

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ROYRICK MILLER – PETITIONER
VS.
UNITED STATES OF AMERICA – RESPONDENT

On Petition for Writ of Certiorari to the
United States Court of Appeals for
the Ninth Circuit, No. 17-15022

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

SEP 29 2017

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROYRICK DWAYNE MILLER,

Defendant-Appellant.

No. 17-15022

D.C. Nos. 4:16-cv-02639-CW

4:10-cr-00681-CW

Northern District of California,
Oakland

ORDER

Before: SILVERMAN, TALLMAN, and N.R. SMITH, Circuit Judges.

Appellee's motion to dismiss this appeal in light of *Beckles v. United States*, 137 S. Ct. 886 (2017) (Docket Entry No. 6) is granted. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) (lower courts must follow the case that directly controls; only the Supreme Court can overrule its own decisions).

DISMISSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

No. CR 10-681-2 CW

Plaintiff,

v.

ORDER DENYING
§ 2255 MOTION

ROYRICK DWAYNE MILLER,

Defendant.

_____ /

Movant Royrick Dwayne Miller, represented by counsel, moves under 28 U.S.C. § 2255 to vacate, set aside or correct his sentence. Respondent has filed an opposition to the motion and Movant has filed a reply. Having considered all of the papers filed by the parties and the record in this case, the Court DENIES the motion.

BACKGROUND

A. Procedural Background

On September 14, 2011, Movant plead guilty, pursuant to a Federal Rule of Criminal Procedure 11(c)(1)(C) plea agreement, to one count of conspiracy to interfere with commerce by robbery, in violation of 18 U.S.C. § 1951(a), and one count of armed bank robbery, in violation of 18 U.S.C. §§ 2113(a) and (d). The plea agreement contained a collateral attack waiver. Docket No. 77 at ¶ 5. In the plea agreement, the parties agreed that Movant qualified as a career offender because armed bank robbery is a crime of violence and he had at least two qualifying prior crimes of violence or controlled substance offenses. Applying the Career

1 Offender Guideline, § 4B1.1(B), and a three-level reduction for
2 acceptance of responsibility, the parties agreed that Movant's
3 total offense level was 31 and his criminal history category was
4 VI, resulting in an advisory Guidelines range of 188 to 235 months
5 of incarceration. The plea agreement provided that, without the
6 application of the Career Offender Guideline, Movant's total
7 offense level would be 27, which, with a criminal history category
8 of VI, would have resulted in an advisory Guidelines range of 130
9 to 162 months of incarceration.

10 Consistent with the binding plea agreement, the Court
11 sentenced Movant to 212 months in prison. Movant did not file a
12 direct appeal but, on May 17, 2016, after the Supreme Court issued
13 its decision in Johnson v. United States, 135 S. Ct. 2551 (2015),
14 he filed the instant § 2255 motion.

15 B. Johnson v. United States

16 In Johnson, the Supreme Court addressed a challenge to the
17 residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C.
18 § 924(e), which provides that a defendant with three prior
19 "violent felony" convictions faces a fifteen-year mandatory-
20 minimum sentence if convicted of violating 18 U.S.C. § 922(g). 18
21 U.S.C. § 924(e). The residual clause of the ACCA's definition of
22 "violent felony," which encompasses any crime that "involves
23 conduct that presents a serious potential risk of physical injury
24 to another," is identical to the residual clause of the
25 Guidelines' definition "crime of violence." The Ninth Circuit
26 makes "no distinction between the terms 'violent felony' as
27 defined in the ACCA and 'crime of violence' as defined in
28 § 4B1.2(a)(2) of the Sentencing Guidelines for purposes of

1 interpreting the residual clauses.” United States v. Spencer, 724
2 F.3d 1133, 1138 (9th Cir. 2013) (quoting United States v. Crews,
3 621 F.3d 849, 852 n.4 (9th Cir. 2010) (internal alteration marks
4 omitted).

5 The Johnson Court held that the residual clause is so vague
6 that it “both denies fair notice to defendants and invites
7 arbitrary enforcement by judges.” 135 S. Ct. at 2557.
8 Accordingly, the Johnson Court held that an increase to a
9 defendant’s sentence under the clause “denies due process of law.”
10 In Welch v. United States, 136 S. Ct. 1357 (2016), the Supreme
11 Court held that Johnson is retroactive as applied to the ACCA.
12 However, neither the Supreme Court nor the Ninth Circuit has
13 addressed whether Johnson is retroactive as to the identical
14 language in the Sentencing Guidelines.

15 LEGAL STANDARD

16 A prisoner in custody under sentence of a federal court,
17 making a collateral attack against the validity of his or her
18 conviction or sentence, must do so by way of a motion to vacate,
19 set aside or correct the sentence pursuant to 28 U.S.C. § 2255 in
20 the court which imposed the sentence. Tripati v. Henman, 843 F.2d
21 1160, 1162 (9th Cir. 1988). Section 2255 was intended to
22 alleviate the burden of habeas corpus petitions filed by federal
23 prisoners in the district of confinement by providing an equally
24 broad remedy in the more convenient jurisdiction of the sentencing
25 court. United States v. Addonizio, 442 U.S. 178, 185 (1979).
26 Under 28 U.S.C. § 2255, a federal sentencing court may grant
27 relief if it concludes that a prisoner in custody was sentenced in
28 violation of the Constitution or laws of the United States.

DISCUSSION

As noted above, Movant's classification as a career offender was based on a finding that his conviction for armed bank robbery was a crime of violence as defined by the Career Offender Guideline. Because the Court agrees with the government's argument that this offense qualifies as a crime of violence as defined by the Guidelines, without relying on the residual clause, it need not reach the government's arguments regarding waiver, procedural default and retroactivity.

At the time of Movant's sentencing, § 4B1.2 defined a crime of violence as

any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that--

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

USSG § 4B1.2(a). The underlined portion of the definition is referred to as the residual clause.

Movant's armed bank robbery conviction was for violation of 18 U.S.C. § 2113(a) and (d). Section 2113(a) sets out the elements for bank robbery and § 2113(d) provides for a higher statutory maximum sentence if a defendant "assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device," when he or she violates § 2113(a). As the government points out, the Ninth Circuit has held that a conviction under § 2113(a) qualifies as a crime of violence because the section

1 "requires, at the very least, either 'force and violence' or
2 'intimidation.'" United States v. Selfa, 918 F.2d 749, 751 (9th
3 Cir. 1990). The Ninth Circuit in turn has defined "intimidation,"
4 in this context, "to mean willfully to take, or attempt to take,
5 in such a way that would put an ordinary, reasonable person in
6 fear of bodily harm." Id. (internal quotation marks omitted).
7 This definition of intimidation "is sufficient to meet the section
8 4B1.2(1) requirement of a 'threatened use of physical force.'" Id.

10 Movant argues that Selfa is no longer controlling because
11 intervening Supreme Court and Ninth Circuit en banc decisions
12 "undercut the theory or reasoning underlying the prior circuit
13 precedent in such a way that the cases are clearly
14 irreconcilable." Miller v. Gammie, 335 F.3d 889, 899-900 (9th
15 Cir. 2003) (en banc). First, Movant notes that, in C. Johnson v.
16 United States (hereinafter C. Johnson), the Supreme Court held
17 that the force clause of the ACCA requires the use, attempted use,
18 or threatened use of force be of "violent force--that is, force
19 capable of causing physical pain or injury to another person."
20 559 U.S. 133, 140 (2010). Movant argues that, because an
21 individual can be convicted under § 2113(a) for robbing a bank "by
22 intimidation," the statute does not require the level of force
23 described in C. Johnson. Next, Movant notes that the Supreme
24 Court's decision in Leocal v. Ashcroft, 543 U.S. 1 (2004), and the
25 Ninth Circuit's en banc decision in Fernandez-Ruiz v. Gonzales,
26 466 F.3d 1121 (9th Cir. 2006) (en banc), hold that the force
27 clause requires the intentional use or threatened use of physical
28

1 force. Movant argues that § 2113(a) lacks the intentional mens
2 rea element required by these cases.

3 While Movant's arguments may be persuasive as to unarmed bank
4 robbery under § 2113(a), the fact that he was convicted of armed
5 bank robbery in violation of §§ 2113(a) and (d) changes the
6 analysis. Movant first argues that the Ninth Circuit's definition
7 of intimidation as putting a person in fear of bodily harm does
8 not satisfy C. Johnson because a defendant could intimidate a bank
9 teller by threatening to poison him or her, which would not
10 involve violent force. However, Movant was convicted of
11 § 2213(d), which requires that a defendant assault or put
12 another's life in jeopardy by the use of a dangerous weapon.
13 Movant also argues that "there is no requirement that the
14 dangerous weapon or device be employed to facilitate the
15 intimidation element." Docket No. 94 at 11. However, Movant
16 concedes that armed bank robbery requires at least "the display of
17 or verbal reference to" the weapon involved. Id. at 12. This
18 demonstrates that a weapon must, in fact, be used to intimidate.
19 Any threat involving a weapon is by definition a threat of violent
20 force. Moreover, such display or reference to a weapon satisfies
21 the requirement that the defendant intentionally threaten to use
22 violent force as required by Leocal. The fact that, under Ninth
23 Circuit law, the weapon at issue need not actually be dangerous
24 does not change this analysis. A robber's display or reference
25 even to a toy gun or road flare is done with the intent to
26 intimidate a bank teller by fear of bodily harm.

27 Moreover, the Court notes that, following Johnson, the Ninth
28 Circuit has, in unpublished decisions, continued to rely on

1 Selfa's holding that even unarmed bank robbery is a crime of
2 violence. See, e.g., United States v. Steppes, 651 Fed. App'x
3 697, 698 (9th Cir. 2016) (citing Selfa and holding that the
4 appellant failed to cite any intervening cases that were "clearly
5 irreconcilable" with holding that § 2113(a) is a crime of
6 violence); United States v. Howard, 2016 U.S. App. LEXIS 11643
7 (9th Cir.) (relying on Selfa to hold that the analogous offense of
8 Hobbs Act robbery is a crime of violence).

9 Accordingly, the Court finds that the enhancement of Movant's
10 sentence based on his armed bank robbery conviction is proper,
11 even after Johnson.

12 If the Court denies Movant's § 2255 motion as it does here,
13 Movant requests a certificate of appealability (COA) pursuant to
14 28 U.S.C. § 2253(c). A COA should be granted "if the applicant
15 has made a substantial showing of the denial of a constitutional
16 right." 28 U.S.C. § 2253(c)(2). Because "reasonable jurists
17 would find the district court's assessment of the constitutional
18 claims debatable or wrong," Slack v. McDaniel, 529 U.S. 472, 484
19 (2000), the Court grants a COA as to whether armed bank robbery
20 continues to be a crime of violence.

21 CONCLUSION

22 For the foregoing reasons, the Court DENIES Movant's § 2255
23 motion and GRANTS a certificate of appealability. Docket No. 62.

24 IT IS SO ORDERED.

25
26 Dated: January 4, 2017



27 CLAUDIA WILKEN
28 United States District Judge