No.

# In The Supreme Court Of The United States

Edward Stain,

*Petitioner,*

v.

United States of America,

*Respondent.*

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

## Petitioner's Appendix

# Appendix A

*United States v. Stain,* No. 17-16707,

2021 WL 3523500 (9th Cir. Aug. 11, 2021) (unpublished)

Memorandum affirming denial of motion to vacate

2021 WL 3523500
Only the Westlaw citation is currently available.
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Edward STAIN, Defendant-Appellant.

No. 17-16707
|
Submitted July 8, 2021 [*] San Francisco, California
|
FILED AUGUST 11, 2021

Appeal from the United States District Court for the District of Nevada, Larry R. Hicks, District Judge, Presiding, D.C. Nos. 2:16-cv-01462-LRH 2:02-cr-00201-LRH-NJK-4

**Attorneys and Law Firms**

Adam McMeen Flake, Assistant U.S. Attorney, USLV - Office of the U.S. Attorney, Las Vegas, NV, Elizabeth Olson White, Esquire, Assistant U.S. Attorney, USRE - Office of the US Attorney-Reno, 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.

Before: GRABER and LEE, Circuit Judges, and VRATIL, [**] District Judge.

MEMORANDUM [***]

***1** Defendant Edward Stain is a federal prisoner who is serving a 535-month sentence for two 2002 robberies. A jury convicted Stain under an accomplice liability theory of conspiracy, Hobbs Act robbery, armed bank robbery, and two counts of possession of a firearm in connection with a violent felony under 18 U.S.C. § 924(c). On direct appeal, we reversed his conspiracy conviction but affirmed his other convictions. *United States v. Stain*, 272 F. App'x 618 (9th Cir. 2008). Now, on his second successive collateral appeal, Stain appeals the district court's denial of his claim that Hobbs Act robbery and armed bank robbery are no longer valid predicate offenses for his § 924(c) convictions. Stain further claims that his sentence violates the Supreme Court's decision in *Dean v. United States*, ––– U.S. ––––, 137 S. Ct. 1170, 197 L.Ed.2d 490 (2017).

"We review a district court's denial of a § 2255 motion de novo, while we review for clear error any factual findings the district court made in deciding the motion." *United States v. Seng Chen Yong*, 926 F.3d 582, 589 (9th Cir. 2019) (cleaned up). We have jurisdiction pursuant to 28 U.S.C §§ 1291 and 2253(a). We affirm the district court's denial and further deny Stain's new *Dean* claim.

1. Stain argues that his § 924(c) convictions may have rested on his conspiracy conviction, which he argues is not a valid predicate offense. But the record makes clear that Stain's § 924(c) convictions rested on his two robbery convictions. The jury instructions for Count Three's § 924(c) conviction explicitly required the jury to find that Stain committed Hobbs Act robbery as alleged in Count Two. Similarly, the jury instruction for Count Five's § 924(c) conviction explicitly required the jury to find that Stain committed armed bank robbery as alleged in Count Four.

Hobbs Act robbery and armed bank robbery are categorically crimes of violence under § 924(c)'s "elements" clause. At the time of Stain's conviction in 2005, we had long held that Hobbs Act robbery constituted a crime of violence under § 924(c)'s elements clause. *See United States v. Mendez*, 992 F.2d 1488, 1491 (9th Cir. 1993). And after the Supreme Court struck down § 924(c)'s residual clause as unconstitutionally vague, [1] we "reiterate[d]" our "previous holding that Hobbs Act armed robbery is a crime of violence for purposes of [§ 924(c)'s elements clause]." *United States v. Dominguez*, 954 F.3d 1251, 1255 (9th Cir. 2020) (citing *Mendez*, 992 F.2d at 1491), *petition for cert. filed*, (U.S. Jan. 18 21, 2021) (No. 20-1000). Similarly, we have held that armed bank robbery is categorically a crime of violence under § 924(c)'s elements clause. *United States v. Watson*, 881 F.3d 782, 783–84 (9th Cir. 2018), *cert. denied* ––– U.S. ––––, 139 S. Ct. 203, 202 L.Ed.2d 139 (2018) (per curiam).

Because both of Stain's § 924(c) convictions properly rested on a valid predicate crime of violence, those convictions pass constitutional muster.

2. Faced with these precedents, Stain contends for the first time in a supplemental brief that a conviction premised on aiding and abetting liability does not meet § 924(c)'s elements clause. But we decline to consider this question because Stain has twice forfeited the argument. For starters, Stain did not

argue this theory before the district court, so it is outside his certificate of appealability. *See* *United States v. Monreal*, 301 F.3d 1127, 1131 (9th Cir. 2002) (holding that absent a showing of manifest injustice, 28 U.S.C. § 2255 claims not raised to the district court are waived). Similarly, Stain made no mention of this claim in his initial briefing, so it was forfeited yet again. *See* *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("[A]rguments not raised by a party in its opening brief are deemed waived.").

***2** 3. Finally, Stain argues that the district court did not recognize its discretion to consider the mandatory sentences imposed by his § 924(c) convictions when imposing sentences for the other counts—an error that requires resentencing under *Dean v. United States*, ––– U.S. ––––, 137 S. Ct. 1170, 197 L.Ed.2d 490 (2017). Even if this argument is preserved, we disagree. Unlike in *Dean*, nothing in the record here suggests that the district court thought that it lacked discretion to consider the mandatory sentences imposed by Stain's § 924(c) convictions when imposing sentences for his other convictions. Indeed, for the non-924(c) convictions, the government recommended a sentence of 121 months which was "within the low end of the initial underlying charge." And when sentencing Stain, the district court explained the severity of the robberies that occurred and said that the "Court cannot consider, in my mind, that a low-end sentence would be appropriate for those particular robberies. Those are the worst kind of robberies under the worst kind of circumstances." Nevertheless, the district court left the sentence in the low-range of 121 months "because the members of the public were not so readily present and the Tec-9-millimeter semiautomatic weapon was also apparently not used in connection with this particular offense." While the district court did not specifically note Stain's § 924(c) counts while deciding this low-end sentence, nothing in the court's analysis suggests that it thought itself constrained from considering the mandatory nature of his § 924(c) convictions.

Stain points to comments from the government and his counsel that the court's hands were tied for his 924(c) convictions. But the court's hands *were* tied for those convictions; § 924(c) convictions carry a statutory minimum sentence. *See* 18 U.S.C. § 924(c). This language does not suggest that the district court thought itself constrained from considering his § 924(c) convictions while sentencing him for his other crimes.

**AFFIRMED.**

**All Citations**

Not Reported in Fed. Rptr., 2021 WL 3523500

## Footnotes

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

** The Honorable Kathryn H. Vratil, United States District Judge for the District of Kansas, sitting by designation.

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

1 *United States v. Davis*, ––– U.S. ––––, 139 S. Ct. 2319, 204 L.Ed.2d 757 (2019).

# Appendix B

*United States v. Stain,* No. 2:02-cr-00201-LRH-NJK,

2017 WL 2974951 (D. Nev. July 12, 2017) (unpublished)

Order denying motion to vacate

2017 WL 2974951
Only the Westlaw citation is currently available.
United States District Court, D. Nevada.

UNITED STATES of America, Plaintiff,
v.
Edward STAIN, Defendant.

2:02–cr–00201–LRH–NJK
|
Signed 07/12/2017

**Attorneys and Law Firms**

Daniel Schiess, Andrew W. Duncan, Carlos A. Gonzalez, Jared Grimmer, US Attorney's Office, Las Vegas, NV, for Plaintiff.

ORDER

LARRY R. HICKS, UNITED STATES DISTRICT JUDGE

***1** Before the court is petitioner Edward Stain's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.[1] ECF No. 404. The court finds that both Hobbs Act robbery and federal bank robbery are categorically crimes 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—Stain is not entitled to relief.[2] The court will therefore deny his motion but will grant him a certificate of appealability.

## I. Background

### A. Stain's conviction and subsequent proceedings

On February 3, 2006, a jury found Stain guilty of one count of conspiracy to commit armed bank robbery (count one); two counts of interference with commerce by threats or violence ("Hobbs Act robbery") (counts two and six); one count of armed bank robbery (count four), and two counts of possession of a firearm during and in relation to a crime of violence under 18 U.S.C. § 924(c) (counts three and five). ECF No. 217; *see also* ECF No. 171. On June 13, 2008, the Ninth Circuit Court of Appeals reversed Stain's conviction only as to the count of *conspiracy* to commit armed bank robbery and affirmed the remainder of the judgment. ECF No. 272. On August 28, 2012, the court granted in part and denied in part Stain's *pro se* section 2255 motion. ECF Nos. 285, 328. The court subsequently entered the second amended judgment (ECF No. 329), which is the operative judgment in this case.[3]

Pursuant to this district's Amended General Order on April 27, 2016, Stain filed an "abridged" motion to vacate in order to toll the statute of limitations under section 2255. ECF No. 397. He subsequently filed a timely full motion to vacate, set aside, or correct his sentence. ECF No. 404.

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

***2** Stain 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").[4] *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.

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**

***3** 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 match [5] one of the two clauses in order to constitute a crime of violence and thus satisfy that element under section 924(c)(1)(A).

Here, the counts of Hobbs Act robbery and federal armed bank robbery (counts 2 and 4) served as the underlying crimes of violence for Stain's two separate section 924(c) convictions (counts 3 and 5). *See* ECF No. 171. 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).

Similarly, a person commits federal bank robbery when he, "by force and violence, or *by intimidation*, takes ... any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association." 18 U.S.C. § 2113(a) (emphasis added). The offense entails a statutory maximum sentence of 20 years of imprisonment. *Id.*

***4** If, however, a defendant, in committing a bank robbery, "assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device," the maximum sentence is increased to 25 years. *Id.* § 2113(d). This enhancement applied to the instant case, as Stain was charged with and convicted of committing federal bank robbery by "assault[ing] and put[ting] in jeopardy the life of another person by the use of dangerous weapons ....” ECF No. 171 at 6; *see also* ECF No. 329 at 1.

Stain now challenges his section 924(c) convictions under section 2255, arguing that Hobbs Act robbery and federal bank robbery can no longer be considered crimes of violence under modern authority. He first contends that the court may not apply section 924(c)'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 neither federal robbery statute is a categorical match for the force clause because they may be committed (1) through the use of nominal (i.e., less-than-violent) force and (2) through reckless and thus unintentional conduct.

Stain'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 Stain 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 and federal bank robbery both satisfy the *force* clause under 924(c) and are therefore crimes of violence. *United States v. Mendoza*, No. 2: 16–CR–00324–LRH–GWF, 2017 WL 2200912 (D. Nev. May 19, 2017) (Hobbs Act robbery); *United States v. Wesley*, No. 3:16–CR–00024–LRH–VPC, 2017 WL 1050587 (D. Nev. Mar. 20, 2017) (federal bank robbery). And because Stain has not raised any arguments that the court did not previously address, it will apply its holdings in *Mendoza* and *Wesley* to this case and deny his motion.

Nonetheless, the court will provide an overview of why both federal robbery crimes satisfy the force clause. The court will also address the partially unique issue raised in this motion by the application of the *armed* bank robbery enhancement under 18 U.S.C. § 2113(d).

### A. Ninth Circuit precedent forecloses Stain's claim for relief

As in *Mendoza* and *Wesley*, one of Stain's primary arguments is that neither Hobbs Act robbery nor bank robbery comport with the force clause because the crimes may be committed, respectively, through “intimidation” and by instilling the “fear of injury” in the victim. He contends that a defendant may therefore commit these crimes without the actual or threatened use of violent force. ECF No. 404 at 19, 24. Stain, however, has failed to address the Ninth Circuits' 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).

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. § 4B1.2, 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 a crime of violence.” *Id.*

***5** The Ninth Circuit's holding in *Selfa* is binding on this court in regards to federal bank robbery. And although *Howard*, as an unpublished decision, is not binding in regards to Hobbs Act robbery, 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).

Moreover, 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); *Wesley*, 2017 WL

1050587, at *3–4 (rejecting this *implicit* argument in regards to bank robbery).

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

Stain argues that the Hobbs Act's common-law origins demonstrate that a defendant can violate this federal statute through the use of nominal force. [6] ECF No. 404 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. Stain 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. 404 at 14–15. Moreover, he cites to federal decisions involving convictions under different federal robbery statutes through the use of seemingly nominal force. *Id.*

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 Stain 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.

Moreover, the court finds that there is no merit to Stain'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. 404 at 17.

***6** 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, Stain 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. Both federal robbery crimes require *intentional* conduct**

The court is also unpersuaded by Stain's argument that, under the intimidation and fear-of-injury elements, a defendant may commit either federal robbery crime through reckless, unintentional conduct. [7] Like the defendants in *Mendoza* and *Wesley*, Stain contends that cases addressing the 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



Appendix - 6a

violence or intimidation).' " *Pena*, 161 F. Supp. 3d at 283 (quoting *Carter v. United States*, 530 U.S. 255, 268 (2000)).

"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)).

***7** This court remains convinced by this reasoning and finds that it applies to both robbery crimes. Accordingly, the court finds that Hobbs Act robbery and federal bank robbery satisfy section 924(c)'s force clause and are therefore crimes of violence regardless of whether the residual clause is void for vagueness.

### D. *Armed* bank robbery is also a crime of violence

Finally, Stain argues that the enhancement under section 2113(d) for committing bank robbery by assaulting a person or placing another person's life in jeopardy by use of a dangerous weapon does not transform the base offense into a crime of violence. ECF No. 404 at 27. The court need not reach this question in this case because it has already found that bank robbery under section 2113(a) is a crime of violence. Nonetheless, the court will address this issue for the sake of thoroughness.

First, Stain argues that a defendant can trigger either variation of the enhancement without violent force. ECF No. 404 at 27. This argument, however, is once again premised on the holdings in *Torres–Miguel* and *Perez–Vargas* regarding the use of poison or hazardous chemicals, which this court rejected in light of the Supreme Court's ruling in *Castleman.* For the same reasons discussed above, the court finds that this argument is without merit.

Stain also contends that section 2113(d) does not require an *intent* to threaten or use violent force. ECF No. 404 at 28. He argues that a defendant can trigger the enhancement by merely brandishing a firearm without an intent to intimidate another person. However, this argument merely recycles Stain's contention that intimidation may result from reckless conduct. The court therefore similarly rejects this argument, as brandishing a firearm in the context of a robbery is objectively intimidating and committed with the intent to depose a bank of the property in its care and custody.

Accordingly, it is clear that committing armed bank robbery under section 2113(d) is a crime of violence.

### E. 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 Edward Stain's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (ECF No. 404) is **DENIED**.

IT IS FURTHER ORDERED that Stain's abridged motion to vacate, set aside, or correct his sentence (ECF No. 397) is **DENIED**.

***8** IT IS FURTHER ORDERED that Stain's motion for reconsideration in sentencing pursuant to 3742(a)(1) and (2) (ECF No. 384) is **DENIED**.

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

IT IS SO ORDERED.

**All Citations**

Not Reported in Fed. Supp., 2017 WL 2974951

## Footnotes

1 Because the content of Stain'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 Before being appointed counsel, Stain filed a *pro se* "motion for reconsideration in sentencing pursuant to 3742(a)(1) and (2)." ECF No. 384. However, this motion seeks reliefunder *Johnson v. United States*, 135 S. Ct. 2551 (2015), arguing that Hobbs Act robbery is not a crime of violence. Because this is one of the key issues addressed by the section 2255 motion that Stain's counsel filed, the court will consider his *pro se* motion as part of his later section 2255 filing and deny it for the same reasons articulated in this order.

3 Because Stain had previously filed a section 2255 motion, which this court adjudicated, he applied to the Ninth Circuit Court of Appeals for leave to file a second or successive motion. *See* 28 U.S.C. § 2255(h). The Ninth Circuit, however, denied the motion as unnecessary, holding that Stain had "not had a prior section 2255 motion adjudicated on the merits that challenged the second amended judgment" that this court entered after granting in part his original 2255 motion. *Stain v. United States*, No. 16–70648, ECF No.2 (9th Cir. 2016).

4 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).

5 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).

6 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.

7 This point is relevant to finding that both robbery crimes are crimes 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 both robbery crimes 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.

End of Document 

# Appendix C

*United States v. Stain,* No. 2:02-cr-00201-LRH-NJK,

Dkt. 329 (D. Nev. Aug. 30, 2012) (unpublished),

Second Amended Judgment

AO 245C (Rev. 09/11) Amended Judgment in a Criminal Case
Sheet 1

(NOTE: Identify Changes with Asterisks (*))

# UNITED STATES DISTRICT COURT

District of Nevada

UNITED STATES OF AMERICA
v.
EDWARD STAIN

**SECOND**
**AMENDED JUDGMENT IN A CRIMINAL CASE**

Case Number: 2:02-cr-201-LRH-LRL
USM Number: 38058-048

**Date of Original Judgment:** 6/19/08
**( Date of Last Amended Judgment)**

Mario C. Valencia
Defendant's Attorney

Reason for Amendment:

☐ Correction of Sentence on Remand (18 U.S.C. § 3742(f)(1) and (2))

☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))

☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))

☐ Correction of sentence for Clerical Mistake (Fed. R. Crim. P. 36)

☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))

☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))

☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))

**(X) Direct Motion to District Court Pursuant (X) 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7) **Per Order|328| dated 8/28/12.**

☐ Modification of Restitution Order (18 U.S.C. § 3664)

**THE DEFENDANT:**

☐ pleaded guilty to count(s) ______

☐ pleaded nolo contendere to count(s) ______ which was accepted by the court.

(X) was found guilty on count(s) 2 through 6 of the Third Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

| Title & Section | Nature of Offense | Offense Ended | Count |
|---|---|---|---|
| 18 U.S.C. 1951 | Interference with Commerce by Threats or Violence | 03/23/02 | 2 |
| 18 U.S.C. 924(c)(1)(A) &(c)(1)(A)(ii) | Possession of a Firearm During and in Relation to a crime of Violence | 03/23/02 | 3 |
| 18 U.S.C. 2113(a) & 2113(d) | Armed Bank Robbery | 04/08/02 | 4 |
| 18 U.S.C. 924(c)(1)(A) (c)(1)(A)(ii) | Possession of a Firearm During and in Relation to a Crime of Violence | 04/08/02 | 5 |
| 18 U.S.C. 1951 | Interference with Commerce by Threats or Violence | 12/23/02 | 6 |
| 18 U.S.C. 2 | Aiding and Abetting | | 2 through 6 |

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) ______

(X) The conviction on Count 1 (Conspiracy) is reversed by the 9th Circuit Court of Appeals by Memorandum dated April 1, 2008.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

___ FILED ___ RECEIVED
___ ENTERED ___ SERVED ON
COUNSEL/PARTIES OF RECORD
AUG 30 2012
CLERK US DISTRICT COURT
DISTRICT OF NEVADA
BY: ______ DEPUTY

8/28/12
Date of Imposition of Judgment

Signature of Judge

Larry R. Hicks, U.S. District Judge
Name and Title of Judge

8/29/12
Date

AO 245C (Rev 06/05) Amended Judgment in a Criminal Case
Sheet 2 - Imprisonment

DEFENDANT: EDWARD STAIN
CASE NUMBER: 2:02-cr-201-LRH(LRL)

Judgment - Page 2

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: Five Hundred Thirty Five (535) months, as follows:

Count 2: one hundred fifty-one (151) months, concurrent with sentence imposed in Counts 4 and 6;
Count 3: eighty-four (84) months, consecutive to sentence imposed in Counts 2, 4 and 6;
Count 4: one hundred fifty-one (151) months, concurrent with sentence imposed in Counts 2 and 6;;
Count 5: three hundred (300) months, consecutive to sentence imposed in Counts 2, 3, 4 and 6;
Count 6: one hundred fifty-one (151) months, concurrent with sentence imposed in Counts 2 and 4.

( √ ) The court makes the following recommendations to the Bureau of Prisons:
Incarceration FCI Terminal Island or such other facility as may be available in Oregon.

( √ ) The defendant is remanded to the custody of the United States Marshal.

( ) The defendant shall surrender to the United States Marshal for this district:
( ) at ____________ a.m./p.m. on ____________
( ) as notified by the United States Marshal.

( ) The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
( ) before 2 p.m. on ____________
( ) as notified by the United States Marshal.
( ) as notified by the Probation of Pretrial Services Office.

## RETURN

I have executed this judgment as follows:

____________________________________________

____________________________________________

Defendant delivered on ____________ to ____________
at ____________, with a certified copy of this judgment.

____________________
UNITED STATES MARSHAL

BY: ____________________
Deputy United States Marshal

AO 245C (Rev 06/05) Amended Judgment in a Criminal Case
Sheet 3 - Supervised Release

DEFENDANT: EDWARD STAIN
CASE NUMBER: 2:02-cr-201-LRH(LRL)



## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: Count 2: 3 years; Count 3: 3 years; Count 4, 5 years; Count 5: 5 years; Count 6: 3 years, all concurrent.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed 104 drug tests annually. Revocation is mandatory for refusal to comply.

( ) The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
(√) The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
(√) The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
( ) The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
( ) The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

## STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: EDWARD STAIN
CASE NUMBER: 2:02-cr-201-LRH(LRL)



**SPECIAL CONDITIONS OF SUPERVISION**

1. Possession of Weapon - The defendant shall not possess, have under his/her control, or have access to any firearm, explosive device, or other dangerous weapons, as defined by federal, state or local law.

2. Warrantless Search - The defendant shall submit to the search of his/her person, and any property, residence, or automobile under his/her control by the probation officer, or any other authorized person under the immediate and personal supervision of the probation officer without a search warrant to ensure compliance with all conditions of release.

3. Substance Abuse Treatment - The defendant shall participate in and complete a substance abuse treatment program, which may include drug testing, out-patient counseling, or residential placement, as approved and directed by the probation officer. The defendant shall be required to contribute to the costs of services for such treatment, as approved and directed by the probation officer, based upon his ability to pay.

4. Access to Financial Information - The defendant shall provide the probation officer access to any requested financial information, including personal income tax returns, authorization for release of credit information, and any other business financial information in which the defendant has a control or interest.

5 Restitution Obligation - The defendant shall make restitution in the amount of SIXTY FIVE THOUSAND ONE HUNDRED NINETY-TWO and 80/100ths DOLLARS ($65,192.80), pursuant to a payment schedule to be determined by the probation officer.

DEFENDANT: EDWARD STAIN
CASE NUMBER: 2:02-cr-201-LRH(LRL)



## CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

| | Assessment | Fine | Restitution |
|---|---|---|---|
| Totals: | **$500.00<br>Due and payable immediately. | $WAIVED | $65,192.80 |

( ) On motion by the Government, IT IS ORDERED that the special assessment imposed by the Court is remitted.

( ) The determination of restitution is deferred until _______________. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

( ) The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

| Name of Payee | Total Loss | Restitution Ordered | Priority of Percentage |
|---|---|---|---|
| Clerk, U.S. District Court<br>Attn: Financial Officer<br>Case No. 2:02-cr-201-LRH(LRL)<br>333 Las Vegas Boulevard, South<br>Las Vegas, NV 89101 | | | |
| TOTALS : | $65,192.80 | $65,192.80 | |

Restitution amount ordered pursuant to plea agreement: $ _______________

The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the: ( ) fine ( ) restitution.
the interest requirement for the: ( ) fine ( ) restitution is modified as follows:

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

## Appendix D

*United States v. Stain,* No. 2:02-cr-0201-LRH-LRL,

2012 WL 3730097 (D. Nev. Aug. 28, 2012) (unpublished),

Order granting in part and denying in part motion to vacate

2012 WL 3730097
Only the Westlaw citation is currently available.
United States District Court, D. Nevada.

UNITED STATES of America, Plaintiff,
v.
Edward STAIN, Defendant.

No. 2:02–cr–0201–LRH–LRL.
|
Aug. 28, 2012.

**Attorneys and Law Firms**

Brian J. Quarles, Karyn Kenny, Carlos A Gonzalez, U.S. Attorney's Office, Las Vegas, NV, for Plaintiff.

*ORDER*

LARRY R. HICKS, District Judge.

***1** Before the court is defendant Edward Stain's ("Stain") motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Doc. # 285. Also before the court is Stain's motion for appointment of counsel. Doc. # 286.

**I. Facts and Procedural History**

Stain was indicted on six separate charges related to a series of robberies: (1) conspiracy; (2) interference with commerce by threats or violence; (3) possession of a firearm during and in relation to a crime of violence; (4) armed bank robbery; (5) possession of a firearm during and in relation to a crime of violence; and (6) interference with commerce by threats or violence. Doc. # 171. Stain proceeded to trial and was convicted by a jury on all six counts. Doc. # 217. He was subsequently sentenced to a total term of five hundred and thirty-five (535) months incarceration. Doc. # 234.

Stain appealed his conviction and sentence and the Ninth Circuit ultimately vacated his conviction for conspiracy, but affirmed his remaining convictions as well as his total sentence. Doc. # 271. Thereafter, Stain filed the present motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Doc. # 285.

**II. Discussion**

**A. Effective Assistance of Counsel**

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 that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255; 2 Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure § 41.3b (5th ed.2005).

The Sixth Amendment to the Constitution provides that criminal defendants "shall enjoy the right to have the assistance of counsel for his defense." U.S. Const. Amend. VI. To establish ineffective assistance of counsel, a petitioner must show that his counsel's performance was deficient, and that petitioner was prejudiced as a result of counsel's deficient performance. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). In determining whether counsel's performance was deficient, the court must examine counsel's overall performance, both before and at trial, and must be highly deferential to the attorney's judgments." *Quintero–Barraza,* 78 F.3d at 1348 (citing *Strickland,* 466 U.S. at 688–89) (internal quotations omitted). Once a petitioner has established that counsel's performance was deficient, the petitioner "must then establish that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

In his motion for relief under § 2255, Stain argues that his counsel was constitutionally ineffective because his counsel failed to raise a double jeopardy defense concerning the two charges for possession of a firearm during and in relation to a crime of violence. *See* Doc. # 285.

***2** The court has reviewed the documents and pleadings on file in this matter and finds that Stain's argument is without merit. Stain contends that the jury convicted him twice for the same crime because the jury instructions did not link each possession of a firearm charge to a separate crime. Stain is mistaken. The first possession of a firearm charge was unequivocally linked in the jury instructions to a robbery committed at the Ramada Inn Speedway Casino. *See* Doc. # 217, Jury Inst. 17 (referencing to Count 2). Similarly, the second possession of a firearm charge was linked to a bank robbery of a Wells Fargo. *See* Doc. # 217, Jury Inst. 19 (referencing Count 4). Because the jury instructions carefully attributed the separate possession of a firearm charges to separate underlying criminal charges, there is no basis to support a double jeopardy challenge. Therefore, the court finds that Stain's counsel was not ineffective for failing to raise a defense that had no merit.

**B. Special Assessment**

Also in his motion Stain challenges the imposition of a $600 special assessment issued by the court in the amended judgment. Stain argues that because the Ninth Circuit vacated his conviction for conspiracy, the special assessment should have been reduced to $500.

The court agrees. Stain is correct that the imposition of a special assessment is limited to the total number of convicted charges. Because Stain's conviction for conspiracy was vacated by the Ninth Circuit, he was ultimately convicted of only five charges. Thus, the special assessment should have been reduced from $600 to $500 in the amended judgment (Doc. # 275) to reflect the Ninth Circuit's order.

**C. Motion for Appointment of Counsel**

An indigent petitioner seeking relief under 28 U.S.C. § 2255 may move the court for appointment of representation to pursue that relief. 18 U.S.C. § 3006(A)(2)(B). The court has discretion to appoint counsel when the interest of justice so requires. 18 U.S.C. § 3006(A)(2). The interest of justice so requires where the complexities of the case are such that denial of counsel would amount to a denial of due process. *See Brown v. United States,* 623 F.2d 54, 61 (9th Cir.1980).

Here, the court has reviewed the documents and pleadings on file in this matter and finds that appointment of counsel is not warranted. The issues raised in Stain's underlying § 2255 motion are not complex and Stain has made no showing as to why denial of counsel would amount to a denial of due process. Therefore, the court finds that Stain is not entitled to counsel and shall deny his motion accordingly.

**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 ("COA") based on "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(1)(B).

***3** Here, the court finds that Stain has not shown a denial of a constitutional right in his § 2255 motion. Further, Stain has failed to, and cannot, demonstrate that reasonable jurists would find the court's assessment of his claims debatable or wrong. *See Allen v. Ornoski,* 435 F.3d 946, 950–951 (9th Cir.2006). Therefore, the court shall not issue Stain a COA on his motion to vacate or correct sentence pursuant to 28 U.S.C. § 2255.

IT IS THEREFORE ORDERED that defendant's motion to vacate or correct sentence pursuant to 28 U.S.C. § 2255 (Doc. # 285) is GRANTED in-part and DENIED in-part in accordance with this order. The clerk of court shall issue an AMENDED JUDGMENT reducing the imposed special assessment from $600 to $500.

IT IS FURTHER ORDERED that defendant's motion for appointment of counsel (Doc. # 286) is DENIED.

IT IS FURTHER ORDERED that defendant's motion to treat the motion to vacate as timely (Doc. # 287) is GRANTED *nunc pro tunc.*

IT IS FURTHER ORDERED that a Certificate of Appealability of this order is DENIED.

IT IS SO ORDERED.

**All Citations**

Not Reported in F.Supp.2d, 2012 WL 3730097

# Appendix E

*United States v. Stain,* No. 2:02-cr-00201-LRH-NJK,

Dkt. 275 (D. Nev. June 20, 2008) (unpublished),

Amended Judgment

AO 245C (Rev. 06/05) Amended Judgment in a Criminal Case
Sheet 1

(NOTE: Identify Changes with Asterisks (*))

✓ FILED
ENTERED
RECEIVED
SERVED ON
COUNSEL/PARTIES OF RECORD

JUN 2 0 2008

CLERK US DISTRICT COURT
DISTRICT OF NEVADA
BY: DEPUTY

**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEVADA**

UNITED STATES OF AMERICA
vs.
EDWARD STAIN

**AMENDED JUDGMENT IN A CRIMINAL CASE**

CASE NUMBER: 2:02-cr-201-LRH(LRL)
USM NUMBER: 38058-048

**DATE OF ORIGINAL JUDGMENT**: JUNE 12, 2006
**(or Date of Last Amended Judgment)**

Mario C. Valencia
Defendant's Attorney

**REASON FOR AMENDMENT**:

(✓) Correction of Sentence on Remand (18:3742(f)(1) & (2))
( ) Reduction of Sentence of Changed Circumstances Fed.R.Crim.P. 35(b))
( ) Correction of Sentence by Sentencing Court (Fed.R.Crim.P. 35(a))
( ) Correction of Sentence for Clerical Mistake (Fed.R.Crim.P. 36)
( ) Modification of Supervision Conditions (18 U.S.C. § 3563(c) OR 3583(e)).
( ) Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
( ) Modification of Imposed Term of Imprisonment for Retroactive to the Sentencing Guidelines 18 U.S.C. § 3582(c)(2))
( ) Direct Motion to District Court Pursuant to ( ) 28 U.S.C. § 2255, ( ) 18 U.S.C. § 3559(c)(7)
( ) Modification of Restitution Order (18 U.S.C. § 3664)

**THE DEFENDANT**:

( ) pled guilty to count(s) ____
( ) pled nolo contendere to count(s)____ which was accepted by the court.
(✓) was found guilty on count(s) **2 through 6 of the Third Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

| Title & Section | Nature of Offense | Offense Ended | Count |
|---|---|---|---|
| 18 U.S.C. 1951 | Interference with Commerce by Threats or Violence | 03/23/02 | 2 |
| 18 U.S.C. 924(c)(1)(A) & (c)(1)(A)(ii) | Possession of a Firearm During and in Relation to a Crime of Violence | 03/23/02 | 3 |
| 18 U.S.C. 2113(a) & 2113(d) | Armed Bank Robbery | 04/08/02 | 4 |
| 18 U.S.C. 924(c)(1)(A) (c)(1)(A)(ii) | Possession of a Firearm During and in Relation Relation to a Crime of Violence | 04/08/02 | 5 |
| 18 U.S.C. 1951 | Interference with Commerce by Threats or Violence | 12/23/02 | 6 |
| 18 U.S.C. 2 | Aiding and Abetting | | 2 through 6 |

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

( ) The defendant has been found not guilty on count(s) ____
(✓) **The conviction on Count 1 (Conspiracy) is reversed by the 9th Circuit Court of Appeals by Memorandum dated April 1, 2008.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material changes in economic circumstances.

JUNE 19, 2008
Date of Imposition of Judgment

Signature of Judge

LARRY R. HICKS
U.S. DISTRICT JUDGE
Name and Title of Judge

6/19/08
Date

DEFENDANT: EDWARD STAIN
CASE NUMBER: 2:02-cr-201-LRH(LRL)



**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: Five Hundred Thirty Five (535) months, as follows:

Count 2: one hundred fifty-one (151) months, concurrent with sentence imposed in Counts 4 and 6;
Count 3: eighty-four (84) months, consecutive to sentence imposed in Counts 2, 4 and 6;
Count 4: one hundred fifty-one (151) months, concurrent with sentence imposed in Counts 2 and 6;;
Count 5: three hundred (300) months, consecutive to sentence imposed in Counts 2, 3, 4 and 6;
Count 6: one hundred fifty-one (151) months, concurrent with sentence imposed in Counts 2 and 4.

( √ ) The court makes the following recommendations to the Bureau of Prisons:
Incarceration FCI Terminal Island or such other facility as may be available in Oregon.

( √ ) The defendant is remanded to the custody of the United States Marshal.

( ) The defendant shall surrender to the United States Marshal for this district:
( ) at __________ a.m./p.m. on __________
( ) as notified by the United States Marshal.

( ) The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
( ) before 2 p.m. on __________
( ) as notified by the United States Marshal.
( ) as notified by the Probation of Pretrial Services Office.

RETURN

I have executed this judgment as follows:

__________

__________

Defendant delivered on __________ to __________
at __________, with a certified copy of this judgment.

__________
UNITED STATES MARSHAL

BY: __________
Deputy United States Marshal

DEFENDANT: EDWARD STAIN
CASE NUMBER: 2:02-cr-201-LRH(LRL)



## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: Count 2: 3 years; Count 3: 3 years; Count 4, 5 years; Count 5: 5 years; Count 6: 3 years, all concurrent.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed 104 drug tests annually. Revocation is mandatory for refusal to comply.

( ) The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

(√) The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

(√) The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

( ) The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

( ) The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

## STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: EDWARD STAIN
CASE NUMBER: 2:02-cr-201-LRH(LRL)



**SPECIAL CONDITIONS OF SUPERVISION**

1. Possession of Weapon - The defendant shall not possess, have under his/her control, or have access to any firearm, explosive device, or other dangerous weapons, as defined by federal, state or local law.

2. Warrantless Search - The defendant shall submit to the search of his/her person, and any property, residence, or automobile under his/her control by the probation officer, or any other authorized person under the immediate and personal supervision of the probation officer without a search warrant to ensure compliance with all conditions of release.

3. Substance Abuse Treatment - The defendant shall participate in and complete a substance abuse treatment program, which may include drug testing, out-patient counseling, or residential placement, as approved and directed by the probation officer. The defendant shall be required to contribute to the costs of services for such treatment, as approved and directed by the probation officer, based upon his ability to pay.

4. Access to Financial Information - The defendant shall provide the probation officer access to any requested financial information, including personal income tax returns, authorization for release of credit information, and any other business financial information in which the defendant has a control or interest.

5 Restitution Obligation - The defendant shall make restitution in the amount of SIXTY FIVE THOUSAND ONE HUNDRED NINETY-TWO and 80/100ths DOLLARS ($65,192.80), pursuant to a payment schedule to be determined by the probation officer.

DEFENDANT: EDWARD STAIN
CASE NUMBER: 2:02-cr-201-LRH(LRL)



## CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

| | **Assessment** | **Fine** | **Restitution** |
|---|---|---|---|
| Totals: | $600.00<br>Due and payable immediately. | $WAIVED | $65,192.80 |

( ) On motion by the Government, IT IS ORDERED that the special assessment imposed by the Court is remitted.

( ) The determination of restitution is deferred until _______________. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

( ) The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

| Name of Payee | Total Loss | Restitution Ordered | Priority of Percentage |
|---|---|---|---|
| Clerk, U.S. District Court<br>Attn: Financial Officer<br>Case No. 2:02-cr-201-LRH(LRL)<br>333 Las Vegas Boulevard, South<br>Las Vegas, NV 89101 | | | |
| TOTALS : | $65,192.80 | $65,192.80 | |

Restitution amount ordered pursuant to plea agreement: $ _______________

The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the: ( ) fine ( ) restitution.
the interest requirement for the: ( ) fine ( ) restitution is modified as follows:

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

# Appendix F

*United States v. Stain,* 272 F. App'x 618 (9th Cir. 2008) (unpublished),

Memorandum reversing Count One and affirming remainder of judgment

KeyCite Yellow Flag - Negative Treatment
Post-Conviction Relief Granted in Part, Denied in Part by U.S. v. Stain, D.Nev., August 28, 2012

272 Fed.Appx. 618
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.
Edward STAIN, Defendant—Appellant.

No. 06–10416.
|
Argued and Submitted March 6, 2008.
|
Filed April 1, 2008.

**Synopsis**
**Background:** Defendant was convicted in the United States District Court for the District of Nevada, Larry R. Hicks, J., of conspiracy to commit three robberies and aiding and abetting use and carrying of firearm during commission of crime of violence. He appealed.

**Holdings:** The Court of Appeals held that:

[1] variance between indictment and proof presented at trial affected defendant's substantial rights, warranting reversal of his conviction; but

[2] evidence was sufficient to support the firearm conviction;

[3] evidence of defendant's involvement with marijuana was not admissible;

[4] admission of evidence of defendant's involvement with marijuana was harmless error;

[5] five-level increase was warranted for brandishing or possessing a firearm during robbery; and

[6] three-level increase was warranted based on defendant's role in the offense.

Affirmed in part and reversed in part.

West Headnotes (6)

**[1]** **Conspiracy** Other particular subjects and offenses
**Criminal Law** Indictment or information in general

Variance between indictment charging defendant with conspiracy to commit three robberies and proof presented at trial affected defendant's substantial rights, warranting reversal of his conviction for conspiracy, where, based on indictment, defendant was prepared to defend against a single conspiracy to commit all three robberies, but proof at trial supported no such conspiracy and required defendant to defend against a charge not presented in indictment, and jury was instructed in such a way as to allow defendant to be convicted on basis of conduct other than that with which he was charged.

**[2]** **Weapons** Parties to crime; aiding and abetting

Evidence was sufficient to support conviction of aiding and abetting use and carrying of firearm during commission of crime of violence, including co-conspirators' testimony that defendant planned for them and directed them to use firearms during robberies. 18 U.S.C.A. § 924(c).

**[3]** **Criminal Law** Conspiracy, racketeering, and money laundering
**Criminal Law** Weapons and explosives

Evidence of defendant's involvement with marijuana was not inextricably intertwined with crimes charged, namely, conspiracy to commit three robberies and aiding and abetting use and carrying of firearm during commission of crime of violence, and, thus, such evidence was not admissible. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.; 18 U.S.C.A. § 924(c).

[4] **Criminal Law** Evidence of other offenses and misconduct

Admission of evidence of defendant's involvement with marijuana was harmless error, in prosecution for conspiracy to commit three robberies and aiding and abetting use and carrying of firearm during commission of crime of violence, where corroborated testimony at trial established that defendant planned each robbery with his confederates, stated his intent that guns be used during the robberies, and provided equipment, including guns, that was used during the robberies. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.; 18 U.S.C.A. § 924(c).

[5] **Sentencing and Punishment** Use

Five-level increase in base offense level under the Sentencing Guidelines was warranted for brandishing or possessing a firearm during robbery, in sentencing defendant for conspiracy to commit three robberies and aiding and abetting use and carrying of firearm during commission of crime of violence, based on evidence that a gun was used in robbery. U.S.S.G. § 2B3.1(b)(2)(C), 18 U.S.C.A.

[6] **Sentencing and Punishment** Organizers, leaders, managerial role

Three-level increase in base offense level under the Sentencing Guidelines was warranted for defendant's organizer role in the offense, in sentencing defendant for conspiracy to commit robbery, based on evidence that defendant helped co-conspirator recruit another for the robbery. U.S.S.G. § 3B1.1(b), 18 U.S.C.A.

**Attorneys and Law Firms**

***620** Robert L. Ellman, Esq., State of Arizona Attorney General Office, Phoenix, AZ, Karyn Kenny, New York County District Attorney, New York, NY, Brian Pugh, USLV–Office of the U.S. Attorney Lloyd George Federal Bldg., Las Vegas, NV, for Plaintiff–Appellee.

Mario Valencia, Henderson, NV, for Defendant–Appellant.

Appeal from the United States District Court for the District of Nevada, Larry R. Hicks, District Judge, Presiding. D.C. No. CR–02–00201–LRH.

Before: HAWKINS, THOMAS, and CLIFTON, Circuit Judges.

MEMORANDUM [*]

****1** **[1]** Edward Stain challenges his conviction for conspiracy under Count One of the Indictment, which charged him with conspiring to commit all three robberies. The Government concedes that a variance existed between the Indictment and the proof presented at trial, but contends that the variance was nonfatal. We conclude that the variance requires reversal of Stain's conviction for conspiracy.

A variance requires reversal "if it prejudices a defendant's substantial rights." *United States v. Adamson,* 291 F.3d 606, 615 (9th Cir.2002) (internal quotation marks omitted). Such prejudice may result from the "inadequate opportunity to prepare a defense and exposure to unanticipated evidence at trial." *United States v. Morse,* 785 F.2d 771, 775 (9th Cir.1986). "One of the primary purposes of an indictment is to inform a defendant of 'what he is accused of doing in violation of the criminal law, so that he can prepare his defense.' " *Adamson,* 291 F.3d at 616 (quoting *United States v. Tsinhnahijinnie,* 112 F.3d 988, 991 (9th Cir.1997)). This purpose was not served here. Based on the Indictment, Stain was prepared to defend against a single conspiracy to commit all three robberies. Because the proof at trial supported no such conspiracy and required Stain to defend against a charge not presented in the Indictment, the Indictment "misled [Stain] and obstructed his defense at trial." *See id.* Moreover, the jury was instructed "in such a way as to allow [Stain] to be convicted on the basis of conduct other than that with which he was charged." *See id.* Stain's substantial rights were therefore affected, and we reverse his conviction


Appendix - 22a

for conspiracy. We do not remand for resentencing, however, as this reversal does not affect Stain's sentence. Nor are we persuaded that the variance as to Count One had any impact on Stain's convictions on the other Counts of the Indictment, so those convictions are not tainted by this variance.

**[2]** Stain argues that insufficient evidence supported his two convictions under 18 U.S.C. § 924(c). "[I]n order to be guilty of aiding and abetting under § 924(c), the defendant must have directly facilitated or encouraged the use of the firearm." *United States v. Nelson,* 137 F.3d 1094, 1103 (9th Cir.1998) (internal quotation marks omitted). "Evidence of ... planning directed at the gun itself is sufficient to support ... convictions for aiding and abetting the use of the gun." *Id.* at 1104. The testimony of Kenneth Akins and Vaughan Flanders established that Stain planned for them and directed them to use firearms during the Speedway and Wells Fargo robberies. Because their ***621** testimony was not "incredible or unsubstantial on its face" and because the jury was entitled to and did believe it, we conclude that sufficient evidence supported Stain's firearm convictions. *See United States v. Lopez,* 803 F.2d 969, 973 (9th Cir.1986); *see also Jackson v. Virginia,* 443 U.S. 307, 318–19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

****2** **[3]** **[4]** Admission of the evidence of Stain's involvement with marijuana was an abuse of discretion, as the evidence was not "inextricably intertwined with the crime charged" and was not admissible under Federal Rule of Evidence 404(b). *See United States v. Williams,* 291 F.3d 1180, 1189 (9th Cir.2002) (discussing evidence inextricably intertwined with the crime charged), *overruled on other grounds by United States v. Gonzales,* 506 F.3d 940, 942 (9th Cir.2007) (en banc); *see also United States v. Rendon–Duarte,* 490 F.3d 1142, 1144 (9th Cir.2007) (noting that evidence admissible under Rule 404(b) "must prove a material element of the offense for which the defendant is now charged"). In light of the overwhelming evidence of Stain's guilt, however, the admission of the marijuana evidence was harmless. *See Rendon–Duarte,* 490 F.3d at 1145. Corroborated testimony at trial established, among other things, that Stain planned each robbery with his confederates, stated his intent that guns be used during the robberies, and provided equipment (including guns) that was used during the robberies.

**[5]** **[6]** We also affirm Stain's sentence. The district court did not abuse its discretion in enhancing Stain's sentence under section 2B3.1(b)(2)(C) of the Sentencing Guidelines, as testimony by Lanita Parker and Aundrai Tucker supported the district court's finding that "a gun was used in the Bally's robbery" and that finding was not clearly erroneous. *United States v. Kimbrew,* 406 F.3d 1149, 1151 (9th Cir.2005) (reviewing district court's findings for clear error). We also affirm the district court's enhancement under section 3B1.1(b) of the Sentencing Guidelines in light of testimony that Joey Prince recruited Akins for the Speedway robbery. *See United States v. Savage,* 67 F.3d 1435, 1444 (9th Cir.1995) (noting that a person who "helped bring other people into" a money laundering scheme was a "participant" for purposes of § 3B1.1). Lastly, we decline to review for lack of jurisdiction the district court's implicit denial of Stain's motion for downward departure. *See United States v. Linn,* 362 F.3d 1261, 1262 (9th Cir.2004) (per curiam). Indeed, by finding that Stain played an aggravating role in the robbery, the district court implicitly found that Stain did *not* play a mitigating role. *See* U.S.S.G. §§ 3B1.1, 3B1.2.

**Conviction on Count One REVERSED; remainder of judgment and sentence AFFIRMED.**

**All Citations**

272 Fed.Appx. 618, 2008 WL 886096

## Footnotes

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36–3.

## Appendix G

*United States v. Stain,* No. 2:02-cr-00201-LRH-NJK, Dkt.234 (D. Nev. June 19, 2006) (unpublished), Judgment

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

U.S. DISTRICT COURT
DISTRICT OF NEVADA
FILED
JUN 19 2006
CLERK, U.S. DISTRICT COURT
DEPUTY

UNITED STATES OF AMERICA
vs.
EDWARD STAIN

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: 2:02-cr-201-LRH(LRL)
USM NUMBER: 38058-048

Marc Saggese
DEFENDANT'S ATTORNEY

THE DEFENDANT:
( ) pled guilty to count(s) ____
( ) pled nolo contendere to count(s) ____ which was accepted by the court.
( √ ) was found guilty on Counts 1 through 6 of the Third Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offense(s):

| Title & Section | Nature of Offense | Date Offense Ended | Count |
|---|---|---|---|
| 18 U.S.C. 371 | Conspiracy | 12/23/02 | 1 |
| 18 U.S.C. 1951 | Interference with Commerce by Threats or Violence | 03/23/02 | 2 |
| 18 U.S.C. 924(c)(1)(A) & (c)(1)(A)(ii) | Possession of a Firearm During and in Relation to a Crime of Violence | 03/23/02 | 3 |
| 18 U.S.C. 2113(a) & 2113(d) | Armed Bank Robbery | 04/08/02 | 4 |
| 18 U.S.C. 924(c)(1)(A) &(c)(1)(A)(ii) | Possession of a Firearm During and in Relation to a Crime of Violence | 04/08/02 | 5 |
| 18 U.S.C. 1951 | Interference with Commerce by Threats or Violence | 12/23/02 | 6 |
| 18 U.S.C. 2 | Aiding and Abetting | | 1 through 6 |

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.
( ) The defendant has been found not guilty on count(s) ____
( √ ) The Indictment, the Superseding Indictment and the Second Superseding Indictment are dismissed on the motion of the United States.

IT IS ORDERED that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

JUNE 12, 2006
Date of Imposition of Judgment

Signature of Judge

LARRY R. HICKS
U.S. DISTRICT JUDGE
Name and Title of Judge

6/16/06
Date

DEFENDANT: EDWARD STAIN 
CASE NUMBER: 2:02-cr-201-LRH(LRL)

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: Five Hundred Thirty Five (535) months, as follows:

Count 1: sixty (60) months, concurrent with sentence imposed in Counts 2, 4 and 6;
Count 2: one hundred fifty-one (151) months, concurrent with sentence imposed in Counts 1, 4 and 6;
Count 3: eighty-four (84) months, consecutive to sentence imposed in Counts 1, 2, 4 and 6;
Count 4: one hundred fifty-one (151) months, concurrent with sentence imposed in Counts 1, 2 and 6;;
Count 5: three hundred (300) months, consecutive to sentence imposed in Count 1, 2, 3, 4 and 6;
Count 6: one hundred fifty-one (151) months, concurrent with sentence imposed in Counts 1, 2 and 4.

( √ ) The court makes the following recommendations to the Bureau of Prisons:
Incarceration FCI Terminal Island or such other facility as may be available in Oregon.

( √ ) The defendant is remanded to the custody of the United States Marshal.

( ) The defendant shall surrender to the United States Marshal for this district:
( ) at ____________ a.m./p.m. on ____________
( ) as notified by the United States Marshal.

( ) The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
( ) before 2 p.m. on ____________
( ) as notified by the United States Marshal.
( ) as notified by the Probation of Pretrial Services Office.

## RETURN

I have executed this judgment as follows:

______________________________
______________________________
______________________________

Defendant delivered on ____________ to ____________
at ____________, with a certified copy of this judgment.

______________________________
UNITED STATES MARSHAL

BY: ______________________________
Deputy United States Marshal

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: Count 1: 3 years; Count 2: 3 years; Count 3: 3 years; Count 4, 5 years; Count5: 5 years; Count 6: 3 years, all concurrent.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed 104 drug tests annually. Revocation is mandatory for refusal to comply.

( ) The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
( √ ) The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
( √ ) The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
( ) The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
( ) The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

### STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

## SPECIAL CONDITIONS OF SUPERVISION

1. Possession of Weapon - The defendant shall not possess, have under his/her control, or have access to any firearm, explosive device, or other dangerous weapons, as defined by federal, state or local law.

2. Warrantless Search - The defendant shall submit to the search of his/her person, and any property, residence, or automobile under his/her control by the probation officer, or any other authorized person under the immediate and personal supervision of the probation officer without a search warrant to ensure compliance with all conditions of release.

3. Substance Abuse Treatment - The defendant shall participate in and complete a substance abuse treatment program, which may include drug testing, out-patient counseling, or residential placement, as approved and directed by the probation officer. The defendant shall be required to contribute to the costs of services for such treatment, as approved and directed by the probation officer, based upon his ability to pay.

4. Access to Financial Information - The defendant shall provide the probation officer access to any requested financial information, including personal income tax returns, authorization for release of credit information, and any other business financial information in which the defendant has a control or interest.

5 Restitution Obligation - The defendant shall make restitution in the amount of SIXTY FIVE THOUSAND ONE HUNDRED NINETY-TWO and 80/100ths DOLLARS ($65,192.80), pursuant to a payment schedule to be determined by the probation officer.

DEFENDANT: EDWARD STAIN
CASE NUMBER: 2:02-cr-201-LRH(LRL)



## CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

| | Assessment | Fine | Restitution |
|---|---|---|---|
| Totals: | $600.00<br>Due and payable immediately. | $WAIVED | $65,192.80 |

( ) On motion by the Government, IT IS ORDERED that the special assessment imposed by the Court is remitted.

( ) The determination of restitution is deferred until ________________. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

( ) The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

| Name of Payee | Total Loss | Restitution Ordered | Priority of Percentage |
|---|---|---|---|
| Clerk, U.S. District Court<br>Attn: Financial Officer<br>Case No. 2:02-cr-201-LRH(LRL)<br>333 Las Vegas Boulevard, South<br>Las Vegas, NV 89101 | | | |
| TOTALS : | $65,192.80 | $65,192.80 | |

Restitution amount ordered pursuant to plea agreement: $ ________________

The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the: ( ) fine ( ) restitution.
the interest requirement for the: ( ) fine ( ) restitution is modified as follows:

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

# Appendix H

*United States v. Stain,* No. 2:02-cr-00201-LRH-NJK,

Dkt. 217 (D. Nev. Feb. 3, 2006) (unpublished),

Jury Verdict

# UNITED STATES DISTRICT COURT
# DISTRICT OF NEVADA

-oOo-

| | | |
|---|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff,<br>vs<br>EDWARD STAIN,<br>Defendant. | ) | 2:02-cr-201-LRH(LRL)<br><br>**VERDICT** |

We, the jury in the above entitled case, upon our oaths, do say:

That we find the defendant, EDWARD STAIN, Guilty (Not Guilty - Guilty) of the offense charged in Count 1 of the Indictment herein.

That we find the defendant, EDWARD STAIN, Guilty (Not Guilty - Guilty) of the offense charged in Count 2 of the Indictment herein.

That we find the defendant, EDWARD STAIN, Guilty (Not Guilty - Guilty) of the offense charged in Count 3 of the Indictment herein.

That we find the defendant, EDWARD STAIN, Guilty (Not Guilty - Guilty) of the offense charged in Count 4 of the Indictment herein.

That we find the defendant, EDWARD STAIN, Guilty (Not Guilty - Guilty) of the offense charged in Count 5 of the Indictment herein.

That we find the defendant, EDWARD STAIN, Guilty (Not Guilty - Guilty) of the offense charged in Count 6 of the Indictment herein.

**DATED** this 3 day of February, 2006.

# Appendix I

*United States v. Stain,* No. 2:02-cr-00201-LRH-NJK,

Dkt. 254 (D. Nev. Feb. 3, 2006) (unpublished),

Partial transcript of jury trial: partial jury instructions (pp. 832-50), jury question and jury verdict (pp. 946-54).

**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

**BEFORE THE HONORABLE LARRY R. HICKS, DISTRICT JUDGE**

| | |
|---|---|
| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>vs.<br><br>EDWARD STAIN,<br><br>Defendant. | **Case No. 2:02-CR-201-LRH**<br><br>Las Vegas, Nevada |

**TRANSCRIPT OF JURY TRIAL - DAY 4**

February 3, 2006

APPEARANCES:

For the Plaintiff: KARYN KENNY
BRIAN PUGH
Assistant United States Attorneys
Las Vegas, Nevada

For the Defendant: MARC SAGGESE
Attorney at Law
Las Vegas, Nevada

Court Reporter: Donna Davidson, RMR, CRR, CCR 318
Official Reporter
400 South Virginia Street
Reno, Nevada 89501
(775) 329-0132

* * *

Instruction number 10. You have heard testimony that the defendant made a statement. It is for you to decide whether the defendant made the statement and, if so, how much weight to give it. In making those decisions, you should consider all of the evidence about the statement, including the circumstances under which the defendant had made it.

Instruction number 11. Evidence has been introduced that statements accusing the defendant of a crime charged in the indictment were made, and that the statements were neither denied nor objected to by the defendant. If you find that the defendant actually was present and heard and understood the statements, and that they were made under such circumstances that the statements would have been denied if they were not true, then you may consider whether the defendant's silence was an admission of the truth of the statements.

Instruction number 12 is the lengthy instruction which sets forth the indictment.

The defendant is charged with the following:

Count One, conspiracy. From on or about March 22nd, 2002, to on or about December 23rd, 2002, in the State and Federal District of Nevada, the defendant, Edward Stain, did knowingly, willfully, and unlawfully conspire and agree among themselves and with others known and unknown to commit the following offense against the United States:

A, armed bank robbery, in violation of Title 18, United States Code, Section 2113 (a) and (d).

B, unlawful possession of a firearm during and in relation to a crime of violence, in violation of Title 18, United States Code, Section 924(c)(1)(A) and (c)(1)(A)(ii).

And, C, interference with commerce by threats or violence, in violation of Title 18, United States Code, Section 1951.

In furtherance of the conspiracy and to effect the objectives of the conspiracy, the following overt acts were committed, among others:

Speedway Casino robbery.

On March 22, 2002, defendant Stain placed a telephone call to coconspirator, Kenneth Akins, hereinafter Akins, and asked Akins if he was interested in committing a robbery later that night. When Akins agreed, defendant Stain directed Akins to meet with defendant Stain at a gas station at Alexander and Lamb Streets in Las Vegas, Nevada.

B, defendant Stain met Akins and together they drove in defendant Stain's car to an apartment complex in North Las Vegas where they met two other coconspirators, Vaughan Flanders, hereinafter Flanders, and Mitchum Soberanis, hereinafter Soberanis.

On March 23rd, 2002, in the parking lot of the apartment complex, defendant Stain laid out the plan to rob the Ramada Inn Speedway Casino, located at 3227 Civic Center

Drive, North Las Vegas, Nevada.

D, defendant Stain gave Flanders a knapsack containing gloves, masks and two firearms, Flanders then gave one of the firearms to Akins.

E, defendant Stain then left the parking lot and proceeded to the Ramada Inn Speedway Casino. Defendant Stain called shortly thereafter and directed his coconspirators to proceed with the robbery. Defendant Stain was already inside the casino when Flanders and Akins entered while Soberanis waited nearby in the get-away car.

F, Flanders and Akins, carrying the firearms, demanded and received approximately $10,231 in United States currency from employees of the Speedway before fleeing the casino. Following the robbery, the coconspirators returned to the apartment. Defendant Stain arrived shortly thereafter. Once inside an apartment, defendant Stain directed how the proceeds of the robbery were to be distributed.

Wells Fargo robbery.

On or about April 8th, 2002, defendant Stain called Akins and asked if Akins would assist defendant Stain in a bank robbery. Akins refused, stating that defendant Stain had failed to provide Akins with his promised share for the Speedway robbery.

H, thereafter defendant Stain, Flanders, Soberanis, and Joey Prince, hereinafter Prince, met in a motel room in

Las Vegas, Nevada, and discussed the armed robbery of a bank. Thereafter, the group left the motel and went to an apartment.

While inside the apartment, defendant Stain, wearing a bulletproof vest, provided Prince and Flanders with a Taurus 9 millimeter semiautomatic pistol and an Intratec Tec 9, 9 millimeter machine pistol.

J, the coconspirators drove to Wells Fargo Bank, 4720 South Eastern Avenue, Las Vegas, Nevada, where defendant Stain's girlfriend worked as a teller.

K, upon arrival at the bank, defendant Stain removed a bulletproof vest he was wearing and entered the bank. Once inside, defendant Stain and his girlfriend went into a break room in the rear of the bank.

L, Flanders and Prince, brandishing firearms, robbed the bank while Soberanis waited outside in the get-away van. Defendant Stain remained inside the break room while Flanders, Prince and Soberanis fled in the van.

Bally's robbery.

M, on or around December 22nd, 2002, at approximately 3:38 a.m., defendant Stain entered the Bally's Casino, 3645 South Las Vegas Boulevard, Las Vegas, Nevada, and sat down at a slot machine next to an escalator in the casino.

Defendant Stain's co-conspirator, Tommy Wilson, hereinafter Wilson, stood a few feet away, outside the time office.

O, two casino employees, carrying a bag containing U.S. currency, came out of the time office and headed to the nearby escalator.

P, as they did so, defendant Stain left area by the slot machine and blocked the path of the employees as they attempted to step onto the escalator, while Wilson approached from behind, produced a weapon and stole the bag of currency.

Q, defendant Stain then proceeded up the escalator to the main floor of the casino as Wilson fled the area. Defendant Stain left soon thereafter.

All in violation of Title 18, United States Code, Sections 371 and 2.

Count Two, interference with commerce by threats or violence.

One, the factual allegations set forth in Count One are incorporated herein by reference.

Two, at all times material to this indictment, Ramada Inn Speedway Casino, located at 3227 Civic Center Drive, Las Vegas, Nevada, was engaged in interstate commerce and was an industry which affected interstate commerce.

On March 23rd, 2002, in the District of Nevada, defendant Edward Stain did unlawfully obstruct, delay and affect, and attempted to obstruct, delay and affect, commerce, as that term is defined in Title 18, United States Code, Section 1951, and the movement of articles and commodities in such commerce, by robbery, as that term is defined in Title 18, United States Code, Section 1951, in that the defendant Edward Stain did unlawfully take and obtain personal property consisting of United States currency from the person and presence of employees of the Ramada Inn Speedway Casino, against their will, by means of actual and threatened force, violence, and fear of injury, immediate and future, to their person, in violation of Title 18, United States Code, Sections 1951 and 2.

Count Three. Possession of a firearm during and in relation to a crime of violence.

One, the factual allegations set forth in Count One are incorporated herein by reference.

Two, at all times material to this indictment, Ramada Inn Speedway Casino, located at 3227 Civic Center Drive, Las Vegas, Nevada, was engaged in interstate commerce and was an industry which affected interstate commerce.

On or about March 23rd, 2002, in the State and Federal District of Nevada, Edward Stain, the defendant herein, and others known and unknown, during and in relation to a crime of violence; namely, interference with commerce by threats or violence, as alleged in Count Two of the indictment, did knowingly and unlawfully use firearms, to wit: A Taurus 9 millimeter semiautomatic pistol and an Intratec 9 millimeter machine pistol and, in the furtherance of the crime, possessed said firearms during and in relation to the crime of violence, all in violation of Title 18, United States Code, Sections 924(c)(1)(A) and (c)(1)(A)(ii) and 2.

Count Four, armed bank robbery. The factual allegations set forth in Count One are incorporated herein by reference.

Two, at all times material to this indictment, Ramada Inn Speedway Casino, located at 3227 Civic Center Drive, Las Vegas, Nevada, was engaged in interstate commerce and was an industry which affected interstate commerce.

On or about April 8th, 2002, in the State and Federal District of Nevada, Edward Stain, the defendant herein, and others known and unknown, by force, violence and intimidation, did take from the person and presence of employees of Wells Fargo Bank, 4720 South Eastern Avenue, Las Vegas, Nevada, approximately $23,160 in United States currency, belonging to and in the care, custody, control, management and possession of Wells Fargo Bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and in committing such offense, the defendant Edward Stain did assault and put in jeopardy the life of another person by use of dangerous weapons; that is firearms, to wit: a Taurus 9 millimeter semiautomatic pistol and Intratec Tec 9, 9 millimeter machine pistol, in violation of Title 18, United States Code, Sections 2113 (a), 2113 (d) and

2.

Count Five, possession of a firearm during and in relation to a crime of violence.

The factual allegations set forth in Count One are incorporated herein by reference.

Two, at all times material to this indictment, Ramada Inn Speedway Casino, located at 3227 Civic Center Drive, Las Vegas, Nevada, was engaged in interstate commerce and was an industry which affected interstate commerce.

On or about April 8th, 2002, in the State and Federal District of Nevada, Edward Stain, the defendant herein, and others known and unknown, during and in relation to a crime of violence; namely, armed bank robbery, as alleged in Count Four of the indictment, did knowingly and unlawfully use firearms, to wit: a Taurus 9 millimeter semiautomatic pistol and an Intratec 9 millimeter machine pistol and, in furtherance of the crime, possessed said firearms during and in relation to the crime of violence, all in violation of Title 18, United States Code, Sections 924(c)(1)(A) and (c)(1)(A)(ii) and 2.

Count Six, interference with commerce by threats or violation.

One, the factual allegations set forth in Count One are incorporated herein by reference.

Two, at all times relevant to this indictment, Bally's Casino, located at 3645 South Las Vegas Boulevard, Las Vegas, Nevada, was engaged in interstate commerce and was an industry which affected interstate commerce.

On December 23rd, 2002, in the District of Nevada, defendant Edward Stain did unlawfully obstruct, delay and affect, and attempted to obstruct, delay and affect, commerce as that term is defined in Title 18, United States Code, Section 1951, and the movement of articles and commodities in such commerce, by robbery, as that term is defined in Title 18, United States Code, Section 1951, in that the defendant did unlawfully take and obtain personal property consisting of United States currency from the person and presence of employees of the Bally's Casino, against their will by means of actual and threatened force, violence, and fear of injury, immediate and future, to their person, in violation of Title 18, United States Code, Sections 1951 and 2.

That's instruction number 12, ladies and gentlemen.

Instruction number 13. A separate crime is charged against the defendant in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

Instruction number 14. Mere presence at the scene of a crime or mere knowledge that a crime is being committed is not sufficient to establish that the defendant committed the crime charged, unless you find that the defendant was a participant and not merely a knowing spectator. The defendant's presence may be considered by the jury along with other evidence in the case.

Instruction number 15. The defendant is charged in Count One of the indictment with conspiring to commit armed bank robbery, in violation of Title 18, United States Code, Section 2113(a) and (d); two counts of possession of a firearm during and in relation to a crime of violence, in violation of Title 18, United States Code, Section 924(c)(1)(A) and (c)(1)(A)(ii); and two counts of interference with commerce by threats or violence, in violation of Title 18, United States Code, Section 1951, all in violation of Title 18, United States Code, Section 371. In order for the defendant to be found guilty of Count One, the government must prove each of the following elements beyond a reasonable doubt:

First, beginning on or about March 22nd, 2002, and ending on or about March 23rd, 2002, there was an agreement between two or more persons to commit at least one crime as charged in the indictment.

Second, the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it.

And, third, one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy, with all of you agreeing on a particular overt act that you find was committed.

I shall discuss with you briefly the law relating to each of these elements.

A conspiracy is a kind of criminal partnership, an agreement of two or more persons to commit one or more crimes. The crime of conspiracy is the agreement to do something unlawful; it does not matter whether the crime agreed upon was committed.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You must find that there was a plan to commit at least one of the crimes alleged in the indictment as an object of the conspiracy with all of you agreeing as to the particular crime which the conspirators agreed to commit.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who willfully joins an existing conspiracy is as responsible for it as the originators. On the other hand, one who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not therefore -- thereby become a conspirator. Similarly, a person does not become a conspirator merely by associating with one or more persons who are conspirators, nor merely by knowing that a conspiracy exists.

That's instruction number 15.

MR. PUGH: Your Honor, before you move on to number 16, when you were on line 8 of the first page of instruction 15, you cited the date as March 22nd to March 23rd, and I believe it's March 22nd to December 23rd.

THE COURT: It is. And I stand corrected. I misread that. It should have -- it's the -- I'm looking at instruction number 15, the first page, lines 8 through 10, and it refers to the period from March 22nd, 2002, ending on or about December 23rd, 2002. If I said March 23rd, 2002, and I believe I did, I definitely misspoke myself.

Instruction number 16. The defendant is charged in Count Two of the indictment with interference with commerce by threats and violence, in violation of Section 1951 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant took property belonging to Ramada Inn Speedway Casino, a corporation, and from the employees of Ramada Inn Speedway Casino, against their will by means of actual or threatened physical force or fear of injury.

Second, the defendant acted with the intent to obtain the property that the defendant knew he was not entitled to receive.

And, third, commerce from one state to another was affected in some way.

Jury instruction number 17. The defendant is charged in Count Three of the indictment with possession of a firearm during and in relation to a crime of violence, in violation of 924(c)(1)(A) and (c)(1)(A)(ii) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt.

First, the defendant committed the crime of interference with commerce by threats or violence, as charged in Count Two of the indictment.

Second, the defendant knowingly brandished a firearm.

And, third, the defendant brandished the firearm during and in relation to the crime.

A defendant carries a firearm if the defendant knowingly possesses or carries the firearm. Carrying is not limited to carrying weapons directly on the person, but can include circumstances such as carrying in a vehicle.

A defendant takes such action in relation to a crime if the firearm facilitated or played a role in the crime.

Instruction number 18. The defendant is charged in Count Four of the indictment with armed bank robbery, in violation of Section 2113 (a) and (d) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt.

First, the defendant took from a teller money belonging to a bank or a financial institution.

Second, the defendant used force, violence, and intimidation in doing so.

Third, a dangerous weapon or device was brandished during said robbery.

And, fourth, at the time of the robbery, the deposits of the bank or financial institution were then insured by the Federal Deposit Insurance Corporation.

Instruction number 19. The defendant is charged in Count Five of the indictment with possession of a firearm during and in relation to a crime of violence, in violation of 924(c)(1)(A) and (c)(1)(A)(ii) and 2 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant committed the crime of armed bank robbery, as charged in Count Four of the indictment.

Second, the defendant knowingly brandished a firearm.

And, third, the defendant brandished the firearm during and in relation to the crime.

A defendant carries a firearm if the defendant knowingly possesses or carries the firearm. Carrying is not limited to carrying weapons directly on the person, but can include circumstances such as carrying in a vehicle.

A defendant takes such action in relation to the crime if the firearm facilitated or played a role in the crime.

Instruction number 20. The defendant is charged in Count Six of the indictment with interference with commerce by threats and violence, in violation of Section 1951 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant took property belonging to Bally's Casino, a corporation, and from the employees of Bally's Casino, against their will by means of actual or threatened physical force or fear of injury.

Second, the defendant acted with the intent to obtain the property that the defendant knew he was not entitled to receive.

And, third, commerce from one state to another was affected in some way.

Instruction number 21. The guilt of any defendant may be established without proof that he personally did every act constituting the offense charged. Under federal law, whoever commits an offense against the United States or who aids, abets, counsels, commands, induces, or procures its commission is punishable as a principal. Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable, likewise, as a principal.

In other words, every person who willfully participates in the commission of a crime may be found to be guilty of that offense. Participation, again, is willful if it's done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the intent to fail to do something the law requires. That is to say again, with bad purpose either to disobey or to disregard the law.

In order to aid and abet another to commit a crime, it is necessary that the accused willfully associate himself in some way with the criminal venture, and willfully participate in it as he would in any -- in something he wishes to bring about. That is to say, that he willfully seeks by some act or omission of his to make the criminal venture succeed. An act or omission is willfully done if done voluntarily and intentionally and, again, with specific intent to do something the law forbids. That is to say, with bad purpose either to disobey or disregard the law.

You, of course, may not find any defendant guilty unless you find beyond a reasonable doubt that every element of the offenses as defined in these instructions was committed by some person or persons and that the defendant participated in its commission.

The government is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted.

That was instruction 21.

Instruction number 22 provides that a person has possession of something if the person knows of its presence and has physical control of it, or knows of its presence and has the power and intention to control it.

More than one person can be in possession of something if each knows of its presence and has the power and intention to control it.

Instruction number 23. An act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake, or accident. The government is not required to prove that the defendant knew that his acts or omissions were unlawful. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

Instruction number 24. The punishment provided by law for this crime is for the court to decide. You may not consider punishment in deciding whether the government has proved its case -- there's a little typo there. I'll correct it.

I'm going to start reading this over again. The punishment provided for -- by law for these crimes is for the court to decide. You may not consider punishment in deciding whether the government has proved its case against the defendant beyond a reasonable doubt.

Instruction number 25. Some of you have taken notes during the trial. Whether or not you took notes, you should rely on your own memory of what was said. Notes are only to assist your memory. You should not be overly influenced by the notes.

Instruction number 26. If it becomes necessary during your deliberations to communicate with me, you may send a note through the bailiff, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with me except by a signed writing, and I will respond to the jury concerning the case only in writing, or here in open court. If you send out a question, I will consult with the lawyers before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone, including me, how the jury stands, numerically or otherwise, on the question of the guilt of the defendant, until after you have reached a unanimous verdict or have been discharged.

The last instruction is instruction number 27. When you begin your deliberations, you should elect one member of the jury as your foreperson. That person will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict, whether guilty or not guilty, must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not exchange an honest belief about the weight and effect of the evidence simply to reach a verdict.

* * *

Just for appellate issues, I'm making that record, lodging that objection.

But, Your Honor, based on what you just stated, I have no problem with that going to the jury.

THE COURT: All right. I note your objection.

Ms. Kenny, do you have any objection to that response?

MS. KENNY: No, Your Honor.

With respect to -- I believe the first time the Court said it was going to re-read instruction number 15. Is that something that the Court is still considering?

THE COURT: I'm not going to read it. Let me read the whole thing to you as it will go to the jury.

The jury has submitted a note asking the following: Conspiracy, does it to have to be for every count? Can Mr. Stain be guilty on one count and not on others?

Breaking the jury's inquiry into the two questions, the Court's response is as follows: Conspiracy -- I'm going to strike the word conspiracy there. One, does it have to be for every count? Well, I better leave conspiracy there.

MS. KENNY: And I apologize, Your Honor. I actually have your document in front of me. I just did not see instruction number 15.

THE COURT: Okay. So here's the way -- I'm starting this paragraph over again.

Breaking the jury's inquiry into the two questions, the Court's response is as follows: Conspiracy, one, does it have to be for every count? The Court refers the jury to instruction 15. 15 is a two-page instruction. Two, can Mr. Stain be guilty on one count and not on others? The question is not entirely clear to the Court. If the jury is asking whether Mr. Stain can be found guilty of conspiracy as charged in Count One of the indictment, if the jury finds that he is guilty of one but less than all three of the robberies with which he has been charged, the answer is yes. If the jury is asking if the defendant can be found guilty of one of the six counts in the indictment and not on others, the answer is yes. The Court refers the jury to instruction number 13.

MR. SAGGESE: That's perfect, Your Honor. I'm totally satisfied with that.

MS. KENNY: Your Honor, may I have one moment, please?

THE COURT: Yes.

MS. KENNY: Your Honor?

THE COURT: Yes?

MS. KENNY: Thank you for the time.

With respect to reviewing the entire response, the only request the government would have would be with the sentence beginning if the jury is asking whether Mr. Stain can be found guilty of conspiracy if the jury finds that he, we would ask that in substitution of the words is guilty of what will be substituted in there is that he agreed to commit one, but less than all three of the robberies, because conspiracy itself is an agreement to commit a crime.

THE COURT: Right.

MS. KENNY: And I think that perhaps the language he is guilty is misleading after conspiracy, and it should be that he agreed to commit one but less than all three. All they have to find is the agreement.

THE COURT: Mr. Saggese?

MR. SAGGESE: Your Honor, I would object to that and say that the question is one of guilt or innocence, and he has to have been found guilty of one of the three robberies in order to be found guilty of conspiring to commit that robbery. I think it's fine as it is.

MS. KENNY: Your Honor, and I would just dispute that point of law. It's the conspiracy charge, he just has to be found guilty of conspiring.

THE COURT: I agree with you. The only thing I'm concerned about is that I don't think that's the page the jury is on when they are asking the question. I'm going to go with the version that is acceptable to Mr. Saggese.

MR. SAGGESE: Thank you, Your Honor.

MS. KENNY: Fine, Your Honor.

THE COURT: All right. A copy of these will be saved for the Court's record. I'll sign it and give it to the jury.

MR. SAGGESE: Your Honor, can we have Rosemarie fax me the finalized version that's going to the jury?

THE COURT: Absolutely.

MR. SAGGESE: Thank you, sir.

(Recess taken from 3:00 p.m. until 3:45 p.m.)

(The following proceedings were held outside the presence of the jury.)

THE COURT: Have a seat, please.

I guess they found the answer to the question.

(The following proceedings were held in the presence of the jury.)

THE COURT: Have a seat, please.

The record will reflect that we are in open court. The parties are present; all the jury is present.

Mr. Mathews, I see you holding the envelope which contain the verdict form. I assume you're the foreperson; is that correct?

MR. MATHEWS: Yes, sir.

THE COURT: All right. And has the jury reached a verdict?

MR. MATHEWS: Yes, we have.

THE COURT: All right.

Madam Clerk, would you please get that from

Mr. Mathews and let the Court review it.

All right. Madam Clerk, would you please publish the verdict.

THE CLERK: Verdict. We, the jury in the above entitled case, upon our oaths, do say:

That we find the defendant, Edward Stain, guilty of the offense charged in Count One of the indictment herein.

That we find the defendant, Edward Stain, guilty of the offense charged in Count Two of the indictment herein.

That we find the defendant, Edward Stain, guilty of the offense charged in Count Three of the indictment herein.

That we find the defendant, Edward Stain, guilty of the offense charged in Count Four of the indictment herein.

That we find the defendant, Edward Stain, guilty of the offense charged in Count Five of the indictment herein.

That we find the defendant, Edward Stain, guilty of the offense charged in Count Six of the indictment herein.

Dated this 3rd day of February, 2006. Stephen Mathews, foreperson.

THE COURT: Does that properly reflect the verdict which has been reached by the jury?

MR. MATHEWS: Yes, sir.

(Jurors nodded their heads affirmatively.)

THE COURT: All right. I see everyone indicating yes.

Does either party wish to have the jury polled?

MS. KENNY: The government does not, Your Honor.

MR. SAGGESE: Your Honor, one matter. Can I speak to you sidebar for a second?

THE COURT: Yes.

(Sidebar conference was held as follows:)

MR. SAGGESE: Just for clarification, they said they found the answer on jury instruction 15, lines 8, 9 and 10. There is no line 8, 9, and 10.

THE COURT: I'm assuming that they are referring to instruction 13, because that's where the answer was to what we thought was the question.

MS. KENNY: Could it be the conspiracy one; is that the one?

MR. SAGGESE: That was conspiracy.

MS. KENNY: There's a longer one.

MR. SAGGESE: I could have the wrong instruction.

THE COURT: There's a two-page conspiracy instruction.

MR. SAGGESE: This is the one you signed, correct?

MS. KENNY: Yeah.

THE COURT: Would you get the original copy of the instructions.

MR. SAGGESE: These aren't the right ones.

MS. KENNY: You're right. But it's here. It's in here.

THE COURT: Here it is. Instruction number 15, lines 8, 9, and 10.

MR. SAGGESE: That doesn't say anything. Oh, I see, at least one crime charged in the indictment. So we're looking at 15, it's just numbered afterwards?

THE COURT: Yes.

MR. SAGGESE: What's it say on the front? It doesn't have a number up front?

THE COURT: Well --

MR. SAGGESE: Okay.

THE COURT: We'll clarify it after -- we should clarify it now.

MR. SAGGESE: For the record, it doesn't make sense that they were inquiring whether or not they had to find him guilty of all three in the conspiracy, and then they have the same problem I objected to the reason the way it was pled may have led them to believe that because they find him guilty in Count One of one, he must be guilty of all because they were all pled together.

MS. KENNY: Your Honor, with respect to -- with regard to counsel's argument, the issue is not the way the indictment is pled, it's the instruction, and the instruction is very clear; and the Court was correct in its response that you only have to find one of the three, which it seems at this point, Your Honor, they found.

MR. SAGGESE: But if there was any doubt as to he was guilty as to One, Two, Three, they wouldn't have that question. If they had that question, they resolved it, and they found him guilty of everything.

MS. KENNY: But they also gave him multiple counts. They could not find him guilty on the conspiracy count and then still find him guilty on the substantive counts.

MR. SAGGESE: The question stems from the fact that there were three -- three separate events in one count. What they wanted to know was, hey, if we think he did Bally's but not Speedway and the other one, do we have to find him guilty of conspiracy; the judge said yes, you do, which then says conspiracy he committed all three.

MS. KENNY: Well, the judge didn't say anything because --

THE COURT: We never -- I'll clarify the record on that after we excuse the jury. I think it's clear. This is the instruction. It's the two-page instruction.

MS. KENNY: And for the record, Your Honor, it's the --

THE COURT: The one that starts with the defendant is charged in Count One of the indictment with conspiring to commit armed bank robbery.

MS. KENNY: Thank you, Your Honor.

MR. SAGGESE: Okay.

THE COURT: All right.

(Sidebar ended and the following was held in open court.)

THE COURT: All right. We have got it cleared up, ladies and gentlemen.

I just want to say this. I want to thank you for doing an outstanding job as jurors in this particular case this week. I'm actually -- I think I'm the only federal judge here in Nevada who has had the privilege of serving in both Reno and Las Vegas. I'm presently serving in Reno, which is where my home has always been; but when I started as a judge four and a half years ago, I started down here in Las Vegas. And I had -- Mr. Pugh, is there something?

MR. PUGH: I'm sorry to interrupt you, Your Honor. I don't know if the question was answered by the defense, whether or not they wanted the jury polled.

MR. SAGGESE: I spoke about that at sidebar in advance.

Yes, I would like the jury polled.

THE COURT: Oh, excuse me. I thought you had answered that.

So at this point, hold that thought, ladies and gentlemen. Either party is entitled to have the jury polled; that is, to ask the jury members whether the verdict agrees

# Appendix J

*United States v. Stain,* No. 2:02-cr-00201-LRH-NJK,

Dkt. 171 (D. Nev. Aug. 17, 2005) (unpublished),

Third Superseding Indictment

FILED RECEIVED

DANIEL G. BOGDEN
United States Attorney
KARYN KENNY
Assistant United States Attorney
333 S. Las Vegas Blvd., Suite 5000
Las Vegas, Nevada 89101
(702) 388-6336

# UNITED STATES DISTRICT COURT
# DISTRICT OF NEVADA
-oOo-

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>PLAINTIFF,<br>VS.<br>EDWARD STAIN,<br>DEFENDANT. | THIRD SUPERSEDING CRIMINAL INDICTMENT<br><br>CR-S-02-201-LRH(LRL)<br><br>VIOLATIONS:<br>18 U.S.C. § 371 - Conspiracy;<br>18 U.S.C. § 2113(a)&(d) - Armed Bank Robbery;<br>18 U.S.C. § 1951 - Interference with Commerce by Threats or Violence;<br>18 U.S.C. §§ 924(C)(1)(A) & (c)(1)(A)(ii) - Possession of a Firearm During and in Relation to a Crime of Violence;<br>18 U.S.C. § 2 - Aiding and Abetting |

THE GRAND JURY CHARGES THAT:

**COUNT ONE**
Conspiracy

1. From on or about March 22, 2002, to on or about December 23, 2002, in the State and Federal District of Nevada,

**EDWARD STAIN,**

the defendant herein, did knowingly, willfully, and unlawfully conspire and agree with others known and unknown to the Grand Jury to commit the following offenses against the United States:

171

a) Armed Bank Robbery, in violation of Title 18, United States Code, Section 2113(a)&(d);

b) Unlawful Possession of a Firearm During and in Relation to a Crime of Violence, in violation of Title 18, United States Code, Section 924(C)(1)(A)& (c)(1)(A)(ii); and,

c) Interference with Commerce by Threats or Violence, in violation of Title 18, United States Code, Section 1951.

2. In furtherance of the conspiracy and to effect the objectives of the conspiracy, the following overt acts were committed, among others:

Speedway Casino Robbery:

a) on March 22, 2002, defendant **STAIN** placed a telephone call to co-conspirator, Kenneth Akins, (hereinafter "Akins") and asked Akins if he was interested in committing a robbery later that night. When Akins agreed, defendant **STAIN** directed Akins to meet with defendant **STAIN** at a gas station at Alexander and Lamb Streets, in Las Vegas, Nevada;

b) defendant **STAIN** met Akins and together they drove in defendant **STAIN'S** car to an apartment complex in North Las Vegas where they met two other co-conspirators, Vaughn Flanders (hereinafter "Flanders") and Mitchum Soberanis (hereinafter "Soberanis");

c) on March 23, 2002, in the parking lot of the apartment complex, defendant **STAIN** laid out the plan to rob the Ramada Inn Speedway Casino, located at 3227 Civic Center Drive, North Las Vegas, Nevada;

d) defendant **STAIN** gave Flanders a knapsack containing masks, gloves and two firearms, Flanders then gave one of the firearms to Akins;

. . .

. . .

e) defendant **STAIN** then left the parking lot and proceeded to the Ramada Inn Speedway Casino. Defendant **STAIN** called shortly thereafter and directed his co-conspirators to proceed with the robbery. Defendant **STAIN** was already inside the casino when Flanders and Akins entered while Soberanis waited nearby in the get-a-way car;

f) Flanders and Akins, carrying the firearms, demanded and received approximately $10,231 in U.S. currency from employees of the Speedway before fleeing the casino. Following the robbery, the co-conspirators returned to the apartment. Defendant **STAIN** arrived shortly thereafter. Once inside an apartment, defendant **STAIN** directed how the proceeds of the robbery were to be distributed;

Wells Fargo Robbery:

g) on or about April 8, 2002, defendant **STAIN** called Akins and asked if Akins would assist defendant **STAIN** in a bank robbery. Akins refused, stating that defendant **STAIN** had failed to provide Akins with his promised share for the Speedway robbery;

h) thereafter defendant **STAIN**, Flanders, Soberanis and Joey Prince ("hereinafter "Prince") met in a motel room in Las Vegas, Nevada, and discussed the armed robbery of a bank; thereafter, the group then left the motel and went to an apartment;

i) while inside the apartment, defendant **STAIN**, wearing a bullet proof vest, provided Prince and Flanders with a Taurus, 9 mm semiautomatic pistol and an Intratec Tech 9, 9mm machine pistol;

j) the co-conspirators drove to Wells Fargo Bank, 4720 South Eastern Avenue, Las Vegas, Nevada, where defendant **STAIN'S** girlfriend worked as a teller;

k) upon arrival at the bank, defendant **STAIN** removed a bullet proof vest he was wearing and entered the bank. Once inside, defendant **STAIN** and his girlfriend went into a break room in the rear of the bank;

. . .

l) Flanders and Prince, brandishing firearms, robbed the bank while Soberanis waited outside in the get-a-way van. Defendant **STAIN** remained inside the break room while Flanders, Prince and Soberanis fled in the van;

Bally's Robbery:

m) on or about December 22, 2002, at approximately 3:38 a.m., defendant **STAIN** entered the Bally's Casino, 3645 South Las Vegas Boulevard, Las Vegas, Nevada, and sat down at a slot machine, next to an escalator in the casino;

n) defendant **STAIN'S** co-conspirator, Tommy Wilson, (hereinafter "Wilson") stood a few feet away, outside the "Time Office";

o) two casino employees, carrying a bag containing U.S. currency, came out of the "Time Office " room and headed to the nearby escalator;

p) as they did so, defendant **STAIN** left area by the slot machine and blocked the path of the employees as they attempted to step onto the escalator, while Wilson approached from behind, produced a weapon and stole the bag of currency;

q) defendant **STAIN** proceeded up the escalator to the main floor of the casino as Wilson fled the area. Defendant **STAIN** left soon thereafter.

All in violation of Title 18, United States Code, Sections 371 and 2.

**COUNT TWO**

Interference with Commerce by Threats or Violence

1. The factual allegations set forth in Count One are incorporated herein by reference.

2. At all times material to this Indictment, Ramada Inn Speedway Casino, located at 3227 Civic Center Drive, North Las Vegas, Nevada, was engaged in interstate commerce and was an industry which affected interstate commerce.

3. On March 23, 2002, in the District of Nevada, the defendant Edward Stain did unlawfully obstruct, delay and affect, and attempted to obstruct, delay and affect,

commerce, as that term is defined in Title 18, United States Code, Section 1951, and the movement of articles and commodities in such commerce, by robbery, as that term is defined in Title 18, United States Code, Section 1951, in that the defendant Edward Stain did unlawfully take and obtain personal property consisting of U.S. currency from the person and presence of employees of the Ramada Inn Speedway Casino, against their will, by means of actual and threatened force, violence, and fear of injury, immediate and future, to their person, in violation of Title 18, United States Code, Sections 1951 & 2.

**COUNT THREE**
Possession of a Firearm During and in Relation to a Crime of Violence

1. The factual allegations set forth in Count One are incorporated herein by reference.

2. On or about March 23, 2002, in the State and Federal District of Nevada,

**EDWARD STAIN,**

the defendant herein, and others known and unknown to the Grand Jury, during and in relation to a crime of violence, namely, Interference with Commerce by Threats or Violence, as alleged in Count Two of this indictment, did knowingly and unlawfully use firearms, to wit; a Taurus, 9 mm semi-automatic pistol and an Intratec 9 mm machine pistol, and in furtherance of the crime, possessed said firearms, during and in relation to the crime of violence, all in violation of Title 18, United States Code, Sections 924(C)(1)(A)&(c)(1)(A)(ii) and 2.

**COUNT FOUR**
Armed Bank Robbery

1. The factual allegations set forth in Count One are incorporated herein by reference.

2. On or about April 8, 2002, in the State and Federal District of Nevada,

**EDWARD STAIN,**

the defendant herein, and others known and unknown to the Grand Jury, by force, violence and intimidation, did take from the person and presence of employees of Wells Fargo Bank, 4720 South Eastern Avenue, Las Vegas, Nevada, approximately twenty-three thousand one hundred sixty dollars ($23,160.00) in United States currency, belonging to and in the care, custody, control, management and possession of Wells Fargo Bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and in commiting such offense, the defendant Edward Stain did assault and put in jeopardy the life of another person by the use of dangerous weapons, that is firearms, to wit: a Taurus, 9 mm semiautomatic pistol an Intratec Tech 9, 9mm machine pistol, in violation of Title 18, United States Code, Sections 2113(a), 2113(d) and 2.

**COUNT FIVE**

Possession of a Firearm During and in Relation to a Crime of Violence

1. The factual allegations set forth in Count One are incorporated herein by reference.

2. On or about April 8, 2002, in the State and Federal District of Nevada,

**EDWARD STAIN,**

the defendant herein, and others known and unknown to the Grand Jury, during and in relation to a crime of violence, namely, armed bank robbery, as alleged in Count Four of this indictment, did knowingly and unlawfully use firearms, to wit; a Taurus 9 mm semiautomatic pistol and an Intratec 9 mm machine pistol and in furtherance of the crime, possessed said firearms, during and in relation to the crime of violence, all in violation of Title 18, United States Code, Sections 924(C)(1)(A)&(c)(1)(A)(ii) and 2.

**COUNT SIX**

Interference with Commerce by Threats or Violence

1. The factual allegations set forth in Count One are incorporated herein by reference.

. . .

2. At all times material to this Indictment, Bally's Casino, located at 3645 South Las Vegas Boulevard, Las Vegas, Nevada was engaged in interstate commerce and was an industry which affected interstate commerce.

3. On December 23, 2002, in the District of Nevada, the defendant Edward Stain did unlawfully obstruct, delay and affect, and attempted to obstruct, delay and affect, commerce as that term is defined in Title 18, United States Code, Section 1951, and the movement of articles and commodities in such commerce, by robbery, as that term is defined in Title 18, United States Code, Section 1951, in that the defendant Edward Stain did unlawfully take and obtain personal property consisting of U.S. currency from the person and presence of employees of the Bally's Casino, against their will by means of actual and threatened force, violence, and fear of injury, immediate and future, to their person, in violation of Title 18, United States Code, Sections 1951 & 2.

**DATED:** this 17th day of August 2005.

**A TRUE BILL:**

/S/
FOREPERSON OF THE GRAND JURY

DANIEL G. BOGDEN
United States Attorney

KARYN KENNY
Assistant United States Attorney