with a person. As discussed above, Hobbs Act robbery, unlike the Florida robbery statute, can be accomplished with little or no force directed at property, and without any actual or threatened physical force directed at a person. Second, the government has presented no evidence that the legislative history of § 924(c)(3) requires, or even supports, a reading of that statute as covering Hobbs Act robbery.

The government next argues that "all of the post-Johnson II courts to have addressed the issue have found that Hobbs Act robbery is a crime of violence under the force clause." Brief at 9-10, Docket No. 348; Brief at 2, Docket No.{2019 U.S. Dist. LEXIS 32} 379.

None of the opinions that the government cites in support of this argument are binding on this Court, however. Moreover, the Court finds the reasoning in these opinions to be unpersuasive or irrelevant for a multitude of reasons, which include the following. First, some of these opinions do not apply the categorical approach correctly or at all, which renders their conclusions incorrect.14 Second, some of

these opinions do not apply the Johnson I standard of violent physical force, either at all or in the context of force against property15; these opinions, therefore, are inapposite because the Ninth Circuit has held, without any qualification, that Johnson I's standard applies in the context of § 924(c). See Watson, 881 F.3d at 784.

Third, some of these opinions interpret the phrase "fear of injury" using the canon of noscitur a sociis and conclude that "fear of injury" "must be like the 'force' or 'violence' described in the clauses preceding it." See, e.g., United States v. Garcia-Ortiz, 904 F.3d 102, 107 (1st Cir. 2018). The Court does not find this reasoning persuasive because Congress chose to use three different terms in the Hobbs Act robbery statute ("force," "violence," and "fear of injury") and each must be given meaning, as discussed**{2019 U.S. Dist. LEXIS 33}** in more detail above. Additionally, Congress specifically chose the terms "force" and "injury" without any qualifiers, which suggests that it intended to give them the broadest possible scope. Congress easily could have worded the Hobbs Act robbery statute using terms that specifically require the use or threats of violent physical force with respect to each of the forms of the offense, but it did not.

Fourth, most of the opinions cited by the government do not consider or address the issue raised here, namely that Hobbs Act robbery can be committed by causing fear of future injury to property; as such, they are irrelevant. The few that do address this argument reject it as immaterial (1) without any meaningful analysis16; or (2) on a ground that is inconsistent with the categorical approach17, namely that the movant did not show prior convictions or instances of Hobbs Act robbery based on that theory. Requiring such a showing of prior convictions or instances of a particular form of a prior offense is contrary to the rule that "[s]entencing courts may look only to the statutory definitions - i.e., the elements - of a defendant's prior offenses" and not facts, Descamps, 507 U.S. at 261, and that "the inquiry is**{2019 U.S. Dist. LEXIS 34}** over" once the court determines that the statute defining the prior offense covers conduct that is broader than the violent crime definition, id. at 265. See also O'Connor, 874 F.3d at 1154 (rejecting government's argument that defendant was required to "demonstrate that the government has or would prosecute threats to property as a Hobbs Act robbery" because the defendant "does not have to make that showing" under the categorical approach) (internal quotation marks omitted).

Next, the government contends that Hobbs Act robbery "incorporates the common-law definition of robbery which requires the threat of physical force." Brief at 11, Docket No. 348. But the government does not explain why the elements of "common-law robbery," which the government does not describe, would be relevant to the Court's application of the categorical approach here, which requires, as discussed above, that the Court compare the elements of the predicate offense (i.e., Hobbs Act robbery), based on that statute, with the elements of the "crime of violence" definition in § 924(c)(3)(A). Moreover, the authorities that the government cites do not support the proposition that Hobbs Act robbery and "common-law robbery" have the**{2019 U.S. Dist. LEXIS 35}** same elements. See Brief at 11, Docket No. 348 (citing United States v. Walker, 595 F.3d 441, 444 (2d Cir. 2010) ("The common law crime of robbery and the various federal statutory offenses of robbery have substantially the same essential elements.")) (emphasis added). Thus, the Court declines to consult or rely on "the definition" of an extraneous common-law offense for the purpose of resolving Chea's motion, because the government has made no showing that doing so would be permissible under the categorical approach. See Taylor v. United States, 495 U.S. 575, 594 (1990) (declining to "read into" a statute its "common-law meaning" in light of "the absence of any specific indication that Congress meant to incorporate the common-law meaning" into that statute).

Lastly, the government argues, without any support, that Hobbs Act robbery involves "inherent" violence, and that "the Hobbs Act requires that the property be in the person's presence." See Brief at 11-12, Docket No. 348. As discussed above, the plain language of § 1951(b)(1) is inconsistent with

these interpretations. The Court declines to read elements into § 1951(b)(1) that simply are not there.

Accordingly, the Court concludes that the government's arguments and authorities are unavailing and that Hobbs Act robbery is not categorically a crime of violence**{2019 U.S. Dist. LEXIS 36}** under the elements clause of § 924(c)(3).18

CONCLUSION

The Court GRANTS Chea's § 2255 motion. The Court will vacate and set aside Chea's convictions and sentence for violations of 18 U.S.C. § 924(c) entered in case number 98-cr20005, and case number 98-cr-40003. Within seven days of the date this order is issued, **Chea** shall file a brief of no more than five pages setting forth his position as to the next steps the Court should take. The government may file a response within seven days thereafter of no more than seven pages. **Chea** may file a reply within three days thereafter of no more than two pages.

IT IS SO ORDERED.

Dated: October 2, 2019

/s/ Claudia Wilken

CLAUDIA WILKEN

United States District Judge

Footnotes

1

Chea filed identical § 2255 motions in the two cases listed above. This order resolves docket number 340 in case number 98-cr-20005, and docket number 453 in case number 98-cr-40003.

2

In the remainder of this order, any references to docket numbers are to those in case number 98-cr-20005.

3

The elements clause is often referred to as the "force clause."

4

See Miller v. Gammie, 335 F.3d 889, 899 (9th Cir. 2003) ("[C]ircuit precedent, authoritative at the time that it issued, can be effectively overruled by subsequent Supreme Court decisions that 'are closely on point,' even though those decisions do not expressly overrule the prior circuit precedent" where the Supreme Court decisions "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable") (citation omitted).

5

In an unpublished opinion, the Ninth Circuit reached the same conclusion. See United States v. Carcamo, No. 17-16825, 2019 WL 3302360, at *1 (9th Cir. July 23, 2019) (unpublished mem.) ("In light of Davis, we also resolve any issues of timeliness in [the movant's] favor" where the § 2255 movant had initially challenged his § 924(c) sentence based on Johnson II).

6

The government argues that Chea's motion turns on the elements clause and, as such, it is untimely because neither Johnson II nor Davis created a new right with respect to the elements clause. The

Court disagrees with this analysis. Because it is not clear whether Chea was sentenced under the residual clause or the elements clause of § 924(c)(3), the Court, for the purpose of determining whether Chea's § 2255 motion is procedurally barred, will interpret the motion as a residual-clause challenge that relies on Johnson II and Davis. See United States v. Geozos, 870 F.3d 890, 896 (9th Cir. 2017) (where it was not clear if the district court relied on the residual clause of the analogous ACCA, 18 U.S.C. § 924(e), in determining whether the prior offense qualified as a "violent felony" under the ACCA, but it may have, construing § 2255 motion as a residual-clause challenge that "relies on" Johnson II where the defendant argued that his § 2255 motion was not procedurally barred on the ground that it relied on Johnson II).
7

Section 1951(a) of Title 18 is "divisible" because it contains at least two separate offenses, robbery and extortion. Where, as here, the statute setting forth the prior offense is divisible, a court may consult documents in the record, such as "indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction." Descamps v. United States, 570 U.S. 254, 257 (2013). Here, the record is clear, and the parties do not dispute, that the prior offenses that served as predicates for Chea's § 924(c) sentence are Hobbs Act robberies in violation of § 1951(a). Therefore, only the elements of Hobbs Act robbery are relevant to the question of whether Chea's prior offenses are crimes of violence under § 924(c)(3). See United States v. Watson, 881 F.3d 782, 784 (9th Cir. 2018) ("Because § 2113(a) is divisible with respect to [bank robbery and bank extortion] and [defendants] were convicted of the first offense, we need not decide whether bank extortion qualifies as a crime of violence.").
8

"'Elements' are the 'constituent parts' of a crime's legal definition-the things the 'prosecution must prove to sustain a conviction.' . . . Facts, by contrast, are mere real-world things-extraneous to the crime's legal requirements." Mathis v. United States, 136 S. Ct. 2243, 2248 (2016) (internal citations omitted).
9

Compare 18 U.S.C. § 924(e)(2)(B)(i)(defining a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year," or a qualifying juvenile delinquency, that "has as an element the use, attempted use, or threatened use of physical force against the person of another") with 18 U.S.C. § 924(c)(3)(A) (defining a "crime of violence" as an offense that is a felony and "has as an element the use, attempted use, or threatened use of physical force against the person or property of another").
10

"[T]he language of the Hobbs Act makes no such distinction between tangible and intangible property." United States v. Local 560 of Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, & Helpers of Am., 780 F.2d 267, 281 (3d Cir. 1985) (collecting cases).
11

In Bowen, the "parties agree[d] that '[a] defendant may be convicted of witness retaliation if, with intent to retaliate, he knowingly causes or threatens to cause [(1)] bodily injury to a witness or knowingly causes or threatens to cause [(2)] damage to a witness's property." No. 17-1011, 2019 WL 4146452, at *7.
12

Chea also argues that there are other means of committing Hobbs Act robbery that do not involve using the "violent force" required by Johnson I, such as where it is committed by placing a person "in fear of injury" "to his person," or "by force" or "threatened force." Docket No. 340 at 10-13. Chea

argues that these forms of Hobbs Act robbery can be committed by using de minimis physical force, or no physical force at all. Under the categorical approach, "a prior crime would qualify as a predicate offense in all cases or in none." Descamps, 570 U.S. at 268. Because the Court concludes that at least one form of Hobbs Act robbery, by causing fear of future injury to property, does not require the violent physical force required by Johnson I, the Court need not consider whether any other forms of the offense also do not meet Johnson I's standard.
13

The government's reliance on other cases that interpret "intimidation" in various federal statutes as "fear of bodily harm" is unavailing for the same reasons.
14

See, e.g., In re Fleur, 824 F.3d 1337, 1341 (11th Cir. 2016) (concluding that Hobbs Act robbery is a crime of violence under the elements clause of § 924(c)(3), not based on the Hobbs Act robbery statute's elements, but because the description of the Hobbs Act robbery count in the indictment stated that the defendant in that case committed the robbery "by means of actual and threatened force, violence, and fear of injury").
15

See, e.g., United States v. Pena, 161 F. Supp. 3d 268, 273 (S.D.N.Y. 2016) (declining to apply Johnson I standard and instead "interpret[ing] the word 'force' in Section 924(c)(3) . . . to mean 'power, violence, or pressure directed against a person or thing'") (citation omitted); United States v. Hill, 890 F.3d 51, 58 (2d Cir. 2018) (holding that Johnson I does not "require that a particular quantum of force be employed or threatened to satisfy its physical force requirement" in the context of injury to property).
16

See, e.g., United States v. Buck, 847 F.3d 267, 275 (5th Cir. 2017) (holding that Hobbs Act robbery by "threatening some future injury to the property of a person who is not present" is not a crime of violence because other courts "have held that the Hobbs Act definition of robbery describes a crime of violence under § 924(c)(3)(A)," without more).
17

See, e.g., Garcia-Ortiz, 904 F.3d at 107 ("Garcia points to no actual convictions for Hobbs Act robbery matching or approximating his theorized scenario . . . Garcia's inability to point to any convictions for Hobbs Act robbery based upon threats to devalue intangible property convince us that Hobbs Act robbery, even when based upon a threat of injury to property, requires a threat of the kind of force described in Johnson I[.]"); Pena, 161 F. Supp. 3d at 283 ("Pena has not presented any case law illustrating his hypothetical ways that Hobbs Act robbery could be committed through fear of injury without force[.]").
18

Even if some ambiguity existed as to whether the elements clause of § 924(c)(3) covers Hobbs Act robbery, the Court would resolve any such ambiguity in favor of Chea under the rule of lenity. United States v. Edling, 895 F.3d 1153, 1158 (9th Cir. 2018) ("The rule of lenity 'instructs that, where a statute is ambiguous, courts should not interpret the statute so as to increase the penalty that it places on the defendant.'") (citation omitted).