No. _____

In the

Supreme Court of the United States

MICHAEL DENNIS WILLIAMS, 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 a Writ of Certiorari

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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, Plaintiff-Appellee, v. MICHAEL DENNIS WILLIAMS, AKA Baby Treystone, AKA Treystone, Defendant-Appellant.	No. 16-56640 D.C. Nos. 2:16-cv-02569-RSWL 2:05-cr-00920-RSWL-1 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. 86) is **DENIED**.

NOT FOR PUBLICATION

FILED

JUN 3 2025

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL DENNIS WILLIAMS, AKA Baby Treystone, AKA Treystone, Defendant-Appellant.	No. 16-56640 D.C. Nos. 2:16-cv-02569-RSWL 2:05-cr-00920-RSWL-1 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Ronald S.W. Lew, District Judge, Presiding

Argued and Submitted November 19, 2024
Pasadena, California

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

Michael Williams appeals from the district court's order denying his 28 U.S.C. § 2255 motion challenging his conviction of the use and discharge of a firearm during a crime of violence causing death in violation of 18 U.S.C. § 924(c)(1)(A)(iii), (j)(1). We review a denial of a § 2255 motion de novo, *United States v. Fredman*, 390 F.3d 1153, 1156 (9th Cir. 2004). We have jurisdiction

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

under § 2255, and we affirm.

1. Our opinion issued today in *Johnson v. United States*, ___ F.4th ____, No. 19-5517 (9th Cir. June 3, 2025) controls the outcome of this appeal. Willams was tried alongside co-defendant Antoine Johnson, and the court gave the jury identical instructions for both defendants. Therefore, like Johnson's § 924(c) conviction, Williams' § 924(c) conviction remains lawful because it was based on one of two valid predicate offenses: Hobbs Act robbery or Hobbs Act robbery under a *Pinkerton* theory of liability.[1]

2. In the alternative, even if the jury could have interpreted the district court's instructions to mean that the § 924(c) charge could be predicated on the conspiracy charged in Count One of the indictment, we affirm the district court's order that any such error in the jury instructions would have been harmless. *See United States v. Reed*, 48 F.4th 1082, 1088–89 (9th Cir. 2022) (citing *Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2008) (per curiam)). The evidence presented against Williams demonstrated his participation in the robbery, and the robbery itself involved extensive advance planning and coordination, demonstrating the existence of a conspiracy. In Johnson's case, we held that the jury could not have reasonably concluded that Johnson used a firearm in the course of the conspiracy

[1] We expand Williams' Certificate of Appealability (Dkt. #3) to include whether Hobbs Act robbery under a *Pinkerton* theory of liability qualifies as a crime of violence. *See Towery v. Schriro*, 641 F.3d 300, 311 (9th Cir. 2010).

but not in the course of the Hobbs Act robbery. Unlike Johnson, no evidence placed Williams at the alleged planning meeting, making it even less likely that the jury could have premised Williams' § 924(c) conviction solely on the Count One conspiracy. *See United States v. Johnson*, 767 F.3d 815, 823–24 (9th Cir. 2014). We agree with the district court that the evidence supporting the Hobbs Act robbery and conspiracy charges was so coextensive and "inextricably intertwined" that no rational juror could have found that Williams carried a firearm in relation to the conspiracy charge and not in relation to the robbery charge. *Reed*, 48 F.4th at 1090.

AFFIRMED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Appeal from the United States District Court
for the Central District of California
Ronald S.W. Lew, District Judge, Presiding

Argued and Submitted November 19, 2024
Pasadena, California

Filed June 3, 2025

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

Opinion by Judge Christen

SUMMARY*

28 U.S.C. § 2255

The panel affirmed the district court's order denying Antoine Johnson's motion pursuant to 28 U.S.C. § 2255 challenging his conviction under 18 U.S.C. § 924(c)(1)(A)(iii) for the use and discharge of a firearm causing death during a crime of violence.

Johnson argued that his § 924(c) conviction was unlawful because intervening Supreme Court case law invalidated § 924(c)'s residual clause and therefore 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.

The panel affirmed the district court's ruling on two alternative grounds. First, the panel held there was no error in the jury instructions because the district 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

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

predicate in addition to the valid theories of Hobbs Act robbery, the error would have been harmless on the facts of this case.

COUNSEL

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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.

OPINION

CHRISTEN, Circuit Judge:

Antoine Johnson appeals the district court's denial of his motion to vacate, 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 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 the co-defendants

[1] Johnson's brief on appeal also raises two uncertified claims that he received ineffective assistance of counsel. 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 (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 (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 who, during and in relation to any crime of violence . . . uses or

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 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 would not come forward with his portion of the proceeds. According to Dunagan, Johnson said he was not

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.").

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 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

[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.

robbery occurred. The jury also heard testimony that in several earlier interviews 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; or (2) the defendant was guilty of Hobbs Act robbery under a *Pinkerton* theory of liability.[4]

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

[4] 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 (1946).

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 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 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 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 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. *Domiguez 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 (2022), that attempted Hobbs Act robbery is not a crime of violence. *Dominguez v. United States*, 142 S. Ct. 2857 (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 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

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). 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. As noted, in *United States v. Eckford*, we affirmed that Hobbs Act robbery

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 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

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 use of physical force

qualifies as a crime of violence pursuant to § 924(c)'s elements clause. 77 F.4th at 1232–36.

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."

In *United States v. Davis*, 588 U.S. 445, 469 (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 § 924(c), an offense must meet the requirements of the elements clause. We apply the 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.

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, 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. 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. Because Hobbs Act robbery is a crime of violence, *Eckford*, 77 F.4th at 1236, Hobbs Act robbery under a *Pinkerton* theory of liability is a

[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).").

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 n.8 (9th Cir. 2005). Specifically, Johnson argues that *Henry* was implicitly overruled by *Borden v. United States*, 593 U.S. 420 (2021), *United States v. Taylor*, 596 U.S. 845 (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. 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

[7] Johnson also points to *Rosemond v. United States*, 572 U.S. 64 (2014), and *Honeycutt v. United States*, 581 U.S. 443 (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.

crime of violence, including the use of force, when it relies on a *Pinkerton* theory. *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). 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 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 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 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 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 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 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.

"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.*

[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.

Pulido, 555 U.S. 57, 58 (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 (1993)). "The task is to evaluate the effect of the error on the jury, rather than merely whether the evidence points to guilt." *Reed*, 48 F.4th at 1090.

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]

[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.*

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, 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 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

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").

identities. This and direct eyewitness testimony supports the conclusion 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 shot and killed the guard. 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 (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 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 on the facts of this case.

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

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL WILLIAMS, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	CV 16-2569-RSWL X CR 05-0920-RSWL-1 **ORDER Re: PETITIONER'S AMENDED MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255** [CV 7] [CR 2029]

Currently before the Court is Petitioner Michael Williams's ("Petitioner") Amended Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 ("§ 2255 Motion") [CV 7] [CR 2029]. The Court **NOW FINDS AND RULES AS FOLLOWS**: Petitioner's § 2255 Motion is **DENIED**. The Court also **DENIES** a Certificate of Appealability.

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I. BACKGROUND

A. Factual Background

On February 27, 2004, Petitioner Michael Williams and co-Defendants Antoine Johnson, Patrick Holifield, and Larry Jordan ("co-Defendants") conspired to rob an Armored Transport Systems ("AT Systems") truck at the Bank of America ("the bank"), located at 8701 South Western Avenue in Los Angeles. First Superseded. Indict. ("Indict.") 3:16-22 [CR 159].

On March 1, 2004, co-Defendant Jordan drove his van to the parking lot near the bank while Petitioner and the others parked a stolen gray sedan in the bank parking lot. Id. at 4:1-13. Armed with a handgun and multiple automatic assault rifles, Petitioner, Johnson, and Holifield approached an AT Systems armored truck outside the bank. Id. 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. Id. at 4:19-5:2. Petitioner and co-Defendants shot and killed guard Evelio Suarez, Jr. as he was unloading bags from the truck. Id. at 4:23-24, 7:19-22.

In February 2007, a Grand Jury indicted Petitioner and co-Defendants on three counts of the following: (1) conspiracy to commit robbery affecting interstate commerce under 18 U.S.C. § 1951(a), Id. at 2:2-10; (2) committing a robbery affecting interstate commerce in violation of 18 U.S.C. § 1951(a), Id. at 6:11-20; 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)(1)(A)(iii), (j)(1), which caused the murder of Evelio Suarez, Jr. Id. at 7:3-26.

The case proceeded to trial in early 2010. The jury returned a guilty verdict for Petitioner and co-defendant Johnson on March 11, 2010. Jury Verdict 1:18-3:12, [CR 1926, 1501]. The jury found Petitioner and co-Defendant Johnson guilty of all three counts of the indictment. Id. On August 13, 2010, this Court sentenced Petitioner to 240 months for count one, 240 months for count two, and a life sentence for count three, to be served consecutively. J. & Commitment Order 1 [CR 1655].

B. Procedural Background

Petitioner filed a § 2255 Motion on April 14, 2016 [CV 1] [CR 2008] and then an Amended § 2255 Motion on May 2, 2016 [CV 7] [CR 2029]. The Government filed its Response to Petitioner's § 2255 Motion ("Opposition") on August 22, 2016 [CV 15] [CR 2046]. Petitioner filed his Reply on October 5, 2016 [CV 21] [CR 2058].

II. DISCUSSION

A. Legal Standard

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.

The range of claims which may be raised in a § 2255 motion is narrow. United States v. Wilcox, 640 F.2d 970, 972 (9th Cir. 1981). In order for a claim to be cognizable under § 2255, a motion must allege: (1) a constitutional error; (2) that the district court lacked jurisdiction to impose the sentence; (3) that the sentence was imposed in excess of the statutory maximum; or (4) that the sentence is otherwise subject to collateral attack. Id.

The remedy under § 2255 does not encompass all claimed errors in conviction and sentencing. United States v. Addonizio, 442 U.S. 178, 185 (1979); Wilcox, 640 F.2d at 973 ("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." (quoting Reed v. Farley, 512 U.S. 339, 354 (1994)) (internal quotation marks omitted).

B. Discussion

1. Crime of Violence Under 18 U.S.C. § 924(c)

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] 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: "[a crime] 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 asks the Court to strike the life sentence associated with his § 924(c) conviction because: (1) the residual clause is void-for-vagueness in light of Johnson v. United States, 135 S. Ct. 2551

(2015) (holding that the residual clause in 18 U.S.C. § 924(e) of the Armed Career Criminal Act ("ACCA") is vague); and (2) neither conspiracy to commit Hobbs Act robbery nor substantive Hobbs Act robbery, 18 U.S.C. § 1951(a), are a crime of violence under the force clause. Pet'r's Am. Mot. to Vacate, Set Aside, or Correct Sent. ("Mot.") 1:9-13.

2. Petitioner's Claims are not Procedurally Defaulted

Petitioner failed to challenge his § 924(c) conviction at trial or on direct appeal, thus placing his claim in procedural default. Petitioner admits that he raised "numerous trial issues" during his appeal, but failed to raise a challenge to his § 924(c) conviction. Mot. 3:5-6.

To overcome procedural default, Petitioner must demonstrate either "cause and actual prejudice" or "actual innocence." Bousley v. United States, 523 U.S. 614, 622 (1998). "Cause" exists if a claim is "so novel that its legal basis is not reasonably available to counsel . . . ." Reed v. Ross, 468 U.S. 1, 16 (1984). For instance, a claim is "novel" if the Supreme Court "explicitly overrule[s] one of [its] precedents." Id. at 17.

Petitioner's challenge to his § 924(c) conviction is sufficiently novel to warrant "cause." Johnson explicitly overruled James v. United States, 550 U.S. 192 (2007) and Sykes v. United States, 564 U.S. 1

(2011), two cases which stated that the ACCA residual clause—and by extension, other statutory residual clauses—were not vague. 135 S. Ct. at 2563. During his trial and appeal, Petitioner could not have anticipated a successful vagueness challenge to § 924(c)'s residual clause, as James and Sykes remained good law. Cf. United States v. Santos, No. LA CR11-566 JAK (4), 2016 WL 5661553, at *3 (C.D. Cal. Sept. 9, 2016) (cause met for failure to raise vagueness challenge to applicable residual clause because Johnson explicitly overruled James and Sykes). Actual prejudice is also satisfied because the Government concedes that Petitioner would suffer prejudice were his claims meritorious. Opp'n to § 2255 Mot. ("Opp'n") 7:20-22.

Because Petitioner has demonstrated cause and actual prejudice, the Court can dispose of the Government's procedural default argument at this stage.

3. The "Residual Clause" in 18 U.S.C. § 924(c)(3)(B) is Void-For-Vagueness Under *Johnson*

Petitioner claims that Johnson's essential holding—that the ACCA residual clause is vague—applies to the residual clause here. The Government contends that § 924(c)(3)(B) "lacks the textual features" that Johnson found troublesome and unconstitutional in the ACCA residual clause. Opp'n 13:23.

Johnson has a direct bearing on the Court's

analysis; thus, its reasoning—and subsequent application in circuit and district courts—is worth reiterating here. In Johnson, the Supreme Court held that the ACCA "residual clause[1]" in the definition of a "violent felony" was vague because of two textual features. First, it asks a court to divine the conduct involved in the "ordinary case" of the crime, leading to grave uncertainty as how to measure a crime's level of risk. Johnson, 135 S. Ct. at 2557. Second, the clause enumerates four crimes that are "violent felonies,"—including arson and use of explosives—but also allows for unenumerated crimes which "otherwise involve[] conduct that presents a serious potential risk." Id. at 2558. The Court rejected this statutory framework as arbitrary and indeterminate.

After Johnson, the Courts of Appeals are split as to whether its reasoning applies to similarly-worded residual clauses. Both the Sixth Circuit and the Second Circuit have concluded that § 924(c)(3)(B) is vague. United States v. Taylor, 814 F.3d 340, 376-79, 377 (6th Cir. 2016)(relying on the ACCA residual clause's emphasis on physical injury [rather than physical force], the list of enumerated crimes, and

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[1] The ACCA defines "violent felony" as follows: "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). Section (ii) is the ACCA's residual clause.

courts' confusion over interpreting the clause to hold § 924(c)(3)(B) vague); United States v. Hill, 832 F.3d 135 (2d Cir. 2016) (emphasizing the "mystifying list of offenses" and uncertainty as to the level-of-risk needed to define a violent felony).

By contrast, the Ninth Circuit has held that 18 U.S.C. § 16(b) is unduly vague under Johnson. Dimaya v. Lynch, 803 F.3d 1110, 1111 (9th Cir. 2015). Section 16(b) in the Immigration and Nationality Act ("INA") has a residual clause virtually identical to the one here. In Dimaya, section 16(b) was plagued by "identical unpredictability and arbitrariness as ACCA's residual clause," for largely the same reasons as in Johnson. Id. at 1115. Specifically, § 16(b) provides judges with little guidance as to what constitutes "substantial risk" of physical force. Id. at 1117.

Although the Ninth Circuit has yet to explicitly rule on whether § 924(c)(3)(B) is vague, several district courts in this circuit have concluded it is.[2]

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[2] For its part, the Central District has yet to expressly confront whether § 924(c)(3)(B) is vague under Johnson. See Santos, 2016 WL 5661553 at *1 (only reaching issue of whether Johnson applies retroactively to cases on collateral review); Espinoza v. United States, No. CV-16-4014-MWF, 2016 WL 5661546 (C.D. Cal. Sept. 21, 2016) (discussing retroactive applicability issue but not vagueness issue); United States v. Bailey, No. CR14-328-CAS, 2016 WL 3381218, at *n.2 (C.D. Cal. June 8, 2016) ("the Court need not consider whether section 924(c)(3)(B) is void for vagueness following the Supreme Court's decision in Johnson II."); Ford v. United States, No. CV 16-6306-BRO(KK), 2016 WL 4499088, at *2 (C.D. Cal. Aug. 26, 2016) (declining to decide Petitioner's "actual innocence" because the issue of § 924(c)(3)(B)'s vagueness is largely unsettled).

See United States v. Bell, 158 F. Supp. 3d 906, 922-23 (N.D. Cal. 2016) (concluding that § 924(c)(3)(B) "cannot stand under Johnson"); United States v. Lattanaphom, 159 F. Supp. 3d 1157, 1164 (E.D. Cal. 2016)("[t]he only binding authority in the Ninth Circuit compels this court to find § 924(c) void for vagueness"); United States v. Baires-Reyes, No. 15-cr-00122-EMC-2, 2016 WL 3163049, at *5 (N.D. Cal. June 7, 2016) (924(c)'s residual clause is vague). The Court finds Dimaya and the district courts' reasoning compelling, and likewise concludes that the § 924(c)(3)(B) residual clause is vague under Johnson.

The Government trots out several unpersuasive textual differences between the ACCA residual clause and the § 924(c) residual clause. For instance, §924(c)(3)(B) focuses on the risk *in the course of committing the offense.* Opp'n 9:3-5. This is a narrower inquiry than the open-ended risk inquiry in the ACCA residual clause, which deals with a person's conduct *before and after* a crime. Id. at 9:3-9. This argument is markedly similar to one rejected in Dimaya. 803 F.3d at 1118 ("we doubt that this phrase actually creates a distinction between [§ 16(b) and the ACCA residual clause].")

The language, "in the course of committing the offense," does not foreclose the reasoning in Johnson. Here, regardless of whether the court is analyzing the risk of violence during the actual commission of the

underlying Hobbs Act robbery crime or in the aftermath, the "grave uncertainty" in calculating the risk involved still remains. Textual distinctions between § 924(c)(3)(B) and the ACCA residual clause, without more, cannot avoid the vagueness and uncertainty in the residual clause's application.

The Government also argues that § 924(c)(3)(B) lacks the "enumerated offenses" that precede the ACCA residual clause, and thus lacks the same indeterminate level-of-risk inquiry. Opp'n 16:1-2. To be sure, Johnson did factor the four enumerated offenses into its conclusion that the "serious potential risk" language is unduly vague. 135 S. Ct. at 2558. But Johnson's quarrel with the enumerated offenses turned more on the indeterminacy of what other crimes would involve conduct presenting "a serious potential risk." And other courts have squarely rejected this exact argument. Dimaya, 803 F.3d at 1118 (rejecting argument that § 16(b) lacked the enumerated offenses and was distinguishable from the ACCA residual clause); Bell, 158 F. Supp. 3d at 923 (same). If anything, § 924(c)(3)(B)'s lack of enumerated crimes renders the residual clause even more vague than the ACCA residual clause. Dimaya, 803 F.3d at n.13 (the enumerated crimes list "provide[s] at least some guidance as to the sort of offense Congress intended for the provision to cover.")

Given the relative consistency with which this

circuit and its district courts have held that the § 924(c)(3)(B) residual clause is vague under Johnson, the Court concludes the same here. It follows then, that neither Hobbs Act robbery nor conspiracy to commit Hobbs Act robbery are crimes of violence under the residual clause.

4. Conspiracy to Commit Hobbs Act Robbery is Not a Crime of Violence Under the Residual Clause or the Force Clause in § 924(c)

Petitioner correctly avers that conspiracy to commit Hobbs Act robbery is not a crime of violence under the either the residual clause or the force clause. Mot. 8:9.

The Ninth Circuit has long held that Hobbs Act conspiracy is a crime of violence under the *residual clause*. Mendez, 992 F.2d 1488, 1488 (9th Cir. 1993). But now that Johnson has largely dismantled the validity of the residual clause, it is difficult to make a straight-faced argument that Hobbs Act conspiracy is a crime of violence. United States v. Luong, No. 2:99-00433 WBS, 2016 WL 1588495, at *3 (E.D. Cal. Apr. 20, 2016) ("If it were not for Johnson, this court would be compelled to conclude . . . that [Hobbs Act conspiracy] is a crime of violence under the residual clause.")

Conspiracy to commit Hobbs Act robbery also fails under the force clause because its elements do not require use of force. The Ninth Circuit is noticeably

silent as to whether Hobbs Act conspiracy constitutes a crime of violence under the *force clause*, and recent district court decisions have clarified that it is not. Baires-Reyes, 2016 WL 3163049 at *2 (Hobbs Act conspiracy elements of two or more people agreeing, knowledge of the conspiracy, and voluntary participation lacked use of force necessary to qualify as crime of violence under § 924(c)(3)(A)); Luong, 2016 WL 1588495, at *2 (jury instructions to find "there was a plan to commit robbery which if successful would have affected interstate or foreign commerce" lacked force element); but see United States v. Williams, 2:15-cr-00069-JDL, 2016 1555696, at *11 (D. Me. Apr. 15, 2016) (because Hobbs Act conspiracy is not a "distinct offense" from substantive Hobbs Act robbery, both are crimes of violence under the force clause).

And generally, conspiracy can be committed without employing force. United States v. Gore, 636 F.3d 728, 731 (5th Cir. 2011) see also United States v. King, 979 F.2d 801, 803 (10th Cir. 1992) (a conspiracy conviction usually does not require actual or attempted force because conspiracy statutes allow law enforcement to intervene rather than wait for some act of force to occur).

In its jury instructions, this Court asked the jury to "find that there was a plan to commit robbery affecting interstate commerce." Id. at Instr. No. 9. This language is nearly identical to the jury

instructions that the court in Luong found defective under the force clause. And similar to Baires-Reyes, the elements of Hobbs Act conspiracy focus on agreement and defendant's knowledge, but not force. Id. at Instr. No. 9. The Court thus finds that these instructions and elements lack any mention—implicit or otherwise—of use of force. Accordingly, Hobbs Act conspiracy fails under both crime of violence prongs in § 924(c).

5. Substantive Hobbs Act Robbery is a Crime of Violence under the "Force Clause" in § 924(c)(3)(A)

Even if Petitioner's § 924(c) conviction and associated life sentence could feasibly be vacated because the residual clause is void for vagueness, substantive Hobbs Act robbery is nevertheless a crime of violence under the force clause in § 924(c)(A). In re Hines, 824 F.3d 1334, 1337 (11th Cir. 2016) (upholding Petitioner's conviction under § 924(c) even though the residual clause was unconstitutional under Johnson, because armed bank robbery is a crime of violence under the force clause); Cf. Bell, 158 F. Supp. 3d at 925 (assault is a crime of violence under the force clause in § 924(c) even though the residual clause is vague).

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a. *The Court Can Uphold the § 924(c) Conviction Under Substantive Hobbs Act Robbery, Even if Conspiracy to Commit Hobbs Act Robbery is Not a Crime of Violence*

Petitioner contends that because the jury was not instructed that it had to be unanimous in its selection, it is unclear whether the Hobbs Act conspiracy or the substantive Hobbs Act robbery was the basis for the jury's § 924(c) finding. Mot. 5:6. Petitioner shoehorns this argument that the jury may have rested its verdict exclusively on Hobbs Act conspiracy, which is not a crime of violence. Id. at 5:8-10.[3]

This red-herring argument asks the Court to make several inferential leaps that do not comport with the proceedings in this case. 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. C Nos. 18, 19. And the jury found Petitioner guilty on the count for Hobbs Act robbery, Hobbs Act conspiracy, and the § 924(c) charge. Mot. Ex. D. It makes little sense that Petitioner could have only discharged a firearm in the conspiracy

[3] This is curiously convenient, as this circuit has only held that Hobbs Act conspiracy is a crime of violence under the § 924(c) residual clause (which is now likely vague under Johnson), as opposed to the force clause.

but not the substantive Hobbs Act robbery. Opp'n 10:13-14.

Petitioner principally relies on In re Gomez, an Eleventh Circuit case. In Gomez, the jurors had to consider multiple crimes for a § 924(c) count, including two drug trafficking crimes and attempted Hobbs act robbery completed in one day, and a two-week long Hobbs Act conspiracy. 830 F.3d 1225, 1227 (11th Cir. 2016). The jury could have convicted defendant of the § 924(c) offense "without reaching unanimous agreement on during which crime . . . [defendant] possessed the firearm." Id. Confusion abounded in the jury instructions because defendant may have carried/possessed a firearm, in violation of § 924(c), during the ongoing Hobbs Act conspiracy, or at some point during the drug trafficking crimes or attempted robbery.

The present case is distinguishable. Here, Petitioner *discharged* rather than passively possessed the firearm during a conspiracy and Hobbs Act robbery that was one "continuing event with the same actors." Opp'n 10:15. And the jury here was not tasked with deciding which of four open-ended crimes—that occurred over a two-week span—would qualify for the § 924(c) charge. Without more, the Court declines to exclusively rely on one out-of-circuit case that is merely persuasive authority.

Petitioner asks the Court to imagine that the jury

found for the § 924(c) conviction solely on § 1951 conspiracy. But the Court could just as easily assume the conviction rested on substantive Hobbs Act robbery, which is surely a crime of violence under the force clause. Postulating about which predicate offense is the basis for the § 924(c) conviction is precisely the conjecture and "judicial fact finding" that Petitioner insists the Court cannot do under Alleyne v. United States, 133 S. Ct. 2151, 2155 (2013); Reply 14:15-16. Petitioner cannot have it both ways. So long as one of the predicate offenses constitutes a crime of violence under § 924(c), which substantive Hobbs act robbery does, then the § 924(c) conviction stands.

b. *Hobbs Act Robbery Includes "Violent" Use of Force as an Element*

As set forth in the jury instructions, the elements for substantive Hobbs Act Robbery, 18 U.S.C. § 1951(a), 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. C, at Jury Instr. No. 13.

Petitioner advances three unpersuasive arguments as to why Hobbs Act robbery lacks violent force. Petitioner first argues that Hobbs Act robbery takes

cues from common-law robbery, which disregards the "degree of violence" used. Mot. 10:11. Petitioner props this argument on United States v. Rodriguez, 925 F.2d 1049 (7th Cir. 1991), where the robbery element was satisfied under 18 U.S.C. § 2114 (robbery of a U.S. Postal Service letter carrier) even though only minimal force and violence was used to pull the keys from the keychain on the victim's clothing. Id. at 1050, 1052.

This precise case and rationale has already been distinguished by and rejected by post-Johnson cases deciding whether Hobbs Act robbery is a crime of violence.[4] Section 2114 robbery is substantively and textually different from Hobbs Act robbery, as it includes assault in its definition and lacks a precise definition of robbery, allowing courts to borrow the common-law definition. United States v. Pena, 161 F. Supp. 3d 268, 278 (S.D.N.Y. 2016).

Second, Petitioner relies heavily on the "fear of injury" language in § 1951(a), advancing several hypotheticals and cases involving injury to intangible assets or economic interests, rather than physical

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[4] In United States v. Dorsey, No. 2:14-CR-00328(B)-CAS, 2016 WL 3607155, at *4 (C.D. Cal. June 30, 2016), Judge Snyder rejected defendant's argument that Hobbs Act robbery is on equal footing with common-law robbery because the two are easily distinguishable. In fact, the court explicitly rejected several of the cases Petitioner cites here that have purportedly held that common-law robbery statutes are not crimes of violence under the force clause. Compare Dorsey, 2016 WL 3607155 at *4 (rejecting Dunlap, Parnell, and Gardner), with Reply 23:8-18 (relying on same cases).

injury. Mot. 10:27-11:13.

Judge Snyder from this district found a similar argument—that because threats to devalue economic interest were sufficient to facilitate a Hobbs Act robbery conviction, the statute is not a crime of violence—unpersuasive, as "fear of injury" includes "fear of injury from the use of force, and not fear instilled by . . . threatened economic devaluation [and similar threats]. Bailey, 2016 WL 3381218 at *4. Judge Snyder also reasoned that defendant's examples were defective because he did not cite cases where the Court applied Hobbs Act robbery to the particular facts of the hypotheticals. Id.

It is true that the categorical approach asks the Court to determine whether the most innocent conduct embraced by the statute matches the force clause, Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013), but this is not an invitation for Petitioner to throw various hypotheticals against the wall and see which one sticks. As the defendant in Bailey, Petitioner would be better served by referencing cases where the court applied the statute in the manner he argues, showing at least a realistic probability, not a theoretical possibility, that the Hobbs Act statute could apply to nonviolent conduct.

Overall, Petitioner's arguments sidestep the unavoidable: "[r]obbery indisputably qualifies as a

crime of violence." Mendez, 992 F.2d at 1491.[5] At least two judges in this district have held that Hobbs Act robbery is a crime of violence. United States v. Elima, No. SACR 16-00037-CJC, 2016 WL 3556603, at *2 (C.D. Cal. June 6, 2016) ("Hobbs Act robbery qualifies as a 'crime of violence' under § 924(c)."); Bailey, 2016 WL 3381218 at *3 (same). And a "chorus of judges" have announced over and over again that Hobbs Act robbery is a crime of violence under § 924(c)(3)(A). Dorsey, 2016 WL 3607155 at *4 (quoting United States v. McCallister, No. 15-0171, 2016 3072237, at *1 (D.D.C May 31, 2016)). The Court is not aware of, nor does Petitioner provide any precedent, indicating that courts in this circuit have held that Hobbs Act robbery is not a crime of violence under the force clause.

c. *Hobbs Act Robbery Includes "Intentional" Threats of Violence Force*

Petitioner also argues that Hobbs Act robbery is not a crime of violence under the force clause, as putting someone in "fear in injury" does not require intentional conduct. Mot. 13:11-3. In doing so, Petitioner analogizes to cases analyzing the

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[5] Petitioner protests that this statement from Mendez is "pure dictum." Reply 20:26. Indeed, the Mendez court made this statement in the context of determining that Hobbs Act robbery is a crime of violence under the § 924(c)(3)(B) residual clause, but countless courts have carried over this language to support the holding that Hobbs Act robbery is a crime of violence under the force clause. E.g., United States v. Howard, 650 F. App'x 466, 468 n.3 (9th Cir. 2016) (citing to Mendez and concluding that Hobbs Act robbery is a crime of violence under the force clause).

"intimidation" language in federal bank robbery statute 18 U.S.C. § 2113(a), because intimidation is "functionally equivalent" to fear of injury. Mot. 14:1.

The Ninth Circuit foreclosed this argument in Selfa, explaining that bank robbery by *intimidation* in § 2113(a)—defined as putting another person "in fear of bodily harm"—involves "threatened use of physical force" as set forth in the nearly-identical force clause in United Sentencing Guidelines § 4B1.2. 918 F.2d 749, 751-52 (9th Cir. 1990). The court concluded: "Because bank robbery by intimidation—which is defined as instilling fear of injury—qualifies as a crime of violence, Hobbs Act robbery by means of fear of injury also qualifies as a crime of violence." Id.

At least two district courts have considered and disposed of Petitioner's "intentional threat of violent force" argument as nonsensical. Merinord, No. 5:15-CR-136, 2015 WL 6457166, at *4 (E.D.N.C. Oct. 26, 2015) (Reasoning it would "make the law an ass" to take one's property by fear of injury without intending to create fear of injury itself; see also United States v. Standberry, 139 F. Supp. 3d 734, 739 (E.D. Va. 2015) (Rejecting a "somewhat implausible paradigm where a defendant unlawfully obtains another person's property against their will by unintentionally placing the victim in fear of injury.")

The statute itself also defies Petitioner's

reasoning. In § 1951(a), taking of property occurs "by means of . . . fear of injury;" that is, a conviction rests on "putting someone in fear of injury in order to take their personal property." McCallister, 2016 WL 3072237 at *11. The Court does not see how a defendant can aspire to take one's property without at least more than "accidental, negligent, or even reckless conduct." Id. (citations omitted). Perhaps most tellingly, Petitioner fails to cite a case or compelling hypothetical where a defendant unintentionally threatened violent force to accomplish Hobbs Act robbery. Because Hobbs Act robbery invites intentional, or at least knowing or willing conduct, it is a crime of violence under the force clause.

6. The Certificate of Appealability is Denied

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 his § 2255 Motion could be decided differently. Therefore, the Court declines to issue Petitioner a Certificate of Appealability.

III. CONCLUSION

Accordingly, the Court **DENIES** Petitioner's § 2255 Motion and **DENIES** the Certificate of Appealability. **IT IS SO ORDERED.**

DATED: October 31, 2016

s/ RONALD S.W. LEW

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

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 44. Firearms (Refs & Annos)

18 U.S.C.A. § 924

§ 924. Penalties

Effective: June 25, 2022
Currentness

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever--

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(l); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly--

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922,

shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other

term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if--

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)--

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both.

(8) Whoever knowingly violates subsection (d) or (g) of section 922 shall be fined under this title, imprisoned for not more than 15 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or

device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

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

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

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall--

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law--

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--

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

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

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

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

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition--

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(l), or knowing violation of section 924, 932, or 933, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: *Provided,* That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are--

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title;

(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(l), 922(n), or 924(b) of this title;

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition; and

(G) any offense under section 932 or 933.

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding

any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

(A) the term "serious drug offense" means--

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

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

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

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

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(f) In the case of a person who knowingly violates section 922(p), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

(g) Whoever, with the intent to engage in conduct which--

(1) constitutes an offense listed in section 1961(1),

(2) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46,

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)),

travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h) Whoever knowingly receives or transfers a firearm or ammunition, or attempts or conspires to do so, knowing or having reasonable cause to believe that such firearm or ammunition will be used to commit a felony, a Federal crime of terrorism, or a drug trafficking crime (as such terms are defined in section 932(a)), or a crime under the Arms Export Control Act (22 U.S.C. 2751 et seq.), the Export Control Reform Act of 2018 (50 U.S.C. 4801 et seq.), the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.), or the Foreign Narcotics Kingpin Designation Act (21 U.S.C. 1901 et seq.), shall be fined under this title, imprisoned for not more than 15 years, or both.

(i)(1) A person who knowingly violates section 922(u) shall be fined under this title, imprisoned not more than 10 years, or both.

(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this subsection.

(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall--

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

(k)(1) A person who smuggles or knowingly brings into the United States a firearm or ammunition, or attempts or conspires to do so, with intent to engage in or to promote conduct that--

(A) is punishable under the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46; or

(B) constitutes a felony, a Federal crime of terrorism, or a drug trafficking crime (as such terms are defined in section 932(a)),

shall be fined under this title, imprisoned for not more than 15 years, or both.

(2) A person who smuggles or knowingly takes out of the United States a firearm or ammunition, or attempts or conspires to do so, with intent to engage in or to promote conduct that--

(A) would be punishable under the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, if the conduct had occurred within the United States; or

(B) would constitute a felony or a Federal crime of terrorism (as such terms are defined in section 932(a)) for which the person may be prosecuted in a court of the United States, if the conduct had occurred within the United States,

shall be fined under this title, imprisoned for not more than 15 years, or both.

(l) A person who steals any firearm which is moving as, or is a part of, or which has moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(m) A person who steals any firearm from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall be fined under this title, imprisoned not more than 10 years, or both.

(n) A person who, with the intent to engage in conduct that constitutes a violation of section 922(a)(1)(A), travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.

(o) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

(p) Penalties relating to secure gun storage or safety device.--

(1) In general.--

(A) Suspension or revocation of license; civil penalties.--With respect to each violation of section 922(z)(1) by a licensed manufacturer, licensed importer, or licensed dealer, the Secretary may, after notice and opportunity for hearing--

(i) suspend for not more than 6 months, or revoke, the license issued to the licensee under this chapter that was used to conduct the firearms transfer; or

(ii) subject the licensee to a civil penalty in an amount equal to not more than $2,500.

(B) Review.--An action of the Secretary under this paragraph may be reviewed only as provided under section 923(f).

(2) Administrative remedies.--The suspension or revocation of a license or the imposition of a civil penalty under paragraph (1) shall not preclude any administrative remedy that is otherwise available to the Secretary.

CREDIT(S)

(Added Pub.L. 90-351, Title IV, § 902, June 19, 1968, 82 Stat. 233; amended Pub.L. 90-618, Title I, § 102, Oct. 22, 1968, 82 Stat. 1223; Pub.L. 91-644, Title II, § 13, Jan. 2, 1971, 84 Stat. 1889; Pub.L. 98-473, Title II, §§ 223(a), 1005(a), Oct. 12, 1984, 98 Stat. 2028, 2138; Pub.L. 99-308, § 104(a), May 19, 1986, 100 Stat. 456; Pub.L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095; Pub.L. 99-570, Title I, § 1402, Oct. 27, 1986, 100 Stat. 3207-39; Pub.L. 100-649, § 2(b), (f)(2)(B), (D), Nov. 10, 1988, 102 Stat. 3817, 3818; Pub.L. 100-690, Title VI, §§ 6211, 6212, 6451, 6460, 6462, Title VII, §§ 7056, 7060(a), Nov. 18, 1988, 102 Stat. 4359, 4360, 4371, 4373, 4374, 4402, 4403; Pub.L. 101-647, Title XI, § 1101, Title XVII, § 1702(b)(3), Title XXII, §§ 2203(d), 2204(c), Title XXXV, §§ 3526 to 3529, Nov. 29, 1990, 104 Stat. 4829, 4845, 4857, 4924; Pub.L. 103-159, Title I, § 102(c), Title III, § 302(d), Nov. 30, 1993, 107 Stat. 1541, 1545; Pub.L. 103-322, Title VI, § 60013, Title XI, §§ 110102(c), 110103(c), 110105(2), 110201(b), 110401(e), 110503, 110504(a), 110507, 110510, 110515(a), 110517, 110518(a), Title XXXIII, §§ 330002(h), 330003(f)(2), 330011(i), (j), 330016(1)(H), (K), (L), Sept. 13, 1994, 108 Stat. 1973, 1998, 1999, 2000, 2011, 2015, 2016, 2018, 2019, 2020, 2140, 2141, 2145, 2147; Pub.L. 104-294, Title VI, § 603(m)(1), (n) to (p)(1), (q) to (s), Oct. 11, 1996, 110 Stat. 3505; Pub.L. 105-386, § 1(a), Nov. 13, 1998, 112 Stat. 3469; Pub.L. 107-273, Div. B, Title IV, § 4002(d)(1)(E), Div. C, Title I, § 11009(e)(3), Nov. 2, 2002, 116 Stat. 1809, 1821; Pub.L. 108-174, § 1(2), (3), Dec. 9, 2003, 117 Stat. 2481; Pub.L. 109-92, §§ 5(c)(2), 6(b), Oct. 26, 2005, 119 Stat. 2100, 2102; Pub.L. 109-304, § 17(d)(3), Oct. 6, 2006, 120 Stat. 1707; Pub.L. 115-391, Title IV, § 403(a), Dec. 21, 2018, 132 Stat. 5221; Pub.L. 117-159, Div. A, Title II, § 12004(c) to (f), June 25, 2022, 136 Stat. 1329.)

18 U.S.C.A. § 924, 18 USCA § 924
Current through P.L. 119-81. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 95. Racketeering (Refs & Annos)

18 U.S.C.A. § 1951

§ 1951. Interference with commerce by threats or violence

Currentness

(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.

(b) As used in this section--

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

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 793; Pub.L. 103-322, Title XXXIII, § 330016(1)(L), Sept. 13, 1994, 108 Stat. 2147.)

18 U.S.C.A. § 1951, 18 USCA § 1951
Current through P.L. 119-81. Some statute sections may be more current, see credits for details.

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