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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Respondent,

v.

BRIAN FIERRO,

Petitioner.

Case No. 2:09-cr-0240-KJD-PAL
2:17-cv-0742-KJD

ORDER

Presently before the Court is Petitioner Brian Fierro's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (#124/139). The Government filed responses in opposition and supplements (#126/141) to which Petitioner replied (#133/142). Also, before the Court is Petitioner's Motion for Leave to File First Amended Motion to Vacate, Set Aside, or Correct Conviction and Sentence under § 2255 (#137). Respondent filed a response in opposition (#139) to which Petitioner replied (#142)

I. Background

Fierro was found guilty after a jury trial on four counts of a superseding indictment. After appeal, the court entered Second Amended Judgment (#94) on : (1) Count One -- Interference with commerce by robbery (Hobbs Act Robbery); and (3) Count Two -- discharging a firearm during and in relation to a crime of violence under 18 U.S.C. § 924(c), specifically the interference with commerce by robbery charged in Count One of the superseding indictment; and (3) Count Three – felon in possession of a firearm. The court sentenced Fierro to one hundred and twenty (120) months imprisonment on Count One and Three each, to run concurrently. It sentenced Fierro to one hundred and twenty (120) months imprisonment on Count Two to be served consecutively to Counts One and Three, followed by five years of supervised release. In the instant motion, Fierro moves to vacate his § 924(c) conviction and sentence pursuant to

1 Johnson v. United States, 135 S. Ct. 2551 (2015) and United States v. Davis, 139 S. Ct. 2319,
2 2336 (2019) , and requests that the court vacate his conviction.

3 II. Motion to Amend

4 Petitioner has also filed a motion for leave to amend his petition wishing to assert claims
5 for relief under Rehaif v. United States, 139 S. Ct. 2191 (2019). The Rehaif claims would
6 address his felon in possession of a firearm conviction, not otherwise at issue in the current §
7 2255. The present motion is a second or third successive petition and was filed after receiving
8 permission (#123) from the Ninth Circuit Court of Appeals to address claims found to be
9 retroactive in cases on collateral review. The Order (#123) from the Ninth Circuit did not grant
10 permission to raise other claims. Further, Rehaif has not been found to apply retroactively to
11 cases on collateral review. See, e.g., In re Palacios, 931 F.3d 1314, 1315 (11th Cir. 2019) (Rehaif
12 “did not announce a new rule of constitutional law”) (internal quotations omitted). At best, the
13 Rehaif claim is premature. Accordingly, the Court denies Petitioner’s leave to amend.

14 III. Analysis

15 A federal prisoner may move to “vacate, set aside or correct” his sentence if it “was
16 imposed in violation of the Constitution.” 28 U.S.C. § 2255(a). When a petitioner seeks relief
17 pursuant to a right recognized by a United States Supreme Court decision, a one-year statute of
18 limitations for seeking habeas relief runs from “the date on which the right asserted was initially
19 recognized by the Supreme Court.” 28 U.S.C. § 2255(f)(3). The petitioner bears the burden of
20 demonstrating that his petition is timely and that he is entitled to relief.

21 In Johnson, the United States Supreme Court held that the residual clause in the
22 definition of a “violent felony” in the Armed Career Criminal Act of 1984, 18 U.S.C. §
23 924(e)(2)(B) (“ACCA”), is unconstitutionally vague. 135 S. Ct. at 2557. The ACCA defines
24 “violent felony” as any crime punishable by imprisonment for a term exceeding one year, that:
25 (i) has as an element the use, attempted use, or threatened use of physical force against the
26 person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise
27 involves conduct that presents a serious potential risk of physical injury to another. 18 U.S.C. §
28 924(e)(2)(B). Subsection (ii) above is known as the ACCA's “residual clause.” Johnson, 135 S.

1 Ct. at 2555-56. The Supreme Court held that “increasing a defendant's sentence under the clause
2 denies due process of law.” Id. at 2557.

3 Fierro was not, however, sentenced pursuant to ACCA. Rather, he was convicted of
4 violating 18 U.S.C. § 924(c) for discharging a firearm during and in relation to a crime of
5 violence. Section 924(c)(3) provides:

6 the term “crime of violence” means an offense that is a felony and–

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

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

11 As with the ACCA, subsection (A) is referred to as the force or elements clause while subsection
12 (B) is referenced as the residual clause. Fierro argues that Johnson is equally applicable to §
13 924(c) cases and that his instant motion is timely as it was filed within one year of Johnson.
14 Additionally, the Supreme Court has subsequently applied the principles first outlined in Johnson
15 to the residual clause of § 924(c), holding “that § 924(c)(3)(B) is unconstitutionally vague.”
16 Davis, 139 S. Ct. at 2336. Accordingly, the Court will now consider the motion as timely given
17 the Supreme Court's decision in Davis, extending the principles of Johnson to § 924(c), and will
18 treat the motion as if filed seeking relief pursuant to Davis. Further, Defendant received
19 permission from the Court of Appeals to file this second or successive § 2255 motion (#123).

20 A. Hobbs Act Robbery

21 Fierro asserts that his conviction is not subject to the provisions of § 924(c)(3) because
22 the crime (Hobbs Act Robbery) underlying his 924(c) conviction does not constitute a “crime of
23 violence.” He argues that his § 924(c) conviction and sentence is unconstitutional under Davis
24 because a Hobbs Act Robbery cannot constitute a crime of violence without relying on the
25 unconstitutional residual clause. The court disagrees.

26 Fierro argues that a Hobbs Act Robbery cannot categorically fall under the force or
27 elements clause of § 924(c)(3)(A) because a Hobbs Act Robbery can be committed by any
28 amount of force necessary to accomplish the taking, it does not necessarily require the use of

1 violent force. Prior to the Supreme Court's holding in Davis, the Ninth Circuit held that Hobbs
2 Act “[r]obbery indisputably qualifies as a crime of violence” under § 924(c). United States v.
3 Mendez, 992 F.2d 1488, 1491 (9th Cir. 1993). In 2016, the Ninth Circuit was confronted with
4 essentially the same argument that Fierro raises here, that “because Hobbs Act Robbery may also
5 be accomplished by putting someone in ‘fear of injury,’ 18 U.S.C. § 1951(b), it does not
6 necessarily involve ‘the use, attempted use, or threatened use of physical force,’ 18 U.S.C. §
7 924(c)(3)(A).” United States v. Howard, 650 Fed App'x. 466, 468 (9th Cir. 2016). The Ninth
8 Circuit held that Hobbs Act Robbery nonetheless qualified as a crime of violence under the force
9 clause:

10 [Petitioner's] arguments are unpersuasive and are foreclosed by
11 United States v. Selfa, 918 F.2d 749 (9th Cir. 1990). In Selfa, we
12 held that the analogous federal bank robbery statute, which may be
13 violated by “force and violence, or by intimidation,” 18 U.S.C. §
14 2113(a) (emphasis added), qualifies as a crime of violence under
15 U.S.S.G. § 4B1.2, which uses the nearly identical definition of
16 “crime of violence” as § 924(c). Selfa, 918 F.2d at 751. We
17 explained that “intimidation” means willfully “to take, or attempt to
18 take, in such a way that would put an ordinary, reasonable person in
19 fear of bodily harm,” which satisfies the requirement of a
20 “threatened use of physical force” under § 4B1.2. Id. (quoting
21 United States v. Hopkins, 703 F.2d 1102, 1103 (9th Cir. 1983)).
22 Because bank robbery by “intimidation”—which is defined as
23 instilling fear of injury—qualifies as a crime of violence, Hobbs Act
24 robbery by means of “fear of injury” also qualifies as [a] crime of
25 violence.

19 Id.

20 The Court holds that a Hobbs Act Robbery constitutes a crime of violence under §
21 924(c)(3)'s force clause. Under the elements set forth in the language of § 1951, Fierro's
22 underlying felony offense (Hobbs Act Robbery) is a “crime of violence” because the offense has,
23 “as an element the use, attempted use, or threatened use of physical force against the person or
24 property of another.” 18 U.S.C. § 924(c)(3)(A); see also United States v. Jay, 705 F. App'x 587
25 (9th Cir. 2017) (*unpublished*) (finding Hobbs Act Robbery a crime of violence). Davis is
26 inapplicable here because Fierro's conviction and sentence do not rest on the residual clause of §
27 924(c). The Court sees no reason to depart from the well-reasoned cases of nine other circuit
28 courts of appeals that have found Hobbs Act Robbery to be a crime of violence after Johnson.

1 See United States v. Garcia-Ortiz, 904 F.3d 102, 106 (1st Cir. 2018); United States v. Hill, 890
2 F.3d 51, 60 (2d Cir. 2018); United States v. Mathis, 932 F.3d 242, 265-67 (4th Cir. 2019);
3 United States v. Buck, 847 F.3d 267, 274–75 (5th Cir. 2017); United States v. Gooch, 850 F.3d
4 285, 292 (6th Cir. 2017); United States v. Fox, 878 F.3d 574, 579 (7th Cir. 2017); United States
5 v. Fierro, 919 F.3d 1064, 1072 (8th Cir. 2019); United States v. Melgar-Cabrera, 892 F.3d 1053,
6 1064-6 (10th Cir. 2018); In re Pollard, 931 F.3d 1318 (11th Cir. 2019).

7 As the Supreme Court found in Stokeling v. United States, 139 S. Ct. 544, 553 (2019),
8 “Robbery . . . has always been within the category of violent, active crimes” that merit enhanced
9 penalties under statutes like 924(c). As stated by the Supreme Court “Congress made clear that
10 the ‘force’ required for common-law robbery would be sufficient to justify an enhanced
11 sentence.” Id. at 551. Like the statute in Florida, Hobbs Act Robbery is “defined as common-law
12 robbery.” United States v. Melgar-Cabrera, 892 F.3d 1053, 1064. Section 924(c) includes crimes
13 that involve “physical force.” 18 U.S.C. § 924(c)(3)(A). Stokeling forecloses Petitioner’s
14 argument that the “force” required for Hobbs Act Robbery does not meet the standard set by 18
15 U.S.C. § 924(c)(3)(A).

16 Defendant argues that Hobbs Act Robbery fails to constitute a crime of violence under
17 the elements clause because it does not categorically require the use of intentional force against
18 the person or property of another, but instead, can be committed by causing fear of future injury
19 to property, tangible or intangible. However, “[a] defendant cannot put a reasonable person in
20 fear” of injury to their person or property without “threatening to use force.” United States v.
21 Gutierrez, 876 F.3d 1254, 1257 (9th Cir. 2017). “[Robbery] by intimidation thus requires at least
22 an implicit threat to use the type of violent physical force necessary” to satisfy the requirements
23 of the elements clause. Id.; see also Estell v. United States, 924 F.3d 1291,1293 (8th Cir. 2019)
24 (bank robbery by intimidation requires threatened use of force causing bodily harm). Like the
25 court in Mathis, this Court sees no reason to discern any basis in the text of elements clause for
26 creating a distinction between threats of injury to tangible and intangible property for the
27 purposes of defining a crime of violence. 932 F.3d at 266. Therefore, Hobbs Act Robbery
28 constitutes a crime of violence under the elements clause of Section 924(c).

1 III. Certificate of Appealability

2 To appeal this order, Fierro must receive a certificate of appealability. 28 U.S.C. §
3 2253(c)(1)(B); Fed. R. App. P. 22(b)(1); 9th Cir. R. 22-1 (a). To obtain that certificate, he “must
4 make a substantial showing of the denial of a constitutional right, a demonstration that ...
5 includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the
6 petition should have been resolved in a different manner or that the issues presented were
7 adequate to deserve encouragement to proceed further.” Slack v. McDaniel, 529 U.S. 473, 483-
8 84 (2000) (quotation omitted). This standard is “lenient.” Hayward v. Marshall, 603 F.3d 546,
9 553 (9th Cir. 2010) (en banc).

10 Given contrary holdings in other district courts in the Ninth Circuit, the Court cannot
11 deny that other reasonable jurists would find it debatable that the Court's determination that
12 Hobbs Act Robbery is a crime of violence pursuant to the force clause of § 924(c) is wrong. See
13 United States v. Chea, No. 4:98-cr-40003-CW, 2019 WL 5061085 (N.D. Cal. Oct. 2, 2019);
14 United States v. Dominguez, No. 14-10268 (9th Cir. argued Dec. 10, 2019). Accordingly, the
15 court grants Defendant a certificate of appealability.

16 IV. Conclusion

17 Accordingly, IT IS HEREBY ORDERED Petitioner’s Motion for Leave to File First
18 Amended Motion to Vacate, Set Aside, or Correct Conviction and Sentence under § 2255 (#137)
19 is **DENIED**;

20 IT IS FURTHER ORDERED that Petitioner Brian Fierro’s Motion to Vacate, Set Aside,
21 or Correct Sentence under 28 U.S.C. § 2255 (#124/139) is **DENIED**;

22 IT IS FURTHER ORDERED that the Clerk of the Court enter **JUDGMENT** for
23 Respondent and against Petitioner in the corresponding civil action, 2:17-cv-0742-KJD, and
24 close that case;

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IT IS FURTHER ORDERED that Petitioner is **GRANTED** a Certificate of Appealability.

DATED this 31st day of March 2020.



Kent J. Dawson
United States District Judge