

No.

In The Supreme Court Of The United States

*Paul Xavier Espinoza, Desmond Quinntrail Hayes,
Mitchell Pulido, and Adolph Vytautas Stankus,*

Petitioners,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

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Appendix A

United States v. Espinoza,
834 F. App'x 379 (9th Cir. Jan. 26, 2021) (unpublished),
Memorandum affirming denial of motion to vacate

834 Fed.Appx. 379 (Mem)

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3. United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.

Paul Xavier ESPINOZA, Defendant-Appellant.

No. 17-16666

|
Submitted January 20, 2021 *

|
FILED January 26, 2021

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Appeal from the United States District Court for the District of Nevada, Larry R. Hicks, District Judge, Presiding, D.C. Nos. 3:16-cv-00358-LRH 3:13-cr-00037-LRH-WGC-1

Before: McKEOWN, CALLAHAN, and BRESS, Circuit Judges.

MEMORANDUM **

Federal prisoner Paul Xavier Espinoza appeals from the district court's order denying his 28 U.S.C. § 2255 motion to vacate his conviction and sentence. We have jurisdiction under 28 U.S.C. § 2253. Reviewing de novo, *see United States v. Reves*, 774 F.3d 562, 564 (9th Cir. 2014), we affirm.

Espinoza challenges his conviction and sentence under 18 U.S.C. § 924(c)(1)(A) for using a firearm during and in relation to a crime of violence. Espinoza's contention that Hobbs Act robbery, 18 U.S.C. § 1951, is not a crime of violence for purposes of 18 U.S.C. § 924(c)(3)(A) is foreclosed. *See United States v. Dominguez*, 954 F.3d 1251, 1260-61 (9th Cir. 2020) (reaffirming *380 that Hobbs Act robbery is a crime of violence under the elements clause of § 924(c)(3)). Espinoza asserts that *Dominguez* was wrongly decided, but as a three-judge panel, we are bound by the decision. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (three-judge panel is bound by circuit precedent unless that precedent is “clearly irreconcilable” with intervening higher authority).

AFFIRMED.

All Citations

834 Fed.Appx. 379 (Mem)

Footnotes

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

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

Appendix B

United States v. Espinoza,
No. 3:13-cr-00037-LRH-WGC,
2017 WL 2974932 (D. Nev. July 12, 2017) (unpublished),
Order denying motion to vacate and granting COA

2017 WL 2974932

Only the Westlaw citation is currently available.

United States District Court, D. Nevada.

UNITED STATES of America, Plaintiff,

v.

Paul Xavier ESPINOZA, Defendant.

3:13-cr-00037-LRH-WGC

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Signed 07/12/2017

Attorneys and Law Firms

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ORDER

LARRY R. HICKS, UNITED STATES DISTRICT JUDGE

*1 Before the court is petitioner Paul Xavier Espinoza's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.¹ ECF No. 37. The court finds that Hobbs Act robbery is categorically a crime of violence under the “force clause” under 18 U.S.C. § 924(c). In turn, even if section 924(c)'s “residual clause” is void for vagueness—a question the court does not reach—Espinoza is not entitled to relief. The court will therefore deny his motion but will grant him a certificate of appealability.

I. Background**A. Espinoza's conviction**

On January 27, 2014, Espinoza pled guilty to one count of the use of a firearm during and in relation to a crime of violence under 18 U.S.C. § 924(c). ECF Nos. 25–26. The United States also charged Espinoza with two counts of interference with commerce by robbery under 18 U.S.C. § 1951 (“Hobbs Act robbery”), but pursuant to the parties' plea agreement, the United States moved to dismiss these counts, which the court granted. ECF Nos. 26, 30. On May 5, 2014, this court sentenced Espinoza to 108 months of imprisonment. ECF Nos. 30, 33.

Pursuant to this district's Amended General Order on April 27, 2016, Espinoza filed an “abridged” motion to vacate in

order to toll the statute of limitations under section 2255. ECF No. 36. He subsequently filed a timely full motion to vacate, set aside, or correct his sentence. ECF No. 37.

B. *Johnson v. United States* and subsequent challenges

Espinoza filed his section 2255 motion in the wake of *Johnson v. United States*, 135 S. Ct. 2551 (2015). There, the U.S. Supreme Court ruled that a portion of the Armed Career Criminal Act's (“ACCA”) violent-felony definition, often referred to as the “residual clause,” was unconstitutionally vague (i.e., “void for vagueness”).² *Johnson*, 135 S. Ct. at 2557. The Supreme Court subsequently held that *Johnson* announced a new substantive rule that applied retroactively to cases on collateral review, *Welch v. United States*, 136 S. Ct. 1257 (2016), thus allowing defendants to challenge their ACCA convictions under section 2255. *See, e.g., United States v. Avery*, No. 3:02–CR–113–LRH–VPC, 2017 WL 29667 (D. Nev. Jan. 3, 2017).

Moreover, *Johnson* also sparked challenges to other federal criminal statutes and sections of the U.S. Sentencing Guidelines (“U.S.S.G.”) that incorporate a “crime-of-violence” definition that includes a residual clause similar or identical to the ACCA's. One such case relevant to this motion is *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), *cert. granted*, 137 S. Ct. 31 (2016). There, the Ninth Circuit addressed a challenge to the residual clause found in 18 U.S.C. § 16(b), which is similar but not identical to the ACCA's residual clause. *Dimaya*, 803 F.3d at 1111–12. The court ultimately held that section 16(b)'s clause was also void for vagueness. *Id.* at 1119.

*2 Last year, the U.S. Supreme Court granted certiorari in *Dimaya* and heard arguments in early 2017. *Lynch v. Dimaya*, 137 S. Ct. 31 (2016). However, instead of issuing a decision, the Court set the case for re-argument for its next term.

As the instant motion demonstrates, *Johnson* and *Dimaya* have also led to challenges to the residual clause found in 18 U.S.C. § 924(c), which is nearly identical to the section 16(b) residual clause that the Ninth Circuit held void for vagueness in *Dimaya*. While a challenge to section 924(c) is currently before the Ninth Circuit, the court has deferred ruling on the issue until the Supreme Court decides *Dimaya*. *United States v. Begay*, No. 14–10080, ECF No. 87 (9th Cir. 2017); *see also United States v. Begay*, 2016 WL 1383556 (9th Cir. 2016).

II. Legal standard

Pursuant to 28 U.S.C. § 2255, a prisoner may move the court to vacate, set aside, or correct a sentence if “the sentence was imposed in violation of the Constitution or laws of the United States, or ... the court was without jurisdiction to impose such sentence, or ... the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C. § 2255(a). “Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.” *Id.* § 2255(b).

Section 2255 creates a one-year statute of limitations. *Id.* § 2255(f). When a petitioner seeks relief pursuant to a right recognized by a U.S. Supreme Court decision, the statute of limitations runs from “the date on which the right asserted was initially recognized by the ... Court, if that right has been ... made retroactively applicable to cases on collateral review” *Id.* § 2255(f)(3). The petitioner bears the burden of demonstrating that his petition is timely and that he is entitled to relief. *Ramos–Martinez v. United States*, 638 F.3d 315, 325 (1st Cir. 2011).

III. Discussion

Under 18 U.S.C. § 924(c)(1)(A), it is a felony to use or carry a firearm “during and in relation to any crime of violence” This statute therefore creates an offense separately punishable from another concurrently-charged offense that the indictment alleges is a crime of violence. Section 924(c) defines “crime of violence” as a felony 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.

18 U.S.C. § 924(c)(3). The first clause in this definition is commonly referred to as either the “force clause” or “elements clause,” while the second clause is the aforementioned residual clause. Because the definition is worded disjunctively, a felony need only categorically match³ one of the two clauses in order to constitute a crime of violence and thus satisfy that element under section 924(c)(1)(A).

*3 Here, one of the dismissed charges of Hobbs Act robbery served as the underlying crime of violence for Espinoza's section 924(c) conviction. *See* ECF No. 1 at 2. The Hobbs Act “prohibits any robbery or extortion or attempt or conspiracy to rob or extort that ‘in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce.’ ” *United States v. Rodriguez*, 360 F.3d 949, 953 (9th Cir. 2004) (quoting 18 U.S.C. § 1951(a)). The statute defines robbery as follows:

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) (emphasis added).

Espinoza now challenges his section 924(c) conviction under section 2255, arguing that Hobbs Act robbery can no longer be considered a crime of violence under modern authority. He first contends that the court may not apply the statute's residual clause because it is void for vagueness in light of the U.S. Supreme Court's decision in *Johnson* and the Ninth Circuit's decision in *Dimaya*. He further argues that bank robbery is not a categorical match for the force clause because it may be committed (1) through the use of nominal (i.e., less-than-violent) force and (2) through reckless and thus unintentional conduct.

Espinoza's claim for relief is dependent on his argument that section 924(c)'s residual clause is void for vagueness. It is that premise that would allow Espinoza to collaterally attack his sentence under section 2255. However, this court need not reach this question because, even if the *residual* clause is void, this court has already held that Hobbs Act robbery satisfies the *force* clause under 924(c) and is therefore a crime of violence.⁴ *United States v. Mendoza*, No. 2:16–CR–00324–LRH–GWF, 2017 WL 2200912 (D. Nev. May 19, 2017). And because Espinoza has not raised any arguments that the court did not previously address, it will apply its holding in

Mendoza to this case and deny his motion. Nonetheless, the court will provide an overview of why Hobbs Act robbery satisfies the force clause.

A. Ninth Circuit precedent forecloses Espinoza's claim for relief

As in *Mendoza*, one of Espinoza's primary arguments is that Hobbs Act robbery does not comport with the force clause because it may be committed by instilling the fear of injury in the victim. He contends that a defendant may therefore commit the crime without the actual or threatened use of violent force. ECF No. 37 at 16–21. Espinoza, however, has failed to address the Ninth Circuit's holdings in *United States v. Selfa*, 918 F.2d 749 (9th Cir. 1990) and *United States v. Howard*, 650 Fed.Appx. 466 (9th Cir. 2016).

As in this case, the defendant in *Howard* argued that Hobbs Act robbery is not a categorical match for section 924(c)'s force clause because the crime “may also be accomplished by putting someone in ‘fear of injury’” *Howard*, 650 Fed.Appx. at 468 (quoting 18 U.S.C. § 1951(b)). The Ninth Circuit held that this argument was “unpersuasive and ... foreclosed by” the court's previous *published* decision in *United States v. Selfa*, 918 F.2d 749 (9th Cir. 1990).

*4 There, the court “held that the analogous federal bank robbery statute, which may be violated by ‘force and violence, or by *intimidation*’ qualifies as a crime of violence under U.S.S.G. B1.2, which uses the nearly identical definition of ‘crime of violence’ as § 924(c).” *Id.* (emphasis in original) (internal citation omitted) (citing *Selfa*, 918 F.2d at 751). The court explained “that ‘intimidation’ means willfully ‘to take, or attempt to take, in such a way that would put an ordinary, reasonable person *in fear of bodily harm*,’ which satisfies the requirement of a ‘threatened use of physical force’ under § 4B1.2.” *Id.* (emphasis in original) (quoting *Selfa*, 918 F.2d at 751). The Ninth Circuit thus concluded that, “[b]ecause 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.*

Although *Howard* is not binding precedent, this court and numerous others throughout this district have found its reasoning persuasive and held that Hobbs Act robbery is a crime of violence. *See, e.g., Mendoza*, 2017 WL 2200912; *United States v. Hayes*, No. 3:13–CR–00007–RCJ–WGC, 2017 WL 58578, at *2 (D. Nev. Jan. 5, 2017); *United States v. Loper*, No. 2:14–CR–321–GMN–NJK, 2016 WL 4528959,

at *2 (D. Nev. Aug. 29, 2016); *United States v. Barrows*, No. 2:13–CR–00185–MMD–VCF, 2016 WL 4010023, at *3 (D. Nev. July 25, 2016). And while other petitioners have argued that subsequent authority has effectively overruled *Selfa*, this court has rejected that contention. *Mendoza*, 2017 WL 2200912, at *8 (D. Nev. May 19, 2017) (rejecting this *explicit* argument in regards to Hobbs Act robbery); *United States v. Wesley*, No. 3:16–CR–00024–LRH–VPC, 2017 WL 1050587, at *3–4 (D. Nev. Mar. 20, 2017) (rejecting this *implicit* argument in regards to bank robbery).

B. Espinoza has not established a realistic probability that a defendant can commit Hobbs Act robbery by using nominal force

Espinoza argues that the Hobbs Act's common-law origins demonstrate that a defendant can violate this federal statute through the use of nominal force.⁵ ECF No. 37 at 14; *see United States v. Nedley*, 255 F.2d 350, 357 (3d Cir. 1958) (“‘Robbery’ under the Hobbs Act, is common law robbery”). This argument is premised on his broader contention that the degree of force a defendant used to commit common-law robbery was immaterial. Espinoza cites to modern secondary sources collecting state-law cases and ostensibly concluding that a defendant could commit common-law robbery through the use of nominal force. ECF No. 37 at 14–15. Moreover, he cites to federal decisions involving convictions under different federal robbery statutes through the use of seemingly nominal force. *Id.* at 15.

The court rejected these precise arguments in *Mendoza* and remains unpersuaded. 2017 WL 2200912, at *6–7. Relying in part on the thorough analysis conducted by another district court in *United States v. Pena*, 161 F. Supp. 3d 268 (S.D.N.Y. 2016), this court was unconvinced by the premise that even the slightest touch could satisfy the force element under common-law robbery. And even if this were not the case, the court was unpersuaded—and remains unpersuaded—that a defendant can commit Hobbs Act robbery through nominal force. This conclusion is underscored by the fact that Espinoza and similar petitioners are unable to cite a single instance from the over 70 years since the Hobbs Act's enactment in which a defendant was convicted under the statute after having used or threatened to use nominal force.

*5 Moreover, the court finds that there is no merit to Espinoza's argument that, by threatening to harm a victim by use of poison or a hazardous chemical, a defendant can commit Hobbs Act robbery without the use of violent force.

He contends that neither means of commission constitutes violent force under the holdings in *United States v. Torres–Miguel*, 701 F.3d 165 (4th Cir. 2012) and *United States v. Perez–Vargas*, 414 F.3d 1282 (10th Cir. 2005). ECF No. 37 at 16.

However, many courts have recognized that the reasoning in both cases has been critically undermined by the Supreme Court's holding in *United States v. Castleman*, 134 S. Ct. 1405 (2014). See, e.g., *United States v. Taylor*, 206 F. Supp. 3d 1148, 1165 (E.D. Va. 2016) (citing cases); *Pikyavit v. United States*, No. 2:06–CR–407–PGC, 2017 WL 1288559, at *7 (D. Utah Apr. 6, 2017). There, in the context of a domestic-violence statute, the Court rejected the argument that the use of poison would not entail “the use or attempted use of physical force.” *Castleman*, 134 S. Ct. at 1407. It reasoned that “[t]he ‘use of force’ ... is not the act of ‘sprinkl[ing]’ the poison; it is the act of employing poison knowingly as a device to cause physical harm. That the harm occurs indirectly, rather than directly (as with a kick or punch), does not matter.” *Id.* at 1415 (emphasis added).

Accordingly, Espinoza has failed to demonstrate a realistic probability that a defendant can commit Hobbs Act robbery through the use of nominal force. See *Gonzales v. Duenas–Alvarez*, 549 U.S. 183, 193 (2007) (requiring “a realistic probability, not a theoretical possibility,” that a statute would apply to conduct not encompassed by the crime-of-violence definition).

C. Hobbs Act robbery requires intentional conduct

Finally, the court is unpersuaded by Espinoza's argument that, under the fear-of-injury element, a defendant may commit Hobbs Act robbery through reckless, unintentional conduct.⁶ Like the defendants in *Mendoza* and *Wesley*, Espinoza contends that cases addressing the comparable intimidation element under federal bank robbery demonstrate this point. For instance, he relies in part on the Ninth Circuit's decision in *United States v. Foppe*, 993 F.3d 1444 (9th Cir. 1993), where the court held that, under the federal-bank-robbery statute, it is “irrelevant” whether the defendant “specifically intended to intimidate” the victim.

However, the *Foppe* court merely held that federal bank robbery “is a general intent crime, not a specific intent crime[.]” in response to the defendant's argument that he never intended to intimidate the bank teller that he approached. *Foppe*, 993 F.3d at 1451. Moreover, in

previously rejecting this argument, this court again relied in part on the *Pena* court's analysis. There, the court rejected an identical argument by citing a Supreme Court case that specified that federal bank robbery “is a general intent crime whose *mens rea* requirement is satisfied only if the ‘defendant possessed knowledge with respect to the *actus reus* of the crime ([i.e.,] the taking of property of another by force and violence or intimidation).’ ” *Pena*, 161 F. Supp. 3d at 283 (quoting *Carter v. United States*, 530 U.S. 255, 268 (2000)).

*6 “In other words, a defendant charged with bank robbery ... must intentionally perform objectively intimidating actions in the course of unlawfully taking the property of another.” *Id.* Thus, “if a defendant robs a bank with violence, the prosecution need not prove a specific intent to cause pain or to induce compliance.” *Id.* “Similarly, if a defendant robs a bank with intimidation, the prosecution need not prove a specific intent to cause fear[.]” which “does not mean that the bank robbery was accomplished through ‘negligent or merely accidental conduct.’ ” *Id.* (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004)).

This court remains convinced by this reasoning and, as in *Mendoza*, finds that it also applies to Hobbs Act robbery. Accordingly, the court finds that Hobbs Act robbery satisfies section 924(c)'s force clause and is therefore a crime of violence regardless of whether the residual clause is void for vagueness.

D. Certificate of appealability

Under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), “an appeal may not be taken to the court of appeals from ... the final order in a proceeding under section 2255” unless a district court issues a certificate of appealability based on “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(1)(B). “The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. To meet this threshold inquiry, the petitioner must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further.” *Allen v. Ornoski*, 435 F.3d 946, 951 (9th Cir. 2006) (internal citations, quotation marks, and brackets omitted).

Because this section 2255 motion involves questions of law that are partially unsettled and are currently being

addressed by higher courts, this court will issue a certificate of appealability.

IT IS FURTHER ORDERED that Espinoza is **GRANTED** a certificate of appealability.

IV. Conclusion

IT IS THEREFORE ORDERED that petitioner Paul Xavier Espinoza's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (ECF No. 37) is **DENIED**.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2017 WL 2974932

IT IS FURTHER ORDERED that Espinoza's abridged motion to vacate, set aside, or correct his sentence (ECF No. 36) is **DENIED**.

Footnotes

- 1 Because the content of Espinoza's motion conclusively shows that he is not entitled to relief, the court has not ordered the United States to respond. See 28 U.S.C. § 2255(b).
- 2 The ACCA applies to certain defendants charged with unlawful possession of a firearm under 18 U.S.C. § 922(g). 18 U.S.C. § 924(e). Normally, a defendant convicted of unlawful possession of a firearm may be sentenced to a statutory maximum of 10–years of imprisonment. *Id.* § 924(a)(2). However, if a defendant has three prior convictions that constitute either a “violent felony” or “serious drug offense,” the ACCA enhances the 10–year maximum sentence to a 15–year minimum sentence. *Id.* § 924(e)(1).
- 3 Courts apply the “categorical approach” in determining whether an offense constitutes a crime of violence under section 924(c). See *United States v. Piccolo*, 441 F.3d 1084, 1086 (9th Cir. 2006). Under the categorical approach, a court may only “compare the *elements* of the statute forming the basis of the defendant's [prior] conviction [or concurrently-charged offense] with the elements of” a crime of violence. *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013) (emphasis added); see also *United States v. Benally*, 843 F.3d 350, 352 (9th Cir. 2016). Therefore, a court may not examine “[h]ow a given defendant actually perpetrated the crime—what [the Supreme Court has] referred to as the ‘underlying brute facts or means’ of commission” *Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016) (citation omitted).
- 4 The court also recently rejected nearly identical arguments in determining that the “analogous” crime of federal bank robbery satisfies section 924(c)'s force clause and is therefore a crime of violence. *United States v. Wesley*, No. 3:16–CR–00024–LRH–VPC, 2017 WL 1050587 (D. Nev. Mar. 20, 2017).
- 5 In *Johnson v. United States*, 559 U.S. 133 (2010) (“*Johnson 2010*”), the Supreme Court specified that the term “physical force” under the ACCA's force clause “means *violent* force—that is, force capable of causing physical pain or injury to another person.” Thus, crimes that can be committed through the use of *nominal* force do *not* satisfy the ACCA's force clause. See, e.g., *United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016). This court and many others have also extended the violent-force requirement to section 924(c)'s force clause. See *Mendoza*, 2017 WL 2200912, at *4 n.5.
- 6 This point is relevant to finding that federal bank robbery is a crime of violence because, in order to satisfy the force clause, the use of force [required by a statute] must be intentional, not just reckless or negligent.” *United States v. Dixon*, 805 F.3d 1193, 1197 (9th Cir. 2015) (citing *United States v. Lawrence*, 627 F.3d 1281, 1284 (9th Cir. 2010)). Because this requirement was recognized only several years after *Selfa*, the contention that bank robbery may be committed unintentionally is often asserted in support of the argument that *Selfa* has been effectively overruled. See, e.g., *Mendoza*, 2017 WL 2200912, at *4–5.

Appendix C

United States v. Hayes,
No. 17-15048 (9th Cir. Feb. 24, 2021) (unpublished),
Order granting government's motion
for summary affirmance of denial of motion to vacate

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

FEB 24 2021

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DESMOND QUINNTRAIL HAYES,

Defendant-Appellant.

No. 17-15048

D.C. Nos. 3:16-cv-00345-RCJ
3:13-cr-00007-RCJ-

WGC-1
District of Nevada,
Reno

ORDER

Before: FERNANDEZ, BYBEE, and BADE, Circuit Judges.

Appellee’s motion for summary affirmance (Docket Entry No. 20) is granted. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (stating standard); *see also United States v. Dominguez*, 954 F.3d 1251, 1260-61 (9th Cir. 2020) (reaffirming that Hobbs Act robbery qualifies as a crime of violence under 18 U.S.C. § 924(c)(3)(A)). Notwithstanding appellant’s assertion that *Dominguez* was wrongly decided, *Dominguez* is controlling as to the outcome of this appeal. *See United States v. Boitano*, 796 F.3d 1160, 1164 (9th Cir. 2015) (“[A]s a three-judge panel we are bound by prior panel opinions and can only reexamine them when the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority.” (internal quotation marks omitted)).

AFFIRMED.

Appendix D

United States v. Hayes,
No. 17-15048 (9th Cir. May 4, 2017) (unpublished),
Order granting COA

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAY 4 2017

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DESMOND QUINNTRAIL HAYES,

Defendant-Appellant.

No. 17-15048

D.C. Nos. 3:16-cv-00345-RCJ

3:13-cr-00007-RCJ-WGC-1

District of Nevada,
Reno

ORDER

Before: RAWLINSON and NGUYEN, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 3) is granted with respect to the following issues: (1) whether appellant's conviction under 18 U.S.C. § 924(c) must be vacated in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015); (2) whether the Hobbs Act robbery is a "crime of violence" under 18 U.S.C. § 924(c)(3)(A); and (3) whether the aforementioned claims are waived by appellant's plea agreement. *See* 28 U.S.C. § 2253(c)(3); *see also* 9th Cir. R. 22-1(e).

Proceedings in this case shall be held in abeyance pending this court's final resolution in *United States v. Begay*, No. 14-10080, or further order of this court. This appeal raises issues similar to those raised in *United States v. Dominguez*, 14-10268 (18 U.S.C. § 1951 Hobbs Act robbery), and *United States v. Williams*, 16-56640 (18 U.S.C. § 1951 Hobbs Act robbery).

This order authorizes production of transcripts at government expense. *See* 28 U.S.C. § 753(f). Appellant shall provide a copy of this order to the reporter(s) along with the designation.

The Clerk shall serve on appellant a copy of the “After Opening a Case - Counseled Cases” document.

Appendix E

United States v. Hayes,

No. 3:13-cr-00007-RCJ-WGC-1, 2017 WL 58578

(D. Nev. Jan. 5, 2017) (unpublished),

Order denying motion to vacate and denying COA

2017 WL 58578

Only the Westlaw citation is currently available.

United States District Court, D. Nevada.

UNITED STATES of America, Plaintiff,

v.

Desmond Quinntrail HAYES, Defendant.

3:13-cr-00007-RCJ-WGC-1

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Signed 01/04/2017

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Filed 01/05/2017

Attorneys and Law Firms

William R. Reed, U.S. Attorney's Office, Reno, NV, for Plaintiff.

ORDER

ROBERT C. JONES, United States District Judge

***1** A grand jury indicted Defendant Desmond Hayes of two counts each of interference with commerce by armed robbery under the Hobbs Act, 18 U.S.C. § 1951, use of a firearm during and in relation to a crime of violence under § 924(c)(1)(A) (based on the Hobbs Act armed robberies), and possession of a firearm by a convicted felon under §§ 922(g)(1) and 924(a)(2). (See Superseding Indictment, ECF No. 12). Defendant pled guilty to the two counts of Hobbs Act armed robbery and one count of use of a firearm during and in relation to a crime of violence via plea agreement, and on September 22, 2014, the Court adjudged him guilty of those counts, sentencing him to consecutive 60-, 60-, and 120-month terms of imprisonment, respectively. (See J. 1–2, ECF No. 59). Plaintiff did not appeal. Plaintiff has now asked the Court to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest 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), (f)(3). Defendant filed the motion on June 17, 2016, which is within one year of June 26, 2015, the date on which the Supreme Court announced the rule of *Johnson v. United States*, 135 S. Ct. 2551 (2015) upon which Defendant relies. The Supreme Court has made *Johnson* retroactive on collateral review. See *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016). The Court finds that although the motion is statutorily timely, it is without merit, even assuming the ability to bring it had not been waived.

The motion fails because collateral attacks, specifically those under § 2255, were waived via the plea agreement, except those based on ineffective assistance of counsel. (See Plea Agreement 11:7–10, ECF No. 45). Even if not waived, the claim would be without merit. Defendant argues the Hobbs Act armed robbery that formed the basis for the firearm offense was not a “crime of violence” under 18 U.S.C. § 924(c)(3) because the residual clause defining “crime of violence” is similar to the residual clause of § 924(e)(2), which the Supreme Court has struck down as unconstitutionally vague. See *Johnson*, 135 S. Ct. 2551, 2563 (2015). The definition of “crime of violence” applied to Defendant reads as follows, with the allegedly unconstitutionally vague residual clause emphasized:

(3) For purposes of this subsection the term “crime of violence” means 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 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)(A)–(B) (emphasis added). The definition of “violent felony” at issue in *Johnson* reads as follows, with the unconstitutionally vague residual clause emphasized:

***2** (B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that

would be punishable by imprisonment for such term if committed by an adult, 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, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*

Id. § 924(e)(2)(B)(i)–(ii) (emphasis added). The language of the two clauses is not identical, but even assuming for the sake of argument that the difference in language is not enough to rescue § 924(c)(3)(B) from constitutional infirmity, *Johnson* is no aid to Defendant, because the physical-force clause of § 924(c)(3)(A) applies to Hobbs Act robbery, at least under the residual clause. *See United States v. Mendez*, 992 F.2d 1488, 1491 (9th Cir. 1993) (citing 18 U.S.C. § 1951(b)(1)) (“[Hobbs Act r]obbery indisputably qualifies as a crime of violence.”). The Court of Appeals has reaffirmed the conclusion in an unpublished opinion since *Johnson* issued. *See United States v. Howard*, 650 Fed. Appx. 466, 468 (9th Cir. May 23, 2016) (citing *United States v. Selfa*, 918 F.2d 749 (9th Cir. 1990)) (holding that Hobbs Act robbery qualifies as a crime of violence under the physical force clause). The

Courts of Appeals to address the issue in published opinions since *Johnson* issued are in accord that Hobbs Act robbery is a categorical crime of violence under the physical force clause. *See United States v. Hill*, 832 F.3d 135, 140–44 (2nd Cir. 2016); *In re Fleur*, 824 F.3d 1337, 1341 (11th Cir. 2016). The Court finds no basis to believe the Court of Appeals would rule to the contrary in a published opinion.

CONCLUSION

IT IS HEREBY ORDERED that the Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255 (ECF Nos. 61, 62) is DENIED.

IT IS FURTHER ORDERED that a certificate of appealability is DENIED.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2017 WL 58578

End of Document

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Appendix F

United States v. Pulido,
834 F. App'x 385 (9th Cir. Jan. 26, 2021) (unpublished),
Memorandum affirming denial of motion to vacate

834 Fed.Appx. 385 (Mem)

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3. United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Mitchell PULIDO, Defendant-Appellant.

No. 17-16045

|
Submitted January 20, 2021 *

|
FILED January 26, 2021

Attorneys and Law Firms

Elizabeth Olson White, Esquire, Assistant U.S. Attorney, USRE - Office of the US Attorney, Reno, NV, for Plaintiff-Appellee

Erica Choi, Assistant Federal Public Defender, Amy B. Cleary, Assistant Federal Public Defender, Federal Public Defender's Office Las Vegas, Las Vegas, NV, for Defendant-Appellant

Appeal from the United States District Court for the District of Nevada, Andrew P. Gordon, District Judge, Presiding, D.C. Nos. 2:16-cv-01345-APG 2:11-cr-00102-APG-CWH-1

Before: McKEOWN, CALLAHAN, and BRESS, Circuit Judges.

MEMORANDUM **

Federal prisoner Mitchell Pulido appeals from the district court's order denying his 28 U.S.C. § 2255 motion to vacate his conviction and sentence. We have jurisdiction under 28 U.S.C. § 2253. Reviewing de novo, *see United States v. Reves*, 774 F.3d 562, 564 (9th Cir. 2014), we affirm.

Pulido challenges his conviction and sentence under 18 U.S.C. § 924(c)(1)(A)(iii) for discharging a firearm during a crime of violence. Pulido's contention that Hobbs Act robbery, 18 U.S.C. § 1951, is not a crime of violence for purposes of 18 U.S.C. § 924(c)(3)(A) is foreclosed. *See United States v. Dominguez*, 954 F.3d 1251, 1260-61 (9th Cir. 2020) (reaffirming that Hobbs Act robbery is a crime of violence under the elements clause of § 924(c)(3)). Pulido asserts that *Dominguez* was wrongly decided, but as a three-judge panel, we are bound by the decision. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en *386 banc) (three-judge panel is bound by circuit precedent unless that precedent is “clearly irreconcilable” with intervening higher authority).

AFFIRMED.

All Citations

834 Fed.Appx. 385 (Mem)

Footnotes

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

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

Appendix G

United States v. Pulido,
No. 2:11-cr-00102-APG-CWH
(D. Nev. May 16, 2017) (unpublished),
Order granting COA

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 * * *

4 UNITED STATES OF AMERICA,

Case No. 2:11-CR-00102-APG-CWH

5 Plaintiff,

**ORDER GRANTING CERTIFICATE
OF APPEALABILITY**

6 v.

7 MITCHELL PULIDO,

8 Defendant.
9

10 I denied defendant Mitchell Pulido's motion to correct his sentence under 28 U.S.C.
11 § 2255. ECF No. 77. To appeal that order, Pulido must receive a certificate of appealability.¹ To
12 obtain that certificate, Pulido "must make a substantial showing of the denial of a constitutional
13 right, a demonstration that . . . includes showing that reasonable jurists could debate whether (or,
14 for that matter, agree that) the petition should have been resolved in a different manner or that the
15 issues presented were adequate to deserve encouragement to proceed further."² This standard is
16 "lenient."³

17 When applying the "hopeless tangle" "of inconsistent case law" that makes up the
18 categorical test, reasonable jurists often disagree.⁴ Although I follow the Ninth Circuit's lead in
19 holding that Pulido's convictions qualify as crimes of violence, other courts have held otherwise.
20 I thus grant Pulido's request for a certificate of appealability.

21 ////

22 ////

23 ////

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25 ¹ 28 U.S.C. § 2253(c)(1)(B); Fed. R. App. P. 22(b)(1); 9th Cir. R. 22-1(a).

26 ² *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (quotation omitted).

27 ³ *Hayward v. Marshall*, 603 F.3d 546, 553 (9th Cir. 2010) (en banc).

28 ⁴ *United States v. Ladwig*, 192 F. Supp. 3d 1153 (E.D. Wash. 2016) (noting that this test
"has stymied law clerks and judges alike in a morass of inconsistent case law").

1 IT IS THEREFORE ORDERED that the defendant is granted a certificate of
2 appealability.

3 DATED this 16th day of May.

4 
5 _____
6 ANDREW P. GORDON
7 UNITED STATES DISTRICT JUDGE
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Appendix H

United States v. Pulido,

No. 2:11-cr-00102-APG-CWH, 2017 WL 2113735

(D. Nev. May 15, 2017) (unpublished),

Order denying motion to vacate

2017 WL 2113735

Only the Westlaw citation is currently available.

United States District Court, D. Nevada.

UNITED STATES of America, Plaintiff,

v.

Mitchell PULIDO, Defendant.

Case No. 2:11-CR-00102-APG-CWH

|

Signed 05/15/2017

Attorneys and Law Firms

Cristina D. Silva, Michael A. Humphreys, U.S. Attorneys Office, Las Vegas, NV, Elizabeth Olson White, United States Attorneys Office, District of Nevada, Reno, NV, for Plaintiff.

ORDER DENYING MOTION TO VACATE SENTENCE

(ECF Nos. 70, 73)

ANDREW P. GORDON, UNITED STATES DISTRICT
JUDGE

***1** Defendant Mitchell Pulido moves to correct his sentence under 28 U.S.C. § 2255. He challenges his conviction for a crime of violence under 18 U.S.C. § 924(c). This conviction requires that he was convicted for a “crime of violence.” In Pulido’s case, his crime of violence was Hobbs Act robbery under 18 U.S.C. § 1951. Pulido contends that intervening Supreme Court caselaw, particularly *Johnson v. United States*, clarifies that Hobbs Act robbery does not qualify as a crime of violence.

But after *Johnson* issued, the Ninth Circuit confirmed that Hobbs Act robbery still qualifies as crimes of violence under § 924(c). I therefore deny Pulido’s motion.

Discussion

Section 924(c) requires that Pulido committed a “crime of violence.” A crime of violence is defined, as is relevant here, as a felony that “has as an element the use, attempted use, or threatened use of physical force against the person or property

of another.”¹ Thus one commits a crime of violence by either threatening, or actually using, physical force against a victim or his property. In the context of the (ACCA), the Supreme Court has interpreted “physical force” to mean “violent force—that is, force capable of causing physical pain or injury to another person.”² And courts have commonly applied this interpretation to § 924(c)’s force clause.³

The predicate conviction the sentencing judge used for the § 924(c) conviction here is Hobbs Act robbery.⁴ The Hobbs Act defines robbery with language similar to § 924(c), prohibiting “threatened” or actual “force”:

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.⁵

Pulido contends that Hobbs Act robbery can be committed by merely instilling “fear” in a victim and that this does not equate to § 924(c)’s definition. He also contends that one can commit this crime with de minimis force, which is not enough to be “violent force.”

***2** But the Ninth Circuit has held as recently as last year that Hobbs Act robbery qualifies as a crime of violence.⁶ In *U.S. v. Howard*, the court explained in an unpublished decision that there is no way to commit Hobbs Act robbery without putting the victim in fear of bodily harm—and that this sort of fear qualifies as actual or threatened physical force under § 924(c). District courts have followed suit, repeatedly holding that Hobbs Act robbery qualifies as a crime of violence under § 924(c) because by “placing someone ‘in fear of injury’ to his person or property,” the defendant uses the sort of “physical force” that satisfies § 924(c).⁷

As to whether one can commit Hobbs Act robbery with too little force to qualify as the sort of violent force contemplated by § 924(c), I agree with the weight of authority that finds this argument “unavailing.”⁸ Even if there is some theoretical possibility that one could commit Hobbs Act robbery using de minimis force—and I am not convinced there is—Pulido must demonstrate that there is “a realistic probability, not a theoretical possibility” that this is so.⁹ “To show that realistic probability, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the [] courts in fact did apply the statute in the ... manner for which he argues.”¹⁰

Pulido has not demonstrated a reasonable likelihood that anyone is convicted for Hobbs Act robbery because they used de minimis force. He does not offer a single case in which someone was convicted for Hobbs Act robbery using

de minimis force. Instead, he relies on different crimes or cases about common law robbery, none of which proves that there is a realistic possibility anyone is being convicted for Hobbs Act robbery for using de minimis force. Pulido has thus not shown that his § 924(c) conviction is infirm.

*3 In light of this authority, I deny Pulido's motion.

Conclusion

IT IS THEREFORE ORDERED that defendant's motions under 28 U.S.C. § 2255 (**ECF Nos. 70, 73**) are **DENIED**.

All Citations

Not Reported in Fed. Supp., 2017 WL 2113735

Footnotes

- 1 18 U.S.C. § 924(c). The parties also dispute whether Pulido's crime might qualify as a crime of violence under another portion of § 924(c), referred to as the residual clause. But because I hold that Pulido qualifies for the crime-of-violence conviction without resorting to that clause, I need not address this thorny issue. The parties also dispute whether Pulido is procedurally barred from appealing his sentence, but because I hold that he fails on the merits, I need not address that issue either.
- 2 *Johnson v. United States*, 559 U.S. 133 at 140 (2010).
- 3 *United States v. Bell*, 2016 WL 344749 at *2 (N.D. Cal. Jan. 28, 2016).
- 4 Pulido pleaded guilty to Hobbs Act robbery under 18 U.S.C. § 1951 and to using a firearm in commission of this robbery under § 924(c). ECF No. 34.
- 5 18 U.S.C. § 1951.
- 6 *Howard*, 2016 WL 2961978, at *1 (holding Hobbs Act robbery qualifies as a crime of violence under 18 U.S.C. § 924(c) by comparing it to federal bank robbery under § 2113(a) and relying on *Selfa*).
- 7 *United States v. Smith*, 2016 WL 2901661, at *4 (D. Nev. May 18, 2016); see also *U.S.A. v. Dorsey*, 2016 WL 3381218, at *2 (C.D. Cal. June 8, 2016); *United States v. Bundy*, 2016 WL 8730142, at *24 (D. Nev. Dec. 30, 2016); *United States v. Hill*, 832 F.3d 135, 144 (2d Cir. 2016); *In re Saint Fleur*, 824 F.3d 1337, 1340 (11th Cir. 2016); *United States v. Crawford*, 2016 WL 320116, *3 (N.D. Ind. Jan. 27, 2016) (denying defendant's motion to dismiss indictment charging him with § 924(c) offense based on a Hobbs Act robbery); *United States v. Pena*, 2016 WL 690746, *8 (S.D.N.Y. Feb. 11, 2016) (same); *United States v. Coleman*, 2016 WL 1435696, *2–3 (N.D. Ill. Apr. 12, 2016) (same); *United States v. Williams*, 179 F. Supp. 3d 141, 144–55 (D. Me. Apr. 15, 2016) (same); *United States v. McCallister*, 2016 WL 3072237, *1 (D.D.C. May 31, 2016) (same); *United States v. Barrows*, 2016 WL 4010023, *2–6 (D. Nev. July 25, 2016) (same); *United States v. Nguyen*, 2016 WL 4479131, *2–3 (D. Kan. Aug. 25, 2016); *United States v. Davis*, 2016 WL 6473074, *4 (N.D. Cal. Nov. 2, 2016); see also *United States v. Evans*, —F.3d—, No. 16–4094 (4th Cir. Feb. 2, 2017) (holding that federal carjacking, which can be accomplished “by force and violence or by intimidation,” qualifies as a crime of violence under § 924(c)).

- 8 *United States v. Johnson*, 2016 WL 7223264, at *3 (C.D. Cal. Dec. 12, 2016); see also *United States v. Casas*, 2017 WL 1008109, at *3 (S.D. Cal. Mar. 14, 2017); *United States v. Bailey*, 2016 WL 3381218, at *4–5 (C.D. Cal. June 8, 2016); *United States v. Lenzy*, 2016 WL 1019712, at *3 (N.D. Ga. Feb. 4, 2016); *United States v. Williams*, 179 F. Supp. 3d 141, 151–52 (D. Me. 2016).
- 9 *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1685 (2013) (quotation omitted).
- 10 *Gonzales v. Duenas–Alvarez*, 549 U.S. 183, 193 (2007).

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Appendix I

United States v. Stankus,
834 F. App'x 375 (9th Cir. Jan. 26, 2021) (unpublished),
Memorandum affirming denial of motion to vacate

834 Fed.Appx. 375 (Mem)

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3. United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.

Adolph Vytautas STANKUS
III, Defendant-Appellant.

No. 17-16630

Submitted January 20, 2021 *

FILED January 26, 2021

Attorneys and Law Firms

Gregory William Addington, Esquire, Assistant U.S. Attorney, William Ramsey Reed, Assistant U.S. Attorney, Elizabeth Olson White, Esquire, Assistant U.S. Attorney, USRE - Office of the US Attorney, Reno, NV, for Plaintiff-Appellee

Wendi L. Overmyer, Assistant Federal Public Defender, Federal Public Defender's Office Las Vegas, Las Vegas, NV, for Defendant-Appellant

Appeal from the United States District Court for the District of Nevada, Larry R. Hicks, District Judge, Presiding, D.C. Nos. 3:16-cv-00359-LRH 3:12-cr-00032-LRH-WGC-1

Before: McKEOWN, CALLAHAN, and BRESS, Circuit Judges.

MEMORANDUM **

Adolph Vytautas Stankus III, appeals from the district court's order denying his 28 U.S.C. § 2255 motion to vacate his conviction and sentence. We have jurisdiction under 28 U.S.C. § 2253. Reviewing de novo, *see United States v. Reves*, 774 F.3d 562, 564 (9th Cir. 2014), we affirm.

Stankus challenges his conviction and sentence under 18 U.S.C. § 924(c)(1)(A) for using a firearm during a crime of violence. Stankus's contention that Hobbs Act robbery, 18 U.S.C. § 1951, is not a crime of violence for purposes of 18 U.S.C. § 924(c)(3)(A) is foreclosed. *See United States v. Dominguez*, 954 F.3d 1251, 1260-61 (9th Cir. 2020) (reaffirming that Hobbs Act robbery is a crime of violence under the elements clause of § 924(c)(3)). Stankus asserts that *Dominguez* was wrongly decided, but as a three-judge panel, we are bound by the decision. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (three-judge panel is bound by circuit precedent unless that precedent is “clearly irreconcilable” with intervening higher authority).

AFFIRMED.

All Citations

834 Fed.Appx. 375 (Mem)

Footnotes

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

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

Appendix J

United States v. Stankus,

No. 3:12-cr-00032-LRH-WGC, 2017 WL 2974933

(D. Nev. July 12, 2017) (unpublished),

Order denying motion to vacate

2017 WL 2974933

Only the Westlaw citation is currently available.

United States District Court, D. Nevada.

UNITED STATES of America, Plaintiff,

v.

Adolph Vytautas STANKUS, Defendant.

3:12-cr-00032-LRH-WGC

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Signed 07/12/2017

West Codenotes**Recognized as Unconstitutional**

18 U.S.C.A. § 16(b)

Attorneys and Law Firms

William R. Reed, U.S. Attorney's Office, Reno, NV, for Plaintiff.

ORDER

LARRY R. HICKS, UNITED STATES DISTRICT JUDGE

*1 Before the court is petitioner Adolph Vytautas Stankus' motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.¹ ECF No. 56. The court finds that Hobbs Act robbery is categorically a crime of violence under the "force clause" under 18 U.S.C. § 924(c). In turn, even if section 924(c)'s "residual clause" is void for vagueness—a question the court does not reach—Stankus is not entitled to relief. The court will therefore deny his motion but will grant him a certificate of appealability.

I. Background**A. Stankus' conviction**

On October 16, 2012, Stankus pled guilty to two counts of interference with commerce by armed robbery ("Hobbs Act robbery") under 18 U.S.C. § 1951 and one count of use of a firearm during and in relation to a crime of violence under 18 U.S.C. § 924(c). ECF Nos. 37–38. On January 14, 2013, this court sentenced Stankus to a total term of 102 months of imprisonment. ECF Nos. 47, 52.

Pursuant to this district's Amended General Order on April 27, 2016, Stankus filed an "abridged" motion to vacate in order to toll the statute of limitations under section 2255. ECF No. 55. He subsequently filed a timely full motion to vacate, set aside, or correct his sentence. ECF No. 56.

B. *Johnson v. United States* and subsequent challenges

Stankus filed his section 2255 motion in the wake of *Johnson v. United States*, 135 S. Ct. 2551 (2015). There, the U.S. Supreme Court ruled that a portion of the Armed Career Criminal Act's ("ACCA") violent-felony definition, often referred to as the "residual clause," was unconstitutionally vague (i.e., "void for vagueness").² *Johnson*, 135 S. Ct. at 2557. The Supreme Court subsequently held that *Johnson* announced a new substantive rule that applied retroactively to cases on collateral review, *Welch v. United States*, 136 S. Ct. 1257 (2016), thus allowing defendants to challenge their ACCA convictions under section 2255. *See, e.g., United States v. Avery*, No. 3:02-CR-113-LRH-VPC, 2017 WL 29667 (D. Nev. Jan. 3, 2017).

Moreover, *Johnson* also sparked challenges to other federal criminal statutes and sections of the U.S. Sentencing Guidelines ("U.S.S.G.") that incorporate a "crime-of-violence" definition that includes a residual clause similar or identical to the ACCA's. One such case relevant to this motion is *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), *cert. granted*, 137 S. Ct. 31 (2016). There, the Ninth Circuit addressed a challenge to the residual clause found in 18 U.S.C. § 16(b), which is similar but not identical to the ACCA's residual clause. *Dimaya*, 803 F.3d at 1111–12. The court ultimately held that section 16(b)'s clause was also void for vagueness. *Id.* at 1119.

*2 Last year, the U.S. Supreme Court granted certiorari in *Dimaya* and heard arguments in early 2017. *Lynch v. Dimaya*, 137 S. Ct. 31 (2016). However, instead of issuing a decision, the Court set the case for re-argument for its next term.

As the instant motion demonstrates, *Johnson* and *Dimaya* have also led to challenges to the residual clause found in 18 U.S.C. § 924(c), which is nearly identical to the section 16(b) residual clause that the Ninth Circuit held void for vagueness in *Dimaya*. While a challenge to section 924(c) is currently before the Ninth Circuit, the court has deferred ruling on the issue until the Supreme Court decides *Dimaya*. *United States v. Begay*, No. 14–10080, ECF No. 87 (9th Cir. 2017); *see also United States v. Begay*, 2016 WL 1383556 (9th Cir. 2016).

II. Legal standard

Pursuant to 28 U.S.C. § 2255, a prisoner may move the court to vacate, set aside, or correct a sentence if “the sentence was imposed in violation of the Constitution or laws of the United States, or ... the court was without jurisdiction to impose such sentence, or ... the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C. § 2255(a). “Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.” *Id.* § 2255(b).

Section 2255 creates a one-year statute of limitations. *Id.* § 2255(f). When a petitioner seeks relief pursuant to a right recognized by a U.S. Supreme Court decision, the statute of limitations runs from “the date on which the right asserted was initially recognized by the ... Court, if that right has been ... made retroactively applicable to cases on collateral review” *Id.* § 2255(f)(3). The petitioner bears the burden of demonstrating that his petition is timely and that he is entitled to relief. *Ramos–Martinez v. United States*, 638 F.3d 315, 325 (1st Cir. 2011).

III. Discussion

Under 18 U.S.C. § 924(c)(1)(A), it is a felony to use or carry a firearm “during and in relation to any crime of violence” This statute therefore creates an offense separately punishable from another concurrently-charged offense that the indictment alleges is a crime of violence. Section 924(c) defines “crime of violence” as a felony 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.

18 U.S.C. § 924(c)(3). The first clause in this definition is commonly referred to as either the “force clause” or “elements clause,” while the second clause is the aforementioned residual clause. Because the definition is worded disjunctively, a felony need only categorically match³ one of the two clauses in order to constitute a crime

of violence and thus satisfy that element under section 924(c)(1)(A).

*3 Here, one of Stankus’ Hobbs Act robbery charges served as the underlying crime of violence for Stankus’ section 924(c) conviction. *See* ECF No. 24 at 2. The Hobbs Act “prohibits any robbery or extortion or attempt or conspiracy to rob or extort that ‘in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce.’ ” *United States v. Rodriguez*, 360 F.3d 949, 953 (9th Cir. 2004) (quoting 18 U.S.C. § 1951(a)). The statute defines robbery as follows:

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) (emphasis added).

Stankus now challenges his section 924(c) conviction under section 2255, arguing that Hobbs Act robbery can no longer be considered a crime of violence under modern authority. He first contends that the court may not apply the statute’s residual clause because it is void for vagueness in light of the U.S. Supreme Court’s decision in *Johnson* and the Ninth Circuit’s decision in *Dimaya*. He further argues that bank robbery is not a categorical match for the force clause because it may be committed (1) through the use of nominal (i.e., less-than-violent) force and (2) through reckless and thus unintentional conduct.

Stankus’ claim for relief is dependent on his argument that section 924(c)’s residual clause is void for vagueness. It is that premise that would allow Stankus to collaterally attack his sentence under section 2255. However, this court need not reach this question because, even if the *residual* clause is void, this court has already held that Hobbs Act robbery satisfies the *force* clause under 924(c) and is therefore a crime of violence.⁴ *United States v. Mendoza*, No. 2:16–CR–00324–

LRH–GWF, 2017 WL 2200912 (D. Nev. May 19, 2017). And because Stankus has not raised any arguments that the court did not previously address, it will apply its holding in *Mendoza* to this case and deny his motion. Nonetheless, the court will provide an overview of why Hobbs Act robbery satisfies the force clause.

A. Ninth Circuit precedent forecloses Stankus’ claim for relief

As in *Mendoza*, one of Stankus’ primary arguments is that Hobbs Act robbery does not comport with the force clause because it may be committed by instilling the fear of injury in the victim. He contends that a defendant may therefore commit the crime without the actual or threatened use of violent force. ECF No. 56 at 16–21. Stankus, however, has failed to address the Ninth Circuit’s holdings in *United States v. Selfa*, 918 F.2d 749 (9th Cir. 1990) and *United States v. Howard*, 650 Fed.Appx. 466 (9th Cir. 2016).

As in this case, the defendant in *Howard* argued that Hobbs Act robbery is not a categorical match for section 924(c)’s force clause because the crime “may also be accomplished by putting someone in ‘fear of injury’” *Howard*, 650 Fed.Appx. at 468 (quoting 18 U.S.C. § 1951(b)). The Ninth Circuit held that this argument was “unpersuasive and ... foreclosed by” the court’s previous *published* decision in *United States v. Selfa*, 918 F.2d 749 (9th Cir. 1990).

*4 There, the court “held that the analogous federal bank robbery statute, which may be violated by ‘force and violence, or by *intimidation*’ qualifies as a crime of violence under U.S.S.G. B1.2, which uses the nearly identical definition of ‘crime of violence’ as § 924(c).” *Id.* (emphasis in original) (internal citation omitted) (citing *Selfa*, 918 F.2d at 751). The court explained “that ‘intimidation’ means willfully ‘to take, or attempt to take, in such a way that would put an ordinary, reasonable person *in fear of bodily harm*,’ which satisfies the requirement of a ‘threatened use of physical force’ under § 4B1.2.” *Id.* (emphasis in original) (quoting *Selfa*, 918 F.2d at 751). The Ninth Circuit thus concluded that, “[b]ecause 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.*

Although *Howard* is not binding precedent, this court and numerous others throughout this district have found its reasoning persuasive and held that Hobbs Act robbery is a crime of violence. *See, e.g., Mendoza*, 2017 WL 2200912;

United States v. Hayes, No. 3:13–CR–00007–RCJ–WGC, 2017 WL 58578, at *2 (D. Nev. Jan. 5, 2017); *United States v. Loper*, No. 2:14–CR–321–GMN–NJK, 2016 WL 4528959, at *2 (D. Nev. Aug. 29, 2016); *United States v. Barrows*, No. 2:13–CR–00185–MMD–VCF, 2016 WL 4010023, at *3 (D. Nev. July 25, 2016). And while other petitioners have argued that subsequent authority has effectively overruled *Selfa*, this court has rejected that contention. *Mendoza*, 2017 WL 2200912, at *8 (D. Nev. May 19, 2017) (rejecting this *explicit* argument in regards to Hobbs Act robbery); *United States v. Wesley*, No. 3:16–CR–00024–LRH–VPC, 2017 WL 1050587, at *3–4 (D. Nev. Mar. 20, 2017) (rejecting this *implicit* argument in regards to bank robbery).

B. Stankus has not established a realistic probability that a defendant can commit Hobbs Act robbery by using nominal force

Stankus argues that the Hobbs Act’s common-law origins demonstrate that a defendant can violate this federal statute through the use of nominal force.⁵ ECF No. 56 at 14; *see United States v. Nedley*, 255 F.2d 350, 357 (3d Cir. 1958) (“‘Robbery’ under the Hobbs Act, is common law robbery”). This argument is premised on his broader contention that the degree of force a defendant used to commit common-law robbery was immaterial. Stankus cites to modern secondary sources collecting state-law cases and ostensibly concluding that a defendant could commit common-law robbery through the use of nominal force. ECF No. 56 at 14–15. Moreover, he cites to federal decisions involving convictions under different federal robbery statutes through the use of seemingly nominal force. *Id.* at 15.

The court rejected these precise arguments in *Mendoza* and remains unpersuaded. 2017 WL 2200912, at *6–7. Relying in part on the thorough analysis conducted by another district court in *United States v. Pena*, 161 F. Supp. 3d 268 (S.D.N.Y. 2016), this court was unconvinced by the premise that even the slightest touch could satisfy the force element under common-law robbery. And even if this were not the case, the court was unpersuaded—and remains unpersuaded—that a defendant can commit Hobbs Act robbery through nominal force. This conclusion is underscored by the fact that Stankus and similar petitioners are unable to cite a single instance from the over 70 years since the Hobbs Act’s enactment in which a defendant was convicted under the statute after having used or threatened to use nominal force.

*5 Moreover, the court finds that there is no merit to Stankus' argument that, by threatening to harm a victim by use of poison or a hazardous chemical, a defendant can commit Hobbs Act robbery without the use of violent force. He contends that neither means of commission constitutes violent force under the holdings in *United States v. Torres-Miguel*, 701 F.3d 165 (4th Cir. 2012) and *United States v. Perez-Vargas*, 414 F.3d 1282 (10th Cir. 2005). ECF No. 56 at 16.

However, many courts have recognized that the reasoning in both cases has been critically undermined by the Supreme Court's holding in *United States v. Castleman*, 134 S. Ct. 1405 (2014). See, e.g., *United States v. Taylor*, 206 F. Supp. 3d 1148, 1165 (E.D. Va. 2016) (citing cases); *Pikyavit v. United States*, No. 2:06-CR-407-PGC, 2017 WL 1288559, at *7 (D. Utah Apr. 6, 2017). There, in the context of a domestic-violence statute, the Court rejected the argument that the use of poison would not entail "the use or attempted use of physical force." *Castleman*, 134 S. Ct. at 1407. It reasoned that "[t]he 'use of force' ... is not the act of 'sprinkl[ing]' the poison; it is the act of employing poison knowingly as a device to cause physical harm. That the harm occurs indirectly, rather than directly (as with a kick or punch), does not matter." *Id.* at 1415 (emphasis added).

Accordingly, Stankus has failed to demonstrate a realistic probability that a defendant can commit Hobbs Act robbery through the use of nominal force. See *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) (requiring "a realistic probability, not a theoretical possibility," that a statute would apply to conduct *not* encompassed by the crime-of-violence definition).

C. Hobbs Act robbery requires *intentional* conduct

Finally, the court is unpersuaded by Stankus' argument that, under the fear-of-injury element, a defendant may commit Hobbs Act robbery through reckless, unintentional conduct.⁶ Like the defendants in *Mendoza* and *Wesley*, Stankus contends that cases addressing the comparable intimidation element under federal bank robbery demonstrate this point. For instance, he relies in part on the Ninth Circuit's decision in *United States v. Foppe*, 993 F.3d 1444 (9th Cir. 1993), where the court held that, under the federal-bank-robbery statute, it is "irrelevant" whether the defendant "specifically intended to intimidate" the victim.

However, the *Foppe* court merely held that federal bank robbery "is a general intent crime, not a specific intent crime[.]" in response to the defendant's argument that he never intended to intimidate the bank teller that he approached. *Foppe*, 993 F.3d at 1451. Moreover, in previously rejecting this argument, this court again relied in part on the *Pena* court's analysis. There, the court rejected an identical argument by citing a Supreme Court case that specified that federal bank robbery "is a general intent crime whose *mens rea* requirement is satisfied only if the 'defendant possessed knowledge with respect to the *actus reus* of the crime ([i.e.,] the taking of property of another by force and violence or intimidation).' " *Pena*, 161 F. Supp. 3d at 283 (quoting *Carter v. United States*, 530 U.S. 255, 268 (2000)).

*6 "In other words, a defendant charged with bank robbery ... must intentionally perform objectively intimidating actions in the course of unlawfully taking the property of another." *Id.* Thus, "if a defendant robs a bank with violence, the prosecution need not prove a specific intent to cause pain or to induce compliance." *Id.* "Similarly, if a defendant robs a bank with intimidation, the prosecution need not prove a specific intent to cause fear[.]" which "does not mean that the bank robbery was accomplished through 'negligent or merely accidental conduct.'" *Id.* (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004)).

This court remains convinced by this reasoning and, as in *Mendoza*, finds that it also applies to Hobbs Act robbery. Accordingly, the court finds that Hobbs Act robbery satisfies section 924(c)'s force clause and is therefore a crime of violence regardless of whether the residual clause is void for vagueness.

D. Certificate of appealability

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), "an appeal may not be taken to the court of appeals from ... the final order in a proceeding under section 2255" unless a district court issues a certificate of appealability based on "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(1)(B). "The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. To meet this threshold inquiry, the petitioner must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further." *Allen v. Ornoski*,

435 F.3d 946, 951 (9th Cir. 2006) (internal citations, quotation marks, and brackets omitted).

Because this section 2255 motion involves questions of law that are partially unsettled and are currently being addressed by higher courts, this court will issue a certificate of appealability.

IV. Conclusion

IT IS THEREFORE ORDERED that petitioner Adolph Vytautas Stankus' motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (ECF No. 56) is **DENIED**.

IT IS FURTHER ORDERED that Stankus' abridged motion to vacate, set aside, or correct his sentence (ECF No. 55) is **DENIED**.

IT IS FURTHER ORDERED that Stankus is **GRANTED** a certificate of appealability.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2017 WL 2974933

Footnotes

- 1 Because the content of Stankus' motion conclusively shows that he is not entitled to relief, the court has not ordered the United States to respond. See 28 U.S.C. § 2255(b).
- 2 The ACCA applies to certain defendants charged with unlawful possession of a firearm under 18 U.S.C. § 922(g). 18 U.S.C. § 924(e). Normally, a defendant convicted of unlawful possession of a firearm may be sentenced to a statutory maximum of 10–years of imprisonment. *Id.* § 924(a)(2). However, if a defendant has three prior convictions that constitute either a “violent felony” or “serious drug offense,” the ACCA enhances the 10–year maximum sentence to a 15–year minimum sentence. *Id.* § 924(e)(1).
- 3 Courts apply the “categorical approach” in determining whether an offense constitutes a crime of violence under section 924(c). See *United States v. Piccolo*, 441 F.3d 1084, 1086 (9th Cir. 2006). Under the categorical approach, a court may only “compare the *elements* of the statute forming the basis of the defendant's [prior] conviction [or concurrently-charged offense] with the elements of” a crime of violence. *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013) (emphasis added); see also *United States v. Benally*, 843 F.3d 350, 352 (9th Cir. 2016). Therefore, a court may not examine “[h]ow a given defendant actually perpetrated the crime—what [the Supreme Court has] referred to as the ‘underlying brute facts or means’ of commission” *Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016) (citation omitted).
- 4 The court also recently rejected nearly identical arguments in determining that the “analogous” crime of federal bank robbery satisfies section 924(c)'s force clause and is therefore a crime of violence. *United States v. Wesley*, No. 3:16–CR–00024–LRH–VPC, 2017 WL 1050587 (D. Nev. Mar. 20, 2017).
- 5 In *Johnson v. United States*, 559 U.S. 133 (2010) (“*Johnson 2010*”), the Supreme Court specified that the term “physical force” under the ACCA's force clause “means *violent* force—that is, force capable of causing physical pain or injury to another person.” Thus, crimes that can be committed through the use of *nominal* force do *not* satisfy the ACCA's force clause. See, e.g., *United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016). This court and many others have also extended the violent-force requirement to section 924(c)'s force clause. See *Mendoza*, 2017 WL 2200912, at *4 n.5.
- 6 This point is relevant to finding that federal bank robbery is a crime of violence because, in order to satisfy the force clause, the use of force [required by a statute] must be intentional, not just reckless or negligent.” *United States v. Dixon*, 805 F.3d 1193, 1197 (9th Cir. 2015) (citing *United States v. Lawrence*, 627 F.3d 1281, 1284 (9th Cir. 2010)). Because this requirement was recognized only several years after *Selfa*, the contention that bank robbery may be committed unintentionally is often asserted in support of the argument that *Selfa* has been effectively overruled. See, e.g., *Mendoza*, 2017 WL 2200912, at *4–5.

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