Appendix

FILED

NOV 17 2020

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RALPH STEPHEN GAMBINA, AKA Jack Dawson, AKA Jack Franco, AKA Tony Franco, AKA Ralph Stephen Gambin, AKA Jack Kiwa, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.	No. 17-56308 D.C. Nos. 2:16-cv-04583-AWT 2:89-cr-00923-AWT-1 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
A. Wallace Tashima, Circuit Judge, Presiding

Submitted November 12, 2020**
Pasadena, California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: CHRISTEN and WATFORD, Circuit Judges, and ROSENTHAL,[***] Chief District Judge.

In 1991, Appellant Ralph Stephen Gambina was convicted of one count of kidnapping during an armed bank robbery, in violation of 18 U.S.C. § 2113(a), (d), (e); one count of kidnapping during an attempted armed bank robbery, in violation of 18 U.S.C. § 2113(a), (d), (e); and two counts of use of a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c). On June 23, 2016, Gambina filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. The district court denied the motion. Gambina appeals, contending that his 1991 bank robbery convictions are not categorically "crimes of violence" under § 924(c). Gambina also argues that his 1974 conviction for bank robbery and his 1976 conviction for assault on a federal officer were not "crimes of violence" for purposes of the United States Sentencing Guidelines' career-offender provision, U.S.S.G. § 4B1.1.

We have jurisdiction pursuant to 28 U.S.C. § 2253. We review de novo a district court's order denying § 2255 relief. *United States v. Swisher*, 811 F.3d 299, 306 (9th Cir. 2016) (en banc). We affirm.

[***] The Honorable Lee H. Rosenthal, Chief United States District Judge for the Southern District of Texas, sitting by designation.

1. Gambina's 1991 convictions under 18 U.S.C. § 2113(a), (d), (e) qualify as "crimes of violence" pursuant to § 924(c). To support a conviction under § 924(c), the defendant must have committed a "crime of violence." Pursuant to § 924(c)(3)(A), a "crime of violence" is defined as an offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." "An offense is categorically a crime of violence only if the least violent form of the offense qualifies as a crime of violence." *United States v. Watson*, 881 F.3d 782, 784 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 203 (2018).

Gambina was convicted of aggravated bank robbery under § 2113(a), (d), (e). Section 2113(d) provides increased penalties for a bank robber if he, "in committing, or in attempting to commit, any offense defined in [§§ 2113(a) and (b)], assault[s] any person, or put[s] in jeopardy the life of any person by the use of a dangerous weapon or device." We conclude that "assault[ing]" someone or putting a life in "jeopardy . . . by the use of a dangerous weapon," requires the "use, attempted use, or threatened use of physical force against the person or property of another." *See* 18 U.S.C. § 924(c)(3)(A). Accordingly, Gambina's § 924(c) convictions are valid.

2. Gambina's challenge to the district court's application of the career-offender guideline, U.S.S.G. § 4B1.1, is foreclosed by our decision in *United States v. Blackstone*, 903 F.3d 1020, 1026-28 (9th Cir. 2018). Gambina argues that the Supreme Court's decision in *Johnson v. United States*, 576 U.S. 591 (2015), which struck down the residual clause of the Armed Career Criminal Act (ACCA), necessarily struck down U.S.S.G. § 4B1.2's identical residual clause. Our court rejected this argument in *Blackstone*, 903 F.3d at 1026-28, and we are bound to our prior decision. *See Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc) (holding that a three-judge panel may not overrule a prior decision of the court). Accordingly, the district court did not err by denying Gambina's § 2255 motion as to this ground.

AFFIRMED.

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

RALPH STEPHEN GAMBINA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

No. CV 16-4583-AWT x

[No. CR 89-923-AWT]

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

Before the Court is Ralph Stephen Gambina's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255. Dkt. No. 1 ("Mot."). The United States filed an Opposition and Gambina a Reply. Dkt. Nos. 16 ("Opp."), 20 ("Reply"). Because of the issues it raised, consideration of Gambina's Motion was deferred pending the Supreme Court's decision in *Beckles v. United States*, 137 S. Ct. 886, (2017), which issued on March 6, 2017. The parties then submitted supplemental briefs. Dkt. Nos. 24, 25. Having fully considered the arguments on each side, Gambina's Motion will be DENIED.

///

///

///

I. Background

In 1991, a jury convicted Gambina of: one count of kidnapping during extortion and armed bank robbery, in violation of 18 U.S.C. § 2113(a), (d), and (e); one count of kidnapping during attempted extortion and armed bank robbery, in violation of 18 U.S.C. § 2113(a), (d), and (e); and two counts of using a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c). *See United States v. Gambina*, 988 F.2d 123 (9th Cir. 1993) (unpublished). Gambina's § 924(c) counts were predicated on his two armed robbery charges, which were deemed to be "crimes of violence" as that phrase is defined in § 924(c)(3).[1] *Id.* The court sentenced Gambina to life imprisonment, plus twenty-five years. He received concurrent life sentences on each of the robbery counts, and additional consecutive sentences of sixty months and two-hundred forty months, respectively, for the two firearm counts.

In sentencing Gambina, the court applied the career offender enhancement, set forth at § 4B1.1 of the U.S. Sentencing Guidelines ("U.S.S.G.").[2] Dkt. No. 6 ("PSR") at ¶ 90. Pursuant to § 4B1.1, "[a] defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." A "crime of violence" is, in turn, defined as "any offense under federal or state law punishable by imprisonment for a term exceeding one year that . . . (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(1). This definition has three discrete parts: subsection (i) is the "elements clause"; the first half of subsection (ii) is known as the "enumerated offenses clause"; and the remainder of subsection (ii) is referred to as the "residual clause."

---

[1] Section 924(c)(3) defines a "crime of violence" as a felony offense that "(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Subpart (A) of this definition is referred to as the "elements clause." Subpart (B) is referred to as the "residual clause."

[2] Because Gambina was sentenced on November 4, 1991, all references to the U.S.S.G. refer to the 1991 Guidelines Manual.

Before applying the career offender enhancement, the court determined that Gambina was previously convicted of two predicate crimes of violence: (1) Gambina's 1974 conviction for armed bank robbery with forced accompaniment, in violation of 18 U.S.C. § 2113(e)[3]; and, (2) his 1976 conviction on two counts of assaulting a U.S. Marshal with a dangerous weapon, in violation of 18 U.S.C. § 111[4], and one count of using a firearm while doing so, in violation of 18 U.S.C. § 924(c)(1). *See* PSR at ¶¶ 90, 97-98.

Gambina unsuccessfully appealed his conviction, *Gambina*, 988 F.2d at 123, and the Supreme Court denied his petition for a writ of certiorari, *Gambina v. United States*, 510 U.S. 847 (1993). Some twenty-three years later, on June 23, 2016, he filed the instant Motion pursuant to § 2255.

II. Discussion

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

Gambina's Motion raises two related arguments. First, he contends that none of his convictions to date – for federal armed robbery, in 1974 and 1991, and for assault of a federal officer, in 1976 – are

---

[3] Paragraphs 90 and 96 of the PSR, which concern Gambina's 1974 conviction for armed bank robbery with forced accompaniment, make reference only to § 2113(e). This creates some ambiguity because § 2113(e) is not a standalone offense, but, rather, an enhancement to the offenses set forth in §§ 2113(a), (b), and (c). *See United States v. Strobehn*, 421 F.3d 1017, 1019 (9th Cir. 2005) (referring to § 2113(e) as the "killing and kidnapping enhancement"). However, Gambina does not raise this ambiguity in his Motion. In fact, his argument assumes that his 1974 conviction occurred under §§ 2113(a), (d), and (e). *See, e.g.*, Mot. at 7-8. This assumption is also consistent with the underlying facts of the 1974 conviction. PSR at ¶ 97 (detailing an armed robbery wherein Gambina took the president of a bank hostage with a gun). For purposes of this Motion, then, the court assumes the same.

[4] At the time of Gambina's conviction in 1976, § 111 provided as follows:

> Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.
>
> Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

See 18 U.S.C. § 111 (1976). *See also United States v. Patrin*, 575 F.2d 708, 709 n.1 (9th Cir. 1978).

Paragraphs 90 and 98 of the PSR, which concern Gambina's 1976 conviction for assault of a federal officer, refer to § 111 but do not specify the clause under which he was convicted. In his Reply, however, Gambina concedes that he was convicted under the second clause. *See* Reply at 38.

Finally, the parties agree -- and for purposes of this order, the court assumes -- that the two clauses of the 1976 version of § 111 map onto present-day § 111(a) and § 111(b), respectively. *Compare* Mot. at 25 *and* Reply at 38 *with* Opp. at 53-59.

crimes of violence under § 4B1.2. Consequently, Gambina argues, none of these convictions can serve as a predicate for the career offender enhancement. Second, Gambina contends that, for many of the same reasons, his instant convictions under § 924(c) cannot stand: if federal armed robbery is not a "crime of violence" as defined in 18 U.S.C. § 924(c)(3), then his instant armed robbery charges cannot serve as predicates for the § 924(c) counts.

Gambina's Motion comes amidst a sea change in how courts define crimes of violence. The genesis of this change was *Johnson v. United States*, 135 S.Ct. 2551 (2015) ("*Johnson II*"), wherein the Supreme Court voided, on vagueness grounds, the residual clause of the Armed Career Criminal Act ("ACCA"), codified at 18 U.S.C. § 924(e)(2)(B)(ii), which defined a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year . . . that . . . involves conduct that presents a serious potential risk of physical injury to another." The following year, in *Welch v. United States*, 136 S.Ct. 1257, 1268 (2016), the Court held that *Johnson II* established a "substantive rule that has retroactive effect in cases on collateral review." These cases gave rise to a number of additional, as yet, unanswered questions, several of which are pending before the Supreme Court and the Ninth Circuit. *See, e.g.*, *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015) (holding § 16(b) void under *Johnson*), *certiorari granted in, Lynch v. Dimaya*, 137 S.Ct. 31 (2016) (held over for re-argument until October 2017); *United States v. Begay*, No. 14-10080 (9th Cir. Mar. 29, 2017) (staying consideration of whether § 924(c)(3) is void under *Johnson* pending the Supreme Court's decision in *Dimaya*); *Beckles*, 137 S.Ct. at 903, n.4 (Sotomayor, J., concurring) ("The Court's adherence to the formalistic distinction between mandatory and advisory rules at least leaves open the question whether defendants sentenced to terms of imprisonment before our decision in *United States v. Booker*, 543 U.S. 220 (2005), . . . may mount vagueness attacks on their sentences.").

Gambina styles his Motion as a natural follow-on to *Johnson*. And, to be sure, the Motion implicates the *Johnson*-line of cases. Critically, however, it does so only contingently: before reaching the *Johnson* questions, i.e., whether the residual clauses of § 4B1.2(1) and § 924(c)(3) are void for vagueness, the court must first determine whether Gambina's convictions for federal armed robbery and assault of a federal officer are crimes of violence under the elements clauses of these same provisions. If they are, then Gambina's § 924(c) convictions remain valid and the court committed no error in

applying the career offender enhancement. Gambina's arguments as to this preliminary question fail to persuade.[5]

B. Gambina's convictions for armed robbery and assault of a federal officer are crimes of violence under the elements clauses of § 4B1.2(1) and § 924(c)(3).

1. Armed bank robbery with forced accompaniment under § 2113(a), (d), and (e).

Two Ninth Circuit decisions foreclose Gambina's argument that his armed robbery convictions are not crimes of violence. In 1990, the Circuit held that "persons convicted of robbing a bank 'by force and violence' or 'intimidation' under 18 U.S.C. § 2113(a) have been convicted of a 'crime of violence' within the meaning of Guideline Section 4B1.1." *United States v. Selfa*, 918 F.2d 749, 751 (9th Cir. 1990) (affirming application of career offender enhancement and rejecting appellant's argument that the court should look to his particular conduct, rather than the elements of the offense, to identify predicate offenses). To reach this conclusion, the Court relied on § 4B1.2(1)'s elements clause and made no mention of the provision's residual clause. *See id.* at 751 (quoting only § 4B1.2's elements clause and omitting any mention of the residual clause, while clarifying how properly to apply the categorical approach, which is relevant only to an elements clause analysis).

Ten years later, the Circuit held that armed bank robbery, as defined in § 2113(a), is also a crime of violence under § 924(c)(3)'s elements clause. *See United States v. Wright*, 215 F.3d 1020, 1028 (9th Cir. 2000) ("Armed bank robbery qualifies as a crime of violence [under § 924(c)(3)] because one of the elements of the offense is a taking 'by force and violence, or by intimidation.'"). Since then, the Circuit has affirmed these holdings in several unpublished dispositions.[6] *See, e.g.*, *United States v. Cross*, No. 15-50458, 2017 WL 2080282 (9th Cir. May 15, 2017) (unpublished) (holding that armed

---

[5] Because Gambina's Motion fails on the merits, the court need not consider the government's waiver and timeliness arguments.

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

and unarmed bank robbery under § 2113(a) and (d) are "crimes of violence" under the elements clauses of § 4B1.2 and § 924(c)(3)); *United States v. Newsome*, 221 F. App'x 627, 628-29 (9th Cir. 2007) ("Because conviction under 18 U.S.C. § 2113(a) is categorically a crime of violence for career offender purposes . . . and all other prerequisites were met, the district court did not err in applying the career offender enhancement under U.S.S.G. § 4B1.1.").

Gambina contends that subsequent decisions implicitly overruled *Selfa* and *Wright*. Mot. at 6-15; Reply at 28-34. Gambina argues these decisions are inconsistent with later case law in two ways: "Armed bank robbery with forced accompaniment does not require an *intentional* use or threat of force, nor does it require a use or threat of *violent* force." Mot. at 8. Thus, according to Gambina, "it is not a crime of violence." *Id.* Each of these arguments fails.

As to his first argument, Gambina asserts that armed robbery under § 2113(a) cannot categorically be a crime of violence because it lacks a *mens rea* element with respect to the use of force. Mot. at 8. According to Gambina, this runs afoul of *Leocal v. Ashcroft*, 543 U.S. 1 (2004), and *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006). *See* Mot. at 6, 8-10.

In *Leocal*, the Supreme Court considered whether Florida's driving under the influence ("DUI") statute, which "does not require[] proof of any particular mental state," is a crime of violence under 18 U.S.C. § 16(a).[7] *See* 543 U.S. at 7. After emphasizing what it deemed to be "[t]he key phrase in § 16(a) – the 'use . . . of physical force against the person or property of another,'" the Court concluded that an offense could meet this standard only if it requires "a higher degree of intent than negligent or merely accidental conduct." *Leocal*, 543 U.S. at 9 (citations omitted). Thus, the Court held that Florida's DUI law, because it lacked a *mens rea* requirement entirely, could not be a predicate crime of violence. *Id.* at 10.

Two years later, in *Fernandez-Ruiz*, the Ninth Circuit considered a related question with respect to an Arizona domestic violence statute. 466 F.3d at 1123. At issue in *Fernandez-Ruiz* was Arizona

[7] Section 16 defines a "crime of violence" as "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16.

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

According to Gambina, his conviction for armed robbery with forced accompaniment, under § 2113(a), (d), and (e), is analogous to the Florida DUI law in *Leocal* and the Arizona domestic violence statute in *Fernandez-Ruiz*. Mot. at 8-10. As with those offenses, Gambina argues, § 2113(a) does not require the intentional use of force. *Id.* at 9 (citing *United States v. Yockel*, 320 F.3d 818, 823 (8th Cir. 2003), and *United States v. Kelley*, 412 F.3d 1240, 1244 (11th Cir. 2005)). In light of these decisions, Gambina asserts that "*Selfa's* and *Wright's* conclusion that bank robbery is a crime of violence under the [elements clause] is no longer good law." *Id.* at 10.

As to his second argument, Gambina contends § 2113(a) also cannot serve as a predicate crime of violence because it "does not require the use or threat of *violent* physical force." Mot. at 10. As a result, Gambina asserts, "[t]he contrary holding in *Wright* is clearly irreconcilable with [*Johnson v. United States*, 559 U.S. 133, 140 (2010) ("*Johnson I*")] and *Leocal*." Mot. at 15.

In *Johnson I*, the Supreme Court confronted whether Florida's felony offense of battery, which has as an element the "actual[] and intentional[] touching" of another person, is a "violent felony" under the elements clause of the ACCA, codified at § 924(e)(2)(B)(i).[8] *See* 559 U.S. at 135. The narrow question before the Court was whether the "actual[] and intentional[] touching" element of Florida's battery law, which may be satisfied even where an individual makes only "nominal contact" with another, satisfies the "physical force" requirement set forth in § 924(e)(2)(B)(i). *Id.* at 138-39. To answer this question, the Court reasoned that "in the context of a statutory definition of '*violent* felony,'

[8] Section 924(e)(2)(B)(i) provides: "the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year . . . that—(i) has as an element the use, attempted use, or threatened use of physical force against the person of another."

the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." *Id.* at 140. Thus, the Court held, a conviction under Florida's felony battery statute is not a "violent felony" under the ACCA. *Id.* Because, according to Gambina, § 2113(a) is analogous to Florida's battery statute, *Johnson I* should control. Mot. at 11, 13.

These arguments are unpersuasive. And, unsurprisingly, the Ninth Circuit has expressly rejected them on multiple occasions. *See, e.g.*, *United States v. Pritchard*, No. 15-50278, 2017 WL 2219005 (9th Cir. May 18, 2017) (unpublished) (rejecting, specifically, the argument that *Wright* and *Selfa* were overruled by *Leocal's* heightened intent requirement and *Johnson's* "violent force" gloss); *Cross*, 2017 WL 2080282 at *1 (rejecting the same because "'no intervening authority' is 'clearly irreconcilable'" with *Selfa* and *Wright*); *United States v. Jordan*, 680 F. App'x 634, 634-35 (9th Cir. 2017) (holding that § 2113(a) is a crime of violence, as held in *Wright* and *Selfa*, and rejecting argument that later cases have displaced these precedents); *United States v. Howard*, 650 F. App'x 466, 468 (9th Cir. 2016) (affirming *Selfa's* continued vitality).

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

Gambina's argument as to "violent force" likewise fails. This is because *Johnson I*, notwithstanding its clarification that the phrase "physical force," requires "violent force," does nothing to undermine the Ninth Circuit's reasoning in *Selfa*. There, the Ninth Circuit emphasized that § 2113(a) "requires, at the very least, either 'force and violence' or 'intimidation.'" *Selfa*, 918 F.2d at 751. Moreover, as the *Selfa* court explained, "intimidation" under § 2113(a) means "willfully to take, or attempt to take, in such a way that would put an ordinary, reasonable person in fear of bodily harm."

Id. (citation omitted). Nothing in *Johnson I's* redefinition of "physical harm" undermines the Ninth Circuit's conclusion that "intimidation," as used in § 2113(a), "is sufficient to meet the section 4B1.2(1) requirement of a 'threatened use of physical force.'" *Id.*

Accordingly, because *Selfa* and *Wright* have not been implicitly overruled, a conviction for armed robbery with forced accompaniment remains a viable predicate crime of violence under the elements clauses of § 4B1.2 and § 924(c)(3).

2. Assault of a federal officer under § 111(b).

A different Ninth Circuit decision forecloses Gambina's argument that his 1976 conviction, under § 111(b), for assaulting a federal officer with a gun, is not a crime of violence. The Circuit held in *United States v. Juvenile Female*, 566 F.3d 943 (9th Cir. 2009), that a conviction under § 111(b) is categorically a crime of violence under 18 U.S.C. § 16(a)'s elements clause. *See id.* at 947 (applying categorical approach to § 111 to determine, for purposes of establishing jurisdiction over a juvenile offender, whether it is a "crime of violence"). In reaching this conclusion, the Circuit reasoned that "[a] defendant charged with . . . assault with a deadly or a dangerous weapon [under § 111(b)], must have *always* 'threatened the use of physical force,'" which necessarily satisfies the elements clause of § 16(a). *Id.* at 948 (emphasis added). The holding in *Juvenile Female* is particularly instructive here because the elements clause in § 16(a) is identical to the elements clause set forth at § 4B1.2(1)(i). Because of this match, *Juvenile Female* must control here.

More recently, in *United States v. Dominguez-Maroyoqui*, 748 F.3d 918 (9th Cir. 2014), the Ninth Circuit reaffirmed that a "felony under § 111(b) is a crime of violence." *Id.* at 920 (citing *Juvenile Female*, 566 F.3d at 947-48, and otherwise holding that § 111(a) was *not* a categorical crime of violence). There, the operative definition for "crime of violence" was found in U.S.S.G. § 2L1.2, which, in relevant part, includes any offense "that has as an element the use, attempted use, or threatened use of physical force against the person of another." *Id.* at 919 (quoting § 2L1.2 cmt. n.1(B)(iii)). Because this language is identical to the elements clause of § 4B1.2(1)(i), this further strengthens the government's case.

In his Motion, Gambina contends that § 111(b) cannot be a predicate crime of violence because it "requires neither the use or threatened use of *violent* force nor the *intentional* use or threatened use of

force." Mot. at 26. In support of his "violent force" argument, Gambina once more relies on *Johnson I*. *See generally* Mot. at 26-31. But this argument fails because, four years after the decision in *Johnson I*, the Ninth Circuit affirmed that § 111(b) remained a "crime of violence" under an elements clause identical to § 4B1.2's. *See Dominguez-Maroyoqui*, 748 F.3d at 920. This published decision forecloses much of Gambina's argument. What remains is Gambina's *mens rea* challenge. Mot. 31-32. For support, Gambina once more relies on *Leocal* and *Fernandez-Ruiz*. *Id.* However, this argument fails for the same reason: after these cases were decided, the Ninth Circuit reaffirmed that § 111(b) is a crime of violence. *See Juvenile Female*, 566 F.3d at 948; *Dominguez-Maroyoqui*, 748 F.3d at 920. Moreover, Gambina's assertion, Mot. at 32, that "*Juvenile Female* does not preclude [his] argument because the court did not consider this issue" fails. *See Juvenile Female*, 566 F.3d at 947 (discussing the elements of § 111 and stating that "[t]his court also requires *intent to assault*").

III. Conclusion

For the reasons set forth above, Gambina's 1974 and 1991 convictions for armed robbery under § 2113(a), (d), and (e), as well as his 1976 conviction for assault of a federal officer under § 111(b), are crimes of violence under § 4B1.2(1) and § 924(c)(3). As a result, there was no error in applying the career offender enhancement to Gambina, and his instant convictions under § 924(c) remain valid. Accordingly,

IT IS SO ORDERED:

1. Gambina's § 2255 motion is **DENIED.**
2. Gambina's request for a Certificate of Appealability ("COA") under 28 U.S.C. § 2253(c)(2) is **GRANTED** as to all issues decided by this Order.[9]

DATE: August 28, 2017

A. Wallace Tashima
United States Circuit Judge
Sitting by Designation

[9] In his reply, Gambina asks that the court grant a COA, in the event that his Motion is denied. Issuance of a COA requires a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The court grants his request upon a belief that reasonable judges could differ with the rationale articulated in this order.