FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. STEVEN RAY PRIGAN, *Defendant-Appellant.*	No. 18-30238 D.C. No. 2:18-cr-00123-SMJ-1 OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Salvador Mendoza, Jr., District Judge, Presiding

Argued and Submitted May 4, 2021
Seattle, Washington

Filed August 16, 2021

Before: Danny J. Boggs,[*] Marsha S. Berzon, and
Mary H. Murguia, Circuit Judges.

Opinion by Judge Murguia

[*] The Honorable Danny J. Boggs, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

SUMMARY[**]

Criminal Law

The panel vacated a sentence for illegally possessing firearms, and remanded for resentencing, in a case in which the district court determined that the defendant's prior conviction for Hobbs Act robbery under 18 U.S.C. § 1951(b)(1) is a "crime of violence" under United States Sentencing Guidelines § 4B1.2(a).

The panel held that Hobbs Act robbery is not a crime of violence under § 4B1.2(a). The panel explained that Hobbs Act robbery, which covers using force or threatening to use force against persons or property, sweeps more broadly than § 4B1.2(a)'s force clause, § 4B1.2(a)'s enumerated offense of robbery, and § 4B1.2(a)'s enumerated offense of extortion—none of whose crime-of-violence definitions covers using force or threatening force against property. The panel held that the district court therefore erred in ruling that Hobbs Act robbery is categorically a crime of violence. The panel held that the error is not harmless, because the district court provided no explanation for varying from the correct Guidelines range, let alone the extent of such variance.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

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James A. Goeke (argued), Assistant United States Attorney; Joseph H. Harrington, United States Attorney; United States Attorney's Office, Spokane, Washington; for Plaintiff-Appellee.

OPINION

MURGUIA, Circuit Judge:

This case involves Steven Prigan's sixty-four-month sentence of imprisonment for illegally possessing firearms in 2018. To correctly calculate Prigan's Sentencing Guidelines range for the 2018 firearms offense, the district court had to first perform a categorical-approach analysis and answer the following question: whether Prigan's 2014 conviction for Hobbs Act robbery under 18 U.S.C. § 1951(b)(1) is a "crime of violence" according to United States Sentencing Guidelines § 4B1.2(a). The answer to that question determined whether Prigan's Guidelines range would increase. *See* U.S. Sent'g Guidelines Manual ("U.S.S.G.") § 2K2.1(a)(3) (U.S. Sent'g Comm'n 2018) (requiring a higher base offense level for a defendant who was previously convicted of a crime of violence under § 4B1.2(a)).

The district court determined that Prigan's 2014 conviction for Hobbs Act robbery is a crime of violence

under § 4B1.2(a) and increased Prigan's Guidelines range. On appeal, Prigan argues that the district court erred in concluding that his 2014 conviction for Hobbs Act robbery is a crime of violence under § 4B1.2(a). Six of our sister circuits have held that Hobbs Act robbery is *not* a crime of violence under § 4B1.2(a). *See United States v. Green*, 996 F.3d 176, 184 (4th Cir. 2021); *Bridges v. United States*, 991 F.3d 793, 800 (7th Cir. 2021); *United States v. Eason*, 953 F.3d 1184, 1194 (11th Cir. 2020); *United States v. Rodriguez*, 770 F. App'x 18, 21–22 (3d Cir. 2019); *United States v. Camp*, 903 F.3d 594, 604 (6th Cir. 2018); *United States v. O'Connor*, 874 F.3d 1147, 1158 (10th Cir. 2017).

We agree with our sister circuits and hold that Hobbs Act robbery is not a crime of violence under § 4B1.2(a). We therefore vacate Prigan's sentence and remand this case for resentencing.

I.

In June 2014, Prigan pleaded guilty to two counts of Hobbs Act robbery under 18 U.S.C. § 1951. For that conviction, the United States District Court for the Eastern District of Washington sentenced Prigan to three years of imprisonment and three years of supervised release. Prigan served three years in prison and was released from physical custody, but he remained on supervised release. Prigan's supervised-release conditions and conviction for Hobbs Act robbery prohibited him from possessing any firearm or ammunition.

In June 2018, federal officers searched Prigan's residence and vehicle. They found firearms, ammunition, and methamphetamine. The officers arrested Prigan. A grand jury indicted Prigan on two counts involving firearms. Count 1 charged Prigan as a felon and unlawful user of

controlled substances who possessed firearms and ammunition in violation of 18 U.S.C. §§ 922(g)(1), 922(g)(3), and 924(a)(2). Count 2 charged Prigan with possessing an unregistered firearm in violation of 26 U.S.C. § 5841. Prigan pleaded guilty to both Counts in a written plea agreement.

In November 2018, the district court held a hearing to sentence Prigan in the 2018 firearms case. The district court received a Presentence Investigation Report ("PSR") containing a Guidelines calculation. The PSR stated that Prigan's 2014 conviction for Hobbs Act robbery constituted a crime of violence under § 4B1.2(a). This categorization increased Prigan's Guidelines range from forty-six to fifty-seven months of imprisonment to fifty-seven to seventy-one months of imprisonment. *See* U.S.S.G. § 2K2.1(a)(3) (requiring a higher base offense level for Prigan's Guidelines calculation if he was previously convicted of a crime of violence under § 4B1.2(a)).

Prigan objected to the PSR. In Prigan's view, the PSR erred in stating that his 2014 conviction for Hobbs Act robbery is a crime of violence under § 4B1.2(a) and erroneously inflated Prigan's Guidelines range. The government's counsel acknowledged Prigan's "very thoughtful brief on the issue" and did not offer any written response in the district court.

The district court overruled Prigan's objections to the PSR. That is, the district court ruled that Prigan's 2014 conviction for Hobbs Act robbery is a crime of violence under § 4B1.2(a). As a result, the district court concluded that Prigan's Guidelines range was fifty-seven to seventy-one months of imprisonment. The district court sentenced Prigan to sixty-four months of imprisonment because the district court thought a sentence within the Guidelines range

was appropriate. Prigan timely appealed his sixty-four-month sentence.[1]

II.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo whether an offense is a crime of violence under the Guidelines. *See United States v. Robinson*, 869 F.3d 933, 936 (9th Cir. 2017). A district court's Guidelines-calculation error is subject to harmless-error review. *United States v. Munoz-Camarena*, 631 F.3d 1028, 1030 (9th Cir. 2011) (per curiam).

III.

On appeal, Prigan argues that his 2014 conviction for Hobbs Act robbery is not a crime of violence under § 4B1.2(a). We apply the "formal categorical approach" to determine whether a criminal defendant's prior conviction is a crime of violence under § 4B1.2(a). *See Descamps v. United States*, 570 U.S. 254, 261 (2013) (citation omitted).

To apply the categorical approach, we do not look at the facts underlying Prigan's 2014 conviction for Hobbs Act robbery. *See United States v. Velasquez-Reyes*, 427 F.3d 1227, 1229 (9th Cir. 2005). We instead compare "the scope of the conduct covered by the elements of Hobbs Act robbery with the definitions of 'crime of violence' in []

[1] The district court also sentenced Prigan to ten months of imprisonment for violating the supervised-release conditions in the 2014 robbery case. The district court ordered those ten months of imprisonment to run consecutively with Prigan's sixty-four-month sentence in the 2018 firearms case. The ten-month sentence is not at issue in this appeal.

§ 4B1.2(a)." *Eason*, 953 F.3d at 1189.[2] If the conduct covered by Hobbs Act robbery sweeps more broadly than the conduct covered by § 4B1.2(a)'s crime-of-violence definitions, Hobbs Act robbery is not categorically a crime of violence under § 4B1.2(a). *See Descamps*, 570 U.S. at 261; *Eason*, 953 F.3d at 1189. On the other hand, if the conduct covered by Hobbs Act robbery does not sweep more broadly than the conduct covered by § 4B1.2(a)'s crime-of-violence definitions, Hobbs Act robbery is categorically a crime of violence under § 4B1.2(a); that is because all Hobbs Act robberies would be contained within § 4B1.2(a)'s crime-of-violence definitions. *See Descamps*, 570 U.S. at 261.

A.

Our categorical-approach analysis starts with the elements of Hobbs Act robbery, which is defined as follows:

> [T]he unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, *to his person or property*, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

[2] Neither the government nor any circuit has suggested that Hobbs Act robbery under 18 U.S.C. § 1951(b)(1) is divisible. The modified-categorical approach is therefore not pertinent here. *See Descamps*, 570 U.S. at 258; *United States v. Walton*, 881 F.3d 768, 774–75 (9th Cir. 2018).

18 U.S.C. § 1951(b)(1) (emphasis added). The key takeaway from § 1951(b)(1)'s text—for our purpose—is that a person may commit Hobbs Act robbery by using force or threatening to use force against a person *or property*. *See Green*, 996 F.3d at 180; *Bridges*, 991 F.3d at 800.

On the other hand, § 4B1.2(a)'s crime-of-violence definitions are narrower because a person commits a crime of violence only if he or she uses force or threatens to use force against *persons*. *See Bridges*, 991 F.3d at 800–02. Section 4B1.2(a) defines "crime of violence" as any federal or state offense that:

> (1) has as an element the use, attempted use, or threatened use of physical force *against the person of another*, or
>
> (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

U.S.S.G. § 4B1.2(a) (emphasis added).

We will call § 4B1.2(a)(1) the "force clause" because it covers defendants who use force or threaten to use force against a person. *See id.* § 4B1.2(a)(1). And we will call § 4B1.2(a)(2) the "enumerated-offenses clause" because it covers a list of enumerated offenses that constitute a crime of violence. *See id.* § 4B1.2(a)(2). The parties here agree that robbery and extortion are the only two relevant offenses within § 4B1.2(a)'s enumerated-offenses clause in Prigan's case.

With these provisions in mind, we must determine whether Hobbs Act robbery sweeps more broadly than (1) § 4B1.2(a)'s force clause, (2) "robbery" under § 4B1.2(a)'s enumerated-offenses clause, and (3) "extortion" under § 4B1.2(a)'s enumerated-offenses clause. *See Green*, 996 F.3d at 180–84. If Hobbs Act robbery sweeps more broadly than all three, Prigan's 2014 conviction for Hobbs Act robbery is not categorically a crime of violence under § 4B1.2(a). *See id.* On the other hand, if Hobbs Act robbery does not sweep more broadly than any one of those three, Prigan's 2014 conviction for Hobbs Act robbery is categorically a crime of violence under § 4B1.2(a). *See id.*

As our sister circuits have held, Hobbs Act robbery sweeps more broadly than all three clauses. While Hobbs Act robbery covers force or threats of force against a person *or property*, § 4B1.2(a)'s force clause and the relevant enumerated offenses—robbery and extortion—cover force or threats of force only against persons. *See, e.g.*, *id.*; *Eason*, 953 F.3d at 1190–96.

B.

1.

The first question is whether Hobbs Act robbery sweeps more broadly than § 4B1.2(a)'s force clause. It does. Hobbs Act robbery includes using force or threatening to use force against any "person *or property*." 18 U.S.C. § 1951(b)(1) (emphasis added). Yet § 4B1.2(a)'s force clause only covers a conviction that has "as an element the use, attempted use, or threatened use of physical force *against the person of another*." U.S.S.G. § 4B1.2(a)(1) (emphasis added).

These definitions—by their express terms—show that Hobbs Act robbery sweeps more broadly than § 4B1.2(a)'s force clause. *Eason*, 953 F.3d at 1190–93. Hobbs Act robbery covers using force or threatening to use force against a person or property, but § 4B1.2(a)'s force clause does not extend to force or threats of force against property. *See Green*, 996 F.3d at 180–81; *Eason*, 953 F.3d at 1190–93; *cf. United States v. Edling*, 895 F.3d 1153, 1156–57 (9th Cir. 2018) (holding that a state robbery statute functionally identical to Hobbs Act robbery—criminalizing taking by force or threat of force against a "person or property"—is broader than § 4B1.2(a)'s force clause). Because Hobbs Act robbery sweeps more broadly than § 4B1.2(a)'s force clause, Hobbs Act robbery is not a categorical match for § 4B1.2(a)'s force clause. *Green*, 996 F.3d at 181. Prigan's 2014 conviction for Hobbs Act robbery is therefore not a crime of violence under § 4B1.2(a)'s force clause. *Id.* at 181, 184.

2.

The second question is whether Hobbs Act robbery sweeps more broadly than § 4B1.2(a)'s enumerated offense of robbery. Because the Guidelines do not define "robbery," we use the generic definition of robbery under federal law. *See Descamps*, 570 U.S. at 257; *Camp*, 903 F.3d at 600. The question thus becomes whether Hobbs Act robbery sweeps more broadly than the generic definition of robbery under federal law. *See Camp*, 903 F.3d at 600.

The analysis here is straightforward. As stated above, Hobbs Act robbery covers any person who uses force or threatens to use force against a "person or property." 18 U.S.C. § 1951(b)(1). By contrast, generic federal robbery is "aggravated larceny, containing at least the elements of misappropriation of property under circumstances involving

immediate danger to the *person*." *United States v. Becerril-Lopez*, 541 F.3d 881, 891 (9th Cir. 2008) (citation omitted). Our court has concluded that "generic federal robbery . . . does not extend to threats to property." *United States v. Bankston*, 901 F.3d 1100, 1103 (9th Cir. 2018); *see also Edling*, 895 F.3d at 1157 ("Generic robbery requires danger to the person, not merely danger to property.").

The definitions above and our precedent show that Hobbs Act robbery sweeps more broadly than generic federal robbery. Although Hobbs Act robbery covers threatening to use force against a person or property, generic federal robbery does not cover threats of force against property. *See, e.g.*, *Eason*, 953 F.3d at 1193–95. Because Hobbs Act robbery sweeps more broadly than generic federal robbery, Hobbs Act robbery is not categorically "robbery" under § 4B1.2(a)'s enumerated-offenses clause. *See id.* So Prigan's 2014 conviction for Hobbs Act robbery is not "robbery" under § 4B1.2(a)'s enumerated-offenses clause. *See, e.g.*, *Descamps*, 570 U.S. at 261; *Green*, 996 F.3d at 181–82; *Eason*, 953 F.3d at 1193–95.

3.

The third question is whether Hobbs Act robbery sweeps more broadly than § 4B1.2(a)'s enumerated offense of extortion. Because the Guidelines define "extortion," we use that definition. *Green*, 996 F.3d at 182; *Bankston*, 901 F.3d at 1103–04. The question becomes whether Hobbs Act robbery sweeps more broadly than the Guidelines' definition of extortion. *Green*, 996 F.3d at 182; *Bankston*, 901 F.3d at 1103–04.

Again, the analysis is straightforward. As already explained, Hobbs Act robbery covers any person who uses force or threatens to use force against a "person or property."

18 U.S.C. § 1951(b)(1). By contrast, the Guidelines define extortion as "obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury." *Bankston*, 901 F.3d at 1103–04 (citation omitted). Our court has construed the Guidelines' definition of extortion to require that "the wrongful use of force, fear, or threats be directed against the *person* of another, *not property*." *Edling*, 895 F.3d at 1157 (emphases added).

These definitions and our prior interpretations show that Hobbs Act robbery sweeps more broadly than the Guidelines' definition of extortion. Hobbs Act robbery covers threatening to use force against persons or property, but the Guidelines' definition of extortion does not extend to threats of force against property. *See Eason*, 953 F.3d at 1194; *Bankston*, 901 F.3d at 1102–04. Because Hobbs Act robbery sweeps more broadly than "extortion" under § 4B1.2(a)'s enumerated-offenses clause, Hobbs Act robbery is not categorically "extortion" under § 4B1.2(a)'s enumerated-offenses clause. *See Eason*, 953 F.3d at 1194–95. As a result, Prigan's 2014 conviction for Hobbs Act robbery is not "extortion" under § 4B1.2(a)'s enumerated-offenses clause. *See Descamps*, 570 U.S. at 261; *Green*, 996 F.3d at 183–84.

* * *

In sum, Hobbs Act robbery sweeps more broadly than (1) § 4B1.2(a)'s force clause, (2) § 4B1.2(a)'s enumerated offense of robbery, and (3) § 4B1.2(a)'s enumerated offense of extortion. *See, e.g.*, *Green*, 996 F.3d at 184. Hobbs Act robbery covers using force or threatening to use force against persons or property, while § 4B1.2(a)'s crime-of-violence definitions do not cover using force or threatening to use force against property. *Id.* at 180–84. Accordingly, Prigan's

2014 conviction for Hobbs Act robbery is not categorically a crime of violence under § 4B1.2(a).[3] The district court erred in ruling otherwise when calculating Prigan's Guidelines range.

C.

Because the district court incorrectly ruled that Prigan's 2014 conviction for Hobbs Act robbery is a crime of violence under § 4B1.2(a), the district court incorrectly concluded that Prigan's Guidelines range for the 2018 firearms offense is fifty-seven to seventy-one months of imprisonment. The PSR stated that Prigan's Guidelines range would be forty-six to fifty-seven months of imprisonment if his 2014 conviction for Hobbs Act robbery were not considered a crime of violence. The district court's sentence for the 2018 firearms offense—sixty-four months of imprisonment—does not fall within Prigan's correct Guidelines range.

The government argues that even if the district court erred in calculating Prigan's Guidelines range, any error was harmless. An error in calculating a criminal defendant's

[3] The government points to *United States v. Dominguez*, 954 F.3d 1251, 1260 (9th Cir. 2020), which held that Hobbs Act robbery constitutes a "crime of violence" under 18 U.S.C. § 924(c)(3)(A). *Dominguez* is not relevant here because § 924(c)(3)(A)'s crime-of-violence definition is different—and broader—than § 4B1.2(a)'s force clause. *Compare* 18 U.S.C. § 924(c)(3)(A) (defining "crime of violence" as a felony that "has as an element the use, attempted use, or threatened use of physical force against the *person or property* of another") (emphasis added), *with* U.S.S.G. § 4B1.2(a)(1) (defining "crime of violence" as having "as an element the use, attempted use, or threatened use of physical force *against the person* of another") (emphasis added). Other circuits agree with this distinction. *See, e.g.*, *Green*, 996 F.3d at 181.

Guidelines range is subject to harmless-error review. *Munoz-Camarena*, 631 F.3d at 1030. But "[n]ormally, [a] mistake in calculating the recommended Guidelines sentencing range is a significant procedural error that requires us to remand for resentencing." *United States v. McCarns*, 900 F.3d 1141, 1145 (9th Cir. 2018) (citation omitted); *see also United States v. Leal-Vega*, 680 F.3d 1160, 1169–70 (9th Cir. 2012). For the district court's calculation error to be harmless, the district court "must explain, among other things, the reason for the *extent* of a variance" from the correct Guidelines range. *Munoz-Camarena*, 631 F.3d at 1031 (citing *United States v. Carty*, 520 F.3d 984, 991–92 (9th Cir. 2008) (en banc)).

Here, the district court provided no explanation for varying from what we now know to be the correct Guidelines range of forty-six to fifty-seven months of imprisonment, let alone for the extent of such variance. In fact, the district court rooted its sixty-four-month sentence squarely in the incorrect Guidelines range of fifty-seven to seventy-one months, expressly stating it "believe[d] that a guideline sentence is appropriate." Nothing in the record demonstrates that the district court would have varied upward and imposed a sixty-four-month sentence if Prigan's "correct Guidelines range [of forty-six to fifty-seven months of imprisonment] was kept in mind throughout the process." *Id.* (citation and quotation marks omitted). For these reasons, the district court did not commit a harmless error when it incorrectly calculated Prigan's Guidelines range. *See id.* at 1030–31.[4]

[4] We have provided non-exhaustive examples of harmless-error situations in the Guidelines context. *See Munoz-Camarena*, 631 F.3d at 1030 n.5. None of these circumstances, nor any similar circumstance

IV.

We remand this case to the district court for resentencing on an open record. The district court must conduct a new sentencing hearing for the 2018 firearms offense and, this time around, may not consider Prigan's 2014 conviction for Hobbs Act robbery a crime of violence when calculating the Guidelines range for the 2018 firearms offense.

VACATED, REVERSED, AND REMANDED.

assuring that the sentence would not have varied had the correct Guidelines calculation been applied, is present here.