No. 22-_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____◆_____

JORDAN HUFF,
MARCUS MAJOR

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

_____◆_____

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

_____◆_____

JOINT APPENDIX

_____◆_____

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APPENDIX A: Order of the United States Court of Appeals for the Ninth Circuit Denying Petition for Rehearing En Banc in *United States of America v. Jordan Huff*, U.S.C.A. 17-16763 (September 7, 2022) A1

APPENDIX B: Order of the United States Court of Appeals for the Ninth Circuit Denying Petition for Rehearing En Banc in *United States of America v. Marcus Major*, U.S.C.A. 17-16764 (September 7, 2022) B1

APPENDIX C: Decision of the United States Court of Appeals for the Ninth Circuit Court in *United States of America v. Jordan Huff*, U.S.C.A. No. 17-16763 (May 23, 2022).....C1-C4

APPENDIX D: Decision of the United States Court of Appeals for the Ninth Circuit Court in *United States of America v. Marcus Major*, U.S.C.A. No. 17-16764 (May 27, 2022)..... D1-D4

APPENDIX E: Order of the District Court for the Eastern District of California Denying Defendant Jordan Huff's Motion to Vacate, Set Aside, or Correct his Sentence under 28 U.S.C. § 2255 in *United States v. Huff*, U.S.D.C. No. 1:07-cr-00156 LJO (August 21, 2017) E1-E12

APPENDIX F: Order of the District Court for the Eastern District of California Denying Defendant Marcus Major's Motion to Vacate, Set Aside, or Correct his Sentence under 28 U.S.C. § 2255 in *United States v. Major*, U.S.D.C. No. 1:07-cr-00156 LJO (August 21, 2017)..... F1-F12

APPENDIX G: Amended Judgment of the District Court for the Eastern District of California in *United States v. Huff*, U.S.D.C. No. 1:07-cr-00156 LJO (May 15, 2012)..... G1-G7

APPENDIX H: Amended Judgment of the District Court for the Eastern District of California in *United States v. Major*, U.S.D.C. No. 1:07-cr-00156 LJO (May 15, 2012) H1-H7

APPENDIX I: Decision of the United States Court of Appeals for the Ninth Circuit Court in *United States v. Henry*, U.S.C.A. No. 19-50080 (January 6, 2021) I1-I28

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JORDAN HUFF, Defendant-Appellant.	No. 17-16763 D.C. Nos. 1:16-cv-01945-LJO 1:07-cr-00156-LJO-2 Eastern District of California, Fresno ORDER

Before: LEE and BRESS, Circuit Judges, and FITZWATER,* District Judge.

The petition for panel rehearing [Dkt. 53] is DENIED. Judges Bress and Lee voted to deny the petition for rehearing en banc. Judge Fitzwater recommended denying the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED.

* The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARCUS MAJOR, Defendant-Appellant.	No. 17-16764 D.C. Nos. 1:17-cv-00360-LJO 1:07-cr-00156-LJO-1 Eastern District of California, Fresno ORDER

Before: LEE and BRESS, Circuit Judges, and FITZWATER,* District Judge.

The petition for panel rehearing [Dkt. 52] is DENIED. Judges Bress and Lee voted to deny the petition for rehearing en banc. Judge Fitzwater recommended denying the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED.

* The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JORDAN HUFF, Defendant-Appellant.	No. 17-16763 D.C. Nos. 1:16-cv-01945-LJO 1:07-cr-00156-LJO-2 MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Lawrence J. O'Neill, District Judge, Presiding

Submitted May 18, 2022**
Pasadena, California

Before: LEE and BRESS, Circuit Judges, and FITZWATER,*** District Judge.

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

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

*** The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

Movant Jordan Huff ("Huff") appeals the denial of his motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his 18 U.S.C. § 924(c) convictions and sentences. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we affirm.

We review de novo the district court's denial of a § 2255 motion, and we review the district court's factual findings for clear error. *United States v. Guess*, 203 F.3d 1143, 1145 (9th Cir. 2000).

1. We do not reach the government's argument that we should dismiss in part the certificate of appealability ("COA") as improvidently granted. *See Phelps v. Alameda*, 366 F.3d 722, 726 (9th Cir. 2004) ("[M]erits panels are not required to examine allegedly defective COAs in the face of jurisdictional challenges.").

2. It is apparent from the record that Huff's § 924(c) convictions are predicated on Hobbs Act robbery, not conspiracy to commit Hobbs Act robbery. But Huff contends that, after *United States v. Davis*, 139 S. Ct. 2319 (2019), his Hobbs Act robbery convictions are invalid predicate crimes of violence for a § 924(c) conviction because they are based on either a *Pinkerton* or an aiding-and-abetting theory of liability. This argument is foreclosed by our precedents. *See Young v. United States*, 22 F.4th 1115, 1122-23 (9th Cir. 2022) (explaining that "there is no distinction between aiding-and-abetting liability and liability as a principal under federal law[,]" and holding that "aiding and abetting a crime of violence, such as

armed bank robbery, is also a crime of violence"); *United States v. Henry*, 984 F.3d 1343, 1355-56 (9th Cir. 2021) (rejecting argument that § 924(c) conviction was invalid if predicate offense was based on *Pinkerton* liability).

Borden v. United States, 141 S. Ct. 1817 (2021) (plurality opinion), is not clearly irreconcilable with these binding precedents. *See United States v. Boitano*, 796 F.3d 1160, 1164 (9th Cir. 2015) (recognizing that three-judge panel may not overrule a prior panel opinion absent clearly irreconcilable, intervening higher authority). In *Borden* the Court held that a criminal offense that requires only a *mens rea* of recklessness cannot qualify as a "violent felony" under the force (or elements) clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i). *Borden*, 141 S. Ct. at 1821-22, 1834. But the Court did not address whether § 924(c) convictions can be predicated on crime-of-violence convictions that are based on a *Pinkerton* or an aiding-and-abetting theory of liability. The Court explicitly stated in *Borden* that it was not addressing accessory liability. *Id.* at 1823 n.3 (stating that the Court had "no occasion to address" inchoate crimes, such as conspiracy, or aiding-and-abetting liability). Regardless, *Borden* confirmed preexisting Ninth Circuit precedent that mere recklessness is not sufficient under the force clause, *United States v. Grajeda*, 581 F.3d 1186, 1191 (9th Cir. 2009), and Hobbs Act robbery in all events requires a

greater *mens rea* than recklessness, *United States v. Dominguez*, 954 F.3d 1251, 1261 (9th Cir. 2020).

3. Huff has also briefed the uncertified issue of whether, after *Davis*, Hobbs Act robbery—committed as a principal—is a valid predicate crime of violence for a § 924(c) conviction. Construing this argument as a motion to expand the COA, *see* Ninth Cir. R. 22-1(e); *Mardesich v. Cate*, 668 F.3d 1164, 1169 n.4 (9th Cir. 2012), we deny the motion because Huff has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Dominguez*, 954 F.3d at 1260-61 (reaffirming that Hobbs Act robbery is a crime of violence under § 924(c)(3)(A)).[1]

Because Hobbs Act robbery is a crime of violence, regardless of the theory of liability that Huff's convictions are based on, we affirm the district court's denial of Huff's § 2255 motion.

AFFIRMED.

[1] We therefore have no need to reach the government's argument that Huff procedurally defaulted his claims.

FILED

MAY 27 2022

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARCUS MAJOR, Defendant-Appellant.	No. 17-16764 D.C. Nos. 1:17-cv-00360-LJO 1:07-cr-00156-LJO-1 MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Lawrence J. O'Neill, District Judge, Presiding

Submitted May 18, 2022**
Pasadena, California

Before: LEE and BRESS, Circuit Judges, and FITZWATER,*** District Judge.

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

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

*** The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

Marcus Major ("Major") appeals the denial of his motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his 18 U.S.C. § 924(c) convictions and sentences. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we affirm.

We review de novo the district court's denial of a § 2255 motion, and we review the district court's factual findings for clear error. *United States v. Guess*, 203 F.3d 1143, 1145 (9th Cir. 2000).

1. We do not reach the government's argument that we should dismiss in part the certificate of appealability ("COA") as improvidently granted. *See Phelps v. Alameda*, 366 F.3d 722, 726 (9th Cir. 2004) ("[M]erits panels are not required to examine allegedly defective COAs in the face of jurisdictional challenges.").

2. It is apparent from the record that Major's § 924(c) convictions are predicated on Hobbs Act robbery, not conspiracy to commit Hobbs Act robbery. But Major contends that, after *United States v. Davis*, 139 S. Ct. 2319 (2019), his Hobbs Act robbery convictions are invalid predicate crimes of violence for a § 924(c) conviction because they are based on either a *Pinkerton* or an aiding-and-abetting theory of liability. This argument is foreclosed by our precedents. *See Young v. United States*, 22 F.4th 1115, 1122-23 (9th Cir. 2022) (explaining that "there is no distinction between aiding-and-abetting liability and liability as a principal under federal law[,]" and holding that "aiding and abetting a crime of violence, such as

armed bank robbery, is also a crime of violence"); *United States v. Henry*, 984 F.3d 1343, 1355-56 (9th Cir. 2021) (rejecting argument that § 924(c) conviction was invalid if predicate offense was based on *Pinkerton* liability).

Borden v. United States, 141 S. Ct. 1817 (2021) (plurality opinion), is not clearly irreconcilable with these binding precedents. *See United States v. Boitano*, 796 F.3d 1160, 1164 (9th Cir. 2015) (recognizing that three-judge panel may not overrule a prior panel opinion absent clearly irreconcilable, intervening higher authority). In *Borden* the Court held that a criminal offense that requires only a *mens rea* of recklessness cannot qualify as a "violent felony" under the force (or elements) clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i). *Borden*, 141 S. Ct. at 1821-22, 1834. But the Court did not address whether § 924(c) convictions can be predicated on crime-of-violence convictions that are based on a *Pinkerton* or an aiding-and-abetting theory of liability. The Court explicitly stated in *Borden* that it was not addressing accessory liability. *Id.* at 1823 n.3 (stating that the Court had "no occasion to address" inchoate crimes, such as conspiracy, or aiding-and-abetting liability).

3. Major has also briefed the uncertified issue of whether after *Davis*, Hobbs Act robbery—committed as a principal—is a valid predicate crime of violence for a § 924(c) conviction. Construing this argument as a motion to expand the COA, *see*

Ninth Cir. R. 22-1(e); *Mardesich v. Cate*, 668 F.3d 1164, 1169 n.4 (9th Cir. 2012), we deny the motion because Major has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see United States v. Dominguez*, 954 F.3d 1251, 1260-61 (9th Cir. 2020) (reaffirming that Hobbs Act robbery is a crime of violence under § 924(c)(3)(A)). Regardless, *Borden* confirmed preexisting Ninth Circuit precedent that mere recklessness is not sufficient under the force clause, *United States v. Grajeda*, 581 F.3d 1186, 1191 (9th Cir. 2009), and Hobbs Act robbery in all events requires a greater *mens rea* than recklessness, *Dominguez*, 954 F.3d at 1261.

Because Hobbs Act robbery is a crime of violence, regardless of the theory of liability that Major's convictions are based on, we affirm the district court's denial of Major's § 2255 motion.[1]

AFFIRMED.

[1] We therefore have no need to reach the government's argument that Major procedurally defaulted his claims.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, **Plaintiff-Respondent,** **v.** **JORDAN HUFF,** **Defendant-Petitioner.**	CASE NO. 1:07-CR-00156 -LJO MEMORANDUM DECISION AND ORDER DENYING PETITIONER'S MOTION TO VACATE, SET ASIDE, OR CORRECT HIS SENTENCE PURSUANT TO 28 U.S.C. § 2255 **ECF No. 486**

I. INTRODUCTION

Before the Court is Petitioner Jordan Huff's ("Petitioner," "Defendant," or "Huff") motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 ("§ 2255"). (ECF No. 486.) Petitioner filed an application for permission to file a second or successive § 2255 motion to the Ninth Circuit, with his motion attached, on June 23, 2016. (*Id.*) The Ninth Circuit granted Petitioner's application for leave to file a second or successive § 2255 motion on February 17, 2017. (ECF No. 485.) On February 21, 2017, the Government filed its opposition. (ECF No. 488.) Petitioner filed a reply on March 23, 2017. (ECF No. 494.) Having considered the parties' briefing and the record in this case, the Court DENIES Petitioner's motion under § 2255.

II. BACKGROUND

On December 22, 2009, Huff was found guilty after a jury trial of 30 counts of Hobbs Act robbery (18 U.S.C. § 1951), one count of conspiracy to commit Hobbs Act robbery (18 U.S.C. § 1951), one count of conspiracy to use/carry/brandish a firearm in relation to a crime of violence (18 U.S.C. § 924(o)), and 30 counts of carrying a firearm during a crime of violence (18 U.S.C. § 924(c)(1)). (ECF No. 312.) On June 5, 2012, Petitioner was re-sentenced as follows: 121 months on each of the non-§ 924(c) counts to be served concurrently; 84 months on the first count of brandishing a firearm, to be served consecutive to the conspiracy and robbery sentences; and 300 months for each of the remaining 29 discharging and brandishing offenses, with each term to run consecutively. In total, Huff was sentenced to 8,905 months. (ECF No. 429.)

III. LEGAL FRAMEWORK

A. 28 U.S.C. § 2255

Section 2255 provides four grounds upon which a sentencing court may grant relief to a petitioning in-custody defendant:

> [1] that the sentence was imposed in violation of the Constitution or laws of the United States, or [2] that the court was without jurisdiction to impose such sentence, or [3] that the sentence was in excess of the maximum authorized by law, or [4] is otherwise subject to collateral attack.

28 U.S.C. § 2255(a). Generally, only a narrow range of claims fall within the scope of § 2255. *United States v. Wilcox*, 640 F.2d 970, 972 (9th Cir. 1981). The alleged error of law must be "a fundamental defect which inherently results in a complete miscarriage of justice." *Davis v. United States*, 417 U.S. 333, 346 (1974).

B. *Johnson II* and *Welch*

Pursuant to the Armed Career Criminal Act ("ACCA"), a defendant must be sentenced to a mandatory minimum of 15 years to life in prison if he has three prior convictions for "a violent felony or a serious drug offense, or both." 18 U.S.C. § 924(e)(1). The ACCA defines "violent felony" as any

crime punishable by imprisonment for a term exceeding one year that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*

18 U.S.C. § 924(e)(2)(B) (emphasis added). Courts generally refer to the first clause, § 924(e)(2)(B)(i), as the "elements clause"; the first part of the disjunctive statement in (ii) as the "enumerated offenses clause"; and its second part (starting with "or otherwise") as the "residual clause." *Johnson v. United States*, 135 S. Ct. 2551, 2556-57, 2563 (2015) ("*Johnson II*"); *United States v. Lee*, 821 F.3d 1124, 1126 (9th Cir. 2016).

In *Johnson II*, the Supreme Court held that "imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process," on the basis that "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges." 135 S. Ct. at 2557, 2563. "Two features of the residual clause conspire to make it unconstitutionally vague." *Id.* at 2557. First, "the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime" by "t[ying] the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." *Id.* Second, "[b]y combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.* at 2558.

The Supreme Court subsequently held that its decision in *Johnson II* announced a new substantive rule that applies retroactively to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016). "By striking down the residual clause for vagueness, [*Johnson II*] changed the substantive reach of the Armed Career Criminal Act, altering the 'range of conduct or the class of

persons that the [Act] punishes." *Id.* at 1265 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)). As a result, defendants sentenced pursuant to the ACCA residual clause can collaterally attack their sentences as unconstitutional under § 2255. *See, e.g.*, *United States v. Heflin*, 195 F. Supp. 3d 1134 (E.D. Cal. 2016).

C. **Sentencing Pursuant to 18 U.S.C. § 924(c)(1)(A)**

Section 924(c)(1)(A) of title 18 of the U.S. Code provides, *inter alia*, that any person who in relation to any "crime of violence" uses or carries a firearm shall in addition to the punishment provided for such "crime of violence," be sentenced to a term of imprisonment of not less than five years, to run consecutively with the punishment for the underlying "crime of violence." If a firearm is brandished in the course of committing the "crime of violence," the consecutive term of imprisonment shall be not less than seven years (84 months). 18 U.S.C. § 924(c)(1)(A)(ii). If a firearm is discharged, the consecutive term of imprisonment shall be not less than ten years. *Id.* § 924(c)(1)(C)(A)(iii).

For purposes of 18 U.S.C. § 924(c)(1)(A), a "crime of violence" is defined as an offense that is a felony and—

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3). "Courts generally refer to the '(a)' clause of section 924(c)(3) as the 'force clause' and to the '(b)' clause of section 924(c)(3) as the 'residual clause.'" *United States v. Bell*, 153 F. Supp. 3d 906, 910 (N.D. Cal. 2016).

IV. DISCUSSION

Petitioner challenges his sentence on the basis that Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) is no longer deemed a qualifying "crime of violence" for purposes of § 924(c)(1) in light of the Supreme Court's decision in *Johnson II.* (ECF No. 486 at 2.) Although the residual clause in § 924(c)(3)(B) is not identical to the residual clause in the ACCA struck down in *Johnson II*, Petitioner

argues that it is very similar and therefore unconstitutionally vague. In response, the Government argues that Petitioner is not entitled to relief under 28 U.S.C. § 2255 because even if the residual clause of § 924(c) is unconstitutional, his conviction for Hobbs Act robbery is categorically a crime of violence under the remaining "elements" or "force" clause of § 924(c)(3)(A). Therefore, his sentence under § 924(c)(1)(A) is not affected by the Supreme Court's decisions in *Johnson II* and *Welch*. (ECF No. 488; *see also* ECF No. 468 (addressing the same arguments in more detail with respect to Huff's co-defendant, Rose).)[1]

A. **Categorical Approach**

To determine whether an offense fits the definition of a "crime of violence," courts employ the "categorical approach" set forth in *Taylor v. United States*, 495 U.S. 575 (1990). A court applying the categorical approach must "determine whether the [offense] is categorically a 'crime of violence' by comparing the elements of the [offense] with the generic federal definition." *United States v. Sahagun-Gallegos*, 782 F.3d 1094, 1098 (9th Cir. 2015) (internal citations omitted). Because the categorical approach is concerned only with what conduct the offense necessarily involves, the court "must presume that the [offense] rest[s] upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (internal quotation marks and alterations omitted). If the elements of the offense "criminalize a broader swath of conduct" than the conduct covered by the generic federal definition, the offense cannot qualify as a crime of violence, even if the particular facts underlying the defendant's own case might satisfy that definition. *United States v. Dominguez-Maroyoqui*, 748 F.3d 918, 920 (9th Cir. 2014) (internal quotation marks omitted).

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[1] In addition to this argument, the Government makes two additional arguments for why the Court should deny Huff's § 2255 petition. First, the Government argues that the residual clause of § 924(c)(3)(B) is still valid after *Johnson II* and therefore Huff's conviction still qualifies as a crime of violence under the residual clause. Second, the Government argues that Petitioner's motion is time-barred. Because the Court concludes that Hobbs Act robbery is still categorically a crime of violence under the force clause of § 924(c)(3)(A) and therefore that Petitioner's sentence is not affected by *Johnson II*, the Court need not address either of these issues.

B. **Hobbs Act Robbery Is Categorically a Crime of Violence Under the Force Clause**

Under the Hobbs Act:

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

18 U.S.C. § 1951(a). The Hobbs Act defines "robbery" as "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." *Id.* § 1951(b)(1).

The Ninth Circuit recently issued an unpublished opinion squarely on point, holding that Hobbs Act robbery is categorically a crime of violence under the force clause in § 924(c)(3)(A). *United States v. Howard*, 650 F. App'x 466, 468 (9th Cir. 2016), *as amended* (June 24, 2016). The court relied on a prior Ninth Circuit decision interpreting an analogous federal bank robbery statute.[2] *Id.* (citing *United States v. Selfa*, 918 F.2d 749, 751 (9th Cir. 1990)). In *Selfa*, the court reasoned that a crime committed by "intimidation," which is defined as an action that willfully puts a "reasonable person *in fear of bodily harm*," satisfies the requirement of a "threatened use of physical force." *Id.* Therefore, because Hobbs Act robbery requires that the defendant willfully place the victim in "fear of injury," it also requires the threat of physical force, and therefore qualifies as a crime of violence under the force clause. *Howard*, 650 F. App'x at 468.

Petitioner contends that Hobbs Act robbery categorically fails to qualify as a crime of violence for three reasons: (1) it can be accomplished by putting another in fear of injury to intangible property,

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[2] The federal bank robbery statute shares the same essential elements as Hobbs Act robbery. *See Howard*, 650 F. App'x at 468 (describing federal bank robbery and Hobbs Act robbery as "analogous"). Both statutes criminalize the taking of property by actual or threatened force or violence, or by intimidation/fear of injury. The federal bank robbery statute provides: "(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another 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; . . . shall be fined not more than $5,000 or imprisoned not more than twenty years, or both." 18 U.S.C. § 2113(a).

which does not require the threat of physical force to property necessary under § 924(c)(3)(B); (2) it can be committed by placing a person in fear of physical injury without the use, attempted use, or threatened use of violent physical force; and (3) it does not require proof that the defendant intentionally used, threatened to use, or attempted to use violent physical force.

1. Hobbs Act Robbery Cannot Be Accomplished Without Actual or Threatened Violent Physical Force

Petitioner argues that Hobbs Act robbery cannot qualify as a crime of violence under the force clause after the Supreme Court's decision in *Johnson v. United States*, 130 S. Ct. 1265 (2010) ("*Johnson I*"), which held that a crime of violence requires "violent physical force." (ECF No. 486 at 5.) First, according to Petitioner, the taking of property through threatening injury to another's intangible property does not satisfy the requirement of "violent physical force" outlined in *Johnson I*.[3] (*Id.* at 6-7.) Petitioner also argues more generally that the act of putting someone in "fear of injury" to his person also does not require the use, attempted use, or threatened use of violent physical force. (*Id.* at 8-9.)

First, although Petitioner argues that a conviction under the Hobbs Act robbery can be sustained on the basis that the victim feared intangible economic injury that does not encompass violent physical force, the case law is clear that Hobbs Act robbery cannot be accomplished without the threat of physical force. The cases cited by Petitioner refer to Hobbs Act extortion, not Hobbs Act robbery; Hobbs Act extortion is a separate crime with different elements. *United States v. McCallister*, No. 15-0171 (ABJ), 2016 WL3072237, at *8-9 (D.D.C. 2016) (distinguishing between cases dealing with Hobbs Act extortion and Hobbs Act robbery, and concluding that Hobbs Act robbery is categorically a crime of violence under the force clause of § 924(c)). Notably, Hobbs Act robbery by definition requires

[3] To the extent Petitioner argues that Hobbs Act robbery is not a categorical match for a crime of violence under § 924(c) because the former contemplates violent physical force against property, that argument fails under the plain language of both statutes. The Hobbs Act requires "actual or threatened force" or "violence" or "fear of injury" to "the person *or property of another*." *Id.* (emphasis added). The force clause of § 924(c)(3) also explicitly includes in the definition any offense that "has as an element the use, attempted use, or threatened use of physical force against the . . . *property of another*." *Id.* (emphasis added). Therefore, as far as the property element is concerned, the statutes are an exact match under the categorical approach; § 1951 is no broader than § 924(c).

non-consensual taking, whereas extortion takes place when property is taken or obtained with consent. Fear of economic loss from a non-consensual taking (as in robbery) implicitly threatens violence and physical force in a way that fear of economic loss from a consensual taking (as in extortion) does not. *See* 18 U.S.C. § 1951.

Several of the cases cited by Petitioner illustrate the difference. For example, Petitioner cites *United States v. Mitov*, noting that fear in the extortion context can encompass fear of economic loss, such as the threatened loss of success in a civil lawsuit. 460 F.3d 901, 907 (7th Cir. 2006). The Court cannot conceive of how fear of injury by loss in a civil lawsuit could ever form the basis for a Hobbs Act *robbery* conviction, as opposed to Hobbs Act *extortion* conviction. *See also United States v. Hancock*, 168 F. Supp. 3d 817, 823 (D. Md. 2016) (noting that "to the extent these cases deal with 'intangible property,' it appears to be in the context of the property being extorted, i.e., taken, not the property being subjected to threats or actual force or fear of injury"). The other cases cited by Petitioner where Hobbs Act extortion was committed by fear of economic injury similarly do not translate to the robbery context. *See, e.g.*, *United States v. Collins*, 78 F.3d 1021, 1030 (6th Cir. 1996) (fear that one might "lose the opportunity to compete for government contracts on a level playing field" was sufficient for extortion); *United States v. Cruz-Arroyo*, 461 F.3d 69, 74 (1st Cir. 2006) (noting that fear "encompasses fear of economic loss, including business opportunities"). Defendant has not offered a plausible hypothetical scenario in which Hobbs Act robbery could create a fear of injury to intangible property without the use or threat of violent physical force. *See United States v. Hill*, 832 F.3d 135, 141 n.8 (2d Cir. 2016) (rejecting the same argument because defendant "failed to show any realistic probability that a perpetrator could effect such a robbery in the manner he posits without employing or threatening physical force").

Lastly, Defendant argues more generally that Hobbs Act robbery does not constitute a crime of violence because it can be accomplished merely "by placing another in fear of injury to his person" without the use of force. Petitioner cites a Second Circuit case for the proposition that "human

experience suggests numerous examples of intentionally causing physical injury without the use of force, such as a doctor who deliberately withholds vital medicine from a sick patient." (ECF No. 486 at 8 (citing *Chrzanoski v. Ashcroft*, 327 F.3d 188, 196 (2d Cir. 2003)). Again, however, this hypothetical fails to explain how a *robbery* could ever be committed with fear of injury but without threat violent physical force. Supreme Court precedent requires Petitioner to present a "realistic probability, not a theoretical possibility" that a conviction under § 2113(a) & (d) could be sustained without demonstrating intentional threatened force. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). Petitioner has not done so here.

A taking by "actual or threatened force" or "violence" or "fear of injury" *necessarily* involves at least the *threat* to use violent force. Courts that have considered this question in the wake of *Johnson II* have also reached the conclusion that "fear of injury" is "limited to fear of injury from the use of violence," and therefore have determined that Hobbs Act robbery cannot be committed without violent physical force in accordance with the Supreme Court's holding in *Johnson I*. *See Hill*, 832 F.3d at 140-44; *United States v. Anglin*, 846 F.3d 954 (7th Cir. 2017) (concluding that Hobbs Act robbery is categorically a crime of violence under § 924(c)(3)(A) because it "necessarily requires using or threatening force"); *In re St. Fleur*, 824 F.3d 1337, 1340 (11th Cir. 2016) (same); *United States v. Farmer*, 73 F.3d 836, 842 (8th Cir. 1996) (Hobbs Act robbery has "as an element the use, attempted use, or threatened use of physical force against the person of another"); *United States v. Bailey*, No. CR14-328-CAS, 2016 WL 3381218, at *4 (C.D. Cal. 2016) ("'fear of injury to [one's] . . . property' under 18 U.S.C. § 1951(b)(1) includes only fear of injury from the use of force, and not fear instilled by, for example, threatened economic devaluation of stocks or physical defacing of a building"), *reconsideration denied sub nom. United States v. Dorsey*, No. 2:14-CR-0328(B)- CAS, 2016 WL 3607155 (C.D. Cal. June 30, 2016); *United States v Pena*, 161 F. Supp. 3d 268, 277 (S.D.N.Y. 2016) ("the text, history, and context of the Hobbs Act compel a reading of the phrase 'fear of injury' that is limited to fear of injury from the use of force").

2. Hobbs Act Robbery Requires General Intent

Petitioner further argues that Hobbs Act robbery does not require the use of *intentional* violent force, and therefore does not meet the *mens rea* requirement necessary to satisfy the force clause of § 924(c)(3). (ECF No. 486 at 11-13.) In *Leocal v. Ashcroft*, the Supreme Court held that a DUI was not a crime of violence because the offense could be committed through mere negligence. 543 U.S. 1, 9-10 (2004). The Ninth Circuit extended *Leocal's* holding, concluding that offenses that could be committed through mere recklessness also do not fit within the crime of violence umbrella. *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1132 (9th Cir. 2006). Therefore, any crime that can be committed without intentional or willful conduct (in other words, a crime that can be committed with mere negligence or recklessness) cannot constitute a crime of violence. *Id.*

Petitioner argues that because a conviction under the analogous federal bank robbery statute can be sustained where the defendant did not have a *specific intent* to use intimidation, *see, e.g.*, *United States v. Woodrup*, 86 F.3d 359 (4th Cir. 1996); *United States v. Foppe*, 993 F.2d 1444, 1451 (9th Cir. 1993); *United States v. Kelley*, 412 F.3d 1240, 1244 (11th Cir. 2005), Hobbs Act robbery likewise does not require intentional or willful conduct and therefore does not meet the *mens rea* requirement necessary to be a crime of violence. In support of the argument that analogous language in § 2113 carries a lesser intent requirement and therefore is not categorically a crime of violence, Petitioner cites several cases where courts rejected the notion that a defendant had to have a *specific* intent to intimidate to be convicted of federal armed bank robbery.

Addressing the same argument in *Pena*, the court reasoned:

> Even assuming that the Section 2113(a) case law applies directly to Section 1951's definition of Hobbs Act robbery, the cited case law does not demonstrate that either statute is not a crime of violence under *Leocal*. Section 2113(a) is not a strict liability crime. The Supreme Court has explained that Section 2113(a) 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 (here, the taking of property of another by force and violence or intimidation)." *Carter v. United States*, 530 U.S. 255, 268 (2000). In other words, a defendant charged with bank

> robbery pursuant to Section 2113(a) must intentionally perform objectively intimidating actions in the course of unlawfully taking the property of another. If a defendant robs a bank with violence, the prosecution need not prove a specific intent to cause pain or to induce compliance. Similarly, if a defendant robs a bank with intimidation, the prosecution need not prove a specific intent to cause fear. This does not mean that the bank robbery was accomplished through "negligent or merely accidental conduct." *Leocal*, 543 U.S. at 9. Accordingly, the Court rejects Pena's "somewhat implausible paradigm where a defendant unlawfully obtains another person's property against their will by unintentionally placing the victim in fear of injury." *Standberry*, 139 F. Supp. 3d at 739. Pena has failed to demonstrate a "realistic probability" that the accidental use of force would meet the elements of Hobbs Act robbery.

Pena, 161 F. Supp. 3d at 283-84. The Court agrees with the reasoning in *Pena*. Indeed, this Court has held that the federal armed bank robbery statute that Petitioner analogizes to here is categorically a crime of violence, and specifically that the intent requirements of § 2113 and § 924(c) are a categorical match. *See United States v. Salinas*, No. 1:08-CR-0338-LJO-SKO, 2017 WL 2671059 (E.D. Cal. June 21, 2017); *United States v. Torres*, No. 1:11-CR-0448-LJO-SKO, 2017 WL 431351, at *3-4 (E.D. Cal. Jan. 31, 2017).

Petitioner also cites *United States v. Abelis*, 146 F.3d 73, 83 (2d Cir. 1998) for the proposition that a defendant can be can be convicted under the Hobbs Act for creating "fear of injury" without intending to cause fear through explicit or implicit threats. Petitioner contends that in *Abelis* "the defendant was found to have satisfied the requisite element of causing fear simply on the basis of his 'reputation as a prominent figure in the underworld.'" (ECF No. 486 at 12 (citing *Abelis*, 146 F.3d at 83). Petitioner misreads *Abelis*, which explicitly held that the defendant could not have been convicted under the causing-fear element solely on the basis of his reputation as a prominent Russian gangster. *Id.* On the contrary, the court upheld the conviction after concluding that the relevant jury instruction adequately advised the jury that "a defendant must knowingly and willfully create or instill fear, or use or exploit existing fear" to be convicted of Hobbs Act extortion. *Id.* This instruction is consistent with the Court's conclusion that knowledge or willfulness is required to sustain a conviction under the Hobbs

Act. This intent requirement matches the requisite intent level for a crime of violence under the force clause.

Hobbs Act robbery is a crime of violence under the force clause of § 924(c)(3)(A). Therefore, Petitioner's sentence under § 924(c)(1)(A) was not imposed in violation of the Constitution or the laws of the United States. The Court **DENIES** Petitioner's § 2255 motion.

V. CERTIFICATE OF APPEALABILITY

An appeal may not be taken from the denial of a § 2255 motion unless a certificate of appealability is issued. 28 U.S.C. § 2253(c)(1). "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). To obtain a certificate of appealability, 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." *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (internal quotation marks and citations omitted).

Because Petitioner has failed to make a showing that he was denied a constitutional right, the Court **DECLINES** to issue a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2). *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

VI. CONCLUSION AND ORDERS

Accordingly, **IT IS HEREBY ORDERED** that Petitioner Jordan Huff's Motion to Vacate, Set Aside, or Correct Sentence pursuant to § 2255 (ECF No. 486) is **DENIED**. The Court **DECLINES** to issue Petitioner a certificate of appealability for this motion.

IT IS SO ORDERED.

Dated: **August 18, 2017**

/s/ Lawrence J. O'Neill
UNITED STATES CHIEF DISTRICT JUDGE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, **Plaintiff-Respondent,** **v.** **MARCUS MAJOR,** **Defendant-Petitioner.**	CASE NO. 1:07-CR-00156 -LJO MEMORANDUM DECISION AND ORDER DENYING PETITIONER'S MOTION TO VACATE, SET ASIDE, OR CORRECT HIS SENTENCE PURSUANT TO 28 U.S.C. § 2255 **ECF No. 491**

I. INTRODUCTION

Before the Court is Petitioner Marcus Major's ("Petitioner," "Defendant," or "Major") motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 ("§ 2255"). (ECF No. 491.) Petitioner filed an application for permission to file a second or successive § 2255 motion to the Ninth Circuit, with his motion attached, on June 23, 2016. (*Id.*) The Ninth Circuit granted Petitioner's application for leave to file a second or successive § 2255 motion on March 10, 2017. (ECF No. 492.) On March 24, 2017, the Government filed its opposition. (ECF No. 495.) Petitioner filed a reply on April 24, 2017. (ECF No. 499.) Having considered the parties' briefing and the record in this case, the Court DENIES Petitioner's motion under § 2255.

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II. BACKGROUND

On December 22, 2009, Major was found guilty after a jury trial of 30 counts of Hobbs Act robbery (18 U.S.C. § 1951), one count of conspiracy to commit Hobbs Act robbery (18 U.S.C. § 1951), one count of conspiracy to use/carry/brandish a firearm in relation to a crime of violence (18 U.S.C. § 924(o)), and 30 counts of carrying a firearm during a crime of violence (18 U.S.C. § 924(c)(1)). (ECF No. 311.) On June 5, 2012, Petitioner was re-sentenced as follows: 135 months on each of the non-§ 924(c) counts to be served concurrently; 84 months on the first count of brandishing a firearm, to be served consecutive to the conspiracy and robbery sentences; and 300 months for each of the remaining 29 discharging and brandishing offenses, with each term to run consecutively. In total, Major was sentenced to 8,919 months. (ECF No. 430.)

III. LEGAL FRAMEWORK

A. 28 U.S.C. § 2255

Section 2255 provides four grounds upon which a sentencing court may grant relief to a petitioning in-custody defendant:

> [1] that the sentence was imposed in violation of the Constitution or laws of the United States, or [2] that the court was without jurisdiction to impose such sentence, or [3] that the sentence was in excess of the maximum authorized by law, or [4] is otherwise subject to collateral attack.

28 U.S.C. § 2255(a). Generally, only a narrow range of claims fall within the scope of § 2255. *United States v. Wilcox*, 640 F.2d 970, 972 (9th Cir. 1981). The alleged error of law must be "a fundamental defect which inherently results in a complete miscarriage of justice." *Davis v. United States*, 417 U.S. 333, 346 (1974).

B. *Johnson II* and *Welch*

Pursuant to the Armed Career Criminal Act ("ACCA"), a defendant must be sentenced to a mandatory minimum of 15 years to life in prison if he has three prior convictions for "a violent felony or a serious drug offense, or both." 18 U.S.C. § 924(e)(1). The ACCA defines "violent felony" as any

crime punishable by imprisonment for a term exceeding one year that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*

18 U.S.C. § 924(e)(2)(B) (emphasis added). Courts generally refer to the first clause, § 924(e)(2)(B)(i), as the "elements clause"; the first part of the disjunctive statement in (ii) as the "enumerated offenses clause"; and its second part (starting with "or otherwise") as the "residual clause." *Johnson v. United States*, 135 S. Ct. 2551, 2556-57, 2563 (2015) ("*Johnson II*"); *United States v. Lee*, 821 F.3d 1124, 1126 (9th Cir. 2016).

In *Johnson II*, the Supreme Court held that "imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process," on the basis that "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges." 135 S. Ct. at 2557, 2563. "Two features of the residual clause conspire to make it unconstitutionally vague." *Id.* at 2557. First, "the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime" by "t[ying] the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." *Id.* Second, "[b]y combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.* at 2558.

The Supreme Court subsequently held that its decision in *Johnson II* announced a new substantive rule that applies retroactively to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016). "By striking down the residual clause for vagueness, [*Johnson II*] changed the substantive reach of the Armed Career Criminal Act, altering the 'range of conduct or the class of

persons that the [Act] punishes." *Id.* at 1265 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)). As a result, defendants sentenced pursuant to the ACCA residual clause can collaterally attack their sentences as unconstitutional under § 2255. *See, e.g.*, *United States v. Heflin*, 195 F. Supp. 3d 1134 (E.D. Cal. 2016).

C. **Sentencing Pursuant to 18 U.S.C. § 924(c)(1)(A)**

Section 924(c)(1)(A) of title 18 of the U.S. Code provides, *inter alia*, that any person who in relation to any "crime of violence" uses or carries a firearm shall in addition to the punishment provided for such "crime of violence," be sentenced to a term of imprisonment of not less than five years, to run consecutively with the punishment for the underlying "crime of violence." If a firearm is brandished in the course of committing the "crime of violence," the consecutive term of imprisonment shall be not less than seven years (84 months). 18 U.S.C. § 924(c)(1)(A)(ii). If a firearm is discharged, the consecutive term of imprisonment shall be not less than ten years. *Id.* § 924(c)(1)(C)(A)(iii).

For purposes of 18 U.S.C. § 924(c)(1)(A), a "crime of violence" is defined as an offense that is a felony and—

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3). "Courts generally refer to the '(a)' clause of section 924(c)(3) as the 'force clause' and to the '(b)' clause of section 924(c)(3) as the 'residual clause.'" *United States v. Bell*, 153 F. Supp. 3d 906, 910 (N.D. Cal. 2016).

IV. DISCUSSION

Petitioner challenges his sentence on the basis that Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) is no longer deemed a qualifying "crime of violence" for purposes of § 924(c)(1) in light of the Supreme Court's decision in *Johnson II.* (ECF No. 491 at 2.) Although the residual clause in § 924(c)(3)(B) is not identical to the residual clause in the ACCA struck down in *Johnson II*, Petitioner

argues that it is very similar and therefore unconstitutionally vague. In response, the Government argues that Petitioner is not entitled to relief under 28 U.S.C. § 2255 because even if the residual clause of § 924(c) is unconstitutional, his conviction for Hobbs Act robbery is categorically a crime of violence under the remaining "elements" or "force" clause of § 924(c)(3)(A). Therefore, his sentence under § 924(c)(1)(A) is not affected by the Supreme Court's decisions in *Johnson II* and *Welch*. (ECF No. 492; *see also* ECF No. 468 (addressing the same arguments in more detail with respect to Major's co-defendant, Rose).)[1]

A. **Categorical Approach**

To determine whether an offense fits the definition of a "crime of violence," courts employ the "categorical approach" set forth in *Taylor v. United States*, 495 U.S. 575 (1990). A court applying the categorical approach must "determine whether the [offense] is categorically a 'crime of violence' by comparing the elements of the [offense] with the generic federal definition." *United States v. Sahagun-Gallegos*, 782 F.3d 1094, 1098 (9th Cir. 2015) (internal citations omitted). Because the categorical approach is concerned only with what conduct the offense necessarily involves, the court "must presume that the [offense] rest[s] upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (internal quotation marks and alterations omitted). If the elements of the offense "criminalize a broader swath of conduct" than the conduct covered by the generic federal definition, the offense cannot qualify as a crime of violence, even if the particular facts underlying the defendant's own case might satisfy that definition. *United States v. Dominguez-Maroyoqui*, 748 F.3d 918, 920 (9th Cir. 2014) (internal quotation marks omitted).

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[1] In addition to this argument, the Government makes two additional arguments for why the Court should deny Major's § 2255 petition. First, the Government argues that the residual clause of § 924(c)(3)(B) is still valid after *Johnson II* and therefore Major's conviction still qualifies as a crime of violence under the residual clause. Second, the Government argues that Petitioner's motion is time-barred. Because the Court concludes that Hobbs Act robbery is still categorically a crime of violence under the force clause of § 924(c)(3)(A) and therefore that Petitioner's sentence is not affected by *Johnson II*, the Court need not address either of these issues.

B. **Hobbs Act Robbery Is Categorically a Crime of Violence Under the Force Clause**

Under the Hobbs Act:

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

18 U.S.C. § 1951(a). The Hobbs Act defines "robbery" as "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." *Id.* § 1951(b)(1).

The Ninth Circuit recently issued an unpublished opinion squarely on point, holding that Hobbs Act robbery is categorically a crime of violence under the force clause in § 924(c)(3)(A). *United States v. Howard*, 650 F. App'x 466, 468 (9th Cir. 2016), *as amended* (June 24, 2016). The court relied on a prior Ninth Circuit decision interpreting an analogous federal bank robbery statute.[2] *Id.* (citing *United States v. Selfa*, 918 F.2d 749, 751 (9th Cir. 1990)). In *Selfa*, the court reasoned that a crime committed by "intimidation," which is defined as an action that willfully puts a "reasonable person *in fear of bodily harm*," satisfies the requirement of a "threatened use of physical force." *Id.* Therefore, because Hobbs Act robbery requires that the defendant willfully place the victim in "fear of injury," it also requires the threat of physical force, and therefore qualifies as a crime of violence under the force clause. *Howard*, 650 F. App'x at 468.

Petitioner contends that Hobbs Act robbery categorically fails to qualify as a crime of violence for three reasons: (1) it can be accomplished by putting another in fear of injury to intangible property,

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[2] The federal bank robbery statute shares the same essential elements as Hobbs Act robbery. *See Howard*, 650 F. App'x at 468 (describing federal bank robbery and Hobbs Act robbery as "analogous"). Both statutes criminalize the taking of property by actual or threatened force or violence, or by intimidation/fear of injury. The federal bank robbery statute provides: "(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another 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; . . . shall be fined not more than $5,000 or imprisoned not more than twenty years, or both." 18 U.S.C. § 2113(a).

which does not require the threat of physical force to property necessary under § 924(c)(3)(B); (2) it can be committed by placing a person in fear of physical injury without the use, attempted use, or threatened use of violent physical force; and (3) it does not require proof that the defendant intentionally used, threatened to use, or attempted to use violent physical force.

1. Hobbs Act Robbery Cannot Be Accomplished Without Actual or Threatened Violent Physical Force

Petitioner argues that Hobbs Act robbery cannot qualify as a crime of violence under the force clause after the Supreme Court's decision in *Johnson v. United States*, 130 S. Ct. 1265 (2010) ("*Johnson I*"), which held that a crime of violence requires "violent physical force." (ECF No. 491 at 4-5.) First, according to Petitioner, the taking of property through threatening injury to another's intangible property does not satisfy the requirement of "violent physical force" outlined in *Johnson I*.[3] (*Id.* at 5-6.) Petitioner also argues more generally that the act of putting someone in "fear of injury" to his person also does not require the use, attempted use, or threatened use of violent physical force. (*Id.* at 8-9.)

First, although Petitioner argues that a conviction under the Hobbs Act robbery can be sustained on the basis that the victim feared intangible economic injury that does not encompass violent physical force, the case law is clear that Hobbs Act robbery cannot be accomplished without the threat of physical force. The cases cited by Petitioner refer to Hobbs Act extortion, not Hobbs Act robbery; Hobbs Act extortion is a separate crime with different elements. *United States v. McCallister*, No. 15-0171 (ABJ), 2016 WL3072237, at *8-9 (D.D.C. 2016) (distinguishing between cases dealing with Hobbs Act extortion and Hobbs Act robbery, and concluding that Hobbs Act robbery is categorically a crime of violence under the force clause of § 924(c)). Notably, Hobbs Act robbery by definition requires

[3] To the extent Petitioner argues that Hobbs Act robbery is not a categorical match for a crime of violence under § 924(c) because the former contemplates violent physical force against property, that argument fails under the plain language of both statutes. The Hobbs Act requires "actual or threatened force" or "violence" or "fear of injury" to "the person *or property of another*." *Id.* (emphasis added). The force clause of § 924(c)(3) also explicitly includes in the definition any offense that "has as an element the use, attempted use, or threatened use of physical force against the . . . *property of another*." *Id.* (emphasis added). Therefore, as far as the property element is concerned, the statutes are an exact match under the categorical approach; § 1951 is no broader than § 924(c).

non-consensual taking, whereas extortion takes place when property is taken or obtained with consent. Fear of economic loss from a non-consensual taking (as in robbery) implicitly threatens violence and physical force in a way that fear of economic loss from a consensual taking (as in extortion) does not. *See* 18 U.S.C. § 1951.

Several of the cases cited by Petitioner illustrate the difference. For example, Petitioner cites *United States v. Mitov*, noting that fear in the extortion context can encompass fear of economic loss, such as the threatened loss of success in a civil lawsuit. 460 F.3d 901, 907 (7th Cir. 2006). The Court cannot conceive of how fear of injury by loss in a civil lawsuit could ever form the basis for a Hobbs Act *robbery* conviction, as opposed to Hobbs Act *extortion* conviction. *See also United States v. Hancock*, 168 F. Supp. 3d 817, 823 (D. Md. 2016) (noting that "to the extent these cases deal with 'intangible property,' it appears to be in the context of the property being extorted, i.e., taken, not the property being subjected to threats or actual force or fear of injury"). The other cases cited by Petitioner where Hobbs Act extortion was committed by fear of economic injury similarly do not translate to the robbery context. *See, e.g.*, *United States v. Collins*, 78 F.3d 1021, 1030 (6th Cir. 1996) (fear that one might "lose the opportunity to compete for government contracts on a level playing field" was sufficient for extortion); *United States v. Cruz-Arroyo*, 461 F.3d 69, 74 (1st Cir. 2006) (noting that fear "encompasses fear of economic loss, including business opportunities"). Defendant has not offered a plausible hypothetical scenario in which Hobbs Act robbery could create a fear of injury to intangible property without the use or threat of violent physical force. *See United States v. Hill*, 832 F.3d 135, 141 n.8 (2d Cir. 2016) (rejecting the same argument because defendant "failed to show any realistic probability that a perpetrator could effect such a robbery in the manner he posits without employing or threatening physical force").

Lastly, Defendant argues more generally that Hobbs Act robbery does not constitute a crime of violence because it can be accomplished merely "by placing another in fear of injury to his person" without the use of force. Petitioner cites a Second Circuit case for the proposition that "human

experience suggests numerous examples of intentionally causing physical injury without the use of force, such as a doctor who deliberately withholds vital medicine from a sick patient." (ECF No. 486 at 8 (citing *Chrzanoski v. Ashcroft*, 327 F.3d 188, 196 (2d Cir. 2003)). Again, however, this hypothetical fails to explain how a *robbery* could ever be committed with fear of injury but without threat violent physical force. Supreme Court precedent requires Petitioner to present a "realistic probability, not a theoretical possibility" that a conviction under § 2113(a) & (d) could be sustained without demonstrating intentional threatened force. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). Petitioner has not done so here.

A taking by "actual or threatened force" or "violence" or "fear of injury" *necessarily* involves at least the *threat* to use violent force. Courts that have considered this question in the wake of *Johnson II* have also reached the conclusion that "fear of injury" is "limited to fear of injury from the use of violence," and therefore have determined that Hobbs Act robbery cannot be committed without violent physical force in accordance with the Supreme Court's holding in *Johnson I*. *See Hill*, 832 F.3d at 140-44; *United States v. Anglin*, 846 F.3d 954 (7th Cir. 2017) (concluding that Hobbs Act robbery is categorically a crime of violence under § 924(c)(3)(A) because it "necessarily requires using or threatening force"); *In re St. Fleur*, 824 F.3d 1337, 1340 (11th Cir. 2016) (same); *United States v. Farmer*, 73 F.3d 836, 842 (8th Cir. 1996) (Hobbs Act robbery has "as an element the use, attempted use, or threatened use of physical force against the person of another"); *United States v. Bailey*, No. CR14-328-CAS, 2016 WL 3381218, at *4 (C.D. Cal. 2016) ("'fear of injury to [one's] . . . property' under 18 U.S.C. § 1951(b)(1) includes only fear of injury from the use of force, and not fear instilled by, for example, threatened economic devaluation of stocks or physical defacing of a building"), *reconsideration denied sub nom. United States v. Dorsey*, No. 2:14-CR-0328(B)- CAS, 2016 WL 3607155 (C.D. Cal. June 30, 2016); *United States v Pena*, 161 F. Supp. 3d 268, 277 (S.D.N.Y. 2016) ("the text, history, and context of the Hobbs Act compel a reading of the phrase 'fear of injury' that is limited to fear of injury from the use of force").

2. Hobbs Act Robbery Requires General Intent

Petitioner further argues that Hobbs Act robbery does not require the use of *intentional* violent force, and therefore does not meet the *mens rea* requirement necessary to satisfy the force clause of § 924(c)(3). (ECF No. 491 at 11-13.) In *Leocal v. Ashcroft*, the Supreme Court held that a DUI was not a crime of violence because the offense could be committed through mere negligence. 543 U.S. 1, 9-10 (2004). The Ninth Circuit extended *Leocal's* holding, concluding that offenses that could be committed through mere recklessness also do not fit within the crime of violence umbrella. *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1132 (9th Cir. 2006). Therefore, any crime that can be committed without intentional or willful conduct (in other words, a crime that can be committed with mere negligence or recklessness) cannot constitute a crime of violence. *Id.*

Petitioner argues that because a conviction under the analogous federal bank robbery statute can be sustained where the defendant did not have a *specific intent* to use intimidation, *see, e.g.*, *United States v. Woodrup*, 86 F.3d 359 (4th Cir. 1996); *United States v. Foppe*, 993 F.2d 1444, 1451 (9th Cir. 1993); *United States v. Kelley*, 412 F.3d 1240, 1244 (11th Cir. 2005), Hobbs Act robbery likewise does not require intentional or willful conduct and therefore does not meet the *mens rea* requirement necessary to be a crime of violence. In support of the argument that analogous language in § 2113 carries a lesser intent requirement and therefore is not categorically a crime of violence, Petitioner cites several cases where courts rejected the notion that a defendant had to have a *specific* intent to intimidate to be convicted of federal armed bank robbery.

Addressing the same argument in *Pena*, the court reasoned:

> Even assuming that the Section 2113(a) case law applies directly to Section 1951's definition of Hobbs Act robbery, the cited case law does not demonstrate that either statute is not a crime of violence under *Leocal*. Section 2113(a) is not a strict liability crime. The Supreme Court has explained that Section 2113(a) 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 (here, the taking of property of another by force and violence or intimidation)." *Carter v. United States*, 530 U.S. 255, 268 (2000). In other words, a defendant charged with bank

> robbery pursuant to Section 2113(a) must intentionally perform objectively intimidating actions in the course of unlawfully taking the property of another. If a defendant robs a bank with violence, the prosecution need not prove a specific intent to cause pain or to induce compliance. Similarly, if a defendant robs a bank with intimidation, the prosecution need not prove a specific intent to cause fear. This does not mean that the bank robbery was accomplished through "negligent or merely accidental conduct." *Leocal*, 543 U.S. at 9. Accordingly, the Court rejects Pena's "somewhat implausible paradigm where a defendant unlawfully obtains another person's property against their will by unintentionally placing the victim in fear of injury." *Standberry*, 139 F. Supp. 3d at 739. Pena has failed to demonstrate a "realistic probability" that the accidental use of force would meet the elements of Hobbs Act robbery.

Pena, 161 F. Supp. 3d at 283-84. The Court agrees with the reasoning in *Pena*. Indeed, this Court has held that the federal armed bank robbery statute that Petitioner analogizes to here is categorically a crime of violence, and specifically that the intent requirements of § 2113 and § 924(c) are a categorical match. *See United States v. Salinas*, No. 1:08-CR-0338-LJO-SKO, 2017 WL 2671059 (E.D. Cal. June 21, 2017); *United States v. Torres*, No. 1:11-CR-0448-LJO-SKO, 2017 WL 431351, at *3-4 (E.D. Cal. Jan. 31, 2017).

Petitioner also cites *United States v. Abelis*, 146 F.3d 73, 83 (2d Cir. 1998) for the proposition that a defendant can be can be convicted under the Hobbs Act for creating "fear of injury" without intending to cause fear through explicit or implicit threats. Petitioner contends that in *Abelis* "the defendant was found to have satisfied the requisite element of causing fear simply on the basis of his 'reputation as a prominent figure in the underworld.'" (ECF No. 491 at 12 (citing *Abelis*, 146 F.3d at 83). Petitioner misreads *Abelis*, which explicitly held that the defendant could not have been convicted under the causing-fear element solely on the basis of his reputation as a prominent Russian gangster. *Id.* On the contrary, the court upheld the conviction after concluding that the relevant jury instruction adequately advised the jury that "a defendant must knowingly and willfully create or instill fear, or use or exploit existing fear" to be convicted of Hobbs Act extortion. *Id.* This instruction is consistent with the Court's conclusion that knowledge or willfulness is required to sustain a conviction under the Hobbs

Act. This intent requirement matches the requisite intent level for a crime of violence under the force clause.

Hobbs Act robbery is a crime of violence under the force clause of § 924(c)(3)(A). Therefore, Petitioner's sentence under § 924(c)(1)(A) was not imposed in violation of the Constitution or the laws of the United States. The Court **DENIES** Petitioner's § 2255 motion.

V. CERTIFICATE OF APPEALABILITY

An appeal may not be taken from the denial of a § 2255 motion unless a certificate of appealability is issued. 28 U.S.C. § 2253(c)(1). "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). To obtain a certificate of appealability, 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." *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (internal quotation marks and citations omitted).

Because Petitioner has failed to make a showing that he was denied a constitutional right, the Court **DECLINES** to issue a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2). *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

VI. CONCLUSION AND ORDERS

Accordingly, **IT IS HEREBY ORDERED** that Petitioner Marcus Major's Motion to Vacate, Set Aside, or Correct Sentence pursuant to § 2255 (ECF No. 491) is **DENIED**. The Court **DECLINES** to issue Petitioner a certificate of appealability for this motion.

IT IS SO ORDERED.

Dated: **August 18, 2017**

/s/ Lawrence J. O'Neill
UNITED STATES CHIEF DISTRICT JUDGE

United States District Court

Eastern District of California

UNITED STATES OF AMERICA
v.
JORDAN HUFF

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: **1:07CR00156-002**

Date of Original Judgment: **4/2/2010**
(Or Date of Last Amended Judgment)

Dale A. Blickenstaff
Defendant's Attorney

Reason for Amendment:
[✔] Correction of Sentence on Remand (Fed R. Crim. P. 35(a))
(Corrections to term of imprisonment and Imposition of Sentence Date)

THE DEFENDANT:
[ ] pleaded guilty to count(s): __.
[ ] pleaded nolo contendere to counts(s) ___ which was accepted by the court.
[✔] was found guilty on counts 1 through 62 of the Indictment after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
See next page.			

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[] The defendant has been found not guilty on counts(s) _ and is discharged as to such count(s).

[] Count(s) _ (is)(are) dismissed on the motion of the United States.

[] Indictment is to be dismissed by District Court on motion of the United States.

[✔] Appeal rights given. [] Appeal rights waived.

IT IS FURTHER 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 must notify the court and United States attorney of material changes in economic circumstances.

*5/15/2012
Date of Imposition of Judgment

/s/ LAWRENCE J. O'NEILL
Signature of Judicial Officer

LAWRENCE J. O'NEILL, United States District Judge
Name & Title of Judicial Officer

6/5/2012
Date

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 1951	CONSPIRACY TO INTERFERE WITH COMMERCE BY ROBBERY	12/24/2005 to 07/24/2006	1
18 USC 924(o)	CONSPIRACY TO USE, CARRY, BRANDISH, AND DISCHARGE FIREARMS DURING AND IN RELATION TO A CRIME OF VIOLENCE	12/24/2005 to 07/24/2006	2
18 USC 924(c)	DISCHARGING A FIREARM DURING AND IN RELATION TO A CRIME OF VIOLENCE	12/24/2005 to 07/24/2006	3 through 8
18 USC 924(c)	BRANDISHING A FIREARM DURING AND IN RELATION TO A CRIME OF VIOLENCE	12/24/2005 to 07/24/2006	9 through 32
18 USC 1951	INTERFERENCE WITH COMMERCE BY ROBBERY	12/24/2005 to 07/24/2006	33 through 62

IMPRISONMENT

*The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for terms of 121 months on each of Counts 1, 2, 33 through 62, to be served concurrently to each other, and a term of **84** months on Count **9**, to be served consecutively to the term imposed in Counts 1, 2, 33 through 62, and a term of 300 months on each of Counts **3 through 8** and **10 through 32** to be served consecutively to the terms imposed in Counts 1, 2, and 33 through 62 and Counts **3 through 8** and **10 through 32** to the extent necessary to produce a total term of **8,905** months. This term of imprisonment shall run consecutively to the sentence the defendant is serving under Fresno County Superior Court Docket No. F07900791.

[✔] The court makes the following recommendations to the Bureau of Prisons:
The Court recommends that the defendant be incarcerated in a California facility, but only insofar as this accords with security classification and space availability. Taft, California or Lompoc, California

[✔] 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 ___ 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 _ on ___.
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Officer.
If no such institution has been designated, to the United States Marshal for this district.

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 U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 36 months on Counts 1, 2, 33 through 62, all to be served concurrently, and 60 months on Counts 3 through 32 all to be served concurrently for a total term of 60 months.

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 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 four (4) drug tests per month.

[ ] 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, destructive device, or any other dangerous weapon. (Check, if applicable.)

[✔] The defendant shall submit to the collection of DNA as directed by the probation officer. (Check, if applicable.)

[ ] The defendant shall register and comply with the requirements in the federal and state sex offender registration agency in the jurisdiction of conviction, Eastern District of California, and in the state and in any jurisdiction where the defendant resides, is employed, or is a student. (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 obligation, 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 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 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 ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
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 by 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;
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. The defendant shall submit to the search of his person, property, home, and vehicle by a United States probation officer, or any other authorized person under the immediate and personal supervision of the probation officer, based upon reasonable suspicion, without a search warrant. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

2. The defendant shall not dispose of or otherwise dissipate any of his assets until the fine and/or restitution order by this Judgment is paid in full, unless the defendant obtains approval of the Court or the probation officer.

3. The defendant shall provide the probation officer with access to any requested financial information.

4. The defendant shall not open additional lines of credit without the approval of the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Sheet 6.

	Assessment	Fine	Restitution
Totals:	$ 6200	$	$ 33940.00

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

[ ] The defendant must 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 or Percentage**
TOTALS:	$ ___	$___	

[] 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 the 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:

[✔] If incarcerated, payment of the fine is due during imprisonment at the rate of not less than $25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program.

[ ] If incarcerated, payment of restitution is due during imprisonment at the rate of not less than $25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program.

** 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.

SCHEDULE OF PAYMENTS

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [✔] Lump sum payment of $ 40,140.00 due immediately, balance due

[ ] not later than __ , or
[ ] in accordance with [ ] C, [ ] D, [ ] E, or [ ] F below; or

B [ ] Payment to begin immediately (may be combined with [ ] C, [ ] D, or [ ] F below); or

C [ ] Payment in equal __ (e.g., weekly, monthly, quarterly) installments of $ __ over a period of __ (e.g., months or years), to commence __ (e.g., 30 or 60 days) after the date of this judgment; or

D [ ] Payment in equal __ (e.g., weekly, monthly, quarterly) installments of $ __ over a period of __ (e.g., months or years), to commence __ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E [ ] Payment during the term of supervised release will commence within ___ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F [ ] Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate:

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

United States District Court

Eastern District of California

UNITED STATES OF AMERICA
v.
MARCUS MAJOR

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: **1:07CR00156-001**

Date of Original Judgment: **4/2/2010**
(Or Date of Last Amended Judgment)

JOHN GARLAND
Defendant's Attorney

Reason for Amendment:
[✔] Correction of Sentence on Remand (Fed R. Crim. P. 35(a))
(Corrections to term of imprisonment and Imposition of Sentence Date))

THE DEFENDANT:
[ ] pleaded guilty to count(s): __.
[ ] pleaded nolo contendere to counts(s) ___ which was accepted by the court.
[✔] was found guilty on counts 1 THROUGH 62 of the Indictment after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
See next page.			

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[] The defendant has been found not guilty on counts(s) _ and is discharged as to such count(s).

[] Count(s) _ (is)(are) dismissed on the motion of the United States.

[] Indictment is to be dismissed by District Court on motion of the United States.

[✔] Appeal rights given. [] Appeal rights waived.

IT IS FURTHER 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 must notify the court and United States attorney of material changes in economic circumstances.

*5/15/2012
Date of Imposition of Judgment

/S/ LAWRENCE J. O'NEILL
Signature of Judicial Officer

LAWRENCE J. O'NEILL, United States District Judge
Name & Title of Judicial Officer

6/5/2012
Date

CASE NUMBER: 1:07CR00156-001
DEFENDANT: MARCUS MAJOR

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 1951	CONSPIRACY TO INTERFERE WITH COMMERCE BY ROBBERY	12/24/2005 TO 07/24/2006	1
18 USC 924(o)	CONSPIRACY TO USE, CARRY, BRANDISH, AND DISCHARGE FIREARMS DURING AND IN RELATION TO A CRIME OF VIOLENCE	12/24/2005 TO 07/24/2006	2
18 USC 924(c)	DISCHARGING A FIREARM DURING AND IN RELATION TO A CRIME OF VIOLENCE	12/24/2005 TO 07/24/2006	3 through 8
18 USC 924(c)	BRANDISHING A FIREARM DURING AND IN RELATION TO A CRIME OF VIOLENCE	12/24/2005 TO 07/24/2006	9 through 32
18 USC 1951	INTERFERENCE WITH COMMERCE BY ROBBERY	12/24/2005 TO 07/24/2006	33 through 62

CASE NUMBER: 1:07CR00156-001
DEFENDANT: MARCUS MAJOR

IMPRISONMENT

*The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for terms of 135 months on each of Counts 1, 2, and 33 through 62, to be served concurrently to each other, and a term of **84** months on Count **9**, to be served consecutively to the term imposed in Counts 1, 2, and 33 through 62, and a term of 300 months on each of Counts **3 through 8** and **10 through 32** , to be served consecutively to the terms imposed in Counts 1, 2, and 33 through 62 and Counts **3 through 8** and **10 through 32** to the extent necessary to produce a total term of **8,919** months imprisonment.

[The court makes the following recommendations to the Bureau of Prisons:

[✔ 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 _ n __
[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 _ on __
[as notified by the United States Marshal.
[as notified by the Probation or Pretrial Services Officer.
If no such institution has been designated, to the United States Marshal for this district.

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 U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 36 months on Counts 1, 2, and 33 through 62, and 60 months on Counts 3 through 32, all to be served concurrently for a total term of 60 months.

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 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 four (4) drug tests per month.

[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, destructive device, or any other dangerous weapon. (Check, if applicable.)

[✔] The defendant shall submit to the collection of DNA as directed by the probation officer. (Check, if applicable.)

[The defendant shall register and comply with the requirements in the federal and state sex offender registration agency in the jurisdiction of conviction, Eastern District of California, and in the state and in any jurisdiction where the defendant resides, is employed, or is a student. (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 obligation, 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 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 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 ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
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 by 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;
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. The defendant shall submit to the search of his person, property, home, and vehicle by a United States probation officer, or any other authorized person under the immediate and personal supervision of the probation officer, based upon reasonable suspicion, without a search warrant. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

2. The defendant shall not dispose of or otherwise dissipate any of his assets until the fine and/or restitution order by this Judgment is paid in full, unless the defendant obtains approval of the Court or the probation officer.

3. The defendant shall provide the probation officer with access to any requested financial information.

4. The defendant shall not open additional lines of credit without the approval of the probation officer.

5. As directed by the probation officer, the defendant shall participate in an outpatient correctional treatment program to obtain assistance for drug or alcohol abuse.

6. As directed by the probation officer, the defendant shall participate in a program of testing (i.e. breath, urine, sweat patch, etc.) to determine if he has reverted to the use of drugs or alcohol.

7. As directed by the probation officer, the defendant shall participate in a program of outpatient mental health treatment.

8. As directed by the probation officer, the defendant shall participate in a co-payment plan for treatment or testing and shall make payment directly to the vendor under contract with the United States Probation Office of up to $25 per month.

CASE NUMBER: 1:07CR00156-001
DEFENDANT: MARCUS MAJOR

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Sheet 6.

	Assessment	Fine	Restitution
Totals:	$ 6200.00	$	$ 33,940.00

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

[The defendant must 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 or Percentage**
TOTALS:	$ __	$__	

[] 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 the 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:

[x The interest requirement is waived for the [fine [x restitution

[The interest requirement for the [fine [restitution is modified as follows:

[If incarcerated, payment of the fine is due during imprisonment at the rate of not less than $25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program.

[x If incarcerated, payment of restitution is due during imprisonment at the rate of not less than $25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program.

** 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.

CASE NUMBER: 1:07CR00156-001
DEFENDANT: MARCUS MAJOR

SCHEDULE OF PAYMENTS

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [✔ Lump sum payment of $ 40,140.00 immediately, balance due

[not later than __ , or
[in accordance with [C, [D, [E, or [F below; or

B [Payment to begin immediately (may be combined with [C, [D, or [F below); or

C [Payment in equal __ (e.g., weekly, monthly, quarterly) installments of $ __ over a period of __ (e.g., months or years), to commence __ (e.g., 30 or 60 days) after the date of this judgment; or

D [Payment in equal __ (e.g., weekly, monthly, quarterly) installments of $ __ over a period of __ (e.g., months or years), to commence __ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E [Payment during the term of supervised release will commence within ___ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F [Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate:

[The defendant shall pay the cost of prosecution.

[The defendant shall pay the following court cost(s):

[The defendant shall forfeit the defendant's interest in the following property to the United States:

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. GARY LAMAR HENRY, AKA G-Thing, AKA G., *Defendant-Appellant*.	No. 19-50080 D.C. No. 2:16-cr-00862-RHW-1 OPINION

Appeal from the United States District Court
for the Central District of California
Robert H. Whaley, District Judge, Presiding

Argued and Submitted November 12, 2020
Pasadena, California

Filed January 6, 2021

Before: Morgan Christen and Paul J. Watford, Circuit Judges, and Lee H. Rosenthal,* Chief District Judge.

Opinion by Chief District Judge Rosenthal

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

SUMMARY**

Criminal Law

The panel affirmed convictions for one count of conspiracy to commit bank robbery under 18 U.S.C. § 371; five counts of armed bank robbery under 18 U.S.C. § 2113(a) and (d); two counts of bank robbery under § 2113(a); and three counts of brandishing a firearm during the bank robberies under 18 U.S.C. § 924(c)(1)(A)(ii).

The panel held that the defendant did not waive his Speedy Trial Act claim, that the district court made sufficient findings to support its three ends-of-justice continuances under 18 U.S.C. § 3161(h)(7), and that the delays were not unreasonable.

The panel held that the defendant did not waive his claims under *United States v. Davis*, 139 S. Ct. 2319 (2019), and *Honeycutt v. United States*, 137 S. Ct. 1626 (2017), that the district court misapplied *Pinkerton* liability to the § 924(c) counts, and that *Rosemond v. United States*, 572 U.S. (2014), requires revisiting *Pinkerton* liability.

Because the defendant's convictions are valid under either a *Pinkerton* or aiding-and-abetting theory, the panel did not need to decide which theory the jury used to convict. The panel held that *Honeycutt*, which addressed joint and several liability under 21 U.S.C. § 853, does not apply principles of conspiracy and thus does not require this court

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

to vacate the defendant's § 924(c)'s convictions. The panel also held that *Davis*, under which crimes of violence for § 924(c) are limited to those that have violence as an element under § 924(c)(3)(A), does not conflict with or undermine the cases upholding § 924(c) convictions based on *Pinkerton* liability.

The panel reviewed for plain error the defendant's argument that his § 924(c) convictions should be vacated because the jury instructions and verdict form for the predicate § 2113(d) convictions only required the jury to find a conspiracy to commit generic bank robbery and did not require the jury to find the knowing use of a gun. Noting that *Rosemond* did not alter Ninth Circuit precedents on accomplice liability, the panel declined the defendant's request to revisit the mens rea required for *Pinkerton* liability in light of the Supreme Court's holding in *Rosemond* that "knowledge"—not just reasonable foreseeability—is required for aiding-and-abetting liability for § 924(c) charges. The panel held that the district court's instructions on aiding-and-abetting liability were not plainly erroneous, and that the defendant's conviction on either a *Pinkerton* or an aiding-and-abetting theory was amply supported.

The panel held that the defendant preserved the claim that the indictment failed to allege the necessary elements of armed bank robbery under § 2113(d). Noting that the word "assault" used in the indictment denotes intentionality, the panel wrote that the indictment charged the required mens rea. The panel wrote that the failure to include the "use of a weapon" element in the verdict form for armed robbery was incorrect, but that there is not a basis for reversal, because the district court correctly instructed the jury on the use of a dangerous weapon.

COUNSEL

Benjamin L. Coleman (argued), Coleman & Balogh LLP, San Diego, California, for Defendant-Appellant.

David R. Friedman (argued), Assistant United States Attorney, Criminal Appeals Section; Nicole T. Hanna, United States Attorney; L. Ashley Aull, Assistant United States Attorney, Chief, Criminal Appeals Section; Los Angeles, California; for Plaintiff-Appellee.

OPINION

ROSENTHAL, Chief District Judge:

This appeal raises three issues: continuances that allegedly violated the Speedy Trial Act; §924(c) convictions after *United States v. Davis*, 139 S. Ct. 2319 (2019); and an allegedly defective indictment and verdict form. Gary Henry appeals his bank robbery, armed bank robbery, and derivative firearms convictions. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742, and we affirm.

I.

In 2017, Gary Henry was indicted with three codefendants for a 2016 series of bank robberies in Los Angeles and Bakersfield, California. Henry was charged with conspiracy under 18 U.S.C. § 371, bank robbery under 18 U.S.C. § 2113(a), armed bank robbery under 18 U.S.C. §§ 2113(a) and (d), and brandishing a firearm during the armed bank robberies under 18 U.S.C. § 924(c)(1)(A)(ii). The indictment alleged that Henry would remain outside the banks while some of his codefendants went inside. The

armed bank robbery counts alleged that "[i]n committing said offense, defendants HENRY and [his codefendants] assaulted and put in jeopardy the life of an employee of [the bank], and others, by using a dangerous weapon and device." Some of the armed bank robbery counts specified that a firearm was used.

Henry was arrested and detained and made his first appearance on May 1, 2017, starting the Speedy Trial Act clock. The district court set a trial date of June 27, 2017. On June 6, 2017, the government and two codefendants, Orlando Soto-Forcey and Edgar Santos, jointly sought a continuance to December 2017, citing the need for more time to prepare and their lawyers' conflicting trial settings through the summer and early fall. Henry opposed the continuance. At a June 12, 2017 status conference, the district court stated that it would grant the continuance over Henry's objection because Santos had just made his first appearance in what was "a complicated conspiracy and bank robbery case." The next day, the district court entered a written order finding that the continuance served the "ends of justice."

In October 2017, the government and all codefendants sought a second continuance, to March 2018. Henry objected but the stipulation provided by the government and Henry's codefendants included Henry's counsel's statement that he too needed the additional time to prepare to defend Henry at trial. The district court issued a written order granting the continuance and finding that: "(i) the ends of justice served by the continuance outweigh the best interest of the public and defendant in a speedy trial; (ii) failure to grant the continuance would be likely to make a continuation of the proceeding impossible, or result in a miscarriage of justice; (iii) failure to grant the continuance would deny

defense counsel the reasonable time necessary for effective preparation, taking into account the exercise of due diligence."

In January 2018, the government and all Henry's codefendants sought a third continuance, to May 2018. Although Henry again objected, the stipulation provided by the government and Henry's codefendants included Henry's counsel's statement that he had trials scheduled for January and March, and that he too needed the additional time "to confer with [Henry], conduct and complete an independent investigation of the case, conduct and complete additional legal research including for potential pre-trial motions, review the discovery and potential evidence in the case, and prepare for trial in the event that a pretrial resolution does not occur." The district court granted the continuance, finding that it served the ends of justice. The district court noted Henry's objection, but also pointed out that Henry's counsel had represented that a "failure to grant the continuance would deny him reasonable time necessary for effective preparation," and that he needed more time because he was "scheduled to begin multiple trials, including a trial set for the same date." (Docket No. 14 at 104–05).

Henry's three codefendants pleaded guilty in February, March, and April 2018. On April 30, 2018, Henry filed a motion to dismiss based on violations of the Speedy Trial Act, 18 U.S.C. § 3161. Henry argued that he had objected to each continuance and that "[t]he Government could have, and should have, brought defendant HENRY to trial within the time period mandated by § 3161(d)(2)." (Docket No. 26 at 319). The district court denied the motion, finding that Henry had not "state[d] or present[ed] any actual issue with the continuances or any contention that the continuances

were invalid [under the Speedy Trial Act]." The district court found the delay excludable under the Speedy Trial Act.

At Henry's six-day trial in May 2018, Santos testified that Henry was the leader of the robbery crew. A jailhouse informant also testified against him and stated that Henry provided guns for robberies.

The parties submitted joint proposed jury instructions and a joint proposed verdict form. The judge read the instructions to the jury before closing arguments. The instruction on armed bank robbery included the requirement that the government prove that "[t]he defendant or a co-conspirator . . . intentionally made a display of force that reasonably caused a victim to fear bodily harm by using a dangerous weapon or device," and that "[a] weapon or device is dangerous if it is something that creates a greater apprehension in the victim and increases the likelihood that police or bystanders would react using deadly force." The instructions explained that "the evidence would not support that the defendant possessed a firearm himself, brandished a firearm, carried it, or used it" during the robberies, but stated that Henry could be convicted under either an aiding-and-abetting or a *Pinkerton* theory of liability, setting out the elements for both.

The verdict form sections on the armed bank robbery counts did not refer to a firearm. The verdict form asked the jury whether it found Henry guilty of armed bank robbery, meaning one including "a display of force that reasonably caused the victim to fear bodily injury." The verdict form sections for the § 924(c) counts did ask the jury whether Henry "or a co-conspirator knowingly possess[ed] a firearm in furtherance of . . . [or] use[d] or carr[ied] a firearm during and in relation to the crime charged," and if the firearm "was brandished."

The jury sent two notes during deliberations. One note asked whether the jury had to find both *Pinkerton* and aiding-and-abetting liability to convict Henry on the substantive counts. The district court responded that the instructions for *Pinkerton* and aiding-and-abetting liability referred to "separate legal principles" and that the jury could base its verdict "on either instruction, alone, or both." The second jury note asked if a finding of guilt on the conspiracy charge would necessarily extend to the armed bank robbery and firearms counts. The court responded that it would not, and while the jury "must decide the other Counts separately," conspiracy was "a means by which [the] defendant may be found guilty of the offenses charged in the other Counts."

Henry was convicted of one count of conspiracy to commit bank robbery under 18 U.S.C. § 371; five counts of armed bank robbery under 18 U.S.C. § 2113(a) and (d); two counts of bank robbery under § 2113(a); and three counts of brandishing a firearm during the bank robberies under 18 U.S.C. § 924(c)(1)(A)(ii). The sentence totaled 387 months: 60 months for conspiracy; concurrent terms of 135 months for each of the bank robbery counts; and a consecutive term of 84 months for each of the three § 924(c) counts.

II.

On appeal, Henry argues that: (1) the indictment should be dismissed because the district court made inadequate findings and did not dismiss the indictment under the Speedy Trial Act, 18 U.S.C. § 3161(h); (2) the § 924(c) convictions should be vacated because the district court improperly applied *Pinkerton* liability to those counts; and (3) the armed bank robbery counts and the derivative § 924(c) counts should be vacated for structural error because the armed bank robbery counts failed to allege the required mens rea.

The court reviews the denial of the motion to dismiss on Speedy Trial Act grounds *de novo* and reviews findings of fact for clear error. *United States v. King*, 483 F.3d 969, 972 n.3 (9th Cir. 2007) (citations omitted). "A district court's finding of an ends of justice exception will be reversed only if there is clear error." *United States v. Murillo*, 288 F.3d 1126, 1133 (9th Cir. 2002) (quotation omitted). Henry's *Pinkerton* claim based on intervening law is reviewed *de novo* and his forfeited *Pinkerton* claims are reviewed for plain error. *See United States v. McAdory*, 935 F.3d 838, 842 (9th Cir. 2019) (claims based on intervening law); *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (forfeited claims). The sufficiency of the indictment is reviewed *de novo*. *United States v. Omer*, 395 F.3d 1087, 1088 (9th Cir. 2005).

III.

A.

The Speedy Trial Act requires a trial within 70 days of the defendant's initial appearance or indictment. *Bloate v. United States*, 559 U.S. 196, 203 (2010). Section 3161(h) sets out delays that are excluded from the 70-day calculation. *Id.* Delays not in one of the enumerated categories may be excluded to serve the "ends of justice." 18 U.S.C. § 3161(h)(7)(A).

The district court must make certain findings to exclude time from the Speedy Trial clock based on the ends of justice:

> No such period of delay . . . shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for

> finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

Id.

"Excludability under [§ 3161(h)(7)(A)] is not automatic; the period of delay must be 'reasonable.'" *United States v. Hall*, 181 F.3d 1057, 1062 (9th Cir. 1999) (citing *Henderson v. United States*, 476 U.S. 321, 326–27 (1986)). This court "gauge[s] the reasonableness of delay on a case by case basis, given the fact-bound nature of the inquiry." *United States v. Lewis*, 611 F.3d 1172, 1177 (9th Cir. 2010) (quoting *United States v. Messer*, 197 F.3d 330, 337 (9th Cir. 1999)). "[C]ourts look particularly to whether the delay was necessary to achieve its purpose and to whether there was any actual prejudice suffered by the appellant." *Hall*, 181 F.3d at 1062 (quotation omitted). Other relevant considerations include whether the length of the delay "was so egregious as to call into question its reasonableness" and "whether the defendant was free on bond during the delay." *Messer*, 197 F.3d at 338. Delay is prejudicial when its purpose is to secure the cooperation of codefendants. *Hall*, 181 F.3d at 1063.

"[W]hen a defendant expressly asserts his speedy trial right before the trial court, he preserves that right even if his actions contradict his lawyer's behavior." *United States v. Tanh Huu Lam*, 251 F.3d 852, 858 (9th Cir. 2001) (citing *Hall*, 181 F.3d 1057). The district court must consider a pretrial motion to dismiss under the Speedy Trial Act when it is "not frivolous, defense counsel is proceeding in good faith, and the facts supporting the motions are set forth." *United States v. Alvarez-Perez*, 629 F.3d 1053, 1061 (9th Cir. 2010).

Henry asserts Speedy Trial Act violations because (1) the district court failed to make adequate findings when it granted the continuances under § 3161(h)(7)(A); and (2) the delays were unreasonable. The government responds that Henry failed to preserve these errors because he did not raise specific violations of the Speedy Trial Act before the district court and because his own counsel twice made the same request for more time as the codefendants. Henry replies that he properly asserted violations of the Speedy Trial Act before trial, his counsel did not "join" in the continuances, and both Henry and his counsel objected to the first continuance, which alone violated the Speedy Trial Act. The government argues in the alternative that the district court did not err in granting any or all of the three continuances.

B.

Henry did not waive his Speedy Trial Act claim. Both Henry and his counsel objected to the first continuance, which totaled 161 days. The second and third continuances present a closer question, but Henry also preserved his objection to those continuances, despite his counsel's inconsistent request for more time to prepare. In *Lam*, the Ninth Circuit found that trial delays were attributable to the defendant when the attorney had "repeatedly stipulated in open court" to the need for more time, and when the defendant did not move to dismiss the indictment prior to trial. *Lam*, 251 F.3d at 857, 858 n.9. Although Henry's counsel stated that he needed the additional time provided by the second and third continuances, Henry maintained his objection, and his counsel did not join in the motions for the continuances or the stipulated facts. Henry moved to dismiss the indictment after the third continuance and before trial. While Henry's motion did not provide detailed facts, he reiterated his objections and asserted that "[t]he Government

could have, and should have, brought defendant Henry to trial within the time period mandated by § 3161(d)(2)." This court has found that, in keeping with Congress's intent "to place a fair share of responsibility for ensuring that cases are tried in a timely fashion on the district court and government counsel," district courts should consider Speedy Trial Act motions as long as the defendant raises "his belief that the STA ha[s] been violated," even when a motion is made orally or on the eve of trial. *Alvarez-Perez*, 629 F.3d at 1061 (alteration in original) (citation and quotation omitted). Henry's assertion of his rights and pretrial motion to dismiss for Speedy Trial Act violations preserved the issue for appeal.

C.

"[T]he district court must satisfy two requirements whenever it grants an ends of justice continuance: (1) the continuance must be specifically limited in time; and (2) it must be justified [on the record] with reference to the facts as of the time the delay is ordered." *United States v. Lloyd*, 125 F.3d 1263, 1268 (9th Cir. 1997) (quotation omitted) (alteration in original). Section 3161(h)(7)(B) lists the likelihood of a miscarriage of justice, the complexity of the case, and the lack of opportunity for counsel to complete adequate trial preparations using due diligence as factors a judge must consider in determining whether to grant an ends-of-justice continuance. 18 U.S.C. § 3161(h)(7)(B). Section 3161(h)(7), which provides for ends-of-justice continuances, "demands on-the-record findings and specifies in some detail certain factors that a judge must consider in making those findings." *Zedner v. United States*, 547 U.S. 489, 509 (2006). If the district court does not make the required findings, the delay resulting from the ends-of-

justice continuance is counted against the Speedy Trial clock. *Id.* at 508.

Henry argues that the district court did not make the required findings because it did not hold hearings before granting the second and third continuances and it failed to identify the reasons specifically applicable to Henry to delay the trial. Section 3161(h)(7) requires the district court to provide reasons "either orally or in writing." 18 U.S.C. § 3161(h)(7)A). The statute does not require the court to hold a live hearing on a motion for continuance. The issue is whether the district court made sufficient findings to support each of the three ends-of-justice continuances that it granted.

The district court held a hearing on the first continuance. The court stated, on the record, several reasons for moving the original trial date. It was the first appearance for one of Henry's codefendants, who would not have time to prepare for the trial, then set only a few weeks away. The court asked counsel for the newly appearing codefendant if he could be ready for the trial when set, and he stated that he could not. Henry did not move to sever his trial from that of his codefendants. The court addressed Henry's objection directly, granting the continuance over the objection because the trial was of "a complicated conspiracy and bank robbery case." The district court issued an order incorporating by reference the codefendants' and the government's written stipulation setting out the reasons justifying the continuance, finding that: "(i) the ends of justice served by the continuance outweigh the best interest of the public and defendant in a speedy trial; (ii) failure to grant the continuance would be likely to make a continuation of the proceeding impossible, or result in a miscarriage of justice; and (iii) failure to grant the continuance would deny defense

counsel the reasonable time necessary for effective preparation, taking into account the exercise of due diligence."

In October 2017, the government and Henry's codefendants sought a second continuance, to March 2018. Henry objected, but the joint written stipulation provided by the government and Henry's codefendants included Henry's counsel's statement that he needed the additional time to prepare to defend Henry at trial. The district court issued a written order granting the continuance. The order incorporated the joint stipulation by reference and stated that the facts in the stipulation supported a continuance. The court found that "(i) the ends of justice served by the continuance outweigh the best interest of the public and defendant in a speedy trial; (ii) failure to grant the continuance would be likely to make a continuation of the proceeding impossible, or result in a miscarriage of justice; (iii) failure to grant the continuance would deny defense counsel the reasonable time necessary for effective preparation, taking into account the exercise of due diligence."

On January 19, 2018, the government and Henry's codefendants sought a third continuance, supported by a joint written stipulation, to May 2018. While Henry objected, the joint stipulation included Henry's counsel's statement that he had trials scheduled for January and March, and that he too needed the additional time "to confer with [Henry], conduct and complete an independent investigation of the case, conduct and complete additional legal research including for potential pre-trial motions, review the discovery and potential evidence in the case, and prepare for trial in the event that a pretrial resolution does not occur." The district judge incorporated the stipulation by reference

and granted the continuance, finding that it served the ends of justice. The court noted Henry's objection, but also noted that Henry's counsel had stated that "failure to grant the continuance would deny him reasonable time necessary for effective preparation," and that Henry's counsel was "scheduled to begin multiple trials, including a trial set for the same date" as Henry's. (Docket No. 14 at 104–05).

In each instance, the district court made findings on the record based on detailed stipulated facts provided in writing by the government and Henry's codefendants. Although not joined by Henry, the stipulations included statements by Henry's counsel. The government and the codefendants stipulated that conflicting trial dates and the need for more time to prepare for trial required the additional delay. The district court made adequate fact findings to justify each of the three ends-of-justice continuances. *See United States v. McCarns*, 900 F.3d 1141, 1145 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 926 (2019) ("A district court's discussion of the statutory factors is adequate to support a continuance that serves the ends of justice when it is clear that the district court considered the factors in § 3161(h)([7])(B) and determined that the continuance was merited based on the applicable factor or factors" (alteration in original) (quotation omitted)); *United States v. Ramirez-Cortez*, 213 F.3d 1149, 1157 n.9 (9th Cir. 2000) ("District courts may fulfill their Speedy Trial Act responsibilities by adopting stipulated factual findings which establish valid bases for Speedy Trial Act continuances.").

D.

Henry argues that the delays were unreasonable. "[A]n exclusion from the Speedy Trial clock for one defendant applies to all codefendants. The attribution of delay to a codefendant, however, is limited by a reasonableness

requirement." *Messer*, 197 F.3d at 336 (internal citation omitted). Reasonableness is assessed on a case-by-case basis according to a totality-of-the-circumstances test. *See Messer*, 197 F.3d at 338 (in determining whether a delay was unreasonable, courts consider the length of the delay and whether the defendant was in pretrial detention).

The three continuances totaled 315 days, or approximately ten and a half months. This delay of close to a year is "presumptively prejudicial." *Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992) ("Depending on the nature of the charges, the lower courts have generally found postaccusation delay presumptively prejudicial at least as it approaches one year." (quotation omitted)). But the Ninth Circuit has upheld similar continuances in complex cases, even when, as here, the defendant is in pretrial detention. *See Lam*, 251 F.3d at 856 (a delay of fourteen and a half months was reasonable in a complex case). In addition to the fact of the detention itself, a jailhouse informant ultimately testified against Henry at trial, and his codefendant Santos pleaded guilty and also testified against him at trial.

In *Hall*, the court found a delay of 293 days between arraignment and trial was unreasonable because, among other issues, "an underlying aim [of the continuances] was to *eliminate* the need for a joint trial by achieving a plea agreement" with the cooperating co-defendant. 181 F.3d at 1063 (emphasis in original). But in *Lewis*, a subsequent case, this court found no error when there was no evidence that the primary purpose of the continuance was to secure the testimony of a codefendant, and when only one of multiple codefendants testified against the objecting defendant. *Lewis*, 611 F.3d at 1178.

This case is closer to *Lewis*. There is no evidence that the primary purpose of the continuances was to secure Santos's testimony or to secure the testimony of a jailhouse informant. Instead, each continuance was supported by detailed information about the complexity of the case and the need for additional time to prepare a defense, particularly because the defense lawyers had a number of conflicting trial commitments. It was reasonable to allow the codefendants and Henry's counsel additional time to adequately prepare to try this complex bank robbery and conspiracy case. Considering all the circumstances, "the addition of [the codefendant's] testimony, although prejudicial, did not make the delay unreasonable." *Id.*

The district court's denial of the motion to dismiss the indictment is affirmed.

IV.

Henry argues that *United States v. Davis*, 139 S. Ct. 2319 (2019) and *Honeycutt v. United States*, 137 S. Ct. 1626 (2017) prohibit using § 2113(d) convictions based on a *Pinkerton* theory of liability as predicates for § 924(c) convictions. He also argues that *Pinkerton* liability is inapplicable to the armed bank robbery and § 924(c) counts because the jury was instructed on conspiracy to commit generic bank robbery, not armed, bank robbery, and because the government failed to show the required mens rea. Finally, Henry argues that the court should reevaluate *Pinkerton* liability in light of the holding in *Rosemond v. United States*, 572 U.S. 65 (2014), that aiding-and-abetting liability for § 924(c) charges requires proof of the defendant's advance knowledge that a firearm would be present.

A.

Again, an initial issue is whether Henry preserved these claims for appeal. The government asserts waiver because Henry did not raise the claims before the district court and because he submitted and approved jury instructions that included *Pinkerton* liability. Henry asserts that because his claims are based on intervening Supreme Court authority, *de novo* review is appropriate.

Henry relies on an intervening Supreme Court case, *Davis*, to support his argument that *Pinkerton* liability is inapplicable to his § 924(c) convictions. "The Government suffers no prejudice because of [Henry]'s failure to raise the issue to the district court—at the time, under then-current law, the answer would have been obvious and in the Government's favor." *McAdory*, 935 F.3d at 842.

Henry has not waived his claim that the district court misapplied *Pinkerton* liability to the § 924(c) counts under *Honeycutt*, or that *Rosemond* requires revisiting *Pinkerton* liability. "[W]aiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a *known* right." *United States v. Depue*, 912 F.3d 1227, 1232 (9th Cir. 2019) (emphasis in original) (quotations omitted). The Ninth Circuit has held that a defendant forfeited, as opposed to waived, his right to appeal an erroneous jury instruction that his attorney submitted at trial when there was no evidence that the attorney knew the correct instruction. *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997); *see also Depue*, 912 F.3d at 1233 ("Under *Perez*, a failure to object or an uninformed representation to the court is not alone sufficient evidence of waiver. Rather, there must be evidence that the defendant was aware of the right he was relinquishing and relinquished

it anyway."). The record does not reflect that Henry's trial counsel was aware of, or intentionally relinquished, the claim that *Pinkerton* liability did not apply to the § 924(c) counts because the object of the conspiracy was generic rather than armed bank robbery. Because Henry forfeited, rather than waived, these issues, we review the district court's decision for plain error. The court reviews Henry's argument that *Pinkerton* liability is inapplicable to his § 924(c) convictions *de novo*.

B.

Henry argues, based on the two notes from the jury during deliberations, that his convictions were based on a *Pinkerton* rather than on an aiding-and-abetting theory of liability. We need not decide which liability theory the jury used to convict, because Henry's convictions are valid under either.

Pinkerton extends liability to a conspirator for a coconspirator's substantive offenses "when they are reasonably foreseeable and committed in furtherance of the conspiracy." *United States v. Long*, 301 F.3d 1095, 1103 (9th Cir. 2002) (citing *Pinkerton v. United States*, 328 U.S. 640, 645–48 (1946)). We have consistently held that *Pinkerton* liability applies to § 924(c) counts. *See, e.g.*, *United States v. Luong*, 627 F.3d 1306, 1308 (9th Cir. 2010); *United States v. Allen*, 425 F.3d 1231, 1234 (9th Cir. 2005); *United States v. Alvarez-Valenzuela*, 231 F.3d 1198, 1203 (9th Cir. 2000); *United States v. Winslow*, 962 F.2d 845, 853 n.2 (9th Cir. 1992). Henry argues that two recent Supreme Court cases require a different result.

In *Honeycutt*, the Supreme Court held that joint and several liability under 21 U.S.C. § 853, which requires forfeiture by defendants convicted of certain drug crimes,

did not extend to defendants who never obtained tainted property as a result of the crime. 137 S. Ct. at 1632. The Supreme Court rejected the government's contention that the text of § 853 was based on background principles of conspiracy liability, and instead based its analysis on the *in rem* nature of forfeiture. *Id.* at 1634–35. The Court explained that "§ 853 maintains traditional *in rem* forfeiture's focus on tainted property unless one of the preconditions [for forfeiting substituted property] exists." *Id.* at 1635. The forfeiture provision did not apply when the individual in question did not reap the profits of the crime. *Id.* *Honeycutt* overturned a forfeiture judgment against a coconspirator who did not receive the proceeds from selling materials used to produce methamphetamine. *Id.* at 1630. The Court did not review or vacate the defendant's underlying conviction for drug conspiracy. *See id.* at 1635. *Honeycutt* does not apply principles of conspiracy liability and does not require this court to vacate Henry's § 924(c) convictions.

Relying on *Davis*, Henry also argues that his § 924(c) convictions are invalid because to convict him under § 2113(d), the jury likely found him guilty under a *Pinkerton* theory, which did not require the jury to find that Henry himself intentionally used, attempted to use, or threatened to use physical force. *Davis* invalidated the § 924(c) residual clause, § 924(c)(3)(B), as unconstitutionally vague, because that provision extended § 924(c)'s long prison sentences to certain offenses treated as "crimes of violence," while "provid[ing] no reliable way to determine which offenses qualify as crimes of violence." *Davis*, 139 S. Ct. at 2324. *Davis* vacated a conviction based on a conspiracy to commit Hobbs Act robbery only under the residual clause. *Id.* at 2336.

Under *Davis*, predicate crimes of violence for § 924(c) charges are limited to those that have violence as an element under § 924(c)(3)(A). Henry's argument fails because armed bank robbery, his predicate offense, does have violence as an element. *See Buford v. United States*, 532 U.S. 59, 61 (2001) (armed bank robbery is a crime of violence in federal court); *United States v. Watson*, 881 F.3d 782, 784 (9th Cir. 2018) (per curiam) (concluding that armed bank robbery is a crime of violence under the elements clause). Defendants found guilty of armed bank robbery under either a *Pinkerton* or aiding-and-abetting theory are treated as if they committed the offense as principals. *See* 18 U.S.C. § 2(a) (whoever "aids, abets, counsels, commands, induces or procures [the] commission" of an offense against the United States is "punishable as a principal"); *Ortiz-Magana v. Mukasey*, 542 F.3d 653, 659 (9th Cir. 2008) ("there is no material distinction between an aider and abettor and principals in any jurisdiction of the United States including . . . federal courts"); *Allen*, 425 F.3d at 1234 ("The *Pinkerton* rule holds a conspirator criminally liable for the substantive offenses committed by a co-conspirator when they are reasonably foreseeable and committed in furtherance of the conspiracy." (quotation omitted)).

This court has repeatedly upheld § 924(c) convictions based on accomplice liability. *See, e.g.*, *United States v. Gadson*, 763 F.3d 1189, 1214–18 (9th Cir. 2014); *Allen*, 425 F.3d at 1234; *United States v. Johnson*, 886 F.2d 1120, 1123 (9th Cir. 1989). We have continued to affirm convictions that may have been based on a *Pinkerton* theory in unpublished decisions after *Davis*. *See*, *e.g.*, *United States v. Sleugh*, 827 F. App'x 645, 648–49 (9th Cir. 2020); *United States v. Jordan*, 821 F. App'x 792, 793 (9th Cir. 2020); *United States v. Khamnivong*, 779 F. App'x 482, 483 (9th

Cir. 2019). Since *Davis*, the First, Third, Sixth, Tenth, and Eleventh Circuits have all held that aiding and abetting Hobbs Act robbery—the conviction that was vacated in *Davis* when based on the residual clause— is a crime of violence under § 924(c)(3)(A). *See United States v. Richardson*, 948 F.3d 733, 742 (6th Cir. 2020) (collecting cases). *Davis* does not conflict with or undermine the cases upholding § 924(c) convictions based on *Pinkerton* liability.

C.

Henry also argues that his § 924(c) convictions should be vacated because the jury instructions and verdict form for the predicate § 2113(d) convictions only required the jury to find a conspiracy to commit generic bank robbery. Henry argues that because the jury did not have to find the knowing use of a gun for the § 2113(d) convictions, the § 924(c) convictions cannot stand.

Henry's argument is unpersuasive. We have sustained convictions based on *Pinkerton* liability when the government has proven, beyond a reasonable doubt, that: "(1) the substantive offense was committed in furtherance of the conspiracy; (2) the offense fell within the scope of the unlawful project; and (3) the offense could reasonably have been foreseen as a necessary or natural consequence of the unlawful agreement." *United States v. Fonseca-Caro*, 114 F.3d 906, 908 (9th Cir. 1997) (quoting *United States v. Douglass*, 780 F.2d 1472, 1475–76 (9th Cir. 1986)).

Henry urges the court to revisit the mens rea required for *Pinkerton* liability in light of the Supreme Court's holding in *Rosemond* that "knowledge"—not just reasonable foreseeability— is required for aiding-and-abetting liability for § 924(c) charges. *See* 572 U.S. at 67. *Rosemond* did not alter Ninth Circuit precedents on accomplice liability.

United States v. Nosal, 844 F.3d 1024, 1040 (9th Cir. 2016) ("The instructions [in *Rosemond*] are perfectly consonant with our line of cases" on aiding-and-abetting liability). *Rosemond* raises some question about whether advance knowledge should be required for *Pinkerton* liability as well as for aiding-and-abetting liability, but it does not hold that. The facts of this case, and our plain error review, provide a poor vehicle to take that step.

The district court instructions on aiding-and-abetting liability were not plainly erroneous.[1] At trial, Henry's friend, part of the bank robbery crew, testified that Henry and another codefendant got in an argument in April 2016 because Henry knew that this codefendant had brandished a gun during a recent robbery. The friend testified that, after this argument, Henry continued to send this codefendant to rob banks, and that this codefendant insisted on using a gun to commit the robberies. The jailhouse informant testified that Henry provided guns for the robberies and decided that using guns in the robberies was "a good idea." The record shows that Henry "chose[], with full knowledge, to participate in the illegal scheme." *Rosemond*, 572 U.S. at 79. Use of a firearm was within the scope of the coconspirators' unlawful scheme, and Henry had advance knowledge that his codefendant would use the gun. Henry's

[1] The judge instructed the jury that, for aiding and abetting liability, "[i]t is not enough that the defendant merely associated with the person committing the crime or unknowingly or unintentionally did things that were helpful to that person or was present at the scene of the crime. The evidence must show beyond a reasonable doubt that the defendant acted with the knowledge and intention of helping that person commit the crime charged." (Docket No. 14 at 51).

conviction on either a *Pinkerton* or an aiding-and-abetting theory was amply supported.

Henry's convictions made him liable for armed bank robbery as a principal. Armed bank robbery is a crime-of-violence predicate for § 924(c)(3)(A). Henry's § 924(c) convictions are valid.

V.

Henry argues that the armed bank robbery counts failed to allege mens rea, requiring reversal of those convictions and of the derivative § 924(c) convictions. Henry also argues that the verdict form was flawed because the definition of "armed bank robbery" did not include the use of a weapon. Instead, the verdict form defined armed bank robbery as robbery with "a display of force that reasonably caused the victim to fear bodily injury."

To support the armed bank robbery counts, the indictment alleged that "[i]n committing said offense, defendants HENRY and [his codefendants] assaulted and put in jeopardy the life of an employee of [the bank], and others, by using a dangerous weapon and device." Some of the armed bank robbery counts specified that a firearm was used. Henry's trial counsel moved to exclude an aiding-and-abetting theory from the jury instructions and verdict form on those counts, arguing that they did not allege that Henry "had the specific intent to facilitate the assault and plac[e] in jeopardy the life of an employee." The district court rejected the argument, finding that aiding and abetting was a theory of liability, not a substantive offense, and that the government had sufficiently alleged the elements of armed bank robbery. Henry reasserts the argument here.

A.

The government contends that Henry has waived this argument on appeal because he moved to dismiss the indictment for failing to allege the specific intent necessary for aiding-and-abetting liability for the bank robbery counts. The pretrial motion did not raise the absence of allegations of specific intent for bank robbery itself.

"[I]t is claims that are deemed waived or forfeited, not arguments." *United States v. Walton*, 881 F.3d 768, 771 (9th Cir. 2018) (quoting *United States v. Pallares–Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004)). In the district court, Henry argued that the indictment did not support aiding-and-abetting liability because the bank robbery counts did not allege that Henry "had the specific intent to facilitate the assault and plac[e] in jeopardy the life of an employee." Henry preserved the claim that the indictment failed to allege the necessary elements for appeal even though he now advances a variation on his original argument. We review Henry's argument *de novo*. *United States v. Studhorse*, 883 F.3d 1198, 1203 n.3 (9th Cir.), *cert. denied*, 139 S. Ct. 127 (2018) (a variation of an argument based on a claim raised before the trial court is reviewed *de novo*).

B.

The armed bank robbery statute, 18 U.S.C. § 2113(d), requires more than "mere possession" of a weapon. *United States v. Odom*, 329 F.3d 1032, 1035 (9th Cir. 2003). While "not necessarily determining that § 2113(d) contains a *mens rea* requirement," this court has held that the statute requires that "the robber *knowingly* made one or more victims at the scene of the robbery aware that he had a gun, real or not." *United States v. McDuffy*, 890 F.3d 796, 799 (9th Cir. 2018), *cert. denied*, 139 S. Ct.

845 (2019) (emphasis in original) (quoting *Odom*, 329 F.3d at 1035). "Implied, necessary elements, not present in the statutory language, must be included in an indictment." *United States v. Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999) (alteration omitted) (quoting *United States v. Jackson*, 72 F.3d 1370, 1380 (9th Cir. 1995)).

The issue is whether the armed robbery counts allege the required mens rea for armed bank robbery. Henry relies on *Du Bo* to argue that these counts fail to allege knowing or intentional use of a weapon. In *Du Bo*, the court found that an indictment alleging that the defendant "unlawfully" affected commerce through the "wrongful" use of force was fatally flawed because it did not allege the "knowingly or willingly" mens rea required for a Hobbs Act conviction. 186 F.3d at 1179.

A defendant acts knowingly when "the defendant is aware of the act and does not act through ignorance, mistake, or accident." Manual of Model Criminal Jury Instructions (Ninth Circuit Jury Instructions Comm. 2010) (brackets and alternate wording omitted). Unlike the word "unlawfully" in the *Du Bo* indictment, the word "assault" used in Henry's indictment denotes intentionality. *See United States v. Acosta-Sierra*, 690 F.3d 1111, 1117 (9th Cir. 2012) (the two types of common-law assault are "a willful attempt to inflict injury upon the person of another" or a threat to inflict injury causing a reasonable apprehension of immediate bodily harm, sometimes called "intent-to-frighten"). The indictment charges the required mens rea.

C.

Before trial, Henry's counsel and the government submitted joint proposed jury instructions. At the final pretrial conference, the district court noted that "[t]he jury

instructions seem to be agreed. Unless someone raises an issue about them, I will give them as – as presented." (Docket No. 26 at 7). The parties then made minor changes to the verdict form, but the relevant language remained the same.

Henry now challenges the armed bank robbery counts in the verdict form, which asked the jury to decide if "the robbery [was] an armed robbery, meaning, defendant aided and abetted or a co-conspirator intentionally made a display of force that reasonably caused the victim to fear bodily injury." (Docket No. 14 at 3, 5–7, 9). Henry argues that these questions on the verdict form, which do not include the "use of a weapon" element for the armed bank robbery counts, are plainly erroneous, requiring reversal of the convictions.

The district judge correctly instructed the jury on the use of a dangerous weapon for counts 3, 5, 6, 7, and 9. Henry's argument does not present a basis for reversal.

The failure to include the "use of a weapon" element in a verdict form for armed robbery was incorrect. But the jury instructions, which Henry agreed to, were correct. The district judge's jury instruction stated that armed robbery required the government to prove beyond a reasonable doubt that "[t]he defendant or a co-conspirator . . . intentionally made a display of force that reasonably caused a victim to fear bodily harm by using a dangerous weapon or device." (Docket No. 14 at 47). The judge instructed the jury that "[a] weapon or device is dangerous if it is something that creates a greater apprehension in the victim and increases the likelihood that police or bystanders would react using deadly force." (Docket No. 14 at 47–48).

VI.

Henry's convictions are **AFFIRMED**.