

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

MARTIN SELWYN PEDRO,
Defendant.

03-CR-346 (SHS)

22-CV-9387 (SHS)

OPINION & ORDER

SIDNEY H. STEIN, U.S. District Judge.

Martin Selwyn Pedro requests pursuant to 28 U.S.C. § 2255 that the Court vacate his conviction and sentence as to Count Four of the underlying indictment, for which he was adjudicated guilty of using a firearm in a crime of violence pursuant to 18 U.S.C. § 924(c)(1)(A)(i).¹ (*See* Motion to Vacate, ECF No. 115 at 4, 8-9.) Pedro brings this claim following the U.S. Supreme Court decision *United States v. Taylor*, which held that attempted Hobbs Act robberies do not constitute crimes of violence pursuant to section 924(c)(3)(A) because no elements of the underlying offense “require the government to prove the use, attempted use, or threatened use of force.” *United States v. Taylor*, 596 U.S. 845, 860 (2022).² Because the elements of Pedro’s underlying 18 U.S.C. §§ 2113(a) and 2113(d) offenses for bank robbery *do* require the government to prove the use, attempted use, or threatened use of force, the offenses are crimes of violence pursuant to section 924(c)(3)(A) and, therefore, Pedro’s section 2255 petition is denied.

I. BACKGROUND

On December 18, 2003, Pedro was found guilty by a jury on eight counts. The guilty counts included conspiracy to commit armed bank robbery; using and carrying a firearm in a bank robbery conspiracy; armed bank robbery; two counts of use of a

¹ Because the jury was not required to find that defendant discharged a firearm, at resentencing it was confirmed that the mandatory minimum for Count Four was 60 months pursuant to 924(c)(1)(A)(i), not 120 months pursuant to 924(c)(1)(A)(iii). (*See* ECF No. 111 at 3-4.)

² The Second Circuit has not yet expressly stated whether *Taylor* applies retroactively. *See Crowder v. United States*, No. 16-cv-4403 (CM), 2023 WL 5097803, at *3 n.1 (S.D.N.Y. Aug. 9, 2023). But at least two courts in this district have held that *Taylor* has retroactive application to cases on collateral review. *See id.*; *see also Aponte v. United States*, No. 02-cr-1082 (NRB), 2023 WL 3600848, at *3-4 (S.D.N.Y. May 23, 2023). Moreover, the Second Circuit has “cited with approval a Sixth Circuit case which applied *Taylor* retroactively to a request to vacate under § 2255,” *Crowder*, 2023 WL 5097803, at *3 n.1 (referring to *United States v. Collymore*, 61 F.4th 295, 297 (2d Cir. 2023)), and has recently considered the implications of *Taylor* in an appeal concerning a section 2255 motion, *Medunjanin v. United States*, 99 F.4th 129, 134-36 (2d Cir. 2024).

firearm in a crime of violence; two counts of possession of a firearm by a convicted felon; and Hobbs Act robberies. (See ECF No. 38 at 1.) Pedro was originally sentenced to 819 months incarceration, consisting of 135 months (60 months on Count 1, 135 months on Count 3, 120 months on Count 5, 120 months on Count 6, and 135 months on Count 7, all to run concurrently) followed by 684 months (300 months on Count 2, 300 months on Count 4, and 84 months on Count 8, all to run consecutively.) (*Id.* at 3.)

Pedro was resentenced on April 8, 2021, after a successful petition based on a change of the law as enunciated by the U.S. Supreme Court in *United States v. Davis*, 588 U.S. 445 (2019). (See ECF No. 111 at 2-3.) Pursuant to the holding of the Supreme Court in *Davis*, this Court vacated Counts 2 (using and carrying a firearm in a bank robbery conspiracy) and 8 (use of a firearm in a crime of violence) because they were not considered crimes of violence post-*Davis*. (See ECF No. 109 at 1.) Pedro was re-sentenced in April 2021 to 195 months incarceration, consisting of the same 135 months on Counts 1, 3, 5, 6, and 7 to run concurrently, plus 60 months on Count 4 to run consecutively. (*Id.* at 3.)

On November 21, 2022, Pedro filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241. (See ECF No. 115.) On November 30, 2022, the Court designated the application as a motion under 28 U.S.C. § 2255. (See ECF No. 116.) Pedro confirmed that he wished to pursue relief under section 2255, and that his November 21, 2022, motion should be designated accordingly. (See ECF No. 117.)

II. ANALYSIS

To determine whether a predicate offense constitutes a crime of violence pursuant to section 924(c)(3)(A), courts typically apply the categorical approach. This approach assesses whether “*categorically*, that is to say, in every instance by its very definition, [the offense] involves the use of force.” *United States v. Martinez*, 991 F.3d 347, 353 (2d Cir. 2021). For some offenses, however, courts apply a modified categorical approach. Courts apply the modified categorical approach for divisible statutes, in which a crime is defined with separable, alternative elements. *Colotti v. United States*, 71 F.4th 102, 108 (2d Cir. 2023). For such offenses, courts first “consult[] a limited set of documents—including the indictment, verdict form, and jury instructions—to determine which of the alternative branches of the statute’s prohibitions was the basis of the defendant’s conviction.” *Id.* Next, courts “assess[] whether the elements of that branch of the offense can be satisfied by conduct that would fall outside the definition of a ‘crime of violence’ provided by section 924(c)(3)(A).” *Id.*

This case involves an application of the “modified categorical approach,” as will be set forth below. In Count Three, Pedro was found guilty of armed bank robbery pursuant to 18 U.S.C. §§ 2113(a) and 2113(d). (See ECF No. 109.) In Count Four, Pedro

was found guilty of the use of a firearm in a crime of violence, with the crime of violence referring to the crimes in Count Three. (*See id.*; *see also* ECF No. 20 at 6-7.)

Section 2113(a)

Section 2113(a) states:

Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank . . . ; or

Whoever enters or attempts to enter any bank . . . with intent to commit in such bank . . . any felony affecting such bank . . . and in violation of any statute of the United States, or any larceny—

Shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 2113(a).

The Second Circuit has categorized section 2113(a) as a divisible statute. *United States v. Moore*, 916 F.3d 231, 238 (2d Cir. 2019). This is because section 2113(a) “delineates two methods of committing the crime of bank robbery: (1) ‘by force and violence, or by intimidation’ or (2) ‘by enter[ing] or attempt[ing] to enter’ a federal financial institution ‘with intent to commit . . . any felony affecting’ such financial institution . . .” *Id.* Since this statute is divisible, the Court can look to other sources to determine the method under which Pedro was convicted.

Count Three of the indictment charges Pedro under the first method of committing a section 2113(a) bank robbery: “by force and violence, or by intimidation.” (ECF No. 20 at 5-6.) The Court read Count Three of the indictment in its charge to the jury. (*See United States v. Pedro* Jury Charge at 38.) Furthermore, the Court instructed the jury that the Government must prove, beyond a reasonable doubt, that “during the bank robbery, the defendant accomplished this taking, or attempted taking, by force and violence, or by acting in an intimidating manner.” (*Id.* at 39.) Clearly “by force and violence” satisfies the categorical test—by force and violence necessarily involves the use of force. So too does the element of “by intimidation.” *See United States v. Hendricks*, 921 F.3d 320, 328 (2d Cir. 2019); *see also Collier v. United States*, 989 F.3d 212, 220 (2d Cir. 2021). The *Moore* court found similarly, holding that “federal bank robbery ‘by force and violence, or by intimidation’ is a crime of violence.” *Moore*, 916 F.3d at 239; *see also Hendricks*, 921 F.3d at 327.

Thus, the section 2113(a) offense is properly considered a crime of violence pursuant to section 924(c)(3)(A) under the modified categorical approach. Therefore, Pedro's *Taylor* argument does not hold up as to this statutory provision.

Section 2113(d)

Section 2113(d) states:

Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

18 U.S.C. § 2113(d).

Section 2113(d) would appear to itself be a divisible statute: it can be violated by an offense committed through either section 2113(a) or section 2113(b). Looking to the indictment and the jury instructions, section 2113(d) is arrived at here via section 2113(a): the indictment charges a violation of section 2113(a) but not section 2113(b). (*See* ECF No. 20 at 5-6.) Clearly, then, subsection "(a)", not subsection "(b)", is the gateway into section 2113(d). The jury instructions specifically employ section 2113(a) language—and, even more specifically, the "by force and violence, or by intimidation" prong of section 2113(a)—in describing section 2113(d) to the jury. (*See United States v. Pedro* Jury Charge at 38).

Moreover, it would appear that section 2113(d) offenses of any stripe are categorically violent pursuant to section 924(c)(3)(A), as they require either the assault of any person or the putting in jeopardy the life of any person by the use of a dangerous weapon or device. Indeed, a district court in this Circuit has noted that "it is well-established that an element of [section 2113(d)] is the use, attempted use, or threatened use of physical force against the person or property of another." *United States v. Campbell*, 647 F. Supp. 3d 76, 86 (E.D.N.Y. 2022). Thus this section 2113(d) offense, much as the section 2113(a) offense, is categorically a crime of violence for which Pedro may not receive relief.

III. CONCLUSION

Because Pedro's section 2113(a) and section 2113(d) offenses are categorically crimes of violence under the modified categorical approach to divisible statutes, his petition based on the Supreme Court's *Taylor* decision fails. Count Four of the amended judgment remains valid, as the offenses upon which it was based—sections 2113(a) and (d)—are crimes of violence pursuant to section 924(c)(3) and merit the additional mandatory sentence set forth in section 924(c)(1)(A)(i).

Because “the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief,” the Court concludes that a hearing on Pedro’s motion is unnecessary. 28 U.S.C. § 2255(b).

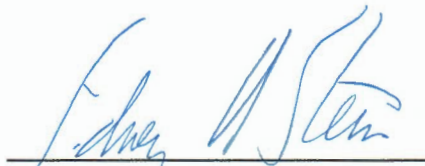
The Court denies Pedro’s request for counsel. *See* 28 U.S.C. § 2255(g); *see also Hodge v. Police Officers*, 802 F.2d 58, 60 (2d Cir. 1986).

Because Pedro has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. *See* 28 U.S.C. § 2253(c)(2); *see also Lucidore v. N.Y. State Div. of Parole*, 209 F.3d 107, 111–13 (2d Cir. 2000). In addition, the Court certifies that any appeal from this order would not be in good faith. *See Coppedge v. United States*, 369 U.S. 438, 445–46 (1962).

The Clerk of Court shall mail a copy of this order to Mr. Martin Selwyn Pedro [51782-054], USP Coleman II, U.S. Penitentiary, P.O. Box 1034, Coleman, FL 33521.

Dated: New York, New York
July 24, 2024

SO ORDERED:

A handwritten signature in blue ink, appearing to read "Sidney H. Stein", is written over a horizontal line.

Sidney H. Stein, U.S.D.J.