

1
2
3
4
5
6
7
8 **United States District Court**
9 **Central District of California**
10 **Western Division**
11

12 CALVIN THOMAS,

13 Petitioner,

14 v.

15 UNITED STATES OF AMERICA,

16 Respondent.
17
18

ED CV 17-00168 TJH
CR 96-00006 RT

Order

JS-6

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

23 Petitioner challenges his sentence under 18 U.S.C. § 924(c), which is predicated
24 on armed bank robbery, in violation of 18 U.S.C. § 2113(a), (d); interference with
25 commerce by robbery ["Hobbs Act robbery"], in violation of 18 U.S.C. § 1951; and
26 assaulting a federal officer with a deadly weapon, in violation of 18 U.S.C. § 111(a)(1).
27

28 Section 924(c) defines "crime of violence" under § 924(c)(3)(A) [the "Force

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

10 Sections 2113 (a) and (d) are crimes of violence under the Force Clause defined
11 in § 924(c)(3)(A). *United States v. Wright*, 215 F.3d 1020, 1028 (9th Cir. 2000).
12 Since *Wright*, the Ninth Circuit has reaffirmed that armed bank robbery qualifies as a
13 crime of violence under the Force Clause. *United States v. Pritchard*, No. 15-50278,
14 2017 WL 2219005, at *1 (9th Cir. May 18, 2017). Subsection (a) provides for a felony
15 conviction for bank robberies and incidental crimes committed “by force and violence,
16 or by *intimidation*.” 18 U.S.C. § 2113(a) (emphasis added). The Ninth Circuit has
17 defined intimidation under § 2113 to mean “wilfully to take, or attempt to take, in such
18 a way that would put an ordinary, reasonable person in fear of bodily harm,” which
19 comports with the requirement of a “threatened use of physical force” contained in the
20 Force Clause. *United States v. Selfa*, 918 F.2d 749, 751 (9th 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 The Hobbs Act robbery is a crime of violence under the Force Clause, as defined
4 in 18 U.S.C. § 924(c)(3)(A). Under Subsection (b)(1), Hobbs Act robbery punishes,
5 *inter alia*, the “fear of injury.” 18 U.S.C.A. §1951(b)(1). As this Court has
6 previously, and persuasively, held, the “fear of injury” prong of Hobbs Act robbery
7 categorically falls under the Force Clause because a Hobbs Act conviction under that
8 prong satisfies both the force and intent requirements of § 924(c)(3)(A). *United States*
9 *v. Bailey*, No. 14-328, 2016 WL 3381218, at *4–5 (C.D. Cal. June 8, 2016). Thus,
10 even in view of the most innocent statutory element, Hobbs Act robberies constitute
11 crimes of violence under the Force Clause.

12 Lastly, the Ninth Circuit has held that § 111(b) qualifies as a crime of violence
13 under the definition in 18 U.S.C. § 16(a), which is identical to definition in
14 924(c)(3)(A), based on the two variants of the § 111(b) offense, namely, (1) assault
15 using a deadly or dangerous weapon, or (2) inflicting bodily injury. *See United States*
16 *v. Juvenile Female*, 566 F.3d 943, 947-48 (9th Cir. 2009). The first variant requires
17 the “threatened use of physical force,” therefore, it comports with the definition of a
18 crime of violence contained in § 16(a). *See Juvenile Female*, 566 F.3d at 948.
19 Similarly, a defendant charged under the second variant “necessarily must have
20 committed an act of force in causing the injury.” *See Juvenile Female*, 566 F.3d at
21 948. Both variants, thus, are crimes of violence pursuant to 16(a). *See Juvenile*
22 *Female*, 566 F.3d at 948.

23 The definition of a crime of violence under § 16(a) is identical to that contained
24 in 924(c)(3)(A). *See United States v. Hutcherson*, CR 12-00235 YGR, 2016 WL
25 6650383, at *4 (N.D. Cal. Nov. 10, 2016). As such, the *Hutcherson* court held that
26 it was bound by the Ninth Circuit holding in *Juvenile Female*, even though it was
27 deciding only whether the predicate offense was a crime of violence pursuant to §
28 924(c). *Hutcherson*, 2016 WL 6650383, at *4. This Court finds the reasoning in

1 *Hutcherson* persuasive. Accordingly, 111(b) is a crime of violence under the Force
2 Clause defined in § 924(c)(3)(A). This conclusion is, further, supported by the only
3 other decision in this Circuit on this issue, which reaches the same result. *See United*
4 *States v. Bell*, 158 F. Supp. 3d 906, 918 (N.D. Cal. 2016).

5 A district court may issue a certificate of appealability “only if the applicant has
6 made a substantial showing of the denial of a constitutional right.” 28 U.S.C. §
7 2253(c)(2). Such a showing requires the petitioner to “demonstrate that the issues are
8 debatable among jurists of reason; that a court could resolve the issues [in a different
9 manner]; or that the questions are adequate to deserve encouragement to proceed
10 further.” *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (alterations in
11 original, emphasis omitted). Petitioner has not made a substantial showing of the denial
12 of a constitutional right under any of the above bases.

13
14 Accordingly,

15
16 **It is Ordered** that the motion to vacate Petitioner’s sentence under 18 U.S.C.
17 § 924(c) be, and hereby is, **Denied**.

18
19 **It is Further Ordered** that Petitioner’s request for a certificate of appealability
20 pursuant to 28 U.S.C. § 2253(c)(2) be, and hereby is, **Denied**.

21
22 Date: July 26, 2017

23
24 
25 **Terry J. Hatter, Jr.**
26 **Senior United States District Judge**
27
28