

APPENDIX

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAN 10 2018

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL JAY,

Defendant-Appellant.

No. 16-16138

D.C. Nos.

1:16-cv-00107-LEK-KJM

1:10-cr-00174-LEK-01

District of Hawaii,
Honolulu

ORDER

Before: SCHROEDER, D.W. NELSON, and McKEOWN, Circuit Judges.

Judge McKeown has voted to deny the petition for rehearing en banc, and
Judges Schroeder and Nelson have so recommended.

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.

Defendant-Appellant's petition for rehearing en banc is **DENIED**.

705 Fed.Appx. 587 (Mem)
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Michael JAY, Defendant-Appellant.

No. 16-16138

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Argued and Submitted October
10, 2017 Honolulu, Hawaii

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Filed November 30, 2017

Appeal from the United States District Court for the
District of Hawaii, Leslie E. Kobayashi, District Judge,
Presiding, D.C. Nos. 1:16-cv-00107-LEK-KJM 1:10-
cr-00174-LEK-01

Attorneys and Law Firms

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HI, for Defendant-Appellant

Before: SCHROEDER, D.W. NELSON, and
McKEOWN, Circuit Judges.

MEMORANDUM *

Defendant-Appellant Michael Jay appeals the district
court's denial of his motion under 28 U.S.C. § 2255
challenging his sentence following his guilty plea to Hobbs
Act Robbery, in violation of 18 U.S.C. §§ 1951 and 2; using
a firearm during and in relation to a crime of violence, in
violation of 18 U.S.C. §§ 924(c)(1)(B)(i) and 2; and being a
felon in possession of a firearm, in violation of 18 U.S.C.

§§ 922(g)(1) and 924(a)(2). Our appellate jurisdiction rests
on 28 U.S.C. §§ 1291 and 2255, and we **AFFIRM**.

Jay contends Hobbs Act Robbery is not a “crime of
violence” within the meaning of 18 U.S.C. § 924(c). Our
Court has held it is. See *United States v. Selfa*, 918
F.2d 749 (9th Cir. 1990). Jay asks, however, that we
overrule *Selfa* and the cases following it. We cannot do
so. We are bound by Circuit precedent unless overruled
or undermined by an en banc decision of this Court or a
decision of the United States Supreme Court. See *Miller*
v. Gammie, 335 F.3d 889, 899-900 (9th Cir. 2003).

Jay suggests *Moncrieffe v. Holder*, 569 U.S. 184, 133 S.Ct.
1678, 185 L.Ed.2d 727 (2013) is such intervening higher
authority. But *Moncrieffe* does no more than require
us to look to the least of the conduct proscribed by
the statute, not to the conduct the defendant actually
committed, and determine “whether even those acts are
encompassed by the generic federal offense.” *Moncrieffe*,
133 S.Ct. at 1684 (citations omitted); see also *Selfa*, 918
F.2d at 751 (holding “the elements of the crimes of
which the defendant was previously convicted, and not the
particular conduct of the defendant on the day the crimes
were committed,” controls the Court's analysis). Under
Selfa and the language of the statute, Hobbs Act Robbery
requires force or intimidation and does not countenance
violation by means of conduct that is essentially passive.
See 18 U.S.C. § 1951(b)(1) (defining “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”);
Selfa, 918 F.2d at 751 (“intimidation,” *588 defined as
willfully taking or attempting to take in such a way “that
would put an ordinary, reasonable person in fear of bodily
harm,” meets the requirement of a “threatened use of
physical force”) (internal quotation marks and citations
omitted).

Jay's challenge to his designation as a Career Offender
under the Guidelines also fails. Jay's argument that the
Career Offender provision's residual clause is void for
vagueness is foreclosed by *Beckles v. United States*, —
U.S. —, 137 S.Ct. 886, 890, 197 L.Ed.2d 145 (2017). The
district court correctly held that Jay's prior convictions
for Assault in the First Degree were crimes of violence
so he was properly sentenced as a career offender under
U.S.S.G. § 4B1.1.

AFFIRMED.

All Citations

705 Fed.Appx. 587 (Mem)

Footnotes

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

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,	)	CR 10-00174 LEK
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
MICHAEL JAY,	)	
	)	
Defendant.	)	
_____	)	
MICHAEL JAY,	)	CV 16-00107 LEK-KJM
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	
_____	)	

**ORDER DENYING MOTION UNDER 28 U.S.C. § 2255 TO
VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN
FEDERAL CUSTODY AND GRANTING CERTIFICATE OF APPEALABILITY**

Before the Court is Defendant/Petitioner Michael Jay's ("Jay") Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("§ 2255 Motion"), filed on March 9, 2016. [Dkt. nos. 60 (§ 2255 Motion), 61 (memorandum in support).¹] Plaintiff/Respondent the United States of America ("the Government") filed its response to the § 2255 Motion on April 5, 2016, and Jay filed his reply on

¹ The § 2255 Motion is filed both in United States v. Jay, CR 10-00174 LEK, and Jay v. United States, CV 16-00107 LEK-KJM. In this Order, unless otherwise specified, all citations to the record refer to the filings in CR 10-00174.

April 19, 2016. [Dkt. nos. 66, 68.] This Court held oral argument on the § 2255 Motion on May 11, 2016. After careful consideration of the § 2255 Motion, the supporting and opposing memoranda, the arguments of counsel, and the relevant legal authority, Jay's § 2255 Motion is HEREBY DENIED for the reasons set forth below. However, because reasonable jurists could find that the issues raised in Jay's § 2255 Motion are debatable, this Court GRANTS a certificate of appealability.

BACKGROUND

On April 15, 2010, Jay was indicted for: one count of Hobbs Act robbery, in violation of 18 U.S.C. §§ 1951 and 2 ("Count 1"); one count of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(B)(i) and 2 ("Count 2"); two counts of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) ("Count 3" and "Count 5"); and two counts of possession of an unregistered firearm, in violation of 26 U.S.C. §§ 5841, 5845, 5861(d), and 5871 ("Count 4" and "Count 6"). [Dkt. no. 1.] Jay initially entered a plea of not guilty, [Minutes, filed 12/20/11 (dkt. no. 9),] but, on August 20, 2012, he withdrew his plea and entered a plea of guilty to Counts 1, 2, and 3, pursuant to a plea agreement. [Dkt. nos. 23 (Minutes), 25 (Memorandum of Plea Agreement).]

This Court held Jay's sentencing hearing on August 25, 2013. [Minutes, filed 7/25/13 (dkt. no. 43).] It accepted the plea agreement, granted the Government's motion for downward departure, and adopted the presentence report. [Motion for Downward Departure, filed 7/12/13 (dkt. no. 38); Amended Presentence Investigation Report ("PSR"), filed 8/15/13 (dkt. no. 45).] This Court found that Jay's base offense level for Count 1 was twenty,² and it applied a three-level increase pursuant to United States Sentencing Guidelines ("U.S.S.G." or "the Guidelines") § 2B3.1(b)(3)(D), and a two-level increase pursuant to U.S.S.G. § 2B3.1(b)(4)(B). [PSR at ¶¶ 34-36.] Thus, his adjusted offense level would have been twenty-five. [*Id.* at ¶ 40.] Pursuant to U.S.S.G. § 4B1.1, however, Jay's offense level was thirty-two because this Court found that: the underlying offense was a felony crime of violence; Jay was eighteen years or older when he committed the underlying offense; and he had at least two prior felony convictions for crimes of violence. [*Id.* at ¶ 41.] Jay's offense level was reduced by three levels for acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1, resulting in a total offense level of twenty-

² Counts 1 and 3 were grouped for the calculation of Jay's offense level, which was determined according to the more serious of the two counts – Count 1. Count 2 was excluded from the offense level determination because the applicable statute required a specific term of imprisonment that had to be imposed consecutively to any other term of imprisonment. [PSR at ¶¶ 31-32.]

nine. [Id. at ¶¶ 42-44.] Also pursuant to § 4B1.1, Jay was designated a career offender, raising his criminal history category from V to VI. [Id. at ¶¶ 65-66.] The otherwise applicable Guideline range for Count 1 was 151 to 188 months of imprisonment. [Id. at ¶ 97.]

In light of the Government's downward departure motion and other mitigating factors, this Court sentenced Jay to thirty-six months of imprisonment as to each of Counts 1 and 3, to run concurrently. In addition, this Court sentenced him to the mandatory minimum of 120 months of imprisonment for Count 2, to be served consecutively to all other counts, as well as three years of supervised release for Counts 1 and 3, and five years for Count 2, all to be served concurrently. This Court ordered Jay to pay \$400 in restitution and a \$100 special assessment as to each of the three counts. This Court granted the Government's oral motion to dismiss Counts 4, 5, and 6. [Minutes, filed 7/25/13 (dkt. no. 43).] The Judgment in a Criminal Case was filed on July 29, 2013. [Dkt. no. 44.]

On October 22, 2014, the Government filed a Rule 35(b) Motion for Reduced Sentence. [Dkt. no. 51.] This Court granted the motion during a hearing on December 1, 2014. [Dkt. no. 54.] The amended judgment was filed on December 3, 2014. [Dkt. no. 56.] This Court reduced Jay's term of imprisonment for Count 2 to forty-two months, to run consecutively to the terms of

imprisonment for Counts 1 and 3. [Id. at 3.] The other portions of Jay's sentence remained unchanged.

In the § 2255 Motion, Jay argues that, based on the United States Supreme Court's decisions in Johnson v. United States, 135 S. Ct. 2551 (2015), and Descamps v. United States, 133 S. Ct. 2276 (2013): 1) Hobbs Act robbery is not a crime of violence, as defined in either § 924(c)(3) or U.S.S.G.

§ 4B1.2(a), and therefore both his conviction of Count 2 and the § 4B1.1 increase in his Guideline sentencing range for Counts 1 and 3 are invalid ("Ground One"); and 2) even if this Court does not set aside his conviction of Count 2, the career offender enhancement is unconstitutional because his prior convictions of assault in the first degree, in violation of Haw. Rev. Stat. § 707-710, and burglary in the first degree, in violation of Haw. Rev. Stat. § 708-810, are not crimes of violence under § 4B1.2(a) ("Ground Two"). Jay argues that, in light of these

Johnson/Descamps errors, his current sentence violates his right to due process under the Fifth Amendment to the United States Constitution. In addition, he argues that, if this Court corrects either the errors alleged in Ground One or the errors alleged in Ground Two, the resulting sentence would be lower than the time that he has already served. Thus, he contends that his continued incarceration violates his Eighth Amendment rights.

STANDARD

Section 2255(a) states:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

This district court has described the standards applicable to

§ 2255 motions as follows:

A court may dismiss a § 2255 motion if "it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief." R. 4(b), Rules Governing Section 2255 Proceedings. A court need not hold an evidentiary hearing if the allegations are "palpably incredible [or] patently frivolous," Blackledge v. Allison, 431 U.S. 63, 76 (1977), or if the issues can be conclusively decided on the basis of the evidence in the record. See United States v. Mejia-Mesa, 153 F.3d 925, 929 (9th Cir. 1998) (noting that a "district court has discretion to deny an evidentiary hearing on a § 2255 claim where the files and records conclusively show that the movant is not entitled to relief"). . . .

Leon v. United States, Civ. No. 15-00099 JMS-BMK, Cr. No. 09-00452 JMS, 2015 WL 3965895, at *4 (D. Hawai'i June 29, 2015) (some alterations in Leon).

The issues raised in Jay's § 2255 Motion are legal issues that "can be conclusively decided on the basis of the evidence in the record," including the record of the underlying

proceedings and the materials that the parties submitted in connection with the § 2255 Motion. See Mejia-Mesa, 153 F.3d at 929. This Court therefore CONCLUDES that an evidentiary hearing is not necessary in this case.

DISCUSSION

I. Ground One

A. Jay's Challenge to His Count 2 Conviction

In Count 2, Jay was charged with using a short-barreled shotgun during and in relation to a crime of violence, *i.e.* the Hobbs Act robbery charged in Count 1. [Indictment at 2-3.] Section 924(c)(1) provides, in pertinent part:

(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime -

. . . .

(B) If the firearm possessed by a person convicted of a violation of this subsection -

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years[.]

For purposes of § 924(c), a “crime of violence” is a felony that

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

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

§ 924(c)(3). Section 924(c)(3)(A) is known as the “force clause,” and § 924(c)(3)(B) is known as the “residual clause.” See, e.g., United States v. Watson, CR NO. 14-00751-01 DKW, 2016 WL 866298, at *3 (D. Hawai`i Mar. 2, 2016); United States v. Bell, Case No. 15-cr-00258-WHO, 2016 WL 344749, at *1 (N.D. Cal. Jan. 28, 2016). The Ninth Circuit has held that, for purposes of the similar force clause in § 924(e)(2)(B)(i), “the phrase “physical force” means violent force – that is, force capable of causing physical pain or injury to another person.” United States v. Parnell, 818 F.3d 974, 977 (9th Cir. 2016) (emphasis omitted) (citing Johnson v. United States, 559 U.S. 133, 140, 130 S. Ct. 1265, 176 L. Ed. 2d 1 (2010)).³

In the instant case, Jay does not dispute either that Hobbs Act robbery is a felony or that he possessed a short-barreled shotgun during, and in relation to, the Hobbs Act robbery. Jay argues that he is actually innocent of Count 2

³ All references to “Johnson” in this Order refer to the Supreme Court’s decision in Johnson v. United States, 135 S. Ct. 2551 (2015).

because: Johnson invalidated the § 924(c)(3)(B) residual clause; and Hobbs Act robbery is not a “crime of violence” under the § 924(c)(3)(A) force clause.

In Johnson, the Supreme Court held that “imposing an increased sentence under the residual clause of the Armed Career Criminal Act [‘ACCA’] violates the Constitution’s guarantee of due process.” 135 S. Ct. at 2563. The Supreme Court has held that Johnson applies retroactively to cases on collateral review. Welch v. United States, 136 S. Ct. 1257, 1268 (2016).

Johnson pled guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g), and the district court imposed an enhanced sentence under the ACCA, based on its finding that Johnson’s three prior offenses were violent felonies for purposes of § 924(e)(1). Johnson, 135 S. Ct. at 2556.

Section 924(e)(2)(B) states:

the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that –

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

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

Section 924(e)(2)(B)(i) is known as the “force clause.” See, e.g., Parnell, 818 F.3d at 977. The first portion of § 924(e)(2)(B)(ii) is known as the “enumerated offenses clause,” and the second portion is known as the “residual clause.” See, e.g., United States v. Carter, Cr. No. 07-00150 JMS(01), 2016 WL 2992054, at *2 (D. Hawai`i May 23, 2016). In Johnson, the Supreme Court expressly stated that the decision “does not call into question application of the [ACCA] to the four enumerated offenses, or the remainder of the [ACCA]’s definition of a violent felony.” 135 S. Ct. at 2563. In other words, the force clause and the enumerated offenses clause are still valid.

Jay argues that, because the wording of the ACCA’s residual clause in § 924(e)(2)(B)(ii) is similar to the wording of the § 924(c)(3)(B) residual clause, Johnson also renders the § 924(c)(3)(B) residual clause invalid. This Court, however, would not need to reach this argument if this Court concludes that Hobbs Act robbery is a crime of violence under the § 924(c)(3)(A) force clause. Even if Johnson invalidated the § 924(c)(3)(B) residual clause, Johnson would not affect the force clause. See, e.g., Watson, 2016 WL 866298, at *7 (“Because the Court finds that the predicate crime at issue . . . is a crime of violence under the Section 924(c)(3)(A) force clause, the Court declines Petitioners’ invitation and expresses no view

on whether the statute qualifies as a crime of violence under the Section 924(c)(3)(B) residual clause.”).

Hobbs Act robbery is:

the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

§ 1951(b). To determine whether Hobbs Act robbery is a “crime of violence” for purposes of § 924(c)(3)(A), this Court applies the following analysis:

To determine whether an offense qualifies as a “crime of violence” under section 924(c)(3), the Ninth Circuit applies the “categorical approach” set forth in Taylor v. United States, 495 U.S. 575, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990). See United States v. Piccolo, 441 F.3d 1084, 1086-87 (9th Cir. 2006) (“In the context of crime of violence determinations under section 924(c), our categorical approach applies regardless of whether we review a current or prior crime.”); United States v. Amparo, 68 F.3d 1222, 1225-26 (9th Cir. 1995); United States v. Mendez, 992 F.2d 1488, 1490-92 (9th Cir. 1993); United States v. Springfield, 829 F.2d 860, 862-63 (9th Cir. 1987).

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” – here, the definition of “crime of violence” set forth in the section 924(c)(3) force clause. United States v. Sahagun-Gallegos, 782 F.3d 1094, 1098 (9th Cir. 2015). This process requires the court to “look to the elements of the offense rather than the particular facts underlying the defendant’s own

[case].” United States v. Dominguez-Maroyoqui, 748 F.3d 918, 920 (9th Cir. 2014). 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, --- U.S. ---, 133 S. Ct. 1678, 1684, 185 L. Ed. 2d 727 (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. Dominguez-Maroyoqui, 748 F.3d at 920 (internal quotation marks omitted).

In ascertaining the scope of conduct criminalized by the elements of an offense, the court considers not only the statutory language, “but also the interpretation of that language in judicial opinions.” Covarrubias Teposte v. Holder, 632 F.3d 1049, 1054 (9th Cir. 2011) (internal quotation marks omitted). To find an offense overbroad, there must be a “realistic probability, not a theoretical possibility,” that the statute would be applied to conduct not encompassed by the generic federal definition. Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193, 127 S. Ct. 815, 166 L. Ed. 2d 683 (2007); accord United States v. McGuire, 706 F.3d 1333, 1337 (11th Cir. 2013) (applying the “realistic probability” standard to a crime of violence determination under section 924(c)(3)).

In a case involving a “divisible” statute, the court may also go beyond the categorical approach and apply the “modified categorical approach,” which allows the court “to examine a limited class of documents to determine which of a statute’s alternative elements formed the basis of the defendant’s prior conviction.” Descamps v. United States, --- U.S. ---, 133 S. Ct. 2276, 2284, 186 L. Ed. 2d 438 (2013) (internal quotation marks omitted). A statute is “divisible” when it

contains “multiple, alternative elements of functionally separate crimes,” Rendon v. Holder, 764 F.3d 1077, 1084-85 (9th Cir. 2014) (emphasis in original), as opposed to just “alternative means of committing the same crime,” Almanza-Arenas v. Lynch, 809 F.3d 515, 524 (9th Cir. 2015).⁴ “[T]he key question [the court] must ask when determining a statute’s divisibility is whether a jury would have to be unanimous in finding those separate elements.” Ramirez v. Lynch, --- F.3d ----, ----, 2016 WL 239661, at *5 (9th Cir. Jan. 20, 2016).

Bell, 2016 WL 344749, at *2 (alterations in Bell).

Jay argues that Hobbs Act robbery cannot be a crime of violence under the § 924(c)(3)(A) force clause because § 1951(b) criminalizes robbery by intimidation, *i.e.* “fear of injury,” and injury to intangible property. [Mem. in Supp. of § 2255 Motion at 12-13.] The Ninth Circuit has recently rejected an argument similar to Jay’s intimidation argument. In determining whether Hobbs Act robbery was a crime of violence under the § 924(c)(3)(A) force clause, the Ninth Circuit stated:

Focusing on the Hobbs Act’s “actual or threatened force, or violence” language, we have previously stated that Hobbs Act “[r]obbery indisputably qualifies as a crime of violence” under § 924(c). United States v. Mendez, 992 F.2d 1488, 1491 (9th Cir. 1993). Howard, however, argues that because Hobbs Act robbery may also be accomplished by putting someone in “fear of injury,” 18 U.S.C. § 1951(b), it does not necessarily involve “the use, attempted use, or

⁴ On February 29, 2016, after the Northern District of California’s decision in Bell, the Ninth Circuit issued an amended opinion in Almanza-Arenas. 815 F.3d 469. The language from the original Almanza-Arenas opinion quoted in Bell also appears in the amended Almanza-Arenas opinion. Id. at 478.

threatened use of physical force," 18 U.S.C. § 924(c)(3)(A). Howard's arguments are unpersuasive and are foreclosed by United States v. Selfa, 918 F.2d 749 (9th Cir. 1990). In Selfa, we held that the analogous federal bank robbery statute, which may be violated by "force and violence, or by intimidation," 18 U.S.C. § 2113(a) (emphasis added), qualifies as a crime of violence under U.S.S.G. § 4B1.2 which uses the nearly identical definition of "crime of violence" as § 924(c). Selfa, 918 F.2d at 751. We explained that "intimidation" means willfully "to take, or attempt to take, in such a way that would put an ordinary, reasonable person in fear of bodily harm," which satisfies the requirement of a "threatened use of physical force" under § 4B1.2. Id. (emphasis added) (quoting United States v. Hopkins, 703 F.2d 1102, 1103 (9th Cir. 1983)). Because bank robbery by "intimidation" – which is defined as instilling fear of injury – qualifies as a crime of violence, Hobbs Act robbery by means of "fear of injury" also qualifies as crime of violence.

United States v. Howard, No. 15-10042, 2016 WL 2961978, at *1 (9th Cir. May 23, 2016) (footnotes omitted). This Court acknowledges that, because Howard is an unpublished decision, it is not binding precedent in the instant case. However, Mendez and Selfa are binding precedent, and this Court agrees with the Ninth Circuit's analysis in Howard of those cases.

Although Howard did not expressly state so, the Ninth Circuit apparently applied the modified categorical approach. Similarly, this Court concludes that § 1951(b) includes conduct that is broader than the generic definition of robbery. See United States v. Becerril-Lopez, 541 F.3d 881, 891 (9th Cir. 2008) (adopting the following "generic definition of robbery" –

“aggravated larceny, containing at least the elements of misappropriation of property under circumstances involving immediate danger to the person” (citations and quotation marks omitted)). This Court also concludes that § 1951(b) is divisible, and therefore it applies the modified categorical approach, and will consider Jay’s Indictment to determine whether the Hobbs Act robbery that he was convicted of was a crime of violence under the § 924(c)(3)(A) force clause. See Descamps, 133 S. Ct. at 2281 (stating that indictments and jury instructions are among the “limited class of documents” that can be considered in the modified categorical approach).

Count 1 of the Indictment charged that Jay and two other persons who were not named as defendants in this case:

each aiding and abetting the other, did obstruct, delay, and affect commerce as that term is defined in Title 18, United States Code, Section 1951, and the movement of articles and commodities in such commerce, by robbery as that term is defined in Title 18, United States Code, Section 1951, to wit: the defendant and his accomplices did obtain property belonging to Leilani Lounge consisting of United States currency and a cash register, from the person and in the presence of T.Y., who was the owner of Leilani Lounge, which was engaged in interstate commerce, against T.Y.’s will by means of actual and threatened force, violence, and fear of injury, immediate and future, on T.Y.

[Indictment at 2.] To the extent that Jay was convicted of Hobbs Act robbery by means of actual and threatened force or violence, this Court concludes that the offense does not “criminalize a broader swath of conduct” than the conduct covered in generic

robbery, see Dominguez-Maroyoqui, 748 F.3d at 920, and therefore it constitutes a crime of violence under the § 924(c)(3)(A) force clause. Further, to the extent that Jay was convicted of Hobbs Act robbery by intimidation, *i.e.* by “fear of injury,” the offense constitutes a crime of violence under the § 924(c)(3)(A) force clause in light of Mendez and Selfa.

This Court does not need to address Jay’s argument that a Hobbs Act robbery involving injury to intangible property cannot be a crime of violence under the § 924(c)(3)(A) force clause. The relevant portion of the Indictment makes it clear that Jay’s Count 1 conviction was not based on that particular alternative element of Hobbs Act robbery.

This Court CONCLUDES that Jay’s Count 1 conviction constitutes a crime of violence under the § 924(c)(3)(A) force clause, and therefore all of the required elements of § 924(c)(1)(B)(i) were present in this case. Jay’s § 2255 Motion is DENIED as to the portion of Ground One challenging the validity of his Count 2 conviction.

B. Whether Hobbs Act Robbery is a Crime of Violence for Purposes of the § 4B1.1 Enhancement

Jay also contends that Johnson and Descamps invalidate this Court’s finding during sentencing that he is a career offender for purposes of § 4B1.1. Pursuant to § 4B1.1, this Court determined that Jay’s offense level for Count 1 was thirty-two, instead of his otherwise applicable adjusted offense level

of twenty-five. See PSR at ¶¶ 40-41. Section 4B1.1 states, in pertinent part:

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

(b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

. . . .

It is undisputed that Jay was at least eighteen when he committed the offenses in this case and that Count 1 is a felony. Ground One challenges this Court's ruling that Jay's Count 1 offense is a crime of violence for purposes of § 4B1.1, and Ground Two challenges this Court's ruling that Jay had at least two prior felony convictions for crimes of violence.

The following definition is applicable to § 4B1.1:

The term "crime of violence" means 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.

§ 4B1.2(a). Like § 924(e)(2)(B), § 4B1.2(a) has a force clause, an enumerated offenses clause, and a residual clause. See, e.g., United States v. Shell, 789 F.3d 335, 341 (4th Cir. 2015); United States v. Serrano-Mercado, 784 F.3d 838, 844 (1st Cir. 2015).

The § 4B1.2(a)(1) force clause is identical to the § 924(c)(3)(A) force clause, except that § 924(c)(3)(A) force clause contains the additional language in bold here: “has as an element the use, attempted use, or threatened use of physical force against the person **or property** of another.” However, that distinction is not relevant here because Jay’s Count 1 conviction was not based on an offense involving the use, attempted use, or threatened use of physical force against the **property** of another. See Indictment at 2. Because the two force clauses are identical for purposes of the instant case, the analysis regarding Jay’s Count 2 conviction also applies to the issue of whether Jay’s Count 1 offense is a crime of violence for purposes of § 4B1.1. Based on that analysis, this Court CONCLUDES that Jay’s Count 1 offense is a crime of violence under the § 4B1.2(a)(1) force clause, and this Court declines to address Jay’s argument that the § 4B1.2(a)(2) residual clause is invalid pursuant to Johnson. Jay’s § 2255 Motion is DENIED as to the portion of Ground One challenging this Court’s ruling that Jay’s Count 1 offense is a

crime of violence for purposes of § 4B1.1.

II. Ground Two

This Court imposed the § 4B1.1(b) career offender enhancement to Jay's criminal history category based on a finding that Jay had at least two prior felony convictions for crimes of violence. Jay had, *inter alia*, two prior state court convictions of assault in the first degree and one prior state court conviction for burglary in the first degree. See PSR at ¶¶ 58, 60, 62. In Ground Two, Jay argues that none of these prior convictions was a § 4B1.2(a) crime of violence.⁵ This Court first turns to the assault convictions.

A. The Assault Convictions

Haw. Rev. Stat. § 707-710(1) states: "A person commits the offense of assault in the first degree if the person intentionally or knowingly causes serious bodily injury to another person." The Ninth Circuit has characterized § 707-710 as a statute punishing "aggravated assaults offenses." United States v. Garcia-Jimenez, 807 F.3d 1079, 1085 & n.6 (9th Cir. 2015).

In addition to the offenses listed in the § 4B1.2(a)(2) enumerated offenses clause, the Commentary to § 4B1.2 states:

⁵ Jay does not dispute that he was at least eighteen years old at the time he committed the offenses underlying the three state court convictions, nor does he dispute that each of the three offenses was a felony.

For purposes of this guideline – “Crime of violence” and “controlled substance offense” include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

“Crime of violence” includes murder, manslaughter, kidnapping, **aggravated assault**, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included as “crimes of violence” if (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another.

U.S.S.G. § 4B1.2 cmt. n.1 (emphases added). U.S.S.G. § 1B1.7 states that the Commentary to a Guidelines provision “may interpret the guideline or explain how it is to be applied” and “is to be treated as the legal equivalent of a policy statement.” Moreover, the Ninth Circuit has stated that:

“Even though the Guidelines are advisory, they are still the ‘starting point and the initial benchmark’ for the sentencing process.” United States v. Ellis, 641 F.3d 411, 415 (9th Cir. 2011) (quoting Kimbrough v. United States, 552 U.S. 85, 108, 128 S. Ct. 558, 169 L. Ed. 2d 481 (2007)). Therefore, we “must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range.” Gall v. United States, 552 U.S. 38, 51, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007). We interpret the Guidelines as we would binding federal regulations and interpret the commentary in the Guidelines like “an agency’s interpretation of its own legislative rules.” Stinson v. United States, 508 U.S. 36, 44-45, 113 S. Ct. 1913, 123 L. Ed. 2d 598

(1993). Thus, the “commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it . . . is inconsistent with, or a plainly erroneous reading of, that guideline.” United States v. Martin, 796 F.3d 1101, 1108 (9th Cir. 2015) (quoting Stinson, 508 U.S. at 38, 113 S. Ct. 1913); see also United States v. Jackson, 697 F.3d 1141, 1146 (9th Cir. 2012).

United States v. Bernardo, 818 F.3d 983 (9th Cir. 2016)

(alteration in Bernardo) (emphasis added).

This Court concludes that Application Note 1 to § 4B1.2 is consistent with, and a reasonable interpretation of, § 4B1.2(a). U.S.S.G. § 2L1.2, which governs the offense levels for unlawfully entering or remaining in the United States, provides that a defendant’s offense level must be increased sixteen levels if “the defendant previously was deported, or unlawfully remained in the United States, after – (A) a conviction for a felony that is . . . (ii) a crime of violence.” § 2L1.2(b)(1)(A)(ii). The Commentary for § 2L1.2, states, in pertinent part:

“Crime of violence” means any of the following offenses under federal, state, or local law: murder, manslaughter, kidnapping, **aggravated assault**, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the

person of another.

§ 2L1.2 cmt. n.1(B)(iii) (emphasis added). This is very similar to Application Note 1 to § 4B1.2, and the Ninth Circuit has stated:

In [United States v.] Pereira[-Salmeron], we explained that the term “crime of violence” does not take on different meanings depending on where it appears in the Guidelines:

We acknowledge that different words are used in some other definitions of “crime of violence” in the Guidelines and its notes. It would perhaps be clearer if the Commission used a more consistent definition. But there is no indication that the term is intended to mean something different for this provision than it does elsewhere. . . .

[337 F.3d 1148,] 1153 [(9th Cir. 2003)].

United States v. Granbois, 376 F.3d 993, 996 (9th Cir. 2004) (some alterations in Granbois).

This Court also notes that, in analyzing whether a state court conviction for attempted aggravated assault was a crime of violence for purposes of § 2L1.2(b)(1)(A)(ii), the Ninth Circuit stated “[a]ggravated assault is an enumerated offense under the Sentencing Guidelines.” United States v. Gomez-Hernandez, 680 F.3d 1171, 1178 (9th Cir. 2012). This Court therefore CONCLUDES that: 1) Application Note 1 to § 4B1.2 is consistent with, and a reasonable interpretation of, that section; and 2) pursuant to Application Note 1, aggravated assault is an enumerated offense for purposes of the § 4B1.2(a)

definition of a crime of violence.

This Court next turns to the issue of whether assault in the first degree, as defined in § 707-710, is an aggravated assault under the categorical approach. The Ninth Circuit has held that:

“[t]he generic offense of ‘aggravated assault’ under § 2L1.2 of the Guidelines involves a criminal assault accompanied by the aggravating factors of either the intent to cause serious bodily injury to the victim or the use of a deadly weapon.” United States v. Palomino Garcia, 606 F.3d 1317, 1332 (11th Cir. 2010) (relying on most states’ definitions of aggravated assault, as well as learned treatises and the Model Penal Code).

We agree with the Eleventh Circuit that (1) intent to cause serious bodily injury, and (2) use of a deadly weapon to attempt to cause bodily injury (serious or not), are both generic aggravating factors.

Gomez-Hernandez, 680 F.3d at 1178 (alteration in Gomez-Hernandez). Like the federal definition of generic aggravated assault, § 707-710 criminalizes assault with the aggravating factor of intent to cause serious bodily injury. However, § 707-710 also criminalizes the aggravating factor of **knowingly** causing serious bodily injury. For a categorical match, the federal definition of generic aggravated assault must also include that aggravating factor.

The Gomez-Hernandez description of generic aggravated assault under federal law suggests that it is a specific intent crime. However, the issue of whether general intent satisfies

the mens rea requirement for the federal definition of generic aggravated assault was not before the Ninth Circuit in Gomez-Hernandez.⁶ See 680 F.3d at 1178 (noting that the Arizona assault statute criminalized other aggravating factors, but that it was not necessary to address whether the other aggravating factors were “coextensive with the generic offense, because the record of conviction demonstrates that Gomez-Hernandez’s attempted aggravated assault conviction necessarily rested on the specific intent to use a deadly weapon in carrying out the assault”). The Ninth Circuit has not directly addressed whether general intent is sufficient to satisfy the mens rea requirement for generic aggravated assault under federal law. However, in holding that generic aggravated assault “does not incorporate a mens rea of extreme indifference recklessness,” the Ninth Circuit

⁶ The Ninth Circuit has stated that:

In general, “purpose” corresponds to the concept of specific intent, while “knowledge” corresponds to general intent. See [United States v.] Bailey, 444 U.S. [394,] 405, 100 S. Ct. 624 [(1980)]; Model Penal Code & Commentaries, *supra*, § 2.02 cmt. at 233-34. A person who causes a result prohibited by common law or statute is said to have acted purposely if he or she consciously desired that result, whatever the likelihood of that result ensuing from his or her actions. See Bailey, 444 U.S. at 404, 100 S. Ct. 624; [United States v.] United States Gypsum [Co.], 438 U.S. [422,] 444, 98 S. Ct. 2864 [(1978)]; Model Penal Code & Commentaries, *supra*, § 2.02, at 225.

United States v. Gracidas-Ulibarry, 231 F.3d 1188, 1196 (9th Cir. 2000).

stated:

Thirty-three states and the District of Columbia do not punish as aggravated assaults offenses committed with only extreme indifference recklessness. In addition, **the common law definition of assault, a general intent offense that requires a showing of willfulness, has been incorporated into the federal offense of assault resulting in serious bodily injury, 18 U.S.C. § 113(a)(6). See United States v. Loera, 923 F.2d 725, 727-28 (9th Cir. 1991).**

Seventeen states and the Model Penal Code do punish aggravated assaults committed with extreme indifference recklessness (or a lesser level of mens rea).

That a substantial majority of U.S. jurisdictions require more than extreme indifference recklessness to commit aggravated assault is a compelling indication that the federal generic definition of aggravated assault also requires more than that mental state. See Estrada-Espinoza v. Mukasey, 546 F.3d 1147, 1153 (9th Cir. 2008) (en banc), *overruled on other grounds as recognized by United States v. Rivera-Constantino, 798 F.3d 900, 904 (9th Cir. 2015)* (describing 35 states as “the vast majority of states” for the purposes of the Taylor analysis).

The Model Penal Code does point in the opposite direction – unlike in Estrada-Espinoza . . . , where the Model Penal Code and the statutory survey results were in harmony. But as we have emphasized, the Model Penal Code, while a helpful tool in the categorical analysis, does not dictate the federal generic definition of a crime. United States v. Velasquez-Bosque, 601 F.3d 955, 961 (9th Cir. 2010). **We also note that at least one treatise confirms that assault, in its various forms, is a general intent crime. See 6 Am. Jur. 2d Assault & Battery § 15 (“The requirement of a general intent to do an act that is inherently dangerous to human life is a general element of assault and battery. . . . Assault is**

a general intent crime.”). The weight of authority – approximately two-thirds of the states, the common law, federal law, and at least one treatise, as compared to the Model Penal Code and one-third of the states – establishes that the federal generic definition of aggravated assault does not incorporate a mens rea of extreme indifference recklessness.

Garcia-Jimenez, 807 F.3d at 1085-87 (some alterations in Garcia-Jimenez) (emphases added) (footnotes and some citation omitted).

In so holding, the Ninth Circuit treated aggravated assault statutes that require general intent “as requiring a mens rea of more than extreme indifference recklessness.” Id. at 1087 n.8. In other words, the state aggravated assault statutes requiring general intent are among the weight of authority that establishes the federal generic definition of aggravated assault.

This Court therefore CONCLUDES that the federal generic definition of aggravated assault also criminalizes assault with the aggravating factor of **knowingly** causing serious bodily injury. Based on this conclusion, this Court also CONCLUDES that all of the acts that are criminalized in Haw. Rev. Stat. § 707-710 “are encompassed by the generic federal offense” of aggravated assault. See Moncrieffe, 133 S. Ct. at 1684. Thus, the two offenses are a categorical match, and this Court CONCLUDES that Jay’s two prior convictions of assault in the first degree, in violation of § 707-710, were properly classified as crimes of violence under § 4B1.2(a). To the extent that Ground Two contends that this Court erred in counting Jay’s two

prior convictions for assault in the first degree as § 4B1.2(a) crimes of violence, Jay's § 2255 Motion is DENIED.

B. The Burglary Conviction

Jay also contends that his prior state conviction for burglary in the first degree cannot be a § 4B1.2(a) crime of violence. Haw. Rev. Stat. § 708-810 defines burglary in the first degree. It states, in pertinent part:

(1) A person commits the offense of burglary in the first degree if the person intentionally enters or remains unlawfully in a building, with intent to commit therein a crime against a person or against property rights, and:

(a) The person is armed with a dangerous instrument in the course of committing the offense;

(b) The person intentionally, knowingly, or recklessly inflicts or attempts to inflict bodily injury on anyone in the course of committing the offense; or

(c) The person recklessly disregards a risk that the building is the dwelling of another, and the building is such a dwelling.

(2) An act occurs "in the course of committing the offense" if it occurs in effecting entry or while in the building or in immediate flight therefrom.

In contrast, "the basic elements of generic burglary" under federal law are "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." Descamps, 133 S. Ct. at 2283. This Court concludes that § 708-810 includes conduct that is broader than the generic

definition of burglary under federal law, but that § 708-810 is divisible because it contains alternative elements. See id. at 2281 (stating that a divisible statute “sets out one or more elements of the offense in the alternative – for example, stating that burglary involves entry into a building **or** an automobile” (emphasis in original)). This Court would therefore apply the modified categorical approach to determine whether the burglary offense that Jay was convicted of was a § 4B1.2(a) crime of violence.

However, it is not necessary for this Court to perform the modified categorical analysis regarding Jay’s burglary conviction because § 4B1.1(a)(3) only requires that a defendant have **at least two** prior felony convictions of crimes of violence. Jay’s two convictions for assault in the first degree satisfy that requirement. In addition, this Court notes that the Government has not provided any of the material that would be necessary for this Court to perform the modified categorical analysis for Jay’s burglary conviction. See Government’s Response, Attachment A (complaint, no contest plea form, and judgment for Jay’s 1997 conviction for assault in the first degree). This Court therefore **DECLINES TO ADDRESS** the portion of Ground Two which contends that this Court erred in counting Jay’s prior conviction for burglary in the first degree, in violation of § 708-810, as a § 4B1.2(a) crime of violence.

Insofar as this Court has concluded that Jay's two prior convictions for assault in the first degree were properly counted as § 4B1.2(a) crimes of violence, and those two convictions are sufficient to support the career offender enhancement under § 4B1.1(a), this Court DENIES Ground Two of Jay's § 2255 Motion. Having denied both of the grounds raised, Jay's § 2255 Motion is HEREBY DENIED.

IV. Certificate of Appealability

This district court has stated that:

In dismissing a § 2255 motion, the court must also address whether [defendant/petitioner] should be granted a certificate of appealability ("COA"). See R. 11(a), Rules Governing Section 2255 Proceedings (providing that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant"). A COA may issue only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

"The standard for a certificate of appealability is lenient." Hayward v. Marshall, 603 F.3d 546, 553 (9th Cir. 2010) (en banc), *overruled on other grounds by Swarthout v. Cooke*, 562 U.S. 216 (2011). The petitioner is required to demonstrate only "that reasonable jurists could debate the district court's resolution or that the issues are adequate to deserve encouragement to proceed further." Id. (citation and internal quotation marks omitted). The standard "requires something more than the absence of frivolity, but something less than a merits determination." Id. (internal quotation marks omitted).

The court carefully reviewed [the defendant/petitioner's] assertions and gave him every benefit by liberally construing them. Based on the above analysis the court finds that

reasonable jurists could not find the court's rulings debatable.

Leon v. United States, Civ. No. 15-00099 JMS-BMK, Cr. No. 09-00452 JMS, 2015 WL 3965895, at *9-10 (D. Hawai'i June 29, 2015) (some alterations in Leon). This Court FINDS that reasonable jurists could find that its rulings regarding Jay's § 2255 Motion are debatable. This Court therefore GRANTS the issuance of a certificate of appealability.

CONCLUSION

On the basis of the foregoing, Jay's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, filed March 9, 2016, is HEREBY DENIED. However, this Court GRANTS a certificate of appealability.

IT IS SO ORDERED.

DATED AT HONOLULU, HAWAII,



/s/ Leslie E. Kobayashi
Leslie E. Kobayashi
United States District Judge

USA VS. MICHAEL JAY; CR 10-00174 LEK; MICHAEL JAY VS. USA; CV 16-00107 LEK-KJM; ORDER DENYING MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCING BY A PERSON IN FEDERAL CUSTODY AND GRANTING CERTIFICATE OF APPEALABILITY

918 F.2d 749
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Phillip Dale SELFA, Defendant-Appellant.

No. 89-10309.

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Argued and Submitted April 17, 1990.

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Decided June 14, 1990.

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As Amended Dec. 7, 1990.

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Certiorari Denied Nov. 26, 1990.

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See 111 S.Ct. 521.

Synopsis

Defendant who pleaded guilty to bank robbery, aiding and abetting, and conspiracy, was declared a career criminal and was sentenced accordingly, in the United States District Court for the Eastern District of California, Edward J. Garcia, J., and defendant appealed. The Court of Appeals, Schroeder, Circuit Judge, held that: (1) defendant's past convictions for bank robbery constituted "crimes of violence," and thus defendant was properly sentenced as career criminal under Sentencing Guidelines; (2) defendant was not entitled to further hearing prior to being sentenced as career criminal; and (3) defendant was not entitled to be advised at time of his guilty plea that he could be sentenced as career criminal.

Affirmed.

Attorneys and Law Firms

*750 Judith Simms, Sacramento, Cal., for defendant-appellant.

Daniel S. Linhardt, Asst. U.S. Atty., Sacramento, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Eastern District of California.

Before HUG, SKOPIL and SCHROEDER, Circuit Judges.

Opinion

SCHROEDER, Circuit Judge.

Appellant Phillip Selfa appealed his sentence under the Sentencing Guidelines following a plea of guilty to bank robbery, aiding and abetting, and conspiracy. Selfa had already been convicted of two prior bank robberies in violation of 18 U.S.C. § 2113(a), and as a result, Selfa was determined to be a career criminal under section 4B1.1 of the Guidelines and his sentence was enhanced.

Selfa's principal contention on appeal was that on this record, he should not have been sentenced as a career criminal under section 4B1.1. [2] Selfa argued that since he was unarmed and he neither harmed nor threatened to harm anyone in any way during the robberies, they were not crimes of violence and that section 4B1.1 does not support a per se rule that all robberies are crimes of violence. [3] However, Selfa was twice convicted of violating section 2113(a) which requires, at the very least, either force and violence or intimidation. [4] The court held therefore, that persons convicted of section 2113(a) have been convicted of a crime of violence within the meaning of Guidelines section 4B1.1 and concluded that the elements of the crimes for which Selfa was previously convicted, and not his particular conduct on the day the crimes were committed, should control. The enhancement of Selfa's sentence under section 4B1.1 was not in error.

SCHROEDER, Circuit Judge:

Phillip Dale Selfa appeals his sentence under the Sentencing Guidelines following a plea of guilty to bank robbery, aiding and abetting, and conspiracy in violation of 18 U.S.C. §§ 371 and 2113(a). He was declared a career criminal pursuant to Sentencing Guidelines § 4B1.1 on the basis of two prior convictions for bank robbery under 18 U.S.C. § 2113(a). Selfa argues in this appeal that the career criminal determination should not have been made without a factual hearing. We affirm.

Selfa's plea in this case related to two bank robberies, one committed on January 24, 1989 and one on January 30, 1989. At that time, Selfa had already been convicted of two prior bank robberies in violation of 18 U.S.C. § 2113(a).

That statute in relevant part prohibits bank robbery committed “by force and violence or intimidation.”¹

As a result of his prior convictions, Selfa was determined to be a career criminal under section 4B1.1 of the Sentencing Guidelines and sentenced to serve 210 *751 months in prison and a period of three years supervised release. He was also ordered to make restitution of \$2,101.

Selfa's principal contention in this appeal is that on this record he should not have been sentenced as a career criminal under section 4B1.1 of the Sentencing Guidelines. He contends that the record did not sufficiently establish that his prior bank robberies were crimes of violence.

Section 4B1.1 provides:

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the incident offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) *the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense....*

U.S.S.G. § 4B1.1 at 4.11 (November 1, 1989 ed.) (emphasis added). The Application Notes to this section state that “ ‘crime of violence’ ... [is] defined in section 4B1.2.” U.S.S.G. § 4B1.1 application note 1. Section 4B1.2 in turn provides in relevant part:

The term “crime of violence” means any offense under federal or state law punishable by imprisonment for a term exceeding one year that-

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

U.S.S.G. § 4B1.2(1). The Application Notes to this section indicate that “ ‘crime of violence’ includes ... robbery....” U.S.S.G. § 4B1.2 application note 2.

[1] Selfa argues that since he was unarmed in the two prior robberies, they were not crimes of violence. Section 4B1.2, however, does not define a crime of violence as

requiring use of a weapon. He further contends that he neither harmed nor threatened to harm anyone in any way during the robberies, that none of his victims suffered any long-term effects from the robberies, and that section 4B1.2(1)(i) does not support a *per se* rule that all robberies are crimes of violence. He seeks a remand for an evidentiary hearing to determine whether his past convictions involved actual or threatened physical force.

The language of the application note to section 4B1.2 supports the government in this case. This court has previously quoted that language as authoritative in a different context. *See United States v. Borrayo*, 898 F.2d 91, 94 (9th Cir.1990) (noting that Sentencing Guidelines § 4B1.2 commentary indicates that robbery is a crime of violence).

We need not decide in this appeal, however, whether all robberies, regardless of the statute under which they are punished, should be considered *per se* crimes of violence. Selfa was twice convicted of violating that portion of 18 U.S.C. § 2113(a) which requires, at the very least, either “force and violence” or “intimidation.” This court has defined “intimidation” under section 2113(a) to mean “wilfully to take, or attempt to take, in such a way that would put an ordinary, reasonable person in fear of bodily harm.” *United States v. Hopkins*, 703 F.2d 1102, 1103 (9th Cir.1983) (emphasis omitted), *cert. denied*, 464 U.S. 963, 104 S.Ct. 399, 78 L.Ed.2d 341 (1983), definition is sufficient to meet the section 4B1.2(1) requirement of a “threatened use of physical force.” *See United States v. Maddalena*, 893 F.2d 815, 819 (6th Cir.1989) (“The requirement that property be taken either ‘by force and violence’ or ‘by intimidation’ requires proof of force or threat of force as an element of the offense.”).

[2] [3] [4] [5] We therefore hold that persons convicted of robbing a bank “by force and violence” or “intimidation” under 18 U.S.C. § 2113(a) have been convicted of a “crime of violence” within the meaning of Guideline Section 4B1.1. We conclude that the elements of the crimes of which the defendant was previously convicted, and not the particular conduct of the defendant on the day the crimes were committed, should control. Further satellite factual hearings should not be required as a matter of course in order to determine whether the defendant has previously been convicted of crimes of violence. As we observed in *United States v. Sherbondy*, 865 F.2d 996, 1008 (9th Cir.1988), “it is unlikely that

Congress *752 would implicitly authorize, without any express language in [the statute], ad hoc mini-trials regarding an individual's prior criminal conduct. The problems with such hearings are evident. Witnesses would often be describing events years past. Such testimony is highly unreliable." The enhancement of Selfa's sentence under Sentencing Guidelines § 4B1.1 was not in error.²

[6] Selfa also contends that he should have been advised at the time of his plea that he could be sentenced as a career criminal and for that reason his sentence must be vacated. However, under the Guidelines, the district court regrettably is usually not in a position at the time of a plea to advise the defendant with any precision as to the range within which the sentence might fall. This court has therefore recently held that the provisions of Rule 11 of the Federal Rules of Criminal Procedure are satisfied when the defendant is advised of the maximum statutory penalty

and of the implications of sentencing under the Sentencing Guidelines. *United States v. Turner*, 881 F.2d 684, 687 (9th Cir.), *cert. denied*, 493 U.S. 871, 110 S.Ct. 199, 107 L.Ed.2d 153 (1989); *see also United States v. Henry*, 893 F.2d 46, 49 (3rd Cir.1990). Those standards were satisfied in this case.

[7] Finally, we reject Selfa's argument that the district court abused its discretion in sentencing Selfa as a career criminal in light of the favorable letters sent to the sentencing judge on his behalf. The career offender Guideline provision does not bestow such discretion. *See* section 4B1.1.

AFFIRMED.

All Citations

918 F.2d 749

Footnotes

- 1 The relevant portion of this section provided at the time Selfa was convicted of violating it:
 - (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) (1984).
- 2 Section 2113(a) of 18 U.S.C. consists of two paragraphs. The first, quoted in footnote 1 *supra*, describes the taking or the attempt to take money or property from a bank by force or intimidation. The second paragraph describes an entry or attempt to enter a bank with intent to commit a felony in it. The second paragraph does not describe a crime of violence. In *United States v. Potter*, 895 F.2d 1231 (9th Cir.1990), we held that a defendant may not be convicted as a career offender where the presentence report indicates only that the defendant was previously convicted under an umbrella statute describing crimes of both violence and of nonviolence, and where the presentence report did not indicate under which subsection of the statute the defendant was convicted. In this case, however, the presentence report clearly shows that it was based upon a review of relevant portions of the record underlying the prior convictions, including a review of the charging documents, which showed that this defendant had been convicted of actual bank robbery pursuant to the first paragraph of 18 U.S.C. § 2113(a).

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