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**United States District Court
Central District of California
Western Division**

CHARLES E. CAVER,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

CV 16-03870 TJH
CR 96-00008 RT-4

Order

JS-6

The Court has considered Petitioner Charles E. Caver’s motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 or, in the alternative, request for a certificate of appealability as to his claim pursuant to 28 U.S.C. § 2253(c)(2), together with the moving and opposing papers.

Petitioner challenges his sentence under 18 U.S.C. § 924(c), which is predicated on armed bank robbery, in violation of 18 U.S.C. § 2113(a), (d), and (e). Petitioner, further, challenges his sentence to the extent the sentence is based on U.S.S.G. § 4B1.1.

Section 924(c) defines “crime of violence” under § 924(c)(3)(A) [the “Force Clause”] and § 924(c)(3)(B) [the “Residual Clause”]. This Court held that the Residual

1 Clause is unconstitutionally vague, and that certain convictions — convictions that,
2 under the categorical approach, *see Taylor v. United States*, 495 U.S. 575 (1990), fall
3 outside the Force Clause because the statutory elements of the conviction include
4 conduct falling outside the Force Clause’s definition of a “crime of violence” — must
5 be vacated. *See Juan Becerra-Perez v. United States*, No. 2:16-cv-07046-TJH (C.D.
6 Cal. Feb. 15, 2017). The Force Clause defines a “crime of violence” as a felony that
7 “has as an element the use, attempted use, or threatened use of physical force against
8 the person or property of another[.]” § 924(c)(3)(A).

9 Sections 2113 (a), (d), and (e) are crimes of violence under the Force Clause
10 defined in § 924(c)(3)(A). *United States v. Wright*, 215 F.3d 1020, 1028 (9th Cir.
11 2000). Since *Wright*, the Ninth Circuit has reaffirmed that armed bank robbery
12 qualifies as a crime of violence under the Force Clause. *United States v. Pritchard*,
13 No. 15-50278, 2017 WL 2219005, at *1 (9th Cir. May 18, 2017). Subsection (a)
14 provides for a felony conviction for bank robberies and incidental crimes committed “by
15 force and violence, or by *intimidation*.” 18 U.S.C. § 2113(a) (emphasis added). The
16 Ninth Circuit has defined intimidation under § 2113 to mean “wilfully to take, or
17 attempt to take, in such a way that would put an ordinary, reasonable person in fear
18 of bodily harm,” which comports with the requirement of a “threatened use of physical
19 force” contained in the Force Clause. *United States v. Selfa*, 918 F.2d 749, 751 (9th
20 Cir. 1990).

21 Similarly, subsection (d) includes “putting in jeopardy the life of any person by
22 the use of a dangerous weapon or device.” 18 U.S.C. § 2113(d). As such, even the
23 most innocent conduct penalized under this section would qualify as a crime of
24 violence. *See United States v. Watson*, No. 14-00751 01 DKW, 2016 WL 866298, at
25 *7 (D. Haw. Mar. 2, 2016). Therefore, both subsections (a) and (d) fall within the
26 definition of a crime of violence under 18 U.S.C. § 924(c)(3)(A). *Watson*, 2016 WL
27 866298, at *7. This conclusion is, further, supported by decisions in this Circuit
28 reaching the same result. *See, e.g., McFarland v. United States*, No. CV 16-7166-

1 JFW, 2017 WL 810267, at *4 (C.D. Cal. Mar. 1, 2017); *United States v. Salinas*, No.
2 1:08 CR 0338 LJO SKO, 2017 WL 2671059, at *7 (E.D. Cal. June 21, 2017).

3 Lastly, Section 2113 (e) is a crime of violence under the Force Clause defined
4 in § 924(c)(3)(A). Section 2113 (e) punishes perpetrators who, *inter alia*, “in avoiding
5 or attempting to avoid apprehension for” the violation of § 2113 “or in freeing himself
6 or attempting to free himself from arrest or confinement for such offense,” *inter alia*,
7 “kills any person[.]” As courts have remarked, determining whether § 2113 (e)
8 categorically constitutes a crime of violence is not altogether straightforward. *See*
9 *Holder v. United States*, 836 F.3d 891, 892–94 (8th Cir. 2016) (Melloy, J., dissenting);
10 *Allen v. United States*, 836 F.3d 894, 895–96 (8th Cir. 2016); *United States v.*
11 *McDuffy*, 194 F. Supp. 3d 1054, 1061–63 (D. Nev. 2016).

12 Nonetheless, the Court notes that “physical force” within the meaning of the
13 Force Clause means “force capable of causing physical pain or injury to another
14 person.” *United States v. Dominguez Maroyoqui*, 748 F.3d 918, 921 (9th Cir. 2014).
15 The force required to “kill[] any person,” *see* § 2113(e), necessarily requires force
16 capable of causing physical pain or injury to another person. *United States v.*
17 *Dominguez Maroyoqui*, 748 F.3d 918, 921 (9th Cir. 2014). Consequently, § 2113(e)
18 constitutes a crime of violence under the Force Clause.

19 On March 6, 2017, the Supreme Court issued its decision in *Beckles v. United*
20 *States*, 137 S. Ct. 886 (2017), holding that the advisory Sentencing Guidelines are not
21 subject to a due process vagueness challenge. 137 S. Ct. at 895. The Court held that
22 unlike the Armed Career Criminal Act, which was subject to the Court’s decision in
23 *Johnson v. United States*, 135 S.Ct. 2551 (2015), the advisory Guidelines “merely
24 guide the exercise of a court’s discretion in choosing an appropriate sentence within the
25 statutory range.” *Beckles*, 137 S. Ct. at 892. Indeed, on this basis, the Supreme Court
26 held that § 4B1.2(a)(2) specifically was not void for vagueness. *Beckles*, 137 S. Ct. at
27 895. As a result, to the extent Petitioner challenges his sentence under § 4B1.2(a)(2),
28 Petitioner’s motion is foreclosed by *Beckles*.

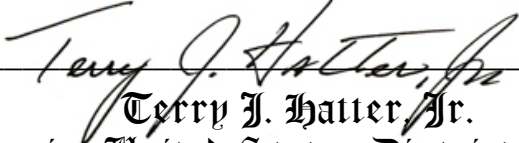
1 A district court may issue a certificate of appealability “only if the applicant has
2 made a substantial showing of the denial of a constitutional right.” 28 U.S.C. §
3 2253(c)(2). Such a showing requires the petitioner to “demonstrate that the issues are
4 debatable among jurists of reason; that a court could resolve the issues [in a different
5 manner]; or that the questions are adequate to deserve encouragement to proceed
6 further.” *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (alterations in
7 original, emphasis omitted). For the reasons discussed above, Petitioner has made such
8 a showing of the denial of a constitutional right with respect to his sentence pursuant to
9 18 U.S.C. § 2113(e) and 18 U.S.C. § 924(c).

10
11 Accordingly,

12
13 **It is Ordered** that the motion to vacate Petitioner’s sentence under 18 U.S.C.
14 § 924(c) and § 4B1.2(a)(2) be, and hereby is, **Denied**.

15
16 **It is Further Ordered** that Petitioner’s request for a certificate of appealability
17 pursuant to 28 U.S.C. § 2253(c)(2) be, and hereby is, **Granted** with respect to his
18 sentence under 18 U.S.C. § 2113(e) and 18 U.S.C. § 924(c).

19
20 Date: July 27, 2017

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23 **Terry J. Hatter, Jr.**
24 **Senior United States District Judge**