No. _____

In the Supreme Court of the United States

ANTOINE LAMONT JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of Certiorari to the United States Court Of Appeals for the Ninth Circuit

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

JAY L. LICHTMAN*
State Bar # 73399
137 N. Larchmont Blvd., # 538
Los Angeles, California 90004
Telephone: (213) 568-0984
Email: jaylawla@aol.com

*Counsel of Record for Petitioner
Antoine Lamont Johnson

Table Of Contents

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 26 2026

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

UNITED STATES OF AMERICA, Respondent-Appellee, v. ANTOINE LAMONT JOHNSON, AKA O Killer, AKA OK, AKA Seal A, Petitioner-Appellant.	No. 19-55717 D.C. Nos. 2:16-cv-03419- RSWL 2:05-cr-00920-RSWL-2 Central District of California, Los Angeles ORDER

Before: RAWLINSON, CHRISTEN, and JOHNSTONE, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40. Accordingly, the combined petition for panel rehearing and for rehearing en banc (Dkt. No. 87) is **DENIED**.

Johnson v. United States

United States Court of Appeals for the Ninth Circuit

November 19, 2024, Argued and Submitted, Pasadena, California; June 3, 2025, Filed

No. 19-55717

Reporter
139 F.4th 830 *; 2025 U.S. App. LEXIS 13480 **; 2025 LX 190232; 2025 WL 1561518

ANTOINE LAMONT JOHNSON, AKA O Killer, AKA OK, AKA Seal A, Petitioner-Appellant, v. ***UNITED STATES*** OF AMERICA, Respondent-Appellee.

Subsequent History: Rehearing denied by, En banc, Rehearing denied by *United States v. Johnson, 2026 U.S. App. LEXIS 1988 (Jan. 26, 2026)*

Prior History: [**1] Appeal from the ***United States*** District Court for the Central District of California. D.C. Nos. 2:16-cv-03419-RSWL. 2:05-cr-00920-RSWL-2. Ronald S.W. Lew, District Judge, Presiding.

*Johnson v. **United States**, 2019 U.S. Dist. LEXIS 69723, 2019 WL 1790218 (Apr. 23, 2019)*

Core Terms

robbery, violent crime, violence, conspiracy, predicate, theory of liability, predicate crime, conspiracy to commit, district court, harmless, jury instructions, invalid, robber, truck, firearm, armor, furtherance of a conspiracy, substantive crime, residuary clause, use of a firearm, instruct a jury, instructional error, armed bank robbery, general verdict, use of force, co-conspirator, categorical, conspirator, juror, wig

Case Summary

Overview
Key Legal Holdings

- Hobbs Act robbery qualifies as a crime of violence under *18 U.S.C.S. § 924(c)*'s elements clause.
- Hobbs Act robbery under a Pinkerton theory of liability is a valid predicate crime of violence for purposes of *§ 924(c)*.
- The jury instructions correctly allowed the jury to convict Johnson of *§ 924(c)* based on either Hobbs Act robbery or Hobbs Act robbery under a Pinkerton theory of liability.
- Even if the jury instructions erroneously allowed the jury to rely on the invalid predicate of conspiracy to commit Hobbs Act robbery for the *§ 924(c)* conviction, that error was harmless on the facts of this case.

Material Facts

- Johnson was convicted by a jury of conspiracy to commit Hobbs Act robbery, Hobbs Act robbery, and using a firearm during a crime of violence under *18 U.S.C.S. § 924(c)* arising from the robbery of an armored truck in which a guard was fatally shot.
- The evidence at trial included eyewitness testimony of Johnson's involvement in the robbery, testimony that Johnson admitted his role, and DNA evidence linking Johnson to a disguise worn by one of the robbers.
- The jury instructions allowed the jury to convict Johnson of *§ 924(c)* based on his own commission of Hobbs Act robbery or based on his participation in a conspiracy during which a reasonably foreseeable Hobbs Act robbery occurred.

Controlling Law

- *18 U.S.C.S. § 924(c)*(use of a firearm during a crime of violence).
- *18 U.S.C.S. § 1951(a)*(Hobbs Act robbery).
- *Pinkerton v. **United States**, 328 U.S. 640, 66 S.*

error in the jury instructions because the district [**2] court correctly told the jury that it could rely on either of two valid predicate crimes of violence: the direct commission of Hobbs Act robbery or Hobbs Act robbery under a *Pinkerton* theory of liability. Second, the panel concluded that even if the trial court had instructed the jury that it could rely on one invalid predicate in addition to the valid theories of Hobbs Act robbery, the error would have been harmless on the facts of this case.

Counsel: Jay L. Lichtman (argued), Los Angeles, California, for Petitioner-Appellant.

Suria M. Bahadue (argued), Assistant ***United States*** Attorney; Bram M. Alden and David R. Friedman, Assistant ***United States*** Attorneys, Chiefs, Criminal Appeals Section; E. Martin Estrada, ***United States*** Attorney; ***United States*** Department of Justice, Los Angeles, California; Elizabeth R. Yang, Assistant ***United States*** Attorney, Criminal Division, Human Rights and Special Prosecutions, ***United States*** Department of Justice, Washington, D.C.; for Respondent-Appellee.

Judges: Before: Johnnie B. Rawlinson, Morgan Christen, and Anthony D. Johnstone, Circuit Judges. Opinion by Judge Christen.

Opinion by: Morgan Christen

Opinion

[*833] CHRISTEN, Circuit Judge:

Antoine Johnson appeals the district court's denial of his motion to vacate, [**3] set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. A jury convicted Johnson of conspiracy to commit Hobbs Act robbery, Hobbs Act robbery, and the use and discharge of a firearm causing death during a crime of violence pursuant to 18 U.S.C. § 924(c)(1)(A)(iii), (j)(1). The charges arose from the robbery of an armored truck in which a guard was fatally shot. We affirmed Johnson's convictions on direct appeal. In his § 2255 motion, Johnson argued that his § 924(c) conviction was unlawful because intervening Supreme Court case law invalidated § 924(c)'s residual clause and therefore, Johnson reasoned, the jury must have based his conviction on invalid crime-of-violence predicates. The district court denied Johnson's motion, holding that his § 924(c) conviction was based on at least one valid predicate pursuant to the elements clause: Hobbs Act robbery. The district court also ruled that any error in the jury instructions was harmless because no reasonable juror could have found Johnson guilty of § 924(c) based solely on his participation in the conspiracy to commit Hobbs Act robbery and not commission of the robbery itself.

We affirm the district court's ruling on two alternative grounds. First, we hold there was no error in the jury instructions because the district [**4] court correctly told the jury that it could rely on either of two theories to show Hobbs Act robbery, and Hobbs Act robbery qualifies as a predicate crime of violence. Second, we conclude that the instructional error Johnson argues would have been harmless on the facts of this case.[1]

I

In our opinion resolving Johnson's direct appeal, we recounted that on March 1, 2004, four assailants robbed "an armored truck as it was making a cash delivery to a Bank of America [branch] in South Central Los Angeles." United States v. Johnson, 767 F.3d 815, 818 (9th Cir. 2014). One participant acted as a getaway driver. "One of the assailants was wearing a Rastafarian wig and at least one was wearing gloves. During the robbery, one of the armored truck security guards was shot and killed." *Id.* A grand jury charged Johnson and three co-conspirators with conspiracy to commit Hobbs Act robbery, Hobbs Act robbery, and the use and discharge of a firearm causing death during a crime of violence under § 924(c).[2] Two of [*834] the co-

[1] Johnson's brief on appeal also raises two uncertified claims that he received ineffective assistance of counsel. ***HN1*** We construe an uncertified issue raised on appeal as a motion to expand the certificate of appealability, ***Towery v. Schriro, 641 F.3d 300, 311 (9th Cir. 2010)***. We grant the motion if it raises a substantial question of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); *see* Buck v. Davis, 580 U.S. 100, 115, 137 S. Ct. 759, 197 L. Ed. 2d 1 (2017). Here, Johnson did not raise a substantial question that he was denied effective assistance of counsel. *See* Strickland v. Washington, 466 U.S. 668, 687-95, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We therefore deny his motion to expand the certificate.

[2] *See* 18 U.S.C. § 1951(a) ("Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both."); 18 U.S.C. § 924(c)(1)(A)(iii) ("[A]ny person

defendants pleaded guilty and did not testify at trial. The government tried Johnson with the remaining co-conspirator, Michael Williams. *Id.* Williams filed a separate motion pursuant to 28 U.S.C. § 2255 that we decide in a separate disposition.

The primary [**5] issue at trial was whether Johnson was one of the robbers. The surviving armored truck guard testified that one of the robbers was wearing a "red, green, black, yellow" hat with "dreadlocks hanging from under the hat." This witness described the wig-wearing robber running up to the truck and shooting a "handgun." The bank assistant manager testified that she saw a robber wearing a "Jamaican-type" cap carrying an "Uzi." The gun she identified at trial is a similar model to a gun recovered later and linked to the robbery. Additional eyewitnesses testified that they saw the robbers running away from the armored truck carrying guns and dropping the wig and gloves as they ran.

The police recovered the wig in the path of the robbers' escape and were able to collect several hairs from it. Four of the hairs were tested for DNA. The jury heard testimony explaining that the DNA detected in the hair samples generated a "1 in 100 quadrillion" statistical match for Johnson's DNA.

The government also introduced evidence that Johnson was a member of a gang led by Jamal Dunagan. Dunagan testified that he met Johnson the day after the robbery because one of the robbery organizers was concerned that Johnson [**6] would not come forward with his portion of the proceeds. According to Dunagan, Johnson said he was not going to give anyone else money from the robbery because the others had left him behind when they escaped. Dunagan also testified that Johnson told him that he had accidentally shot himself in the foot while running away from the crime scene.

Defense counsel impeached Dunagan's credibility on cross-examination. Before the jury, Dunagan admitted to: (1) being a prior cooperator in a federal drug trafficking investigation; (2) lying under oath and suborning perjury in a prior case; (3) routinely lying to police; and (4) specifically contacting law enforcement about fellow gang members against whom he held grudges. The defense also called two medical professionals who testified that they had examined Johnson one month and four years after the robbery, respectively, and observed no indication that Johnson had suffered a gunshot wound to his foot.[3]

One of the government's witnesses, Veronica Burgess, could not be located for trial. The court nevertheless admitted her grand jury testimony because it ruled that the government proved by a preponderance of the evidence that Johnson caused her [**7] unavailability by threatening her. *Johnson, 767 F.3d at 818-19*. A law enforcement witness read Burgess's grand jury testimony aloud to the jury. In it, Burgess explained that she overheard Johnson and others planning the robbery in a restaurant a few days before the robbery occurred. The jury also heard testimony that in several earlier interviews [*835] with law enforcement, Burgess gave a variety of inconsistent statements about who she was with when she allegedly overheard the conversation in the restaurant, the date and time of the meeting in the restaurant, and which co-conspirators were present. Finally, the jury heard that Burgess had told the grand jury that a friend of hers was with her when she overheard the conspirators' planning meeting in the restaurant, but that friend testified at trial that she was not at the restaurant and did not overhear the meeting Burgess described.

At the close of evidence, the district court instructed the jury on three counts: Count One was conspiracy to commit Hobbs Act robbery. Count Two was Hobbs Act robbery. For this count, the district court instructed the jury that it could convict on either of two theories of liability: (1) the defendant committed the robbery himself; [**8] or (2) the defendant was guilty of Hobbs Act robbery under a *Pinkerton* theory of liability.[4]

---

who, during and in relation to any crime of violence . . . uses or carries a firearm . . . shall, in addition to the punishment provided for such crime of violence . . . if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.").

[3] An emergency room nurse who treated Johnson for a head and neck injury after a minor car accident approximately one month after the robbery testified that she did not observe Johnson had a gunshot wound to his foot while checking for sensation in his extremities. The professional who examined Johnson's foot four years after the robbery testified that, after viewing x-rays and conducting a physical examination, she saw no evidence he had ever suffered a gunshot wound to that area.

[4] *HN2* A co-conspirator can be held liable for a substantive offense committed by another member of a conspiracy if the offense was within the scope of the conspiracy, committed in furtherance of the conspiracy, and a reasonably foreseeable consequence of the conspiracy. *Pinkerton v. United States, 328 U.S. 640, 647, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946)*.

Count Three charged Johnson with using a firearm during a crime of violence pursuant to § 924(c). For Count Three, Jury Instruction 18 directed the jury that it could convict based on one of two theories of liability: by finding that Johnson committed the crime of violence himself, or by finding that Johnson was "part of a conspiracy as charged in Count One, during or in furtherance of which occurred the reasonably foreseeable crime of robbery and the knowing use of the firearm during and in relation to that crime." The court instructed the jury that Hobbs Act robbery is a crime of violence.

Jury Instruction 19 contained further instructions on the elements necessary to find Johnson guilty of the § 924(c) offense based on his involvement in the conspiracy. Specifically, it instructed the jury that, to convict, the government must have proven five elements beyond a reasonable doubt:

> First, a person named in Count Three of the Indictment committed the crime of robbery and knowingly used the firearm during and in relation to that crime;
>
> Second, the person was a member of the conspiracy charged in Count One of the **[**9]** Indictment;
>
> Third, the person committed the crime of robbery and knowingly used the firearm during and in relation to that crime in furtherance of the conspiracy;
>
> Fourth, the defendant was a member of the same conspiracy at the time the offense charged in Count Three was committed; and
>
> Fifth, the offense fell within the scope of the unlawful agreement and could reasonably have been foreseen to be a necessary or natural consequence of the unlawful agreement.

The jury found Johnson guilty on all three counts, but its general verdict did not specify whether it convicted Johnson of § 924(c) based on his own conduct or based on his participation in the conspiracy. The district court sentenced Johnson to 240 months on Count One and 240 months on Count Two, for a total of 480 months to be served consecutively. On Count Three, the court sentenced Johnson to life in prison.

Johnson appealed his convictions. On direct appeal, he argued that Burgess's out-of-court grand jury testimony should not have been admitted because the government **[*836]** had not shown by clear and convincing evidence that he caused Burgess's absence at trial. *Johnson, 767 F.3d at 819-20*. We affirmed Johnson's convictions on direct appeal, holding that the government **[**10]** had met its burden to show that Johnson threatened Burgess and caused her unavailability by a preponderance of the evidence. *Id. at 822-23*.

Johnson filed this § 2255 motion in 2016. The district court denied it in April 2019 after several delays and extensions in the briefing schedule. In the motion, Johnson argued that his § 924(c) conviction should be reversed because the district court's instructions allowed the jury to convict on Count Three based on conspiracy to commit Hobbs Act robbery, and Johnson argued that conspiracy to commit Hobbs Act robbery does not qualify as a "crime of violence." The district court acknowledged there were cases pending before the Supreme Court and our court that would likely resolve whether conspiracy to commit Hobbs Act robbery qualifies as a crime of violence for purposes of § 924(c). But the court denied Johnson's motion because it concluded that Hobbs Act robbery, Count Two, does qualify as a crime of violence and, even if the jury interpreted the instructions to mean that the Count One conspiracy conviction could serve as a § 924(c) predicate, that error would have been harmless on the facts of Johnson's case. On the latter point, the district court reasoned that the conspiracy charged **[**11]** in Count One "was inextricably intertwined with, and in furtherance of, the substantive Hobbs Act robbery" and "it makes little sense that [Johnson] could have only discharged a firearm in the conspiracy but not the substantive Hobbs Act robbery."

Johnson filed a timely appeal, and our court granted a certificate of appealability (COA) on one issue: "whether [Johnson's] conviction and sentence for violating 18 U.S.C. § 924(c) must be vacated because neither conspiracy to commit Hobbs Act robbery, nor Hobbs Act robbery based on a *Pinkerton* theory of liability, is a qualifying predicate crime of violence."

Johnson's § 2255 appeal was stayed pending the resolution of a related case, ***United States*** *v. Dominguez (Dominguez I), 954 F.3d 1251 (9th Cir. 2020)*. In *Dominguez I*, we held that both *attempted* Hobbs Act robbery and Hobbs Act robbery qualify as crimes of violence under § 924(c)'s elements clause. *Dominguez I, 954 F.3d at 1260-62*. The Supreme Court vacated *Dominguez I* after it ruled in *United States v.*

Taylor, 596 U.S. 845, 851-52, 142 S. Ct. 2015, 213 L. Ed. 2d 349 (2022), that attempted Hobbs Act robbery is not a crime of violence. *Dominguez v. **United States**, 142 S. Ct. 2857, 213 L. Ed. 2d 1082 (2022)* (granting certiorari and vacating judgment). We then vacated Dominguez's *§ 924(c)* convictions that were based on attempted Hobbs Act robbery but reaffirmed that Hobbs Act robbery qualifies as a crime of violence under *§ 924(c)*'s elements clause. ***United States** v. Dominguez (Dominguez II), 48 F.4th 1040 (9th Cir. 2022)*. After *Dominguez II* was resolved, we lifted the stay **[**12]** in this appeal. Before Johnson filed his opening brief, we decided *United States v. Eckford, 77 F.4th 1228 (9th Cir. 2023)*, and again held that Hobbs Act robbery qualifies as a crime of violence under *§ 924(c)*'s elements clause. *Id. at 1236*.

II

HN3 We review "de novo a district court's denial of relief to a federal prisoner under *28 U.S.C. § 2255*." ***United States** v. Swisher, 811 F.3d 299, 306 (9th Cir. 2016)* (en banc). We may affirm the denial of a writ of habeas corpus on any ground supported by the record. *Holley v. Yarborough, 568 F.3d 1091, 1098 (9th Cir. 2009)*. **[*837]** We review "de novo whether a criminal conviction is a 'crime of violence' and whether a jury instruction misstated the elements of an offense." ***United States** v. Begay, 33 F.4th 1081, 1087 (9th Cir. 2022)* (en banc) (quoting ***United States** v. Benally, 843 F.3d 350, 353 (9th Cir. 2016)*).

III

Johnson continues to challenge his conviction for using a firearm while committing a crime of violence pursuant to *§ 924(c)*, but given some of the intervening case law published since he originally filed his *§ 2255* motion, Johnson now argues that his *§ 924* conviction was potentially based on an invalid predicate crime of violence because *neither* Hobbs Act robbery under a *Pinkerton* theory of liability nor conspiracy to commit Hobbs Act robbery are valid predicate crimes of violence under *§ 924(c)*'s elements clause.[5]

[5]Johnson also preserves his arguments that Hobbs Act robbery is not a crime of violence. As an initial matter, the COA does not cover whether Hobbs Act robbery is a crime of violence, and we decline to expand the COA on this issue because binding precedent from our circuit controls the question. *28 U.S.C. § 2253(c)(2)*; *see Buck, 580 U.S. at 115*.

The government's position has also changed since the time Johnson first filed his motion. It now concedes that conspiracy to commit Hobbs Act robbery is not a valid **[**13]** predicate crime of violence for purposes *§ 924(c)*'s elements clause. *See **United States** v. Reed, 48 F.4th 1082, 1088 (9th Cir. 2022)*. But the government maintains its position that Johnson's *§ 924(c)* conviction was supported by his conviction for Hobbs Act robbery, either by direct commission of the robbery or on a *Pinkerton* theory of liability. Thus, the remaining substantive issue before the panel is whether Hobbs Act robbery under a *Pinkerton* theory of liability qualifies as a valid predicate crime of violence for purposes of *§ 924(c)*.

In addition to their substantive legal dispute about which crimes can serve as *§ 924(c)* predicates, the parties also disagree about which predicate crimes were identified in the district court's jury instructions. We hold that the jury instructions allowed the jury to convict Johnson of *§ 924(c)* based on either of two valid predicates: Hobbs Act robbery or Hobbs Act robbery under a *Pinkerton* theory of liability. The instructions for Count Three described both of these theories.

A

HN4 *Section 924(c)* imposes additional punishment for "any person who, during and in relation to any crime of violence . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm." *Section 924(c)* defines "crime of violence" as a felony that "(A) has as an element the use, attempted use, or threatened **[**14]** use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *18 U.S.C. § 924(c)(3)*. The first clause is typically referred to as "the elements clause" and the second clause is referred to as "the residual clause."

HN5 In *United States v. Davis, 588 U.S. 445, 469, 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019)*, the Supreme Court held that *§ 924(c)*'s residual clause is unconstitutionally vague. Therefore, to qualify as a crime of violence and support a conviction under **[*838]** *§ 924(c)*, an offense must meet the requirements of the elements clause. We apply the

As noted, in ***United States** v. Eckford*, we affirmed that Hobbs Act robbery qualifies as a crime of violence pursuant to *§ 924(c)*'s elements clause. *77 F.4th at 1232-36*.

categorical approach to determine whether a crime fits the federal definition of a "crime of violence." *See Taylor, 596 U.S. at 860*. Here, the government was required to show that at least one of Johnson's convictions had as an element the use, attempted use, or threatened use of force. *Id.*

Johnson argues that Hobbs Act robbery under a *Pinkerton* theory of liability does not qualify as a predicate crime of violence capable of supporting a *§ 924(c)* conviction. We disagree.

HN6 In ***United States*** *v. Henry, 984 F.3d 1343, 1356 (9th Cir. 2021)*, we affirmed long-standing precedent establishing that *Pinkerton* attaches liability for substantive crimes that are reasonably foreseeable in furtherance of a conspiracy, **[**15]** including *§ 924(c)* offenses. The defendant in *Henry* was a member of a group that committed a series of armed bank robberies, but he remained outside of the banks during the commission of the crimes. *Id. at 1347-48*. *HN7* In *Henry*, we recognized that *Davis* held that the residual clause in *§ 924(c)* is unconstitutionally vague but went on to hold that an armed bank robbery conviction proved through a *Pinkerton* theory of liability can still serve as a valid predicate crime of violence supporting a *§ 924(c)* conviction under the elements clause. *Id. at 1355-56*. We reasoned that, because *Pinkerton* serves to attach liability for the commission of a substantive crime, the relevant consideration in *Henry* was whether the substantive crime committed in furtherance of the conspiracy (armed bank robbery) qualified as a crime of violence. *See id.* To answer that question, we asked whether the armed bank robbery had as an element the use or threatened use of physical force—not whether the conspiracy to commit armed bank robbery was itself a crime of violence.[6] *Id. at 1355*.

Applying *Henry*'s reasoning to Johnson's case, the relevant *Pinkerton* predicate is Hobbs Act robbery because that is the substantive crime committed in furtherance of the conspiracy charged in the indictment. *HN8* Because Hobbs Act robbery is a crime **[**16]** of violence, *Eckford, 77 F.4th at 1236*, Hobbs Act robbery under a *Pinkerton* theory of liability is a valid predicate crime of violence for purposes of *§ 924(c)*. *Henry, 984 F.3d at 1356*.

Johnson attempts to avoid *Henry* by arguing that intervening decisions from the Supreme Court and our court sitting en banc are clearly irreconcilable with *Henry*'s reasoning and implicitly overrule it. *Miller v. Gammie, 335 F.3d 889, 893 (9th Cir. 2003)* (en banc); *Overstreet v. United Broth. Carpenters & Joiners Am., Loc. Union No. 1506, 409 F.3d 1199, 1205 [*839] n.8 (9th Cir. 2005)*. Specifically, Johnson argues that *Henry* was implicitly overruled by *Borden v. **United States**, 593 U.S. 420, 141 S. Ct. 1817, 210 L. Ed. 2d 63 (2021)*, *United States v. Taylor, 596 U.S. 845, 142 S. Ct. 2015, 213 L. Ed. 2d 349 (2022)*, and *Alfred v. Garland, 64 F.4th 1025 (9th Cir. 2023)* (en banc).[7]

Johnson fails to persuade us that any of these cases, individually or combined, implicitly overrule *Henry*. *Borden* addressed only the mens rea necessary to show that the use of force was sufficiently directed "against the person of another" to constitute a crime of violence. *Borden, 420 U.S. at 430-38* (Kagan, J., plurality opinion). And, contrary to Johnson's argument, *Taylor* did not create a rule that the government must show the defendant *personally* used force in order to commit a crime of violence. *HN9* Rather, *Taylor* held that the government must prove that the use of force is an element of the predicate offense. *Taylor, 596 U.S. at 850-52*. *Taylor* does not conflict with *Henry*, because *Henry* holds that the government must prove that at least one conspirator committed all of the elements of the underlying crime of violence, including the use of force, **[**17]** when it relies on a *Pinkerton* theory.

---

[6] Four other circuits have addressed whether finding a defendant guilty of a predicate crime of violence through a theory of *Pinkerton* liability remains valid after *Davis*, and all have come to the same conclusion. *Gomez v. **United States**, 87 F.4th 100, 109-10 (2nd Cir. 2023)* (noting "that *Pinkerton* liability does not somehow transform a conviction for substantive bank robbery into one for bank robbery conspiracy" because the conviction is for the substantive offense); *United States v. Woods, 14 F.4th 544, 552 (6th Cir. 2021)* ("Finding the [defendants] guilty through a theory of *Pinkerton* liability is still permissible as long as the underlying predicate offenses qualify as crimes of violence under the *§ 924(c)* elements clause."); ***United States** v. Gillespie, 27 F.4th 934, 941-42 (4th Cir. 2022)* ("It was precisely this still-valid theory of *Pinkerton* liability that the jury embraced when finding Gillespie guilty of the challenged *§ 924(c)* conviction."); ***United States** v. Hernández-Román, 981 F.3d 138, 145 (1st Cir. 2020)* ("We have held that where, as here, *Pinkerton* liability is in play, the defendant does not need to have carried the gun himself to be liable under *section 924(c)*.").

[7] Johnson also points to *Rosemond v. **United States**, 572 U.S. 65, 134 S. Ct. 1240, 188 L. Ed. 2d 248 (2014)*, and *Honeycutt v. **United States**, 581 U.S. 443, 137 S. Ct. 1626, 198 L. Ed. 2d 73 (2017)* as grounds for overturning *Henry*. These arguments fail because *Rosemond* and *Honeycutt* were decided before *Henry*, and *Henry* addressed both cases. ***Henry, 984 F.3d at 1355, 1356-57***.

Henry, 984 F.3d at 1355.

Neither is *Henry* clearly irreconcilable with *Alfred. Alfred* addressed whether a state conviction that could have been based on either the direct commission of an underlying offense, or aiding and abetting the commission of the offense, qualifies as an "aggravated felony" for purposes of the Immigration and Nationality Act (INA). *Alfred, 64 F.4th at 1030-37* (Bybee, J., plurality opinion). The plurality opinion in *Alfred* suggests that when conducting a categorical analysis, the court should examine whether the defendant was convicted as either a principal or an accomplice to determine if there is a categorical match with the federal definition because the elements the government must prove for accomplice liability under federal law often vary from the elements required under state law. *Alfred, 64 F.4th at 1030-37* (Bybee, J., plurality opinion). *HN10* This is especially true regarding the required mens rea. *Id. Alfred*'s concerns about potential categorical overbreadth based on accomplice liability do not apply when a defendant is convicted under a *Pinkerton* theory, because *Pinkerton* requires proof that at least one co-conspirator satisfied all elements of the crime committed in furtherance of the conspiracy, including the necessary mens rea. Because the government must prove all **[**18]** elements of the relevant crime of violence when it relies on a *Pinkerton* theory, *Henry, 984 F.3d at 1355*, *Alfred* is not clearly irreconcilable with *Henry.*

None of the cases cited by Johnson undermine *Henry*'s reasoning that it is the substantive crime that is the relevant unit of analysis when applying a *Pinkerton* theory of liability in the *§ 924(c)* context. *Id. at 1355.* In keeping with *Henry*'s reasoning, we conclude that Hobbs Act robbery under a *Pinkerton* theory is a valid crime-of-violence predicate.

B

The parties agree that Jury Instruction 18 told the jury that one way it could convict Johnson of using a firearm **[*840]** during the course of a crime of violence in violation of *§ 924(c)* was by finding that he committed Hobbs Act robbery himself. The parties' disagreement centers on whether the instructions also gave the jury the option of relying on conspiracy to commit Hobbs Act robbery—an offense the parties agree is *not* a crime of violence—or Hobbs Act robbery based on a *Pinkerton* theory of liability, an offense that we have now established is a crime of violence.

The government argues that the jury instructions correctly informed the jury that Hobbs Act robbery based on a *Pinkerton* theory of liability could serve as an alternative predicate crime of violence for the *§ 924(c)* charge. Johnson reads the instructions **[**19]** differently. He maintains that the jury instructions incorrectly directed that Count One, conspiracy to commit Hobbs Act robbery, could serve as an alternative predicate crime of violence for the *§ 924(c)* conviction. We agree with the government.

The jury instructions for the *§ 924(c)* charge directed the jury that it could convict if it found that Johnson committed Hobbs Act robbery under a *Pinkerton* theory of liability. Instruction 18 told the jury that it could find the defendants guilty of *§ 924(c)* if they were "part of a conspiracy as charged in Count One, during or in furtherance of which occurred the reasonably foreseeable crime of robbery and the knowing use of the firearm during and in relation to that crime." Instruction 19 elaborated by identifying the elements necessary to convict Johnson of *§ 924(c)* based on his participation in the conspiracy, and those elements are the same elements required for attaching liability for a substantive crime to a member of a conspiracy under *Pinkerton. See United States v. Allen, 425 F.3d 1231, 1234 (9th Cir. 2005)* (citing *Pinkerton, 328 U.S. at 647*). Indeed, Instruction 19 was based on the pattern instructions for *Pinkerton* liability. Ninth Cir. Jury Instructions Comm., Manual of Model Criminal Jury Instructions, at 230 (2022). Read together, the instructions informed the jury that Hobbs Act robbery under a *Pinkerton* theory of liability could serve as a predicate **[**20]** crime of violence.

Johnson is correct that conspiracy to commit Hobbs Act robbery could not have served as a predicate crime of violence for the *§ 924* charge because the robbers could have completed the crime of *conspiring* to rob the armored truck without actually robbing it. *See Reed, 48 F.4th at 1087-88.* But Johnson's argument fails because the instructions did not allow the jury to convict Johnson of *§ 924(c)* solely based on his participation in the conspiracy charged in Count One. Rather, in order to convict Johnson of *§ 924(c)*, the instructions required the jury to find that a member of the conspiracy committed Hobbs Act robbery under either of the two alternative theories: directly or via a *Pinkerton* theory. If the jury convicted based on Johnson's participation in the conspiracy, the instructions required the jury to also find that the robbery was reasonably foreseeable as a "necessary or natural consequence" of the conspiracy and that a member of the conspiracy committed all

elements of Hobbs Act robbery. This is *Pinkerton* liability.

Contrary to Johnson's argument, the jury instructions directed the jury that it could convict Johnson of the *§ 924(c)* charge based on either Hobbs Act robbery or Hobbs Act robbery under a *Pinkerton* theory of liability, and both **[**21]** are valid predicate crimes of violence for *§ 924(c)*. We conclude there was no error in the jury instructions.

IV

We also hold that the instructional error Johnson argues would have been harmless **[*841]** on the facts of this case. We reach this alternative ground because we are cognizant of the government's change in position from the one it advanced in the district court.[8] The general verdict does not specify the grounds the jury relied upon to convict Johnson of the *§ 924(c)* charge, but on the facts of this case, we agree with the district court that even if the jury interpreted the instructions to *also* allow the *§ 924(c)* charge to be premised on conspiracy to commit the robbery, that error would have been harmless.

HN11 "A conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one." *Hedgpeth v. Pulido, 555 U.S. 57, 58, 129 S. Ct. 530, 172 L. Ed. 2d 388 (2008)* (per curiam). In reviewing an instructional error at the habeas stage, this court applies harmless error review, and the reviewing court "should ask whether the flaw in the instructions 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* (quoting *Brecht v. Abrahamson, 507 U.S. 619, 623, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)*). "The task is to evaluate the effect of the error on the **[**22]** jury, rather than merely whether the evidence points to guilt." *Reed, 48 F.4th at 1090*.

HN12 We recently confirmed that the harmless error standard applies on habeas review when a jury is "instructed on both a valid and an invalid predicate offense and [the general verdict] fails to specify which predicate form[ed] the basis for a *§ 924(c)* conviction." *Id.* The defendant in *Reed* was accused of planning to rob a drug stash house with the intent to steal and resell cocaine. *Id. at 1085-86*. The district court instructed the jury on two potential predicates for the *§ 924(c)* charge: a valid drug crime predicate and conspiracy to commit Hobbs Act robbery. *Id. at 1086*. We held that instructing the jury on the invalid predicate was harmless because the conspiracy in *Reed* was "inextricably intertwined" with the valid predicate offense. *Id. at 1090* (quoting ***United States*** *v. Cannon, 987 F.3d 924, 932 (11th Cir. 2021)*). *Reed* reasoned that because there was only one course of conduct alleged at trial, "no rational juror could have found that [defendants] carried a firearm in relation to one predicate but not [in relation to] the other." *Id.* (quoting *Cannon, 987 F.3d at 948*).[9]

[*842] We reach the same result here. Even if the trial court in Johnson's case had instructed the jury that it could rely on one invalid predicate in addition to the valid theories of Hobbs Act robbery, **[**23]** the error would have been harmless on the facts of this case. Pointing to Burgess's discredited testimony, Johnson's basic argument is that a juror "could have decided that Mr. Johnson was present at the planning meeting and

---

[8] In the district court, the government assumed the premise of Johnson's argument: that the jury instructions allowed the jury to rely on conspiracy to commit Hobbs Act robbery as a predicate crime supporting the *§ 924(c)* charge. The government argued this was not error because conspiracy to commit Hobbs Act robbery qualifies as a crime of violence pursuant to the residual clause of *§ 924(c)*. On appeal, the government concedes its position in the district court was wrong as a matter of substantive law, because conspiracy to commit Hobbs Act robbery is not a crime of violence. The government also concedes that it misinterpreted the jury instructions in the opposition it filed to Johnson's *§ 2255* motion in the district court. On appeal, the government argues that Instruction 19 contained a *Pinkerton* instruction. Johnson was the first party to raise whether a *Pinkerton* theory of liability could support a *§ 924(c)* charge. He raised this issue in his reply brief in support of the *§ 2255* motion before the district court. Johnson also had the opportunity to counter the government's revised argument about the contents of the jury instructions in the reply brief he filed before our court.

[9] The Fourth Circuit and Seventh Circuit have applied similar logic on direct appeal when reviewing cases in which the jury instructions included both valid substantive Hobbs Act robbery and invalid conspiracy to commit Hobbs Act robbery predicates. ***United States*** ***v. Ali, 991 F.3d 561, 575-76 (4th Cir. 2021)*** (holding defendant could not show the "outcome would have been different absent the improper instruction" given the weight of the evidence that he perpetrated the robbery); ***Reyes v. United States, 998 F.3d 753, 759 (7th Cir. 2021)*** (noting even if there was instructional error, "[n]o rational juror could have concluded that the gun was brandished in furtherance of only the conspirators' agreement to commit a robbery, but not in furtherance of the robbery itself, during which the gun was actually brandished").

thereby joined the conspiracy to rob the armored truck," but did not participate in the robbery, and thus the § 924(c) conviction would be based only on the invalid predicate of conspiracy. In part, this argument is premised on Johnson's contention that Hobbs Act robbery based on a *Pinkerton* theory of liability is not a valid predicate for a § 924(c) conviction. We have rejected this argument as a matter of substantive law.

Separately, we agree with the district court that the facts in this case do not support Johnson's argument that a juror could have relied on only the conspiracy charge to support the § 924(c) conviction. To be sure, strong circumstantial evidence introduced at trial made it clear that the robbery was planned and coordinated. The actions of the robbers demonstrated that the robbery was a planned operation because multiple participants brought weapons, staged getaway vehicles, and wore disguises to conceal their identities. This and direct eyewitness testimony supports the conclusion **[**24]** that the robbers conspired in advance.

But in Johnson's direct appeal, we characterized the evidence of Johnson's participation in the robbery as "strong." It included Dunagan's testimony, eyewitness testimony, and DNA evidence linking the Rastafarian wig to Johnson. *Johnson, 767 F.3d at 820*. Johnson argues the jury could not have relied on Dunagan's testimony about his participation in the robbery because Dunagan's credibility was thoroughly impeached. We disagree. The jury was free to believe all or none that testimony, and considerable other evidence linked Johnson to the robbery, including DNA evidence from the wig and eyewitness testimony recounting that a robber wearing the Rastafarian wig fired shots into the back of the armored truck at the security guard.

Johnson's two remaining arguments do not persuade us that any instructional error could have prejudiced him. First, Johnson contends the prosecutor emphasized the robbers' conspiracy in closing arguments. This challenge fails because the record clearly shows that the government's main theory and focus of its closing argument was that Johnson was one of the co-conspirators who directly participated in the robbery of the armored truck and that he personally **[**25]** shot and killed the guard. ***HN13*** Second, Johnson is correct that the length of jury deliberations can indicate that an error had a substantial impact on the outcome of a trial, but this factor is not dispositive. *See, e.g., Parker v. Gladden, 385 U.S. 363, 364-65, 87 S. Ct. 468, 17 L. Ed. 2d 420 (1966)* (finding that bailiff's statements that defendant was guilty prejudiced jury, because one juror testified that she was influenced by the statement and the jury deliberated for 26 hours).

Overall, we agree with the district court's conclusion that any instructional error would have been harmless. No reasonable juror could have concluded that a **[*843]** conspirator fired a gun only in furtherance of the conspiracy, because, as the district court observed, "no evidence was produced at trial suggesting that firearms were used in the conspiracy, but not in the substantive offense." Moreover, we agree with the district court that Johnson's theory—that the jury relied on the shaky Burgess testimony as the basis for its convictions and ignored the evidence incriminating him in the underlying robbery—"would be a stretch beyond the bounds of rationality." Therefore, we conclude that even if the jury instructions had included an invalid predicate crime of violence, that error would be harmless **[**26]** on the facts of this case.

The district court's order denying Johnson's § 2255 motion is **AFFIRMED**.

End of Document

Appendix C

O

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ANTOINE LAMONT JOHNSON, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	CR-05-920-RSWL-1 CV-16-3419-RSWL **ORDER re: Petitioner's AMENDED MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255** [CV 11] [CR 2086]

On August 13, 2010, Petitioner Antoine Lamont Johnson ("Petitioner") was sentenced to life in federal prison, consisting of 240 months on one count of conspiracy to commit Hobbs Act robbery; 240 months on one count of Hobbs Act robbery, in violation of 18 U.S.C. § 1951; and a life sentence for using, carrying, brandishing, and discharging a firearm during a crime of violence causing death under 18 U.S.C. §§ 924(c)(1)(A)(iii), (j)(1). Pet'r's J & Commitment Order [CR 1657].

Currently before the Court is Petitioner's Amended Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 ("Motion") [CV 11] [CR 2086]. Petitioner asks the Court to strike the life sentence associated with his § 924(c) conviction, and vacate his underlying convictions due to ineffective representation provided by his trial counsel. See generally Pet'r's. Am. Mot. To Vacate, Set Aside, or Correct Sent. ("Mot."), ECF No. CR-2086, CV-11. Having reviewed all papers submitted pertaining to this Motion, the Court **NOW FINDS AND RULES AS FOLLOWS**: the Court **DENIES** Petitioner's § 2255 Motion. The Court also **DENIES** Petitioner's request for an evidentiary hearing, and **DENIES** Petitioner's request for a Certificate of Appealability.

I. BACKGROUND

A. Factual Background

1. Underlying Offense Conduct

On or about February 27, 2004, Petitioner and co-Defendants Michael Williams, Patrick Holifield, and Larry Jordan ("co-Defendants"), all members of the Eight Trey Hoover Criminals street gang (the "Hoovers"), conspired to rob an Armored Transport Systems ("AT Systems") truck at the Bank of America, located at 8701 South Western Avenue in Los Angeles. Mot. Ex. A, First Superseding Indict. ("Indict.") 3:16-22, ECF No. CR-2086-1, CV-11-1.

On March 1, 2004, co-Defendant Jordan drove his van

to the parking lot of the Superior Market near the bank while Petitioner and the others parked a stolen gray sedan in the bank parking lot. Id. at 4:1-13. Petitioner and co-Defendants Williams and Holifield were each wearing latex gloves, and Petitioner wore a Rastafarian wig with a Jamaican-colored cap and shoulder-length dread locks ("the Rastafarian wig"). Johnson Revised Presentence Report ("PSR") ¶ 18, ECF No. CR-1641.

Petitioner, armed with a 9mm "MAC"-style handgun and wearing latex gloves and the Rastafarian wig; co-Defendant Williams, armed with an AK47-type rifle and also wearing latex gloves; and the other co-Defendants, approached an AT Systems armored truck outside the bank. Id. at ¶¶ 17-18; Indict. at 4:14-18. Together they fired fifty-two rounds of ammunition at the guard, the truck, and the exterior of the bank while stealing multiple bags of money worth $436,000. Indict. at 4:19-5:2. Petitioner and co-Defendants shot and killed guard Evelio Suarez, Jr. ("Suarez") as he was unloading bags from the truck. Id. at 4:23-24, 7:19-22.

After shooting and killing Suarez, Petitioner and co-Defendants fled on foot towards the getaway van. PSR ¶ 20. The van stalled, so Petitioner and co-Defendants jumped out and ran towards the Superior Market parking lot to the second getaway van. Id. While running, Petitioner dropped the Rastafarian Wig, co-Defendant Williams dropped his latex gloves and an

empty AK47 ammunition magazine, and another co-Defendant dropped latex gloves. Id. ¶ 21. Petitioner did not make it to the second getaway van, which left with co-Defendant Williams and the others, but managed to escape by other means. Id. ¶ 22.

2. Burgess Testimony

After the robbery, law enforcement went public with a surveillance video of the getaway van used in the robbery and offered a $175,000 reward for apprehension of the robbers. Pl.'s Opp'n to Pet'r's Am. Mot. To Vacate, Set Aside, or Correct Sent. ("Opp'n") 46:17-23, ECF No. CR-2116, CV-38. Two weeks later, in May of 2004, Veronica Burgess ("Burgess") contacted law enforcement stating that she had information. Id. Burgess met with law enforcement several times and cooperated with them during a five-year period prior to the trial. Id. at 47:1-17; Opp'n, Ex. E Decl. of Joseph O'Donnell ("O'Donnell Decl.") ¶¶ 2-3, ECF No. CR-2116-5, CV-38-5. Burgess told police that during the week prior to the robbery, she overheard a discussion among a group of men, including Petitioner, planning the robbery while at a local restaurant, Fannie Mae's. Opp'n at 47:1-8; Opp'n, Ex. E Decl. of Daniel Jaramillo ("Jaramillo Decl.") ¶ 3.c, ECF No. CR 2116-5, CV-38-5. Burgess testified to the same before the grand jury. Opp'n at 47:4-8.

In August of 2007, the Court ordered that the identities of certain witnesses, including Burgess, be

disclosed to Petitioner and co-Defendant Williams forty-five days before trial. See ECF No. CR-1711, 1712. With a trial date of September 15, 2009, the date on which Burgess's identity would be disclosed was August 2, 2009. On August 3, 2009, Burgess called law enforcement and informed them that "her name had been given to the 'Hoovers' and she had been receiving death threats." O'Donnell Decl. ¶ 8. The Government was subsequently unable to locate Burgess to have her testify at trial. The Government amassed evidence that Petitioner caused the threats to be made against Burgess, and moved in limine to introduce her prior statements and identifications of Petitioner against Petitioner. See ECF No. CR-1392. The Court found that the Government met its burden to establish that Petitioner procured Burgess's unavailability, and therefore granted the Government's Motion to Admit the Burgess Evidence. See ECF No. CR-1460.

At trial, the Government called four witnesses to testify about Burgess's prior identifications of Petitioner as being at the planning meeting at Fannie Mae's restaurant, including her testimony before the grand jury. Opp'n at 57:17-20. The Government elicited testimony that Burgess went to the restaurant to have breakfast with her friend, Reshanna Russell, between Wednesday and Friday during the week prior to the robbery and that while there, she overheard the conversation of a group of men, including Petitioner,

talking about an armed robbery. Id. at 57:20-26.

While defense counsel vigorously cross-examined Burgess and called their own witnesses to impeach her testimony, the jury was not informed that after Burgess's identity was disclosed to Petitioner and she learned she would be expected to testify at trial, she recanted her statements. Specifically, on August 4, 2009, Burgess was contacted by the defense attorney and investigator, and on August 5, 2004, Burgess told them that the initial statements she made to law enforcement and testimony to the grand jury about observing Petitioner at a planning meeting were false; that the police had employed suggestive interview techniques that induced her to make false pre-trial identifications; and that she was motivated by the substantial reward money she believed she could receive for providing information. Mot. at 33:14-23; see generally Mot. Ex. E Decl. of Christian S. Filipiak ("Filipiak Decl."), ECF No. CR-2086-6, CV-11-6.

Petitioner contends that his trial counsel were ineffective in opposing the Government's Motion to Admit the Burgess Evidence, and that the hearsay statements made by Burgess implicating Petitioner should have never been presented to the jury in the first place. Mot. at 34:34:17-44:21. Petitioner further argues that since the Burgess evidence was admitted at trial, his trial counsel were ineffective for not introducing evidence that Burgess later

recanted her statements about witnessing a planning meeting involving Petitioner. Id. at 44:22-46:5.

3. Jamal Dunagan Testimony

At trial, the Government called Jamal Dunagan ("Dunagan"), a fellow Hoover gang member. See Mot. at 55:7-9; Opp'n at 72:25-73:5. Dunagan testified that he had been contacted by the suspected organizer of the armored truck robbery to reach out to Petitioner, who was refusing to return phone calls and meet with the other members of the robbery. See Opp'n Ex. D Gov.'s Answering Br. on Appeal, 2013 WL 3790841 at *42-44 (citing GER 1217-1218, 1399-1400, 1414).[1] According to Dunagan, he met with Petitioner in the Los Angeles area twice on March 2, 2004, the day after the armored truck robbery. Opp'n Ex. D, at *44-46 (citing GER 1217, 1412-1414). Dunagan testified that during the meetings, Petitioner confessed to his participation in the robbery. Id. Dunagan also testified that during the meetings, he saw that Petitioner had his foot wrapped, and that Petitioner told him he had discharged his "MAC" and shot himself while running away from the scene of the crime. Id.

Petitioner claims that evidence available at trial, but uncovered during the habeas investigation, would

---

[1] The Government attaches as Exhibit D to its Opposition, its Answering Brief on Appeal to the Ninth Circuit, which in turn cites to Government's Excerpts of the Record ("GER") PACER No. 10-50401, ECF No. 50. The Court has reviewed each of the excerpts cited in connection with this Motion.

have shown that on March 2, 2004, Petitioner was not present in Los Angeles and therefore, could not have attended the meetings with Dunagan. Mot. at 56:22-25. Specifically, Petitioner alleges that the testimony of Petitioner's sister, Chetarah Sims, and phone records would have shown that on the evening of March 1, 2004, Petitioner left on a Greyhound bus in the direction of Memphis, Tennessee to visit his grandmother. Id. at 56:26-58:20; Pet'r's Reply ISO Pet'r's Am. Mot. To Vacate, Set Aside, or Correct Sent. ("Reply") 71:9-14, ECF No. CR-2121, CV-42, 45. Petitioner argues that his trial counsel were ineffective for failing to introduce this evidence, which would have impeached Dunagan's testimony. Reply at 70:13-76:19.

B. Procedural Background

In February 2007, a grand jury indicted Petitioner and co-Defendants on: (1) conspiracy to commit Hobbs Act robbery, (2) committing Hobbs Act robbery, and (3) using, brandishing, and discharging a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c) which caused the murder of Suarez. The case proceeded to trial in early 2010. Petitioner and co-Defendant Williams were tried together. On March 11, 2010, a jury returned a verdict finding Petitioner and co-Defendant Williams guilty of all three counts charged in the indictment. Mot. at 5:15-19. Petitioner was sentenced to 240 months each for the first two counts and life for the third, all to be

served consecutively. Id. at 5:20-22.

Petitioner appealed, and the Ninth Circuit affirmed his convictions on September 12, 2014. See United States v. Johnson, 767 F.3d 815 (9th Cir. 2014). Petitioner's petition for a writ of certiorari to the United States Supreme Court was denied on December 14, 2015.

Petitioner filed a § 2255 Motion on May 18, 2016 [CV 1] [CR 2021]. On July 6, 2016, the Court set a briefing schedule for litigating the § 2255 Motion. [CV 7] [CR 2034]. On December 9, 2016, Petitioner filed his Amended § 2255 Motion [CV 11] [CR 2086]. The Court subsequently granted several stipulations by the parties to modify the briefing schedule, as well as three *ex parte* applications by the Government requesting an extension of time to file an Opposition, and one *ex parte* application by Petitioner requesting an extension of time to file his Reply. The Government filed its Response to Petitioner's Motion ("Opposition") on September 11, 2018 [CV 38] [CR 2116]. Petitioner filed his Reply on January 11, 2019 [CV 42, 45] [CR 2121].

II. DISCUSSION

A. Legal Standard

1. § 2255 Motion

28 U.S.C. § 2255 provides that a federal prisoner may make a motion to vacate, set aside or correct his sentence on 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. 28 U.S.C. § 2255(a).

The remedy under § 2255 does not encompass all claimed errors in conviction and sentencing. United States v. Addonizio, 442 U.S. 178, 185 (1979); United States v. Wilcox, 640 F.2d 970, 973 (9th Cir. 1981) ("Errors of law which might require reversal of a conviction or sentence on appeal do not necessarily provide a basis for relief under § 2255.") A mere error of law does not provide a basis for collateral relief under § 2255 unless the claimed error constituted "a fundamental defect which inherently results in a complete miscarriage of justice" and renders the entire proceeding "irregular and invalid." Addonizio, 442 U.S. at 185-86; Hill v. United States, 368 U.S. 424, 428 (1962).

Further, "the Court has cautioned that § 2255 may not be used as a chance at a second appeal." United States v. Berry, 624 F.3d 1031, 1038 (9th Cir. 2010); United States v. Johnson, 988 F.2d 941, 945 (9th Cir. 1993) ("Section 2255 . . . is not designed to provide criminal defendants multiple opportunities to challenge their sentence."). A matter that has been decided adversely on appeal from a conviction cannot be

relitigated on a § 2255 motion absent changed circumstances of law or fact. Odom v. United States, 455 F.2d 159, 160 (9th Cir. 1972). Similarly, "[h]abeas relief is an extraordinary remedy and will not be allowed to do service for an appeal." Bousley v. United States, 523 U.S. 614, 621 (1998) (quoting Reed v. Farley, 512 U.S. 339, 354 (1994)) (internal quotation marks omitted).

2. Ineffective Assistance of Counsel

To prevail on a claim for ineffective assistance of counsel, a defendant must satisfy the two prong test set forth in Strickland v. Washington, 466 U.S. 668, 687-90, 694 (1984). A defendant must establish (1) that his trial counsel's performance was constitutionally deficient, and (2) that the deficient performance prejudiced the defense. Id. To meet the deficient performance prong, defendant must show that counsel's performance fell below an objective standard of reasonableness. Id. In evaluating trial counsel's performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689 (quotations omitted). To establish prejudice, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. Ultimately, "[s]urmounting [Strickland's] high bar is never an easy task." Runningeagle v. Ryan, 686 F.3d 758, 775 (9th Cir. 2012) (internal quotations omitted).

B. Validity of § 18 U.S.C. 924(c) Conviction

18 U.S.C. § 924(c) penalizes use of a deadly or dangerous weapon during a "crime of violence." In turn, §§ 924(c)(3)(A)-(B) define "crime of violence." Section 924(c)(3)(A) contains the "Force Clause": "[a crime of violence is an offense that is a felony and that] has as an element the use, attempted use, or threatened use of physical force against the person or property of another." Section 924(c)(3)(B), the "Residual Clause," defines a crime of violence as: "[an offense that is a felony and] that by its nature, involves a substantial risk that physical force against the person or property of another may be used in committing the offense."

Petitioner seeks to vacate his § 924(c) conviction on the grounds that: (1) it may have been based on the conspiracy charge, which is not a "crime of violence;" and (2) Hobbs Act robbery fails to qualify as a "crime of violence" under the Force Clause. Mot. at 7:1-7. The Court addresses each argument in turn.

///

///

1. § 924(c) Conviction Was Based on the Substantive Hobbs Act Robbery

"A conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one." Hedgpeth v. Pulido, 555 U.S. 57, 58 (2008). In such instances, harmless-error analysis applies and a reviewing court "should ask whether the flaw in the instructions 'had a substantial and injurious effect or influence in determining the jury's verdict.'" Id. (quoting Brecht v. Abrahamson, 507 U.S. 619, 623 (1993)). This question requires courts to consider "the record as a whole" and "'take account of what the error meant to [the jury], not singled out and standing alone, but in relation to all else that happened.'" Pulido v. Chrones, 629 F.3d 1007, 1012 (9th Cir. 2010) (quoting Kotteakos v. United States, 328 U.S. 750, 765 (1946)). Ultimately, "[t]here must be more than a reasonable possibility that the error was harmful . . . . [b]ut where a judge in a habeas proceeding is in grave doubt as to the harmlessness of the error, the habeas petitioner must win." Rogers v. McDaniel, 793 F.3d 1036, 1042 (9th Cir. 2015) (internal quotations and citations omitted).

Here, the jury instructions indicated that the Government could prove the § 924(c) charge by showing Petitioner (1) committed the crime [Hobbs Act robbery]; or (2) was part of the Hobbs Act conspiracy. Mot. Ex.

D-1, Jury Instrs. Nos. 18, 19, ECF No. CR-2086-4, CV-11-4. Petitioner takes issue with these instructions, insisting that Hobbs Act conspiracy is not a crime of violence under § 924(c) and is thus an invalid predicate upon which a § 924(c) conviction can be based. It is undisputed that Hobbs Act conspiracy is only a crime of violence if it satisfies the Residual Clause. However, after the Supreme Court's recent decisions in Johnson v. Untied States, 135 S. Ct. 2551 (2015), and Sessions v. Dimaya, 138 S. Ct. 1204 (2018), circuit courts are split on the issue of whether the Residual Clause is unconstitutionally vague. The issue is currently pending before the Ninth Circuit and the Supreme Court.[2] However, the Court need not await the decisions of the Supreme Court or Ninth Circuit to address Petitioner's claims because the record reveals that the jury based its conviction on the substantive Hobbs Act robbery, and not the conspiracy. Accordingly, even assuming that Hobbs Act conspiracy is an invalid predicate, any error in the jury instructions was harmless since it did not have a

---

[2] The Supreme Court granted certiorari in United States v. Davis, 903 F.3d 483 (5th Cir. 2018) (per curiam) *cert. granted*, 2019 WL 98544 (Jan. 4, 2019), to decide "whether the subsection-specific definition of 'crime of violence' in 18 U.S.C. § 924(c)(3)(B) . . . is unconstitutionally vague." While the Ninth Circuit has yet to weigh in, it recently requested supplemental briefing on the issue in United States v. Begay, No. 14-10080, Docket No. 107, and stayed proceedings pending the disposition of Davis.

substantial and injurious effect in determining the jury's verdict.

Petitioner was convicted of all three counts charged: (1) conspiracy to commit Hobbs Act robbery, (2) Hobbs Act robbery, and (3) the § 924(c) count. Mot. Ex. B, ECF No. CR-2086-2, CV-11-2. The conspiracy was inextricably intertwined with, and in furtherance of, the substantive Hobbs Act robbery. As this Court previously determined with respect to co-Defendant Williams, since the jury convicted Petitioner of the Hobbs Act robbery, "it makes little sense that Petitioner could have only discharged a firearm in the conspiracy but not the substantive Hobbs Act robbery." Order re Williams' Am. Mot. To Vacate, Set Aside, or Correct Sent. ("Williams' Order") 15:24-16:2, No. 16-2569-RSWL, ECF No. 22. This is especially so in light of the fact that no evidence was produced at trial suggesting that firearms were used in the conspiracy, but not in the substantive offense.

Nonetheless, Petitioner argues that based on the jury instructions, it is possible that the jury's finding of Petitioner's guilt on the conspiracy count could have led to his convictions on the robbery and gun counts.[3] Mot. at 12. Petitioner contends that the

---

[3] The jury instructions for the substantive Hobbs Act robbery allowed the jury to convict Petitioner based on him "being part of a conspiracy as charged in Count One, during or in furtherance on which the reasonably-foreseeable crime of robbery affecting interstate commerce was committed." Mot. Ex. D-1, Jury

primary evidence at trial of his involvement in the conspiracy was the testimony of Burgess, in which she stated that she saw and overheard Petitioner at a local restaurant planning the robbery with some of his co-conspirators. Mot. at 12:15-22. Petitioner contends that the jury could have accepted this evidence as proof of Petitioner's involvement in the Hobbs Act conspiracy, and on that basis, convicted Petitioner of the conspiracy, robbery, and gun charges. Id.

However, Petitioner overestimates the import of the Burgess testimony to the case. The planning meeting discussed by Burgess provided evidence of only one of the fourteen overt acts identified by the Government, in support of the conspiracy. See Mot. Ex. A, Indict. at 3:9-5:23. While the Burgess testimony spanned in excess of 150 pages of transcript, Petitioner's cross-examinations took up approximately 90 of the pages, and in total, witness testimony at trial covered approximately 2,380 transcript pages. Opp'n at 16:10-14; Decl. of Elizabeth R. Yang ("Yang Decl.") ¶ 5, ECF No. CR-2086, CV-11. Moreover, in its closing argument, the Government's summary of the Burgess evidence comprised less than 1½ pages of an approximately 16-page argument, and followed a recitation of the evidence of the substantive crime itself, which

---

Instr. No. 13. The jury instructions for the § 924(c) count similarly allowed the jury to convict Petitioner if the Government proved that he committed the substantive robbery, or was part of the conspiracy. Id. Jury Instrs. Nos. 18, 19.

provided circumstantial evidence of advanced planning consistent with a conspiracy. Opp'n at 16:21-17:3; 3/5/10 RT 4-20, ECF No. CR-1718. For example, such evidence included wearing disguises, using multiple semi-automatic weapons, setting up two getaway vans, and lying in wait (appearing to know the armored truck's route and schedule) to commit the robbery. Opp'n at 17 n. 11; 3/5/10 RT 7.

Moreover, an examination of the record as a whole reveals that the jury rested its conviction on the Hobbs Act robbery. See Pulido, 629 F.3d at 1019 ("[W]e consider whether the evidence in the trial record made it likely that the instructional errors had a substantial and injurious effect on the verdict."). At trial, the Government put forth substantial evidence of Petitioner's involvement in the Hobbs Act robbery. As stated by the Ninth Circuit:

> The evidence at trial incriminating both Johnson and Williams was strong. Jamal Dunagan, former Hoover gang member [of which Petitioner was affiliated], testified that both Johnson and Williams had confessed to having participated in the robbery-murder. He also testified that Derrick Maddox, an uncharged co-conspirator, had given him a detailed account of the robbery and subsequent shootout, including the extent of Johnson and Williams' involvement. In addition, the Government introduced evidence that DNA recovered from a wig and latex gloves that were found on the scene matched the DNA profiles of Johnson and Williams respectively.

Johnson, 767 F.3d at 820.[4] That the § 924(c) conviction was predicated on the substantive robbery is further illustrated by the Court's instructions to the jury, in which the Court identified the substantive robbery as the predicate crime of violence for the § 924(c) count. Opp'n at 15:7-15 (citing 3/5/10 RT 175-77) ("a crime of violence, robbery") ("the crime of robbery . . . which I instruct you is a crime of violence").). This instruction mirrored the language of the indictment, which identified the predicate crime of violence for the § 924(c) count as "the March 1, 2004, robbery of an Armored Transport Systems armored truck." Mot. Ex. A, Indict. at 7. See Ortega v. United States, No. 16-cv-1622-GPC, 2017 WL 6371739, at *4 (S.D. Cal. Dec. 13, 2017) (looking to the "plain language of the superseding indictment" to find that the § 924(c) conviction rested on a valid predicate). The Government also identified the predicate crime of violence for the § 924(c) count as "the armored truck robbery" and not the conspiracy in its closing argument to the jury. Opp'n at 14:21-29 (citing 3/5/10 RT 10).

Petitioner contends that the Government mischaracterizes the Court's instructions to the jury and the Government's closing argument, because in both

[4] This list only illuminates some of the evidence from which the jury may have based its decision. The Court notes that trial in this case lasted approximately four weeks and involved over 60 witnesses and 250 exhibits.

situations, the jury was repeatedly told that they could find Petitioner guilty of the robbery and gun charges if they found Petitioner guilty of the conspiracy charge. Reply at 15:1-19. The Court does not dispute that the jury was so informed. However, as discussed above, the only evidence of Petitioner's involvement in the conspiracy—apart from the circumstantial evidence of advanced planning evident from the substantive robbery itself—was the Burgess testimony. Yet at trial, Petitioner elicited substantial evidence impeaching Burgess as a witness.[5] To assume that the jury adopted the shaky Burgess testimony as the basis for its convictions, and ignored the "strong" evidence incriminating Petitioner in the underlying robbery, would be a stretch beyond the bounds of rationality.

In sum, the Court finds that to the extent that Hobbs Act conspiracy is an invalid predicate for a § 924(c) conviction, the jury instruction allowing the jury to convict Petitioner of his § 924(c) count by a finding of guilt as to his conspiracy or robbery counts was harmless error.

2. Hobbs Act Robbery is a Crime of Violence

Petitioner contends that even if his § 924(c) conviction was predicated on substantive Hobbs Act

---

[5] A full discussion of the evidence impeaching Burgess appears in the Court's discussion of Petitioner's claim of ineffective assistance of counsel.

robbery, substantive Hobbs Act robbery is not a crime of violence under the Force Clause of § 924(c).[6] Petitioner supports his position with two primary arguments: (1) the Force Clause of § 924(c) is only satisfied by proof of intentional violent physical force but Hobbs Act robbery can be violated without proof of such force; and (2) the Hobbs Act definition of fear of injury does not always constitute an active threatened use of force on the person as required by the Force Clause. Mot. at 13:9-22:9. Similar arguments were previously raised by co-Defendant Williams in his § 2255 motion, and this Court provided detailed reasoning as to why they lack merit. See Williams' Order at 17:14-22:14. Nonetheless, Petitioner asserts that this Court relied on flawed analysis in its Williams Order, and argues that the cases cited by this Court are insufficient to support the conclusion that Hobbs Act robbery is a crime of violence. Mot. at 17:23-22:3. However, both prior to and after this Court's Williams' Order, the Ninth Circuit (albeit in an unpublished decision), sister

---

[6] This issue is also the subject of co-Defendant Williams' appeal to the Ninth Circuit. See United States v. Williams, No. 05-cr-00920, ECF No. 2091. The Ninth Circuit granted Williams' request for a certificate of appealability on the following issues: (1) whether Williams' conviction under § 924(c) must be vacated in light of Johnson v. United States; and (2) whether the Hobbs Act robbery is a "crime of violence" under the Force Clause (§ 924(c)(3)(A)). Id. The Ninth Circuit held the case in abeyance pending its decision in United States v. Begay, No. 14010080, which was continued pending the Supreme Court's final resolution in United States v. Davis, 2019 WL 98544.

circuits, and district courts have uniformly held that Hobbs Act robbery constitutes a crime of violence under the Force Clause. See e.g. U.S.A. v. Dorsey, No.14-cr-00328(B)-CAS, 2017 WL 3159981, at *12 (C.D. Cal. July 24, 2017) (citing cases from the Ninth, Seventh, Second, Eleventh, and Fifth Circuits to support its finding that "there is an 'unbroken consensus' among the courts across the country that a Hobbs Act robbery constitutes a crime of violence"); United States v. Figueroa, No. 12cr236-GPC, 2017 WL 3412526, at *8 (S.D. Cal. Aug. 9, 2017) ("[T]he Second, Third, Fifth, Eighth, and Eleventh Circuits agree that Hobbs Act robbery is categorically a crime of violence under the physical force clause."); United States v. Hall, No. 12-cr-00132-JAD-CWH-3, 2017 WL 2174951, at *2 (D. Nev. May 17, 2017) ("District courts and other circuit courts . . . overwhelmingly agree that Hobbs Act robbery qualifies as a crime of violence under § 924(c)'s force clause."); United States v. Elima, SACR 16-00037-CJC, 2016 WL 3556603, at *1 (C.D. Cal. June 6, 2016) (citations omitted) (stating that the argument that Hobbs Act robbery is not a crime of violence "has been 'squarely rejected by district courts nationwide'").

The Force Clause defines a "crime of violence" as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). To

determine whether Hobbs Act robbery satisfies this definition, the Court applies the categorical approach announced by the Supreme Court in Taylor v. United States, 495 U.S. 575, 600 (1990). "Under this approach, we do not look to the particular facts underlying the conviction, but 'compare the elements of the statute forming the basis of the defendant's conviction with the elements of' a 'crime of violence.'" United States v. Benally, 843 F.3d 350, 352 (9th Cir. 2016) (quoting Descamps v. United States, 133 S. Ct. 2276, 2281 (2013)). As set forth in the jury instructions, the elements for Hobbs Act robbery, 18 U.S.C. § 1951, are: "(1) defendant unlawfully took or obtained property . . . against his will; (2) defendant used actual or threatened *force*, or violence, or fear of injury, immediate or future, to the person; (3) defendant intended to permanently deprive the person of the property; (4) as a result, interstate commerce was obstructed, delayed, or affected." Mot. Ex. D-1, Jury Instr. No. 13.

Petitioner first argues that Hobbs Act robbery can be violated without proof of intentional violent force; that is through negligent or reckless conduct—as opposed to intentional conduct—and through the use of minimal—as opposed to violent—force. In support of his argument, Petitioner analogizes Hobbs Act robbery to common law robbery and draws on judicial interpretations of similar statutes. Notably, however,

Petitioner fails to cite any case where a court has found Hobbs Act robbery can be committed without intent or with only minimal force.[7] Yet, in order to prevail under a categorical approach, Petitioner must at least show a "realistic probably" that the Hobbs Act statute could apply to non-violent, unintentional conduct. See Moncrieffe v. Holder, 559 U.S. 184, 191 (2013) ("[T]here must be a 'realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.'"). Because Petitioner has failed to satisfy this burden, the Court maintains its position as set forth in William's Order, and agrees with the long list of courts who have rejected the argument that Hobbs Act robbery can be committed through reckless or negligent conduct, or with only minimal force.[8]

---

[7] Of course, Petitioner cannot support his assertion with his own case, since 52 rounds of ammunition were discharged from multiple firearms during the underlying robbery.

[8] See e.g. United States v. Goldsby, 2018 WL 1146401, at *2 (D. Nev. Feb. 22, 2018) (emphasis added) ("Every case cited by the Government and independently researched by the Court has found that a Hobbs act robbery requires the *intentional* use, attempted use, or threatened use of *violent* force."); United States v. Mendoza, 2:16-cr-00324-LRH-GWF, 2017 WL 2200912, at *9 (D. Nev. May 19, 2017) ("Hobbs Act robbery requires a defendant to intentionally use, attempt to use, or threaten to use [violent] force."); Hall, 2017 WL 2174951, at *3 ("As to whether one can commit Hobbs Act robbery with too little force to qualify as the sort of violent force contemplated by § 924(c), I agree with the weight of authority that finds this argument 'wholly unavailing.'").

Petitioner next argues that Hobbs Act robbery is not a crime of violence because it can be violated by non-violent fear of injury to property. This precise argument was discussed and rejected by the Ninth Circuit in United States v. Howard, 650 Fed. Appx. 466, 468 (9th Cir. May 23, 2016), which concluded that Hobbs Act robbery is a crime of violence.[9] Undeterred, Petitioner highlights three scenarios which he claims are possible from the language of the Hobbs Act: (1) injury to property may be accomplished without threat of violent force; (2) fear of future injury is contrary to the required need for an active violent crime; and (3) threatened force includes implied threats of force that is contrary to a present willingness to use force. Reply at 34:15-23.

In support of the first scenario, Petitioner cites jury instructions from two district of Nevada cases and one district of Texas case. See United States v. Brown, No. 11-CR-334-APG, Dkt. 197 (D. Nev. July 28, 2015); United States v. Nguyen, No. 03-cr 158-KJD-PAL,

---

[9] Petitioner takes issue with the Ninth Circuit's decision in Howard arguing that it relied on "an outdated decision," United States v. Selfa, 918 F.2d 749 (9th Cir. 1990). Mot. at 19:20-23. However, the cases which Petitioner claims render Selfa outdated were decided well before the Ninth Circuit's decision in Howard. Without a showing that Howard has been effectively overruled, it remains good law and the Court finds its reasoning persuasive. See e.g. United States v. Esteban, Cr. No. 02-00540 SOM, 2017 WL 49693239, at *7 (D. Haw. Oct. 31, 2017) (citing Howard for the proposition that Hobbs Act robbery is a crime of violence, and recognizing that "[t]he Ninth Circuit has broadly reaffirmed [Selfa] as recently as this year.").

Dkt. 157 (D. Nev. Feb. 10, 2005); and United States v. Hayes, No. 95-141-D (N.D. Tex. 1995). The court in each case provided an instruction effectively indicating that the "fear of injury" requirement of the Hobbs Act can be shown through fear that another will cause economic harm. Petitioner then cites United States v. Camp, 903 F.3d 594, 602 (6th Cir. 2018) for the proposition that "threats to property alone — whether immediate or future — do not necessarily create a danger to the person." However, the Sixth Circuit in Camp made this statement in the context of evaluating whether Hobbs Act robbery qualifies as a crime of violence under the career offender Sentencing Guidelines, and specifically held that Hobbs Act robbery constitutes a crime of violence under the Force Clause of § 924(c). Id. Further, more recent cases than those cited by Petitioner have consistently concluded that "Hobbs Act robbery cannot be accomplished without at least the threat of physical force." McGriggs v. Shinn, No. EDCV 16-1757-SVW (JEM), 2017 WL 9477013, at *8 (C.D. Cal. Sept. 27, 2017) ("A taking by 'actual or threatened force' or 'violence' or 'fear of injury' necessarily involves at least the threat to use physical force. Other courts that have considered this question . . . have also reached the conclusion that 'fear of injury' is 'limited to fear of injury from the use of violence . . . .'"). Finally, in each case cited by Petitioner, the defendant was

convicted for participating in a robbery which did involve a threat or the use of violent force. See Brown at Dkt 1 (defendant indicted for involvement in an armed robbery during which she brandished a firearm); Nguyen at Dkt. 232 (defendant indicted for involvement in an armed robbery/homicide); Hayes at Dkt. 353 (defendant convicted for violating the Hobbs Act and using and carrying a firearm in furtherance thereof). Consequently, Petitioner has still failed to cite a case in which the statute was actually *applied* in the manner identified.

Petitioner also fails to cite any case in which Hobbs Act robbery has been applied in a manner consistent with the second two scenarios.[10] To the contrary, the only cases addressing these arguments

---

[10] Petitioner cites a Second Circuit case, United States v. Santos, 449 F.3d 93 (2d Cir. 2006), to support his claim that the "threat of force" requirement of the Hobbs Act can be satisfied by implied threats (for example, alluding to a person's reputation). The court in Santos indicated that the reasoning of another Second Circuit case, which held that one's reputation could be sufficient to instill fear as required by Hobbs Act extortion, "can be applied to the Hobbs Act robbery context *as long as the reputation is knowingly used to instill a 'fear of injury.'*" Id. (emphasis added). Petitioner conveniently leaves out the requirement that the reputation must be used "knowingly to instill a fear of injury" and the court's subsequent discussion that in such situations, it must consider "(1) how a reasonable person in the victim's position would perceive an action . . .; (2) the perpetrators' knowledge that a victim would perceive such action to be part of a pattern of violence, intimidation, or threats; and (3) the perpetrators' intention to 'exploit their victim's fears.'" Id. Thus, even if a person's reputation were used as a means to instill fear, the context in which the reputation would have to be used still requires proof of a communicated willingness to use force. In other words, an implied threat is insufficient to satisfy the Hobbs Act.

have found them unpersuasive. See e.g. United States v. Buck, 847 F.3d 267, 274-75 (5th Cir. 2017) (rejecting the argument "that because an individual could be convicted under the Hobbs Act for nothing more than threatening some future injury to the property of a person who is not present, this cannot be a crime of violence"). Thus, Petitioner fails to establish a "realistic probability" that the Hobbs Act could apply to such conduct.

Petitioner responds that the "realistic probability" standard plays no role in the analysis where the language of the statute indicates that it will be applied in a certain manner. Reply at 37:2-15. However, the statute itself, belies Petitioner's contention. Specifically, when read in context, "[t]he requirement that the taking [of property] be from the person or in his presence . . . supports the conclusion that a fear of injury means a fear of physical injury, which requires the threatened use of physical force." United States v. Mendoza, 2:16-cr-00324-LRH-GWF, 2017 WL 2200912, at *8 (D. Nev. May 19, 2017); United States v. Goldsby, No. 2:16-cr-00294-JCM-VCF, 2018 WL 1146401, at *2 (D. Nev. Feb. 22, 2018) (citing United States v. Pena, 161 F. Supp. 3d 268, 279 (S.D.N.Y. Feb. 11, 2016)) ("'The text, history, and context of the Hobbs Act compel a reading of the phrase 'fear of injury' that is limited to fear of injury from the use of

force.'");[11] McGriggs, 2017 WL 9477013, at *8 ("Hobbs Act robbery by definition requires non-consensual taking. See 18 U.S.C. § 1951. A taking by 'actual or threatened force' or 'violence' or 'fear of injury' necessarily involves at least the threat to use physical force."). Indeed, the fact that Petitioner is unable to cite to any case in which the Hobbs Act was applied in the way he indicates, is further proof that the language of the statute does not lend itself to Petitioner's proffered interpretation. Cf. Mendoza, 2017 WL 2200912, at *7 ("It is therefore telling in this case that Mendoza is unable to cite a single instance from the over 70 years since the Hobbs Act's enactment in which a defendant was convicted under the statute after having used or threatened to use nominal force.").

This Court declines to part from the consensus among the courts that Hobbs Act robbery constitutes a crime of violence under the Force Clause of § 924(c). Thus, the Court holds that Hobbs Act robbery, a crime

---

[11] Petitioner disputes the applicability of Pena for several reasons, each of which the Court finds unpersuasive. Notably, Pena is still relied on by many Courts for its statutory construction of the Hobbs Act. See e.g. United States v. Casas, No. 10cr3045-1, 2017 WL 1008109, at *4 (S.D. Cal. Mar. 14, 2017) ("This Court is also persuaded by the reasoning of the district court in Pena, and finds that the 'fear of injury' prong of § 1951(b)(1) does not render Hobbs Act robbery overly broad in comparison with the definition of 'crime of violence' in § 924(c)(3)(A)"); United States v. Huff, No. 1:07-CR-00156-LJO, 2017 WL 3593373, at *6 (E.D. Cal. Aug. 21, 2017) (same); United States v. Johnson, No. SACR 16-00029-CJC-5, 2016 WL 7223264, at *4 (C.D. Cal. Dec. 12, 2016) (same).

of violence, is a sufficient predicate for the § 924(c) charge. As such, Petitioner's conviction on this basis is valid, and the Court **DENIES** Petitioner's request to strike his § 924(c) sentence.[12]

C. Ineffective Assistance of Counsel Claims

Petitioner was represented by attorneys Amy E. Jacks and Richard P. Lasting (collectively, "Trial Counsel") in his underlying criminal case. Petitioner claims that Trial Counsel provided ineffective assistance in (1) opposing the Government's Motion to Admit the Burgess Testimony and countering that testimony at trial, and (2) failing to present the testimony of Petitioner's sister and phone records that would have purportedly impeached the testimony of Dunagan.

1. Burgess Evidence

Petitioner alleges ineffective representation in that: (1) Trial Counsel erred in opposing the Government's Motion to Admit Burgess's Testimony; and (2) Trial Counsel erred in failing to introduce evidence at trial that Burgess recanted her testimony implicating Petitioner. Reply at 44:1-6.

---

[12] Petitioner argues that if the Court chooses to reverse the life sentence on the gun count, then it should also re-evaluate the consecutive sentences imposed for the conspiracy and robbery counts because the two offenses are part of one continuous act and the multiple punishments imposed violate Double Jeopardy. See Reply at 39:12-43-16. Because the Court declines to reverse the life sentence, it need not address this argument.

a. *Opposing Government's Motion to Admit Burgess Testimony*

Petitioner asserts that Trial Counsel made several prejudicial errors in opposing the Government's Motion to Admit the Burgess Testimony: Trial Counsel revealed an attorney-client confidential communication that the Government used without objection to support its Motion; Trial Counsel failed to argue that the Government had not shown a "good-faith" effort to produce Burgess at trial; and Trial Counsel failed to investigate or produce evidence regarding the actual source of the threat made against Burgess. Petitioner contends that but for these errors, the Court would have denied the Government's Motion to Admit the Burgess testimony and her out-of-court statements would not have been produced at trial.

Ultimately, Trial Counsel's handling of the Burgess testimony is only relevant under Strickland insofar as it prejudiced the defense. See United States v. Sanchez-Cervantes, 282 F.3d 664, 672 (9th Cir. 2002) ("If either prong [of the Strickland test] is not met, we must dismiss the claim."). In other words, unless Petitioner establishes "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt," then Trial Counsel's alleged errors are inconsequential in this context. Strickland, 466 U.S. at 2068-69.

As discussed in section II(B)(1) of this Order, the

Burgess evidence, while important, was not necessary to this case. Although Burgess placed Petitioner at the planning meeting at Fannie Mae's, the other evidence of Petitioner's involvement in the actual Hobbs Act robbery provided circumstantial evidence of Petitioner's participation in the conspiracy sufficient to support his conspiracy conviction. Indeed, the planning meeting was merely one of fourteen overt acts identified by the Government in support of the conspiracy. See Mot. Ex. A, Indict. at 3:9-5:23.

Moreover, even as presented, the Burgess evidence was shaky. Trial Counsel spent considerable time impeaching Burgess's statements, and her credibility as a witness. Petitioner's efforts to impeach Burgess included extensively cross-examining the Government's witnesses who testified about Burgess's out-of-court statements, through which Petitioner adduced evidence of law enforcement's incomplete note-taking and report-writing, as well as inconsistencies in Burgess's prior statements. Such inconsistencies included: what day she witnessed the planning meeting, what time she was at Fannie Mae's, what exactly she overheard, how many individuals participated in the planning meeting, and the identities of the participants. See Opp'n at 58:6-14 (citing GER 2011-31, 2039-52, 2054-69, 2073-75, 2088-99). Moreover, Trial Counsel called three of their own witnesses to impeach Burgess. First, Trial Counsel introduced into evidence a testimonial

stipulation from a detective who arrested Burgess in December of 1994 for counterfeit credit card fraud. Id. at 58:18-21 (citing GER 2640-41). The testimonial stipulation identified Burgess's statements and admissions in connection with the fraud. Id. Second, Trial Counsel called Reshanna Russell, the friend identified by Burgess as being with her at Fannie Mae's restaurant. Id. at 58:21-26 (citing GER 2673-97). Russell denied having ever been to Fannie Mae's with Burgess, denied witnessing any planning meeting, and denied previously telling law enforcement that she had been to Fannie Mae's in late February 2004 and that she had eaten at Fannie Mae's with Burgess before. Id. Trial Counsel then called a LAUSD custodian of records who confirmed Russell's testimony that she worked every day during the week of February 23, 2004, except for Wednesday (February 25). Id. at 58:27-59:2 (GER 2698-2702). In light of the substantial evidence impeaching Burgess, it is highly unlikely that her out-of-court testimony played a significant role in the jury's decision.

That Petitioner would have been convicted even without the introduction of the Burgess testimony is further illustrated by the Ninth Circuit's Opinion. See Johnson, 767 F.3d at 820. Specifically, in laying out the relevant facts of the case, the Ninth Circuit explained that the Court instructed the jury to not consider the Burgess testimony when assessing co-

Defendant Williams' guilt. Id. Immediately after making this statement, the Ninth Circuit recognized that "[t]he evidence at trial incriminating *both* Johnson and Williams was strong." Id. (emphasis added). The Ninth Circuit supported this assertion by pointing to the following evidence: testimony from Dunagan who indicated that both Petitioner and Williams had confessed to having participated in the robbery-murder; testimony from Dunagan that an uncharged co-conspirator, Derrick Maddox, gave him a detailed account of the robbery and shootout, including the extent of Petitioner and Williams' involvement; and evidence that DNA recovered from a wig and latex gloves that were found on the scene matched the DNA profiles of Petitioner and Williams respectively. Id. Notably, the Ninth Circuit did not include the Burgess testimony in the paragraph identifying the "strong" incriminating evidence. Nor did it need to, as the fact that Williams was convicted of all three counts charged even without the Burgess evidence shows that the Burgess evidence was not vital to the jury's ultimate decision.

While it is possible that the Burgess evidence may have had "some conceivable" effect on the verdict, Strickland requires more. 466 U.S. at 693. Petitioner must establish "a reasonable probability," that is, "a probability sufficient to undermine confidence in the outcome." Id. at 694. Here, Petitioner has failed to establish that absent the Burgess evidence, there is a

reasonable probability that the jury would have had a reasonable doubt regarding Petitioner's guilt on any of the counts charged.[13] See Guam v. Santos, 741 F.2d 1167, 1169 (9th Cir. 1994) (denying a claim for ineffective assistance of counsel because "the errors, if any, occurred, were harmless in light of the overwhelming evidence of guilt").[14]

b. *Burgess's Recantation Evidence*

Given that the Burgess evidence was produced at trial, the next issue raised by Petitioner is whether Trial Counsel was deficient in failing to introduce evidence that Burgess recanted her statements

---

[13] Petitioner repeatedly asserts that this was a "close case" and supports this assertion with the fact that the jury deliberations lasted for three and a half days. However, the length of their deliberations were not unreasonable considering trial in this case lasted approximately four weeks and involved over 60 witnesses and 250 exhibits. Moreover, during their deliberations, the jury only sent out one note and the note did not concern Petitioner. See ECF No. CR-1495, 1719.

[14] Petitioner moves under Rule 7(a) of the Rules Governing Section 2255 Proceedings for The United States District Courts, to expand the record to include the Declarations of Kathy Smith, Veronica Williams, Amy E. Jacks, and Petitioner. These declarations would support Petitioner's claim that Trial Counsel was deficient in opposing the Government's Motion to Admit the Burgess Evidence, see Section II(C)(1)(a), because Petitioner contends that they establish (1) that Petitioner was not responsible for threatening Burgess to procure her unavailability to testify at trial, and (2) that Trial Counsel had no authority to disclose a confidential client communication. Reply at 76:25-78:10. However, the Court concluded that it need not address the first prong of the Strickland test because even if Trial Counsel were deficient, there was no prejudice since the Burgess evidence did not have a significant impact on the jury's verdict. In other words, even if the declarations were permitted in the record, the analysis would not change. As such, the Court **DENIES as MOOT** Petitioner's request to expand the record.

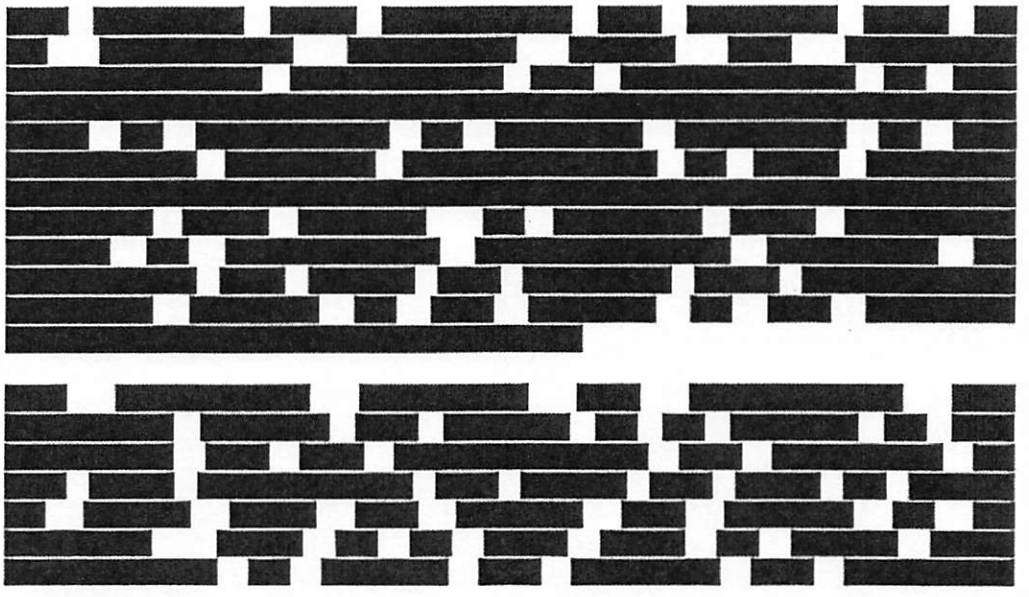
incriminating Petitioner. Specifically, Petitioner contends that Trial Counsel could have presented evidence which would have informed the jury of the following: that statements Burgess made to law enforcement and the grand jury that Petitioner was present at a planning meeting were false; that the police had employed suggestive interview techniques that induced Burgess to make false statements; and that Burgess was motivated by reward money offered by police.[15] Mot. at 25-33, 44-54; Reply at 61:11-20.

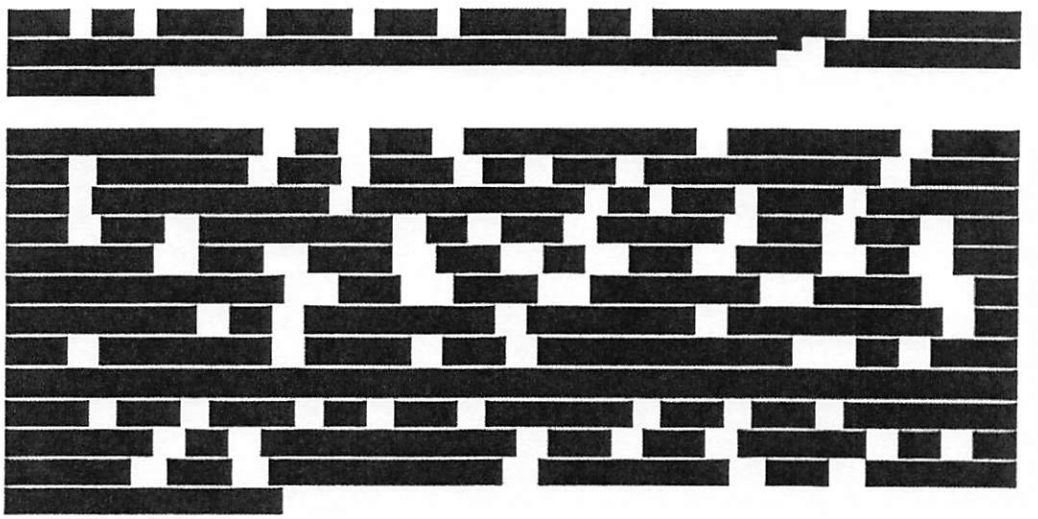
Trial Counsel debated the issue of presenting evidence of Burgess's recantation at trial. See Opp'n Ex. B, Responses of Amy E. Jacks to Gov. Interrogatories ("Jacks Interrog. Resp.") No. 7, ECF No. CV 38-2 ; Opp'n Ex. C, Resp. of Richard P. Lasting to Gov. Interrog. ("Lasting Interrog. Resp.") No. 9, ECF No. CR-2116-3, CV-38-3. Strategically, however, Trial Counsel chose not to introduce this evidence for fear that it would end up hurting Petitioner's case. Jacks Interrog Resp. Nos. 8-9; Lasting Interrog. Resp. No. 9. Specifically, Burgess went missing and was unavailable to testify at trial because she had been threatened by the "Hoovers" after her identity had been exposed to the defense. O'Donnell Decl. ¶ 8. The

---

[15] Petitioner then argues in depth why the recantation evidence would have been admissible at trial. See Mot. at 46:9-53:18. For purposes of analyzing Petitioner's Motion, the Court assumes, but does not hold, that the evidence would have been admissible.

Government moved in limine to introduce Burgess's out-of-court statements on the basis that Petitioner caused these threats to be issued against Burgess, thereby procuring her unavailability. See ECF No. CR-1392. Based on the evidence presented to the Court, the Court agreed with the Government and permitted the Burgess evidence to be introduced against Petitioner. See ECF No. CR-1460. The Ninth Circuit affirmed. See Johnson, 767 F.3d at 823 ("[T]he evidence tended to show that Johnson alone had the means, motive, and opportunity to threaten Burgess . . . ."). Trial Counsel expressed concern that if they introduced evidence that Burgess recanted her statements implicating Petitioner, that would open the door for the Government to put on evidence that Burgess only recanted her statements in response to being threatened by Petitioner. As stated by Ms. Jacks:





Jacks Interrog. Resp. No. 8.

In evaluating whether Trial Counsel's performance was deficient, the question is whether the assistance was "reasonable considering all of the circumstances." Strickland, 466 U.S. at 688, 689 ("[T]he defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"). Here, it is apparent that Trial Counsel thoughtfully weighed the competing considerations in determining whether to introduce the recantation evidence. Irrespective of whether their ultimate decision was more right than wrong or more wrong than right, it was reasonable for Trial Counsel to believe that under the circumstances, Petitioner's case would benefit most by not introducing the recantation evidence. See Strickland, 466 U.S. at 689 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are

virtually unchallengeable."); Santos, 741 F.2d at 1169 ("A tactical decision by counsel with which the defendant disagrees cannot form the basis of a claim of ineffective assistance of counsel.").

Moreover, Trial Counsel was correct in recognizing that had it been permitted to introduce the recantation evidence, the Court would have allowed the Government to respond by introducing the threat evidence. The threat evidence would likely include the statements made by Burgess to law enforcement a mere twenty-four hours after her identity was disclosed to the defense, specifically that her name had been given to the "Hoovers" and she had been receiving death threats. Opp'n at 51:6-9; O'Donnell Decl. ¶ 8. Depending on the grounds under which the recantation evidence was introduced, a number of evidence rules would have rendered the threat evidence admissible. These statements could have been admitted under Federal Rule of Evidence ("FRE") 804(b)(6), the forfeiture by wrongdoing exception to the rule against hearsay, for the same reasons why Burgess's out-of-court statements were permitted to be introduced at trial in the first place. The threat evidence could also be admitted in order to repair Burgess's credibility under FRE 806 which provides that "[w]hen a hearsay statement . . . has been admitted in evidence, the declarant's credibility may be attacked, *and then supported*, by an evidence that would be admissible for those purposes if

the declarant had testified as a witness." Fed. R. Evid. 806 (emphasis added). Further, the threat evidence could be admitted to impeach the recantation testimony. See Fed. R. Evid. 607. Petitioner contests the applicability of the impeachment by arguing that "the [G]overnment would be improperly attempting to impeach its own witnesses" and "the hearsay statements would not serve to directly impeach the content of the recantation evidence." Reply at 66:17-26. However, FRE 607 specifically states that even "the party that called the witness" may impeach her. Fed. R. Evid. 607. Moreover, the threat evidence would be used to impeach the recantation evidence because it would show that Burgess changed her story for the defense as a result of the threat made against her for initially speaking out against Petitioner.

Petitioner contends that even if Trial Counsel were concerned that the threat evidence would be admitted, they could have moved in limine to exclude it before determining whether to present the recantation evidence. While it is true that Trial Could have taken extra measures to make certain that the threat evidence would be admissible, "effective assistance need not be 'infallible' assistance." United States v. McAdams, 759 F.2d 1407, 1409 (9th Cir. 1985) (citations omitted). Moreover, Trial Counsel were both highly experienced criminal defense litigators. See Jacks Interrog. Resp. Nos. 1-2 ([redacted]

[redacted]; Lasting Interrog. Resp. Nos. 1-3 [redacted]. It goes without saying that Trial Counsels' decisions were largely based on their experience and legal knowledge. Thus, Trial Counsel's assumption that the threat evidence would be admissible was reasonable under the circumstances.

Lastly, Petitioner asserts that even if the threat evidence was admitted, the defense could have shown either that someone other than Petitioner caused the threat, or that the hearsay claims of threats were false and developed to explain Burgess's absence. Reply at 61:28-62:2. However, this alternative ignores Ms. Jacks' explanation [redacted] and also ignores Trial Counsel's fear [redacted] Jacks Interrog Resp. Nos. 8. Without this individual's testimony, it is not clear that Trial Counsel would

have been able to pin the threat on anyone else. Additionally, [redacted], it seems that Trial Counsel considered Petitioner's suggestion that Trial Counsel could have explained to the jury that the threat allegations were false, but ultimately decided that the risk of the jury siding with the Government was too great. Id. [redacted] As stated, this kind of strategic decision is not enough to establish that Trial Counsel's performance was deficient.

In sum, Petitioner has failed to establish that Trial Counsels' performance was deficient, as required to state an ineffective assistance of counsel claim.[16] Even the culmination of the alleged errors do not rise to the level of "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. Moreover, as discussed, Petitioner has failed to

---

[16] Petitioner contends that assuming the truth of the recantation evidence, then the Government presented false evidence (in the form of Burgess's prior statements to the police and grand jury testimony) to the jury in violation of Petitioner's due process rights. Mot. at 53:21-54:25. However, this claim is procedurally defaulted because Petitioner failed to raise it both before the district court and on direct appeal. See Bousley v. United States, 523 U.S. 614, 622 (1998).

establish that even without the Burgess evidence, there is a reasonable probability that the jury would have a reasonable doubt about Petitioner's guilt. Thus, the Court **DENIES** Petitioner's claim for ineffective assistance of counsel with respect to Trial Counsel's handling of the Burgess evidence.

2. Dunagan Evidence

Petitioner contends that Trial Counsel was ineffective for failing to introduce the "alibi-type" evidence that Petitioner was on a bus heading toward Memphis on March 2, 2004, the date when Dunagan claimed that he met with Petitioner in Los Angeles.[17] Prior to trial, Dunagan was [redacted] between Trial Counsel and Petitioner. Jacks Interrog. Resp. No. 11. Trial Counsel expressed to Petitioner that they were concerned about introducing this "alibi-type" evidence because:

[redacted]

[17] Petitioner analogizes the evidence that he was out of the Los Angeles area on March 2, 2004, to "alibi evidence" and cites cases finding ineffective assistance of counsel where the counsel failed to present actual alibi evidence. However, at most, the evidence that Petitioner was out of the Los Angeles area on March 2, 2004 is evidence that would impeach Dunagan and his testimony. Contrary to the cases cited by Petitioner, this evidence does not provide Petitioner with an alibi to the underlying robbery.

[redacted]

Id. at No. 12. Nevertheless, Trial Counsel agreed to [redacted] Id. at No. 12. Trial Counsel's investigation consisted of: [redacted].[18] Id. at Nos. 12, 15; Lasting Interrog. Resp. Nos. 12-14. As stated by Ms. Jacks, [redacted] Despite their own beliefs, however, Trial Counsel were unable to corroborate

---

[18] Ms. Jacks also stated that [redacted] Jacks Interrog. Resp. No. 15.a.

that Petitioner left Los Angeles on a Greyhound bus on the evening of March 1, 2004 headed for Memphis, as he and Sims alleged.

Petitioner contends that Trial Counsel should have called Sims to testify about Petitioner's Memphis trip. In support, Petitioner points to Sims' declaration in which she states that she spoke with Petitioner on March 1, 2004 about his plan to take the trip to Memphis; that on the evening of March 1, 2004, Petitioner went to the Greyhound bus station; that either during the late evening of March 1, 2004 or on March 2, 2004, Petitioner called Sims and they talked about the fact that he was on the bus trip en route to his destination; and that when Petitioner left on the bus trip, he took one of the phones connected to Sims' account with him and must have used that phone to call her. See Mot. Ex. H Decl. of Chetarah Sims ("Sims Decl.") ¶¶ 2-4, ECF No. CR-2086-9, CV-11-9. Petitioner also points to phone records from Sims' account showing five phone calls during the morning and evening of March 2, 2004, which he alleges confirm the statements in Sims' declaration, namely that on March 2, 2004, she spoke to Petitioner whilst he was on his bus trip. See Mot. Ex. I. However, Sims was an unreliable witness, as evidenced by her inconsistent and vague statements on a variety of related matters. See

Lasting Interrog. Resp. No. 13 [redacted] [redacted].[19] Further, at most the phone records only show that a number that Petitioner may have been using on March 2, 2004 had connected several times to Sims' number in Los Angeles and that the calls lasted anywhere from three to seven minutes each. Importantly, however, the records do not contain information supporting that Petitioner actually took the trip to Memphis, as none of the records indicate where *Petitioner* was located when he made or received calls.

---

[19] See e.g. Jacks Interrog. Resp. No. 13 [redacted].

Given the lack of strong evidence supporting Petitioner's trip to Memphis, the weak impeachment value it would have if Dunagan simply stated that he got the date wrong, and the grave risk that the jury would interpret the trip as Petitioner attempting to flee after committing the robbery, Trial Counsel acted reasonably in choosing to focus their impeachment efforts elsewhere. Specifically, Trial Counsel gathered and presented impeachment evidence to attack Dunagan's claim that Petitioner had shot himself in the foot. See Opp'n at 77:7-78:2 (citing ECF No. 1708, 3/2/10 RT 152-70; ECF No. CR-1709, 3/3/10 RT 5-16). Trial Counsel had Petitioner physically examined and x-rays taken of his feet, and had two experts testify at trial expressing doubt that Petitioner suffered any type of gunshot wound. Id. Trial Counsel also undertook great efforts to impeach Dunagan's credibility as a witness based on his background. See Opp'n at 78:3-79:11. In addition to the discovery the Government produced on Dunagan consisting of his extensive criminal background, his prior cooperation with the Government, his lies to law enforcement in court proceedings, and his phone records and calls from custody, see Opp'n at 78 n. 62, Trial Counsel conducted a thorough investigation to gather impeachment evidence:

[redacted]

Jacks Interrog. Resp. No. 16; see also Lasting Interrog. Resp. No. 16 [redacted]. At trial, Trial Counsel elicited much of this damaging evidence against Dunagan during their thorough cross-examination of him. Trial Counsel also questioned several law enforcement witnesses about inconsistent statements made by Dunagan, and presented their own witnesses and evidence to impeach aspects of Dunagan's testimony. See Opp'n Ex. D, at *41 n.33.

Thus, even without introducing Petitioner's

trip, Trial Counsel were effective in putting forth substantial impeachment evidence. Trial Counsel's decision to rely on this impeachment evidence, which came without any risk to Petitioner, instead of hedging their bets by introducing weak evidence of a trip which could be perceived as an attempt by Petitioner to flee on the night of the crime, was reasonable.[20] See Hensley v. Crist, 67 F.3d 181, 185 (9th Cir. 1995) (citation omitted) ("Tactical decisions that are not objectively unreasonable do not constitute ineffective assistance of counsel."). Thus, the Court **DENIES** Petitioner's claim of ineffective assistance of counsel with respect to Trial Counsel's handling of the Dunagan evidence.

D. Request For Evidentiary Hearing

Pursuant to 28 U.S.C. §2255, a hearing must be granted "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). In making such determination, "[s]ection

---

[20] Petitioner doubts that the Court would have instructed the jury that the trip could be evidence of flight and consciousness of guilt. See Reply at 73:6-74:20. Even assuming that were true, the jury would still draw their own conclusions about the suspicious timing of the trip and the Government would have been free to connect these dots for the jury in their closing argument. In other words, just because the jury may not have received an instruction that the trip could be evidence of flight, does not mean that the evidence would not have been perceived that way.

2255 requires only that the district court give a claim 'careful consideration and plenary processing, including full opportunity for presentation of the relevant facts.'" Shah v. United States, 878 F.2d 1156, 1159 (9th Cir. 1989) (citations omitted). The "choice of method [is entrusted] to the court's discretion." Id.

Petitioner moves for an evidentiary hearing as to the claims relating to counsel's ineffective representation regarding the Burgess evidence. See Reply at 78:13-14; Mot. at 66:25-26. However, other than making the conclusory statement that "Petitioner has made factual allegations that entitle him to relief," Petitioner fails to provide any reason why an evidentiary hearing is warranted. The Court has already permitted both parties to file extremely lengthy briefs in order to ensure that both sides are fully heard. See Mot. (67 pages excluding exhibits); Opp'n (87 pages excluding exhibits); Reply (79 pages excluding exhibits). These briefs, in addition to the exhibits attached thereto, adequately flesh out each side's positions regarding the Burgess evidence. The arguments made have been adequately addressed by the parties' briefs, exhibits, and the existing voluminous record in this case, with which the Court is very familiar. The Court has thoughtfully considered each argument presented by

Petitioner, and has concluded that even assuming the truth of Petitioner's allegations, he would not be entitled to relief because he has failed to establish a reasonable probability that without the Burgess evidence, the jury would have had a reasonable doubt about Petitioner's guilt. See Baumann v. United States, 692 F.2d 565, 571 (9th Cir. 1982) ("[T]he petitioner . . . must only make specific factual allegations which, if true, would entitle him to relief."). Because the Motion, files and records in this case conclusively establish that Petitioner is not entitled to relief, the Court **DENIES** Petitioner's request for an evidentiary hearing.

E. Certificate of Appealability

Under 28 U.S.C. § 2253(c), a federal prisoner must seek and obtain a certificate of appealability ("COA") to appeal the district court's denial of relief under § 2255. 28 U.S.C. § 2253 (c)(1). A district judge may also issue a COA. See Fed. R. App. P. 22 (b); United States v. Asrar, 116 F.3d 1268, 1269-70 (9th Cir. 1997) ("[D]istrict courts possess the authority to issue certificates of appealability in § 2255."). A "certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(2). The petitioner must show that reasonable jurists

could debate whether the petition should have been resolved differently or that the issues presented are "adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 483-84 (2000).

Petitioner fails to meet this burden. Because Hobbs Act robbery is a crime of violence under the Force Clause, § 924(c)(3)(A), reasonable jurists could not debate whether Petitioner's § 2255 Motion could be decided differently with respect to his § 924(c) sentence. Moreover, based on all of the reasons already stated in the Court's analysis rejecting Petitioner's ineffective assistance of counsel claims, reasonable jurists could not debate whether Petitioner's ineffective assistance of counsel claims could be decided differently. In short, Petitioner has failed to make a "substantial showing of the denial of a constitutional right." As such, the Court **DENIES** Petitioner's request for the Court to issue Petitioner a Certificate of Appealability.

///

///

///

///

///

///

///

III. CONCLUSION

For the foregoing reasons, the Court **DENIES** Petitioner's § 2255 Motion. The Court further **DENIES** Petitioner's request for an evidentiary hearing, and **DENIES** Petitioner's request for a certificate of appealability.

DATED: April 23, 2019

/s/ RONALD S.W. LEW

HONORABLE RONALD S.W. LEW
Senior U.S. District Judge