APPENDIX

APPENDIX

A-1

883 F.3d 1319
United States Court of
Appeals, Eleventh Circuit.

UNITED STATES of
America, Plaintiff-Appellee,
v.
Michael ST. HUBERT,
Defendant-Appellant.

No. 16-10874
|
(February 28, 2018)

Synopsis

Background: Defendant pled guilty in the United States District Court for the Southern District of Florida, No. 1:15–cr–20621–FAM–1, Federico A. Moreno, J., to using, carrying, and brandishing firearm during, in relation to, and in furtherance of crime of violence, and he appealed.

Holdings: The Court of Appeals, Hull, Circuit Judge, held that:

[1] defendant's unconditional guilty plea did not waive review of his claim that statute of conviction was unconstitutional;

[2] defendant's plea did not waive review of his statutory claim;

[3] Hobbs Act robbery qualified as "crime of violence"; and

[4] attempted Hobbs Act robbery qualified as "crime of violence."

Affirmed.

***1320** Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:15–cr–20621–FAM–1

Attorneys and Law Firms

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Before MARCUS, ANDERSON and HULL, Circuit Judges.

Opinion

HULL, Circuit Judge:

On February 16, 2016, Michael St. Hubert pled guilty to two counts of using, carrying, and brandishing a firearm during, in relation to, and in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c). The district court sentenced St. Hubert to 84 months' imprisonment for the first § 924(c) conviction and 300 consecutive months' imprisonment for the second § 924(c) conviction. St. Hubert appeals his § 924(c) convictions

and sentences claiming his predicate Hobbs Act robbery and attempted robbery do not constitute crimes of violence under either the risk-of-force (residual) clause in § 924(c)(3)(B) or the use-of-force clause in § 924(c)(3)(A).

After careful review and with the benefit of oral argument, we affirm both convictions and sentences.

I. BACKGROUND FACTS

A. Indictment

On August 11, 2015, St. Hubert was indicted on thirteen counts in connection with a series of five robberies and one attempted robbery committed in southern Florida between December 23, 2014 and January 27, 2015. Counts 1, 3, 5, 7, 9, and 11 contained the six robbery counts. Five counts charged that St. Hubert committed a Hobbs Act robbery, and one count ***1321** charged an attempted robbery, all in violation of 18 U.S.C. § 1951(b).

Counts 2, 4, 6, 8, 10, and 12 were § 924(c) firearm counts and charged St. Hubert with knowingly using, carrying, and possessing a firearm during, in relation to, and in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A). Each § 924(c) firearm count specifically identified and charged that the predicate crime of violence was one of five Hobbs Act robberies or the attempted Hobbs Act robbery charged in the six substantive robbery counts. Each § 924(c) firearm count also charged St. Hubert with brandishing the firearm in violation of 18 U.S.C. § 924(c)(1)(A)(ii).

Count 13 charged St. Hubert with knowingly possessing a firearm and ammunition after having been previously convicted of a felony, in violation of 18 U.S.C. § 922(g)(1).

Ultimately, St. Hubert pled guilty to the two § 924(c) firearm counts contained in Counts 8 and 12. Therefore, only Counts 8 and 12 (the firearm offenses), which expressly incorporated as predicates the robberies in Counts 7 and 11, are relevant to this appeal. We set out the allegations in those counts.

More specifically, Count 8 charged that St. Hubert used and carried a firearm during the Hobbs Act robbery in Count 7, stating that St. Hubert:

> did knowingly use and carry a firearm during and in relation to a crime of violence, and did knowingly possess a firearm in furtherance of a crime of violence, an offense for which the defendant may be prosecuted in a court of the United States, specifically, a violation of Title 18, United States Code, Section 1951(a), as alleged in Count 7 of this Indictment, in violation of Title 18, United States Code, Section 924(c)(1)(A).
>
> Pursuant to Title 18, United States Code, Section 924(c)(1)(A)(ii), it is further alleged that the firearm was brandished.

In turn, Count 7 charged that St. Hubert committed the Hobbs Act robbery of an AutoZone store in Hollywood, Florida on January 21, 2015, stating St. Hubert:

> did knowingly obstruct, delay, and affect commerce and the movement of articles and commodities in commerce, by means of robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Sections 1951(b)(1) and (b)(3), in that the defendant did take property from the person and in the presence of persons employed by AutoZone, located at 1513 North State Road 7, Hollywood, Florida 33021, a business and company operating in interstate and foreign commerce, against the will of those persons, by means of actual and threatened force, violence, and fear of injury to said persons, in violation of Title 18, United States Code, Section 1951(a).

(emphasis added).

Count 12 charged that St. Hubert used and carried a firearm on January 27, 2015 during the attempted Hobbs Act robbery in Count 11, stating that St. Hubert:

> did knowingly use and carry a firearm during and in relation to a crime of violence, and did knowingly possess a firearm in furtherance of a crime of violence, an offense for which the defendant may be prosecuted in a court of the United States, specifically, a violation of Title 18, United States Code, Section 1951(a), as alleged in Count 11 of this Indictment, in violation of Title 18, United States Code, Section 924(c)(1)(A).
>
> Pursuant to Title 18, United States Code, Section 924(c)(1)(A)(ii), it is further alleged that the firearm was brandished.

Count 11, in turn, charged that St. Hubert committed the attempted Hobbs Act robbery ***1322** of an AutoZone store in Miami, Florida on January 27, 2015, stating that St. Hubert:

> did knowingly attempt to obstruct, delay, and affect commerce and the movement of articles and commodities in commerce, by means of robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Sections 1951(b)(1) and (b)(3), in that the defendant did attempt to take property from the person and in the presence of persons employed by AutoZone, located at 59 N.E. 79th Street, Miami, Florida 33138, a business and company operating in interstate and foreign commerce, against the will of those persons, by means of actual and

> threatened force, violence, and fear of injury to said persons, in violation of Title 18, United States Code, Section 1951(a).

(emphasis added).

B. Motion to Dismiss Indictment

On December 22, 2015, St. Hubert filed a motion to dismiss the § 924(c) firearm counts in his indictment. St. Hubert's motion argued that "[t]he 924(c) Counts fail to state an offense because the Hobbs Act charges upon which they are predicated do not qualify as 'crime[s] of violence': Hobbs Act 'robbery' does not fall within the definition of 18 U.S.C. § 924(c)'s 'force clause,' and § 924(c)'s residual clause is unconstitutionally vague under Johnson v. United States, 576 U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015)." The district court denied St. Hubert's motion.

C. Guilty Plea Colloquy Outlined the Offense Conduct

Subsequently, during a February 16, 2016 hearing, pursuant to a written plea agreement, St. Hubert pled guilty to Counts 8 and 12, both § 924(c) firearm crimes, in exchange for dismissal of the other eleven counts. The predicate crimes in Counts 8 and 12, respectively, were the Hobbs Act robbery on January 21 and the attempted Hobbs Act robbery on January 27. We recount the offense conduct which St. Hubert admitted during his plea colloquy.

On January 21, 2015, St. Hubert robbed with a firearm an AutoZone store located at North State Road 7 in Hollywood, Florida. At approximately 8:00 p.m., St. Hubert entered the store wearing a gray and yellow striped hoodie. St. Hubert brandished a firearm and directed three store employees to the rear of the store. St. Hubert demanded that the employees place money from the store's safe inside one of the store's plastic bags and threatened to shoot them. Approximately $2,300 was stolen during the robbery. Two of the three employees subsequently identified St. Hubert in a six-person photographic array.

On January 27, 2015, St. Hubert attempted to rob with a firearm a different AutoZone store located at 59 Northeast 79th Street in Miami, Florida. At approximately 7:00 p.m., St. Hubert entered the store wearing a gray Old Navy hoodie. St. Hubert proceeded to hold a firearm against the side of one employee and directed a second employee to open the store safe.

As this was occurring, the second employee noticed a City of Miami Police Department vehicle outside the store and ran out of the door to request help. St. Hubert then fled in a blue Mercury sedan which was registered in his name and to his home address. A subsequent car chase led law enforcement officials to St. Hubert, who was arrested at his residence. Both AutoZone employees later identified St. Hubert in a showup.

During subsequent valid and authorized searches of St. Hubert's residence, law enforcement officers located both the gray

and yellow striped hoodie worn by St. Hubert during the January 21st robbery, and ***1323** the gray Old Navy hoodie worn by St. Hubert during the January 27th attempted robbery. DNA recovered from both hoodies matched St. Hubert's DNA. During the execution of a search warrant for St. Hubert's vehicle, law enforcement officials located a firearm and ammunition. [1]

During the plea colloquy, the district court also recited the firearm charge set forth in Count 8 and explained that the predicate crime of violence was St. Hubert's AutoZone robbery charged in Count 7. The district court also recited the firearm charge set forth in Count 12 and explained that the predicate crime of violence was his attempted AutoZone robbery charged in Count 11. St. Hubert confirmed that he understood the charges and that he was pleading guilty to both Counts 8 and 12. St. Hubert also affirmed that he was pleading guilty because he was in fact guilty. The district court found that St. Hubert's guilty plea was freely and voluntarily entered, accepted his guilty plea and found him guilty.

D. Sentencing

On February 16, 2016, the district court sentenced St. Hubert to 84 months' imprisonment on Count 8 and to 300 consecutive months' imprisonment on Count 12.

St. Hubert timely appealed.

II. WAIVER BY GUILTY PLEA

On appeal, St. Hubert asks the Court to vacate his convictions and sentences. He does not dispute that he committed the Hobbs Act robbery and attempted robbery of the AutoZone stores and used a firearm in doing so. St. Hubert also does not challenge the validity of his guilty plea. Rather, St. Hubert contends that Hobbs Act robbery and attempted robbery do not qualify as crimes of violence under 18 U.S.C. § 924(c), and therefore he pled guilty to what he terms a non-offense.

In response, the government argues that St. Hubert waived those claims when he knowingly and voluntarily pled guilty to Counts 8 and 12. St. Hubert counters that his § 924(c) claim is jurisdictional and thus not waivable. At the outset, we point out that St. Hubert's appeal actually raises two distinct claims, one constitutional and the other statutory in nature.

St. Hubert's constitutional claim involves § 924(c)(3)(B). St. Hubert's constitutional claim is that: (1) § 924(c)(3)(B)'s residual clause definition of crime of violence is unconstitutionally vague in light of Johnson v. United States, 576 U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015); and (2) thus that unconstitutional part of the statute cannot be used to convict him.

[1] St. Hubert's statutory claim involves § 924(c)(3)(A). Specifically, St. Hubert says that Hobbs Act robbery and attempted robbery categorically do not qualify as

crimes of violence under the other statutory definition of crime of violence in § 924(c)(3)(A)'s use-of-force clause. Consequently, before we can address the merits of St. Hubert's § 924(c) claims, we must first determine whether St. Hubert has waived them. [2]

***1324 A. Constitutional Challenge to § 924(c)(3)(B)**

The Supreme Court recently spoke directly to whether a guilty plea waives a constitutional challenge to a statute of conviction. We start with that case.

In Class v. United States, the defendant pled guilty and was convicted under 40 U.S.C. § 5104(e), which prohibits the carrying of a firearm "on the Grounds or in any of the Capitol Buildings." Class v. United States, —— U.S. ——, ——, 138 S.Ct. 798, 802, —— L.Ed.2d ——, 2018 WL 987347, at *2 (2018). On appeal, the defendant argued that this statute violated the Second Amendment and the Due Process Clause. Id. at ——, 138 S.Ct. at 802–03, 2018 WL 987347, at *3. The Supreme Court concluded that the defendant's voluntary and unconditional guilty plea by itself did not waive his right to challenge on direct appeal the constitutionality of that statute of conviction. Id. at ——, 138 S.Ct. at 803–04, 2018 WL 987347, at *4.

Prior to Class, this Court had already reached the same conclusion in United States v. Saac, 632 F.3d 1203, 1208 (11th Cir. 2011) (concluding that the "defendants did not waive their argument" that Congress exceeded its authority under Article I, Section 8, Clause 10 of the Constitution when it enacted the Drug Trafficking Vessel Interdiction Act, 18 U.S.C. § 2285, the statute of conviction, "insofar as this claim goes to the legitimacy of the offense that defendants' indictment charged").

[2] Here, St. Hubert argues that he cannot be convicted under § 924(c)(3)(B) because that provision is unconstitutionally vague. Like the defendants in Class and Saac, St. Hubert's guilty plea in this case does not bar his claim that this statute of conviction is unconstitutional.

B. Statutory Claim as to § 924(c)(3)(A)

Neither Class nor Saac involved the other type of claim St. Hubert raises on appeal, a statutory claim about whether an offense qualifies under the remaining definition of crime of violence in § 924(c)(3)(A). Thus, these decisions do not directly answer the question of whether St. Hubert's unconditional guilty plea waived that statutory claim. To answer that question, we must determine the precise nature of St. Hubert's statutory claim.

St. Hubert pled guilty to using, carrying, and brandishing a firearm during two crimes of violence, affirmatively identified in the indictment as Hobbs Act robbery and attempted Hobbs Act robbery. St. Hubert claims that Hobbs Act robbery and attempted Hobbs Act robbery do not qualify as predicate crimes of violence under § 924(c)(3)(A), and thus he pled guilty to a non-offense that the government did not have the power to prosecute. St. Hubert argues

this claim cannot be waived because it raises "jurisdictional" defects in his indictment.

In response, the government contends that the district court had jurisdiction, i.e., the power to act, pursuant to 18 U.S.C. § 3231 because St. Hubert's indictment alleged violations of 18 U.S.C. § 924(c), a law of the United States, and whether Hobbs Act robbery and attempted robbery are crimes of violence under § 924(c)(3)(A) goes merely to the sufficiency of his indictment and raises only non-jurisdictional defects, which can be waived.

Because the government relies on United States v. Cotton, 535 U.S. 625, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002), we discuss it first. In Cotton, the defendants were charged with a cocaine conspiracy under 21 U.S.C. §§ 841(a)(1) and 846, but the indictment charged only a "detectable amount" of cocaine and cocaine base and not a threshold amount needed for enhanced penalties under § 841(b). 535 U.S. at 627–28, 122 S.Ct. at 1783. The Supreme Court had held in ***1325** United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), that if drug quantity is used to increase a defendant's sentence above the statutory maximum sentence for an § 841 drug offense, then that drug quantity must be charged in the indictment and decided by a jury. 543 U.S. at 235–44, 125 S.Ct. at 751–56 (extending the holding of Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), to federal sentencing proceedings under the Sentencing Guidelines).

In Cotton, the Supreme Court rejected the Fourth Circuit's conclusion, based on Ex parte Bain, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887), that the omission of the drug-quantity element from the indictment was a jurisdictional defect that required vacating the defendants' sentences. Cotton, 535 U.S. at 629, 122 S.Ct. at 1784. The Supreme Court explained that "Bain's elastic concept of jurisdiction is not what the term 'jurisdiction' means today, i.e., the courts' statutory or constitutional power to adjudicate the case." Id. at 630, 122 S.Ct. at 1785 (internal quotation marks omitted). The Supreme Court pointed to several of its more contemporary cases, which the Court said stood for the broad proposition that defects in an indictment are not jurisdictional, as follows:

> Post-Bain cases confirm that defects in an indictment do not deprive a court of its power to adjudicate a case. In Lamar v. United States, 240 U.S. 60, 36 S.Ct. 255, 60 L.Ed. 526 (1916), the Court rejected the claim that "the court had no jurisdiction because the indictment does not charge a crime against the United States." Id. at 64, 36 S.Ct. 255. Justice Holmes explained that a district court "has jurisdiction of all crimes cognizable under the authority of the United States ... [and] [t]he objection that the indictment does not charge a crime against the United States goes only to the merits of the case." Id. at 65, 36 S.Ct. 255. Similarly, United States v. Williams, 341 U.S. 58, 66, 71 S.Ct. 595, 95 L.Ed. 747 (1951), held that a ruling "that the indictment is defective does not affect the jurisdiction of the trial court

to determine the case presented by the indictment."

Id. at 630–31, 122 S. Ct. at 1785. The Supreme Court in Cotton concluded that "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction, Bain is overruled." Id. at 631, 122 S.Ct. at 1785. Relying on Cotton, the government argues that St. Hubert's claims that his indictment was defective are non-jurisdictional and waived.

The problem for the government is that this Court has narrowly limited Cotton's overruling of Bain and jurisdictional holding to only omission of elements from the indictment. See United States v. Peter, 310 F.3d 709, 713–14 (11th Cir. 2002). In Peter, the defendant pled guilty to an indictment charging a Racketeer Influenced and Corrupt Organizations Act conspiracy with the sole predicate act being mail fraud, in violation of 18 U.S.C. § 1341, by making misrepresentations on state license applications he mailed to a state agency. Id. at 711, 715. Later, the Supreme Court in Cleveland v. United States, 531 U.S. 12, 121 S.Ct. 365, 148 L.Ed.2d 221 (2000), held that state and municipal licenses did not qualify as "property in the hands of the victim" as required for the offense of mail fraud. Id. at 711. Therefore, Peter had pled guilty to the predicate act of alleged mail fraud in the very form held in Cleveland not to constitute an offense under § 1341. Id. at 715. The Peter Court concluded that the defendant's claim that his conduct was never a crime under § 1341 was a jurisdictional error and could not be procedurally defaulted. Id. at 711–15. In reaching this conclusion, the Court in Peter relied on pre-Cotton precedent and concluded that "the decision in ***1326** United States v. Meacham, 626 F.2d 503 (5th Cir. 1980), establishes that a district court is without jurisdiction to accept a guilty plea to a 'non-offense.' " Id. at 713 (footnote omitted). [3]

Based on our pre-Cotton precedent in Meacham, the Peter Court decided that when an indictment "affirmatively alleged a specific course of conduct that is outside the reach" of the statute of conviction —or stated another way, "alleges only a non-offense"—the district court has no jurisdiction to accept the guilty plea. Id. at 715 (holding that the pre-Cotton "rule of Meacham, that a district court lacks jurisdiction when an indictment alleges only a non-offense, controls" even after Cotton). In following Meacham, the Peter Court rejected the government's claim that the language of Cotton rejected the rule of Meacham. Id. at 713. The Peter Court limited Cotton's holding to an omission from the indictment, reasoning that "Cotton involved only an omission from the indictment: the failure to allege a fact requisite to the imposition of defendants' sentences, namely, their trade in a threshold quantity of cocaine base." Id. at 714. [4]

Our best determination is that in this case we are bound by our circuit precedent in Peter. St. Hubert's claim is not, as in Cotton, that his indictment omitted a necessary fact. Rather, like in Peter, the error asserted by St. Hubert is that "the indictment consisted only of specific conduct"—carrying, using, and brandishing a firearm during a Hobbs

Act robbery and an attempted Hobbs Act robbery—that, according to St. Hubert, is "as a matter of law, ... outside the sweep of the charging statute." Id. at 714. Said another way, because "the Government affirmatively alleged a specific course of conduct that [at least in St. Hubert's view] is outside the reach" of § 924(c)(3)(A), "the Government's proof of th[at] alleged conduct, no matter how overwhelming, would have brought it no closer to showing the crime charged than would have no proof at all." Id. at 715 (emphasis added).

Moreover, we see nothing in the Supreme Court's recent Class decision that undermines Peter, much less undermines it to the point of abrogation. See United States v. Kaley, 579 F.3d 1246, 1255 (11th Cir. 2009) (explaining that for a subsequent Supreme Court opinion to abrogate our prior precedent, it must "directly conflict with" that prior precedent). Indeed, while the Supreme Court in Class did not speak in terms of jurisdiction or jurisdictional indictment defects, it suggested, albeit in dicta, that a claim that the facts alleged in the indictment and admitted by the defendant do not constitute a crime at all cannot be waived by a defendant's guilty plea because that kind of claim challenges the district court's power to act. See Class, —— U.S. at ——, —— S.Ct. at ——, No. 16–424, 2018 WL 987347, at *5. Notably, the Supreme Court in Class, in its discussion of historical examples of claims not waived by a guilty plea, included cases in which the defendant argued that the charging document did not allege conduct that constituted a crime. Id. at ——, —— S.Ct. at ——, 2018 WL 987347, at *5 (citing United States v. Ury, 106 F.2d 28, 28–30 (2d Cir. 1939); Hocking Valley Ry. Co. v. United States, 210 F. 735, 738–39 (6th Cir. 1914); ***1327** Carper v. Ohio, 27 Ohio St. 572, 575–76 (1875); Commonwealth v. Hinds, 101 Mass. 209, 210 (1869)). Thus, if anything, the dicta in Class supports Peter's analysis.

[3] St. Hubert's claim is that Counts 8 and 12 of the indictment failed to charge an offense against the laws of the United States because Hobbs Act robbery and attempted robbery are not crimes of violence under § 924(c)(3)(A). Under Peter his challenge to his § 924(c) convictions on this ground is jurisdictional, and therefore we must conclude that St. Hubert did not waive it by pleading guilty. Having concluded that neither of St. Hubert's § 924(c) claims has been relinquished by his guilty plea, we now proceed to the merits of those claims.

III. HOBBS ACT ROBBERY IN COUNT 8

A. Section 924(c)(3)(A) and (B)

For purposes of § 924(c), a predicate offense can qualify as a crime of violence under one of two definitions. Specifically, under § 924(c), a crime of violence is an offense that is a felony and that:

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

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

18 U.S.C. § 924(c)(3)(A), (B) (emphasis added). The first definition in § 924(c)(3)(A) is commonly referred to as the use-of-force clause. The second definition in § 924(c)(3)(B) is commonly referred to as the risk-of-force or residual clause. St. Hubert contends Hobbs Act robbery does not qualify under either definition in § 924(c)(3). We address the definitions separately.

B. Risk-of-Force Clause in § 924(c)(3)(B)

As to the second definition, St. Hubert argues that Hobbs Act robbery no longer can qualify under the risk-of-force clause in § 924(c)(3)(B) because that definition is unconstitutional in light of Johnson v. United States, 576 U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), in which the Supreme Court declared unconstitutionally vague similar language in the "residual clause" of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii).[5]

This Court has already rejected a Johnson-based void-for-vagueness challenge to § 924(c)(3)(B) in Ovalles v. United States, 861 F.3d 1257 (11th Cir. 2017). At the time Ovalles was decided, three other Circuits had already held that the Supreme Court's Johnson decision did not invalidate the risk-of-force or residual clause in § 924(c)(3)(B). See Ovalles, 861 F.3d at 1265–66 (following the Second, Sixth, and Eighth Circuits).[6] Since Ovalles, the D.C. Circuit also has held that Johnson did not ***1328** invalidate § 924(c)(3)(B) and that § 924(c)(3)(B) is constitutional. See United States v. Eshetu, 863 F.3d 946, 952–55 (D.C. Cir. 2017); see also United States v. Jones, 854 F.3d 737, 740 (5th Cir. 2017).

In so holding, the Ovalles Court stressed the differences, both textual and contextual, between the ACCA's residual clause and § 924(c)(3)(B)'s risk-of-force clause, including: (1) § 924(c)'s distinct purpose of punishing firearm use "in the course of committing" a specific, and contemporaneous, companion crime rather than recidivism; (2) § 924(c)(3)(B)'s more concrete and predictable requirement that the "risk" of force must arise within that contemporaneous crime charged in the same federal indictment, rather than the ACCA's evaluation of the risk presented by prior state crimes committed long ago under divergent state laws; and (3) the fact that the § 924(c)(3)(B) determination was freed from comparison to a "confusing list of exemplar crimes" like that found in the ACCA's residual clause. Ovalles, 861 F.3d at 1263–66. Based on these and other material differences between the two statutes, the Court in Ovalles concluded that the risk-of-force or residual clause in § 924(c)(3)(B) remains valid after Johnson. Id. at 1267.

[4] Under our prior panel precedent rule, we are bound to follow Ovalles and conclude that St. Hubert's constitutional challenge to § 924(c)(3)(B) lacks merit. See U.S. v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008). St. Hubert does not deny that Hobbs Act

robbery qualifies as a crime of violence if that risk-of-force or residual clause in § 924(c)(3)(B) is constitutional. Thus, we affirm St. Hubert's convictions and sentences based on Ovalles.

C. Use-of-Force Clause in § 924(c)(3)(A)

[5] Even assuming that Ovalles is not binding and that Johnson invalidated § 924(c)(3)(B)'s risk-of-force clause as unconstitutionally vague, we conclude St. Hubert's challenge to his first § 924(c) conviction (Count 8) fails because this Court has already held that Hobbs Act robbery (the predicate for Count 8) independently qualifies as a crime of violence under § 924(c)(3)(A)'s use-of-force clause. See In re Saint Fleur, 824 F.3d 1337, 1340–41 (11th Cir. 2016) (addressing Hobbs Act robbery); In re Colon, 826 F.3d 1301, 1305 (11th Cir. 2016) (addressing aiding and abetting Hobbs Act robbery). Accordingly, as an independent and alternative ground for affirmance, we hold that St. Hubert's Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A)'s use-of-force clause, and thus we affirm his first § 924(c) conviction in Count 8.

St. Hubert argues that Saint Fleur and Colon are not binding precedent in his direct appeal because they were adjudications of applications for leave to file a second or successive § 2255 motion. St. Hubert refers to these adjudications as "SOS applications" and as decisions "occurring in a procedurally distinct context." We reject that claim because this Court has already held that "our prior-panel-precedent rule applies with equal force as to prior panel decisions published in the context of applications to file second or successive petitions. In other words, published three-judge orders issued under § 2244(b) are binding precedent in our circuit." In re Lambrix, 776 F.3d 789, 794 (11th Cir. 2015); see also In re Hill, 777 F.3d 1214, 1223–24 (11th Cir. 2015).

[6] St. Hubert next argues that these Lambrix and Hill decisions themselves involved second or successive applications and thus cannot bind this Court in St. Hubert's direct appeal. We disagree because the rulings in Lambrix and Hill were squarely about the legal issue of whether the prior panel precedent rule encompasses ***1329** earlier published three-judge orders under § 2244(b). Lest there be any doubt, we now hold in this direct appeal that law established in published three-judge orders issued pursuant to 28 U.S.C. § 2244(b) in the context of applications for leave to file second or successive § 2255 motions are binding precedent on all subsequent panels of this Court, including those reviewing direct appeals and collateral attacks, "unless and until [they are] overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting en banc." See Archer, 531 F.3d at 1352. [7]

Accordingly, in this direct appeal, this panel is bound by Saint Fleur and Colon and concludes that St. Hubert's Hobbs Act robbery is a crime of violence under § 924(c)(3)(A)'s use-of-force clause. [8]

IV. ATTEMPTED ROBBERY IN COUNT 12

We now turn to St. Hubert's second § 924(c) conviction (Count 12), where the predicate offense is attempted Hobbs Act robbery. Our circuit precedent has not squarely ruled on that precise offense. Nonetheless, Saint Fleur and Colon are our starting point for that crime too.

St. Hubert's brief argues that Saint Fleur and Colon are inconsistent with the Supreme Court's decisions in Descamps v. United States, Mathis v. United States, Moncrieffe v. Holder and Leocal v. Ashcroft, which applied the categorical approach.[9] St. Hubert contends that when the categorical approach is properly applied, Hobbs Act robbery and attempted robbery fail to qualify as crimes of violence because these offenses can be committed by putting a victim in "fear of injury, immediate or future" and do not require a threat of physical force.

We agree that the Supreme Court's discussion of the categorical approach in these decisions is relevant to St. Hubert's appeal, which is why, in analyzing his attempted Hobbs Act robbery, as well as his Hobbs Act robbery, we take time to apply the categorical approach to the applicable statutes in more detail than Saint Fleur and Colon did.[10] First, we compare the ***1330** statutory texts of § 1951 and § 924(c)(3)(A), and then set forth the tenets of the categorical approach.

A. Statutory Text and Categorical Approach

The Hobbs Act provides that:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a) (emphasis added). The text of the Hobbs Act proscribes both robbery and extortion. See 18 U.S.C. § 1951(a), (b)(1)-(2).

We agree with the Sixth Circuit's conclusion that (1) the Hobbs Act is a divisible statute that sets out multiple crimes, and (2) robbery and extortion are distinct offenses, not merely alternative means of violating § 1951(a). See United States v. Gooch, 850 F.3d 285, 290–92 (6th Cir.) (discussing Mathis, 579 U.S. ——, 136 S.Ct. 2243), cert. denied, —— U.S. ——, 137 S.Ct. 2230, 198 L.Ed.2d 670 (2017)). Under the categorical approach, we thus consider only the portion of the Hobbs Act defining "robbery" for the elements of St. Hubert's predicate offenses.[11] See Mathis, 579 U.S. at ——, 136 S.Ct. at 2248.

"Robbery" under the Hobbs Act is defined as:

> [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.

***1331** 18 U.S.C. § 1951(b)(1). A conviction for Hobbs Act robbery by definition requires "actual or threatened force, or violence, or fear of injury, immediate or future, to ... person or property." Id. § 1951(b)(1) (emphasis added). Similarly, § 924(c)(3)(A) refers to the "use, attempted use, or threatened use of physical force against person or property." 18 U.S.C. § 924(c)(3)(A) (emphasis added).

We also point out, and St. Hubert agrees, that the definition of "robbery" in § 1951(b)(1) is indivisible because it sets out alternative means of committing robbery, rather than establishing multiple different robbery crimes. See 18 U.S.C. § 1951(b)(1); Mathis, 579 U.S. at ——, 136 S.Ct. at 2248–49 (describing the difference between divisible and indivisible statutes). Accordingly, we apply the categorical approach in analyzing whether St. Hubert's Hobbs Act robbery and attempted robbery offenses qualify as crimes of violence under § 924(c). See Mathis, 579 U.S. at ——, 136 S.Ct. at 2248–49 (explaining that, in the ACCA context, indivisible statutes must be analyzed using the categorical approach); see also United States v. McGuire, 706 F.3d 1333, 1336–37 (11th Cir. 2013) (applying the categorical approach in the § 924(c) context).

[7] In applying the categorical approach, we look only to the elements of the predicate offense statute and do not look at the particular facts of the defendant's offense conduct. See, e.g., United States v. Keelan, 786 F.3d 865, 870–71 (11th Cir. 2015) ("Under the categorical approach, a court must look to the elements and the nature of the offense of conviction, rather than to the particular facts of the defendant's record of conviction." (quotation marks omitted)). In doing so, "we must presume that the conviction rested upon [nothing] more than the least of th[e] acts criminalized, and then determine whether even those acts" qualify as crimes of violence. See Moncrieffe, 569 U.S. at 190–91, 133 S.Ct. at 1684 (quotation marks omitted). Thus, under the categorical approach, each of the means of committing Hobbs Act robbery—"actual or threatened force, or violence, or fear of injury"—must qualify under the use-of-force clause in § 924(c)(3)(A).

Reaching the same conclusion as Saint Fleur, four other circuits have applied the categorical approach, listing each of these means, and concluded that Hobbs Act

robbery is categorically a crime of violence under the use-of-force clause in § 924(c)(3)(A). See Gooch, 850 F.3d at 291–92; United States v. Rivera, 847 F.3d 847, 848–49 (7th Cir. 2017); United States v. Anglin, 846 F.3d 954, 964–65 (7th Cir.), cert. granted & judgment vacated on other grounds, —— U.S. ——, 138 S.Ct. 126, 199 L.Ed.2d 1 (2017); United States v. Hill, 832 F.3d 135, 140–44 (2d Cir. 2016); United States v. House, 825 F.3d 381, 387 (8th Cir. 2016). [12]

B. St. Hubert's Main Argument: Fear of Injury to Person or Property

Despite this precedent, St. Hubert's main argument is that (1) the least of the acts criminalized in § 1951(b)(1) is "fear of injury," and (2) a Hobbs Act robbery "by means of fear of injury" can be committed without the use, attempted use, or threatened use of any physical force. Although bound by Saint Fleur and Colon in this ***1332** regard, we take time to outline why St. Hubert's argument fails.

First, this argument is inconsistent not only with Saint Fleur and Colon, but also with our precedent in In re Sams, 830 F.3d 1234, 1238–39 (11th Cir. 2016) and United States v. Moore, 43 F.3d 568, 572–73 (11th Cir. 1994), in which this Court concluded that federal bank robbery "by intimidation," in violation of 18 U.S.C. § 2113(a), and federal carjacking "by intimidation," in violation of 18 U.S.C. § 2119, both have as an element the use, attempted use, or threatened use of physical force and thus qualify as crimes of violence under § 924(c)(3)(A). See also United States v. Robinson, 844 F.3d 137, 151 n.28 (3d Cir. 2016) (Fuentes, J., concurring) (applying the categorical approach and equating "intimidation" in the federal bank robbery statute with "fear of injury" in Hobbs Act robbery, noting that the legislative history of § 924(c) identified federal bank robbery as the prototypical crime of violence, and reasoning that Congress therefore intended § 924(c)'s physical force element to be satisfied by intimidation or fear of injury), cert. denied, —— U.S. ——, 138 S.Ct. 215, 199 L.Ed.2d 141 (2017); United States v. Gutierrez, 876 F.3d 1254, 1257 (9th Cir. 2017) (holding "intimidation as used in the federal bank robbery statute requires that a person take property in such a way that would put an ordinary, reasonable person in fear of bodily harm, which necessarily entails the threatened use of physical force" (quotation marks omitted)).

Second, we agree with the Second Circuit's decision in Hill, which explained why that court rejected the argument, like St. Hubert's, that one could commit Hobbs Act robbery by "putting the victim in fear" without any physical force or threat of physical force. Hill, 832 F.3d at 141–43. The Second Circuit noted that a hypothetical nonviolent violation of the statute, without evidence of actual application of the statute to such conduct, is insufficient to show a "realistic probability" that Hobbs Act robbery could encompass nonviolent conduct. [13] Id. at 139–40, 142–43. The Second Circuit added that "there must be 'a realistic probability, not a theoretical possibility,' that the statute at issue could be applied to conduct that does not constitute

a crime of violence," and, to that end, "a defendant 'must at least point to his own case or other cases in which the ... courts in fact did apply the statute in the ... manner for which he argues.' " Id. at 140 (quoting in part Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193, 127 S.Ct. 815, 822, 166 L.Ed.2d 683 (2007)); see also United States v. McGuire, 706 F.3d 1333, 1337 (11th Cir. 2013) (citing Duenas-Alvarez and explaining that to determine whether an offense is categorically a crime of violence under § 924(c), courts must consider whether "the plausible applications of the statute of conviction all require the use or threatened use of force ...." (emphasis added)).

St. Hubert has not pointed to any case at all, much less one in which the Hobbs Act applied to a robbery or attempted robbery, that did not involve, at a minimum, a threat to use physical force. Indeed, St. Hubert does not offer a plausible scenario, and we can think of none, in which a Hobbs Act robber could take property from the victim against his will and by putting the victim in fear of injury (to his ***1333** person or property) without at least threatening to use physical force capable of causing such injury. See Curtis Johnson v. United States, 559 U.S 133, 140, 130 S.Ct. 1265, 1271, 176 L.Ed.2d 1 (2010) (stating that the phrase "physical force" as used in the ACCA's "violent felony" definition means "violent force—that is, force capable of causing physical pain or injury to another person"). [14]

Having applied the categorical approach and explained why Saint Fleur and Colon properly concluded that Hobbs Act robbery is a crime of violence under § 924(c)(3)(A), we now turn to the attempt element of St. Hubert's attempted Hobbs Act robbery.

C. Attempt Crimes

While this Court has not yet addressed attempted Hobbs Act robbery, the definition of a crime of violence in the use-of-force clause in § 924(c)(3)(A) explicitly includes offenses that have as an element the "attempted use" or "threatened use" of physical force against the person or property of another. See 18 U.S.C. § 924(c)(3)(A). Moreover, the Hobbs Act itself prohibits attempts to commit Hobbs Act robbery, and such attempts are subject to the same penalties as completed Hobbs Act robberies. See 18 U.S.C. § 1951(a).

[8] **[9]** To be convicted of an "attempt," a defendant must: (1) have the specific intent to engage in the criminal conduct with which he is charged; and (2) have taken a substantial step toward the commission of the offense that strongly corroborates his criminal intent. United States v. Jockisch, 857 F.3d 1122, 1129 (11th Cir.), cert. denied, —— U.S. ——, 138 S.Ct. 284, 199 L.Ed.2d 181 (2017); United States v. Yost, 479 F.3d 815, 819 (11th Cir. 2007). "A substantial step can be shown when the defendant's objective acts mark his conduct as criminal and, as a whole, 'strongly corroborate the required culpability.' " Yost, 479 F.3d at 819 (quoting United States v. Murrell, 368 F.3d 1283, 1288 (11th Cir. 2004)).

[10] Like substantive Hobbs Act robbery, attempted Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)

(A)'s use-of-force clause because that clause expressly includes "attempted use" of force. Therefore, if, as this Court has held, the taking of property from a person against his will in the forcible manner required by § 1951(b)(1) necessarily includes the use, attempted use, or threatened use of physical force, then by extension the attempted taking of such property from a person in the same manner must also include at least the "attempted use" of force. Cf. United States v. Wade, 458 F.3d 1273, 1278 (11th Cir. 2006) (explaining that an attempt to commit a crime enumerated as a violent felony under § 924(e)(2)(B)(ii) is also a violent felony); see also ***1334** Hill v. United States, 877 F.3d 717, 718–19 (7th Cir. 2017) ("When a substantive offense would be a violent felony under § 924(e) and similar statutes, an attempt to commit that offense also is a violent felony."); United States v. Armour, 840 F.3d 904, 908–09 (7th Cir. 2016) (holding that attempted armed bank robbery qualifies as a crime of violence under § 924(c)(3)(A)).

In reaching this conclusion, we note the Seventh Circuit's analysis about why it concluded that an attempt to commit a violent felony under the ACCA is also a violent felony. See Hill, 877 F.3d at 719. As to attempt crimes, the Seventh Circuit observed in Hill that: (1) a defendant must intend to commit every element of the completed crime in order to be guilty of attempt, and (2) thus, "an attempt to commit a crime should be treated as an attempt to commit every element of that crime." Id. Also as to attempt crimes, the Seventh Circuit explained that "[w]hen the intent element of the attempt offense includes intent to commit violence against the person of another, ... it makes sense to say that the attempt crime itself includes violence as an element." Id. Importantly too, the Seventh Circuit then pointed out that the elements clause in the text of § 924(e) equates actual force with attempted force, and this means that the attempted use of physical force against the person of another suffices and that the text of § 924(e) thus tells us that actual force need not be used for a crime to qualify under the ACCA. Id. "Given the statutory specification that an element of attempted force operates the same as an element of completed force, and the rule that conviction of attempt requires proof of intent to commit all elements of the completed crime," the Seventh Circuit concluded that when a substantive offense qualifies as a violent felony under the ACCA, an attempt to commit that offense also is a violent felony. See id.

Analogously here, substantive Hobbs Act robbery itself qualifies as a crime of violence under § 924(c)(3)(A) and, therefore, attempt to commit Hobbs Act robbery requires that St. Hubert intended to commit every element of Hobbs Act robbery, including the taking of property in a forcible manner. Similar to Hill's analysis, the definition of a crime of violence in § 924(c)(3)(A) equates the use of force with attempted force, and thus the text of § 924(c)(3)(A) makes clear that actual force need not be used for a crime to qualify under § 924(c)(3)(A). Thus, under Hill's analysis, given § 924(c)'s "statutory specification that an element of attempted force operates the same as an element of

completed force, and the rule that conviction of attempt requires proof of intent to commit all elements of the completed crime," attempted Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A) as well.

Accordingly, as an alternative and independent ground, we conclude that St. Hubert's predicate offense of attempted Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A)'s use-of-force clause, which remains unaffected by Johnson, and we thus affirm St. Hubert's second § 924(c) firearm conviction in Count 12.[15]

V. MODIFIED CATEGORICAL APPROACH

Although under our precedent we have applied and base our holding on the categorical approach, we pause to mention another approach that makes good sense. ***1335** The Third Circuit has aptly explained why a modified categorical approach is more appropriate in § 924(c) firearm cases, where the federal district court evaluates a contemporaneous federal crime charged in the same indictment and has an already developed factual record as to both offenses. In United States v. Robinson, the Third Circuit, like five other circuits, held that Hobbs Act robbery is a crime of violence under § 924(c)(3)(A). 844 F.3d at 141.

In doing so, the Third Circuit first pointed out that the categorical approach emerged as a means of judicial analysis in Taylor v. United States, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), because the ACCA requires courts to examine prior "violent felonies" that are "often adjudicated by different courts in proceedings that occurred long before the defendant's sentencing." Robinson, 844 F.3d at 142. In Taylor, the two prior convictions at issue were adjudicated in Missouri courts over 17 years before the defendant's ACCA sentencing proceeding. Taylor, 495 U.S. at 578 & n.1, 110 S.Ct. at 2148 & n.1. The Third Circuit stressed that the Supreme Court's Taylor decision recognized that determining the precise facts of an old conviction "could require a sentencing court to engage in evidentiary inquiries based on what occurred at a trial in the distant past." Robinson, 844 F.3d at 142. The Third Circuit explained that the "practical difficulties and potential unfairness" of engaging in a factual inquiry in part led the Supreme Court to adopt its elements-based approach to determining whether a prior state conviction qualifies as a violent felony under the ACCA. Id. at 141–42 (quotation marks omitted).

The Third Circuit then contrasted the material differences between the ACCA and § 924(c) and determined that "[t]he remedial effect of [that] approach is not necessary" in § 924(c) cases for several reasons. Id. at 141–43. For example, in § 924(c) cases, the predicate offense and the § 924(c) offense are companion contemporaneous crimes, charged in the same indictment before the same federal judge; whereas the ACCA involves a prior crime committed long ago in different state jurisdictions with divergent laws. Id. at 141, 143. The Third Circuit

explained that, unlike in the ACCA context, in § 924(c) cases, "the record of all necessary facts are before the [federal] district court" as to both offenses. Id. at 141. Consequently, the contemporaneous "§ 924(c) conviction will shed light on the means by which the predicate offense was committed." Id. at 143.

Furthermore, the Third Circuit concluded that "[t]he defendant suffers no prejudice" when a court looks to the defendant's contemporaneous § 924(c) conviction to determine the basis for his predicate offense "because the [federal] court is not finding any new facts which are not of record in the case before it." Id. Rather, it is instead relying only on those facts "that have either been found by the jury or admitted by the defendant in a plea" before the federal court. Id. The Third Circuit therefore concluded that "analyzing a § 924(c) predicate offense in a vacuum is unwarranted when the convictions of contemporaneous offenses, read together, necessarily support the determination that the predicate offense was committed with the 'use, attempted use, or threatened use of physical force against the person or property of another.' " Id. (quoting 18 U.S.C. § 924(c)(3)(A)).

In Robinson, the Third Circuit also recognized (1) that, like the definition of violent felony in the ACCA, the definition of crime of violence in § 924(c) "still directs courts to look at the elements of an offense"; (2) that Hobbs Act robbery is defined as taking property from a person ***1336** against his will "by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property"; (3) that the minimum conduct criminalized in the statute is "fear of injury"; and (4) that the defendant in Robinson posed hypotheticals where a threat is made to throw paint on a house, pour chocolate syrup on a passport, or to take an intangible economic interest without any use of physical force. Id. at 143–44 (emphasis omitted). While describing Robinson's counsel as "creative," the Third Circuit stressed that the § 924(c) firearm statute requires that the firearm be used or brandished "in the course of committing" the crime of violence. Id. at 140, 144 (emphasis added). The Third Circuit reasoned that "from the two convictions combined, we know that in committing robbery Robinson (1) used or threatened force, violence, or injury to person or property, and (2) used a firearm in order to intimidate a person." Id. at 144. The Third Circuit rejected Robinson's "far-fetched scenarios" in his case because "the combined convictions before [the court] make clear that the 'actual or threatened force, or violence, or fear of injury' in Robinson's Hobbs Act robbery sprang from the barrel of a gun." Id. (emphasis added).

The same is true in St. Hubert's case. Indeed, in his guilty plea before the district court, St. Hubert admitted that he used a firearm in both robberies and even held a firearm against the side of one employee during the attempted robbery on January 27. Thus, St. Hubert's combined contemporaneous crimes (firearm offense and Hobbs Act robbery or attempted robbery) charged in a single indictment before the same

district court made clear that the actual or threatened force or violence or fear of injury in St. Hubert's robbery and attempted robbery sprang from the barrel of a gun. We agree with the Third Circuit that the firearm's presence should not be ignored in determining whether a defendant is guilty of a § 924(c) offense.

Nonetheless, under our precedent we must apply only the categorical approach and "must close our eyes as judges to what we know as men and women." United States v. Davis, 875 F.3d 592, 595 (11th Cir. 2017). The categorical approach serves a purpose when evaluating prior state convictions committed long ago in fifty state jurisdictions with divergent laws. But, as the Third Circuit has shown, the modified categorical approach is more appropriate in § 924(c) cases when a federal district court is looking at combined contemporaneous federal crimes, and the full record of both crimes is directly before the district court.

VI. SESSIONS V. DIMAYA

Finally, we note that, before oral argument in this appeal, St. Hubert moved this Court to stay his appeal pending the outcome of the Supreme Court's decision in Sessions v. Dimaya, No. 15–1498 (U.S., argued Oct. 2, 2017), in which the Supreme Court will address whether the residual clause in 18 U.S.C. § 16(b), as incorporated into the Immigration and Nationality Act ("INA"), is unconstitutionally vague. Before oral argument, we denied St. Hubert's motion for a stay. There are several reasons why Dimaya is inapposite here.

First, Dimaya deals with a different substantive section than St. Hubert's crime. Although § 16(b) contains a similarly worded provision, § 16(b), as incorporated into the INA, operates in a materially different context from § 924(c) because § 16(b), in the immigration context, (like the ACCA) applies to remote prior convictions, rather than to contemporaneous companion offenses charged in the same indictment and requiring a specified nexus to the use, carrying, or possession of a firearm. Federal courts can more manageably ***1337** and predictably evaluate the predicate contemporaneous crime of violence in the § 924(c) context than in the immigration (or ACCA) context, which involves remote prior convictions under divergent state laws with no nexus to the instant federal proceeding.

Second, the role that the categorical analysis fulfills for § 924(c) is far more limited than for the ACCA and § 16(b) in the immigration context because § 924(c) applies to only federal crimes. See United States v. Gonzales, 520 U.S. 1, 5, 117 S.Ct. 1032, 1035, 137 L.Ed.2d 132 (1997) ("Congress explicitly limited the scope of the phrase 'any crime of violence or drug trafficking crime' [in § 924(c)] to those 'for which [a defendant] may be prosecuted in a court of the United States.' " (second alteration in original)).

Third, in the ACCA and § 16(b) immigration context, federal courts must try to "discern some sort of cross-jurisdictional common

character for an offense that could be articulated fifty different ways by fifty different States." United States v. Eshetu, 863 F.3d 946, 960 (D.C. Cir. 2017) (Millett, J., concurring in part and concurring in the judgment that conspiracy to commit Hobbs Act robbery is a crime of violence under § 924(c)). In contrast, in § 924(c) cases, as explained above, federal courts are evaluating a contemporaneous companion federal crime in the same indictment where the relevant record is directly before the district court. As one judge adroitly explained:

> Section 924(c), in other words, simply does not require courts to overlay a categorical analysis on top of such broad variation in the nature, elements, and contours of the predicate crimes, and courts will confront less variation in how offense conduct is commonly manifested. The courts will also be dealing with a body of federal law with which they are more experienced.

Id. In § 924(c) cases "there is already jurisprudential scaffolding that gives structure to the Section 924(c) inquiry." Id.

For these reasons, we conclude that no matter the outcome about § 16(b)'s residual clause in Dimaya, St. Hubert's § 924(c) convictions and sentences must be affirmed under both clauses in § 924(c)(3)(A) and (B).

AFFIRMED.

All Citations

883 F.3d 1319, 27 Fla. L. Weekly Fed. C 640

Footnotes

1 Cell site records show that on January 27th, 2015, St. Hubert's phone was in the immediate vicinity of the AutoZone store located at 59 Northeast 79th Street, Miami, Florida shortly before the attempted robbery. The cell site records also show that St. Hubert's phone was in the immediate vicinity of his residence shortly after the attempted robbery.

2 We review de novo whether a defendant's unconditional guilty plea waives his right to bring a particular claim on appeal. See United v. Patti, 337 F.3d 1317, 1320 & n.4 (11th Cir. 2003).

3 This Court adopted as binding precedent decisions of the former Fifth Circuit issued before October 1, 1981. See Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

4 We note that some Circuits have criticized and rejected Peter's narrow reading of Cotton. See United States v. De Vaughn, 694 F.3d 1141, 1148 (10th Cir. 2012); United States v. Scruggs, 714 F.3d 258, 264 (5th Cir. 2013). Further, the Fifth Circuit, after Cotton, overruled Meacham. See United States v. Cothran, 302 F.3d 279, 283 (5th Cir. 2002).

5 The ACCA's residual clause defines a "violent felony" as an offense that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added).

6 The Ovalles Court followed United States v. Prickett, 839 F.3d 697, 699–700 (8th Cir. 2016); United States v. Hill, 832 F.3d 135, 145–49 (2d Cir. 2016); and United States v. Taylor, 814 F.3d 340, 375–79 (6th Cir. 2016), petition for cert. filed (U.S., Oct. 12, 2016)(No. 16–6392). In Ovalles, the government and the Federal Public Defender who represented the 28 U.S.C. § 2255 movant fully briefed these circuit decisions, which had analyzed at length the Johnson issue as to the continuing validity of § 924(c)(3)(B)'s risk-of-force clause. The Ovalles Court set forth at length the reasoning of these other circuits, which the Court adopted, and we do not need to set forth their reasoning again here.

7 St. Hubert points to language in some of our successive application decisions stating that this Court's determination under 28 U.S.C. §§ 2244(b)(3)(C) and 2255(h) that an applicant has made a prima facie showing that his application contains a claim meeting the statutory criteria does not bind the district court. See, e.g., In re Jackson, 826 F.3d 1343, 1351 (11th Cir. 2016). These decisions do not in any way contradict Lambrix and Hill, but rather stand for the unexceptional proposition that given the "limited determination" involved in finding that an applicant has made a prima facie showing, the district courts must consider the merits of the now-authorized successive § 2255 motion de novo. See In re Moss, 703 F.3d 1301, 1302 (11th Cir. 2013) (explaining that whether an application "made a prima facie showing" is a "limited determination on our part, and, as we have explained before, the district court is to decide the § 2255(h) issues fresh, or in the legal vernacular, de novo" (alterations and internal quotation marks omitted)).

8 The government also relies on St. Hubert's sentence appeal waiver. St. Hubert responds that the sentence appeal waiver does not preclude his challenge to his § 924(c) convictions and sentences because his claim is jurisdictional and because he is "actually innocent of violating 18 U.S.C. § 924(c)." If his convictions are valid, St. Hubert does not dispute his consecutive sentences were required by § 924(c). Given that St. Hubert's claims on appeal as to his convictions fail on the merits, we need not address his sentence appeal waiver.

9 Mathis v. United States, 579 U.S. ——, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016); Descamps v. United States, 570 U.S. 254, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013); Moncrieffe v. Holder, 569 U.S. 184, 133 S.Ct. 1678, 185 L.Ed.2d 727 (2013); Leocal v. Ashcroft, 543 U.S. 1, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004).

10 Mathis and Descamps addressed burglary under the enumerated crimes clause of the ACCA's violent felony definition, not the definition of crime of violence under § 924(c)(3)(A)'s use-of-force clause. See Mathis, 579 U.S. at ——, 136 S.Ct. at 2248; Descamps, 570 U.S. at 258, 133 S.Ct. at 2282. Similarly, Moncrieffe and Leocal, which involved immigration removal proceedings, addressed different predicate offenses and statutory provisions from this case. See Moncrieffe, 569 U.S. at 189, 133 S.Ct. at 1683; Leocal, 543 U.S. at 3–4, 125 S.Ct. at 379. Moncrieffe addressed whether a prior state drug conviction qualified as a "drug trafficking crime" under § 924(c)(2) and, therefore, as an "aggravated felony" under the Immigration and Nationality Act ("INA"). Moncrieffe, 569 U.S at 187–90, 133 S.Ct. at 1682–84. And Leocal addressed whether a prior conviction for driving under the influence qualified as a "crime of violence" under 18 U.S.C. § 16 and, therefore, as an "aggravated felony" under the INA. Leocal, 543 U.S. at 3–6, 125 S.Ct. at 379–80.

While these decisions are relevant to our analytical approach, they did not involve Hobbs Act robbery or attempted robbery, or the use-of-force clause in § 924(c)(3)(A), and thus are not clearly on point here. See United States v. Lopez, 562 F.3d 1309, 1312 (11th Cir. 2009); Atlantic Sounding Co. v. Townsend, 496 F.3d 1282, 1284 (11th Cir. 2007) (explaining that "a later panel may depart from an earlier panel's decision only when the intervening Supreme Court decision is 'clearly on point' " and that when only the reasoning, and not the holding, of the intervening Supreme Court decision "is at odds with that of our prior decision" there is "no basis for a panel to depart from our prior decision"). For this reason, we disagree with St. Hubert's suggestion that we may disregard Saint Fleur and Colon in light of these Supreme Court decisions.

11 Notably too, St. Hubert acknowledges that the predicate crimes of violence for his § 924(c) convictions were Hobbs Act robbery and attempted robbery. He has made no argument about extortion.

12 The Third Circuit also has concluded that Hobbs Act robbery is a crime of violence under § 924(c)(3)(A)'s use-of-force clause, but the majority opinion did so applying the modified categorical approach. See United States v. Robinson, 844 F.3d 137, 141–44 (3rd Cir. 2016), cert. denied, —— U.S. ——, 138 S.Ct. 215, 199 L.Ed.2d 141 (2017); id. at 150–51 (Fuentes, J., concurring) ("Hobbs Act robbery is categorically a crime of violence under Section 924(c)(3)). We discuss the Third Circuit's approach at the end of this opinion.

13 The hypotheticals that the defendant in Hill suggested would violate the Hobbs Act but would not involve use or threatened use of physical force were: threatening to throw paint on a victim's car or house, threatening to pour chocolate syrup on the victim's passport, and threatening to withhold vital medicine from the victim or to poison him. Hill, 832 F.3d at 141–42. Here, St. Hubert's briefing poses similar hypotheticals to the defendant in Hill.

14 In citing Curtis Johnson, we note that it was an ACCA case where the use-of-force clause in the definition of violent felony required that the physical force be "against the person of another" only. 18 U.S.C. § 924(e)(2)(B)(i); Curtis Johnson, 559 U.S. at 135–36, 130 S.Ct. at 1268.

In contrast, § 924(c)(3)(A)'s use-of-force clause in the definition of crime of violence is broader and includes threatened physical force "against the person or property of another." 18 U.S.C. § 924(c)(3)(A). As discussed above, the definition of robbery in the Hobbs Act parallels § 924(c)(3)(A), as it likewise refers to actual or threatened force against a person or property. See Robinson, 844 F.3d at 144. Thus, in the § 924(c) context, Curtis Johnson may be of limited value in assessing the quantum of force necessary to qualify as a "use, attempted use, or threatened use of physical force" against

property within the meaning of § 924(c)(3)(A). Nonetheless, even strictly applying Curtis Johnson's definition of physical force, we conclude that Hobbs Act robbery categorically qualifies as a crime of violence.

15 As with Count 8 (with a Hobbs Act robbery predicate), we alternatively affirm St. Hubert's conviction on Count 12 (with an attempted Hobbs Act robbery predicate) based on the residual clause in § 924(c)(3)(B). See Ovalles, 861 F.3d at 1267.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

15-20621-CR-MORENO/O'SULLIVAN

CASE NO. _____

18 U.S.C. § 1951(a)
18 U.S.C. § 924(c)(1)(A)(ii)
18 U.S.C. § 922(g)(1)
18 U.S.C. § 981(a)(1)(C)
18 U.S.C. § 924(d)(1)
21 U.S.C. § 853

UNITED STATES OF AMERICA

vs.

MICHAEL ST. HUBERT,

Defendant.
_____/

INDICTMENT

The Grand Jury charges that:

COUNT 1

On or about December 23, 2014, in Miami-Dade County, in the Southern District of Florida, the defendant,

MICHAEL ST. HUBERT,

did knowingly obstruct, delay, and affect commerce and the movement of articles and commodities in commerce, by means of robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Sections 1951(b)(1) and (b)(3), in that the defendant did take property from the person and in the presence of persons employed by, and customers patronizing, MetroPCS, located at 14808 N.W. 7th Avenue, Miami, Florida 33168, a business and company operating in interstate and foreign commerce, against the will of those persons, by means

of actual and threatened force, violence, and fear of injury to said persons, in violation of Title 18, United States Code, Section 1951(a).

COUNT 2

On or about December 23, 2014, in Miami-Dade County, in the Southern District of Florida, the defendant,

MICHAEL ST. HUBERT,

did knowingly use and carry a firearm during and in relation to a crime of violence, and did knowingly possess a firearm in furtherance of a crime of violence, an offense for which the defendant may be prosecuted in a court of the United States, specifically, a violation of Title 18, United States Code, Section 1951(a), as alleged in Count 1 of this Indictment, in violation of Title 18, United States Code, Section 924(c)(1)(A).

Pursuant to Title 18, United States Code, Section 924(c)(1)(A)(ii), it is further alleged that the firearm was brandished.

COUNT 3

On or about January 10, 2015, in Miami-Dade County, in the Southern District of Florida, the defendant,

MICHAEL ST. HUBERT,

did knowingly obstruct, delay, and affect commerce and the movement of articles and commodities in commerce, by means of robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Sections 1951(b)(1) and (b)(3), in that the defendant did take property from the person and in the presence of persons employed by Advance Auto Parts, located at 4770 N.W. 183rd Street, Miami, Florida 33055, a business and company operating in interstate and foreign commerce, against the will of those persons, by means of actual and

threatened force, violence, and fear of injury to said persons, in violation of Title 18, United States Code, Section 1951(a).

COUNT 4

On or about January 10, 2015, in Miami-Dade County, in the Southern District of Florida, the defendant,

MICHAEL ST. HUBERT,

did knowingly use and carry a firearm during and in relation to a crime of violence, and did knowingly possess a firearm in furtherance of a crime of violence, an offense for which the defendant may be prosecuted in a court of the United States, specifically, a violation of Title 18, United States Code, Section 1951(a), as alleged in Count 3 of this Indictment, in violation of Title 18, United States Code, Section 924(c)(1)(A).

Pursuant to Title 18, United States Code, Section 924(c)(1)(A)(ii), it is further alleged that the firearm was brandished.

COUNT 5

On or about January 16, 2015, in Broward County, in the Southern District of Florida, the defendant,

MICHAEL ST. HUBERT,

did knowingly obstruct, delay, and affect commerce and the movement of articles and commodities in commerce, by means of robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Sections 1951(b)(1) and (b)(3), in that the defendant did take property from the person and in the presence of persons employed by AutoZone, located at 2500 State Road 7, Miramar, Florida 33023, a business and company operating in interstate and foreign commerce, against the will of those persons, by means of actual and threatened force,

violence, and fear of injury to said persons, in violation of Title 18, United States Code, Section 1951(a).

COUNT 6

On or about January 16, 2015, in Broward County, in the Southern District of Florida, the defendant,

MICHAEL ST. HUBERT,

did knowingly use and carry a firearm during and in relation to a crime of violence, and did knowingly possess a firearm in furtherance of a crime of violence, an offense for which the defendant may be prosecuted in a court of the United States, specifically, a violation of Title 18, United States Code, Section 1951(a), as alleged in Count 5 of this Indictment, in violation of Title 18, United States Code, Section 924(c)(1)(A).

Pursuant to Title 18, United States Code, Section 924(c)(1)(A)(ii), it is further alleged that the firearm was brandished.

COUNT 7

On or about January 21, 2015, in Broward County, in the Southern District of Florida, the defendant,

MICHAEL ST. HUBERT,

did knowingly obstruct, delay, and affect commerce and the movement of articles and commodities in commerce, by means of robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Sections 1951(b)(1) and (b)(3), in that the defendant did take property from the person and in the presence of persons employed by AutoZone, located at 1513 North State Road 7, Hollywood, Florida 33021, a business and company operating in interstate and foreign commerce, against the will of those persons, by means of actual and

threatened force, violence, and fear of injury to said persons, in violation of Title 18, United States Code, Section 1951(a).

COUNT 8

On or about January 21, 2015, in Broward County, in the Southern District of Florida, the defendant,

MICHAEL ST. HUBERT,

did knowingly use and carry a firearm during and in relation to a crime of violence, and did knowingly possess a firearm in furtherance of a crime of violence, an offense for which the defendant may be prosecuted in a court of the United States, specifically, a violation of Title 18, United States Code, Section 1951(a), as alleged in Count 7 of this Indictment, in violation of Title 18, United States Code, Section 924(c)(1)(A).

Pursuant to Title 18, United States Code, Section 924(c)(1)(A)(ii), it is further alleged that the firearm was brandished.

COUNT 9

On or about January 22, 2015, in Broward County, in the Southern District of Florida, the defendant,

MICHAEL ST. HUBERT,

did knowingly obstruct, delay, and affect commerce and the movement of articles and commodities in commerce, by means of robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Sections 1951(b)(1) and (b)(3), in that the defendant did take property from the person and in the presence of persons employed by Advance Auto Parts, located at 1200 North Dixie Highway, Hollywood, Florida 33020, a business and company operating in interstate and foreign commerce, against the will of those persons, by means of actual

and threatened force, violence, and fear of injury to said persons, in violation of Title 18, United States Code, Section 1951(a).

COUNT 10

On or about January 22, 2015, in Broward County, in the Southern District of Florida, the defendant,

MICHAEL ST. HUBERT,

did knowingly use and carry a firearm during and in relation to a crime of violence, and did knowingly possess a firearm in furtherance of a crime of violence, an offense for which the defendant may be prosecuted in a court of the United States, specifically, a violation of Title 18, United States Code, Section 1951(a), as alleged in Count 9 of this Indictment, in violation of Title 18, United States Code, Section 924(c)(1)(A).

Pursuant to Title 18, United States Code, Section 924(c)(1)(A)(ii), it is further alleged that the firearm was brandished.

COUNT 11

On or about January 27, 2015, in Miami-Dade County, in the Southern District of Florida, the defendant,

MICHAEL ST. HUBERT,

did knowingly attempt to obstruct, delay, and affect commerce and the movement of articles and commodities in commerce, by means of robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Sections 1951(b)(1) and (b)(3), in that the defendant did attempt to take property from the person and in the presence of persons employed by AutoZone, located at 59 N.E. 79th Street, Miami, Florida 33138, a business and company operating in interstate and foreign commerce, against the will of those persons, by means of actual and

threatened force, violence, and fear of injury to said persons, in violation of Title 18, United States Code, Section 1951(a).

COUNT 12

On or about January 27, 2015, in Miami-Dade County, in the Southern District of Florida, the defendant,

MICHAEL ST. HUBERT,

did knowingly use and carry a firearm during and in relation to a crime of violence, and did knowingly possess a firearm in furtherance of a crime of violence, an offense for which the defendant may be prosecuted in a court of the United States, specifically, a violation of Title 18, United States Code, Section 1951(a), as alleged in Count 11 of this Indictment, in violation of Title 18, United States Code, Section 924(c)(1)(A).

Pursuant to Title 18, United States Code, Section 924(c)(1)(A)(ii), it is further alleged that the firearm was brandished.

COUNT 13

On or about January 27, 2015, in Miami-Dade County, in the Southern District of Florida, the defendant,

MICHAEL ST. HUBERT,

having been previously convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm and ammunition, in and affecting interstate and foreign commerce, in violation of Title 18, United States Code, Section 922(g)(1).

CRIMINAL FORFEITURE ALLEGATIONS

1. The allegations in this Indictment are re-alleged and by this reference fully incorporated herein for the purpose of alleging forfeiture to the United States of America of certain

property in which the defendant has an interest.

2. Upon conviction of a violation of Title 18, United States Code, Section 1951, as alleged in this Indictment, the defendant shall forfeit to the United States any property, real or personal, which constitutes or is derived from proceeds traceable to such violation, pursuant to Title 18, United States Code, Section 981(a)(1)(C).

3. Upon conviction of a violation of Title 18, United States Code, Section 924(c)(1)(A), or a violation of Title 18, United States Code, Section 922(g)(1), the defendant shall forfeit to the United States all of his respective right, title, and interest in any firearm or ammunition involved in or used in any such violation, pursuant to Title 18, United States Code, Section 924(d)(1).

All pursuant to Title 18, United States Code, Section 981(a)(1)(C) and Title 18, United States Code, Section 924(d)(1), as made applicable by Title 28, United States Code, Section 2461(c), and the procedures set forth at Title 21, United States Code, Section 853.

A TRUE BILL

WIFREDO A. FERRER
UNITED STATES ATTORNEY

OLIVIA S. CHOE
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA **CASE NO.** _____

vs.

CERTIFICATE OF TRIAL ATTORNEY*

MICHAEL ST. HUBERT,

_____ **Defendant.** /

Superseding Case Information:

Court Division: (Select One)

X	Miami	____	Key West		
____	FTL	____	WPB	____	FTP

New Defendant(s) Yes ____ No ____
Number of New Defendants ____
Total number of counts ____

I do hereby certify that:

1. I have carefully considered the allegations of the information, the number of defendants, the number of probable witnesses and the legal complexities of the Indictment/Information attached hereto.

2. I am aware that the information supplied on this statement will be relied upon by the Judges of this Court in setting their calendars and scheduling criminal trials under the mandate of the Speedy Trial Act, Title 28 U.S.C. Section 3161.

3. Interpreter: (Yes or No) No
List language and/or dialect _____

4. This case will take 3-5 days for the parties to try.

5. Please check appropriate category and type of offense listed below:

	(Check only one)		(Check only one)	
I	0 to 5 days	X	Petty	____
II	6 to 10 days	____	Minor	____
III	11 to 20 days	____	Misdem.	____
IV	21 to 60 days	____	Felony	X
V	61 days and over	____		

6. Has this case been previously filed in this District Court? (Yes or No) No
If yes:
Judge: _____ Case No. _____
(Attach copy of dispositive order)
Has a complaint been filed in this matter? (Yes or No) No
If yes:
Magistrate Case No. _____

Related Miscellaneous numbers: _____
Defendant(s) in federal custody as of _____
Defendant(s) in state custody as of 1/27/2015
Rule 20 from the District of _____

Is this a potential death penalty case? (Yes or No) No

7. Does this case originate from a matter pending in the Northern Region of the U.S. Attorney's Office prior to October 14, 2003? ____ Yes X No

8. Does this case originate from a matter pending in the Central Region of the U.S. Attorney's Office prior to September 1, 2007? ____ Yes X No

OLIVIA S. CHOE
ASSISTANT UNITED STATES ATTORNEY
COURT ID NO. A5501503

*Penalty Sheet(s) attached

REV.9/11/07

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: MICHAEL ST. HUBERT

Case No:

Counts 1, 3, 5, 7, 9, 11:

Hobbs Act Robbery

Title 18, United States Code, Section 1951(a)

***Max. Penalty:** 20 years' imprisonment

Counts 2, 4, 6, 8, 10, 12:

Use of a Firearm During and In Relation to a Crime of Violence

Title 18, United States Code, Section 924(c)

***Max. Penalty:** Life imprisonment

For conviction on any of Counts 2, 4, 6, 8, 10, or 12, mandatory minimum term of imprisonment of 7 years. For every additional conviction of any of Counts 2, 4, 6, 8, 10 or 12, mandatory minimum term of imprisonment of 25 years. All such terms to be served consecutive to one another and to any other term of imprisonment imposed.

Count 13:

Possession of Firearm and Ammunition by a Convicted Felon

Title 18, United States Code, Section 922(g)(1)

***Max. Penalty:** 10 years' imprisonment

***Refers only to possible term of incarceration, does not include possible fines, restitution, special assessments, parole terms, or forfeitures that may be applicable**

A-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-20621-CR-MORENO

UNITED STATES OF AMERICA,
Plaintiff,

v.

MICHAEL ST. HUBERT,
Defendant.
_____/

MICHAEL ST. HUBERT'S MOTION TO DISMISS COUNTS 2, 4, 6, 8, 10 AND 12 OF THE INDICTMENT FOR FAILURE TO STATE A CLAIM

Mr. St. Hubert, by and through his undersigned counsel, hereby moves this Honorable Court, pursuant to Federal Rules of Criminal Procedure 12(b)(3)(B)(v) and (b)(1), to dismiss Counts 2, 4, 6, 8, 10 and 12 (hereinafter the "924(c) Counts") for failure to state a claim.

The 924(c) Counts fail to state an offense because the Hobbs Act charges upon which they are predicated[1] do not qualify as "crime[s] of violence": Hobbs Act "robbery" does not fall within the definition of 18 U.S.C. § 924(c)'s "force clause," and § 924(c)'s residual clause is unconstitutionally vague under *Johnson v. United States*, __ U.S. __, 135 S. Ct. 2551 (2015).

INTRODUCTION

Counts 2, 4, 6, 8, 10 and 12 of the Indictment charge Mr. St. Hubert with brandishing a firearm in relation to a "crime of violence," in violation of 18 U.S.C. § 924(c). [DE 1]. Each of the Counts alleges that the underlying "crime of violence"

[1] Counts 1, 3, 5, 7, 9 and 11 (hereinafter the "Hobbs Act Counts").

is "a violation of Title 18, United States Code, Section 1951(a)," as alleged in the Indictment's Hobbs Act Counts. *Id.*

But each of the 924(c) Counts fails to state an offense. Hobbs Act Robbery categorically fails to qualify under § 924(c)(3)(A) (the "Force Clause") because it can be accomplished merely by placing one in fear of injury to his person or property, which 1) does not require threat of *violent physical force*, and 2) does not require the *intentional* threat of the same. And under the Supreme Court's rationale in *Johnson*, § 924(c)(3)(B) (the "Residual Clause") is unconstitutionally vague. Therefore, each of the Indictment's 924(c) Counts must be dismissed for failure to state an offense. *See* Fed. R. Crim. Proc. 12(b)(3)(B).

PERTINENT STATUTES

This motion primarily concerns the following two federal statutes:

1) **18 U.S.C. § 1951(b)**

Section 1951, in pertinent part, provides:

> (1) The term "robbery" means the 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 shall [be punished in accordance with the remainder of the statute]

2) **18 U.S.C. § 924(c)**

Section 924(c)(1)(A), in pertinent part, provides:

> . . . any person who, during and in relation to a crime of violence. . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, shall, or who in furtherance of

any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence. . . . . .

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

Under § 924(c)(3), "crime of violence" is defined as follows:

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

I. has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

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

ARGUMENT

The Court must dismiss the 924(c) Counts because the predicate Hobbs Act robbery offenses, as defined by 18 U.S.C. § 1951(b), do not qualify as a "crime of violence" as a matter of law.

Section 924(c)'s definition of "crime of violence" has two alternative clauses: § 924(c)(3)(A), the Force Clause, and § 924(c)(3)(B), the Residual Clause. Hobbs Act robbery fails to qualify as a crime of violence under the Force Clause since it may be committed by putting one in fear of future injury to his person or property, which 1) does not require the threat of *violent physical force* against persons or property, and 2) does not require an *intentional* threat of the same. And the Residual Clause, post-

Johnson, is void for vagueness.

I. Hobbs Act Robbery Does Not Qualify as a Crime of Violence Under the Force Clause.

Courts employ the categorical approach to determine whether a predicate offense qualifies as a "crime of violence" under § 924(c). *See Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013); *United States v Royal*, 731 F.3d 333, 341-42 (4th Cir. 2014); *United States v. Serafin*, 562 F.3d 1105, 1107-08 (10th Cir. 2009); *United States v. Acosta*, 470 F.3d 132, 135 (2d Cir. 2006). This approach requires that courts "look only to the statutory definitions – i.e., the elements – of a defendant's [offense] and not to the particular facts underlying [the offense]" in determining whether the offense qualifies as a "crime of violence." *Descamps*, 133 S. Ct. at 2283 (citation omitted); *Royal*, 731 F.3d at 341-42; *Serafin*, 562 F.3d at 1107; *Acosta*, 470 F.3d at 135. A prior offense can only qualify as a "crime of violence" if all of the criminal conduct covered by a statute, "including the most innocent conduct," matches or is narrower than the "crime of violence" definition. *United States v. Torres-Miguel*, 701 F.3d 165, 167 (4th Cir. 2012). If the most innocent conduct penalized by a statute does not constitute a "crime of violence," then the statute categorically fails to qualify as one. And so post-*Descamps*, for Hobbs Act robbery under § 1951(b) to qualify as a "crime of violence" under the Force Clause, it must necessarily have an element of "physical force." In this context, "physical force" means "*violent* force"—that is, "strong physical force" that is "capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010) (emphasis in original).

a. Putting Somebody In Fear of Injury Does Not Require the Use, Attempted or Threatened Use of "Violent Force."

Hobbs Act robbery can be committed without actual or threatened violent force, but instead by merely placing another in fear of injury to person or property. *See* § 1951 (" . . . by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property . . ."). But injury may be inflicted—both on property and on a person-- without any physical force at all, let alone the violent physical force that is required under the force clause.

First, Hobbs Act robbery can be accomplished by placing somebody in fear of injury to his *property*—an act which does not require the use of violent physical force. "The concept of 'property' under the Hobbs Act is an expansive one" that includes "*intangible assets*, such as rights to solicit customers and to conduct a lawful business." *United States v. Arena*, 180 F.3d 380, 392 (2d. Cir. 1999); *abrogated in part on other grounds by Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 401 n.8 (2003) (emphasis added); *see also United States v. Iozzi*, 420 F.2d 512, 514 (4th Cir. 1970) (sustaining Hobbs Act conviction when boss threatened "to slow down or stop construction projects unless his demands were met"); *United States v. Local 560 of the International Brotherhood of Teamsters*, 780 F.2d 267, 281 (3d Cir. 1986) (noting that the Circuits "are unanimous in extending Hobbs Act to protect intangible, as well as tangible property"). So for example, Hobbs Act robbery can be committed via threats to cause a devaluation of some economic interest, like a stock holding. Such threats to economic interests are certainly not threats of "violent force." Even injury to tangible property does not require the threat of

violent force. One can threaten to injure another's property by throwing paint on someone's house, pouring chocolate syrup on one's passport, or spray painting someone's car. It goes without saying that these actions do not require violent force.

Even a threat of physical injury to the person of another does not require the use of physical force, let alone violent physical force. *See, e.g., United States v. Torres-Miguel*, 701 F.3d 165 (4th Cir. 2012) (Evaluating Cal. Penal Code § 422(a) and reasoning that "[o]f course, a crime may *result* in death or serious injury without involving *use* of physical force"); *Chrzanoski v. Ashcroft*, 327 F.3d 188, 194 (2d Cir. 2003) (noting that "there is a difference between the causation of an injury . . . and an injury's causation by the use of physical force"); *United States v. Cruz-Rodriguez*, 625 F.3d 274, 276 (5th Cir. 2010) (holding that statute criminalizing threatening to commit a crime which will result in death or great bodily injury to another person is not a crime of violence because it does not necessarily involve the use of force); *United States v. Perez-Vargas*, 414 F.3d 1282, 1287 (10th Cir. 2005) (explaining that although Colorado assault statute required causation of bodily injury, imposing injury does not "necessarily include the use or threatened use of 'physical force' as required by the Guidelines"). As the Second Circuit has explained, "human experience suggest numerous examples of intentionally causing physical injury without the use of force, such as a doctor who deliberately withholds vital medicine from a sick patient" or someone who causes physical impairment by placing a tranquilizer in the victim's drink. *Chrzanoski*, 327 F.3d. at 195-96. Likewise, the Tenth Circuit has reasoned that "several examples [exist] of third degree assault that would not use or threaten the use of physical force: . . .

intentionally placing a barrier in front of a car causing an accident, or intentionally exposing someone to hazardous chemicals." *Perez-Vargas*, 414 F.3d at 1286.[2]

Because "the full range of conduct" covered by the Hobbs Act robbery statute does not require "violent force" against a person, it simply cannot qualify as a "crime of violence" under the Force Clause. And it makes no difference whether the odds are slim of violating the Hobbs Act robbery statute without violent physical force. Because the possibility exists, *see, e.g., Iozzi,* 420 F.2d 512 (Hobbs Act robbery by economic extortion), Hobbs Act robbery is not a "crime of violence" under the Force Clause.

b. Putting Somebody In Fear of Injury Does Not Require the *Intentional* Threat of Violent Force.

The "fear of injury" element under the Hobbs Act statute does not require a defendant to *intentionally* place another in fear of injury. And as the Fourth Circuit has held, an offense can only constitute a "crime of violence" under the Force Clause if it has an element that requires an "*intentional* employment of physical force [or threat of physical force]." *Garcia v. Gonzalez*, 455 F.3d 465, 468 (4th Cir. 2006) (analyzing 18 U.S.C. § 16(a)'s identical clause).

Federal cases interpreting the "intimidation" element in the federal bank robbery statute (18 U.S.C. § 2113(a)) are instructive here. Federal bank robbery may be accomplished by "intimidation," which means placing someone in fear of

[2] The drafters of the Guidelines certainly understood the difference between use or threatened use of physical force, on the one hand, and causation of injury, on the other, because on multiple occasions they have revised the Guidelines to reflect this difference. Before 1989, the guidelines definition of crime of violence under the career offender provision referred to 18 U.S.C. §16, requiring the use of force. *See Chrzanoski*, 327 F.3d at 195 n.11. In 1989, the drafters broadened the crime of violence definition to require resultant injury, but not necessarily use of force. *See id.* More recently, the drafters changed the Guidelines definition back to one requiring use of force. Thus,

bodily harm – the same action required under the Hobbs Act robbery statute. *See United States v. Woodrop*, 86 F.3d 359, 364 (4th Cir. 1996) ("intimidation" under federal bank robbery statute means "an ordinary person in the [victim's position] reasonably could infer a threat of *bodily harm* from the defendant's acts."); *see also United States v. Pickar*, 616 F.2d 821, 825 (2010) (same); *United States v. Kelley*, 412 F.3d 1240, 1241 (11th Cir. 2005) (same); *United States v. Yockel*, 320 F.3d 818, 824 (8th Cir. 2003) (same); *United States v. Higdon*, 832 F.3d 312, 315 (5th Cir. 1987) (same).

"Intimidation" is satisfied under the bank robbery statute "whether or not the defendant actually intended the intimidation," as long as "an ordinary person in the [victim's] position reasonably could infer a threat of bodily harm from the defendant's acts." *Woodrup*, 86 F.3d at 36. Indeed, "[w]hether a particular act constitutes intimidation is viewed objectively, . . . and a defendant can be convicted under [federal bank robbery] even if he did not intend for an act to be intimidating." *Kelley*, 412 F.3d at 1244. *See also United States v. Yockel*, 320 F.3d 818, 821 (8th Cir. 2003) (upholding bank robbery conviction even though there was no evidence that defendant intended to put teller in fear of injury: defendant did not make any sort of physical movement toward the teller and never presented her with a note demanding money, never displayed a weapon of any sort, never claimed to have a weapon, and by all accounts, did not appear to possess a weapon); *United States v. Foppe*, 993 F.2d 1444, 1451 (9th Cir. 1993) (same). In other words, a defendant may

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the Sentencing Commission has repeatedly recognized the important distinction between use of force and injury caused by force. *See* U.S.S.G. § 4B1.2(a)(1). *Torres-Miguel*, 701 F.3d at 169 n.2.

be found guilty of federal bank robbery even though he did not intend to put another in fear of injury. It is enough that the victim reasonably fears injury from the defendant's actions – whether or not the defendant actually intended to create that fear. Due to the lack of this intent, federal bank robbery criminalizes conduct that does not require an intentional threat of physical force. Therefore, bank robbery squarely fails to qualify as a "crime of violence" under *Garcia*. Because the federal bank robbery "intimidation" element is defined the same as the Hobbs Act robbery "fear of injury" element, it follows that Hobbs Act robbery also fails to qualify as a "crime of violence" under *Garcia*.

In sum, Hobbs Act robbery is not a "crime of violence" under the § 924(c)(3)(A) Force Clause for two independent reasons. First, the statute does not require a threat of *violent force*, or even any physical force at all. Second, the statute does not require the *intentional* threat of the same.

II. Section 924(c)(3)'s Residual Clause is Unconstitutionally Vague and Thus Cannot Support a Conviction under the Statute.

In *Johnson*, ___ U.S. ___, 135 S. Ct. 2551 (2015), the Supreme Court, in considering the definition of "violent felony" under the Armed Career Criminal Act, invalidated that statute's residual clause. The statute, 18 U.S.C. §924(e)(2)(B), defines "violent felony" as a felony that:

> (i) has as an element the use, attempted use or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves the use of explosives *or otherwise involves conduct that presents a serious risk of physical injury*[3] *to another.*

[3] By contrast to the ACCA's physical *injury* language, § 924(c)'s Residual Clause addresses a crime that presents a "substantial risk that physical *force* against the

(Emphasis added). The Court held that the residual clause of that provision (the clause beginning with "or otherwise") is "unconstitutionally vague" because the "indeterminancy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by Judges." *Id.* at 2557. The Court held that the process, espoused by *James v. United States*, 550 U.S. 192 (2007), of determining what is embodied in the "ordinary case" of an offense, and then of quantifying the risk posed by that ordinary case, is constitutionally problematic: "Grave uncertainty" surrounds the method of determining the risk posed by the "judicially imagined ordinary case.'" *Id.* at 2557. The Court concluded that "[t]he residual clause offers no reliable way to choose between . . . competing accounts of what 'ordinary' . . . involves." *Id.* at 2558.

The Supreme Court's reasoning in *Johnson* applies equally to § 924(c)(3)'s Residual Clause. The Court's holding there did not turn on the type of risk described by the clause (that it involved a "risk of injury" versus the "risk of physical force"), but on the flawed approach that courts use to assess and quantify that risk. That flawed inquiry is the same under both the ACCA and § 924(c): both statutes require courts to first picture the "ordinary case" embodied by a felony, and then to assess the risk posed by that "ordinary case." *See, e.g., United States v. Keelan*, 786 F.3d 865, 871 (11th Cir. 2015) (applying the "ordinary risk" analysis in the § 16(b)[4] context) (citing *United States v. James*, 550 U.S. 192 (2007) (applying

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person or property of another may be used in the course of committing the offense." (Emphasis added).

[4] 18 U.S.C. § 16(b)'s residual clause is the same as the one at issue here, purporting to cover "any other offense that is a felony and that, by its nature, involves a

the approach in the ACCA context; overruled by *Johnson*, 135 S. Ct. 2551)) and citing *United States v. Chitwood*, 676 F.3d 971, 977 (2012) (affirming that "it is the 'ordinary' or 'generic' case that counts" in the Career Offender context); *United States v. Avila*, 770 F.3d 1100, 1107 (2014) (applying the "ordinary case" analysis with respect to § 16(b); relying on a case analyzing the ACCA). Indeed, in litigating *Johnson*, the United States Solicitor General, agreed that the phrases at issue in *Johnson* and in § 924(c)(3)(B) pose the same problem. The Solicitor General first noted that the definitions of a "crime of violence" in both § 924(c)(3)(B) and § 16(b) are identical. The Solicitor General then stated:

> Although Section 16 refers to the risk that force will be used rather than that injury will occur, it is equally susceptible to petitioner's central objection to the residual clause: Like the ACCA, Section 16 requires a court to identify the ordinary case of the commission of the offense and to make a commonsense judgment about the risk of confrontations and other violent encounters.

Johnson v. United States, S. Ct. No. 13-7120, Supplemental Brief of Respondent United States at 22-23 (available at 2015 WL 1284964 at *22-*23 or 2014 U.S. Briefs 7120 at *22-*23). The Solicitor General was right. Section 924(c)(3)(B) and the ACCA are essentially the same and contain the same flaws. This Court should hold the government to that concession.

Indeed, courts regularly equate the ACCA's residual clause to the clause at issue here, which is also contained in 18 U.S.C. § 16(b). *See, e.g., Chambers v. United States*, 555 U.S. 122, 133, n.2 (2009) (citing both ACCA and § 16(b) cases and noting that § 16(b) "closely resembles ACCA's residual clause") (Alito, J.,

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substantial risk that physical force against the person or property of another may

concurring); *United States v. Ayala*, 601 F.3d 256, 267 (4th Cir. 2010) (relying on an ACCA case to interpret the definition of a crime of violence under § 924(c)(3)(B)); *United States v. Aragon*, 983 F.2d 1306, 1314 (4th Cir. 1993) (same). *See also Keelan*, 786 F.3d at 871 n.7 (describing the ACCA otherwise clause and § 16(b) as "analogous" for analysis purposes); *Roberts v. Holder*, 745 F.3d 928, 930-31 (8th Cir. 2014) (using both ACCA cases and § 16(b) cases to define the same "ordinary case" analysis); *United States v. Sanchez-Espinal*, 762 F.3d 425, 432 (5th Cir. 2014) (despite the fact that the ACCA talks of risk of injury and § 16(b) talks of risk of force, "we have previously looked to the ACCA in deciding whether offenses are crimes of violence under § 16(b)"). *See Jimenez-Gonzales v. Mukasey*, 548 F.3d 557, 562 (7th Cir. 2008) (noting that, "[d]espite the slightly different definitions," the Supreme Court's respective analyses of the ACCA and § 16(b) "perfectly mirrored" each other). *See also United States v. Gomez-Leon*, 545 F.3d 777 (9th Cir. 2008) (describing the "physical force" residual clause of U.S.S.G. § 2L1.2 as "subject to the same construction" as § 16(b)'s "physical injury" residual clause); *United States v. Coronado-Cervantes*, 154 F.3d 1242, 1244 (10th Cir. 1998) (comparing U.S.S.G. § 4B1.2's residual clause to U.S.S.G. § 16(b)'s).

In determining whether an offense falls under § 924(c)'s Residual Clause, a court would have to engage in the very analysis deemed constitutionally problematic by the Supreme Court in *Johnson*. Like the residual clause at issue there, § 924(c)'s Residual Clause is unconstitutional and cannot be relied upon to classify Hobbs Act robbery as a "crime of violence."

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be used in the course of committing the offense."

CONCLUSION

Because Hobbs Act robbery under § 1951 categorically fails to qualify as a "crime of violence" under § 924(c)'s Force Clause, and because § 924(c)'s Residual Clause is unconstitutionally vague, Hobbs Act robbery may not serve as a predicate "crime of violence" upon which any § 924(c) Count may rest.

WHEREFORE, for the foregoing reasons, Mr. St. Hubert respectfully requests that the Court grant this Motion and dismiss the 924(c) Counts for failure to state a claim.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

BY: s/*Christy O'Connor*
Christy O'Connor
Assistant Federal Public Defender
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Suite 1700
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Tel: 305-530-7000/Fax: 305-536-4559
E-Mail Address: christy_o'connor@fd.org

CERTIFICATE OF SERVICE

I HEREBY certify that on December 22, 2015, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/*Christy O'Connor*
Christy O'Connor

A-4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-20621-CR-MORENO

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL ST. HUBERT,

Defendant.
_____/

ORDER DENYING MOTION TO DISMISS

THIS CAUSE came before the Court upon defendant's motion to dismiss counts 2, 4, 6, 8, 10 and 12 of the Indictment for failure to state a claim **[D.E. #17]** and the Court being fully advised in the premises, it is

ORDERED and ADJUDGED that said motion to dismiss is **DENIED.**

DONE and ORDERED in Miami-Dade County Florida this 29th day of December, 2015.

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies furnished to:

All counsel of record

A-5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-CR-20621-MORENO

UNITED STATES OF AMERICA

vs.

MICHAEL ST. HUBERT,

Defendant.
_____/

PLEA AGREEMENT

The United States Attorney's Office for the Southern District of Florida ("this Office") and Michael St. Hubert (hereinafter, the "defendant") enter into the following agreement:

1. The defendant agrees to plead guilty to Counts 8 and 12 of the Indictment, which charge the defendant with using and carrying a firearm in furtherance of a crime of violence, in violation of Title 18, United States Code, Section 924(c).

2. This Office agrees to seek dismissal of Counts 1-7, 9-11, and 13 of the Indictment after sentencing.

3. The defendant is aware that the sentence will be imposed by the Court after considering the advisory Federal Sentencing Guidelines and Policy Statements (hereinafter "Sentencing Guidelines"). The defendant acknowledges and understands that the Court will compute an advisory sentence under the Sentencing Guidelines and that the applicable guidelines will be determined by the Court relying in part on the results of a pre-sentence investigation by the Court's Probation Office, which investigation will commence after the guilty plea has been entered. The defendant is also aware that, under certain circumstances, the Court may depart

from the advisory sentencing guideline range that it has computed, and may raise or lower that advisory sentence under the Sentencing Guidelines. The defendant is further aware and understands that the Court is required to consider the advisory guideline range determined under the Sentencing Guidelines, but is not bound to impose a sentence within that advisory range; the Court is permitted to tailor the ultimate sentence in light of other statutory concerns, and such sentence may be either more severe or less severe than the Sentencing Guidelines' advisory range. Knowing these facts, the defendant understands and acknowledges that the Court has the authority to impose any sentence within and up to the statutory maximum authorized by law for the offenses identified in paragraph 1 and that the defendant may not withdraw the plea solely as a result of the sentence imposed.

4. The defendant also understands and acknowledges that as to Count 8, the Court must impose a minimum term of imprisonment of seven years and may impose a statutory maximum term of life imprisonment, followed by a term of supervised release of up to five years. As to Count 12, the defendant understands and acknowledges that the Court must impose a minimum term of imprisonment of twenty-five years and may impose a statutory maximum term of life imprisonment, followed by a term of supervised release of up to five years. The defendant further acknowledges and understands that these sentences of imprisonment must be run consecutively, for a total mandatory minimum sentence of thirty-two years' imprisonment and a potential maximum term of life imprisonment. In addition to a term of imprisonment and supervised release, the Court may impose a fine of up to $250,000 as to each of Counts 8 and 12 and may order restitution.

5. The defendant further understand and acknowledges that, in addition to any sentence imposed under paragraph 4 of this agreement, a special assessment in the amount of $200

will be imposed on the defendant. The defendant agrees that any special assessment imposed shall be paid at the time of sentencing. If a defendant is financially unable to pay the special assessment, the defendant agrees to present evidence to this Office and the Court at the time of sentencing as to the reasons for the defendant's failure to pay.

6. This Office reserves the right to inform the Court and the Probation Office of all facts pertinent to the sentencing process, including all relevant information concerning the offenses committed, whether charged or not, as well as concerning the defendant and the defendant's background. Subject only to the express terms of any agreed-upon sentencing recommendations contained in this agreement, this Office further reserves the right to make any recommendation as to the quality and quantity of punishment.

7. This Office agrees that it will recommend at sentencing that the Court reduce by two levels the sentencing guideline level applicable to the defendant's offense, pursuant to Section 3E1.1(a) of the Sentencing Guidelines, based upon the defendant's recognition and affirmative and timely acceptance of personal responsibility. If at the time of sentencing the defendant's offense level is determined to be 16 or greater, this Office will file a motion requesting an additional one level decrease pursuant to Section 3E1.1(b) of the Sentencing Guidelines, stating that the defendant has assisted authorities in the investigation or prosecution of the defendant's own misconduct by timely notifying authorities of the defendant's intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the Court to allocate their resources efficiently. This Office, however, will not be required to make this motion and this recommendation if the defendant: (1) fails or refuses to make a full, accurate and complete disclosure to the Probation Office of the circumstances surrounding the relevant offense conduct; (2) is found to have misrepresented facts to the

government prior to entering into this plea agreement; or (3) commits any misconduct after entering into this plea agreement, including but not limited to committing a state or federal offense, violating any term of release, or making false statements or misrepresentations to any governmental entity or official.

8. The defendant is aware that the sentence has not yet been determined by the Court. The defendant also is aware that any estimate of the probable sentencing range or sentence that the defendant may receive, whether that estimate comes from the defendant's attorney, this Office, or the Probation Office, is a prediction, not a promise, and is not binding on this Office, the Probation Office or the Court. The defendant understands further that any recommendation that this Office makes to the Court as to sentencing, whether pursuant to this agreement or otherwise, is not binding on the Court and the Court may disregard the recommendation in its entirety. The defendant understands and acknowledges, as previously acknowledged in paragraph 3 above, that the defendant may not withdraw his plea based upon the Court's decision not to accept a sentencing recommendation made by the defendant, this Office, or a recommendation made jointly by the defendant and this Office.

9. The defendant agrees to forfeit to the United States voluntarily and immediately all firearms and ammunition involved in or used in the offenses charged in Counts 8 and 12 of the Indictment. Such property includes, but is not limited to:

One (1) Astra, model Cub, 5.35/.25 caliber semi-automatic pistol, serial number 958120

Five (5) rounds of CCI .25 caliber ammunition

The defendant agrees to waive all interest in the above-named property in any administrative or judicial forfeiture proceeding, whether criminal or civil, state or federal, and also agrees to voluntarily abandon all right, title, and interest in the above-named property.

10. The defendant knowingly and voluntarily agrees to waive any claim or defense the defendant may have under the Eighth Amendment to the United States Constitution, including any claim of excessive fine or penalty with respect to the forfeited property.

11. The defendant is aware that Title 18, United States Code, Section 3742 and Title 28, United States Code, Section 1291 afford the defendant the right to appeal the sentence imposed in this case. Acknowledging this, in exchange for the undertakings made by the Office in this plea agreement, the defendant hereby waives all rights conferred by Sections 3742 and 1291 to appeal any sentence imposed, including any restitution order, or to appeal the manner in which the sentence was imposed, unless the sentence exceeds the maximum permitted by statute or is the result of an upward departure and/or an upward variance from the advisory guideline range that the Court establishes at sentencing. The defendant further understands that nothing in this agreement shall affect the government's right and/or duty to appeal as set forth in Title 18, United States Code, Section 3742(b) and Title 28, United States Code, Section 1291. However, if the United States appeals the defendant's sentence pursuant to Sections 3742(b) and 1291, the defendant shall be released from the above waiver of appellate rights. By signing this agreement, the defendant acknowledges that the defendant has discussed the appeal waiver set forth in this agreement with the defendant's attorney.

12. The defendant recognizes that pleading guilty may have consequences with respect to the defendant's immigration status if the defendant is not a natural-born citizen of the United States. Under federal law, a broad range of crimes are removable offenses. In addition, under certain circumstances, denaturalization may also be a consequence of pleading guilty to a crime. Removal, denaturalization, and other immigration consequences are the subject of a separate proceeding, however, and the defendant understands that no one, including the defendant's

attorney or the Court, can predict to a certainty the effect of the defendant's conviction on the defendant's immigration status. The defendant nevertheless affirms that the defendant wants to plead guilty regardless of any immigration consequences that the defendant's plea may entail, even if the consequence is the defendant's denaturalization and automatic removal from the United States.

13. This is the entire agreement and understanding between this Office and the defendant. There are no other agreements, promises, representations, or understandings.

WIFREDO A. FERRER
UNITED STATES ATTORNEY

Date: 2/16/2016 By: _____
OLIVIA S. CHOE
ASSISTANT UNITED STATES ATTORNEY

Date: 2/16/16 By: _____
CHRISTY O'CONNOR
ATTORNEY FOR DEFENDANT

Date: 2/16/16 By: _____
MICHAEL ST. HUBERT
DEFENDANT

A-6

UNITED STATES DISTRICT COURT

Southern District of Florida
Miami Division

UNITED STATES OF AMERICA
v.
MICHAEL ST. HUBERT

JUDGMENT IN A CRIMINAL CASE

Case Number: **15-20621-CR-MORENO**
USM Number: **08405-104**

Counsel For Defendant: **Christine O'Connor, AFPD**
Counsel For The United States: **Olivia S. Choe**
Court Reporter: **Gilda Pastor-Hernandez**

The defendant pleaded guilty to Counts 8 and 12 of the Indictment.

The defendant is adjudicated guilty of these offenses:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 924(C)	Use of a Firearm During and In Relation to a Crime of Violence	01/21/2015	8
18 U.S.C. § 924(c)	Use of a Firearm During and In Relation to a Crime of Violence	01/27/2015	12

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

All remaining counts are dismissed on the motion of the government.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence: **2/16/2016**

Federico A. Moreno
United States District Judge

Date: February 17, 2016

DEFENDANT: **MICHAEL ST. HUBERT**
CASE NUMBER: **15-20621-CR-MORENO**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **384 MONTHS (32 years).**

Count 8 - 7 years; Count 12 - 25 years (to run CONSECUTIVE to Count 8).

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **MICHAEL ST. HUBERT**
CASE NUMBER: **15-20621-CR-MORENO**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **FIVE (5) years (CONCURRENT).**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **MICHAEL ST. HUBERT**
CASE NUMBER: **15-20621-CR-MORENO**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$200.00	$0.00	$0.00

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

NAME OF PAYEE	TOTAL LOSS*	RESTITUTION ORDERED	PRIORITY OR PERCENTAGE

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: **MICHAEL ST. HUBERT**
CASE NUMBER: **15-20621-CR-MORENO**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. Lump sum payment of $200.00 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

CASE NUMBER DEFENDANT AND CO-DEFENDANT NAMES (INCLUDING DEFENDANT NUMBER)	TOTAL AMOUNT	JOINT AND SEVERAL AMOUNT

The Government shall file a preliminary order of forfeiture within 3 days.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

A-7

Michael Caruso
Federal Public Defender

Location: Fort Lauderdale

Hector A. Dopico
Chief Assistant

Miami:

Helaine B. Batoff
Sowmya Bharathi
R. D'Arsey Houlihan
Anthony J. Natale
Paul M. Rashkind,
Supervising Attorneys

Bonnie Phillips-Williams,
Executive Administrator

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Anshu Budhrani
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Tracy Dreispul
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Aimee Ferrer
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Gail M. Stage
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Peter Birch,
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Lori E. Barrist
Neison M. Marks
Caroline McCrae
Kristy Militello
Robin C. Rosen-Evans

Fort Pierce:

Panayotta Augustin-Birch
R. Fletcher Peacock

February 5, 2018

United States Court of Appeals
for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Attention: David J. Smith, Clerk of Court

Re: *United States v. Michael St. Hubert*, Case No. 16-10874-GG
Letter of Supplemental Authority Pursuant to Fed. R. App. P. 28(j)

Dear Mr. Smith:

At oral argument, the government stated *United States v. Buck*, 847 F.3d 267 (5th Cir. 2017); *United States v. Gooch*, 850 F.3d 285 (6th Cir. 2017); and *United States v. Anglin*, 856 F.3d 954 (7th Cir. 2017) found *In re Fleur*, 824 F.3d 1337 (11th Cir. 2016) was "binding authority" in holding Hobbs Act robbery is a "crime of violence" under 18 U.S.C. §924(c)(3)(A).

Fleur cannot be "binding authority" in another circuit. At most, these courts found *Fleur*'s holding persuasive; not its reasoning. And these other-circuit decisions are themselves unpersuasive here because they (like *Fleur*) did not consider whether a Hobbs Act robbery conviction could "categorically" require the use of "violent force," where juries are instructed the offense can be committed by causing "fear" of purely economic harm, and "property" includes "intangible rights."

To this day, the Seventh Circuit does not have a pattern Hobbs Act robbery instruction. When *Gooch* was decided, the Sixth Circuit did not. And while the Fifth Circuit uses the same instruction for Hobbs Act

extortion and robbery, and defines both "property" and "fear" as does Eleventh Circuit Pattern O70.3, the Fifth Circuit did not consider its pattern in *Buck*.

Only the Second Circuit has even considered the argument that a Hobbs Act robbery conviction is overbroad because a defendant can place a victim in fear of economic injury to an intangible asset. But while the Second Circuit rejected that argument in *United States v. Hill*, 832 F.3d 135 (2nd Cir. 2016) in the absence of a "case" so holding, *id.* at 141 n. 8 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)), the Second Circuit—unlike the Eleventh—does *not* have any pattern instructions, or *United States v. McGuire*, 706 F.3d 1333 (11th Cir. 2013)(O'Connor, J.) binding it to interpret *Duenas-Alvarez* to require only that the crime "plausibly covers" non-violent conduct. *Id.* at 1337.

Hobbs Act robbery "plausibly covers" non-violent conduct—at least in our circuit—because Eleventh Circuit Pattern O70.3 instructs juries that "property" includes "intangible rights" and a defendant may cause fear of "financial loss as well as fear of physical violence."

Respectfully submitted,

s/Brenda G. Bryn
Brenda G. Bryn
Assistant Federal Public Defender
Counsel for Appellant Michael St. Hubert

cc: AUSA Sivashree Sundaram

Attachment 1

ELEVENTH CIRCUIT

PATTERN JURY INSTRUCTIONS

(CRIMINAL CASES)

2016

THOMSON REUTERS

For Customer Assistance Call 1-800-328-4880

Mat #41970669

O70.1

Interference with Commerce by Extortion Hobbs Act: Racketeering (Force or Threats of Force) 18 U.S.C. § 1951(a)

It's a Federal crime to extort something from someone else and in doing so to obstruct, delay, or affect interstate commerce.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant caused [person's name] to part with property;

(2) the Defendant did so knowingly by using extortion; and

(3) the extortionate transaction delayed, interrupted, or affected interstate commerce.

"Property" includes money, other tangible things of value, and intangible rights that are a source or part of income or wealth.

"Extortion" means obtaining property from a person who consents to give it up because of the wrongful use of actual or threatened force, violence, or fear.

"Fear" means a state of anxious concern, alarm, or anticipation of harm. It includes the fear of financial loss as well as fear of physical violence.

"Interstate commerce" is the flow of business activities between one state and anywhere outside that state.

The Government doesn't have to prove that the Defendant specifically intended to affect interstate commerce in any way. But it must prove that the natural

consequences of the acts described in the indictment would be to somehow delay, interrupt, or affect interstate commerce. If you decide that there would be any effect at all on interstate commerce, then that is enough to satisfy this element. The effect can be minimal.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 1951(a) provides:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce . . . by extortion [shall be guilty of an offense against the United States].

Maximum Penalty: Twenty (20) years imprisonment and applicable fine.

In *United States v. Blanton*, 793 F.2d 1553 (11th Cir. 1986), the Eleventh Circuit upheld the District Court's refusal to instruct the jury that the Defendant must cause or threaten to cause the force, violence or fear to occur. The Court explained that the Defendant need only be aware of the victim's fear and intentionally exploit that fear to the Defendant's own possible advantage.

In *United States v. Kaplan*, 171 F.3d 1351, 1356–58 (11th Cir. 1999), the Eleventh Circuit held that under § 1951 the effect on commerce need not be adverse. The effect on commerce can involve activities that occur outside of the United States. *See, e.g., Kaplan*,171 F.3d at 1355–58 (use of interstate communication facilities and claimed travel to carry out extortion scheme's object, which was the movement of substantial funds from Panama to Florida, constituted sufficient affect under § 1951).

The commerce nexus for an attempt or conspiracy under § 1951 can be shown by evidence of a potential impact on commerce or by evidence of an actual, de mininis impact on commerce. *Kaplan*, 171 F.3d at 1354 (citations omitted). In the case of a substantive offense, the impact on commerce need not be substantial; it can be minimal. *See id.; see also United States v. Le*, 256 F.3d 1229 (11th Cir. 2001); *U. S. v. Verbitskaya*, 406 F.3d 1324 (11th Cir. 2005) (jurisdictional element can be met simply by showing this crime had a minimal effect on commerce); *U.S. v. White*, No. 07-11793, 256 Fed. Appx 333 (11th Cir. 2007) (jurisdictional element can be met simply by showing this crime had a minimal effect on commerce); *U.S. v. Mathis*, 186 Fed. Appx. 971 (11th Cir. 2006); *U.S. v. Stamps*, 201 Fed. Appx. 759 (11th Cir. 2006).

In *U.S. v. Taylor*, 480 F.3d 1025 (11th Cir. 2007), the Eleventh Circuit held that the jurisdictional element is met even when the object of a planned robbery (*i.e.* drugs in a sting operation) or its victims are fictional.

O70.2

Interference with Commerce by Extortion Hobbs Act: Racketeering (Color of Official Right) 18 U.S.C. § 1951(a)

It's a Federal crime to extort something from someone else and in doing so to obstruct, delay, or affect interstate commerce.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant caused [person's name] to part with property;

(2) the Defendant did so knowingly by using extortion under color of official right; and

(3) the extortionate transaction delayed, interrupted, or affected interstate commerce.

"Property" includes money, other tangible things of value, and intangible rights that are a source or element of income or wealth.

"Extortion under color of official right" is the wrongful taking or receipt of money or property by a public officer who knows that the money or property was taken or received in return for [doing] [not doing] official acts. It does not matter whether or not the public officer employed force threats or fear.

"Wrongful" means to get property unfairly and unjustly because the person has no lawful claim to it.

"Interstate commerce" is the flow of business activities between one state and anywhere outside of that state.

The Government doesn't have to prove that the Defendant specifically intended to affect interstate commerce in any way. But it must prove that the natural consequences of the acts described in the indictment would be to somehow delay, interrupt, or affect interstate commerce. If you decide that there would be any effect at all on interstate commerce, then that is enough to satisfy this element. The effect can be minimal.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 1951(a) provides:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce,. . . by extortion [shall be guilty of an offense against the United States].

18 U.S.C. § 1951(b)(2) provides:

> The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Maximum Penalty: Twenty (20) years imprisonment and applicable fine.

In *United States v. Martinez*, 14 F.3d 543 (11th Cir. 1994), the Eleventh Circuit acknowledged that a Hobbs Act conviction for extortion under color of official right requires proof of a quid pro quo. *See Evans v. United States*, 504 U.S. 255, 112 S. Ct. 1881, 119 L. Ed. 2d 57 (1992); *McCormick v. United States*, 500 U.S. 257, 111 S. Ct. 1807, 114 L. Ed. 2d 307 (1991). Fulfillment of the quid pro quo is not an element of the offense.

In *United States v. Kaplan*, 171 F.3d 1351, 1356–58 (11th Cir. 1999), the Eleventh Circuit held that under § 1951 the affect on commerce need not be adverse. The effect on commerce can involve activities that occur outside of the United States. *See, e.g., Kaplan*, 171 F.3d at 1355–58 (use of interstate communication facilities and claimed travel to carry out extortion scheme's object, which was the movement of substantial funds from Panama to Florida, constituted sufficient affect under § 1951).

The commerce nexus for an attempt or conspiracy under § 1951 can be shown by evidence of a potential impact on commerce or by

evidence of an actual, de minimis impact on commerce. *Kaplan*, 171 F.3d at 1354 (citations omitted). In the case of a substantive offense, the impact on commerce need not be substantial; it can be minimal. *See id.; see also United States v. Le*, 256 F.3d 1229 (11th Cir. 2001); *U.S. v. Verbitskaya*, 406 F.3d 1324 (11th Cir. 2005) (jurisdictional element can be met simply by showing this crime had a minimal effect on commerce); *U.S. v. White*, No. 07-11793, 256 Fed. Appx. 333 (11th Cir. 2007) (jurisdictional element can be met simply by showing this crime had a minimal effect on commerce); *U.S. v. Mathis*, 186 Fed. Appx. 971 (11th Cir. 2006); *U.S. v. Stamps*, 201 Fed. Appx. 759 (11th Cir. 2006).

In *U.S. v. Taylor*, 480 F.3d 1025 (11th Cir. 2007), the Eleventh Circuit held that the jurisdictional element is met even when the object of a planned robbery (i.e. drugs in a sting operation) or its victims are fictional.

O70.3

Interference with Commerce by Robbery Hobbs Act — Racketeering (Robbery) 18 U.S.C. § 1951(a)

It's a Federal crime to acquire someone else's property by robbery and in doing so to obstruct, delay, or affect interstate commerce.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt.

(1) the Defendant knowingly acquired someone else's personal property;

(2) the Defendant took the property against the victim's will, by using actual or threatened force, or violence, or causing the victim to fear harm, either immediately or in the future; and

(3) the Defendant's actions obstructed, delayed, or affected interstate commerce.

"Property" includes money, tangible things of value, and intangible rights that are a source or element of income or wealth.

"Fear" means a state of anxious concern, alarm, or anticipation of harm. It includes the fear of financial loss as well as fear of physical violence.

"Interstate commerce" is the flow of business activities between one state and anywhere outside that state.

The Government doesn't have to prove that the Defendant specifically intended to affect interstate commerce. But it must prove that the natural consequences of the acts described in the indictment would

be to somehow delay, interrupt, or affect interstate commerce. If you decide that there would be any effect at all on interstate commerce, then that is enough to satisfy this element. The effect can be minimal.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 1951(a) provides:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery [shall be guilty of an offense against the United States].

Maximum Penalty: Twenty (20) years imprisonment and applicable fine.

In *United States v. Thomas*, 8 F.3d 1552, 1562–63 (11th Cir. 1993), the Eleventh Circuit suggested that the Government need not prove specific intent in order to secure a conviction for Hobbs Act robbery. *See also United States v. Gray*, 260 F.3d 1267, 1283 (11th Cir. 2001) (noting that the Court in *Thomas* suggested that specific intent is not an element under § 1951).

In *United States v. Kaplan*, 171 F.3d 1351, 1356–58 (11th Cir. 1999), the Eleventh Circuit held that under § 1951 the affect on commerce need not be adverse. The effect on commerce can involve activities that occur outside of the United States. *See, e.g., Kaplan*, 171 F.3d at 1355–58 (use of interstate communication facilities and claimed travel to carry out extortion scheme's object, which was the movement of substantial funds from Panama to Florida, constituted sufficient affect under § 1951).

The commerce nexus for an attempt or conspiracy under § 1951 can be shown by evidence of a potential impact on commerce or by evidence of an actual, de minimis impact on commerce. *Kaplan*, 171 F.3d at 1354 (citations omitted). In the case of a substantive offense, the impact on commerce need not be substantial; it can be minimal. *See id.; see also United States v. Le*, 256 F.3d 1229 (11th Cir. 2001); *U.S. v. Verbitskaya*, 40 F.3d 1324 (11th Cir. 2005) (jurisdictional element can be met simply by showing this crime had a minimal effect on commerce); *U.S. v. White*, No. 07-11793, 256 Fed. Appx. 333 (11th Cir. 2007) (jurisdictional element can be met simply by showing this crime had a minimal effect on commerce); *U.S. v. Mathis*, 186 Fed. Appx. 971 (11th Cir. 2006); *U.S. v. Stamps*, 201 Fed. Appx. 759 (11th Cir. 2006).

In *U.S. v. Taylor*, 480 F.3d 1025 (11th Cir. 2007), the Eleventh

Circuit held that the jurisdictional element is met even when the object of a planned robbery (*i.e.* drugs in a sting operation) or its victims are fictional.

Attachment 2

PATTERN JURY INSTRUCTIONS (Criminal Cases)

Prepared by the

Committee on Pattern

Jury Instructions

District Judges Association

Fifth Circuit

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2.73A

EXTORTION BY FORCE, VIOLENCE, OR FEAR 18 U.S.C. § 1951(a) (HOBBS ACT)

Title 18, United States Code, Section 1951(a), makes it a crime for anyone to obstruct, delay, or affect commerce by extortion. Extortion means the obtaining of or attempting to obtain property from another, with that person's consent, induced by wrongful use of actual or threatened force, violence, or fear.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant obtained [attempted to obtain] [conspired to obtain] property from another with that person's consent;

Second: That the defendant did so by wrongful use of actual or threatened force, violence, or fear; and

Third: That the defendant's conduct in any way or degree obstructed [delayed] [affected] commerce [the movement of any article or commodity in commerce].

The government is not required to prove that the defendant knew that his conduct would obstruct [delay] [affect] commerce [the movement of any article or commodity in commerce]. It is not necessary for the government to show that the defendant actually intended or anticipated an effect on commerce by his actions. All that is necessary is that the natural and probable consequence of the acts the defendant took would be to affect commerce. If you decide that there would be any effect at all on commerce, then that is enough to satisfy this element.

The term "property" includes money and other tangible and intangible things of value.

The term "fear" includes fear of economic loss or damage, as well as fear of physical harm.

It is not necessary that the government prove that the fear was a consequence of a direct threat; it is sufficient for the government to show that the victim's fear was reasonable under the circumstances.

The use of actual or threatened force, violence, or fear is "wrongful" if its purpose is to cause the victim to give property to someone who has no legitimate claim to the property.

The term "commerce" means commerce within the District of Columbia [commerce within the Territory or Possession of the United States] [all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof] [all commerce between points within the same State through any place outside such State] [all other commerce over which the United States has jurisdiction].

Note

Interference with commerce is the "express jurisdictional element" of the Hobbs Act. *United States v. Robinson*, 119 F.3d 1205, 1215 (5th Cir. 1997).

That the defendant's conduct affected commerce is an essential element of the offense, and must be submitted to the jury for determination. *See United States v. Gaudin*, 115 S. Ct. 2310 (1995); *United States v. Hebert*, 131 F.3d 514, 521–22 (5th Cir. 1997); *United States v. Miles*, 122 F.3d 235, 239–40 (5th Cir. 1997).

"Commerce" is defined in § 1951(b)(3). The statute requires that commerce or the movement of goods in commerce be affected "in any way or degree." 18 U.S.C. § 1951(a). However, Fifth Circuit jurisprudence reveals tension regarding the degree of proof required to establish the element of effect on commerce. *See United States v. Mann*, 493 F.3d 484, 494 (5th Cir. 2007) ("A Hobbs Act prosecution requires the government to prove that the defendant committed, or attempted or conspired to commit, a robbery or act of extortion that caused an interference with interstate commerce."); *United States v. McFarland*, 311 F.3d 376 (5th Cir.

2002) (en banc) (affirming the constitutionality of the federal Hobbs Act robbery and extortion statute by an equally divided court); *United States v. Hickman*, 179 F.3d 230 (5th Cir. 1999) (en banc) (conviction affirmed by equally divided vote).

The Hobbs Act proscribes attempts and conspiracies as well as substantive offenses. In a prosecution for attempt or conspiracy, proof that a successful completion of the scheme would have affected commerce may suffice, but substantive convictions require proof that each act of robbery or extortion affected commerce. *See Mann*, 493 F.3d at 494–96; *United States v. Jennings*, 195 F.3d 795, 801–02 (5th Cir. 1999); *Robinson*, 119 F.3d at 1215.

It is not necessary to prove that the defendant caused the victim's fear by a direct threat, so long as the victim's fear was actual and reasonable, and the defendant took advantage of that fear to extort property. *See United States v. Rashad*, 687 F.3d 637, 642 (5th Cir. 2012); *United States v. Tomblin*, 46 F.3d 1369, 1384 (5th. Cir. 1995); *United States v. Quinn*, 514 F.2d 1250, 1266–67 (5th Cir. 1975).

For a discussion of the meaning of "wrongful," see *United States v. Enmons*, 93 S. Ct. 1007 (1973) (holding that the Hobbs Act "does not apply to the use of force to achieve legitimate labor ends").

Extortion requires not only deprivation, but also acquisition of property. The Supreme Court held that anti-abortion protesters did not violate the Hobbs Act by using violence or threats of violence against a clinic, their employees, or their patients because the defendants did not "obtain" property from the plaintiffs. *See Scheidler v. Nat'l Org. for Women, Inc.*, 123 S. Ct. 1057, 1066 (2003) (dismissing injunction because defendants "neither pursued nor received something of value from respondents that they could exercise, transfer, or sell").

The Hobbs Act does not apply where the federal government is the intended beneficiary of the alleged extortion. *See Wilkie v. Robbins*, 127 S. Ct. 2588, 2607 (2007) (holding that Congress did not intend to expose all federal employees "to extortion charges whenever they stretch in trying to enforce Government property claims").

This instruction addresses extortion by force, violence, or fear, not robbery. If the indictment charges robbery, the second element should be amended to replace "extortion" with "robbery." In that circumstance, the judge may also wish to define "robbery" pursuant to 18 U.S.C. § 1951(b)(1).

2.73B

EXTORTION UNDER COLOR OF OFFICIAL RIGHT
18 U.S.C. § 1951(a) (HOBBS ACT)

Title 18, United States Code, Section 1951(a), makes it a crime for anyone to obstruct, delay, or affect commerce by extortion. Extortion includes the wrongful obtaining of or attempting to obtain property from another, with that person's consent, under color of official right.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant wrongfully obtained [attempted to obtain] [conspired to obtain] property from another with that person's consent;

Second: That the defendant did so under color of official right; and

Third: That the defendant's conduct in any way or degree obstructed [delayed] [affected] commerce [the movement of any article or commodity in commerce].

The government is not required to prove that the defendant knew that his conduct would obstruct [delay] [affect] commerce [the movement of any article or commodity in commerce]. It is not necessary for the government to show that the defendant actually intended or anticipated an effect on commerce by his actions. All that is necessary is that the natural and probable consequence of the acts the defendant took would be to affect commerce. If you decide that there would be any effect at all on commerce, then that is enough to satisfy this element.

However, the effect on commerce must be real. It is

not sufficient to show that commerce was somehow implicated in the course of events.

The term "property" includes money and other tangible and intangible things of value.

"Wrongfully obtaining property under color of official right" is the taking or attempted taking by a public official of property not due to him or his office, whether or not the public official employed force, threats, or fear. In other words, the wrongful use of otherwise valid official power may convert dutiful action into extortion. If a public official accepts or demands property in return for promised performance or nonperformance of an official act, the official is guilty of extortion. This is true even if the official was already duty bound to take or withhold the action in question, or even if the official did not have the power or authority to take or withhold the action in question, if the victim reasonably believed that the official had that authority or power.

The term "commerce" means commerce within the District of Columbia [commerce within any Territory or Possession of the United States] [all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof] [all commerce between points within the same State through any place outside such State] [all other commerce over which the United States has jurisdiction].

Note

See Note following Instruction No. 2.73A, 18 U.S.C. § 1951(a), Extortion by Force, Violence, or Fear.

Extortion under color of official right does not require proof of force, violence, threats, or use of fear, nor is it required that the defendant induced or solicited the payment by the victim. It is sufficient to prove that the defendant received a payment to which he was not entitled with knowledge that the payment was made in

return for the performance or nonperformance of an official act. *See Evans v. United States*, 112 S. Ct. 1881, 1889 (1992); *United States v. Millet*, 123 F.3d 268, 275 (5th Cir. 1997).

The government is not required to prove that the defendant had the power or authority to take or refrain from taking the promised action so long as the victim reasonably believed that the official had the authority or power. *See United States v. Robinson*, 700 F.2d 205 (5th Cir. 1983). Further, a private individual who holds no official position but who conspires with a public official, masquerades as a public official, or speaks for a public official may be convicted of extortion under color of official right. *United States v. Reagan*, 725 F.3d 471, 484 (5th Cir. 2013).

The phrase "wrongful use of otherwise valid official power" was cited with approval in *United States v. Partida*, 385 F.3d 546, 559 (5th Cir. 2004).

Attachment 3

PATTERN CRIMINAL JURY INSTRUCTIONS

Prepared by
Sixth Circuit Committee
on Pattern Criminal Jury Instructions

Updated as of March 15, 2014

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PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT

(2012 Ed.)

Prepared by
The Committee on Federal Criminal Jury Instructions
of the Seventh Circuit

18 U.S.C. § 1951 EXTORTION – NON-ROBBERY – ELEMENTS

[The indictment charges the defendant[s] with; Count[s] ___ of the indictment charge[s] the defendant[s] with] extortion. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [five] following elements beyond a reasonable doubt:

1. That the defendant knowingly obtained money or property from [name of victim]; and

2. That the defendant did so by means of extortion [by] [threatened] [force] [violence] [fear] [under color of official right], as that term is defined in these instructions; and

3. That [name of victim] consented to part with the money or property because of the extortion; and

4. That the defendant believed that [name of victim] parted with the money or property because of the extortion; and

5. That the conduct of the defendant affected interstate commerce.

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

It has not been expressly decided whether the government needs to prove an overt act in a Hobbs Act conspiracy. *United States v. Corson*, 579 F.3d 804 (7th Cir. 2009). Several Seventh Circuit cases have held without discussion that proof of an overt act is necessary in a Hobbs Act conspiracy charge. Id. at 810. See *United States v. Stodola*, 953 F.2d 266, 272 (7th Cir. 1992); *United States v. Tuchow*, 768 F.2d 855, 869 (7th Cir. 1985). However, other circuits have specified that a Hobbs Act conspiracy does not require proof of an overt act. See, e.g., *United States v. Palmer*, 203 F.3d 55, 63 (1st Cir. 2000); *United States v. Pistone*, 177 F.3d 957, 959–60 (11th Cir. 1999); *United States v. Clemente*, 22 F.3d 477, 480 (2d Cir. 1994). In *Corson* the jury instructions did not include an overt act requirement, and the Court noted that the overt act requirement had not been expressly addressed in the Seventh Circuit. *Corson*, 579 F.3d at 810. The *Corson* Court did not decide the issue as it had not been raised on appeal. *Id.*

18 U.S.C. § 1951 ATTEMPTED EXTORTION – ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] attempted extortion. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. That the defendant knowingly [obtained or] attempted to obtain money or property from _____; and

2. That the defendant did so by means of extortion [by] [threatened] [force] [violence] [fear] [under color of official right], as that term is defined in these instructions; and

3. That the defendant believed that _____ [would have] parted with the money or property because of the extortion; and

4. That the conduct of the defendant affected, would have affected or had the potential to affect interstate commerce.

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

18 U.S.C. § 1951 EXTORTION – ROBBERY – ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] extortion by robbery. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. That the defendant knowingly obtained money or property from or in the presence of [name of victim]; and

2. That the defendant did so by means of robbery, as that term is defined in these instructions; and

3. That the defendant believed that [name of victim] parted with the money or property because of the robbery; and

4. That the robbery affected interstate commerce.

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

It has not been expressly decided whether the government needs to prove an overt act in a Hobbs Act conspiracy. *United States v. Corson*, 579 F.3d 804 (7th Cir. 2009). Several Seventh Circuit cases have held without discussion that proof of an overt act is necessary in a Hobbs Act conspiracy charge. Id. at 810. See *United States v. Stodola*, 953 F.2d 266, 272 (7th Cir. 1992); *United States v. Tuchow*, 768 F.2d 855, 869 (7th Cir. 1985). However, other Circuits have held that a Hobbs Act conspiracy does not require proof of an overt act. See, *e.g.*, *United States v. Palmer*, 203 F.3d 55, 63 (1st Cir. 2000); *United States v. Pistone*, 177 F.3d 957, 959–60 (11th Cir. 1999); *United States v. Clemente*, 22 F.3d 477, 480 (2d Cir. 1994). In *Corson* the jury instructions did not include an overt act requirement, and the Court noted that the overt act requirement had not been expressly addressed in the Seventh Circuit. *Corson*, 579 F.3d at 810. The *Corson* Court did not decide the issue as it had not been raised on appeal. *Id.*

18 U.S.C. § 1951 DEFINITION OF ROBBERY

Robbery means the 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].

Committee Comment

Use material in brackets when appropriate.

18 U.S.C. § 1951 COLOR OF OFFICIAL RIGHT – DEFINITION

[Attempted] Extortion under color of official right occurs when a public official receives [or attempts to obtain] money or property to which [he][she] is not entitled, knowing [believing] that the money or property is being [would be] given to [him][her] in return for taking, withholding or influencing official action. [Although the official must receive [or attempt to obtain] the money or property, the government does not have to prove that the public official first suggested giving money or property, or that the official asked for or solicited it.] [While the official must receive [or attempt to obtain] the money or property in return for the official action, the government does not have to prove [that the official actually took or intended to take that action] [or] [that the official could have actually taken the action in return for which payment was made] [or] [that the official would not have taken the same action even without payment].]

[Acceptance by an elected official of a campaign contribution, by itself, does not constitute extortion under color of official right, even if the person making the contribution has business pending before the official. However, if a public official receives [or attempts to obtain] money or property, knowing [believing] that it is [would be] given in exchange for a specific requested exercise of [his][her] official power, [he][she] has committed extortion under color of official right, even if the money or property is [to be] given to the official in the form of a campaign contribution.]

Committee Comment

See *Evans v. United States*, 504 U.S. 255 (1992); *McCormick v. United States*, 500 U.S. 257 (1991); *United States v. Giles*, 246 F.3d 966 (7th Cir. 2001); *United States v. Abbas*, 560 F.3d 660 (7th Cir. 2009).

An extortion conviction "under color of official right" requires the government to prove a quid pro quo. In *McCormick*, 500 U.S. at 273, the Court held that the jury should have been instructed that the receipt of campaign contributions constitutes extortion under color of official right, 18 U.S.C. § 1951, "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not perform an official act." In *Evans*, 504 U.S. 255, another Hobbs Act case involving campaign contributions, the Court elaborated on the quid pro quo requirement from *McCormick*, holding that "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." Id. at 268. The Court in *Evans* held that the following jury instruction satisfied *McCormick*:

[I]f a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance

does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution.

Id. at 258, 268 (second brackets in original).

In *United States v. Giles*, the Court extended the *quid pro quo* requirement beyond campaign contributions and held that any extortion "under color of official right" conviction under the Hobbs Act requires the government to prove that a payment was made in exchange for a specific promise to perform an official act. 246 F.2d at 971–73 (approving the language of this instruction as sufficient to instruct jury on *quid pro quo* requirement).

The *quid pro quo* can be implied. Id. at 972 ("The official and the payor need not state the quid pro quo in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods. The inducement from the official is criminal if it is express or if it is implied from his works and actions, so long as he intends it to be so and the payor so interprets it.")

In *Abbas*, the Seventh Circuit held that "under color of official right" liability applies only to public officials who misuse their official office. 560 F.3d at 664. Thus, a defendant who impersonated an FBI agent could not commit a crime against the public trust and was not subject to this "special brand of criminal liability." *Id.*

18 U.S.C. § 1951 EXTORTION – DEFINITION

[Attempted] Extortion by [threatened] [force] [or] [violence] [or] [fear] means the wrongful use of [threatened] [force] [or] [violence] [or] [fear] to obtain [or attempt to obtain] money or property. "Wrongful" means that the defendant had no lawful right to obtain [money] [property] in that way. ["Fear" includes fear of economic loss. This includes fear of a direct loss of money, fear of harm to future business operations or a fear of some loss of ability to compete in the marketplace in the future if the victim did not pay the defendant.] The government must prove that the victim's fear was [would have been] reasonable under the circumstances. [However, the government need not prove that the defendant actually intended to cause the harm threatened.]

Committee Comment

See *United States v. Mitov*, 460 F.3d 901, 907–09 (7th Cir. 2006); see also *United States v. Capo*, 791 F.2d 1054, 1062 (2d Cir. 1986); *United States v. Beeler*, 587 F.2d 340, 344 (6th Cir. 1978); *United States v. Brecht*, 540 F.2d 45, 51–52 (2d Cir. 1976); *United States v. Crowley*, 504 F.2d 992, 997 (7th Cir. 1974); *United States v. DeMet*, 486 F.2d 816, 819–20 (7th Cir. 1973); *United States v. Biondo*, 483 F.2d 635, 640 (8th Cir. 1973); *United States v. Varlack*, 225 F.2d 665, 668–69 (2d Cir. 1955).

18 U.S.C. § 1951 PROPERTY – DEFINITION

"Property" includes [name that which was extorted as charged in the indictment].

Committee Comment

In cases where there is no dispute that the item at issue is property (such as in cases in which the "property" is money), the Committee suggests that the appropriate term be incorporated into the elements instruction rather than using a separate definitional instruction.

18 U.S.C. § 1951 INTERSTATE COMMERCE – DEFINITION

With respect to Count[s] ____, the government must prove that the defendant's actions affected [had the potential to affect] interstate commerce in any way or degree. This occurs if the natural consequences of the defendant's actions were [would have been] some effect on interstate commerce, however minimal. [This would include reducing the assets of a [person who] [or] [business that] customarily purchased goods from outside the state of _____ or actually engaged in business outside the state of _____, and if those assets would have been available to the [person] [or] [business] for the purchase of such goods or the conducting of such business if not for defendant's conduct.] It is not necessary for you to find that the defendant knew or intended that his actions would affect interstate commerce [or that there have been an actual effect on interstate commerce].

[Even though money was provided by a law enforcement agency as part of an investigation, a potential effect on interstate commerce can be established by proof that the money, if it had come from _____, would have affected interstate commerce as I have described above.]

Committee Comment

Under the Hobbs Act the government need only show a *de minimus* actual effect on interstate commerce, or where there is no actual effect, a realistic probability of or potential for an effect on interstate commerce. *United States v. Re*, 401 F.3d 828, 835 (7th Cir. 2005) (given that the Hobbs Act criminalizes attempted as well as completed crimes, the impact on commerce need not be actual, it is enough that the conduct had the potential to impact commerce); *United States v. Moore*, 363 F.3d 631 (7th Cir. 2004)(extortion case); *United States v. Sutton*, 337 F.3d 792 (7th Cir. 2003)(robbery case); *United States v. Peterson*, 236 F.3d 848, 851–52 (7th Cir. 2001) (holding that Supreme Court decisions in *United States v. Morrison*, 529 U.S. 598 (2000) and *United States v. Lopez*, 514 U.S. 549 (1995), do not undermine prior holdings that a de minimus effect on interstate commerce is constitutionally satisfactory in a Hobbs Act prosecution). See also *United States v. Carter*, 530 F.3d 565, 572 (7th Cir. 2008)(when the government uses a depletion of assets theory to prove the interstate commerce element, there is no requirement that the business directly purchase its items through interstate commerce, it is enough that the business purchase such items through a wholesaler or other intermediary, and the money used can be the FBI's and not the money of the business itself); *United States v. Watson*, 525 F.3d 583, 589 (7th Cir. 2008)(government's theory that the money that defendants stole traveled in interstate commerce was legally insufficient as cash itself cannot serve as the jurisdictional hook or any robbery would be a federal crime); *United States v. Mitov*, 460 F.3d 901, 908 (7th Cir. 2006)(government could prove effect on interstate commerce through temporary depletion of assets); *United States v. McCarter*, 406 F.3d 460, 462 (7th Cir.

2005)(in a case charging attempted robbery in violation of the Hobbs Act, "the question is merely whether commerce would have been affected had the attempt succeeded"); *United States v. Marrero*, 299 F.3d 653, 655 (7th Cir. 2002)(case charging multiple robberies of drug dealers, each individual criminal act need not have a measurable impact on commerce, it is enough if a class of acts has such an impact).

Much of the language in brackets is designed for undercover cases charged as attempted extortion. Courts should feel free to customize the bracketed sentence in the first paragraph regarding the "asset depletion" theory to fit the allegations in particular cases.

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CRIMINAL PATTERN JURY INSTRUCTIONS

Prepared by the
Criminal Pattern Jury
Instruction Committee
of the United States
Court of Appeals for the
Tenth Circuit

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2.70

[ROBBERY] [EXTORTION] BY FORCE, VIOLENCE OR FEAR
18 U.S.C. § 1951(a) (Hobbs Act)

The defendant is charged in count_____with a violation of 18 U.S.C. section 1951(a), commonly called the Hobbs Act.

This law makes it a crime to obstruct, delay or affect interstate commerce by [robbery] [extortion].

To find the defendant guilty of this crime you must be convinced that the government has proved beyond a reasonable doubt that:

First: the defendant obtained [attempted to obtain] property from another [without][with] that person's consent;

Second: the defendant did so by wrongful use of actual or threatened force, violence, or fear; and

Third: as a result of the defendant's actions, interstate commerce, or an item moving in interstate commerce, was actually or potentially delayed, obstructed, or affected in any way or degree;

[Robbery is the unlawful taking of personal property from another against his or her will. This is done by threatening or actually using force, violence, or fear of injury, immediately or in the future, to person or property. "Property" includes money and other tangible and intangible things of value. "Fear" means an apprehension, concern, or anxiety about physical violence or harm or economic loss or harm that is reasonable under the circumstances.]

[Extortion is the obtaining of or attempting to obtain property from another, with that person's consent, induced by wrongful use of actual or threatened force, violence, or fear. The use of actual or threatened force, violence, or fear is "wrongful" if its purpose is to cause the victim to give property to someone who has no legitimate claim to the property.]

"Obstructs, delays, or affects interstate commerce" means any action which, in any manner or to any degree, interferes with, changes, or alters the movement or transportation or flow of goods, merchandise, money, or other property in interstate commerce.

The defendant need not have intended or anticipated an effect on interstate commerce. You may find the effect is a natural consequence of his actions. If you find that the government has proved beyond a reasonable doubt that the defendant intended to take certain actions—that is, he did the acts charged in the indictment in order to obtain property—and you find those actions actually or potentially caused an effect on interstate commerce, then you may find the requirements of this element have been satisfied.

Comment

The extortion provision of the Hobbs Act requires not only the deprivation, but also the acquisition, of property. 18 U.S.C. §1951(b)(2). Thus, the property, whether tangible or intangible, must actually be "obtained" in order for there to be a violation. *See Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 409 (2003) (holding that by interfering with, disrupting, and in some instances "shutting down" clinics that performed abortions, individual and corporate organizers of antiabortion protest network did not "obtain or attempt to obtain property from women's rights organization or abortion clinics, and so did not commit "extortion" under the Hobbs Act).

The Tenth Circuit has consistently upheld the Hobbs Act as a permissible exercise of the authority granted to Congress under the Commerce Clause, both in the context of robbery, *United States v. Shinault*, 147 F.3d 1266, 1278 (10th Cir. 1998), and extortion, *United States v. Bruce*, 78 F.3d 1506, 1509 (10th Cir. 1996). It also has made clear that only a *de minimis* effect on commerce is required, *United States v. Wiseman*, 172 F.3d 1196, 1214-15 (10th Cir. 1999), and has upheld a trial court's refusal to instruct that a substantial effect is required, *United States v. Battle*, 289 F.3d 661, 664 (10th Cir. 2002).

The court seems to have struggled with the language that "commerce . . . was actually or potentially . . . affected" and that the government can meet its burden by evidence that the defendant's actions caused or "would probably cause" an effect on interstate commerce. In *United States v. Nguyen*, 155 F.3d 1219 (10th Cir. 1998), the court observed that use of the words probable and potential "while perhaps not the best way to explain to the jury the interstate commerce requirement, did not constitute error." *Id.* at 1229. In *United States v. Wiseman*, *supra*, the court upheld an instruction which stated, in pertinent part, that the government could meet its burden by evidence that money stolen for businesses "*could* have been used to obtain such foods or services" from outside the state, opposed to "would" have been so used. *Id.* at 1215 (emphasis in original). The court, citing *Nguyen*, held that the instruction was not prejudicial because only a potential effect on commerce is required. *Id.* at 1216. The Tenth Circuit continues to approve instructions requiring proof of actual, potential, *de minimis* or even just probable effect on commerce. *See United States v. Curtis*, 344 F.3d 1057, 1068-69 (10th Cir. 2003).

Use Note

When the government's evidence is that the robbery or extortion actually affected commerce, the words "potentially," "probably" and "could" can be eliminated from the instruction.

The instruction should be modified in the case of an "attempt." *See* Instruction 1.32.

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EIGHTH CIRCUIT

MODEL JURY INSTRUCTIONS

The 2017 edition Manual, available soon in print, is updated here to reflect new and revised instructions approved by the Judicial Committee on Model Jury Instructions for the Eighth Circuit since publication of the 2014 edition Manual.

6.18.1951B INTERFERENCE WITH COMMERCE BY MEANS OF COMMITTING OR THREATENING PHYSICAL VIOLENCE (18 U.S.C. § 1951) (Hobbs Act)

The crime of interference with commerce by means of [committing physical violence][threatening physical violence][1] as charged in [Count_____] of the Indictment, has three elements, which are:

One, on or about [date], the defendant knowingly [committed physical violence] [threatened physical violence] while at (describe place/entity, e.g. John's Mini Mart in Mason City, Iowa);

Two, the defendant [committed][threatened] the physical violence against (describe person or property); and

Three, the defendant's actions [obstructed][delayed][affected] commerce in some way or degree.

The term "commerce" includes, among other things, travel, trade, transportation, and communication. And, it also means (1) all commerce between any point in one State and any point outside of that State, and (2) all commerce between points within the same State through any place outside of that State.[2]

The phrase "[obstructed][delayed][affected] commerce" in element three means any action which, in any manner or to any degree interferes with, changes, or alters the movement or transportation or flow of goods, merchandise, money, or other property in commerce.

[In considering the third element, you must decide whether there is an actual effect on commerce. If you decide that there was any effect at all on commerce, then that is enough to satisfy this element. The effect can be minimal.] Such effect can be proved by one or more of the following: [depletion of the assets of a business operating in commerce,] [the temporary closing of a business to recover from the [threatened] physical violence,] [[threatened] physical violence of a business covered by an out-of-state insurer,] [loss of sales of an out-of-state commercial product,] or [business slowdown as a result of the [threatened] physical violence]. [The [threatened] physical violence at a local or "mom and pop" business can have the necessary

minimal effect on commerce, so long as the business dealt in goods that moved through "commerce," as defined above.][3]

It is not necessary for the [government] [prosecution] to show that the defendant actually intended or anticipated an effect on commerce. All that is necessary is that commerce was affected as a natural and probable consequence of the defendant's actions.

(Insert paragraph describing government's burden of proof; *see* Instruction 3.09, *supra.*)

Notes of Use

1. If the defendant is alleged to have committed a Hobbs Act violation by extortion, use Instruction 6.18.1951, *supra*. If the defendant is alleged to have committed a Hobbs Act violation by robbery, use Instruction 6.18.1951, *supra.*

2. *See also* 18 U.S.C. § 1951(b)(3) and Instruction 6.18.1956J(2), *infra*, for definitions of commerce.

3. Include this sentence only if the business at issue is a "mom and pop" type business.

Committee Comments

For background on the Hobbs Act, see the Committee Comments at Instructions 6.18.1951 and 6.18.1951A, *supra.*