

APPENDIX A
Eleventh Circuit Court of Appeals' Opinion affirming
Mr. Huling's conviction and sentence

United States v. Huling, No. 17-13032, 741 F. App'x. 702 (11th Cir. July 10, 2018)

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13032
Non-Argument Calendar

D.C. Docket No. 4:16-cr-00025-CDL-MSH-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CURTIS D. HULING,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Georgia

(July 10, 2018)

Before TJOFLAT, ROSENBAUM, and NEWSOM, Circuit Judges.

PER CURIAM:

Curtis Huling appeals his 168-month sentence of imprisonment following his conviction for bank robbery, in violation of 18 U.S.C. § 2113(a). He argues that his prior conviction for Georgia aggravated assault under O.C.G.A. § 16-5-21 does not qualify as a crime of violence for purposes of the career-offender enhancement in the Sentencing Guidelines. After careful review, we affirm.

We review de novo whether a defendant's prior conviction qualifies as a crime of violence under the Guidelines. *United States v. Hall*, 714 F.3d 1270, 1271 (11th Cir. 2013). We may affirm the district court's decision on any ground supported by the record. *United States v. Acuna-Reyna*, 677 F.3d 1282, 1284 (11th Cir. 2012).

The Sentencing Guidelines provide for increased penalties when a defendant is a "career offender." See U.S.S.G. § 4B1.1. Generally, career-offender status increases the defendant's offense level and criminal-history category, rendering the criminal-history category the highest (VI) in every case. *Id.* § 4B1.1(b)(2). Here, Huling's guideline range without the career-offender enhancement would have been 70–87 months (total offense level 21 and criminal-history category V). With the enhancement, his guideline range was 151–188 months (total offense level 29 and criminal-history category VI).

A defendant qualifies as a career offender under § 4B1.1 if, among other requirements not at issue here, he has "at least two prior felony convictions of

either a crime of violence or a controlled substance offense.” *Id.* § 4B1.1(a). Section § 4B1.2 defines the term “crime of violence” to mean any felony offense that either (1) “has as an element the use, attempted use, or threatened use of physical force against the person of another” (known as the “elements” clause), or (2) is one of several specifically enumerated offenses, including “aggravated assault” (known as the “enumerated offenses” clause). *Id.* § 4B1.2(a)(1)–(2).

The district court applied the career-offender enhancement based on Huling’s prior Georgia convictions for sale of cocaine and aggravated assault. Only the aggravated assault conviction is at issue here; Huling does not dispute that sale of cocaine qualifies as a controlled-substance offense.

When Huling was convicted of aggravated assault in 2008, Georgia law defined the crime as an “assault” committed

- (1) With intent to murder, to rape, or to rob;
- (2) With a deadly weapon or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury; or
- (3) [Against a] person or persons without legal justification by discharging a firearm from within a motor vehicle toward a person or persons.

O.C.G.A. § 16-5-21(a) (2008).¹ Huling concedes that he was convicted of assault with a deadly weapon or dangerous object under § 16-5-21(a)(2). *See State v. Wyatt*, 759 S.E.2d 500, 504 (Ga. 2014) (“An indictment charging aggravated assault must allege the element that aggravates the crime above a simple assault, in this case the use of a deadly weapon or dangerous object.”).

In Huling’s view, a conviction under § 16-5-21(a)(2) does not qualify as a crime of violence under § 4B1.2’s elements clause because it does not require proof of a specific intent to use, threaten, or attempt to use physical force. Rather, all the state must prove is that the defendant intended the acts that caused another to reasonably apprehend violent injury. *See Patterson v. State*, 789 S.E.2d 175, 178 (Ga. 2016) (the crime of “assault” does not require proof of intent “to place the victim in reasonable apprehension of receiving a violent injury”). It also fails under the enumerated offenses clause, according to Huling, because the offense contains a *mens rea* element broader than the generic version of aggravated assault.

As Huling acknowledges, however, we recently held that aggravated assault under § 16-5-21(a)(2) qualifies as a crime of violence under the Guidelines because it is equivalent to the enumerated offense of “aggravated assault.” *United*

¹ The Georgia legislature has since amended the statute to add a fourth aggravator that is not relevant here. *See* O.C.G.A. § 16-5-21(a)(4) (2016).

States v. Morales-Alonso, 878 F.3d 1311, 1320 (11th Cir. 2018). That holding binds us here.²

In *Morales-Alonso*, we explained that, to determine whether a defendant’s aggravated-assault conviction qualifies under the enumerated-offenses clause, “we must first identify the essential elements of generic aggravated assault” and determine whether the defendant’s crime corresponds to that generic version. *Id.* at 1315. Applying our decision in *United States v. Palomino Garcia*, 606 F.3d 1317, 1331–32 (11th Cir. 2010), we stated that generic aggravated assault has two elements: (1) a “criminal assault” that (2) is “accompanied by either the intent to cause serious bodily injury to the victim or the use of a deadly weapon.” 878 F.3d at 1315 (quotation marks omitted).

With the definition of generic aggravated assault in hand, we next compared that definition with the elements of Georgia’s aggravated-assault statute. *Id.* In making that determination, we first found that the “aggravator component” of § 16-5-21(a) is “divisible”—that is, that it “defines multiple crimes and sets out the

² *Morales-Alonso* applied the definition of “crime of violence” in § 2L1.2 of the 2015 Sentencing Guidelines. Section 2L1.2, like § 4B1.2(a)(2), defines the term “crime of violence” by reference to several enumerated offenses, including “aggravated assault.” Compare U.S.S.G. § 2L1.2, cmt. n.1(B)(iii), with U.S.S.G. § 4B1.2(a)(2). Because both guideline provisions specifically designate “aggravated assault” as a “crime of violence,” we apply the same analysis that *Morales-Alonso* did. See *United States v. Lockley*, 632 F.3d 1238, 1242 (11th Cir. 2011) (“Where . . . the Guidelines specifically designate a certain offense as a ‘crime of violence,’ we compare the elements of the crime of conviction to the generic form of the offense as defined by the States, learned treatises, and the Model Penal Code.”). Accordingly, *Morales-Alonso*’s holding that § 16-5-21(a)(2) is equivalent to the generic form of aggravated assault applies equally to the crime-of-violence definitions in both § 4B1.2 and § 2L1.2.

elements of each crime in the alternative.” *Id.* at 1316 (citing *Mathis v. United States*, 136 S. Ct. 2243 (2016)). Because the statute is divisible, we applied the “modified categorical approach”—looking to a narrow category of documents to determine which alternative version of the crime the defendant was convicted of—and concluded that Morales-Alonso was convicted of § 16-5-21(a)(2). *Id.* at 1316–17. We then compared this version of Georgia aggravated assault to the generic definition. *See id.* at 1317–20. We found that § 16-5-21(a)(2), like generic aggravated assault, required proof of an assault accompanied by the use of a deadly weapon. *Id.* at 1318. And we rejected the defendant’s argument that the statute plausibly “encompasses the use of an object that happens to cause injury in a particular case, regardless of the manner in which the object is used and even if injury is unlikely.” *Id.* at 1319. Because the elements of § 16-5-21(a)(2) sufficiently matched the elements of generic aggravated assault, we held that it qualified as a crime of violence. *Id.* at 1320.

In light of *Morales-Alonso*, Huling’s Georgia aggravated-assault conviction qualifies as a crime of violence because the elements of § 16-5-21(a)(2) are equivalent to the elements of generic aggravated assault. *See United States v. Brown*, 342 F.3d 1245, 1246 (11th Cir. 2003) (under the prior precedent rule, we are bound by our prior decisions unless and until they are overruled by the Supreme Court or this Court en banc). Huling maintains that *Morales-Alonso*

failed to address whether the *mens rea* element is overbroad, as that argument was not addressed to the panel in that case, “but we have categorically rejected an overlooked reason or argument exception to the prior precedent rule.” *United States v. Johnson*, 528 F.3d 1318, 1320 (11th Cir. 2008), *rev’d on other grounds*, 559 U.S. 133 (2010). So we are bound by *Morales-Alonso*.

Accordingly, Huling’s prior conviction was a crime of violence under the enumerated offenses clause of § 4B1.2(a)(2), and he was properly found to be a career offender. Although the district court rested its decision on the elements clause rather than the enumerated-offenses clause, we may affirm on any ground supported by the record. *See Acuna-Reyna*, 677 F.3d at 1284. We therefore need not and do not address whether the conviction also qualified as a crime of violence under the elements clause.

Because Huling does not raise any other issue on appeal, his sentence is

AFFIRMED.

APPENDIX B

United States District Court for the Middle District of Georgia, Columbus Division
Criminal Case No. 4:16-CR-00025

Transcript of Mr. Huling's June 21, 2017, Sentencing Hearing

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

| | | |
|--------------------------|---|------------------------|
| UNITED STATES OF AMERICA |) | CASE NO. 4:16-CR-00025 |
| |) | |
| VS. |) | JUNE 21, 2017 |
| |) | |
| CURTIS D. HULING |) | SENTENCING HEARING |

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE CLAY D. LAND,
UNITED STATES DISTRICT JUDGE

Proceedings recorded by stenography; transcript produced by
computer.

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1 (Proceedings on June 21, 2017, commencing at 10:03 a.m.,
2 as follows:)

3 THE COURT: Please be seated. Good morning.

4 All right. Madam Clerk, call our case.

5 THE CLERK: United States of America versus Curtis D.
6 Huling, Case No. 4:16-CR-25. The government is represented by
7 Ms. Michelle Schieber, Mr. Mel Hyde, and Ms. Erin Spritzer.
8 The defendant is represented by Michael Simpkins.

9 THE COURT: All right. First of all, Mr. Huling, you
10 understand this is your sentencing hearing. Do you understand
11 that?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: I want to make sure you've had an
14 opportunity to review the presentence report prepared by the
15 U.S. Probation Office. Have you reviewed that report?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Have you discussed it with your attorney?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Do you believe you understand the report?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: I want to make sure that you have
22 reviewed all of the items in the report, including the
23 recommendations regarding supervised release that sets out the
24 mandatory and standard conditions as well as any special
25 conditions of supervised release. Have you studied all of that

1 in the report?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Have you gone over it with your attorney?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Do you understand those conditions of
6 supervised release?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Mr. Simpkins, you've reviewed the
9 presentence report; correct?

10 MR. SIMPKINS: I have, Your Honor.

11 THE COURT: And you've gone over it with your client.
12 Is that correct?

13 MR. SIMPKINS: That's correct, Your Honor.

14 THE COURT: And you believe he understands it?

15 MR. SIMPKINS: Yes, Your Honor.

16 THE COURT: The Court has also reviewed the
17 presentence report and understands that there's no objection to
18 the report by the government. Is that correct, Mr. Hyde?

19 MR. HYDE: That's correct, Your Honor.

20 THE COURT: Mr. Simpkins, you have made an objection
21 to the presentence report regarding the defendant's career
22 offender status. Is that correct?

23 MR. SIMPKINS: That's correct, Your Honor.

24 THE COURT: I'll hear from you at this time with
25 regard to that objection.

1 MR. SIMPKINS: Your Honor, I'll stand primarily by
2 the motion that I filed and highlight a couple of things.
3 Primarily what I'm arguing is that Mr. Huling was convicted
4 under the subsection of the Georgia Statute 16-5-2-82 and
5 looking at the modified categorical approach in the documents
6 that I provided in my objection to reach that conclusion.

7 THE COURT: What section is that, the possession of
8 a -- the use of a deadly weapon, a gun?

9 MR. SIMPKINS: That's correct, Your Honor. It's that
10 a person commits the offense of aggravated assault when he or
11 she assaults with a deadly weapon or with any object, device,
12 or instrument which, when used offensively against a person, is
13 likely to or actually does result in serious bodily injury.

14 THE COURT: So the essential elements of that offense
15 would have been that he used a deadly weapon, a pistol, that
16 placed another person in reasonable apprehension of immediately
17 receiving a violent injury. Those would be the elements of
18 that offense; correct?

19 MR. SIMPKINS: Somewhat, Your Honor. I don't believe
20 that it has to be a pistol, and I think that's part of the
21 argument that I'm making is that the term "deadly weapon" --

22 THE COURT: Well, didn't they -- didn't they allege
23 specifically in the -- in the charge that he used a gun?

24 MR. SIMPKINS: They did, Your Honor, but when -- my
25 understanding is when we do this modified categorical approach

1 and we look at the *Shepard* documents in order to determine what
2 subsection of the statute he's being -- he was convicted under
3 or he pled guilty to, that ends the inquiry --

4 THE COURT: All right. Well, let's take the gun out
5 of it. Under the subsection that they charged him with and
6 convicted him under, they had to prove, first of all, the
7 essential element that... that he either used a deadly weapon
8 or an object, device, or instrument which, when used
9 offensively, is likely to or actually does result in serious
10 bodily injury. That would be the first element they'd have to
11 prove; correct?

12 MR. SIMPKINS: Yes, Your Honor. That's one of the
13 elements. I think --

14 THE COURT: All right. Well, that's -- that's what
15 I'm asking you. They'd have to prove that; right?

16 MR. SIMPKINS: They do have to prove that, yes, Your
17 Honor.

18 THE COURT: And then they would have to prove that he
19 did so, that he used either the deadly weapon or this object,
20 device, or instrument which, when used offensively, is likely
21 or actually does result in serious bodily injury; that by doing
22 so, they've also got to prove that he placed another person in
23 reasonable apprehension of immediately receiving a violent
24 injury. They got to prove that element, too; correct?

25 MR. SIMPKINS: That's correct, Your Honor.

1 THE COURT: If they prove those essential elements,
2 then he's convicted.

3 MR. SIMPKINS: That's correct.

4 THE COURT: If they don't prove those, he's not
5 convicted.

6 MR. SIMPKINS: That's correct.

7 THE COURT: So we can assume — for purposes of
8 determining whether he's a career offender, we can assume that
9 he had a deadly weapon or an object, device, or instrument
10 which, when used offensively, is likely to or actually does
11 result in serious bodily injury. And if you think object,
12 device, or instrument which, when used offensively, is likely
13 to or actually does result in serious bodily injury — if you
14 think that's more beneficial to your client, then we'll just
15 assume that, if they prove that, and that he did so — that by
16 doing so he placed another person in reasonable apprehension of
17 immediately receiving a violent injury.

18 Now, tell me why that offense is different than the
19 offense that the Eleventh — than the aggravated assault
20 offense under Florida law, that the Eleventh Circuit indicated
21 in *In re: Hires* case, 825 F.3d at 1301, that the Eleventh
22 Circuit determined there was a violent felony for the Armed
23 Career Criminal Act elements clause, and how that's
24 distinguishable from the career offender violent felony career
25 criminal guideline in this case.

1 MR. SIMPKINS: Your Honor, I have not read that
2 specific case. So I can't answer --

3 THE COURT: That case would be right on point,
4 wouldn't it? Didn't the Eleventh Circuit in *Hires* -- weren't
5 they faced -- it was -- granted it was under the Armed Career
6 Criminal Act and not under the career offender guideline, but I
7 think they're the same or very similar. And they were deciding
8 whether or not a conviction under Florida law for aggravated
9 assault was a violent felony under the Armed Career Criminal
10 Act.

11 Now, here I've got to decide whether a conviction
12 under Georgia law for aggravated assault is a violent felony
13 for purposes of the career offender guideline; correct?

14 MR. SIMPKINS: That's correct.

15 THE COURT: And violent felony, for purposes of the
16 career offender guideline, is the same as violent felony under
17 the Armed Career Criminal Act, isn't it?

18 MR. SIMPKINS: I believe it's similar, yes, Your
19 Honor.

20 THE COURT: All right. So if the Eleventh Circuit
21 has held that for purposes of the Armed Career Criminal Act a
22 conviction under Florida law for aggravated assault is a
23 violent felony, wouldn't that be instructive as to whether a
24 conviction under Georgia's statute for aggravated assault is a
25 violent felony under the guidelines?

1 MR. SIMPKINS: I think it could be instructive but
2 not dispositive, Your Honor.

3 THE COURT: All right. Well, to determine whether
4 it's instructive, we have to have read *In re: Hires* --

5 MR. SIMPKINS: That's correct.

6 THE COURT: -- to see whether or not the Florida
7 aggravated assault statute is similar to the Georgia aggravated
8 assault statute; correct?

9 MR. SIMPKINS: That's correct.

10 THE COURT: And if the elements there for aggravated
11 assault under Florida law are the same as the elements for
12 aggravated assault under Georgia law, then it would be
13 reasonable to conclude that the Eleventh Circuit would
14 determine that a conviction under Georgia's aggravated assault
15 statute is a violent felony for career offender status. That
16 would be reasonable, wouldn't it?

17 MR. SIMPKINS: I disagree, Your Honor, and I think --

18 THE COURT: Whoa, whoa, whoa, whoa. So let me make
19 sure I understand where you disagree.

20 If the essential elements for aggravated assault
21 under Florida law are the same as the essential elements for
22 aggravated assault under Georgia law, and the Eleventh Circuit
23 has concluded that aggravated assault under Florida law is a
24 violent felony for purposes of armed career criminal status, do
25 you think it would be unreasonable to conclude that the

1 Eleventh Circuit would find that a conviction for aggravated
2 assault under Georgia law, with the same elements as Florida
3 law, it would be unreasonable to conclude that they would also
4 conclude that aggravated assault under Georgia law is a violent
5 felony for purposes of career offender status under the
6 guidelines?

7 MR. SIMPKINS: Yes, because the Florida statute is
8 different than the Georgia statute. I don't know the exact --

9 THE COURT: Okay. Well, that's where we need to hone
10 in on. I just said if they're the same essential elements --

11 MR. SIMPKINS: Well, if they're exactly the same.

12 THE COURT: If they're the same essential elements,
13 then you'd agree that that would be binding and that the
14 Georgia statute would be a violent felony, if they're the same
15 elements.

16 MR. SIMPKINS: If they're the exact same and the
17 Florida courts have interpreted those definitions the same,
18 then yes, I would agree with you --

19 THE COURT: All right.

20 MR. SIMPKINS: -- as to Georgia courts.

21 THE COURT: So the key is whether the essential
22 elements for Florida aggravated assault are the same as the
23 essential elements for Georgia aggravated assault.

24 MR. SIMPKINS: And I think --

25 THE COURT: Tell me how the Florida -- well, you

1 can't tell me because you haven't read the case.

2 MR. SIMPKINS: That's correct.

3 THE COURT: But I need for somebody to tell me how
4 the Florida essential elements are different than the Georgia
5 essential elements. Now, they use different language, but I
6 have been unable to discern how they're different as far as
7 determining violent felony. For me it seems that the elements
8 under Florida law are sufficiently similar to the elements
9 under Georgia law such that if aggravated assault under Florida
10 law is a violent felony for career offender status, then the
11 same would be true under Georgia law.

12 So you can't help me because you haven't read the
13 case.

14 MR. SIMPKINS: That's correct.

15 THE COURT: Then how can you -- how can you say that
16 the Florida statute is different, in all candor to the Court?

17 MR. SIMPKINS: I can't, Your Honor, say that it's --
18 in all candor that it's different.

19 THE COURT: Okay. Well, you just a minute ago said
20 it was different, but you really can't say it's different
21 because you haven't looked at it.

22 MR. SIMPKINS: That's correct.

23 THE COURT: All right.

24 MR. SIMPKINS: But I would say that it's -- I would
25 make the logical assumption that it's different because it's

1 the Florida statute, not the Georgia statute.

2 THE COURT: Oh, okay. Because it's Florida, not
3 Georgia.

4 MR. SIMPKINS: That's correct.

5 THE COURT: Okay. Has anybody for the government
6 read the Florida statute?

7 MS. SCHIEBER: If I may, Your Honor. I — it's been
8 a while since I've read in *In re: Hires*. My recollection of *In*
9 *re: Hires* is that it's actually an order on an application for
10 a second 2255. And so I think — and it's been a while — I
11 think the analysis is slightly different there in terms —
12 because they're looking at whether — and it's been a while.
13 But if I'm not mistaken, they were looking at whether or not he
14 had made charge sufficient to commit and make a second 2255.
15 And I think that puts it in a slightly different posture that
16 has some significance to our analysis here, but —

17 THE COURT: I thought the Court in — I thought the
18 Eleventh Circuit in *Hires* said that a conviction under Florida
19 law for aggravated assault is categorically a violent felony —

20 MS. SCHIEBER: I believe it —

21 THE COURT: — under the ACC elements clause because
22 it requires a threat to do violence against someone.

23 MS. SCHIEBER: I believe it may say that. I just
24 think it says that in the context of whether or not to allow
25 that particular defendant or appellant to — defendant in that

1 context — to make a second 2255. So I don't think they've
2 done — I don't want to say it's a wrong analysis. I just want
3 to say it's a short-circuited analysis. And what Mr. Simpkins
4 is —

5 THE COURT: Well, what I'm looking at is whether or
6 not there's any precedent out there in the Eleventh Circuit
7 that helps us determine whether aggravated assault under
8 Georgia law is a violent felony for purposes of career offender
9 enhancement.

10 MS. SCHIEBER: And may I speak to that —

11 THE COURT: It would seem to me that if the — if the
12 Eleventh Circuit has said in a case that a conviction under
13 Florida law is a violent felony for purposes of ACCA
14 enhancement, then that would at a minimum be persuasive
15 authority as to whether they would conclude that a conviction
16 under Georgia law is a violent felony, which would mean we
17 would need to look at the elements — essential elements under
18 Florida law for aggravated assault and see if they're similar
19 to the ones under Georgia law.

20 MS. SCHIEBER: May I tell you, sir —

21 THE COURT: Yes.

22 MS. SCHIEBER: — where that — where we disagree?
23 And I actually agree with Mr. Simpkins on that point.

24 THE COURT: Well, that's happened before. Y'all have
25 agreed with the — with the defendant on these cases before,

1 and the Court thinks both of you are wrong. But the Eleventh
2 Circuit will decide that. I'm really confused on this one, but
3 go ahead and explain to me --

4 MS. SCHIEBER: So one --

5 THE COURT: -- how if the Eleventh Circuit says -- if
6 the Eleventh Circuit were to -- what if there was a case in the
7 Eleventh Circuit where they said aggravated assault under
8 Georgia law is a violent felony for purposes of the Armed
9 Career Criminal Act. Would you then also agree with
10 Mr. Simpkins that, so what, that doesn't mean in this case?

11 MS. SCHIEBER: No.

12 THE COURT: Okay. So, if there was a -- if there was
13 a -- if there was an Eleventh Circuit opinion that said that
14 for purposes of the ACCA aggravated assault in Georgia is a
15 violent felony, you would agree that in this case a conviction
16 for aggravated assault in Georgia would be a violent felony for
17 purposes of career offender status.

18 MS. SCHIEBER: I believe I would, Your Honor, but --

19 THE COURT: So if the Eleventh Circuit has found that
20 aggravated assault in Florida is a violent felony for purposes
21 of ACCA enhancement, then why would you not look at whether the
22 essential elements under Florida law are the same as the
23 essential elements under Georgia law, and if they are the same,
24 that would lead one to conclude that aggravated assault under
25 Georgia law, just like under Florida law, is a violent felony

1 for career offender enhancement?

2 MS. SCHIEBER: And I can answer that question.

3 THE COURT: All right.

4 MS. SCHIEBER: So the problem with these cases and
5 the application of these definitions is that the courts have
6 said, "We don't -- we -- we want every state -- every defendant
7 who's been convicted in any state to be assessed under the same
8 standard." And that's why they set up these generic
9 definitions.

10 THE COURT: That's under the enumeration -- I mean,
11 y'all -- this is all going to --

12 MS. SCHIEBER: It's under both.

13 THE COURT: Well --

14 MS. SCHIEBER: Well, let -- may I just -- so --

15 THE COURT: Your argument is that the enumeration
16 clause is analyzed the same way as the elements clause.

17 MS. SCHIEBER: No, no. I see what your point is.

18 THE COURT: My point is this. Just let me make sure
19 it's absolutely clear, because I think it's -- I'm not saying
20 what the Eleventh Circuit is going to do or what the supreme
21 court would eventually do. But what I think is absolutely
22 clear is there's a difference between the enumeration clause
23 and the elements clause. Under the enumeration clause, they
24 have enumerated certain generic offenses that can qualify for
25 enhancement purposes. One of those that's the most litigated

1 is burglary.

2 MS. SCHIEBER: Yes.

3 THE COURT: And they have said, "How do we determine
4 what Congress meant by burglary since it may be different in
5 every state?" And they said, "We're going to look at the
6 generic definition of burglary, and for purposes of enhancement
7 burglary is going to mean the same thing in this statute in
8 every state, regardless." And then they compare the elements
9 to see whether or not -- whether or not in this particular case
10 based on whether or not it's a burglary for purposes of
11 enhancement.

12 But the elements clause, you're trying to determine
13 whether something is a violent felony. And you do that by -- I
14 think you do that by looking at the elements of the particular
15 offense for which the defendant has been convicted. And in
16 this particular case, aggravated assault is not an enumerated
17 -- doesn't fall under the enumeration clause in my book except
18 to the extent it's a violent felony. It's not separately
19 listed, as I understand it, like burglary is.

20 MS. SCHIEBER: If I may interrupt. We're -- we're
21 under career offender here. And so under 4B1.2(a)(2), crime of
22 violence is -- and I'll skip the first one -- but manslaughter,
23 kidnapping, aggravated assault. So in determining whether or
24 not Mr. Huling here is a career offender, we'll be looking at
25 both 4B1.2(a)(2) or 4B1.2(a)(1). But your point about the

1 elements is correct.

2 THE COURT: But -- so if we take out the enumeration
3 and we treat it as an elements clause case --

4 MS. SCHIEBER: Yes.

5 THE COURT: -- then do you not look at the elements
6 of this particular statute in Georgia?

7 MS. SCHIEBER: Yes, you do. And you are correct.

8 THE COURT: And you then determine whether -- after
9 looking at those elements, whether or not this is a violent
10 felony for purposes of enhancement.

11 MS. SCHIEBER: Yes. And in your point about
12 Florida --

13 THE COURT: And if in Florida the Eleventh Circuit
14 has already determined that the essential elements for
15 aggravated assault under Florida law meet the requirements for
16 violent felony under the Armed Career Criminal Act, and if
17 those elements are indistinguishable from the elements for
18 aggravated assault under Georgia law, then why would it not be
19 reasonable to conclude that the Eleventh Circuit would hold
20 that aggravated assault under the elements clause analysis and
21 under Georgia law is a violent felony?

22 MS. SCHIEBER: I think you're right. I think
23 that's --

24 THE COURT: Well, you disagree with Mr. Simpkins.
25 You just said a moment ago you agreed with him. He doesn't

1 agree with that. The reason he doesn't agree with it is
2 because — at this point — is because the Florida legislature
3 enacted this statute and the Georgia legislature enacted that
4 statute.

5 Now, I suspect between the time of this hearing and
6 the time of appeal he'll find some other differences when he —
7 when he has time to read the case, but —

8 MS. SCHIEBER: Your Honor, if I may —

9 THE COURT: So it seems to me that we ought — what
10 we ought to focus on, at least in part, are what the essential
11 elements of the Florida aggravated assault statute are and
12 whether for purposes of violent felony analysis they're any
13 different than the Georgia statute.

14 Now, the language is a little different. But as to
15 the issue of whether they're a violent felony, I've been unable
16 to see how that difference in language makes a difference.

17 And it sounds like nobody is really that prepared to
18 do that analysis for me this morning. I mean, this very issue
19 was presented in *Greer*. And in *Greer* — maybe this shows that
20 my orders are not read. But in *Greer* one of the charges
21 against Mr. Greer was attempted aggravated assault. And what I
22 concluded, which both the government and Mr. Simpkins' office
23 disagrees with, is that aggravated assault under Georgia law is
24 a violent felony.

25 MS. SCHIEBER: If I may, Your Honor —

1 THE COURT: And I did the analysis as to why,
2 including a citation to the *Hires* case.

3 MS. SCHIEBER: If I may, Your Honor --

4 THE COURT: Yes.

5 MS. SCHIEBER: -- Greer involved terroristic threats.

6 THE COURT: Well, it involved --

7 MS. SCHIEBER: We were just debating whether it was
8 terroristic --

9 THE COURT: Well, you're correct, partly. As you
10 will recall, the terroristic threat statute requires proof of a
11 -- I forgot how Georgia law phrases it -- but a threat
12 involving a violent felony. In other words, there has to be a
13 threat that there was -- that they were going to commit -- here
14 it is.

15 One of the convictions --

16 MS. SCHIEBER: May I ask what page --

17 THE COURT: One of the convictions -- I'm on page 19
18 of my order. One of the -- one of the convictions that was
19 relied on to qualify him as a armed career criminal was a
20 terroristic threat conviction that was based on his threat to
21 commit aggravated assault by simulating the use of a pistol.
22 So the terroristic threat charge -- which I understand the
23 Middle District U.S. Attorney's Office and the Northern
24 District U.S. Attorney's Office and maybe every U.S. Attorney's
25 Office in the entire world disagrees with this analysis. But

1 what I concluded is that you then needed to look at the
2 essential elements of the underlying offense that was the basis
3 of the terroristic threat charge; in other words, aggravated
4 assault. You couldn't look at what he did. But the Court said
5 its examination was restricted to the elements of the offense.

6 And so I thought you would look at he threatened to
7 commit the offense of aggravated assault. And then I set out
8 what those elements are and concluded that by being convicted
9 of that offense he must have committed the elements of
10 aggravated assault, threat to commit aggravated assault, and
11 therefore you needed to analyze whether those elements
12 supported a finding that that terroristic threat charge was a
13 violent felony under the Armed Career Criminal Act precedent.

14 And what I concluded was that certainly the threat to
15 commit an aggravated assault was a threat to commit a violent
16 injury to someone and therefore was a violent felony under the
17 Armed Career Criminal Act and did the analysis making that
18 determination in the order and cited to *Hires*. *Hires* is
19 actually more on point in this case than it was in *Greer*,
20 because in *Greer* you had the double step. You had the step
21 that it was a terroristic threat charge that was based on a
22 threat to commit aggravated assault. Here the question is
23 simpler. It's just whether a conviction for aggravated assault
24 under Georgia law is a violent felony for career offender
25 purposes.

1 MS. SCHIEBER: Your Honor --

2 THE COURT: In *Hires*, I just don't get why *Hires*
3 doesn't answer the question.

4 MS. SCHIEBER: Well, Your Honor, we -- we agree with
5 the result in this case in terms of where you're going with the
6 analysis on aggravated assault.

7 THE COURT: You just don't think you need to go
8 through the *Hires* opinion.

9 MS. SCHIEBER: Well, no, we don't. And --

10 THE COURT: Tell me what your -- tell me what your
11 analysis is.

12 MS. SCHIEBER: Well, Your Honor, number one, I think
13 we went under the enumerated clause.

14 THE COURT: You didn't even address the elements
15 clause.

16 MS. SCHIEBER: We are prepared to address the
17 elements clause, but I want to make my point that you don't
18 have to get to the elements clause. I think we went under the
19 enumerated offenses clause, but --

20 THE COURT: All right. Well, explain to me how you
21 went under the enumeration clause.

22 MS. SCHIEBER: Well, Your Honor, so --

23 THE COURT: You got it to come up with a generic
24 definition for aggravated assault.

25 MS. SCHIEBER: Right, which is where I was confused

1 earlier because I --

2 THE COURT: Did the Eleventh Circuit define a generic
3 definition for aggravated assault?

4 MS. SCHIEBER: Yes. And both Mr. Simpkins and I
5 agree on that definition, which is found at *United States v.*
6 *Palomino Garcia*, 606 F.3d 1317, and it's 2010 Eleventh Circuit
7 decision. And it says, "We hold that the generic offense of
8 aggravated assault" — and in this case it's under the 201.2
9 guidelines, but when you compare the language it's exactly the
10 same. "We hold that it involves a criminal assault accompanied
11 by the aggravated factors of either the intent to cause bodily
12 injury to the victim or the use of a deadly weapon."

13 And I'm sure Mr. Simpkins can make the argument for
14 himself and has in his objections that he says that the Georgia
15 aggravated assault statute's language under 16-5-21(a)(2) is
16 broader than that definition that I read to you, and we
17 disagree. We think that qualifies. So 16-5-21(a)(2), which I
18 know the Court has read because the Court read it back to us
19 earlier, provides that "A person commits the offense of
20 aggravated assault when he or she assaults with a deadly
21 weapon," which — so right there that language I just read you
22 matches up with *Palomino Garcia* precisely. But it adds "or
23 with any object, device, or instrument which, when used
24 offensively against a person, is likely to or actually does
25 result in serious bodily injury."

1 And Mr. Simpkins takes the position -- and I'm
2 speaking for him, and I'm sure he'll correct me if I'm wrong --
3 that that broadens the definition of a deadly weapon. We think
4 it qualifies the definition of a deadly weapon, so that
5 basically what it -- what 16-5-21(a) (2) does is it -- it
6 defines -- it references deadly weapons -- and those would be
7 which are deadly weapons per se under the law -- and objects
8 which are not per se deadly weapons but which when -- which
9 when satisfy these criteria become deadly weapons.

10 And so we think 16-5-21(a) (2) is actually just two
11 different ways of saying deadly weapon. And when -- when you
12 reach that analysis -- and we think a case that Mr. Simpkins
13 cited actually supports that, which is East -- *State v. Easter*,
14 and that's 297 Georgia 171. It's a Georgia Supreme Court case,
15 which would be the highest authority for the state and
16 therefore binding over any contrary appellate court decision.
17 And that was decided June of 2015.

18 And when you -- when you read it that way, which we
19 think is the correct way to read it, then Georgia aggravated
20 assault meets the *Palomino* definition under the elements clause
21 and, in our opinion, we're done.

22 MS. SPRITZER: I would --

23 THE COURT: What is the -- what is the generic
24 definition -- I mean, what you're -- what you're talking about
25 is the aspect of the crime that makes it aggravated. What is

1 the --

2 MS. SCHIEBER: Yes.

3 THE COURT: What is the generic definition of
4 assault?

5 MS. SCHIEBER: Well --

6 THE COURT: Under Georgia law, it's to put --
7 place -- to use that weapon in a manner that places someone in
8 reasonable apprehension that they are going to be subjected to
9 a violent injury. What is the generic definition of assault?

10 Yes, sir.

11 MR. HYDE: Your Honor, almost universally, I believe
12 in every jurisdiction in America, an assault is simply a
13 willful attempt to inflict an unjustified injury. Whether any
14 injury results or not is immaterial, but that is the definition
15 of an assault. An assault does not become aggravated until it
16 is inflicted or the assault is perpetrated --

17 THE COURT: Well, under Georgia law, doesn't it
18 require that the injury be a violent injury? Isn't that the
19 language --

20 MR. HYDE: We're talking about assault; is that
21 correct?

22 THE COURT: Yes, sir.

23 MR. HYDE: Simple assault.

24 THE COURT: Yes, sir.

25 MR. HYDE: Simple assault requires no injury at all.

1 THE COURT: I know. But placed them in
2 apprehension --

3 MR. HYDE: Yes, sir, that's correct.

4 THE COURT: -- of receiving --

5 MR. HYDE: That's correct.

6 THE COURT: -- a violent injury.

7 MR. HYDE: Correct again.

8 THE COURT: I couldn't sit there and say, "I've got
9 this pistol, and I'm going to just tap you on the knee with it.
10 It's unloaded. I'm just going to tap you on the knee with it."

11 If that was --

12 MR. HYDE: That would be unreasonable.

13 THE COURT: -- the charge, the jury would have to
14 find that that conduct placed you in reasonable apprehension of
15 receiving a violent injury.

16 MR. HYDE: It would be unreasonable under those
17 circumstances for someone to expect that they were going to be
18 violently injured. Correct.

19 THE COURT: All right. Well, then, it seems to me
20 that what Mr. Simpkins' argument may be is that Georgia law may
21 require that you be apprehensive of a violent injury, which
22 could make it a violent felony for purposes of career offender
23 enhancement. But the question would be whether the generic
24 definition everywhere of assault requires that the victim be in
25 apprehension of violent injury or just some injury, whether it

1 be violent or not.

2 MR. HYDE: Can anyone --

3 THE COURT: And that could -- that could determine
4 whether it is in fact a violent felony for purposes of career
5 offender status. In other words, are there some states where
6 you can commit an assault where you place someone in
7 apprehension of receiving an injury no matter how slight?

8 MR. HYDE: Is there any other way to injure someone,
9 other than accidentally, that is not violent? How can there be
10 a nonviolent injury inflicted on --

11 THE COURT: I don't know, but the Georgia
12 legislature -- I'm assuming they picked their words carefully,
13 and they have said violent injury, which I think they did in
14 order to not make every *de minimus* -- every threat of some type
15 of injury, no matter how *de minimus*, a crime. In other words,
16 they could have said violent injury because they wanted it to
17 be serious. They -- they didn't want, you know, I'm going to
18 flip you with my finger on the head. They didn't want that to
19 be an assault.

20 MR. HYDE: I agree, Your Honor. Every case --

21 THE COURT: They wanted you to be in fear of a
22 violent injury.

23 MR. HYDE: Every case has to stand on its own, on its
24 own merits.

25 THE COURT: Well, that would be the point if I were

1 Mr. Simpkins, that generic definition of aggravated assault
2 simply requires that someone be placed in the position through
3 a threat of being apprehensive about receiving some injury,
4 however slight. And if they use an object -- this would be the
5 question --

6 MS. SCHIEBER: Your Honor --

7 THE COURT: -- can you use an object which, when used
8 offensively, is likely to result in serious bodily injury, if
9 you use -- if you use an object, when used offensively, is
10 likely to actually result in serious bodily injury. And the
11 use of that -- that threat of using that object places someone
12 in fear or makes them apprehensive that they are going to
13 receive an injury, no matter how slight. Does that qualify as
14 a violent felony for career offender enhancement purposes?

15 In other words, you could -- you could have -- you
16 could have an object, like a Coke bottle maybe, that if you
17 used it offensively, it -- by hitting somebody on the head with
18 it, it could create a serious bodily injury. But let's say the
19 manner in which that person uses it suggests that he's not
20 going to hit him on the head with it but that he's going to
21 gently rub it up against his arm. Under Georgia law, that
22 would not be an aggravated assault because it would be
23 unreasonable to conclude that he put that person, that
24 victim -- made him apprehensive of receiving a violent injury.
25 And Georgia law requires that as an element.

1 MR. HYDE: It wouldn't be an aggravated assault. It
2 wouldn't even be a regular assault.

3 THE COURT: Well, under Georgia law. But if in
4 Montana the person just had to be apprehensive of receiving any
5 injury by the threat, no matter how slight, and it didn't have
6 to be a violent injury, then why couldn't they be — why
7 couldn't under Montana law, whatever state has that lower
8 standard, that be an assault?

9 I think what Mr. Simpkins is arguing is that's what
10 you got to find out. You find the lowest common denominator if
11 you're going under the enumerated clause, which is why I would
12 think — I'm a little surprised the government ignores the
13 elements clause.

14 MS. SCHIEBER: Well, we're not —

15 THE COURT: Because — because the fact of the
16 matter, if you go under the elements clause, then you look at
17 Georgia law and you look at the essential elements under
18 Georgia law. And under Georgia law, there is clearly an
19 element that you have to be apprehensive of a violent injury.
20 And if that is an element that has got to be proved for the
21 conviction, then how in the world can it not be a violent
22 felony for career offender status if the threat requires that
23 the victim be apprehensive of, quote, a violent injury? It
24 just seems absolutely clear — which may explain why
25 Mr. Simpkins, being the good lawyer that he is, wants to divert

1 us solely down to the enumeration clause analysis and hasn't
2 even read *Hires*, which seems to lock it up for the government
3 on the elements clause.

4 MS. SCHIEBER: Well, Your Honor, we're not
5 disregarding the elements clause. We think we can go under
6 either clause.

7 THE COURT: But you suggest that the enumeration
8 clause argument is stronger than the -- than the elements
9 clause argument.

10 MS. SCHIEBER: You know, I -- I would let you decide
11 which is the stronger argument. I think we went under both.
12 And I agree --

13 THE COURT: Mr. Simpkins, he needs to earn his
14 salary.

15 MR. SIMPKINS: I think I did already, Judge. Y'all
16 are doing a great job today.

17 THE COURT: Well, you -- well, luckily, you're not
18 paid on results. You haven't got the ruling yet.

19 Under the enumeration clause, what do you contend the
20 elements are for generic aggravated assault?

21 MR. SIMPKINS: I agree with the government that it's
22 the -- that there's a criminal assault with the intent to cause
23 bodily injury with a deadly weapon under *Palomino Garcia*. And
24 I think --

25 THE COURT: All right. You -- the government has to

1 prove, one, what?

2 MR. SIMPKINS: There was a criminal assault.

3 THE COURT: Criminal assault. And two?

4 MR. SIMPKINS: The intent -- there is an intent to
5 cause bodily injury.

6 THE COURT: To cause bodily injury.

7 MS. SCHIEBER: Or.

8 MR. SIMPKINS: Or. I'm sorry.

9 MS. SCHIEBER: Or the use of a deadly --

10 MR. SIMPKINS: Or the use of a deadly weapon.

11 THE COURT: Okay.

12 MR. SIMPKINS: I'm sorry if I said --

13 THE COURT: All right. Or use of deadly weapon.

14 Okay. So to do the analysis, you would say, to give
15 your client the benefit of the doubt, you would travel under
16 the intent to cause bodily injury prong or the use of deadly
17 weapon prong?

18 MR. SIMPKINS: I think both, Your Honor, and touched
19 on it about the reasonable apprehension and --

20 THE COURT: All right. So the next question becomes,
21 then, what is the generic definition of criminal assault.

22 Now, under Georgia law, it -- it means that you have
23 done one of these things and have placed the victim in
24 apprehension of receiving a violent injury.

25 MR. SIMPKINS: That's correct.

1 THE COURT: So you've done something that makes the
2 victim think they're about to receive a violent injury. Do you
3 contend that that is the generic definition of criminal
4 assault?

5 MR. SIMPKINS: I'm not contending that at all, no,
6 Your Honor.

7 THE COURT: You're contending that criminal assault,
8 the generic definition, would be placing someone in
9 apprehension of receiving some bodily injury —

10 MR. SIMPKINS: Yes.

11 THE COURT: — no matter how slight.

12 MR. SIMPKINS: Yes.

13 THE COURT: And you're saying that if that's all
14 that's got to be proved, then that does not meet the definition
15 of violent felony because you could have the defendant having
16 engaged in some conduct that makes someone apprehensive of
17 receiving some injury that could be *de minimus*, or minimal.

18 MR. SIMPKINS: That's correct. And it focuses
19 specifically on the intent of the actor, the intent of the
20 defendant; whereas the Georgia statute, it focuses only on the
21 reasonable apprehension of fear of the victim. And it doesn't
22 matter what the intent of the defendant is, as long as the
23 government were to prove that that act was voluntary and that
24 he knowingly committed the act. And I think that's where we
25 draw the line.

1 In Georgia, if a jury finds that I committed an act
2 voluntarily and knowingly, it doesn't — and I put somebody in
3 reasonable apprehension of violent injury, and if that person's
4 apprehension was reasonable — then I can be convicted of
5 assault. And it's based solely on their — I guess the
6 victim's perception of my actions, whether I intended —

7 THE COURT: Oh, so you're — you're saying the
8 opposite of what I'm saying, then. You're saying that it's
9 easier to be convicted of assault, aggravated assault, under
10 Georgia law than it is under the generic definition.

11 MR. SIMPKINS: Yes, because it — it focuses solely
12 on the subjective — I guess the subjective view of the victim
13 in the case and not my intent. I can be joking around —

14 THE COURT: Well, if that's the case, then — then
15 the enumerated clause generic offense analysis should not apply
16 in your view. In other words, you're saying you should not
17 look at the generic aggravated assault definition because
18 aggravated — because that may constitute a violent felony for
19 enhancement purposes but Georgia law does not rise to that
20 level.

21 MR. SIMPKINS: That's correct.

22 THE COURT: All right. So you're advocating that —
23 that the only way to get the enhancement here is an elements
24 clause analysis, and the elements here do not require proof
25 that would rise to the level of a violent felony.

1 MR. SIMPKINS: That's correct, because almost the
2 exact same reason, Your Honor, that --

3 THE COURT: All right. Well, you certainly should
4 have read *Hires* and explain to me how *Hires* is not inconsistent
5 with your argument.

6 I mean, what about that, Ms. Schieber, Schieber --
7 how --

8 MS. SCHIEBER: Schieber.

9 THE COURT: Schieber. Ms. Schieber.

10 MS. SCHIEBER: You know what? I'll answer to
11 whatever.

12 THE COURT: What about -- well, we just don't see you
13 often. I know who you are, but we usually depend on you to
14 make sure that, when we rule in Mr. Hyde's favor, that you're
15 affirming, get him affirmed.

16 MS. SCHIEBER: I try.

17 THE COURT: But when you're teaming up with the other
18 side on these appeals --

19 MS. SCHIEBER: Well, we oppose on this one.

20 THE COURT: I mean, it's difficult. The court of
21 appeals will have to find somebody to represent the judge.

22 But what about the case where it's an enumerated
23 clause case and he claims that the generic definition or the
24 generic -- the element, the essential elements for the generic
25 offense may constitute a violent felony for enhancement

1 purposes, but this particular statute that -- that says it's
2 the same as the enumerated offense actually has elements that
3 are different than the generic offense and that, if you look at
4 those elements, they do not constitute a violent felony. Then
5 do you have to do the essential element -- the elements clause
6 analysis, as opposed to the generic -- as opposed to the -- as
7 opposed to the enumerated clause analysis?

8 MS. SCHIEBER: A couple of thoughts there. First of
9 all, you can do it under either. And it doesn't -- it isn't an
10 and/or. It's just whichever you choose to analyze. And -- but
11 with respect to the enumerated clauses, the fact that the
12 elements might be different isn't the test. It's whether the
13 elements are broader than the generic. We don't believe that
14 the elements are broader than the generic. It's -- it's -- it
15 fits perfectly.

16 And the reason and the mistake I think that
17 Mr. Simpkins makes in his analysis is because he tries to parse
18 out the assault and keep it sort of separate from the
19 aggravated nature, and so -- and you can't do that. No
20 matter --

21 THE COURT: Why can't you do that?

22 MS. SCHIEBER: Because it's an aggravated assault,
23 and you have --

24 THE COURT: I know. But if you went -- if you went
25 to a jury, if -- if the Court were instructing the jury, they

1 would -- they would tell the jury -- the Court would tell the
2 jury that before you can convict this defendant you've got to
3 find, first of all, that he committed a criminal assault; and
4 second, that he either did so with the intent to cause bodily
5 injury to the person or that he committed that assault with the
6 use of a deadly weapon.

7 MS. SCHIEBER: Uh-huh.

8 THE COURT: And I charge you that criminal assault
9 means... isn't it important to know what that means?

10 MS. SCHIEBER: Yes.

11 THE COURT: And so under the generic definition, what
12 does it mean? I know what it means under Georgia law. Under
13 Georgia law, it means placing the victim in a situation where
14 they are apprehensive that they may immediately receive a
15 violent injury. That's the Georgia definition of simple
16 assault.

17 MS. SCHIEBER: Yes.

18 THE COURT: Is it the position of the government that
19 that is the generic definition also?

20 MS. SCHIEBER: Well, here's -- we didn't -- we didn't
21 break --

22 THE COURT: Some cases seem to suggest that an
23 assault is an attempted but failed battery, which may not
24 include circumstances that would involve immediately -- may not
25 include circumstances believing that you are immediately going

1 to be subjected to a violent injury. I mean, to me that's the
2 key here under the enumeration clause, is that Georgia clearly
3 has this element, I think, for simple assault, that you have to
4 be apprehensive of receiving an immediate violent injury.

5 Now, if the generic definition of assault does not
6 require you to be apprehensive of a immediate violent injury
7 but just apprehensive that you're going to receive some injury,
8 then Mr. Simpkins may have an argument that the generic
9 definition is different than the Georgia definition. Now,
10 whether that makes a difference, I don't know.

11 MS. SCHIEBER: Well, for one thing, the generic --
12 the Georgia definition is probably narrower, which actually
13 means it still fits. Broader wouldn't fit. But it's probably
14 narrow because it requires a violent injury.

15 And I do want to point out one thing about simple
16 assault in Georgia, which is that it has two components, an
17 attempt to commit a violent injury to the person of another or
18 a person commits an act which places another in reasonable
19 apprehension of immediately receiving a violent injury. And
20 Mr. Simpkins and the government agree again --

21 THE COURT: They don't have to prove both.

22 MS. SCHIEBER: What?

23 THE COURT: It's "or." They have to prove either one
24 of them.

25 MS. SCHIEBER: Either one, that's right, that's

1 right. And so we both agree that you're not required to charge
2 which one you're alleging in an aggravated assault. And so the
3 jury can come back with a conviction without actually even
4 having to tell you which one they found.

5 THE COURT: But for purposes of the enumerated clause
6 analysis, we've got to pick the elements that are most
7 beneficial to the defendant.

8 MS. SCHIEBER: Well, "beneficial" may not necessarily
9 be the right word, but -- but the point is the least offense.

10 THE COURT: That we have to look at it -- when you're
11 trying to determine whether it was -- it's a violent felony
12 that can enhance his sentence, you've got to look at the
13 elements that would've had to have been proven that would have
14 made it the most difficult to reach the conclusion that it's a
15 violent felony and nevertheless conclude, even under the most
16 basic element, he would have been -- he would have -- it was a
17 violent felony.

18 MS. SCHIEBER: And by "basic," what -- the language
19 in the court's "the least offense."

20 THE COURT: Right.

21 MS. SCHIEBER: You know, the least offense --

22 THE COURT: Wouldn't that under Georgia law be
23 paragraph 2 and not Paragraph 1?

24 MS. SCHIEBER: Say that again?

25 THE COURT: Wouldn't that mean -- in Georgia law you

1 can commit a simple assault by attempting to commit a violent
2 injury. Now, if you attempt to do that, then it seems like if
3 that's what you're -- if that were the only element, then it's
4 pretty easy to conclude, I think, that would be a violent
5 felony for purposes of the guidelines.

6 MS. SCHIEBER: I agree.

7 THE COURT: But the second one is commits an act
8 which places another in reasonable apprehension of immediately
9 receiving a violent injury. That seems to be a little less --

10 MS. SCHIEBER: Right.

11 THE COURT: -- lesser than No. 1 as far as being a
12 violent felony.

13 MS. SCHIEBER: Right.

14 THE COURT: So that's the one we've got to travel
15 under for our analysis of whether or not this is a violent
16 felony.

17 MS. SCHIEBER: I think so.

18 THE COURT: And if we're traveling under the elements
19 clause, the fact that the conduct had to be so significant that
20 the victim had to have reasonably apprehended that he was going
21 to be subjected or she was going to be subjected to an
22 immediate violent injury, then it seems to me, like the
23 Eleventh Circuit did in *Hires* -- that's pretty clear to me that
24 that is a threat of committing an act that places a person in a
25 position that they think they're going to suffer serious

1 physical harm --

2 MS. SCHIEBER: Right.

3 THE COURT: -- which is a violent felony.

4 MS. SCHIEBER: Right.

5 THE COURT: But I'm not -- I'm not understanding that
6 this Georgia definition is the same as the generic definition
7 of assault throughout the country. And I think what
8 Mr. Simpkins is saying is that the generic definition does not
9 include this violent injury component. And if that is true,
10 then he's got an argument at least that aggravated assault
11 under the enumerated clause is not a violent felony.

12 MS. SCHIEBER: Well -- and we disagree, and partly
13 because the language itself is violent injury. I mean, it's
14 very clear from the statute that it requires violent injury.

15 THE COURT: No, no. That's under the -- that's under
16 the elements clause. But all you've told me under the
17 enumeration clause, all I've heard so far, is that the supreme
18 court and the Eleventh Circuit has said that the generic
19 definition of aggravated assault is, quote, criminal assault
20 with the intent to cause bodily injury --

21 MS. SCHIEBER: Serious.

22 THE COURT: -- serious bodily injury or criminal
23 assault using a deadly weapon.

24 MS. SCHIEBER: Yes.

25 THE COURT: So it seems to me that the question then

1 becomes, as I said before, what is the generic definition of
2 criminal assault, not under Georgia law but under the generic
3 definition.

4 MS. SCHIEBER: Well, Your Honor --

5 THE COURT: Does it -- does it in some way allow a
6 conviction when you don't have the threat of a serious physical
7 injury?

8 MS. SCHIEBER: Well --

9 THE COURT: Does it?

10 MS. SCHIEBER: So let me just say, I don't believe we
11 have actually worked out the generic definition of simple
12 assault. We have -- we have kind of worked on the theory that
13 aggravated assault, you know, is the statute we need to be
14 following. And -- and it's interesting because we're -- these
15 cases -- we refer to them in the lingo as "nesting dolls," you
16 know, that you have an offense inside an offense inside an
17 offense and that it -- there haven't been a lot of decisions
18 out there that have done the dig-down deep into that next layer
19 of offense. So I'm not sure that there's a court out there
20 that has come up with a generic definition of simple assault.
21 So -- and I don't have a generic definition of simple assault
22 for you. I think Mel gave the best one. Mr. Hyde gave the
23 best.

24 THE COURT: Well, to do the analysis that the supreme
25 court says under the enumeration clause, don't you have to know

1 what the -- each essential element is of the generic offense?

2 MS. SCHIEBER: Well, you know, it's interesting
3 because in *Palomino Garcia*, when they define aggravated
4 assault, they don't also define assault. They look at how the
5 Arizona -- in that case -- court defined assault. So it's
6 interesting to me because, you know, when you said that, you
7 know, I had this moment where I'm thinking, "Well, you know,
8 why don't we have a generic definition of assault?"

9 What?

10 (A discussion was held off the record.)

11 MS. SCHIEBER: And she's right. And assault by
12 itself is never going to be a crime of violence, which is why
13 no one's looked at it to come up with a generic definition. I
14 think that's a good point. So --

15 THE COURT: See, I don't get that, because --

16 MS. SCHIEBER: But --

17 THE COURT: -- because aggravated assault, which is,
18 as you pointed out, under the guidelines, an enumerated violent
19 felony, I think is always defined -- maybe "always" is too
20 broad, but it's typically defined as a simple assault with
21 aggravating circumstances. They go to aggravated assault and
22 they say, You're guilty of this if you committed an assault and
23 these aggravated circumstances exist. Maybe you did it with a
24 weapon, a dangerous weapon, or you did it by placing someone --
25 or you did it in some other manner, or you did it to some law

1 enforcement officer, whatever. It's an aggravated
2 circumstance.

3 So it seems to me that it would be necessary, in a
4 criminal trial against somebody who's being accused of an
5 aggravated assault, that you've got to prove that he engaged in
6 conduct that meets the definition of simple assault plus the
7 aggravating circumstances.

8 MS. SCHIEBER: And Georgia requires that, yes.

9 THE COURT: So you would need to know -- the jury
10 would need to know what the elements of simple assault are.

11 MS. SCHIEBER: And I can tell you what Georgia's
12 elements of simple --

13 THE COURT: Well, I know you can do that. And that
14 applies if we're doing the elements clause analysis.

15 MS. SCHIEBER: Yes.

16 THE COURT: But if you're going to do the enumeration
17 clause analysis, you've got to decide what the generic -- what
18 the elements are for generic assault so that you can compare
19 those to this statute and decide which one's broader. And all
20 I'm hearing is that the generic definition or generic elements
21 of aggravated assault are criminal assault plus this intent to
22 cause serious bodily injury or use of a deadly weapon. But I'm
23 not hearing what you would have to prove under the generic
24 aggravated assault charge, what you would have to prove on the
25 first element, which is that he committed a criminal assault.

1 MS. SCHIEBER: Yeah. And I'll tell you --

2 THE COURT: I know what it is in Georgia, but I'm
3 trying to figure out is it the same in Georgia -- is that the
4 generic definition or --

5 MS. SCHIEBER: I do not know that there has been a
6 generic definition put out there.

7 THE COURT: How can there be enumerated clause
8 analysis if we don't know what the first essential element
9 means?

10 MS. SCHIEBER: Well, and I will tell you in *Palomino*
11 *Garcia* they did it. They just worked right from assault.

12 THE COURT: They just brushed right over it.

13 MS. SCHIEBER: Brushed right over it.

14 THE COURT: The court of appeals judges, they do that
15 sometimes.

16 MS. SCHIEBER: They have been known to. They like to
17 get to the easy part.

18 THE COURT: All right.

19 MS. SCHIEBER: But, Your Honor --

20 THE COURT: This is what I'm going to do --

21 MS. SCHIEBER: Your Honor, if you were inclined to
22 take a break, I would be happy to research that issue for a
23 little while --

24 THE COURT: No. You're going to be able to research
25 it when Mr. Simpkins appeals my order.

1 MS. SCHIEBER: All right.

2 THE COURT: I mean, I've already found in my *Greer*
3 order that aggravated assault under Georgia law, when you
4 analyze it under the elements clause, is a violent felony for
5 purposes of the Armed Career Criminal Act. I've already done
6 that exercise and made that conclusion. And I made it in part
7 based upon the Eleventh Circuit's analysis in the *Hires* case,
8 which I suggest be looked at before this goes up on appeal as
9 at least an argument that aggravated assault under the elements
10 clause is a violent felony. And so I'm not going to change my
11 mind on that.

12 With regard to whether it should also be a violent
13 felony under the enumeration clause, I don't think I need to
14 decide that because I'm going to overrule the objection based
15 on the elements clause.

16 Let me just make sure I'm clear on this. The
17 guideline for this enhancement that was made provides that
18 there can be an enhancement if his aggravated assault charges
19 were -- the charge was a violent felony --

20 MS. SCHIEBER: Actually, under the guidelines, to be
21 precise, they use the language "crime of violence" --

22 THE COURT: Crime of violence.

23 MS. SCHIEBER: -- although they're typically
24 considered interchangeable.

25 THE COURT: Okay. But under the guideline -- I want

1 to make sure that I'm clear. Under the guideline, the
2 enhancement and the finding that he's a career offender would
3 be proper if the aggravated assault conviction is a crime of
4 violence under either the elements clause or the enumeration
5 clause. Is that correct?

6 PROBATION OFFICER: That's correct.

7 THE COURT: Okay. Well, I'm finding that it's proper
8 under the elements clause. Do you agree that — that if it's
9 either, that it's proper, there's a proper enhancement?

10 MS. SCHIEBER: The government agrees.

11 THE COURT: Okay. You disagree with that,
12 Mr. Simpkins?

13 MR. SIMPKINS: No, Your Honor. I think — although I
14 disagree with your analysis, I think that it does not have to
15 be both under the elements clause and the enumerated crimes
16 clause.

17 THE COURT: I'm finding that it is under the elements
18 clause. And the Eleventh Circuit can analyze it under both.
19 And I may would find that it is also under the enumeration
20 clause. The only reason I hesitate is that I haven't convinced
21 myself of what the definition of criminal assault is
22 generically. I think that that could mean an attempt to commit
23 a battery that is not successful, which may mean that it could
24 be a threat to commit something that leads to any kind of
25 injury, no matter how slight. And if that's the case, then —

1 I don't know that that helps Mr. Simpkins' case. He seems to
2 be arguing the opposite.

3 You seem to be arguing — you're not arguing that you
4 could be in violation of the generic definition of aggravated
5 assault and that not be a crime of violence. That's not your
6 argument. Your argument is that you could be in violation of
7 this particular statute and it not be a crime of violence, even
8 though you could be — it could be crime of violence if it's
9 the generic offense.

10 MR. SIMPKINS: That's correct, Your Honor, because —
11 and as I've said before, it's — I'm focusing on the fact that
12 also under the elements clause —

13 THE COURT: Your argument is more of an elements
14 clause.

15 MR. SIMPKINS: Well, no, it's both, Judge. It's both
16 because, you know, the deadly weapon definition that we've
17 talked about and how Georgia's definition in the aggravated
18 assault statute has broadened it to where it encompasses
19 weapons or encompasses objects that don't necessarily meet
20 that —

21 THE COURT: But your essential argument is that you
22 could be in violation of the Georgia statute and that those
23 essential elements do not meet the definition of crime of
24 violence. That's your argument.

25 MR. SIMPKINS: Correct, for the elements clause,

1 absolutely.

2 THE COURT: But even under the enumeration clause,
3 you're not arguing that he could be found guilty of generic
4 assault and battery, and generic assault and battery does not
5 involve crime of violence. You're not making that argument,
6 which I would think would be a better argument for you, but --

7 MR. SIMPKINS: What do you mean by --

8 THE COURT: You're not arguing that for the
9 enumeration clause you look at the essential elements of the
10 generic offense of aggravated assault --

11 MR. SIMPKINS: That's correct.

12 THE COURT: -- and if the generic offense of
13 aggravated assault does not rise to the level of being a crime
14 of violence, then this can't be -- then this conviction, even
15 if under Georgia law it would be a crime of violence because it
16 has elements that involve violence, that he can't be assessed
17 an enhancement because under the generic definition it doesn't
18 rise to the level of crime of violence. You're not making that
19 argument today.

20 MR. SIMPKINS: No, I don't think --

21 THE COURT: But I --

22 MR. SIMPKINS: I don't think I can. I think that if
23 the -- if a crime is named --

24 THE COURT: Because you think -- you think if -- you
25 think if -- that if someone is convicted of the generic crime

1 of aggravated assault, that that does meet the definition of
2 crime of violence?

3 MR. SIMPKINS: Yes, under the enumeration clause,
4 because it says this is -- I mean, they could for all intents
5 and purposes say driving under the influence is a crime of
6 violence, and then we would have to analyze the elements of
7 driving under the influence to see if it met the generic
8 definition in Georgia. They can say -- under the enumeration
9 clause, they can say, This is what -- this crime we are saying
10 is a crime of violence. And then we look to the generic
11 definition of whatever crime it is they're saying is a crime of
12 violence and compare that to the particular state statute,
13 which here would be Georgia. I can't -- I don't think I could
14 argue that the legislature or in this case the sentencing
15 commission's naming of a crime, that that particular crime
16 doesn't meet the elements clause or the later definition of
17 crime of violence. I think --

18 THE COURT: No. Well, maybe I'm confused. But I
19 thought under the enumeration clause Congress has said or the
20 sentencing commission has said aggravated assault is a crime of
21 violence.

22 MR. SIMPKINS: That's correct. And --

23 THE COURT: You've got to then determine what -- what
24 aggravated assault means under the guideline.

25 MR. SIMPKINS: That's correct.

1 THE COURT: And what it means under the guideline is
2 not what Georgia says it means under its statute. This is
3 under the enumeration clause.

4 MR. SIMPKINS: That's absolutely correct.

5 THE COURT: You look at what the generic definition
6 of crime of aggravated assault. And if the essential elements
7 of the generic aggravated assault do not rise to the level of
8 being crime of violence, as that has been interpreted by the
9 federal courts, then this conviction cannot be a crime of
10 violence. Is that not correct?

11 MR. SIMPKINS: That's not correct, Your Honor. I
12 don't believe -- and I'll let the smarter people in front of me
13 tell me if I'm wrong --

14 THE COURT: What's the next step of that analysis
15 under the enumeration clause?

16 MR. SIMPKINS: Then you would compare that generic
17 definition to the elements of the Georgia statute and make a
18 determination as to whether or not the Georgia statute is
19 broader than that generic definition or -- or more restrictive.
20 And I would agree with the government that if it is more
21 restrictive, then it would still meet the definition of -- it
22 would still qualify as an aggravated assault. But if it's
23 broader, as what I am arguing, that it encompasses conduct that
24 is not encompassed by the generic definition of aggravated
25 assault, then the Georgia --

1 THE COURT: When you say "broader," you mean broader
2 in the sense that he could have been convicted of it and it not
3 involve elements that would suggest it is a crime of violence?
4 Is that what you mean when you say "broader"?

5 MR. SIMPKINS: What I'm -- yes. What I'm saying is
6 that Mr. Huling can be convicted -- or anybody, any defendant
7 in Georgia -- can be convicted of aggravated assault under the
8 Georgia statute but not be -- not then be convicted of the
9 generic definition of aggravated assault, so that it
10 encompasses that the Georgia statute --

11 THE COURT: Let's say crime of violence means a
12 threat of causing a serious physical injury. Are you saying
13 that to be convicted under the generic definition of aggravated
14 assault, anybody that's convicted under that generic definition
15 necessarily has threatened to cause a serious physical injury,
16 but under the Georgia statute you're saying that that is not
17 necessarily required?

18 MR. SIMPKINS: Yes. If I understand your --

19 MS. SCHIEBER: Could I interject, then?

20 THE COURT: Yes.

21 MS. SCHIEBER: I think -- I think that you're -- you
22 kind of got misdirected by trying to define crime of violence.
23 The guidelines have identified an enumerated offense clause,
24 what are the crimes of violence. And any of those, according
25 to the guidelines, are crimes of violence. What we -- what

1 you're looking at -- and we've said it exactly up to this
2 point -- we're looking at is the generic definitions of those
3 particularly identified crimes of violence to see if, as he
4 says, they match up with the particular state's conviction or
5 particular state's elements. And that's really what you're
6 doing. You're matching the Georgia elements to the generic
7 elements. They're all crimes of violence --

8 THE COURT: But the purpose of doing that matching,
9 is it not, is to make sure that the crime of violence component
10 exists?

11 MS. SCHIEBER: Not precisely, because under the
12 guideline -- and I think probation officers would know --

13 THE COURT: So it doesn't matter if it's more
14 restrictive or less restrictive?

15 MS. SCHIEBER: Oh, it matters. It matters.

16 THE COURT: Why? In what way does it matter? Does
17 it not matter as it relates to the circumstances that relate to
18 crime of violence?

19 MS. SCHIEBER: What the -- what the guidelines have
20 done is they've identified --

21 THE COURT: Well, I know the -- the guidelines have
22 done just what the Armed Career Criminal Act has done --

23 MS. SCHIEBER: Right.

24 THE COURT: -- where they have listed certain
25 offenses --

1 MS. SCHIEBER: Correct.

2 THE COURT: -- that are crimes of violence.

3 MS. SCHIEBER: But each states treats them
4 differently, as you know.

5 THE COURT: Right.

6 MS. SCHIEBER: And so what you want to do is
7 uniformly make sure that someone who's convicted of murder in
8 Georgia is being sentenced as a crime -- as a criminal who's
9 accused of committing a crime of violence using the same
10 criteria across the board, and that's why that --

11 THE COURT: Right. So -- so when you're doing the
12 comparison of the state crime --

13 MS. SCHIEBER: Yes.

14 THE COURT: -- to the generic crime, the baseline
15 that you're interested in are the elements that relate to
16 whether it's a crime of violence, because --

17 MS. SCHIEBER: Under the elements clause.

18 THE COURT: -- you want to make sure that when --
19 when the guidelines said aggravated assault is a crime of
20 violence, you want to make sure that the crime in Georgia has
21 at least at a minimum those same components relating to
22 violence as the -- as the generic offense, because that's what
23 you're trying to -- that's the bottom line of what you're
24 trying to get to here. The bottom line is whether or not this
25 is a, quote, crime of violence.

1 MS. SCHIEBER: Not -- yes and no. So let -- I feel
2 like I'm in law school again.

3 So the guidelines have said here are the things that
4 are crimes of violence. One are the ones that have these
5 particular elements. Two, we're identifying specific offenses
6 that are just by their nature crimes of violence.

7 And let me just read you what *Palomino Garcia* says at
8 the very first paragraph under their analysis.

9 It says, "It is well settled that a felony conviction
10 for enumerated offense qualifies as a crime of violence" -- and
11 again 201.2 there, but it's the same definition -- "whether or
12 not the use of physical force is an element of the crime."

13 So the sentencing commission has said these
14 offenses -- and I'll read them off -- murder, voluntary
15 manslaughter, kidnapping, aggravated assault, forceful sex, and
16 on -- are so -- let's just say, you know, egregious by their
17 nature that just by their nature they are crimes of violence.
18 So -- so you don't have to find physical injury. You don't
19 have to find anything. What you have to find is that they meet
20 the generic definition for how you commit those particular
21 offenses, because we're not going to have Georgia having to do
22 it one way and Montana having to do it another way.
23 Everybody's definition has to fall within the generic
24 definition.

25 So they are per se, if you will, crimes of violence

1 just by — by the category that they are. It's just a question
2 of whether the particular elements under each state's code fall
3 within the generic definition for those crimes.

4 THE COURT: So it's the government's position that if
5 they're — if the elements are somewhat different, even though
6 that element does not relate to violence?

7 MS. SCHIEBER: The elements, the generic — whatever
8 the generic definition —

9 THE COURT: When was *Palomino* decided?

10 MS. SCHIEBER: *Palomino Garcia*?

11 THE COURT: *Palomino*.

12 MS. SCHIEBER: It was decided in 2010, but it
13 continues to be followed for that definition because it is
14 still — you know, we don't think —

15 THE COURT: Did they decide it before or after the
16 opinion in which Scalia defined crime of violence to require
17 physical injury to somebody else?

18 MS. SCHIEBER: That was *Curtis Johnson*, which is also
19 cited in 2010. And I'm not sure if she talks about that,
20 but — but that — that again that goes to the type of force.
21 *Curtis Johnson* decided in 2010 — if that's the one you're
22 thinking of — talks about the nature of physical force has to
23 be violent force. But, again, that's not an issue here under
24 the enumerated offenses clauses because the sentencing
25 commission and the Congress under the ACCA has said certain

1 types of offenses are just crimes of violence by their very
2 nature. And burglary is the perfect example of that.

3 THE COURT: But they're -- I'm not going to belabor
4 this, but they are crimes of violence by their very nature --

5 MS. SCHIEBER: Yes.

6 THE COURT: -- because they include as elements
7 circumstances that relate to violence.

8 MS. SCHIEBER: Most likely.

9 THE COURT: That's what the sentencing commission is
10 doing when they list these offenses. They said, These offenses
11 involve violent conduct by their very nature, so we are going
12 to list them as enumerated offenses. And one of those is
13 aggravated assault. And the reason we're listing it is because
14 we believe the generic definition of aggravated assault
15 necessarily includes violent components. Otherwise, why are we
16 going to put it in here, if the whole purpose of putting it in
17 here is because it's a crime of violence that justifies this
18 enhancement. So we're going to put it in here, and it is crime
19 of violence.

20 And what the supreme court has said is you've got to
21 look at this person's offense and see whether the elements of
22 this offense match up with the generic definition. In other
23 words, is -- what you're trying to find out is, is this Georgia
24 offense the type of aggravated assault that the sentencing
25 commission was thinking about when they listed this as an

1 enumerated offense. And to do that you compare the elements of
2 the two -- of the two -- the generic elements to this
3 particular crime. And what I'm not understanding is why the
4 elements that are important in that analysis are those that
5 relate to the violent aspect of the crime, because that's the
6 only reason it's included in the guideline.

7 MS. SCHIEBER: That's the purpose that the elements
8 clause serves, is it gets to those crimes, any crime, that has
9 the violence. That's the elements clause. But the enumerated
10 offenses clauses is just like these crimes. We really want to
11 get people who commit these crimes.

12 And, yes, I think you could presume that the
13 sentencing commission and Congress under the ACC were looking
14 at crimes that they thought were inherently violent.

15 But let's talk about burglary. Burglary -- the
16 generic definition of burglary is entering a dwelling house or
17 business of another with intent to commit a crime therein. Not
18 a single thing about violence in there, and yet burglary is
19 still an enumerated offense under the ACCA. Now, they've taken
20 it out of the guidelines, and we can talk all day about whether
21 that was a good decision or not. But burglary -- the
22 sentencing commission finally said, You know what? Burglary
23 may not be one of these kinds of crimes we're trying to get at
24 when we enumerate them.

25 So they took burglary out. But the elements at the

1 time when they were using it, and under the ACCA the generic
2 definition doesn't have a thing to do with violence. So it is
3 — it is — under the enumerated clause, yes, most likely when
4 you look at the elements and the generic definition, you're
5 going to see some element of violence. And aggravated assault
6 does have it. But it doesn't necessarily have to, because all
7 you're doing is comparing the generic elements of that offense
8 to the offense of the state in which he was convicted.

9 THE COURT: All right. Well, if the generic
10 definition of aggravated assault is a criminal assault using a
11 deadly weapon — that's not the exact definition under Georgia
12 law. Mr. Simpkins is correct.

13 MS. SCHIEBER: Well, it doesn't have to be exact.

14 THE COURT: Well, that —

15 MS. SCHIEBER: It has to be — they have to — you
16 have to —

17 THE COURT: Well, this defendant could have been
18 found guilty of aggravated assault under Georgia law without
19 using a dangerous weapon, could he not?

20 MS. SCHIEBER: No. No. And that's — that's the
21 point I was getting at earlier, is that, you know, you cannot
22 artificially separate the definition of assault from the
23 offense of aggravated assault, because aggravated assault by
24 definition — and the one he was convicted of and the one we're
25 discussing — by definition requires a deadly weapon or any

1 object that, when used offensively against a person, likely
2 results in serious bodily injury. So that's what I was trying
3 to get earlier. You cannot -- you cannot artificially separate
4 the assault from the criminal assault or the aggravation --
5 aggravating factors in trying to decide whether aggravated
6 assault in fact is, A, a crime of violence under the elements
7 clause, or meets the definition under the generic definition.

8 And when you look at the definition of aggravated
9 assault in Georgia --

10 THE COURT: Well, let me --

11 MR. SIMPKINS: Judge --

12 THE COURT: Let me ask you this.

13 MS. SCHIEBER: Excuse me.

14 THE COURT: If --

15 MR. SIMPKINS: Your Honor --

16 THE COURT: If deadly weapon --

17 MS. SCHIEBER: Yes.

18 THE COURT: If deadly weapon under the Georgia
19 statute means the same thing as an object, device, or
20 instrument which, when used offensively, is likely to or
21 actually does result in serious bodily injury, why is there the
22 need to have the "or" --

23 MS. SCHIEBER: Because --

24 THE COURT: -- in the definition? Why -- why would
25 they not just under the Georgia statute have "with a deadly

1 weapon"?

2 MS. SCHIEBER: Because --

3 THE COURT: Is it not because they contemplated that
4 you should also -- could also be guilty of aggravated assault
5 if you used a nondeadly weapon --

6 MS. SCHIEBER: No.

7 THE COURT: -- but if you used it in a manner that
8 was likely to cause perhaps not death but serious bodily
9 injury?

10 MS. SCHIEBER: So --

11 THE COURT: Isn't that why the legislature has that
12 disjunctive definition?

13 MS. SCHIEBER: I think you're partially correct. But
14 deadly weapon there are -- under Georgia law, there are items
15 that are deadly weapons per se. And I know one is a gun when
16 used as -- a firearm when used as a firearm is a deadly weapon
17 per se. There are other objects which, as you just pointed
18 out, are not per se deadly weapons but which, because of the
19 manner in which they're used -- which is when used offensively
20 against a person -- is likely to actually -- does result in
21 serious bodily injury -- becomes a deadly weapon.

22 So, yes, it does not start out as a deadly weapon per
23 se, but it becomes a deadly weapon by virtue of the definition
24 of aggravated assault. And so when I say that the definition
25 of -- that it is a -- that it matches up, it's because that

1 extraneous language actually creates another sort of category
2 of deadly weapons. But they're all deadly weapons.

3 MR. SIMPKINS: Your Honor, I would love to address
4 that, but I really could use about a three-minute recess.

5 THE COURT: Okay.

6 MR. SIMPKINS: And I think my client might could use
7 the same three-minute recess.

8 THE COURT: All right. Well, I'm going to — we're
9 going to come back and proceed to the actual sentencing and let
10 him allocute. I'm going to overrule the objections to the
11 presentence report and —

12 MS. SCHIEBER: Your Honor —

13 THE COURT: Yes.

14 MS. SCHIEBER: — before you —

15 THE COURT: Is that your only objection, his career
16 offender status?

17 MR. SIMPKINS: That was my only objection, yes, Your
18 Honor.

19 MS. SCHIEBER: Before we move off of that, can I just
20 make a couple of little housekeeping notes?

21 THE COURT: Sure.

22 MS. SCHIEBER: First of all, we have his exhibit —
23 or excuse me, his — the aggravated assault conviction here. I
24 thought it would be —

25 THE COURT: That will be admitted as an exhibit.

1 MS. SCHIEBER: Thank you. And also I wanted the
2 Court to note that --

3 THE COURT: Exhibit 1.

4 (Government's Exhibit 1 was admitted into evidence.)

5 MS. SCHIEBER: -- that this precise issue is going to
6 be argued before the Eleventh Circuit on June 27th. It will be
7 argued under two contexts, one under the guidelines and one
8 under the ACCA, in back-to-back oral arguments next week.

9 THE COURT: Okay. Your case?

10 MS. SCHIEBER: No.

11 THE COURT: Okay.

12 MS. SCHIEBER: Northern District of Georgia. So
13 we'll be -- I don't know how long it'll take --

14 THE COURT: I'm skeptical of the Northern District of
15 Georgia.

16 MS. SCHIEBER: Well, I would like to point out that
17 the courts in the Northern District of Georgia are finding that
18 aggravated assault is a violent -- a crime of violence or a
19 violent felony.

20 THE COURT: Well, they are. They just haven't gotten
21 to that point on terroristic threats yet.

22 MS. SCHIEBER: And then I also wanted to let the
23 Court know just for complete effect Judge Treadwell had this
24 very issue come before him, and he kind of split the baby and
25 declined to rule one way or another. He just said it was not a

1 career offender issue, it was a 2K2.1 issue. So --

2 THE COURT: I'm not splitting the baby. I am finding
3 today that the aggravated assault under Georgia law is a crime
4 of violence for purposes of the guideline career offender
5 enhancement. I think the stronger argument is under the
6 elements clause. You may be right under the enumeration clause
7 also, but my ruling -- which is not going to be in writing,
8 it's -- here it is.

9 MS. SCHIEBER: And just to preserve our objection, I
10 would like to say that we believe that it -- we preserve our
11 position that it is a crime of violence under either clause.

12 THE COURT: No, I understand. And it may very well
13 be. I'm saying that I don't have enough in front of me today
14 to decide what the generic definition of aggravated assault is
15 for the enumeration clause analysis. But it's clear to me that
16 under the elements clause it would be.

17 Okay. We'll be in recess for 10 minutes.

18 (Brief break)

19 THE COURT: Be seated.

20 Let me just put on the record -- and maybe for future
21 reference -- the case of -- that I referred to earlier is *In*
22 *Re: Morris Vernell Hires*, at 825 F.3d 1297, decided by the
23 Eleventh Circuit on June 15th of 2016. And in that case the
24 Eleventh Circuit says the following: "Hires' conviction
25 for" -- this is analysis under the Armed Career Criminal Act.

1 "Hires' conviction for aggravated assault counts as a violent
2 felony. The Court has held that a Florida conviction for
3 aggravated assault is categorically a violent felony under the
4 ACCA's elements clause." And then the Court cites the *Turner*
5 *v. Warden Coleman FCI* case at 709 F.3d 1328, a 2013 case which
6 was abrogated on other grounds.

7 The Eleventh Circuit in this *Hires* case goes on to
8 say that "In *Turner* we reasoned that an aggravated assault
9 conviction will always include as an element the threatened use
10 of physical force against the person of another." And,
11 therefore, they concluded in this case -- which was a 2255
12 proceeding, that aggravated assault, at least under Florida
13 law, is a violent felony for purposes of the Armed Career
14 Criminal Statute.

15 Now, in *Turner* they describe the elements of Florida
16 law aggravated assault. And the Court of the Eleventh Circuit
17 in the *Turner* case says that "In Florida an aggravated assault"
18 in -- "an aggravated assault is an assault with a deadly weapon
19 without intent to kill or with an intent to commit a felony.
20 An assault is an intentional unlawful threat by word or act to
21 do violence to the person of another, coupled with an apparent
22 ability to do so, and doing some act which creates a
23 well-founded fear in such other person that such violence is
24 imminent."

25 That to me sounds pretty close to the -- it's not the

1 exact words under the Georgia statute, but to me it sounds
2 pretty close to what the Georgia statute requires. And if they
3 are -- for all practical purposes, if they do conclude the same
4 basic elements, I just don't see how the Eleventh Circuit could
5 say that aggravated assault under Florida law is a violent
6 felony for purposes of the elements clause of the Armed Career
7 Criminal Act and then about a year later -- that was a 2016
8 published opinion -- about a year later decide that aggravated
9 assault under Georgia law, which seems to conclude very similar
10 elements to the Florida statute, is not a crime of violence for
11 purposes of the guidelines.

12 I mean, I suspect that there's some people on the
13 court of appeals who probably don't think it should be, and so
14 we'll end up with one of these 250 *en banc* opinions that
15 everybody in the world wants to explain why they dissent or
16 concur. But I would suggest that somebody -- surely there's
17 some law clerk up there in the court of appeals that knows
18 about this *Hires* opinion that is going to attempt to
19 distinguish them in some way or say that it's nothing -- that
20 it's the same. I mean, I'm assuming the attempt to distinguish
21 it would be somebody will try to argue that the elements of
22 Florida aggravated assault are different than Georgia
23 aggravated assault. But insofar as the component of violence,
24 they seem to have the same essential elements to me.

25 MS. SCHIEBER: Well, Your Honor, if I --

1 THE COURT: Yes.

2 MS. SCHIEBER: Along the same lines, if I could
3 add -- let me find... there's a -- so *Hires*, as I -- and,
4 again, not having seen it, as I recall, is an order on the --
5 an application for success of 2255. And that may be one reason
6 that it is distinguished. But if Your Honor is relying --

7 THE COURT: Well, what they tried to do in -- what he
8 tried to do in *Hires* is he tried to appeal -- he tried to have
9 a successive petition based on *Johnson* under the residual
10 clause, but the court of appeals pointed out that this was not
11 a residual clause case --

12 MS. SCHIEBER: Well --

13 THE COURT: -- that this was an elements clause case.

14 MS. SCHIEBER: If I might add, then --

15 THE COURT: But they specifically went on to find in
16 the case the reason they denied his motion to file a successive
17 petition is because they found that there was no merit to it
18 because on the merits his sentence was properly enhanced.

19 MS. SCHIEBER: And I might add that in *In re*:
20 *Safeeullah* -- I'm pronouncing it, I don't know, right or
21 wrong -- it's S-a-f-e-e-u-l-l-a-h -- which was decided on June
22 9th of 2016, which was also in the same posture as *Hires*, which
23 is an application for second 2255 under the ACCA, they were
24 actually discussing Georgia aggravated assault, not Florida
25 aggravated assault. And in *Safeeullah* the Court said, "At the

1 time Safeeullah committed the offense, Georgia law provided" --

2 THE COURT REPORTER: Ms. Schieber, slow down.

3 MS. SCHIEBER: Thank you.

4 THE COURT REPORTER: "The offense Georgia law
5 provided"... pick up there.

6 MS. SCHIEBER: -- "provided that a person commits the
7 offense of aggravated assault when he assaults with intent to
8 murder, to rape, or to rob, or with a deadly weapon or any
9 object, device, or instrument which, when used offensively
10 against a person, is likely to or actually does result in
11 serious bodily injury," the same language we're discussing
12 here, and says, "Assault" -- and then it defines assault in
13 turn, which is the same definition we've been using.

14 Then it says, "The first prong of simple assault
15 statute, which" -- and it requires an attempt to commit a
16 violent injury -- "clearly includes as an element the attempted
17 use of physical force," cite in turn, and then adds -- and
18 we're saying, citing Florida law. And then it adds that --
19 then they refer to the facts of the case, which I'm not sure
20 they should, but says that "Accordingly, his 2004 aggravated
21 assault conviction involved using a deadly weapon to bring
22 about violent injury and qualify as a violent felony under the
23 elements clause of the ACCA."

24 So you -- there's actually an Eleventh Circuit
25 decision in the same posture as *Hires* that specifically

1 addresses --

2 THE COURT: Was that published?

3 MS. SCHIEBER: No.

4 THE COURT: Okay. This one is a published opinion,
5 so this is precedential -- the Florida one is published -- so
6 that's in the Federal Appendix?

7 MS. SCHIEBER: It is -- I don't even know if it's --
8 it's an order. I don't know if it even made Federal Appendix.
9 But it's Case No. 16-12-24 --

10 THE COURT: This one is actually in the Federal
11 Reporter, which means it's a -- has precedential value.
12 It's -- now, it looks like it's *per curiam*. And the judges
13 were Hull, Pryor, and Julie Carnes.

14 MS. SCHIEBER: William Pryor.

15 THE COURT: William Pryor.

16 So, you know, to me it's clear under the elements
17 clause. It may be clear under the enumerated clause, but I
18 haven't found any case under the enumerated clause.

19 But, in any event, the objection is overruled and the
20 Court finds that the conclusion of the career offender status
21 was appropriate under the guidelines.

22 Mr. Huling, before I pronounce sentence in your case,
23 you have the right to say anything you wish for me to consider.
24 You can speak for yourself, or you can have your attorney speak
25 on your behalf, or you can speak in combination with your

1 attorney, but it is your right. So if you have anything that
2 you wish to say, now would be the time.

3 MR. SIMPKINS: Your Honor, Mr. Huling has got a
4 statement that he prepared for the Court, and then --

5 THE COURT: Okay.

6 MR. SIMPKINS: -- I'm also going to speak briefly.

7 Judge, I did at some point in time -- we can do it
8 after the Court pronounces sentence -- just want to make a
9 record of specifically what I was trying to argue so that I'm
10 not precluded later.

11 THE COURT: Well, go ahead and make it now. You mean
12 on your objection?

13 MR. SIMPKINS: Yes, Your Honor.

14 THE COURT: All right. Go ahead and make it
15 uninterrupted.

16 MR. SIMPKINS: Your Honor --

17 THE COURT: Should have already made it in your
18 brief, but go ahead.

19 MR. SIMPKINS: I did, Your Honor. But essentially
20 what I was arguing is that under the enumeration clause of that
21 career offender definition, that Georgia aggravated assault
22 statute does not qualify because of, again, the definition of
23 deadly weapon is broader in Georgia and also that there is no
24 required intent at all. It's a -- Georgia aggravated
25 statute -- excuse me -- aggravated assault statute is a general

1 intent crime. And for that reason, I believe it's broader than
2 the generic definition of aggravated assault, and therefore it
3 doesn't apply.

4 As to the elements clause, again, it also goes to
5 that intent argument, specifically that the Georgia aggravated
6 assault statute does not require any intent on the part of the
7 defendant and merely only focuses on the subjective intent of
8 the victim and that there has to be more than just mere
9 reckless conduct under *Johnson*. There has to be some kind of
10 intentional volitional act which is not required under the
11 Georgia statute. And those would be the things that I would be
12 arguing. I just wanted to make sure that those were noted for
13 the record.

14 THE COURT: Okay. Well, so under the generic
15 definition, it requires intent to cause serious bodily injury
16 or the use of a deadly weapon. And your contention is that
17 under Georgia statute you can be convicted if you commit an act
18 which places another in reasonable apprehension of immediately
19 receiving a violent injury even if that act is not done with
20 the intent to cause serious bodily injury or using a deadly
21 weapon.

22 MR. SIMPKINS: That's correct.

23 THE COURT: I think that's a stronger argument, but
24 it only applies under the enumeration clause. It doesn't apply
25 to the evidence clause.

1 MR. SIMPKINS: That's correct.

2 THE COURT: Your objection is noted and preserved.

3 And now you want to participate in your client's
4 allocution or let him allocute?

5 MR. SIMPKINS: Yes, Your Honor. He's going to read a
6 statement to the Court.

7 THE DEFENDANT: First, I would like to apologize to
8 the victims of Wells Fargo. I'm sorry for the harm I caused
9 you all. I never meant to hurt anyone. There's not a day that
10 goes by that I don't regret what I did. So I hope you can find
11 it in your heart to forgive me.

12 I also want to apologize to my family for the shame
13 and embarrassment I have caused on them. I hope y'all can
14 forgive me as well for my stupidity. I do understand the
15 severity of this crime. I wish I could turn back the hands of
16 time, but I can't. I can only learn from my mistakes.

17 THE COURT: All right. Thank you, sir.

18 Mr. Simpkins?

19 MR. SIMPKINS: Your Honor, I wanted to point out to
20 the Court that Mr. Huling does have family here today. His
21 fiancée, as well as his grandfather and his father, are here to
22 support him. And I've submitted letters from various members
23 of his family in my sentencing memorandum.

24 Judge, my — my request is that the Court sentence
25 Mr. Huling either below the sentencing guideline range or at

1 the bottom of the sentencing guideline range. As the Court can
2 see, Mr. Huling's life was one tragedy after another tragedy.
3 And a lot of those were dealing, you know, with the death of
4 children. And I -- I have never and I hope I never have to
5 experience that myself. But one of my paralegals explained to
6 me that it's a different kind of grief when you lose a child,
7 because when you lose a parent or a grandparent you are able to
8 reflect on the good life that you lived with them and those
9 memories and -- and you're losing something that you already
10 had. And it can be harder when you lose a child, because what
11 you're grieving is not what you already had but the things that
12 will never happen.

13 And I'm not telling the Court that to justify
14 Mr. Huling's actions. I think a lot of that -- most of his
15 actions were caused by the fact that he was grieving the loss
16 of his children and he turned to alcohol and drugs and that
17 contributed to his poor decision-making throughout his life.
18 And I think his -- one of the letters told the Court that after
19 that it seemed that Curtis changed.

20 Mr. Huling's not a young man anymore, and I think he
21 would admit that to the Court. I think this time that he's had
22 since this has happened -- I know I've spent time talking with
23 him about it. He wants to make a change, and he hopes that he
24 can get past this. And he's hoping that, regardless of whether
25 we won on this objection or not, he was going to have a

1 significant amount of time in prison to contemplate this and
2 move on. But he's hoping that he can get that help that he's
3 needed in the Bureau of Prisons, not just for his substance
4 abuse issues but also to kind of deal with that grief and that
5 tragedy that he's experienced about his life.

6 I don't think a sentence at the top of the guidelines
7 or even in the middle of the guidelines really achieves that
8 purpose. I think a sentence towards the bottom of the
9 guidelines allows him to receive help. It still is more than
10 sufficient punishment for robbing a bank, and I think that that
11 would be appropriate in this case.

12 THE COURT: All right. Having considered the
13 presentence report that was prepared following the defendant's
14 guilty plea, the Court accepts the plea in this case and
15 adjudicates you guilty of Count 1 of the indictment.

16 The Court has determined that the advisory sentencing
17 range is 151 to 188 months, considering an offense level of 29
18 and a criminal history category of VI as a career offender. In
19 imposing sentence in this case, the Court has considered the
20 advisory sentencing range and the sentencing factors found at
21 18 U.S.C., Section 3553(a), and has made an individualized
22 assessment based on the facts presented.

23 The court commits you to the Bureau of Prisons for a
24 period of 168 months. This sentence shall be served
25 consecutive to any state sentences which may be imposed in

1 Muscogee County, Georgia, Superior Court, Case
2 No. SU-16-CR-905.

3 Since the sentence ordered by the Court is within an
4 advisory guideline range that is greater than 24 months, the
5 Court is required to state the reasons for the sentence. The
6 Court imposed a sentence of 168 months based on the nature of
7 the instant offense and your substantial criminal history.

8 The Court orders you to immediately make restitution
9 in the amount of \$80 to the victim through the U.S. District
10 Court Clerk's Office. The Court also imposes a mandatory
11 assessment in the amount of \$100 but waives the imposition of a
12 fine and any alternative sanctions based on your financial
13 condition. Financial penalties shall be paid in accordance
14 with the Court's standing order 2017-01.

15 The prison term is to be followed by a period of
16 supervised release of three years. Supervised release shall
17 include the mandatory, standard, and special conditions as
18 noted in the presentence report and the Court's standing order
19 2017-01.

20 The Court advises you that you do have the right to
21 appeal the sentence in this case and that you have not waived
22 that right. Should you decide to appeal your sentence, you
23 must file a notice of appeal or request the clerk of court to
24 file a notice of appeal on your behalf within 14 days of
25 judgment being filed in your case. If you're unable to afford

1 the cost of the appeal, you have the right to ask the Court to
2 waive the normal cost and/or to appoint counsel to represent
3 you.

4 Now that the findings of the Court have been made and
5 the sentence imposed, are there any objections to the sentence
6 as to the findings of fact and conclusions of law other than
7 those already stated for the record?

8 By the defendant, Mr. Simpkins?

9 MR. SIMPKINS: No, Your Honor. And I just wanted to
10 be clear about one thing, and I was just double checking. When
11 the Court referenced the conditions of supervision in this
12 case, I just want it to be clear on the record that it's the
13 conditions outlined in the final presentence report in Document
14 38. I believe in the draft presentence report there were some
15 additional conditions that were included in there by mistake
16 that were later corrected.

17 THE COURT: It is — the sentence includes the
18 conditions that are included in the final presentence report,
19 yes.

20 MR. SIMPKINS: Okay. Then other than that, Your
21 Honor, I don't have any objections than those I've already
22 made.

23 THE COURT: By the government?

24 MR. HYDE: No, Your Honor.

25 THE COURT: And just so we'll make sure the record is

1 clear, the government has presented all the exhibits it wants
2 to present in support of the career offender determination;
3 correct?

4 MS. SCHIEBER: Yes, Your Honor.

5 THE COURT: And just so the record will be clear,
6 those are the only items that the Court looked at. The Court
7 did not look at any underlying conduct in making its ruling.
8 And the Court, I think, has thoroughly explained its findings
9 with regard to that particular objection and why it is included
10 that the defendant should be treated under the guidelines as a
11 career offender.

12 Okay. We are adjourned.

13 (Proceedings concluded at 12:13 p.m.)

14 CERTIFICATE OF REPORTER

15 I, Betsy J. Peterson, Official Court Reporter of
16 the United States District Court, in and for the Middle
17 District of the State of Georgia, Columbus Division, a
18 Registered Professional Reporter, do hereby CERTIFY that the
19 foregoing proceedings were reported by me in stenographic
20 shorthand and were thereafter transcribed under my direction
21 into typewriting; that the foregoing is a full, complete, and
22 true record of said proceedings.

23 This 15th day of August, 2017.

24 s/Betsy J. Peterson
25 Betsy J. Peterson, CRR, RPR, CCR
Federal Official Court Reporter

APPENDIX C

United States District Court for the Middle District of Georgia, Columbus Division
Criminal Case No. 4:16-CR-00025

District Court's Final Judgment in a Criminal Case, Document No. 41

AO 245B

(Rev. 11/16) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Middle District of Georgia

UNITED STATES OF AMERICA

v.

CURTIS D. HULING

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:16-CR-00025-001

USM Number: 99867-020

MICHAEL N SIMPKINS

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

| <u>Title & Section</u> | <u>Nature of Offense</u> | <u>Offense Ended</u> | <u>Count</u> |
|----------------------------|--------------------------|----------------------|--------------|
| 18 U.S.C. § 2113(a) | Bank Robbery | 7/26/2016 | 1 |

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

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.

6/21/2017

Date of Imposition of Judgment

UNITED STATES DISTRICT JUDGE

s/ Clay D. Land

Signature of Judge

CLAY D. LAND, CHIEF U.S. DISTRICT JUDGE

Name and Title of Judge

06/21/2017

Date

DEFENDANT: CURTIS D. HULING
CASE NUMBER: 4:16-CR-00025-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 168 months (TO BE SERVED CONSECUTIVELY TO ANY STATE SENTENCE WHICH MAY BE IMPOSED IN MUSCOGEE COUNTY, GEORGIA SUPERIOR COURT CASE NUMBER SU16CR905)

- ☐ The court makes the following recommendations to the Bureau of Prisons:
- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district:
- ☐ at _____ ☐ a.m. ☐ p.m. on _____.
- ☐ as notified by the United States Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before 2 p.m. on _____.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: CURTIS D. HULING
CASE NUMBER: 4:16-CR-00025-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 3 years.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must 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 above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
6. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

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

DEFENDANT: CURTIS D. HULING
CASE NUMBER: 4:16-CR-00025-001

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at the www.uscourts.gov.

Defendant's Signature _____

Date _____

AO 245B (Rev. 11/16) Judgment in a Criminal Case
Sheet 3D — Supervised Release

Judgment—Page 5 of 7

DEFENDANT: CURTIS D. HULING
CASE NUMBER: 4:16-CR-00025-001

SPECIAL CONDITIONS OF SUPERVISION

You shall submit your person, property, house, residence, vehicle, papers, computers (as defined by 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. The Defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition.

DEFENDANT: CURTIS D. HULING
CASE NUMBER: 4:16-CR-00025-001

CRIMINAL MONETARY PENALTIES

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

| | <u>Assessment</u> | <u>JVTA Assessment*</u> | <u>Fine</u> | <u>Restitution</u> |
|---------------|-------------------|-----------------------------|-------------|--------------------|
| TOTALS | \$100.00 | | WAIVED | \$80.00 |

- ☐ The determination of restitution is deferred until *An Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.
- ☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

| <u>Name of Payee</u> | <u>Total Loss*</u> | <u>Restitution Ordered</u> | <u>Priority or Percentage</u> |
|--|--------------------|----------------------------|-------------------------------|
| WELLS FARGO BANK 5590 MILGEN RD COLUMBUS, GA 31907 | \$ 80.00 | \$ 80.00 | |

TOTALS \$ 80.00 \$ 80.00

- ☐ Restitution amount ordered pursuant to plea agreement \$
- ☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
- | | | |
|---|-------------------------------|--|
| <input type="checkbox"/> the interest requirement is waived for the | <input type="checkbox"/> fine | <input type="checkbox"/> restitution |
| <input type="checkbox"/> the interest requirement for the | <input type="checkbox"/> fine | <input type="checkbox"/> restitution is modified as follows: |

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22

** 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.

DEFENDANT: CURTIS D. HULING
CASE NUMBER: 4:16-CR-00025-001

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 \$ _____ due immediately, balance due
- ☐ not later than _____, or
- ☐ in accordance ☐ C, ☐ D ☐ E, or ☐ F below; or
- B** ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☒ F below); or
- C** ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D** ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E** ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F** ☒ Special instructions regarding the payment of criminal monetary penalties:

Any criminal monetary penalty ordered by the court shall be due and payable in full immediately. Present and future Assets are subject to enforcement and may be included in the treasury offset program allowing qualified federal benefits to be applied to the balance of criminal monetary penalties.

Payment during the term of supervised release will commence within 60 days after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time. (fine/restitution) payment shall be due during the period of imprisonment at the rate of not less than \$25 per quarter and pursuant to the bureau of prisons' financial responsibility program. The value of any future assets may be applied to offset the balance of criminal monetary penalties. The defendant may be included in the treasury offset program, allowing qualified benefits to be applied to offset the balance of any criminal monetary penalties.

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.

- ☐ Joint and Several

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

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

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.