

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAY 18 2021

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TIERRE COLE,

Defendant-Appellant.

No. 20-16006

D.C. Nos.

2:16-cv-01377-KJD

2:14-cr-00344-KJD-PAL-1

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada

Kent J. Dawson, District Judge, Presiding

Submitted May 14, 2021**
San Francisco, California

Before: HAWKINS and MILLER, Circuit Judges, and MORRIS,*** District
Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Brian M. Morris, Chief United States District Judge for the District of Montana, sitting by designation.

Tierre Cole appeals the denial of his motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his 18 U.S.C. § 924(c) conviction and sentence. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

We review de novo both the denial of a § 2255 motion, *United States v. Aguirre-Ganceda*, 592 F.3d 1043, 1045 (9th Cir. 2010), and whether a prior conviction qualifies as a crime of violence under § 924(c), *United States v. Begay*, 934 F.3d 1033, 1037 (9th Cir. 2019).

Cole was convicted and sentenced under § 924(c) for the use of a firearm during and in relation to a crime of violence (Hobbs Act robbery, 18 U.S.C. § 1951) as a principal and as an aider and abettor. He argues that Hobbs Act robbery does not qualify as a crime of violence after *United States v. Davis*, 139 S. Ct. 2319 (2019),¹ where the Supreme Court concluded that § 924(c)'s residual clause, § 924(c)(3)(B), was unconstitutionally vague.

Under either theory of liability for Hobbs Act robbery, Cole's conviction and sentence under § 924(c) are constitutional. *United States v. Dominguez*, 954 F.3d 1251, 1255 (9th Cir. 2020), recognized that Hobbs Act robbery qualifies as a crime

¹ Cole may proceed with his appeal even though he waived the right to collaterally attack his sentence in his written plea agreement because he argues that his conviction and sentence are unconstitutional. See *United States v. Torres*, 828 F.3d 1113, 1125 (9th Cir. 2016); *United States v. Barron*, 172 F.3d 1153, 1160 (9th Cir. 1999) (en banc).

of violence under § 924(c). And, for the purpose of determining whether an offense qualifies as a crime of violence under § 924(c), aiding and abetting Hobbs Act robbery is treated no differently than a substantive Hobbs Act robbery. *See United States v. Hall*, No. 17-16166, slip op. at 2–3 (9th Cir. Apr. 23, 2021) (aiding and abetting Hobbs Act robbery qualifies as a crime of violence because “aiding and abetting liability does not alter the categorical approach analysis”); *see also United States v. Henry*, 984 F.3d 1343, 1356 (9th Cir. 2021) (defendants found guilty of armed bank robbery under an aiding and abetting theory are treated as principals). Thus, Cole’s conviction and sentence under § 924(c) are constitutional.

AFFIRMED.