

APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-4378

UNITED STATES OF AMERICA

v.

ANDRE S. LEWIS,
Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2-15-cr-00368-001)
District Judge: Hon. Legrome D. Davis

Submitted Under Third Circuit L.A.R. 34.1(a)
October 2, 2017

Before: SHWARTZ and ROTH, Circuit Judges,
and PAPPERT, District Judge.*

(Filed: January 8, 2018)

OPINION**

SHWARTZ, Circuit Judge.

* Honorable Gerald J. Pappert, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

** This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

Andre Lewis pleaded guilty to one count of unarmed bank robbery and two counts of attempted unarmed bank robbery, in violation of 18 U.S.C. § 2113(a), and was sentenced pursuant to the career offender guideline, U.S.S.G. § 4B1.1. Because Lewis's bank robbery convictions and prior conviction for aggravated assault under 18 Pa. Cons. Stat. § 2702(a)(4) are crimes of violence under § 4B1.1, and because he also had a prior drug conviction, he was properly sentenced under the career offender guideline, and we will affirm.

I

In June 2015, Lewis entered a Wells Fargo bank in Philadelphia, displayed the handle of a firearm, and passed the teller a note stating: "I know where you live. Dn't make any funny movements or us an your coworkers are fuckin dead hand over cash." The teller handed Lewis \$1,740.25, and Lewis left the bank. Over the next month, Lewis twice attempted to rob another Wells Fargo bank using similar demand notes but left with no money. Lewis pleaded guilty to bank robbery and attempted bank robbery in violation of § 2113(a).

The United States Probation Office prepared a Presentence Investigation Report ("PSR") recommending that Lewis be sentenced as a career offender under § 4B1.1. Under that provision, a defendant qualifies for the career offender enhancement if, among other things, he is convicted of either a "controlled substance offense" or a "crime of violence" and has at least two prior convictions falling within those two categories. U.S.S.G. § 4B1.1(a). According to the PSR, Lewis was convicted of bank robbery,

which the PSR stated was a crime of violence, and had prior drug and aggravated assault convictions.

Lewis objected to the career offender designation on the ground that his prior aggravated assault conviction did not qualify as a crime of violence. The District Court rejected that argument, departed downward from the applicable career offender Guidelines range of 151 to 181 months, and sentenced Lewis to 120 months' imprisonment followed by three years of supervised release. Lewis appeals.

II¹

Lewis argues that his unarmed bank robbery conviction and his prior Pennsylvania aggravated assault conviction are not “crime[s] of violence” under U.S.S.G. § 4B1.2, and therefore, it was error to sentence him as a career offender.²

“Whether a . . . conviction constitutes a crime of violence for purposes of the career offender Guideline is a question of law over which we exercise plenary review.” United States v. Brown, 765 F.3d 185, 188 (3d Cir. 2014) (internal quotation marks omitted). However, where a defendant fails to preserve his objection in the District Court, we review for plain error.³ United States v. Russell, 564 F.3d 200, 203 (3d Cir.

¹ The District Court had jurisdiction pursuant to 18 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. §§ 1291 and 3742.

² Lewis does not dispute that his drug conviction is a qualifying offense under the career offender provision.

³ To establish plain error, Lewis must demonstrate: (1) an error; (2) that is clear or obvious; and (3) that affects his substantial rights. Gov't of the V.I. v. Mills, 821 F.3d 448, 456 (3d Cir. 2016). If all three prongs are satisfied, then our Court has discretion to remedy the error “only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.” Id. at 457 (internal quotation marks and alteration omitted).

2009); see also Fed. R. Crim. P. 52(b) (“A plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.”). In the District Court, Lewis argued only that his prior aggravated assault conviction is not a crime of violence under the career offender provision. Thus, the District Court’s application of the career offender sentencing guideline is subject to plain error review with respect to Lewis’s bank robbery conviction and plenary review with respect to Lewis’s aggravated assault conviction.

Regardless of the standard of review, each issue raised on appeal requires us to consider whether a particular offense constitutes a crime of violence under § 4B1.2. A “crime of violence” is defined as “any offense under federal or state law, punishable by imprisonment for a term exceeding one year,” that “has as an element the use, attempted use, or threatened use of physical force against the person of another.”⁴ U.S.S.G. § 4B1.2(a)(1). “[P]hysical force” under § 4B1.2(a)(1) means “violent force,” which is a “force capable of causing physical pain or injury to another person.” Johnson v. United States, 559 U.S. 133, 140 (2010) (interpreting “physical force” as used in the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e)(2)(B)(i), whose language is identical to § 4B1.2(a)(1)).⁵ In addition, the use of physical force must be knowing or intentional;

⁴ The word “use” in the force clause of § 4B1.2(a)(1) means “the intentional employment of . . . force, generally to obtain some end.” Tran v. Gonzales, 414 F.3d 464, 470 (3d Cir. 2005).

⁵ Although Johnson involved a sentencing enhancement under the ACCA, our Court has extended that analysis to § 4B1.2. E.g., United States v. Chapman, 866 F.3d 129, 132 n.3 (3d Cir. 2017); Brown, 765 F.3d at 189 n.2; United States v. Hopkins, 577 F.3d 507, 511 (3d Cir. 2009).

recklessness or gross negligence are insufficient. United States v. Chapman, 866 F.3d 129, 133-36 (3d Cir. 2017); United States v. Otero, 502 F.3d 331, 335 (3d Cir. 2007).

To determine whether the crime of conviction is a crime of violence, courts typically apply the categorical approach, which compares the elements of the statute under which the defendant was convicted with the definition of a crime of violence. Chapman, 866 F.3d at 133-34 (citing Descamps v. United States, 133 S. Ct. 2276, 2281 (2013)). Specifically, we “ask whether ‘the use or threat of physical force’ is an element of the [statute]” under which the defendant was convicted. Id. at *4. This requires us to “ascertain the least culpable conduct hypothetically necessary to sustain a conviction under the statute.” United States v. Dahl, 833 F.3d 345, 350 (3d Cir. 2016) (internal quotation marks omitted). In making this determination, “we look only to the statutory definitions—i.e., the elements—of a defendant’s . . . offense, and not to the particular facts underlying the conviction.”⁶ Chapman, 866 F.3d at 134 (internal quotation marks, alterations, and emphasis omitted). That crime is then compared to the crime of violence definition described above. Id. at 133-36.⁷

⁶ If a statute is divisible such that it “list[s] elements in the alternative, and thereby define[s] multiple crimes,” then courts use the modified categorical approach, which allows a court to consider certain limited documents to determine “what crime, with what elements, a defendant was convicted of.” Mathis v. United States, 136 S. Ct. 2243, 2249 (2016).

⁷ Our concurring colleague, relying on United States v. Robinson, 844 F.3d 137, 141 (3d Cir. 2016), says that we need not resort to the categorical approach to determine whether the instant conviction (as opposed to a prior conviction) constitutes a crime of violence because “the record of all necessary facts [concerning the offense] are before the District Court.” After Robinson, however, our Court issued Chapman, in which it applied the categorical approach to determine whether the instant offense there constituted a crime of violence under § 4B1.2, see Chapman, 866 F.3d at 131-34, even

With this background, we will consider whether unarmed bank robbery under § 2113(a) and aggravated assault under 18 Pa. Cons. Stat. § 2702(a)(4) are crimes of violence.

though the Court had the facts before it and could have reviewed the record to evaluate whether the offense was a crime of violence. We are bound to follow Chapman and not Robinson. First, like this case, Chapman assessed whether a conviction constituted a crime of violence under the career offender sentencing enhancement and the conviction was based on a plea rather than a trial. In contrast, Robinson concerned whether a post-trial conviction for Hobbs Act robbery qualified as a crime of violence for purposes of a conviction under 18 U.S.C. § 924(c), which punishes brandishing a firearm during the commission of a crime of violence. 844 F.3d at 139-40. Second, the Chapman panel was aware of Robinson and chose not to apply it, *see, e.g.*, 866 F.3d at 136 (Jordan, J., concurring) (citing Robinson). Moreover, four other circuit courts have similarly applied the categorical or modified categorical approach to assess whether an instant offense of federal bank robbery was a crime of violence under the career offender sentencing enhancement. *See United States v. Harper* 869 F.3d 624, 626-27 (8th Cir. 2007); United States v. Ellison, 866 F.3d 32, (1st Cir. 2017); United States v. Brewer, 848 F.3d 711 (5th Cir. 2017); United States v. McBride, 826 F.3d 293 (6th Cir. 2016). As a result, we have applied Chapman because that is what the precedent requires.

Our application of the precedent, however, does not mean that our concurring colleague and the courts whose opinions she cites lack a well-founded concern. In fact, we agree with the observations of these jurists concerning the practicalities (or put differently, the lack of reality) sometimes associated with the categorical approach. Thus, contrary to the concurrence's characterization, we are not closing our eyes to the facts or even the well-placed criticism of the categorical approach. Rather, we are applying the approach required by the current, albeit criticized, precedent.

In any event, whether or not we apply the categorical approach, the result is the same because Lewis's unarmed bank robbery conviction constituted a crime of violence under the enumerated offenses clause of § 4B1.2. In the context of the Sentencing Guidelines, "generic federal robbery is defined . . . without the requirement of more than *de minimis* force." United States v. Graves, __ F.3d __, 2017 WL ____ (3d Cir. Dec. 13, 2017). Robbery by intimidation under § 2113(a) requires at least *de minimis* force and therefore is consistent with the generic crime of robbery referenced in § 4B1.2's enumerated offenses clause. For this additional reason, it qualifies as a crime of violence.

III

A

Section 2113(a) provides, in relevant part:

Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion 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 under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 2113(a). The elements of the crime are: “[1] taking, or attempting to take, [2] anything of value, [3] by force and violence, by intimidation, or by extortion” from a financial institution whose accounts are insured by the Federal Deposit Insurance Corporation. United States v. Askari, 140 F.3d 536, 548 (3d Cir. 1998) (en banc), vacated and superseded on other grounds on reconsideration, 159 F.3d 774 (3d Cir. 1998); see also 18 U.S.C. § 2113(f) (defining “bank”). Thus, § 2113(a) bank robbery is committed “by force and violence, or by intimidation” or by “extortion.” The least culpable conduct for which a defendant can be convicted under the statute is taking money or property “by intimidation.” We must therefore assess whether intimidation necessarily includes a use of physical force, meaning force “capable of causing physical pain or injury to another person,” Johnson, 559 U.S. at 140, and if so, whether the intimidation must be intentional or knowing.

To intimidate under § 2113(a) means to cause fear of bodily injury. Askari, 140 F.3d at 541; see also United States v. Ellison, 866 F.3d 32, 37 (1st Cir. 2017) (concluding

that “proving ‘intimidation’ under § 2113(a) requires proving that a threat of bodily harm was made”); United States v. McBride, 826 F.3d 293, 296 (6th Cir. 2016) (observing that “[r]obbery by intimidation involves the threat to do immediate bodily harm”) (alterations, internal quotation marks, and emphasis omitted). Causing a fear of bodily injury in the context of a bank robbery necessarily requires a threat of physical force. As the Court of Appeals for the Fifth Circuit recently observed, “[t]he kind of intimidation that suffices to put a victim in fear of bodily injury during the course of a bank robbery . . . is the very sort of threat of immediate, destructive, and violent force required to satisfy the crime of violence definition.” United States v. Brewer, 848 F.3d 711, 715 (5th Cir. 2017) (internal quotation marks omitted); cf. Chapman, 866 F.3d at 135 (concluding that a threat “to injure” another “necessarily threatens the use of physical force”). Thus, robbery by intimidation under § 2113(a) necessarily includes the use or threatened use of physical force.⁸ Brewer, 848 F.3d at 715-16; Ellison, 866 F.3d at 35-38; McBride, 826 F.3d at 296; United States v. McNeal, 818 F.3d 141, 153 (4th Cir. 2016). Therefore, § 2113(a)’s intimidation element satisfies § 4B1.2(a)(1)’s use or threatened use of force requirement.

⁸ Lewis’s argument that intimidation in the form of a threat to cause bodily injury can occur without the use of physical force, such as through a threat to release poison or a hazardous substance, was rejected in United States v. Castleman, where the Supreme Court stated that poisoning does constitute a “use or attempted use of physical force” even though the force is applied indirectly. 134 S. Ct. 1405, 1415 (2014) (explaining that the use of force “is the act of employing poison knowingly as a device to cause physical harm” and that the fact “the harm occurs indirectly, rather than directly (as with a kick or punch), does not matter”); see also Ellison, 866 F.3d at 37-38 (rejecting same argument raised by Lewis). Although Castleman involved the application of the force clause in 18 U.S.C. § 921(a)(33)(A)(ii), our Court has explicitly extended Castleman’s analysis of the use of physical force to the use of physical force clause under § 4B1.2(a)(1). Chapman, 866 F.3d at 132-33; see also Ellison, 866 F.3d at 37-38 (same).

Section 2113(a) also satisfies § 4B1.2(a)(1)’s scienter requirement even though § 2113(a) lacks explicit scienter language. The Supreme Court has held that § 2113(a) “requir[es] proof of general intent—that is, that 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) (emphasis omitted). Thus, § 2113(a) has an implicit scienter requirement of intent or knowledge as to the taking of property by intimidation, which forecloses Lewis’s argument that a defendant could be convicted under that statute for mere reckless or negligent conduct. See Ellison, 866 F.3d at 38-40 (noting Carter requires proof defendant knowingly took property and knew that his actions were objectively intimidating); McNeal, 818 F.3d at 155-56 (same); McBride, 826 F.3d at 296 (observing Carter requires prosecution to prove that defendant “at least kn[e]w that his actions would create the impression in an ordinary person that resistance would be met by force”).

Therefore, because federal bank robbery by intimidation necessarily involves the use or threatened use of physical force and proof of the required mental state, it qualifies as a crime of violence within the meaning of § 4B1.2,⁹ see Ellison, 866 F.3d at 35 (holding that 18 U.S.C. § 2113(a) is a crime of violence under the force clause of

⁹ Even before Johnson’s interpretation of “physical force” under the ACCA, courts of appeal held that § 2113(a) bank robbery was a crime of violence under § 4B1.2. See United States v. Wright, 957 F.2d 520, 521 (8th Cir. 1992); United States v. Jones, 932 F.2d 624, 625 (7th Cir. 1991); United States v. Selfa, 918 F.2d 749, 751 (9th Cir. 1990); United States v. Davis, 915 F.2d 132, 133 (4th Cir. 1990); United States v. Maddalena, 893 F.2d 815, 819 (6th Cir. 1989).

§ 4B1.2); Brewer, 848 F.3d at 716 (same); McBride, 826 F.3d at 295-96 (same), and the District Court did not err in so finding.

B

Lewis also argues that the District Court erred in finding that his prior conviction for aggravated assault under 18 Pa. Cons. Stat. § 2702(a)(4) constitutes a crime of violence. To evaluate his claim, we must determine whether the elements of § 2702(a)(4) necessarily include a use of physical force under § 4B1.2(a)(1)’s force clause and proof of intent or knowledge.¹⁰

Section 2702(a)(4) punishes a person who “attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon.” 18 Pa. Cons. Stat. § 2702(a)(4). The provision explicitly requires intent or knowledge, thereby satisfying the force clause’s required mental state. See Chapman, 866 F.3d at 135-36; Otero, 502 F.3d at 335. Thus, we must determine whether § 2702(a)(4)’s element of “caus[ing] bodily injury with a deadly weapon” requires use of physical force under § 4B1.2(a)(1), meaning a “violent force” that is “capable of causing physical pain or injury to another person,” Johnson, 559 U.S. at 140 (emphasis omitted).

To determine whether the crime includes that sort of violent force, we must examine two terms in the statute: bodily injury and deadly weapon. Pennsylvania defines “[b]odily injury” to mean an “impairment of physical condition or substantial pain,” and

¹⁰ The parties do not dispute that Pennsylvania’s aggravated assault statute is divisible, meaning the modified categorical approach applies, and that Lewis was convicted under 18 Pa. Cons. Stat. § 2702(a)(4).

“[d]eadly weapon” to include “any . . . device or instrumentality which, in the manner in which it is used or intended to be used, is calculated or likely to produce death or serious bodily injury.” 18 Pa. Cons. Stat. § 2301. Aggravated assault under § 2702(a)(4) therefore requires intentional or knowing conduct sufficient to cause bodily “impairment” or “substantial pain” by means of a device that is “calculated or likely to produce death or serious injury.” Because “it is impossible to cause bodily injury without applying force,” Castleman, 134 S. Ct. at 1415, conduct causing bodily “impairment” or “substantial pain” necessarily involves a use of a force. Moreover, the force under § 2702(a)(4) necessarily includes physical force within the meaning of § 4B1.2(a)(1) because § 2702(a)(4) requires use of an object “calculated or likely to produce death or serious injury.” Hence, the offense requires proof of “violent force” “capable of causing physical pain or injury,” required by Johnson, 559 U.S. at 140 (emphasis omitted). United States v. Whindleton, 797 F.3d 105, 114 (1st Cir. 2015) (explaining the dangerous weapon element “imports the violent force required by Johnson into the otherwise overbroad simple assault statute”); see also Johnson, 559 U.S. at 140-41 (suggesting that the ACCA’s force element would be satisfied by crimes “characterized by extreme physical force, such as murder, forcible rape, and assault and battery with a dangerous weapon”) (internal quotation marks omitted).¹¹ As a result, aggravated assault under 18 Pa. Cons. Stat. §

¹¹ Lewis’s reliance on Commonwealth v. Thomas, 867 A.2d 594, 597 (Pa. Super. Ct. 2005), which affirmed the aggravated assault conviction of a mother who neglected and starved her child to death is misplaced because that case involves a different provision of Pennsylvania’s aggravated assault statute. Moreover, our Court has rejected the argument that causing bodily injury or death does not necessarily require a use of violent force. Chapman, 866 F.3d at 135-36.

2702(a)(4) qualifies as a crime of violence under § 4B1.2(a)(1), and the District Court was correct in so finding.

IV

For the foregoing reasons, Lewis was properly designated a career offender under § 4B1.1, and we will affirm.

United States v. Lewis
No. 16-4378

ROTH, *Circuit Judge*, concurring in the judgment.

Were I a poet, I would opine that the “categorical approach” is an albatross hung round my neck. But were this “bird” really dead, I would feel no guilt for having killed it.¹ Indeed, the categorical approach has of late received its share of deserved criticism. Chief Judge Carnes of the Eleventh Circuit lamented that the categorical approach had once again thrust him and his colleagues “down [a] rabbit hole . . . to a realm where we must close our eyes as judges to what we know as men and women.”² In his concurrence in *United States v. Chapman*, Judge Jordan likened the categorical approach to “kudzu . . . which seems to be always enlarging its territory.”³ That kudzu quality infects the Majority’s opinion here, which applies the categorical approach where it does not belong—namely, to instant offenses to which a defendant has pled guilty. I write separately in an attempt to curb the misapplication of the doctrine.

In this case, Andre Lewis pled guilty to one count of unarmed robbery and two counts of attempted unarmed robbery “knowingly and unlawfully by force and violence, and by intimidation.” **App. 19-20.** Those are the instant offenses in this case, not prior convictions. In *United States v. Robinson*, we held that, in circumstances such as these,

¹ I recognize that Samuel Taylor Coleridge’s albatross, in *The Rime of the Ancient Mariner*, was already dead when it was hung round the mariner’s neck. I take some artistic license with the metaphor.

² *United States v. Davis*, 875 F.3d 592, 595 (11th Cir. 2017).

³ 866 F.3d 129, 136 (3d Cir. 2017) (Jordan, J., concurring).

where an instant offense is tried to conviction or where the underlying facts are admitted in a guilty plea, “[t]he remedial effect of the ‘categorical approach’ is not necessary.”⁴ That is because “the record of all necessary facts [is] before the district court” and “[t]he defendant suffers no prejudice” when the categorical approach is not applied.⁵ To further explain that conclusion, we examined the history of the categorical approach and its rationale.⁶ A reminder of that history is warranted here.

Twenty-seven years ago, *Taylor v. United States* spawned the categorical approach. There, the Supreme Court considered whether two *prior convictions* for second-degree burglary were “violent felony” convictions under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), so that they triggered the statute’s sentencing enhancement.⁷ The central question in *Taylor* was “whether the sentencing court in applying § 924(e) must look only to the statutory definitions of the prior offenses, or whether the court may consider other evidence concerning the defendant’s prior crimes.”⁸ The Court opted for the former approach—the categorical approach—largely because of “the practical difficulties and potential unfairness of a factual approach” for prior convictions, some of which may have occurred in the distant past.⁹

⁴ 844 F.3d 137, 141 (3d Cir. 2016).

⁵ *Id.* at 141, 143.

⁶ *Id.* at 141-143.

⁷ 495 U.S. 575 (1990).

⁸ *Id.* at 600.

⁹ *Id.* at 601. The *Taylor* Court also considered the text and legislative history of the ACCA, which are not germane here. This case is about Lewis’s status as a “career offender” under § 4B1.1 of the Federal Sentencing Guidelines. Since *Taylor*, the reach of the categorical approach has extended to the Sentencing Guidelines and immigration, among other contexts. See, e.g., *United States v. Brown*, 765 F.3d 185, 188-89 (3d Cir.

The problem *Taylor* was trying to solve was an epistemic and evidentiary one: How is a “trial court . . . to determine what [a defendant’s prior] conduct was”?¹⁰ The Court recognized that a factual inquiry years after a prior conviction was fraught with risk and—in the face of an incomplete or otherwise undependable factual record—would effectively require a fresh trial.¹¹ Even in the case of prior guilty pleas, the Court acknowledged that “there often is no record of the underlying facts” and “it would seem unfair to impose a sentence enhancement” where a sentencing court cannot glean from the record whether a defendant had pleaded guilty to a lesser offense, instead of the violent felony.¹² For that reason, the Court embraced the categorical approach as a means of analyzing prior convictions.

That practical concern does not apply when a defendant has admitted the facts underlying an instant offense before the very judge who will be sentencing him. Indeed, since *Taylor*, every landmark Supreme Court decision to apply and develop the categorical approach has done so in the context of prior convictions only. *See, e.g., Shepard v. United States*, 544 U.S. 13, 23 (2005) (analyzing prior Massachusetts burglary convictions entered upon guilty pleas and recognizing that the categorical approach served as a means of avoiding “collateral trials” on prior convictions); *Johnson v. United*

2014) (“Sentencing courts examining a *prior conviction* to determine whether it is a federally defined ‘crime of violence’ must apply a categorical approach.” (emphasis added)); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1567-68 (2017) (using the approach to analyze whether an alien’s prior conviction qualified as an “aggravated felony” under the Immigration and Nationality Act).

¹⁰ 495 U.S. at 601.

¹¹ *Id.*

¹² *Id.* at 601-02.

States, 559 U.S. 133, 144-145 (2010) (using the modified categorical approach to analyze a defendant’s seven-year-old battery conviction); *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013) (“To determine whether a past conviction is for [a violent felony], courts use what has become known as the ‘categorical approach.’” (emphasis added)); *Mathis v. United States*, 136 S. Ct. 2243, 2247 (2016) (“To determine whether a past conviction is for [a violent felony], courts compare the elements of the crime of conviction with the elements of the ‘generic’ version of the listed offense . . .” (emphasis added)).

Mindful of that history and rationale, we held in *Robinson* that the categorical approach need not be applied when the facts underlying an instant offense “have either been found by [a] jury or admitted by the defendant in a plea.”¹³ The Majority chooses to ignore *Robinson* and instead points to *United States v. Chapman*, where this Court used the categorical approach to analyze a guilty plea to an instant offense.¹⁴ *Robinson* preceded *Chapman*; to the extent *Chapman* conflicts with *Robinson*, *Robinson* still controls. Our Internal Operating Procedures command as much and require en banc consideration for the holding in a precedential opinion to be overruled.¹⁵

The Majority’s preferred approach would have sentencing judges “ignore facts already known and instead proceed with eyes shut.”¹⁶ That willful blindness—which

¹³ 844 F.3d at 143.

¹⁴ 866 F.3d at 131-34.

¹⁵ 3d Cir. I.O.P. 9.1 (2017).

¹⁶ 866 F.3d at 138 (Jordan, J., concurring).

may allow violent offenders to evade accountability—has been lambasted before¹⁷ and I do so again today. If the albatross around my neck cannot be slayed, I will at least have the noose around its neck tightened.¹⁸

¹⁷ See, e.g., *Mathis v. United States*, 136 S. Ct. 2243, 2269 (2016) (Alito, J., dissenting) (“A real-world approach would avoid the mess that today’s decision will produce.”); *United States v. Faulls*, 821 F.3d 502, 516 (4th Cir. 2016) (Shedd, J., concurring) (“[T]he categorical approach is the antithesis of individualized sentencing; we do not consider what the individual to be sentenced has actually done, but the most lenient conduct punished by his statute of conviction. This flaw is even more apparent in cases like this one, involving instant offenses. . .”); *United States v. Doctor*, 842 F.3d 306, 312-313 (4th Cir. 2016) (Wilkinson, J., concurring) (remarking that the categorical approach “has pushed criminal sentencing to the very last place that sentencing ought to be, that is at an untenable remove from facts on the ground”).

¹⁸ Our recently published opinion in *United States v. Graves* provides a separate basis for today’s result. We held that the enumerated crime of “robbery” in the Federal Sentencing Guidelines requires no more than *de minimis* force, force “which pose[s] no threat of injury to another.” No. 16-3995 at 15, 20 (3d Cir. Dec. 13, 2017). Accordingly, bank robbery under 18 U.S.C. 2113(a)—the offense to which Lewis pled guilty—necessarily qualifies as “robbery” under Section 4B1.2 of the Guidelines, a “crime of violence.”

APPENDIX B

UNITED STATES DISTRICT COURT

Eastern District of Pennsylvania

UNITED STATES OF AMERICA

v.

ANDRE S. LEWIS

JUDGMENT IN A CRIMINAL CASE

Case Number: DPAE2:15cr000368-001

USM Number: 72337-066

Rossman D. Thompson, Esq.

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1, 2 and 3☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18:2113(a)	Bank Robbery	6/15/2015	1
18:2113(a)	Attempted Bank Robbery	6/25/2016	2
18:2113(a)	Attempted Bank Robbery	7/14/2016	3

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

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

12/15/2016

Date of Imposition of Judgment

/s/ Legrome D. Davis

Signature of Judge

Legrome D. Davis, J.

Name and Title of Judge

12/16/2016

Date

DEFENDANT: ANDRE S. LEWIS
CASE NUMBER: DPAE2:15cr000368-001

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
120 months imprisonment on counts 1, 2 and 3 to be served concurrent to each other. The total term of imprisonment is 120 months. The defendant is to receive credit for time served.

- ☒ The court makes the following recommendations to the Bureau of Prisons:
The defendant is to be evaluated for drug, alcohol and mental health treatment and is to receive any treatment deemed appropriate while imprisoned. The defendant is to receive any educational and vocational training available while imprisoned.
- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district:
☐ at _____ ☐ a.m. ☐ p.m. on _____
☐ as notified by the United States Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
☐ before 2 p.m. on _____
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

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

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ANDRE S. LEWIS
CASE NUMBER: DPAE2:15cr000368-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

3 years

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

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

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

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

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

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

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

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

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

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

STANDARD CONDITIONS OF SUPERVISION

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

DEFENDANT: ANDRE S. LEWIS
CASE NUMBER: DPAE2:15cr000368-001

SPECIAL CONDITIONS OF SUPERVISION

The defedant is to be evaluated and receive any drug, alcohol and mental health treatment deemed appropriate while on supervised release. He is to receive educational and voacational training.

The defendant is participate in the reentry program while on supervised release.

The defendant is to submit yearly tax returns and monthly financial reports to the U.S. Probation Department while on supervised Release. He in not permitted to open any lines of credit or credit cards while on supervised release without the advance permission of the U.S. Probation Department.

DEFENDANT: ANDRE S. LEWIS
CASE NUMBER: DPAE2:15cr000368-001

CRIMINAL MONETARY PENALTIES

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

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 300.00	\$	\$ 1,740.00

☐ 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.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
Wells Fargo Bank 2843 N. Broad Street Philadelphia, PA 19132	\$1,740.00	\$1,740.00	100

TOTALS	\$ <u>1,740.00</u>	\$ <u>1,740.00</u>
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☒ Restitution amount ordered pursuant to plea agreement \$ 1,740.00

☐ 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:

* 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.

DEFENDANT: ANDRE S. LEWIS
CASE NUMBER: DPAE2:15cr000368-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☒ Lump sum payment of \$ 300.00 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, ☐ 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:
THE DEFENDANT SHALL MAKE PAYMENTS FROM ANY WAGES HE MAY EARN IN PRISON IN ACCORDANCE WITH THE BUREAU OF PRISONS' INMATE FINANCIAL RESPONSIBILITY PROGRAM. ANY PORTION OF THE FINE OR ASSESSMENT THAT IS NOT PAID IN FULL AT THE TIME OF RELEASE FROM IMPRISONMENT SHALL BECOME A CONDITION OF SUPERVISED RELEASE, WITH PAYMENTS MADE AT THE RATE OF NOT LESS THAN \$ 25.00 PER QUARTER TO BEGIN 90 DAYS AFTER RELEASE FROM CUSTODY.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of 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:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.