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

UNITED STATES OF AMERICA, Plaintiff, v. REY CHEA, Defendant.	Case Nos. 98–cr-20005-1 CW 98–cr-40003-2 CW ORDER GRANTING MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255 Dkt. No. 340, 98–cr-20005-1 Dkt. No. 453, 98–cr-40003-2

Rey Chea, who is represented by counsel, moves under 28 U.S.C. § 2255 to vacate, set aside, or correct his sixty-five-year sentence for convictions under 18 U.S.C. § 924(c) on the ground that the four counts of Hobbs Act robbery that served as predicates are not categorically "crimes of violence" under § 924(c)(3).[1] The government opposes the motion. In light of United States v. Davis, 139 S. Ct. 2319 (2019), which invalidated the residual clause of § 924(c)(3), Chea's sentence under § 924(c) can be upheld only if Hobbs Act robbery is categorically a crime of violence under the elements clause of § 924(c)(3). For the reasons set forth below, the Court concludes that Hobbs Act robbery is not categorically a crime of violence under the elements clause of § 924(c)(3), because the offense can be committed by causing fear of future injury to property, which

[1] Chea filed identical § 2255 motions in the two cases listed above. This order resolves docket number 340 in case number 98-cr-20005, and docket number 453 in case number 98-cr-40003.

does not require "physical force" within the meaning of § 924(c)(3). Accordingly, the Court GRANTS Chea's motion.

BACKGROUND

I. Procedural history

In 1998, a grand jury returned indictments against Chea in two cases: case number 98-cr-20005, and case number 98-cr-40003. Juries in two trials found Chea guilty of each of the counts on which he was indicted. Chea's aggregate sentence in both cases was 880 months, or slightly over seventy-three years, with sixty-five of those years being for the § 924(c) convictions and sentence at issue here.

A. Case No. 98-cr-20005

In case number 98-cr-20005, the operative indictment charged Chea with one count of conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) (Count One); three counts of Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) (Counts Two, Four, and Six); and three counts of using, carrying, or brandishing a firearm in violation of 18 U.S.C. § 924(c) (Counts Three, Five, and Seven), with the predicate offenses being the three counts of Hobbs Act robbery in Counts Two, Four, and Six. Indictment, Case No. 98-cr-20005, Docket No. 113; Docket No. 340-1, Ex. B.

After a trial, a jury convicted Chea on all seven counts on April 1, 1999. Verdict, Case No. 98-cr-20005, Docket No. 244; Docket No. 340-1, Ex. C.

District Judge Ronald M. Whyte sentenced Chea to 188 months as to Count One; a combined 188 months as to Counts Two, Four, and Six to run concurrently to the sentence for Count One; five

years as to Count Three; twenty years as to Count Five; and twenty years as to Count Seven, with the sentences for Counts Three, Five, and Seven to be served consecutively to each other and to the other sentences. Case No. 98-cr-20005, Docket No. 280. Judge Whyte also sentenced Chea to two years of supervised release and to pay a special assessment of $350 and restitution. Id.

Judge Whyte entered judgment on August 25, 1999. Case No. 98-cr-20005, Docket No. 282.

Chea filed a notice of appeal on August 26, 1999. Case No. 98-cr-20005, Docket No. 283. The Ninth Circuit affirmed Chea's conviction but remanded for resentencing. Case No. 98-cr-20005, Docket Nos. 306, 307; United States v. Chea, 231 F.3d 531, 540 (9th Cir. 2000). The reasons for the remand for resentencing are not relevant to the issues now before the Court.

On remand, Judge Whyte resentenced Chea on June 13, 2001, to seventy-two months as to Count One; a combined seventy-two months as to Counts Two, Four, and Six, with the term to be served concurrently to the sentence for Count One; five years as to Count Three; twenty years as to Count Five; and twenty years as to Count Seven, with the terms for Counts Three, Five, and Seven to be served consecutively to each other and to the other sentences. Judgment, Case No. 98-cr-20005, Docket No. 317; Docket No. 340-1, Ex. D. Judge Whyte also sentenced Chea to twenty-four months of supervised release, and to pay restitution. Id.

This action was reassigned to the undersigned on September 26, 2016. Case No. 98-cr-20005, Docket No. 346.

B. Case No. 98-cr-40003

In case number 98-cr-40003, Chea was indicted on one count of conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) (Count One); one count of Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) (Count Two); and one count of using, carrying, or brandishing a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c) (Count Three), with the predicate crime being the Hobbs Act robbery in Count Two. Indictment, Case No. 98-cr-40003, Docket No. 1; see also Case No. 98-cr-20005, Docket No. 340-1, Ex. F.

After a trial, on April 29, 1999, a jury found Chea guilty as to all three counts. Verdict, Case No. 98-cr-40003, Docket No. 206; see also Case No. 98-cr-20005, Docket No. 340-1, Ex. G (Verdict) & H (Judgment).

The Court sentenced Chea to 100 months as to Counts One and Two, to be served concurrently to each other and to the term of imprisonment imposed in Case No. 98-cr-20005; and to twenty years as to Count Three, to be served consecutively to the prison term for Counts One and Two and to the term of imprisonment imposed in Case No. 98-cr-20005 for the § 924(c) counts. Judgment, Case No. 98-cr-40003, Docket No. 244; see also Case No. 98-cr-20005, Docket No. 340-1, Ex. H (Judgment). The Court also sentenced Chea to thirty-six months of supervised release, and to pay restitution. Id.

Chea filed a notice of appeal on September 17, 1999. Case No. 98-cr-40003, Docket No. 245. The Ninth Circuit affirmed on December 5, 2000. Case No. 98-cr-40003, Docket No. 294.

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II. Prior § 2255 motions

On January 4, 2005, Chea moved under § 2255 to vacate his convictions and sentence in Case No. 98-cr-40003, Docket No. 327, on the grounds of ineffective assistance of counsel and that his convictions and sentence violated his Sixth Amendment rights. The Court denied the motion on June 22, 2005, on the grounds that it was untimely and lacked merit. Case No. 98-cr-40003, Docket No. 332.

On April 16, 2012, Chea filed an identical motion under § 2255 in both cases. See Case No. 98-cr-20005, Docket No. 336; Case No. 98-cr-40003, Docket No. 435. The motion was predicated on the argument that his convictions and resulting sentence violated the Ninth and Tenth Amendments. The Court dismissed the motion in case number 98-cr-40003 on May 24, 2012, on the ground that it was a successive § 2255 motion not authorized by the court of appeals. Case No. 98-cr-40003, Docket No. 438. The Court denied the motion in case number 98-cr-20005 on the grounds that it was untimely and lacked merit. Case No. 98-cr-20005, Docket No. 338.

III. Present § 2255 motion

On May 11, 2016, Chea filed an identical § 2255 motion in both cases, seeking to vacate his convictions and sentence under § 924(c). Case number 98-20005, Docket No. 340; Case Number 98- cr-40003, Docket No. 453.[2]

Section 924(c)(1) "authorizes heightened criminal penalties for using or carrying a firearm 'during and in relation to,' or

[2] In the remainder of this order, any references to docket numbers are to those in case number 98-cr-20005.

possessing a firearm 'in furtherance of,' any federal 'crime of violence or drug trafficking crime.'" Davis, 139 S. Ct. at 2324 (citing 18 U.S.C. § 924(c)(1)(A)).

"The statute proceeds to define the term 'crime of violence' in two subparts – the first known as the elements clause, and the second as the residual clause." Id.

According to § 924(c)(3), a crime of violence is 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.

Id. (citation and internal quotation marks omitted).

On September 19, 2016, the Ninth Circuit authorized Chea's successive § 2255 motion on the ground that it makes a prima facie showing under Johnson v. United States, 135 S. Ct. 2551 (2015) (Johnson II).

In his initial brief in support of his present § 2255 motion, Chea argues that his § 924(c) conviction and sentence must be vacated as illegal based on Johnson II. There, the Supreme Court held that the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii), which was worded similarly to the residual clause of § 924(c)(3), was unconstitutionally vague. Chea contends that Johnson II's holding also applies to the residual clause of § 924(c)(3) and renders it unconstitutionally vague. Chea further argues that, post-Johnson II, his § 924(c) sentence can be upheld only if Hobbs Act robbery is a crime of violence under the elements

clause[3] of § 924(c)(3), which he contends is not the case, because Hobbs Act robbery does not involve the requisite degree of physical force required for a conviction under § 924(c)(3).

The government opposes the motion. The government argues that Chea's motion must be denied because his sentence is valid under the elements clause of § 924(c)(3). The government also argues that Chea's motion is procedurally barred because he failed to assert his current challenge to his § 924(c) conviction and sentence on direct appeal, and that the motion is untimely, because Chea filed it more than a year after his § 924(c) conviction and sentence became final.

The Court stayed its determination of Chea's § 2255 motion pending the final disposition of several Ninth Circuit cases involving issues that could be determinative of it. Docket Nos. 351, 375. The parties filed supplemental briefs addressing these cases. Docket Nos. 369, 370.

On July 8, 2019, the Court ordered the parties to file supplemental briefs specifically addressing the impact on Chea's § 2255 motion of Davis, 139 S. Ct. at 2319, and United States v. Blackstone, 903 F.3d 1020 (9th Cir. 2018), cert. denied, 139 S. Ct. 2762 (2019). Docket No. 377.

In Davis, the Supreme Court considered whether the residual clause of § 924(c)(3) is unconstitutionally vague and on June 24, 2019, held that it is. 139 S. Ct. at 2319. The Supreme Court reasoned that the residual clause of § 924(c)(3) is unconstitutional for the same reasons that it previously held

[3] The elements clause is often referred to as the "force clause."

that other, similarly-worded residual clauses in other statutes defining violent crimes were unconstitutional, namely because it requires judges to employ the "categorical approach" to determine whether an offense qualifies as a crime of violence. See id. at 2325-27 (discussing similarities between residual clause in § 924(c)(3) and residual clause in the ACCA, which was held to be unconstitutionally vague in Johnson II, and residual clause in 18 U.S.C. § 16(b), which was held to be unconstitutionally vague in Sessions v. Dimaya, 138 S. Ct. 1204 (2018)). Employing the categorical approach in the context of the residual clause of § 924(c)(3) is constitutionally problematic because it requires judges to disregard how the defendant actually committed the crime and instead to "imagine the idealized ordinary case of the defendant's crime and then guess whether a serious potential risk of physical injury to another would attend its commission." Id. at 2326 (citations and internal quotation marks omitted). This produces "more unpredictability and arbitrariness when it comes to specifying unlawful conduct than the Constitution allows." Id. at 2326 (citations and internal quotation marks omitted).

In Blackstone, which was issued before Davis, the Ninth Circuit held that § 2255 motions challenging § 924(c) convictions or sentences under the residual clause of § 924(c)(3) cannot be considered to be timely by virtue of being filed within one year of Johnson II because the "Supreme Court has not recognized that § 924(c)(3)'s residual clause is void for vagueness in violation of the Fifth Amendment." 903 F.3d at 1028. The Supreme Court denied certiorari in Blackstone on June 24, 2019. See 139 S. Ct. at 2762. No party disputes that Davis abrogated the holding in

Blackstone that a § 2255 motion challenging a conviction or sentence under the residual clause of § 924(c)(3) is not rendered timely by filing it within a year of Johnson II.[4]

The parties filed supplemental briefs addressing these cases. See Docket Nos. 378, 379.

LEGAL STANDARD

A prisoner in custody under sentence of a federal court, making a collateral attack against the validity of his or her conviction or sentence, must do so by way of a motion to vacate, set aside, or correct the sentence pursuant to 28 U.S.C. § 2255 in the court that imposed the sentence. Tripati v. Henman, 843 F.2d 1160, 1162 (9th Cir. 1988). Section 2255 was intended to alleviate the burden of habeas corpus petitions filed by federal prisoners in the district of confinement by providing an equally broad remedy in the more convenient jurisdiction of the sentencing court. United States v. Addonizio, 442 U.S. 178, 185 (1979). Under § 2255, a federal sentencing court may grant relief if it concludes that a prisoner in custody was sentenced in violation of the Constitution or laws of the United States. United States v. Barron, 172 F.3d 1153, 1157 (9th Cir. 1999).

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[4] See Miller v. Gammie, 335 F.3d 889, 899 (9th Cir. 2003) ("[C]ircuit precedent, authoritative at the time that it issued, can be effectively overruled by subsequent Supreme Court decisions that 'are closely on point,' even though those decisions do not expressly overrule the prior circuit precedent" where the Supreme Court decisions "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable") (citation omitted).

ANALYSIS

I. Procedural barriers to the consideration of Chea's motion

A. Timeliness

A motion to vacate, set aside, or correct a sentence under § 2255 must be filed within one year of the latest of the date on which: (1) the judgment of conviction became final; (2) an impediment to making a motion created by governmental action was removed, if such action prevented the movant from making a motion; (3) the right asserted was recognized by the Supreme Court, if the right was newly recognized by the Supreme Court and made retroactive to cases on collateral review; or (4) the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence. 28 U.S.C. § 2255(f). A federal prisoner's judgment becomes final for purposes of the one-year statute of limitations when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition of certiorari elapsed or a petition for certiorari finally denied." Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987).

Chea contends that his § 2255 motion is timely because he filed it on May 11, 2016, within one year of Johnson II, which was decided on June 26, 2015.

The government argues that the motion is untimely because Chea did not file it within one year of the date on which his conviction under § 924(c) became final. The government further contends that Johnson II did not extend the limitations period because Johnson II did not create a new right with respect to the elements clause of § 924(c)(3), which the government argues is

the clause that governs the determination of Chea's § 2255 motion.

The Court concludes that Chea's § 2255 motion is timely because any issues of timeliness are resolved in a § 2255 movant's favor in light of Davis where, as here, the movant initially challenged his § 924(c) sentence based on Johnson II.[5]

Chea's § 2255 motion has, from the outset, challenged his § 924(c) convictions and sentence based on the argument that the residual clause of § 924(c)(3) is unconstitutionally vague under Johnson II.[6] Chea filed his motion within one year of Johnson II. Davis, which holds that the residual clause of § 924(c)(3) is unconstitutionally vague and cites Johnson II in support of that holding. This confirms that Chea was timely in filing his § 2255 motion within one year of the date on which Johnson II was decided. Further, the government does not dispute that Davis's holding with respect to the unconstitutionality of the residual

[5] In an unpublished opinion, the Ninth Circuit reached the same conclusion. See United States v. Carcamo, No. 17-16825, 2019 WL 3302360, at *1 (9th Cir. July 23, 2019) (unpublished mem.) ("In light of Davis, we also resolve any issues of timeliness in [the movant's] favor" where the § 2255 movant had initially challenged his § 924(c) sentence based on Johnson II).

[6] The government argues that Chea's motion turns on the elements clause and, as such, it is untimely because neither Johnson II nor Davis created a new right with respect to the elements clause. The Court disagrees with this analysis. Because it is not clear whether Chea was sentenced under the residual clause or the elements clause of § 924(c)(3), the Court, for the purpose of determining whether Chea's § 2255 motion is procedurally barred, will interpret the motion as a residual-clause challenge that relies on Johnson II and Davis. See United States v. Geozos, 870 F.3d 890, 896 (9th Cir. 2017) (where it was not clear if the district court relied on the residual clause of the analogous ACCA, 18 U.S.C. § 924(e), in determining whether the prior offense qualified as a "violent felony" under the ACCA, but it may have, construing § 2255 motion as a residual-clause challenge that "relies on" Johnson II where the defendant argued that his § 2255 motion was not procedurally barred on the ground that it relied on Johnson II).

clause of § 924(c)(3) abrogated Blackstone's holding with respect to the untimeliness of § 2255 motions based on Johnson II. Accordingly, Chea's motion is not barred as untimely. See 28 U.S.C. § 2255(f)(3) (providing that a § 2255 motion is timely if it is filed within one year of the date on which a right is newly recognized by the Supreme Court and is retroactively applicable to cases on collateral review).

B. Procedural default

The government argues that Chea's motion is procedurally barred because he failed to challenge his § 924(c) convictions and sentence on direct appeal.

Chea argues that his failure to challenge his § 924(c) convictions and sentence earlier is excused because his claim that the residual clause of § 924(c)(3) is unconstitutionally vague did not become viable until after Johnson II was issued. Chea also argues that his procedural default is excused because he is actually innocent as to his § 924(c) convictions.

As a general rule, "claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice," Massaro v. United States, 538 U.S. 500, 504 (2003), or that he is "actually innocent" as to the count of conviction he seeks to vacate, Vosgien v. Persson, 742 F.3d 1131, 1134 (9th Cir. 2014).

Cause is found when "the factual or legal basis for a claim was not reasonably available to counsel" at the time a direct appeal was or could have been filed. Murray v. Carrier, 477 U.S. 478, 488 (1986). Accordingly, the failure to file a direct appeal when the appeal "would have been futile, because a solid

wall of circuit authority" precluded the appeal, does not constitute procedural default. English v. United States, 42 F.3d 473, 479 (9th Cir. 1994) (internal quotation marks and citations omitted).

Prejudice requires showing that the alleged error "worked to [the movant's] actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" United States v. Braswell, 501 F.3d 1147, 1150 (9th Cir. 2007) (citation omitted). The Supreme Court has not defined the level of prejudice necessary to overcome procedural default but it has held that the level is "significantly greater than that necessary under the more vague inquiry suggested by the words 'plain error.'" Murray, 477 U.S. at 493-94 (citation omitted). To show prejudice under the plain error standard, a defendant must "show her substantial rights were affected, and to do so, must establish that the probability of a different result is sufficient to undermine confidence in the outcome of the proceeding." United States v. Bonilla-Guizar, 729 F.3d 1179, 1187 (9th Cir. 2013) (internal quotation marks omitted).

Here, Chea has satisfied the cause requirement. Chea's argument that his § 924(c) convictions and sentence are illegal because the residual clause of § 924(c)(3) is unconstitutionally vague was not reasonably available to him at the time he was sentenced. Johnson II, which was issued in 2015, expressly overruled James v. United States, 550 U.S. 192 (2007), and Sykes v. United States, 131 S. Ct. 2267 (2011), which had upheld the analogous residual clause in the ACCA. Accordingly, Chea's

residual-clause challenge would have been futile prior to Johnson II.

Chea also has satisfied the prejudice requirement. Chea has shown that a failure to recognize at his sentencing that the residual clause of § 924(c)(3) was unconstitutionally vague worked to his actual and substantial disadvantage, because it resulted in the imposition of a sixty-five-year sentence under § 924(c). As explained in more detail in the next section, Hobbs Act robbery is not categorically a crime of violence under the elements clause of § 924(c)(3), so Chea could not have received a constitutionally valid sentence under the elements clause of § 924(c)(3) at the time he was sentenced.

Because Chea has shown cause and prejudice, his failure to file a direct appeal challenging his § 924(c) convictions and sentence does not preclude his present § 2255 motion.

II. Chea is entitled to relief under 28 U.S.C. § 2255

The Court now turns to the merits of Chea's § 2255 motion. No party disputes that, after Davis, Chea's sentence under § 924(c), with four counts of Hobbs Act robbery under 18 U.S.C. § 1951(a) as the predicate offenses[7], cannot be upheld based on

[7] Section 1951(a) of Title 18 is "divisible" because it contains at least two separate offenses, robbery and extortion. Where, as here, the statute setting forth the prior offense is divisible, a court may consult documents in the record, such as "indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction." Descamps v. United States, 570 U.S. 254, 257 (2013). Here, the record is clear, and the parties do not dispute, that the prior offenses that served as predicates for Chea's § 924(c) sentence are Hobbs Act robberies in violation of § 1951(a). Therefore, only the elements of Hobbs Act robbery are relevant to the question of whether Chea's prior offenses are crimes of violence under § 924(c)(3). See United States v. Watson, 881 F.3d 782, 784 (9th Cir. 2018) ("Because § 2113(a) is divisible with respect to [bank robbery and bank extortion] and

the now-void residual clause of § 924(c)(3). Accordingly, the Court now must determine whether Hobbs Act robbery can serve as a predicate crime of violence under the elements clause of § 924(c)(3), which is the only clause of § 924(c)(3) that survived Davis. See Geozos, 870 F.3d at 897 (in the context of the analogous ACCA, 18 U.S.C. § 923(e), and Johnson II, holding that when reviewing a § 2255 motion on the merits, a court must determine whether there are offenses that support a ACCA sentencing enhancement under one of the clauses that survived Johnson II). If so, then Chea is not entitled to § 2255 relief. Id.

To determine whether Chea's prior convictions for Hobbs Act robbery qualify as predicate crimes of violence under the elements clause of § 924(c)(3), the Court must employ the categorical approach. The categorical approach requires a comparison of the elements of the prior offense with the elements of the definition of the predicate offense that can result in enhanced penalties. See Descamps v. United States, 570 U.S. 254, 260-61 (2013) (applying categorical approach to determine whether a prior burglary offense qualifies as a predicate "violent felony" under the ACCA, 18 U.S.C. § 924(e)(2)(B)). A prior offense categorically qualifies as a predicate offense only if the statute defining the prior offense "has the same elements" or "defines the crime more narrowly" than the predicate offense definition. Id. at 261 (citation omitted). By contrast, if the prior offense "sweeps more broadly" than the predicate offense

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[defendants] were convicted of the first offense, we need not decide whether bank extortion qualifies as a crime of violence.").

definition, then the prior offense does not qualify as a predicate offense. Id. Under the correct application of the categorical approach, "a prior crime would qualify as a predicate offense in all cases or in none." Id. at 268.

"The key" to the categorical approach "is elements, not facts."[8] Id. "Sentencing courts may look only to the statutory definitions – i.e., the elements – of a defendant's prior offenses, and not to the particular facts underlying those convictions." Id. (citation and internal quotation marks omitted) (emphasis added). Where the scope of the prior offense, based on its elements "does not correspond to" the scope of the predicate offense definition, "the inquiry is over." Id. at 265.

Here, the categorical approach requires a comparison of the elements of Hobbs Act robbery with the elements of the definition of "crime of violence" in the elements clause of § 924(c)(3). Only if the elements of Hobbs Act robbery are the same, or narrower, than the definition of "crime of violence" in the elements clause of § 924(c)(3) can the Court conclude that Hobbs Act robbery is categorically a crime of violence under the elements clause of § 924(c)(3).

Subsection (a) of 18 U.S.C. § 1951 defines various offenses under the Hobbs Act, including robbery and extortion; it provides that:

[8] "'Elements' are the 'constituent parts' of a crime's legal definition–the things the 'prosecution must prove to sustain a conviction.' . . . Facts, by contrast, are mere real-world things–extraneous to the crime's legal requirements." Mathis v. United States, 136 S. Ct. 2243, 2248 (2016) (internal citations omitted).

> 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.

Subsection (b)(1) of 18 U.S.C. § 1951 defines "robbery" as follows:

> 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.

The elements clause of § 924(c)(3) defines a "crime of violence" as an offense that is a felony and "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). Section 924(c)(3) does not define the term "physical force."

Chea contends that Hobbs Act robbery is not categorically a crime of violence under the elements clause of § 924(c)(3) because the Hobbs Act robbery statute sweeps more broadly than the elements clause's "crime of violence" definition. Chea argues that the plain language of § 1951(b)(1) shows that Hobbs Act robbery can be committed by causing fear of future injury to property, which does not involve the "physical force" required for it to qualify as a crime of violence under the elements clause of § 924(c)(3) in light of Johnson v. United States, 559 U.S. 133 (2010) (Johnson I).

In Johnson I, the Supreme Court held that, for a prior offense to qualify as a predicate offense under the elements clause of the ACCA, 18 U.S.C. § 924(e)(2)(B)(i), which defines a "violent felony" using statutory language similar to the elements clause of § 923(c)(3), the "physical force" used must be "violent force – that is, force capable of causing physical pain or injury to another person." Id. at 140 (emphasis added). The ACCA's "violent felony" definition defines the "physical force" requirement in the context of force applied against "the person of another," whereas the elements clause of § 924(c)(3) defines "physical force" more broadly, in the context of force applied against "the person or property of another" (emphasis added).[9]

Notwithstanding this distinction, the Ninth Circuit has held that "the Johnson I standard" for "physical force" applies to the elements clause of § 924(c)(3). United States v. Watson, 881 F.3d 782, 784 (9th Cir. 2018) (citation omitted) ("Although Johnson [I] construed the force clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i), the Johnson [I] standard also applies to the similarly worded force clause of § 924(c)(3)(A)."). The Ninth Circuit has not yet applied the Johnson I standard for "physical force" in the context of a prior offense that can be committed by using or threatening to use force against property. Nonetheless, in the context of offenses

[9] Compare 18 U.S.C. § 924(e)(2)(B)(i)(defining a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year," or a qualifying juvenile delinquency, that "has as an element the use, attempted use, or threatened use of physical force against the person of another") with 18 U.S.C. § 924(c)(3)(A) (defining a "crime of violence" as an offense that is a felony and "has as an element the use, attempted use, or threatened use of physical force against the person or property of another").

committed by actual or threatened force against property, the only reasonable way to apply the Johnson I standard is to require likewise that the offense involve "violent" physical force against the property.

Thus, Chea's argument that Hobbs Act robbery is not categorically a crime of violence under the elements clause of § 924(c)(3) depends on two premises: (1) that Hobbs Act robbery can be committed by causing fear of future injury to property; and (2) that Hobbs Act robbery by causing fear of future injury to property fails to meet the Johnson I standard that the prior offense involve actual or threatened physical force that is "violent."

The first premise is supported by the plain language of 18 U.S.C. § 1951(b)(1). That statute, as described above, defines "robbery" under the Hobbs Act and provides that it can be committed "by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property . . ." (emphasis added). Courts have recognized that, based on its plain language, Hobbs Act robbery can be committed by threats to property. See, e.g., United States v. O'Connor, 874 F.3d 1147, 1158 (10th Cir. 2017) (holding that "Hobbs Act robbery criminalizes conduct involving threats to property," and that "Hobbs Act robbery reaches conduct directed at 'property' because the statute specifically says so") (citing 18 U.S.C. § 1951(b)(1)).

The second premise, that Hobbs Act robbery by causing fear of future injury to property does not involve the use or threats of violent physical force required by Johnson I, also is

supported by the statute's plain language. The phrases "fear of injury," "future," and "property" are not defined in § 1951(b)(1), so the Court gives them their ordinary meaning. See Leocal v. Ashcroft, 543 U.S. 1, 9 (2004) ("When interpreting a statute, we must give words their 'ordinary or natural' meaning.") (citation omitted). Nothing in the ordinary meaning of these phrases suggests that placing a person in fear that his or her property will suffer future injury requires the use or threatened use of any physical force, much less violent physical force. Where the property in question is intangible,[10] it can be injured without the use of any physical contact at all; in that context, the use of violent physical force would be an impossibility. Even tangible property can be injured without using violent force. For example, a vintage car can be injured by a mere scratch, and a collector's stamp can be injured by tearing it gently.

Further, the fact that § 1951(b)(1) expressly sets forth other, potentially violent alternative means of accomplishing a Hobbs Act robbery, namely by means of "actual or threatened force, or violence," further supports the notion that "fear of injury" does not require the use or threats of violent physical force required by Johnson I. See 18 U.S.C. § 1951(b)(1) (". . . by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property . . .") (emphasis added). Interpreting "fear of injury" as requiring the

[10] "[T]he language of the Hobbs Act makes no such distinction between tangible and intangible property." United States v. Local 560 of Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, & Helpers of Am., 780 F.2d 267, 281 (3d Cir. 1985) (collecting cases).

use or threat of violent physical force would render superfluous the other, potentially violent alternative means of committing Hobbs Act robbery, specifically, by threatened force or violence. See Ratzlaf v. United States, 510 U.S. 135, 140–41 (1994) ("Judges should hesitate . . . to treat statutory terms [as surplusage] in any setting, and resistance should be heightened when the words describe an element of a criminal offense."); Duncan v. Walker, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (citations and internal quotation marks omitted). If Congress had intended "fear of injury" to mean "fear of violence or violent force," it could have said so expressly. It did not.

Further still, nothing in the plain language of § 1951(b)(1) suggests that the "property" that the victim fears could be injured needs to be in the victim's physical custody or possession, or even proximity, at the time the Hobbs Act robbery is committed. This is important, because it preempts any argument that the fear of injury to property necessarily involves a fear of injury to the victim (or another person) by virtue of the property's proximity to the victim or another person. See United States v. Camp, 903 F.3d 594, 602 (6th Cir. 2018) (noting that Hobbs Act robbery can be committed by "threats to property alone" and that such threats "whether immediate or future—do not necessarily create a danger to the person"). Section 1951(b)(1) lists alternative scenarios in which a victim can be placed in fear of injury to property, and one of these alternatives requires only that the "fear of injury" be "to his person or property," without requiring that the property be in any

particular location. See 18 U.S.C. § 1951(b)(1) (". . . fear of injury, immediate or future, to his person or property, or property in his custody or possession . . ."). (emphasis added).

Thus, the plain language of § 1951(b)(1) clearly supports the notion that committing Hobbs Act robbery by causing fear of future injury to property does not require the use or threatened use of any physical force, much less the violent physical force required by Johnson I. This form of Hobbs Act robbery can be committed with threatened de minimis force or no force at all with respect to the property, and without any actual or threatened physical contact with a person.

No binding authority precludes this conclusion; neither the Supreme Court nor the Ninth Circuit has addressed the question of whether Hobbs Act robbery by causing fear of future injury to property satisfies the violent physical force standard of Johnson I.

At least one court of appeals that has considered the applicability of § 924(c)(3) to offenses that cover injury to property has reached a conclusion similar to the one the Court reaches here. In United States v. Bowen, the Tenth Circuit considered whether a prior offense of federal witness retaliation[11] committed by damage to a victim's property could serve as a predicate crime of violence under the elements clause of § 924(c)(3). No. 17-1011,__F.3d__, 2019 WL 4146452, at *8 (10th Cir. Sept. 3, 2019). The court of appeals concluded that

[11] In Bowen, the "parties agree[d] that '[a] defendant may be convicted of witness retaliation if, with intent to retaliate, he knowingly causes or threatens to cause [(1)] bodily injury to a witness or knowingly causes or threatens to cause [(2)] damage to a witness's property." No. 17-1011, 2019 WL 4146452, at *7.

this offense did not meet Johnson I's standard and therefore was not a crime of violence under the elements clause of § 924(c)(3) because the offense could be committed without the use of violent physical force. Id. at *10. It reasoned that, "[a]s with force applied against or towards people, not all force applied against property is 'inherently violent' . . . there is not inherent violence in, for example, spray-painting another's car, or 'threatening to throw paint on [another's] house . . . or . . . to pour chocolate syrup on his passport[.]' Nothing about those actions is inherently violent, so the mere fact that they damage property cannot make them crimes of violence under § 924(c)(3)." Id. at *10-11 (internal citations omitted).

Based on the foregoing, § 1951(b)(1) sweeps more broadly than the definition of a "crime of violence" under the elements clause of § 924(c)(3), because Hobbs Act robbery by causing fear of future injury to property can be accomplished without the use or threats of violent physical force required by Johnson I. Under the categorical approach, this "disparity" ends the inquiry and warrants vacating Chea's convictions and sentence under § 924(c)(3). See Mathis v. United States, 136 S. Ct. 2243, 2251 (2016) (holding that "the mismatch of elements saves the defendant from an ACCA sentence" where the prior offense's elements "cover a greater swath of conduct than the elements of the relevant ACCA offense").[12]

[12] Chea also argues that there are other means of committing Hobbs Act robbery that do not involve using the "violent force" required by Johnson I, such as where it is committed by placing a person "in fear of injury" "to his person," or "by force" or "threatened force." Docket No. 340 at 10-13. Chea argues that these forms of Hobbs Act robbery can be committed by using de minimis physical force, or no physical force at all. Under the

The government's arguments to the contrary are unavailing. The government interprets the Ninth Circuit to say in United States v. Mendez, 992 F.2d 1488 (9th Cir. 1993), that Hobbs Act robbery is a crime of violence under § 924(c)(3)(A). See Brief at 7, Docket No. 7. But that is not what Mendez holds. In Mendez, the Ninth Circuit considered whether a conspiracy to commit Hobbs Act robbery qualified as a crime of violence under the residual clause of § 924(c)(3) and held that it did. See 992 F.2d at 1492. The Ninth Circuit expressly declined to address whether conspiracy to commit Hobbs Act robbery qualified as a crime of violence under the elements clause of § 924(c)(3). Id. at 1491 ("We do not address whether conspiracy to rob, in violation of § 1951 is a 'crime of violence' under subsection (A) of § 924(c)(3) because we conclude that it is a "crime of violence" under subsection (B)."). The Ninth Circuit stated in dicta that robbery indisputably qualifies as a crime of violence. See id. However, it necessarily did so in connection with its analysis of the residual clause.

The holding and reasoning in Mendez are irrelevant to the resolution of Chea's motion because (1) the prior offense at issue in Mendez was conspiracy to commit Hobbs Act robbery, which has different elements than Hobbs Act robbery; and (2) Mendez's holding was limited to the residual clause of § 924(c)(3) and

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categorical approach, "a prior crime would qualify as a predicate offense in all cases or in none." Descamps, 570 U.S. at 268. Because the Court concludes that at least one form of Hobbs Act robbery, by causing fear of future injury to property, does not require the violent physical force required by Johnson I, the Court need not consider whether any other forms of the offense also do not meet Johnson I's standard.

thus has been abrogated by Davis, which invalidated the residual clause under § 924(c) as unconstitutionally vague.

The government next argues that the Ninth Circuit held in United States v. Howard, 650 F. App'x 466, 467 (9th Cir. 2016), as amended (June 24, 2016), that Hobbs Act robbery "by fear of injury" necessarily involves violent physical force. Brief at 12-13, Docket No. 348. The Court disagrees.

In Howard, the Ninth Circuit considered whether Hobbs Act robbery "by putting someone in 'fear of injury'" meets the physical force requirement in the elements clause of § 924(c)(3) in light of Johnson I and held that it does. Id. at 468. The Court reasoned that "intimidation" as used the federal bank robbery statute, which "means willfully 'to take, or attempt to take, in such a way that would put an ordinary, reasonable person in fear of bodily harm,'" is equivalent to "fear of injury" in the Hobbs Act. Id. The Ninth Circuit held, "Because bank robbery by 'intimidation' — which is defined as instilling fear of injury — qualifies as a crime of violence, Hobbs Act robbery by means of 'fear of injury' also qualifies as crime of violence." Id.

Howard, which is an unpublished memorandum and is not precedent, does not impact the Court's analysis or conclusion. First, it does not address Hobbs Act robbery by causing fear of future injury to property; its reasoning and holding are limited to the context of "putting someone" in "fear of bodily harm." Nothing in the opinion suggests that its reasoning and holding would apply (or even make sense) in the context of Hobbs Act robbery by causing fear of future injury to property, which, as

discussed above, does not require any threatened or actual bodily contact, much less bodily harm.[13] Second, the Ninth Circuit in Howard expressly declined to consider whether "Hobbs Act robbery may be accomplished through de minimis use of force," because the defendant in that case did not make that argument. Id. at 468 n.1. The Ninth Circuit recognized that it "has held that crimes that require only a de minimis use of force do not qualify as crimes of violence," but it took "no position on that issue or the applicability of these precedents to Hobbs Act robbery." Id. As a result of the Ninth Circuit's express declination to consider whether a form of Hobbs Act robbery that involves de minimis or no force at all (such as that by causing fear of future injury to property) can be a "crime of violence," Howard neither precludes, nor is inconsistent with, the Court's reasoning and conclusion here.

The government also cites Stokeling v. United States, 139 S. Ct. 544, 550 (2019), to counter Chea's argument that Hobbs Act robbery does not require the use of violent physical force. Brief at 3-4, Docket No. 379. But Stokeling says nothing about the Hobbs Act, and its holding and reasoning are inapposite.

There, the Supreme Court considered whether a Florida robbery statute qualifies as a "violent felony" under the ACCA's elements clause and concluded that it does. In so holding, the Supreme Court relied on the fact that "[a]s originally enacted," the ACCA specifically prescribed an enhanced sentence for prior convictions for robbery or burglary, id. at 550 (emphasis added),

[13] The government's reliance on other cases that interpret "intimidation" in various federal statutes as "fear of bodily harm" is unavailing for the same reasons.

and that a prior version of the ACCA included a definition of robbery as a predicate offense that "mirrored the elements of the common-law crime of robbery, which has long required force or violence." Id. Although the current version of the ACCA does not enumerate robbery as a predicate offense, the Supreme Court held that, because of the ACCA's legislative history and its express inclusion of robbery as a predicate offense in its prior version, the ACCA's elements clause had to be interpreted to cover the Florida robbery statute at issue, which the Florida Supreme Court had interpreted as requiring physical force sufficient to overcome a victim's resistance. Id. at 551, 554.

Stokeling does not alter the Court's conclusions. First, Stokeling did not address whether robbery of the type at issue here, namely robbery by causing fear of injury to property, would meet Johnson I's violent physical force standard. Stokeling holds that the Florida robbery statute at issue in that case requires violent force sufficient to meet Johnson I's standard, because that offense requires physical force sufficient to overcome a victim's resistance, and thus necessarily involves the use of actual physical force against a person. See id. at 549 (citing Fla. Stat. § 812.13(1) (1995)). That Florida statute is unlike the Hobbs Act robbery statute, because it does not cover threatened future injury to property divorced from actual or threatened physical contact with a person. As discussed above, Hobbs Act robbery, unlike the Florida robbery statute, can be accomplished with little or no force directed at property, and without any actual or threatened physical force directed at a person. Second, the government has presented no evidence that

the legislative history of § 924(c)(3) requires, or even supports, a reading of that statute as covering Hobbs Act robbery.

The government next argues that "all of the post-Johnson II courts to have addressed the issue have found that Hobbs Act robbery is a crime of violence under the force clause." Brief at 9-10, Docket No. 348; Brief at 2, Docket No. 379.

None of the opinions that the government cites in support of this argument are binding on this Court, however. Moreover, the Court finds the reasoning in these opinions to be unpersuasive or irrelevant for a multitude of reasons, which include the following. First, some of these opinions do not apply the categorical approach correctly or at all, which renders their conclusions incorrect.[14] Second, some of these opinions do not apply the Johnson I standard of violent physical force, either at all or in the context of force against property[15]; these opinions, therefore, are inapposite because the Ninth Circuit has held, without any qualification, that Johnson I's standard applies in the context of § 924(c). See Watson, 881 F.3d at 784.

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[14] See, e.g., In re Fleur, 824 F.3d 1337, 1341 (11th Cir. 2016) (concluding that Hobbs Act robbery is a crime of violence under the elements clause of § 924(c)(3), not based on the Hobbs Act robbery statute's elements, but because the description of the Hobbs Act robbery count in the indictment stated that the defendant in that case committed the robbery "by means of actual and threatened force, violence, and fear of injury").

[15] See, e.g., United States v. Pena, 161 F. Supp. 3d 268, 273 (S.D.N.Y. 2016) (declining to apply Johnson I standard and instead "interpret[ing] the word 'force' in Section 924(c)(3) . . . to mean 'power, violence, or pressure directed against a person or thing'") (citation omitted); United States v. Hill, 890 F.3d 51, 58 (2d Cir. 2018) (holding that Johnson I does not "require that a particular quantum of force be employed or threatened to satisfy its physical force requirement" in the context of injury to property).

Third, some of these opinions interpret the phrase "fear of injury" using the canon of noscitur a sociis and conclude that "fear of injury" "must be like the 'force' or 'violence' described in the clauses preceding it." See, e.g., United States v. Garcia-Ortiz, 904 F.3d 102, 107 (1st Cir. 2018). The Court does not find this reasoning persuasive because Congress chose to use three different terms in the Hobbs Act robbery statute ("force," "violence," and "fear of injury") and each must be given meaning, as discussed in more detail above. Additionally, Congress specifically chose the terms "force" and "injury" without any qualifiers, which suggests that it intended to give them the broadest possible scope. Congress easily could have worded the Hobbs Act robbery statute using terms that specifically require the use or threats of violent physical force with respect to each of the forms of the offense, but it did not.

Fourth, most of the opinions cited by the government do not consider or address the issue raised here, namely that Hobbs Act robbery can be committed by causing fear of future injury to property; as such, they are irrelevant. The few that do address this argument reject it as immaterial (1) without any meaningful analysis[16]; or (2) on a ground that is inconsistent with the categorical approach[17], namely that the movant did not show prior

[16] See, e.g., United States v. Buck, 847 F.3d 267, 275 (5th Cir. 2017) (holding that Hobbs Act robbery by "threatening some future injury to the property of a person who is not present" is not a crime of violence because other courts "have held that the Hobbs Act definition of robbery describes a crime of violence under § 924(c)(3)(A)," without more).

[17] See, e.g., Garcia-Ortiz, 904 F.3d at 107 ("Garcia points to no actual convictions for Hobbs Act robbery matching or approximating his theorized scenario . . . Garcia's inability to point to any convictions for Hobbs Act robbery based upon threats to devalue intangible property convince us that Hobbs Act

convictions or instances of Hobbs Act robbery based on that theory. Requiring such a showing of prior convictions or instances of a particular form of a prior offense is contrary to the rule that "[s]entencing courts may look only to the statutory definitions – i.e., the elements – of a defendant's prior offenses" and not facts, Descamps, 507 U.S. at 261, and that "the inquiry is over" once the court determines that the statute defining the prior offense covers conduct that is broader than the violent crime definition, id. at 265. See also O'Connor, 874 F.3d at 1154 (rejecting government's argument that defendant was required to "demonstrate that the government has or would prosecute threats to property as a Hobbs Act robbery" because the defendant "does not have to make that showing" under the categorical approach) (internal quotation marks omitted).

Next, the government contends that Hobbs Act robbery "incorporates the common-law definition of robbery which requires the threat of physical force." Brief at 11, Docket No. 348. But the government does not explain why the elements of "common-law robbery," which the government does not describe, would be relevant to the Court's application of the categorical approach here, which requires, as discussed above, that the Court compare the elements of the predicate offense (i.e., Hobbs Act robbery), based on that statute, with the elements of the "crime of violence" definition in § 924(c)(3)(A). Moreover, the

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robbery, even when based upon a threat of injury to property, requires a threat of the kind of force described in Johnson I[.]"); Pena, 161 F. Supp. 3d at 283 ("Pena has not presented any case law illustrating his hypothetical ways that Hobbs Act robbery could be committed through fear of injury without force[.]").

authorities that the government cites do not support the proposition that Hobbs Act robbery and "common-law robbery" have the same elements. See Brief at 11, Docket No. 348 (citing United States v. Walker, 595 F.3d 441, 444 (2d Cir. 2010) ("The common law crime of robbery and the various federal statutory offenses of robbery have substantially the same essential elements.")) (emphasis added). Thus, the Court declines to consult or rely on "the definition" of an extraneous common-law offense for the purpose of resolving Chea's motion, because the government has made no showing that doing so would be permissible under the categorical approach. See Taylor v. United States, 495 U.S. 575, 594 (1990) (declining to "read into" a statute its "common-law meaning" in light of "the absence of any specific indication that Congress meant to incorporate the common-law meaning" into that statute).

Lastly, the government argues, without any support, that Hobbs Act robbery involves "inherent" violence, and that "the Hobbs Act requires that the property be in the person's presence." See Brief at 11-12, Docket No. 348. As discussed above, the plain language of § 1951(b)(1) is inconsistent with these interpretations. The Court declines to read elements into § 1951(b)(1) that simply are not there.

Accordingly, the Court concludes that the government's arguments and authorities are unavailing and that Hobbs Act robbery is not categorically a crime of violence under the elements clause of § 924(c)(3).[18]

[18] Even if some ambiguity existed as to whether the elements clause of § 924(c)(3) covers Hobbs Act robbery, the Court would resolve any such ambiguity in favor of Chea under the rule of

CONCLUSION

The Court GRANTS Chea's § 2255 motion. The Court will vacate and set aside Chea's convictions and sentence for violations of 18 U.S.C. § 924(c) entered in case number 98-cr-20005, and case number 98-cr-40003. Within seven days of the date this order is issued, Chea shall file a brief of no more than five pages setting forth his position as to the next steps the Court should take. The government may file a response within seven days thereafter of no more than seven pages. Chea may file a reply within three days thereafter of no more than two pages.

IT IS SO ORDERED.

Dated: October 2, 2019

CLAUDIA WILKEN
United States District Judge

lenity. United States v. Edling, 895 F.3d 1153, 1158 (9th Cir. 2018) ("The rule of lenity 'instructs that, where a statute is ambiguous, courts should not interpret the statute so as to increase the penalty that it places on the defendant.'") (citation omitted).