

No.

**In the
Supreme Court of the United States**

ISHMAEL DOUGLAS,
Petitioner,

v.

UNITED STATE OF AMERICA
Respondent,

**On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the First Circuit**

**APPENDIX FOR
PETITION FOR CERTIORARI**

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- A. Decision of the First Circuit in *United States v. Douglas*, 907 F.3d 1 (1st Cir. 2018) APP.P.A1
- B. Decision of the United States District Court for the District of Maine in *United States v. Douglas*, 179 F. Supp. 3d 141 (D. Me. 2016).....APP.P.B5

907 F.3d 1

United States Court of Appeals, First Circuit.

UNITED STATES, Appellee,

v.

Ishmael DOUGLAS, Defendant, Appellant.

No. 18-1129

October 12, 2018

Synopsis

Background: Following denial, in the United States District Court for the District of Maine, Jon D. Levy, J., 179 F.Supp.3d 141, of his motion to dismiss, defendant entered conditional plea of guilty to charges of conspiracy to commit a Hobbs Act robbery and of using, carrying, or brandishing a firearm in relation to a crime of violence. Defendant appealed denial of his motion to dismiss.

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

[1] district court would not consider government's purported concession that residual clause of statute prohibiting using, carrying, or brandishing a firearm in relation to a crime of violence involves risk-based analysis of ordinary case of a predicate offense;

[2] government did not waive its argument that case-specific approach rather than categorical approach was appropriate;

[3] case-specific approach rather than categorical approach was appropriate for determining whether offense constituted crime of violence under residual clause of statute prohibiting using, carrying, or brandishing a firearm in relation to a crime of violence; and

[4] under case-specific approach, defendant's conspiracy to commit Hobbs Act robbery constituted crime of violence under residual clause of statute prohibiting using, carrying, or brandishing a firearm in relation to a crime of violence.

Affirmed.

West Headnotes (19)

[1] **Criminal Law**

⚙ Review De Novo

Court of Appeals reviews challenges to constitutionality of federal statutes de novo.

Cases that cite this headnote

[2] **Criminal Law**

⚙ Scope of Inquiry

District court would not consider government's purported concession that determining whether offense constitutes crime of violence under residual clause of statute prohibiting using, carrying, or brandishing a firearm in relation to a crime of violence involves risk-based analysis of the ordinary case of a predicate offense, for purposes of determining whether government waived its argument that the statute allows for case-specific, real-world approach rather than a categorical approach; issue was recurrent, determination on the substantive issues would provide guidance to district courts in unsettled area of law, it would be "unseemly" to hold government to its earlier position when intervening Supreme Court case substantially changed the area of law, and the proper approach to determining whether offense constitutes crime of violence was technical issue. 18 U.S.C.A. § 924(c)(3)(B).

1 Cases that cite this headnote

[3] **Criminal Law**

⚙ Scope of Inquiry

A concession by either party in a criminal case as to a legal conclusion is not binding on an appellate court.

Cases that cite this headnote

[4] **Criminal Law**

⚙ Scope of Inquiry

When determining whether a court should address an earlier concession by a party, three pertinent considerations are: (1) whether the issue is recurrent so that decision would give guidance to the district courts; (2) whether it would be unseemly to accept, even arguendo, a mistaken legal proposition and reason from it to decide the case; and (3) whether the issues are technical and complex and not explored carefully in existing decisions so that adversary briefing would be critical.

Cases that cite this headnote

[5] Estoppel

⚡ Nature and elements of waiver

Waiver is usually treated as an intentional, and therefore permanent, abandonment of a position.

Cases that cite this headnote

[6] Estoppel

⚡ Nature and elements of waiver

Waiver doctrine can be applied against any party.

Cases that cite this headnote

[7] Criminal Law

⚡ Presentation of questions in general

Court of Appeals has discretion to overlook waiver by the government in a criminal case when circumstances justify doing so.

Cases that cite this headnote

[8] Criminal Law

⚡ Criminal liability

Government did not waive its argument, on appeal, that case-specific, rather than categorical approach was appropriate for determining whether Hobbs Act robbery constituted crime of violence under statute prohibiting using, carrying, or brandishing a firearm in relation to a crime of violence, notwithstanding its acknowledgement of the categorical approach before the district court;

government did not intentionally abandon the argument and government was not seeking proverbial second bite at the apple due to lack of due diligence or any gamesmanship before the district court, but was rather forthright about its changed position and the reasons underlying the change. 18 U.S.C.A. §§ 924(c)(3)(B), 1951(a).

1 Cases that cite this headnote

[9] Criminal Law

⚡ Reply briefs

Arguments developed for the first time in a reply brief are waived.

Cases that cite this headnote

[10] Weapons

⚡ Crimes of violence

Case-specific approach rather than categorical approach for determining whether an offense constitutes crime of violence under residual clause of statute prohibiting using, carrying, or brandishing a firearm in relation to a crime of violence is appropriate; text of statute could reasonably be construed as allowing case-specific approach, because statute required considerations of a contemporaneous predicate offense rather than a prior conviction, the finding of fact would be made by a jury thus raising no Sixth Amendment right-to-trial concerns, and, if court were to take a categorical approach, there could be constitutional problems of vagueness. U.S. Const. Amend. 6; 18 U.S.C.A. § 924(c)(3)(B).

2 Cases that cite this headnote

[11] Courts

⚡ Number of judges concurring in opinion, and opinion by divided court

Under law of the circuit rule, Court of Appeals is bound by a prior panel decision, absent any intervening authority.

Cases that cite this headnote

[12] Statutes

⚙️ Plain Language; Plain, Ordinary, or Common Meaning

When determining the meaning of a statutory provision that is not defined in the statute, Court of Appeals looks first to its language, giving the words used their ordinary meaning.

Cases that cite this headnote

[13] Courts

⚙️ Number of judges concurring in opinion, and opinion by divided court

When a fragmented Supreme Court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.

Cases that cite this headnote

[14] Constitutional Law

⚙️ Avoidance of doubt

“Constitutional avoidance” is an interpretive tool counseling that ambiguous statutory language be construed to avoid serious constitutional doubts.

Cases that cite this headnote

[15] Constitutional Law

⚙️ Avoidance of constitutional questions

Under constitutional avoidance principle, the elementary rule is that every reasonable construction of a statute must be resorted to in order to save a statute from unconstitutionality.

Cases that cite this headnote

[16] Constitutional Law

⚙️ Avoidance of constitutional questions

Canon of constitutional avoidance comes into play only when, after the application of

ordinary textual analysis, a statute is found to be susceptible of more than one construction.

Cases that cite this headnote

[17] Constitutional Law

⚙️ Avoidance of constitutional questions

In applying canon of constitutional avoidance when interpreting a statute, the chosen interpretation must be plausible.

Cases that cite this headnote

[18] Weapons

⚙️ Crimes of violence

Under case-specific approach, defendant's conspiracy to commit Hobbs Act robbery constituted crime of violence under residual clause of statute prohibiting using, carrying, or brandishing a firearm in relation to a crime of violence; three of the conspirators, including defendant, used substantial violence in course of the robbery in that one or more conspirator dragged victim by the head through a hallway, conspirators brandished firearms, forced several victims around the house and outside with guns pressed against their heads, threatened to kill a victim multiple times, and beat all three victims with a crowbar, bloodying at least one, and the conspirators committed the violence in furtherance of the conspiracy's goals, namely to steal Oxycodone and proceeds of drug dealing. 18 U.S.C.A. §§ 924(c)(3)(B), 1951(a).

1 Cases that cite this headnote

[19] Weapons

⚙️ Crimes of violence

In determining whether a conspiracy constitutes a crime of violence for purposes of residual clause of statute prohibiting using, carrying, or brandishing a firearm in relation to a crime of violence, federal court does not determine the “substantial risk” of violence of a conspiracy by the conspiracy's outcome; many conspiracies may pose a “substantial

risk” of violence where little or no violence actually occurs. 18 U.S.C.A. § 924(c)(3)(B).

Cases that cite this headnote

West Codenotes

Recognized as Unconstitutional

18 U.S.C.A. § 924(e)(2)(B)(ii)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE [Hon. Jon D. Levy, U.S. District Judge]

Attorneys and Law Firms

J. Hilary Billings, Portland, ME, on brief for appellant.

Benjamin M. Block, Assistant United States Attorney, and Halsey B. Frank, United States Attorney, on brief for appellee.

Before Lynch, Stahl, and Thompson, Circuit Judges.

Opinion

LYNCH, Circuit Judge.

This direct appeal after entry of a guilty plea raises important questions under federal criminal law, particularly whether it is appropriate to use the categorical approach in determining what is a “crime of violence” under 18 U.S.C. § 924(c)(3)(b).

Ishmael Douglas entered a conditional plea of guilty to charges of conspiracy to commit a Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a), and of using, carrying, or brandishing a firearm in relation to a “crime of violence,” in violation of 18 U.S.C. § 924(c)(1). Douglas now appeals the district court's denial of his motion, before the plea, to dismiss a portion of the latter charge, on the ground that the residual clause at 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague under Johnson v. United States, — U.S. —, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), and Sessions v. Dimaya, — U.S. —, 138 S.Ct. 1204, 200 L.Ed.2d 549 (2018). See United States v. Williams, 179 F.Supp.3d 141 (D. Me. 2016). The district court did not reach this issue in denying the motion. Id.

After de novo review, we conclude that § 924(c)(3)(B) is not, as Douglas argues, void for vagueness. That is because the statute reasonably allows for a case-specific approach, considering real-world conduct, rather than a categorical approach, and because Douglas's conspiracy to commit a Hobbs Act robbery qualifies as a “crime of violence.” We largely agree with the reasoning of the Second Circuit in a similar case, United States v. Barrett, 903 F.3d 166 (2d Cir. 2018), save for one point, and with the result and much of the reasoning in Ovalles v. United States, No. 17-10172, 905 F.3d 1231, 2018 WL 4830079 (11th Cir. Oct. 4, 2018) (en banc). We affirm.

I. Background

A. Facts

We describe the background facts of the underlying offense, accepted by both parties,¹ because they are relevant to a case-specific, real-world analysis of a “crime of violence” under § 924(c)(3)(b).

In August 2014, Douglas, along with Kourtney Williams, Victor Lara, Jr., and Heidi Hutchinson, conspired to commit a home invasion robbery in Minot, Maine. Williams, Lara, and Hutchinson began planning the robbery on July 26; Douglas joined the conspiracy on either August 1 or August 2.² The conspirators targeted the house of a person they believed to be engaged in illegal drug trafficking, in order to steal Percocet (oxycodone) pills and proceeds from the drug trafficking.

On August 2, Hutchinson drove the other conspirators to the targeted house in Minot and waited outside after dropping them off. Lara, Williams, and Douglas, in partial disguise, entered the house by breaking a glass sliding door. They yelled “get down,” “DEA,” and “police.” Williams carried a pistol; Lara had a crowbar. Douglas found in a bedroom a 9-millimeter Beretta handgun with an extended clip, which he took and brandished during the robbery.

The conspirators found three men inside the house, whom they tried to secure by placing zip ties around the men's hands.³ But the zip ties were not large enough for the task.

Lara assaulted the three men with a crowbar. First, Lara beat and bloodied one man, striking him in the back,

shoulders, and head with a crowbar because he did not look away from the conspirators when told to do so. Lara later beat him again with a crowbar when he said that he did not know the combination to a safe in the house. Lara beat a second man in the back, shoulders, arms, and thighs with a crowbar after he was found hiding under a futon. Lara also beat the third man in the face, legs, and back.

Douglas and Williams also threatened the three men several times with firearms. The conspirators demanded that the men, at gunpoint, give them “the shit” and the combination to the safe. Douglas also forced the first man to the garage, with Douglas holding his hand on the man's neck and pressing a gun to his head. After the man stated that there was nothing in the garage, Lara told Douglas to shoot him, but Douglas did not do so. One of the conspirators also dragged that man down a hallway, holding him in a headlock.

After unsuccessfully searching the house for oxycodone and money, Williams and Lara then forced two of the men outside at gunpoint. The first man—believing he was about to be shot—fled to a neighbor's house. He saw the conspirators run to Hutchinson in the waiting SUV and drive away. The third man escaped and called the police from another neighbor's house.

The conspirators did not find any pills or proceeds. They did steal a video game console, six to eight ounces of marijuana, and the Beretta pistol that Douglas had found, taken, and brandished during the robbery. Police, acting with a search warrant for the house, found the crowbar and zip ties used in the robbery. DEA agents later found items at the house that the conspirators had unsuccessfully sought: 147 fifteen-milligram and 504 thirty-milligram oxycodone pills, 376 grams of powder cocaine, thirty-three pounds of marijuana, and more than \$6,000 in cash. Later, pursuant to a warrant, the police searched a storage unit used by the conspirators and found the two guns brandished in the robbery.

B. Procedural History

On April 7, 2015, Douglas was charged with four counts of a seven count indictment: conspiracy to possess with intent to distribute oxycodone, in violation of 21 U.S.C. § 846 (Count One); conspiracy to commit a Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Count Two); possession of a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1) (Count Five); and knowingly using,

carrying, and brandishing a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1) (Count Six).

Douglas moved to dismiss the portion of Count Six containing “the allegation that he knowingly used, carried, and brandished a firearm during and in relation to a crime of violence.” In effect, he claimed that a conspiracy to commit a Hobbs Act robbery does not qualify as a “crime of violence” under 18 U.S.C. § 924(c).

The district court denied this motion in an order issued on April 15, 2016. Williams, 179 F.Supp.3d at 155. Taking a categorical approach to the “force clause”⁴ at § 924(c)(3)(A), the district court determined that “a conspiracy to commit a Hobbs Act robbery may serve as a predicate ‘crime of violence’ under the ‘force clause.’ ” Id. The district court did not reach Douglas's argument that § 924(c)(3)(B), the residual clause,⁵ is void for vagueness in light of Johnson. Id.

Douglas then entered a conditional guilty plea to Counts Two and Six, reserving his right to appeal the district court's denial of the motion to dismiss a portion of Count Six. At the Rule 11 hearing, Douglas affirmed that he understood the basis for the charges. Defense counsel acknowledged that the “admissible part of the evidence would permit a properly instructed jury to determine beyond a reasonable doubt” that Douglas had committed the charged offenses.

The district court sentenced Douglas to 108 months' imprisonment: twenty-four months on Count Two and eighty-four months on Count Six, to be served consecutively. Douglas appealed the denial of his motion to dismiss.

II. Discussion

We address three substantive issues. First, we consider Douglas's assertion that the government has waived its key argument on appeal that the use of the term “crime of violence” in § 924(c)(3)(B) allows for a case-specific rather than a categorical approach, by not asserting it in the district court.⁶ The government acknowledges it made a concession, but argues it was not a waiver. Second, we reach the merits of Douglas's argument that, under Johnson and Dimaya, the residual clause at § 924(c)

(3)(B) is void for vagueness. The government does not defend the district court's alternate rationale or contend that the conspiracy charged would qualify as a "crime of violence" under the force clause at § 924(c)(3)(A), so we do not address this point.⁷ Third, because we find that § 924(c)(3)(B) is not void for vagueness, we consider—by a case-specific, real-world approach—whether Douglas's particular conspiracy to commit a Hobbs Act robbery qualifies as a "crime of violence" under the residual clause. We affirm the denial of the motion to dismiss.

[1] We review de novo the denial of Douglas's motion to dismiss a portion of Count Six of his indictment, as Douglas's appeal challenges the constitutionality of a federal statute. *See, e.g., United States v. Hussein*, 351 F.3d 9, 14 (1st Cir. 2003). And we also review de novo the proper understanding and application of "crime of violence" in the residual clause. *See, e.g., United States v. Turner*, 501 F.3d 59, 67 (1st Cir. 2007).

A. Concession and Waiver

We turn to the intertwined issues of concession and waiver. At the district court proceedings, which occurred before the Supreme Court's decision in *Dimaya*, the government acknowledged that § 924(c)(3)(B) "involves a risk-based analysis of the 'ordinary case' of a predicate offense." Douglas argues, albeit solely in his reply brief, that the government has therefore waived its argument that § 924(c)(3)(B) allows for a case-specific, real-world approach rather than a categorical approach. The government asserts that its acknowledgement of the categorical approach in the district court should be viewed at most as a concession made for purposes of argument. Admittedly, the line between waiver and concession is a hazy one. *See, e.g., United States v. Torres-Rosario*, 658 F.3d 110, 116 (1st Cir. 2011) ("Courts are not always consistent in their use of the term waiver.... [A]n explicit concession can waive both existing and yet-to-be-recognized rights." (emphasis in original)). Whether the government's acknowledgment in the district court is best viewed as a concession or a waiver, the situation here—where an intervening Supreme Court case, *Dimaya*, has shifted the relevant legal landscape—leads us to conclude that we should review the substantive issue.

[2] [3] [4] The law is clear that a "concession by either party in a criminal case as to a legal conclusion is not binding on an appellate court." *United States v. Sanchez-*

Berrios, 424 F.3d 65, 81 (1st Cir. 2005); accord *United States v. Borrero-Acevedo*, 533 F.3d 11, 15 n.3 (1st Cir. 2008). There are at least three "pertinent considerations" in determining whether we should address an earlier concession by a party:

1) whether the issue is recurrent so that decision would give guidance to the district courts, 2) whether it would be unseemly to accept, even *arguendo*, a mistaken legal proposition and reason from it to decide the case, and 3) whether the issues are technical and complex and not explored carefully in existing decisions so that adversary briefing would be critical.

United States v. Mescual-Cruz, 387 F.3d 1, 8 n.2 (1st Cir. 2004). Each consideration leads us to bypass the so-called concession and reach the merits. Indeed, the opinion in *Dimaya* alone would lead us to this same conclusion.

First, this is a recurring issue. Section 924(c)(3)(B) has come up numerous times in district courts in this circuit, and in several cases in the past few months alone.⁸ A determination on the substantive issues in this appeal would provide guidance to district courts in this unsettled area of law. Second, it would be "unseemly" to hold the government to its earlier position when an intervening Supreme Court case, *Dimaya*, substantially changed this area of law. Third, the proper approach to the residual clause at § 924(c)(3)(B) is a technical issue that has arisen in current form only after *Dimaya*, and merits our serious evaluation.

[5] [6] [7] [8] In the interests of completeness, we also address, and reject, Douglas's waiver argument. Waiver raises similar considerations as concession. Waiver is usually "treated as an 'intentional,' and therefore permanent, abandonment of a position." *Torres-Rosario*, 658 F.3d at 115.⁹

[9] We do not think there was an intentional abandonment by the government, and so there was no waiver.¹⁰ Regardless, we would in any event choose to reach the issues, and we do not "religiously hold[] waiver against the Government" when fairness dictates otherwise. *Dimott v. United States*, 881 F.3d 232, 239

(1st Cir. 2018) (quotation marks omitted). There is no unfairness in reaching the merits argument but there would be in not reaching it. This is not a case where the government seeks the proverbial second bite at the apple due to lack of due diligence or “any gamesmanship before the district court.” *Id.* Nor is it one where “a prosecutor attempts to rely on fleeting references to unsubstantiated conclusions.” *Caraballo-Cruz*, 52 F.3d at 393. The government has been forthright about its changed position and the reasons underlying this change.

Our view is consistent with that of several of our sister circuits. The Second Circuit recently considered the government's changed position regarding a case-specific, real-world approach, and held that the residual clause allowed for this approach. *Barrett*, 903 F.3d at 184.¹¹ The Eleventh Circuit, en banc, also considered the government's new position and held that “§ 924(c)(3)(B) prescribes a conduct-based approach, pursuant to which the crime-of-violence determination should be made by reference to the actual facts and circumstances underlying a defendant's offense.” *Ovalles*, No. 17-10172, 905 F.3d at 1234, 2018 WL 4830079, at *2. And the D.C. Circuit and Fifth Circuit both indicated that only circuit precedent vitiated the need for consideration of the government's argument on a case-specific, real-world approach. *United States v. Eshetu*, 898 F.3d 36, 37 (D.C. Cir. 2018) (per curiam) (“Whatever the clean-slate merits of the government's construction, we as a panel are not at liberty to adopt [a case-specific approach]; circuit precedent demands a categorical approach....”); *United States v. Davis*, 903 F.3d 483, 485 (5th Cir. 2018) (“[T]he Government argues we can, and should, adopt a new ‘case specific’ method when applying the residual clause.... Regardless of whether *Dimaya* would otherwise permit us to do so, we do not find a suggestion by a minority of justices in that case sufficient to overrule our prior precedent.”).

B. The Merits of a Case-Specific Approach versus a Categorical Approach to § 924(c)(3)(B)

Douglas asserts that the residual clause at § 924(c)(3)(B) is void for vagueness under the reasoning of *Johnson* and *Dimaya*. In relevant part, this clause reads:

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

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

18 U.S.C. § 924(c)(3)(B).

[10] After laying out pertinent Supreme Court precedent, we consider the text of § 924(c)(3)(B). We find that the text of § 924(c)(3)(B) can and should be reasonably construed as allowing a case-specific approach. We next consider the statute's context. Because § 924(c)(3)(B) requires consideration of a contemporaneous offense rather than a prior conviction, this residual clause does not raise either the practical or the Sixth Amendment right-to-trial concerns that led the Supreme Court to adopt the categorical approach in *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). See also *Descamps v. United States*, 570 U.S. 254, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013); *James v. United States*, 550 U.S. 192, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007). We then consider constitutional avoidance, because, if we were to apply a categorical approach, there could be vagueness problems.

[11] Unlike some other circuits, our circuit has not held definitively that either the categorical or the case-specific approach applies to the residual clause at § 924(c)(3)(B).¹² And so we have no binding precedent. In *Turner*, we held without direct reference to a categorical or case-specific approach that conspiracy to commit a Hobbs Act robbery was a crime of violence under § 924(c)(3)(B). *Turner*, 501 F.3d at 67. The law of the circuit rule—under which “we are bound by a prior panel decision, absent any intervening authority,” *United States v. Grupee*, 682 F.3d 143, 149 (1st Cir. 2012)—does not bind us here.¹³ See *San Juan Cable LLC v. Puerto Rico Tel. Co.*, 612 F.3d 25, 33 (1st Cir. 2010); *United States v. Malouf*, 466 F.3d 21, 26-27 (1st Cir. 2006).

i. Supreme Court Precedent

The Supreme Court first required that the “categorical approach” be used to make a determination about a prior state conviction in *Taylor*, 495 U.S. at 602, 110 S.Ct. 2143, which turned on the proper understanding of the definition of burglary in the Armed Career Criminal Act (ACCA), in a portion of the statute used to enhance

sentences for prior offenses.¹⁴ The Court concluded that ACCA referred to “burglary” in a general sense and therefore required a trial court “to look only to the fact of conviction and the statutory definition of the prior offense.” *Id.* In justifying this, the Court especially worried about the “practical difficulties” of a case-specific analysis for prior convictions. It also was concerned with possibly “abridging [the Sixth Amendment] right to a jury trial.” *Id.* at 601, 110 S.Ct. 2143. The Court extended the categorical approach to the residual clause of ACCA in *James*, and significantly added the “ordinary case” component to the categorical analysis. 550 U.S. at 208, 127 S.Ct. 1586 (“[T]he proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another.”).

In *Johnson*, which overruled *James*, the Supreme Court held that the definition of “violent felony” in the residual clause of ACCA was unconstitutionally vague. 135 S.Ct. at 2555-57. ACCA’s residual clause defined a violent felony, in part, as a felony that “involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B)(ii).

The Court held that “[t]wo features of the residual clause conspire[d] to make it unconstitutionally vague.” *Johnson*, 135 S.Ct. at 2557. First, “the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime,” because the categorical approach “ties the judicial assessment of risk to a judicially imagined ‘ordinary case’ of a crime, not to real-world facts or statutory elements.” *Id.* The Court noted “how speculative (and how detached from statutory elements)” considering an “idealized ordinary case of a crime” can become. *Id.* at 2557-58. Second, “the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony.” *Id.* at 2558. And “[b]y combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.” *Id.*

In *Dimaya*, an alien challenged a deportation order based on a state conviction for first-degree burglary, which immigration officials found was a “crime of violence” under the federal criminal code’s residual clause at 18 U.S.C. § 16(b), explicitly incorporated by Congress into

the Immigration and Nationality Act. 8 U.S.C. § 1101(a)(43)(F). In relevant part, this residual clause defined “crime of violence” using the same language as § 924(c)(3)(B): a “crime of violence” is a felony “that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” 18 U.S.C. § 16(b). The government had conceded that the categorical approach applied. *Dimaya*, — U.S. —, 138 S.Ct. 1204, 1217, 200 L.Ed.2d 549 (2018).

The Supreme Court determined that the “straightforward application” of *Johnson* dictated the result in *Dimaya*. *Id.* at 1213. The same two features—an “ordinary case” analysis and uncertainty about the sufficient degree of risk—combined in “the same constitutionally problematic way” to make the residual clause impermissibly vague. *Id.*

The Supreme Court majority in *Dimaya* also referenced the Sixth Amendment right-to-trial concerns that led to the initial adoption of the categorical approach in *Taylor*. See *Dimaya*, 138 S.Ct. at 1217 (noting that the Supreme Court required a categorical approach “in part to avoid ... Sixth Amendment concerns” (quotation marks and citation omitted)). In dissent, Justice Thomas, joined by Justices Kennedy and Alito, pointed out that the “categorical approach was never really about the best reading of the text.” *Id.* at 1256 (Thomas, J., with Kennedy, Alito, JJ., dissenting). Justice Thomas suggested, instead, that the “Court adopted that approach to avoid a potential Sixth Amendment problem with sentencing judges conducting minitrials to determine a defendant’s past conduct.” *Id.* So all justices in *Dimaya* recognized that the categorical approach was adopted at least in part to avoid potential Sixth Amendment problems about how to characterize prior convictions.¹⁵

Importantly, in both *Dimaya* and *Johnson*, the Supreme Court dismissed the notion that uncertainty as to risk evaluation of what constitutes a crime of violence was a problem by itself: “[W]e do not doubt the constitutionality of laws that call for the application of a qualitative standard such as ‘substantial risk’ to real-world conduct; the law is full of instances where a man’s fate depends on his estimating rightly ... some matter of degree[.]” *Dimaya*, 138 S.Ct. at 1214 (quoting *Johnson*, 135 S.Ct. at 2561) (brackets and ellipsis in original).

ii. The Text of § 924(c)(3)(B)

Douglas argues that § 924(c)(3)(B)'s text unambiguously requires a categorical, ordinary-case approach. We disagree, and find that statutory language allows for a case-specific approach.

[12] When determining the meaning of a statutory provision that is not defined in the statute, “we look first to its language, giving the words used their ordinary meaning.” *Moskal v. United States*, 498 U.S. 103, 108, 111 S.Ct. 461, 112 L.Ed.2d 449 (1990) (quotation marks and citation omitted); see *In re Hill*, 562 F.3d 29, 32 (1st Cir. 2009) (“We assume that the words Congress chose, if not specially defined, carry their plain and ordinary meaning.”).

Douglas argues that the “by its nature” language requires a categorical approach. The word “nature” is not defined in the statute. In ordinary use, “nature” means a “normal and characteristic quality,” *Webster’s Third New International Dictionary* 1507 (2002), or “the basic or inherent features, character, or qualities of something,” *Oxford Dictionary of English* 1183 (3d ed. 2010). In the context of applying § 924(c)(3)(B), this “something” clearly must refer to the predicate offense charged. But these straightforward dictionary definitions do not answer the key question here: whether the offense whose “basic or inherent features, character, or qualities” are considered is the particular real-world conduct of the predicate offense charged or, instead, an “ordinary,” idealized, or generic example of that same offense. See *Barrett*, 903 F.3d at 182. As the Supreme Court has noted, “in ordinary speech words such as ‘crime,’ ‘felony,’ ‘offense,’ and the like sometimes refer to a generic crime ... and sometimes refer to the specific acts in which an offender engaged on a specific occasion.” *Nijhawan v. Holder*, 557 U.S. 29, 33–34, 129 S.Ct. 2294, 174 L.Ed.2d 22 (2009); see *Mathis v. United States*, — U.S. —, 136 S.Ct. 2243, 2252, 195 L.Ed.2d 604 (2016) (noting that language like “offense ... committed” indicated Congress’s intent that “judges ... look into the facts of prior crimes”); *United States v. Hayes*, 555 U.S. 415, 426, 129 S.Ct. 1079, 172 L.Ed.2d 816 (2009) (holding that a statute with the phrase “offense ... committed by a current or former spouse” allowed for case-specific consideration).

Furthermore, although Douglas does not raise this issue, the government also points out that the term “involves” in the residual clause is used in several provisions in the

Comprehensive Crime Control Act of 1984 that require looking into a defendant’s underlying conduct rather than a hypothetical or idealized offense. See, e.g., Pub. L. No. 98-473, § 4243, 98 Stat. 1837, 2059 (Oct. 12, 1984) (changing the requisite burden of proof for the release of “a person found not guilty only by reason of insanity of an offense involving bodily injury to, or serious damage to the property of, another person, or involving a substantial risk of such injury or damage” (emphasis added)); *id.* at § 502, 98 Stat. 2068 (setting sentences for drug offenses “involving” specific types and quantities of illegal drugs). “Involves,” by itself, does not necessarily suggest either a categorical or a case-specific approach. As to § 924(c)(3)(B), it is plausible that “by its nature” refers to the real-world conduct of a particular offense, and that “involves” also refers to that same conduct. See *Ovalles*, 17-10172, 905 F.3d at 1248, 2018 WL 4830079, at *14 (“[W]e simply aren’t convinced that the phrase ‘by its nature’ requires application of the categorical approach here.”)

Douglas asserts that this textual understanding is foreclosed by the Supreme Court’s interpretation of the nearly identically worded provision in *Dimaya*, where the plurality required a categorical approach. In his reply brief, Douglas argues that Justice Gorsuch, in a concurrence, “acknowledged that the categorical approach was appropriately employed,” so, according to Douglas, this approach is therefore required for § 924(c)(3)(B). This is incorrect on both counts.

[13] A four-justice plurality suggested in *Dimaya* that the text of § 16(b) was “[b]est read” as “demand[ing] a categorical approach.” 138 S.Ct. at 1217. Even assuming for the sake of argument that this statement applies to the distinct context of § 924(c)(3)(B),¹⁶ there was no holding by a majority of the court that a categorical approach was required by the text of this provision. And the Supreme Court has held in several cases that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.’” *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (opinion of Stewart, Powell, and Stevens, JJ)).

Justice Gorsuch, who concurred and was the narrowest vote in the majority,

proceeded on the premise that the Immigration and Nationality Act, as it incorporates § 16(b) of the criminal code, commands courts to determine the risk of violence attending the ordinary case of conviction for a particular crime ... because no party before us has argued for a different way to read these statutes in combination; because our precedent seemingly requires this approach; and because the government itself has conceded (repeatedly) that the law compels it.

Dimaya, 138 S.Ct. at 1232 (Gorsuch, J., concurring in part and concurring in judgment). Justice Gorsuch then suggested a willingness to consider, “in another case,” the textual question of whether “precedent and the proper reading of language” meant that the categorical approach, or another approach, must apply. Id. at 1233. While Justice Gorsuch accepted the government’s concession in Dimaya and noted the lack of “adversarial testing” or briefing of an alternative approach in that case, id. at 1232, he did not determine that the text of § 16(b) required a categorical approach. And he certainly did not determine anything about the text of the contextually distinct § 924(c)(3)(B).

When the plurality dismissed the possible application of the case-specific approach to § 16(b), these justices had already stated that taking a case-specific approach would create “Sixth Amendment concerns.” Id. at 1217 (quoting Descamps, 570 U.S. at 267, 133 S.Ct. 2276). But for § 924(c)(3)(B), Sixth Amendment concerns around the right to trial do not arise because a contemporaneous offense rather than a prior conviction is considered. Thus, when considering the text of § 16(b), the plurality opinion addressed a constitutional context distinct from this case. And as noted, the government had already conceded that the categorical approach applied. Douglas’s textual argument is unavailing.

iii. The Context of § 924(c)(3)(B)

We turn now to the context of § 924(c)(3)(B). As a preliminary matter, nothing from Congress suggests a

preference for applying the categorical approach to § 924(c)(3)(B). Indeed, this residual clause, in exactly the same language as today, was in place before the Supreme Court applied the categorical approach for the first time in 1990. 18 U.S.C. § 924(e)(2012); Taylor, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607. Thus, Congress could not have demonstrated a preference for a judicial approach that did not yet exist when the statute was passed. Instead, the application of the categorical approach to aspects of federal recidivist criminal statutes is a judicial construct designed to avoid constitutional and practical concerns raised by particular context, rather than a choice dictated by Congress.

The context of § 924(c)(3)(B) clearly distinguishes it from the textually similar provisions at issue in Dimaya and Johnson. The Supreme Court in Dimaya and Johnson dealt with statutes requiring judicial consideration of prior convictions in subsequent proceedings. In contrast, § 924(c)(3)(B) applies only to a predicate offense of a pending § 924(c)(1)(A) charge, meaning that the predicate offense and the § 924(c)(3)(B) enhancement are considered at the same time. The Supreme Court has not yet applied the categorical approach to a residual clause that “defines a predicate offense for a crime of pending prosecution,” Barrett, 903 F.3d at 181, rather than to a residual clause that defines a qualifying predicate offense based on a prior conviction.

This is a crucial distinction. At its core, the categorical approach is a thoughtful judicial construct designed for a particular context: the judicial consideration, under federal statutes, of prior convictions, often by different tribunals. As discussed, the Supreme Court fashioned and refined the categorical approach both for practical and constitutional reasons that are specific to the consideration of a prior conviction. See, e.g., Taylor, 495 U.S. at 601, 110 S.Ct. 2143 (noting the “practical difficulties and potential unfairness of a factual approach” when considering a prior conviction). Despite Douglas’s argument to the contrary, these reasons for the categorical approach do not exist in the distinct context of § 924(c)(3)(B).

As to practical issues, the situation under § 924(c)(3)(B) is different from one in which a court must consider prior convictions “adjudicated by different courts in proceedings that occurred long before the defendant’s [present] sentencing.” United States v. Robinson, 844

F.3d 137, 142 (3d Cir. 2016). For the prior conviction, the earlier court did not have to determine, in finding guilt, whether the offense constituted a crime of violence unless the particular statute happened to require it. In addition, a prior conviction could not only be from a different tribunal, but could be from many years ago. As an illustrative example, in the Supreme Court's initial adoption of the categorical approach in *Taylor*, the underlying prior convictions had been adjudicated in state courts in Missouri in 1963 and 1971, whereas the defendant's guilty plea to the federal case was in 1988. 495 U.S. at 578 & n.1, 110 S.Ct. 2143. Such an inquiry clearly can be fraught with uncertainty, and may even involve some degree of implicit second-guessing of prior convictions by other tribunals. But this issue simply does not arise when considering a contemporaneous offense as in § 924(c)(3)(B).

The application of § 924(c)(3)(B) to the real-world conduct described in a pending charge means that the facts concerning the relevant predicate crime (and whether that amounts to a crime of violence) will be in front of a jury, if a case goes to trial, or will be accepted by a defendant like Douglas in a plea agreement. See *Ovalles*, No. 17-10172, 905 F.3d at 1249, 2018 WL 4830079, at *14 (noting “[t]he ‘utter impracticability’ that *Taylor*, *Johnson*, and *Dimaya* identified ... simply isn’t an issue” because “the crimes are typically (as here) charged in the same indictment, and if they are tried, they are considered by the same jury.”); *St. Hubert*, 883 F.3d at 1335 (noting that in § 924(c) cases, there will be “a contemporaneous federal crime charged in the same indictment and ... an already developed factual record”). Consideration of the facts underlying a pending charge steers clear of the Supreme Court's understandable concern about prior convictions with the “impracticability of requiring a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction.” *Johnson*, 135 S.Ct. at 2562; see *Dimaya*, 138 S.Ct. at 1218.

Douglas argues further that a case-specific approach would be unworkable and, in his words, lead to “absurd results.” However, Douglas provides no evidence of such a problem. Courts around the country have succeeded at this task in the sentencing context. Numerous federal criminal laws, like § 924(c)(3)(B), “require gauging the riskiness of conduct in which an individual defendant engages on a particular occasion.” *Johnson*, 135 S.Ct. at 2561; see *Dimaya*, 138 S.Ct. at 1215 (“[T]he point is not

that such a non-numeric standard [like substantial risk] is alone problematic.”). On the whole, it is at least as practical to allow a jury to parse carefully between crimes based on specific real-world conduct rather than, under a categorical approach, to force judges to be willfully blind to particular facts and thus to go “down the rabbit hole ... to a realm where we must close our eyes as judges to what we know as men and women.” *United States v. Davis*, 875 F.3d 592, 595 (11th Cir. 2017).

The Supreme Court has suggested that such a fact-specific approach, “deal[ing] with the actual, not with an imaginary condition other than the facts,” can create more predictability than less fact-bound inquiries. *Johnson*, 135 S.Ct. at 2561 (quoting *Int'l Harvester Co. of Am. v. Kentucky*, 234 U.S. 216, 223, 34 S.Ct. 853, 58 L.Ed. 1284 (1914)). Juries have the ability to evaluate and understand real-world conduct. And in § 924(c)(3)(B), there is no link of the “substantial risk” language to a “confusing list of examples,” *id.*, nor is there any other particularly confusing factor distinguishing § 924(c)(3)(B) from other laws that require juries to consider real-world conduct.

Beyond these practical distinctions, the difference between evaluating a prior conviction and evaluating an alleged predicate crime charged contemporaneously in the same indictment is important with regard to the Sixth Amendment right-to-trial concerns that motivated the categorical approach. In *Dimaya*, a plurality suggested that taking a case-specific approach to § 16(b) would “merely ping-pong us from one constitutional issue to another,” because the categorical approach was imposed in part to “avoid[] the Sixth Amendment concerns that would arise from sentencing courts' making findings of fact that properly belong to juries.” *Dimaya*, 138 S.Ct. at 1217 (quoting *Descamps*, 570 U.S. at 267, 133 S.Ct. 2276); see *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (holding that “any fact that increases the penalty for a crime beyond the ... statutory maximum must be submitted to a jury”).

Here, because the residual clause at § 924(c)(3)(B) requires a consideration of a contemporaneous predicate offense rather than a past conviction, the finding of fact would be made by a jury (or stipulated in a plea agreement), thus raising no Sixth Amendment problem. See *Ovalles*, No. 17-10172, 905 F.3d at 1249–50, 2018 WL 4830079, at *15 (noting no Sixth Amendment issues when taking a conduct-specific approach to § 924(c)). A defendant like

Douglas has the chance to contest the relevant facts either at trial or in plea negotiations. If for whatever reason a defendant cannot or will not accept the prosecution's version of the facts, either in whole or in part, he or she maintains the constitutional right to contest these facts at trial in front of a jury. By considering a contemporaneous offense, then, a “defendant suffers no prejudice because the court is not finding any new facts which are not of record in the case before it.” Robinson, 844 F.3d at 143. Here, the district court had the relevant facts concerning all charges against Douglas, and Douglas had the right to contest them as he saw fit.

iv. Constitutional Avoidance

If we were to take a categorical approach to § 924(c)(3)(B), there could be constitutional problems of vagueness after Dimaya, given that this approach would layer the two features at issue in Johnson and Dimaya in the same problematic way. The principle of constitutional avoidance further supports our determination that a case-specific, real-world approach applies to § 924(c)(3)(B).

[14] [15] Constitutional avoidance is an “interpretive tool ... counseling that ambiguous statutory language be construed to avoid serious constitutional doubts.” F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 516, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009). Under this principle, the “elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” Skilling v. United States, 561 U.S. 358, 406, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010) (quotation marks and emphasis omitted); see Jennings v. Rodriguez, — U.S. —, 138 S.Ct. 830, 836, 200 L.Ed.2d 122 (2018) (“[W]hen statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems.”).

[16] [17] Importantly, a court must start its inquiry with normal analysis: the canon “comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction.” Clark v. Martinez, 543 U.S. 371, 385, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005); see United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 494, 121 S.Ct. 1711, 149 L.Ed.2d 722 (2001) (holding that this canon “has no application in the absence of ... ambiguity”). The chosen interpretation

must be “plausible.” Clark, 543 U.S. at 381, 125 S.Ct. 716; see Jennings, 138 S.Ct. at 842 (holding that the Ninth Circuit “misapplied the [constitutional avoidance] canon ... because its interpretations of the three provisions at issue here are implausible”).

As discussed, there is a clearly “plausible” interpretation here that does not raise potential vagueness problems: a case-specific approach, looking at a defendant's actual conduct in determining whether a “crime of violence” has been committed. Taking this approach avoids constitutional problems and, in turn, provides due respect to Congress, in presuming that Congress does not intend to craft unconstitutional laws. See Diop v. ICE/Homeland Sec., 656 F.3d 221, 231 (3d Cir. 2011).

To be clear, we are not creating any new rule of constitutional law here. Nor are we saying that Dimaya compels the result in this case. Instead, we are simply noting that taking the categorical approach to this statute might create constitutional problems. Therefore, interpreting the provision in another plausible way after ordinary textual analysis obviates this issue.

C. Douglas's Conspiracy as a “Crime of Violence” Under § 924(c)(3)(B)

[18] Finally, we turn to whether Douglas's conspiracy—when considering the “real-world conduct”, Johnson, 135 S.Ct. at 2561—qualifies as a crime of violence under § 924(c)(3)(B). We hold that it does.

To be clear, we do not hold that all conspiracies to commit Hobbs Act robbery would constitute crimes of violence under § 924(c)(3)(B). When applying a case-specific, real-world approach, some such conspiracies would not qualify. In this, we differ from Barrett, which held, as an alternative to its adoption of the case-specific approach, that conspiracy to commit a Hobbs Act robbery is necessarily a crime of violence because “conspiracy to commit a crime of violence is itself a crime of violence.” 903 F.3d at 175. And the government says it disagrees with this alternative holding in Barrett.

Here, the district court properly explained the elements of the § 924(c) charge to Douglas. See Fed. R. Crim. P. 11(b)(1)(G) (requiring the district court to determine that “the defendant understands ... the nature of each charge to which the defendant is pleading”).¹⁷ Douglas's

conditional plea came after the district court's order, denying his motion to dismiss, expressly determined that his actions constituted a "crime of violence" under § 924(c). Furthermore, the acts that Douglas admitted to in his guilty plea amply demonstrate that he committed a "crime of violence" as defined in the residual clause.

This court has earlier said, without reference to whether a categorical or case-specific approach should be used, that "a Hobbs Act conspiracy is a 'crime of violence' for purposes of Section 924(c)" under the residual clause. Turner, 501 F.3d at 67.¹⁸ We are at this point unwilling to say that the question can be resolved as a matter of law. We think it properly must go to the jury for determination, if there is a trial.

[19] Douglas's conspiracy to commit a Hobbs Act robbery qualifies as a "crime of violence" because "by its nature, [it] involve[d] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3)(B). Douglas joined the conspiracy knowing its goal. Three of the conspirators, including Douglas, used substantial violence in the course of the robbery. As discussed, during the robbery one or

more of the conspirators: dragged a victim by the head through a hallway; brandished firearms; forced several victims around the house and outside with guns pressed against their heads, threatened to kill a victim multiple times; and beat all three victims with a crowbar, bloodying at least one. The conspirators committed this violence in furtherance of the conspiracy's goals, namely to steal oxycodone and proceeds of drug dealing. We do not determine the "substantial risk" of violence of a conspiracy by the conspiracy's outcome, and many conspiracies could pose a "substantial risk" of violence where little or no violence actually occurs, see Turner, 501 F.3d at 67; Phan, 121 F.3d at 152.

III. Conclusion

For the foregoing reasons, we affirm the district court's denial of the motion to dismiss a portion of Count Six and affirm Douglas's conviction under § 924(c)(3)(B).

All Citations

907 F.3d 1

Footnotes

- 1 With one exception, discussed in footnote 2, Douglas accepted the prosecution version of the facts in his brief. He did not object to the facts in the revised Presentence Report.
- 2 At his change of plea hearing, Douglas told the district court that he joined the conspiracy as the group was driving to Minot on August 2, rather than the day before as the prosecution claimed. However, mirroring the prosecution's assertion, Douglas's own brief for this court states that he joined the conspiracy on August 1. In any event, the precise date is not relevant to our analysis, because it is settled that Douglas joined the conspiracy before the armed robbery.
- 3 The government refers to all victims here as male regardless of gender, and we will do the same.
- 4 Some courts instead refer to this clause as the "elements clause." See, e.g., United States v. Armour, 840 F.3d 904, 907 (7th Cir. 2016).
- 5 Some courts instead refer to this clause as the "risk-of-force clause." See, e.g., United States v. St. Hubert, 883 F.3d 1319, 1320 (11th Cir. 2018).
- 6 As discussed later, a categorical or modified categorical approach considers an "idealized ordinary case" of the crime charged; a case-specific approach considers a defendant's "real-world conduct." Johnson, 135 S.Ct. at 2557-58.
- 7 The government explicitly "does not adopt the district court's holding that conspiracy to commit Hobbs Act robbery constitutes a crime of violence under the force clause.... [T]he Department of Justice's position is that a conspiracy offense does not have 'as an element the use, attempted use, or threatened use of physical force against the person or property of another.'"
- 8 At least three district court cases in this circuit have considered § 924(c)(3)(B) in light of the Supreme Court's decision in Dimaya. See LiCausi v. United States, No. 16-CV-279-JD, 2018 WL 4054905, at *3 (D.N.H. Aug. 23, 2018) (holding that "§ 924(c)(3)(B) is unconstitutionally vague"); United States v. Rossetti, No. CR 99-10098-RGS, 2018 WL 3748161, at *3 (D. Mass. Aug. 7, 2018) (same); Soto-Cosme v. United States, 320 F.Supp.3d 350, 353 (D.P.R. 2018) (noting, but avoiding, the "void-for-vagueness" challenge).

- 9 Waiver doctrine can be applied against any party: “in fairness, what is sauce for the defendant’s goose is sauce for the government’s gander.” United States v. Caraballo-Cruz, 52 F.3d 390, 393 (1st Cir. 1995). Waiver doctrine, therefore, “has been applied against the government in criminal cases, where appropriate.” United States v. Carrasco-De-Jesus, 589 F.3d 22, 26 (1st Cir. 2009). Though we are under no obligation “to do the government’s homework,” United States v. Vega Molina, 407 F.3d 511, 524 (1st Cir. 2005), “we have discretion to overlook waiver by the government in a criminal case when circumstances justify us in doing so.” Carrasco-De-Jesus, 589 F.3d at 26 n.1; see generally Torres-Rosario, 658 F.3d at 116; United States v. Moran, 393 F.3d 1, 11 (1st Cir. 2004).
- 10 Further, Douglas has likely waived his own argument on the issue of the government’s waiver, by not mentioning this somewhere in his primary brief but only in his reply brief. “[A]rguments developed for the first time in a reply brief are waived.” Small Justice LLC v. Xcentric Ventures LLC, 873 F.3d 313, 323 n.11 (1st Cir. 2017); accord Transupport, Inc. v. Comm’r of Internal Revenue, 882 F.3d 274, 281 n.4 (1st Cir. 2018); Irving Tanning Co. v. Kaplan, 876 F.3d 384, 392 n.7 (1st Cir. 2017).
- 11 The government’s supplemental brief in Barrett made similar arguments to the government’s brief here, as did the government’s en banc brief in Ovalles.
- 12 By contrast, we have held in several cases that a categorical approach properly applies to the force clause at § 924(c)(3) (A). United States v. Cruz-Rivera, No. 16-1321, 904 F.3d 63, 64–65, 2018 WL 4378173, at *1 (1st Cir. Sept. 14, 2018); United States v. Taylor, 848 F.3d 476, 491 (1st Cir. 2017).
- 13 It is true that some district courts in our circuit have held, or assumed, that the categorical approach applies. See, e.g., Rossetti, No. CR 99-10098-RGS, 2018 WL 3748161, at *2 (“The government’s position until recently has been that § 924(c)(3)(B) requires a categorical approach—a conclusion that ... the First Circuit has never definitively held but that the lower district courts had regularly assumed to be the case.”). But of course, such decisions are not precedent for this court.
- 14 The definition at issue in the case was this:
 (B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year ... that—
 (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
 (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.
 18 U.S.C. § 924(e)(2)(B).
- 15 We are aware that the Supreme Court has granted certiorari, vacated judgment, and remanded for further consideration in light of Dimaya in several cases involving convictions under § 924(c)(3)(B). See United States v. Odum, 878 F.3d 508 (6th Cir. 2017), cert. granted, judgment vacated sub nom. Frazier v. United States, No. 17-8381, — U.S. —, — S.Ct. —, — L.Ed.2d —, 2018 WL 1640324 (U.S. Oct. 9, 2018); Manners v. United States, No. 17-1171, 2017 WL 3613308 (6th Cir. Aug. 22, 2017), cert. granted, judgment vacated, No. 17-8035, — U.S. —, — S.Ct. —, — L.Ed.2d —, 2018 WL 1278398 (U.S. Oct. 1, 2018); United States v. Jackson, 865 F.3d 946 (7th Cir. 2017), cert. granted, judgment vacated, — U.S. —, 138 S.Ct. 1983, 201 L.Ed.2d 240 (May 14, 2018). This does not change our analysis here.
- 16 The plurality said nothing about § 924(c)(3)(B) in Dimaya. Nor do we assume that similar text across the United States Code must always be interpreted in exactly the same way: context and commensurate congressional intent matter. There are clearly exceptions to any presumption that Congress uses the same term or language in precisely the same way across different statutes. As will be discussed, the general definition in § 16(b) is contextually distinct from § 924(c)(3)(B).
- 17 Even if there were error here, it would surely be harmless based on the facts that Douglas accepted in his plea agreement.
- 18 Accord United States v. Taylor, 176 F.3d 331, 338 (6th Cir. 1999) (“[A] conspiracy to commit a robbery that violates the Hobbs Act is necessarily a conspiracy that, by its nature, involves a substantial risk that physical force may be used against the person or property of another, and therefore is a crime of violence within the meaning of section 924(c).”); United States v. Phan, 121 F.3d 149, 152–53 (4th Cir. 1997) (holding, among other things, that conspiracy to commit Hobbs Act robbery is a crime of violence under 924(c)); United States v. Elder, 88 F.3d 127, 129 (2d Cir. 1996) (“[A] Hobbs Act conspiracy to commit robbery is by definition a conspiracy that involves a substantial risk that physical force may be used against the person or property of another.”); United States v. Mendez, 992 F.2d 1488, 1492 (9th Cir. 1992) (“[W]here conspirators agree to use actual or threatened force, or violence to obtain personal property from another ... the risk that physical force may be used in the course of the conspiracy is substantial within the meaning of § 924(c)(3) (B).” (quotation marks and citation omitted)).

179 F.Supp.3d 141
United States District Court, D. Maine.

UNITED STATES of America
v.
Kourtney WILLIAMS, Victor Lara,
Jr., and Ishmael Douglas, Defendants.

2:15-cr-00069-JDL

|
Signed April 15, 2016

Synopsis

Background: In prosecution for conspiracy to possess with intent to distribute controlled substances and conspiracy to commit Hobbs Act robbery, codefendants filed motions to dismiss the indictment's allegation that they knowingly used, carried, and brandished a firearm during and in relation to a crime of violence, namely, the two conspiracy offenses.

Holdings: The District Court, Jon D. Levy, J., held that:

[1] modified categorical approach was applicable when determining, on motion to dismiss indictment, whether Hobbs Act robbery qualified as predicate generic crime of violence, and

[2] conspiracy to commit Hobbs Act robbery qualifies as predicate generic crime of violence.

Motions denied.

West Headnotes (6)

[1] Sentencing and Punishment

☞ Crime of violence

Under categorical framework for determining whether an offense of conviction qualifies as a predicate generic crime of violence that has as an element the use, attempted use, or threatened use of physical force, for purposes of statute providing for certain penalties for knowingly using, carrying, or

brandishing a firearm during and in relation to a crime of violence, the statutory offense of conviction must have the same elements as a generic crime of violence, and if the elements of the indivisible statutory offense of conviction sweep more broadly than the generic crime, then the conviction cannot count as a predicate offense, even if the defendant actually committed the offense in its generic form. 18 U.S.C.A. § 924(c)(1)(A), (c)(3)(A).

3 Cases that cite this headnote

[2] Sentencing and Punishment

☞ Crime of violence

Under modified categorical framework for determining whether an offense of conviction qualifies as predicate generic crime of violence that has as an element the use, attempted use, or threatened use of physical force, for purposes of statute providing for certain penalties for knowingly using, carrying, or brandishing a firearm during and in relation to crime of violence, if statutory offense of conviction is divisible, meaning that relevant statute sets out one or more elements of the offense in the alternative, then courts may consult limited set of documents, such as charging documents, plea agreements, plea colloquies, jury instructions, and verdict forms, to determine which of statute's alternative elements formed basis of conviction, and court must then apply categorical approach to relevant elements of divisible statute, by comparing elements of crime of conviction, including alternative element used in the case, with elements of the generic crime. 18 U.S.C.A. § 924(c)(1)(A), (c)(3)(A).

2 Cases that cite this headnote

[3] Sentencing and Punishment

☞ Violent or Nonviolent Character of Offense

Modified categorical approach was applicable when determining, on defendants' motion to

dismiss the indictment, whether Hobbs Act robbery qualified as predicate generic crime of violence that had as an element the use, attempted use, or threatened use of physical force, for purposes of statute providing for certain penalties for knowingly using, carrying, or brandishing a firearm during and in relation to crime of violence; Hobbs Act was divisible because three different acts, i.e., robbery, extortion, or committing or threatening physical violence, were alternative elements. 18 U.S.C.A. §§ 924(c)(1)(A), (c)(3)(A), 1951(a), (b)(1, 2).

32 Cases that cite this headnote

[4] **Sentencing and Punishment**

🔑 Violent or Nonviolent Character of Offense

“Physical force,” for purposes of statute providing for certain penalties for knowingly using, carrying, or brandishing a firearm during and in relation to a crime of violence that has as an element the use, attempted use, or threatened use of physical force, means violent force capable of causing physical pain or injury to another person, regardless of whether that force is applied directly or indirectly. 18 U.S.C.A. § 924(c)(1)(A), (c)(3)(A).

17 Cases that cite this headnote

[5] **Sentencing and Punishment**

🔑 Particular offenses

Conspiracy to commit Hobbs Act robbery qualifies as predicate generic crime of violence that has as an element the use, attempted use, or threatened use of physical force, for purposes of statute providing for certain penalties for knowingly using, carrying, or brandishing a firearm during and in relation to crime of violence; Hobbs Act robbery can be committed by means of actual or threatened force, or violence, or fear of immediate or future injury, those means satisfy physical force element for generic crime of violence, and under Hobbs Act, interference with

commerce by robbery is not a distinct offense from conspiracy to interfere with commerce by robbery. 18 U.S.C.A. §§ 924(c)(1)(A), (c)(3)(A), 1951(b)(1).

33 Cases that cite this headnote

[6] **Constitutional Law**

🔑 Necessity of Determination

Constitutional review of a statute is not appropriate where it is not necessary to decide the case.

Cases that cite this headnote

West Codenotes

Recognized as Unconstitutional

18 U.S.C.A. § 924(e)(2)(B)(ii)

Attorneys and Law Firms

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***143 ORDER ON DEFENDANTS' MOTIONS TO DISMISS A PORTION OF THE INDICTMENT**

JON D. LEVY, UNITED STATES DISTRICT JUDGE

Ishmael Douglas moves to dismiss a portion of Count Six of the Indictment for failure to state an offense. ECF No. 112. Specifically, Douglas seeks to dismiss the allegation that he knowingly used, carried, and brandished a firearm during and in relation to a crime of violence. *Id.* Count Six as a whole alleges that Douglas knowingly used, carried, and brandished a firearm during and in relation to a drug trafficking crime and a crime of violence for which he may be prosecuted in a court of the United States, namely, the offenses alleged in Counts One and Two of the Indictment, in violation of 18 U.S.C. § 924(c)(1)(A)(ii). ECF No. 25 at 4-5. Count One charges Douglas, along with codefendants Kourtney Williams and Victor Lara,

Jr., with conspiracy to possess with intent to distribute controlled substances, in violation of 21 U.S.C. §§ 841(a)(1), 846. *Id.* at 1. Count Two charges Douglas, Williams, and Lara with conspiracy to commit a Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a). *Id.* at 1-2.

Williams has moved to join Douglas' motion (ECF No. 149), seeking to dismiss the portion of Count Four that alleges that Williams knowingly used, carried, and brandished a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii). ECF No. 25 at 3. A hearing was held on December 4, 2015, on Douglas' and Williams' motions. ECF No. 151. Subsequent to the hearing, Lara moved to join Douglas' motion (ECF No. 155), seeking to dismiss the portion of Count Seven that alleges that Lara knowingly used firearms during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii). ECF No. 25 at 5. For the reasons discussed below, I deny the defendants' motions.

I. LEGAL ANALYSIS

Douglas argues that the portion of Count Six that he seeks to dismiss fails to state an offense, for two reasons: (1) the predicate crime of violence, conspiracy to commit a Hobbs Act robbery charged in Count Two, does not qualify categorically as a “crime of violence” under 18 U.S.C. § 924(c)(3), and (2) given the recent decision in *Samuel Johnson v. United States*, — U.S. —, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), the “residual clause,” § 924(c)(3)(B), is unconstitutionally vague. ECF No. 112 at 1-2.

Subsection 924(c)(3) defines the term “crime of violence” as:

an offense that is a felony and—

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

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

18 U.S.C.A. § 924(c)(3) (2015).

As Count Six¹ identifies the offense charged in Count Two as the predicate crime of violence for the charge of use of a firearm during and in relation to a drug trafficking crime or a crime of violence, *see* ECF No. 25 at 4-5, the question presented is whether conspiracy to commit a Hobbs Act robbery qualifies as a “crime of violence” under one of the two definitions in *144 18 U.S.C.A. § 924(c)(3). I first address the issue of whether the predicate offense qualifies as a “crime of violence” as defined in § 924(c)(3)(A), which I refer to as the “force clause,” and then turn to the question of whether the definition of “crime of violence” in § 924(c)(3)(B), the “residual clause,” is unconstitutionally vague and therefore void.

A. Whether a Hobbs Act Violation Qualifies as a “Crime of Violence” under § 924(c)(3)(A) (“Force Clause”)

Douglas contends that a Hobbs Act robbery does not qualify as a “crime of violence” under the “force clause,” § 924(c)(3)(A), because it does not “[have] as an element the use, attempted use, or threatened use of physical force against the person or property of another[.]” He advances three reasons in support: (1) one of the ways in which a Hobbs Act robbery can be committed is by placing another in fear of injury, which does not require “the use, attempted use, or threatened use of physical force” against another; (2) placing another in fear of injury does not require an intentional threat of physical force; and (3) Count Two of the Indictment charges him with conspiracy to commit a Hobbs Act robbery, and the elements of conspiracy do not include the use, attempted use, or threatened use of physical force against the person or property of another. ECF No. 112.

The Government argues that a Hobbs Act robbery qualifies as a “crime of violence” under the “force clause” because, to prove the offense, the Government must establish that the defendant knowingly and willfully obtained property from the person or corporation robbed by means of robbery. ECF No. 120 at 3. As such, the Government asserts, a Hobbs Act robbery involves “unlawfully taking or obtaining personal property from another, against his or her will, by means of actual or threatened force, or violence, or fear of injury to his or her person or property, or property in his or her custody or possession” *Id.* at 3-4 (quoting First Circuit Pattern Jury Instructions at 4.18.1951 (2014)).

Before addressing these arguments, I note that Hobbs Act robbery has previously been treated by the First Circuit as serving as the predicate “crime of violence” for a § 924(c) charge. *See, e.g., United States v. Morales–Machuca*, 546 F.3d 13, 18, 21–22 (1st Cir.2008) (affirming conviction under 18 U.S.C.A. § 924(c)(1)(A)(iii) and 18 U.S.C.A. § 2 for aiding and abetting in knowing possession, use, or carrying of firearms in furtherance of or during and in relation to conspiracy to obstruct commerce by robbery and stating that a Hobbs Act violation “is a crime of violence for purposes of [18 U.S.C.A. § 924(c)(1)(A)]”) (citing *United States v. Rodríguez–Casiano*, 425 F.3d 12, 13 (1st Cir.2005)); *United States v. DeCologero*, 530 F.3d 36, 67–69 (1st Cir.2008) (affirming conviction under § 924(c) for using or carrying a firearm during and in relation to a Hobbs Act robbery, the predicate felony); *United States v. Jiménez–Torres*, 435 F.3d 3, 6–8, 10 (1st Cir.2006) (affirming conviction under 18 U.S.C.A. § 924(j)(1)² for use of a firearm in the commission of a violent *145 federal felony that resulted in a death, where Hobbs Act robbery was the predicate felony). The relevant decisions do not address the question in any detail, however, and, more importantly, they do not specifically recognize whether a Hobbs Act robbery qualifies as a “crime of violence” under § 924(c)(3)(A) or § 924(c)(3)(B). The decision that addressed the issue most directly is *United States v. Turner*, where the court implicitly applied the “residual clause,” § 924(c)(3)(B), and concluded that “conspiracy under the Hobbs Act constitutes a ‘crime of violence’ for purposes of 18 U.S.C. § 924(c).” *See United States v. Turner*, 501 F.3d 59, 67–68 (1st Cir.2007).³ In addition, the Government has neither cited these cases nor argued that the question of whether a Hobbs Act robbery may serve as a predicate “crime of violence” for purposes of the “force clause” is settled law in this Circuit.⁴ I therefore treat the question as unsettled.

1. The Categorical Framework

[1] The Supreme Court established a categorical framework to determine whether a predicate offense of conviction qualifies as a generic federal offense in *Taylor v. United States*, 495 U.S. 575, 600–02, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), and, more recently, in *Descamps v. United States*, — U.S. —, 133 S.Ct. 2276, 2282–85, 186 L.Ed.2d 438 (2013) (examining prior conviction for purposes of a sentence enhancement under the Armed Career Criminal Act (“ACCA”), 18 U.S.C.A. § 924(e)). The framework requires the court to compare the elements

of the predicate offense—here, Hobbs Act robbery—with *146 the elements of the generic federal offense—here, “crime of violence” as defined in the “force clause.” *See United States v. Castro–Vazquez*, 802 F.3d 28, 35 (1st Cir.2015); *Descamps*, 133 S.Ct. at 2281. Accordingly, a “categorical approach” applies to the determination of whether an offense meets the definition of “crime of violence” in 18 U.S.C.A. § 924(c)(3)(A). *See Leocal v. Ashcroft*, 543 U.S. 1, 7, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004) (stating that the language of 18 U.S.C.A. § 16,⁵ which uses the terms “offense,” “an element,” and “by its nature,” requires courts “to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to [defendant’s] crime”).

Under [a categorical] approach, if the statute has the same elements as the “generic” crime as defined in the guidelines, then the prior conviction serves as a predicate offense under the guidelines. If the elements of the indivisible statute sweep more broadly than the generic crime, then the conviction cannot count as a predicate offense, “even if the defendant actually committed the offense in its generic form.”

Castro–Vazquez, 802 F.3d at 35 (emphasis in text) (citations omitted) (discussing the categorical framework for analyzing prior convictions for purposes of a sentence enhancement under U.S.S.G. § 2K2.1(a)(2)).

[2] In *Descamps* the Supreme Court also recognized that a “modified categorical approach” may apply in circumstances where the predicate offense statute is “divisible,” meaning that the relevant statute “sets out one or more elements of the offense in the alternative—for example, stating that burglary involves entry into a building or an automobile.” *Descamps*, 133 S.Ct. at 2281. In those cases, courts may consult “a limited set of ‘Shepard’ documents, such as the charging documents, plea agreements, plea colloquies, jury instructions, and verdict forms, ... to determine which of a statute’s alternative elements formed the basis of the prior conviction.” *Castro–Vazquez*, 802 F.3d at 35 (citing *Descamps*, 133 S.Ct. at 2283–84) (citing *Shepard v. United States*, 544 U.S. 13, 17, 25–26, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005)); *United States v. Morales*, 801 F.3d 1, 4–5 (1st Cir.2015) (for divisible statutes, “those providing alternative elements,” “limited factual consideration is appropriate to determine under which portion of the statute the offense lies”). The court must then apply the categorical approach to the relevant elements of the

divisible statute, that is, “compare the elements of the crime of conviction (including the alternative element used in the case) with the elements of the generic crime.” *Descamps*, 133 S.Ct. at 2281; see also *United States v. Fish*, 758 F.3d 1, 6 (1st Cir.2014). The review of the limited set of documents is thus “a tool for implementing the categorical approach[.]” *Descamps*, 133 S.Ct. at 2284–85. The modified categorical approach “retains the categorical approach’s central feature: a focus on the elements, rather than the *147 facts, of a crime.” *Id.* at 2285; *Castro–Vazquez*, 802 F.3d at 35.

Accordingly, I turn to consider whether the Hobbs Act, 18 U.S.C.A. § 1951, is divisible or indivisible.⁶

2. Whether the Hobbs Act, 18 U.S.C.A. § 1951, Is

Divisible or Indivisible under the *Descamps* Framework

The elements of the predicate offense at issue here, interference with commerce by threats or violence, are contained in 18 U.S.C.A. § 1951 (2015), which reads in relevant part:

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

(b) As used in this section—

(1) The term “robbery” means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

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

18 U.S.C.A. § 1951.

The first step in the *Descamps* inquiry is to identify the elements of the predicate offense to determine whether the predicate offense “has as an element the use, attempted use, or threatened use of physical force against the person or property of another,” as the generic offense is defined in the “force clause” of § 924(c)(3). See *Descamps*, 133 S.Ct. at 2281. The predicate offense statute’s elements must be the same as, or narrower than, the elements of the generic offense. *Id.*

*148 There is a split among the federal circuits as to when a statute should be treated as divisible, stemming from whether the statute is construed as setting forth alternate means of committing a required element of the offense, or setting forth alternate elements of the offense.⁷ See *United States v. Mathis*, 786 F.3d 1068, 1075 n. 6 (8th Cir.2015) (“We recognize the elements/means distinction is a matter that splits our sister circuits.”), cert. granted, — U.S. —, 136 S.Ct. 894, 193 L.Ed.2d 788 (2016).⁸ Compare *Rendon v. Holder*, 764 F.3d 1077, 1084–86, 1088 (9th Cir.2014) (finding a California burglary statute indivisible because the different possible substantive crimes that the defendant may intend to commit following entry are “alternative means of satisfying one element” of the offense, the element of criminal intent), and *Omargharib v. Holder*, 775 F.3d 192, 198–200 (4th Cir.2014), with *United States v. Mitchell*, 743 F.3d 1054, 1065–66 (6th Cir.2014) (finding that the Tennessee robbery statutes in question are divisible because they contain “disjunctive phrasing” in stating the means of robbery, which indicates two alternative elements), *United States v. Clinton*, 591 F.3d 968, 972–73 (7th Cir.2010), and *United States v. Rodriguez*, 768 F.3d 1270, 1273–74 (10th Cir.2014).

In *United States v. Carter*, 752 F.3d 8, 17–18 (1st Cir.2014), the First Circuit treated the “Maine general-purpose assault statute,” 17-A M.R.S. § 207, as divisible because it provided for alternate means of commission and alternate forms of intent. The court explained:

The Maine general-purpose assault statute is divisible into six permutations of subsumed offenses, based on the combination of one element from each of two categories: (1) mens rea (“intentionally, knowingly or recklessly”), and (2) actus reus (“causes bodily injury or offensive physical contact to another person”).

Carter, 752 F.3d at 17–18 (quoting 17-A M.R.S. § 207(1) (A)); see also *United States v. Voisine*, 778 F.3d 176, 192–

93 (1st Cir.2015), *cert. granted in part*, — U.S. —, 136 S.Ct. 386, 193 L.Ed.2d 309 (2015).

Douglas argues that robbery and extortion, as identified and defined in the Hobbs Act, should be viewed as alternate *means* of committing a Hobbs Act violation because they are differentiated only by the state of mind of the victim. Therefore, he contends, a categorical approach applies. *See* ECF No. 152 at 6-9; ECF No. 159 at 4 (citing *Schad v. Arizona*, 501 U.S. 624, 631, 633, 636, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991); *149 *United States v. UCO Oil Co.*, 546 F.2d 833, 836 (9th Cir.1976)). The Government asserts that the Hobbs Act statute is divisible because it “comprises multiple, alternative versions of one crime[.]” and therefore requires the application of the modified categorical approach under *Descamps*. *See* ECF No. 158 at 2; ECF No. 160 at 1-2.

[3] Section 1951 may be violated by committing one of three different acts—robbery, extortion, or committing or threatening physical violence as described in the statute. *See* 18 U.S.C.A. § 1951(a); *see also* *Scheidler v. Nat'l Org. for Women, Inc.*, 547 U.S. 9, 13, 22–23, 126 S.Ct. 1264, 164 L.Ed.2d 10 (2006).⁹ The statute contains separate definitions of robbery and extortion, which in turn set forth different possible forms of commission of robbery and of extortion. *See* 18 U.S.C.A. §§ 1951(b) (1)-(2). As defined, “robbery” and “extortion” describe discrete ways of obtaining property from another. In the case of robbery, the property must be taken or obtained against the will of the victim. *Id.* § 1951(b)(1). In the case of extortion, the property must be obtained with the victim’s consent. *Id.* § 1951(b)(2). This material distinction is substantial and represents more than mere alternate means by which an offender may commit the same criminal act. Rather, § 1951 is most logically read as presenting alternate elements by which the offense of “obstruct[ing], delay[ing], or affect[ing] commerce or the movement of any article or commodity in commerce” may be committed. *Id.* § 1951(a); *see also* *Evans v. United States*, 504 U.S. 255, 112 S.Ct. 1881, 119 L.Ed.2d 57 (1992) (treating the crime of extortion under the Hobbs Act as a discrete offense); *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 123 S.Ct. 1057, 154 L.Ed.2d 991 (2003) (same); *Stirone v. United States*, 361 U.S. 212, 218, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960) (explaining, with respect to Hobbs Act extortion, “there are two essential elements of a Hobbs Act crime: interference with commerce, and extortion,” and that both elements have to be charged).

This conclusion aligns with the common understanding that robbery and extortion are discrete crimes.

Because robbery is an element under § 1951 and the statute is divisible, a modified categorical approach that considers relevant *Shepard* documents is required to determine which of the “multiple, alternative versions” of a Hobbs Act violation forms the predicate offense in this case. *See* *Castro-Vazquez*, 802 F.3d at 35; *Carter*, 752 F.3d at 17–19; *see also* *United States v. Castleman*, — U.S. —, 134 S.Ct. 1405, 1413–15, 188 L.Ed.2d 426 (2014). Here, the Indictment,¹⁰ a permissible *150 *Shepard* document, specifies that Douglas is charged with conspiracy to commit a Hobbs Act robbery. Thus the question narrows to whether a Hobbs Act robbery¹¹ qualifies as a “crime of violence” for purposes of the “force clause,” § 924(c)(3) (A).

B. Whether Hobbs Act Robbery Satisfies the Force Clause’s Element of “Physical Force”

[4] The definition of “crime of violence” in § 924(c)(3)(A) requires the element of “physical force,” which has been construed as meaning violent force. *See* *Curtis Johnson v. United States*, 559 U.S. 133, 140, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010) (finding that the phrase “physical force” in § 924(e)(2)(B)(i) means “violent force—that is, force capable of causing physical pain or injury to another person[.]” given its “context of a statutory definition of ‘violent felony’ ”) (emphasis in text); *cf.* *Castleman*, 134 S.Ct. at 1409–13 (distinguishing the meaning ascribed to the phrase “physical force” in § 924(e)(2)(B)(i) in *Curtis Johnson* in construing the phrase “physical force” as used in § 921(a)(33)(A)(ii), on the basis that the common-law meaning of “force” fits the phrase “physical force” in the definition of a “misdemeanor crime of domestic violence,” for purposes of a § 922(g)(9) charge). The Supreme Court in *Curtis Johnson* stated that the adjective “physical” in the phrase “physical force” in § 924(e)(2)(B)(i) “plainly refers to force exerted by and through concrete bodies—distinguishing physical force from, for example, intellectual force or emotional force.” *Curtis Johnson*, 559 U.S. at 138, 130 S.Ct. 1265.

Douglas argues that because a Hobbs Act robbery “can be accomplished by the act of placing another in fear of injury[.]” which “at best, constitutes a threat of *injury* to another,” it does not require the use or threatened use of violent force. ECF No. 112 at 5 (emphasis in text). He cites

in support of his argument *United States v. Torres–Miguel*, 701 F.3d 165 (4th Cir.2012), in particular the Fourth Circuit’s reasoning that there are many ways in which physical injury, including death, can result without the use of violent force. ECF No. 112 at 5-7 (citing *Torres–Miguel*, 701 F.3d at 168–69). In *Torres–Miguel*, the Fourth Circuit considered whether a crime under California state law, “willfully threaten[ing] to commit a crime which will result in death or great bodily injury to another person ...,” *Torres–Miguel*, 701 F.3d at 167–68 (quoting Cal. Penal Code § 422(a)) (emphasis removed), qualified categorically as a “crime of violence” for purposes of a sentence enhancement under U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(A)(ii) (U.S. Sentencing Comm’n 2011),¹² *id.* at 166–68.

*151 *Torres–Miguel* held that, contrary to the conclusion of the Ninth Circuit in an earlier case, the California statute did not contain any element that “necessarily include[s] a threatened use of physical force to accomplish” the result of death or great bodily injury to another. *Id.* at 168 (internal quotation marks omitted) (emphasis in text). The court reasoned that a crime may result in death or serious injury without involving the use or threatened use of physical force, for instance, a threat to poison another. *Id.* at 168–69. The court also cited other circuit opinions recognizing that a state offense can result in physical injury or death but not involve the use or threatened use of physical force, such as third-degree assault or reckless endangerment. *Id.* at 169 (citing *Chrzanoski v. Ashcroft*, 327 F.3d 188, 194 (2d Cir.2003); *United States v. Perez–Vargas*, 414 F.3d 1282, 1287 (10th Cir.2005); *Dalton v. Ashcroft*, 257 F.3d 200, 207 (2d Cir.2001)).

In *Castleman*, the Supreme Court rejected the reasoning applied in *Torres–Miguel* and the idea that force, if indirectly applied such as by the use of poison, is not physical force. *Castleman*, 134 S.Ct. at 1414–15; *see also* *McDaniels*, 147 F.Supp.3d at 432–34, 2015 WL 7455539, at *4–5; *United States v. Bell*, 158 F.Supp.3d 906, 916–18, 2016 WL 344749, at *7–8 (N.D.Cal. Jan. 28, 2016).¹³ The Court explained: “The use of force ... is not the act of sprinkling the poison; it is the act of employing poison knowingly as a device to cause physical harm. That the harm occurs indirectly, rather than directly (as with a kick or punch), does not matter.” *Castleman*, 134 S.Ct. at 1415 (internal quotation marks and brackets omitted).

Taken together, *Curtis Johnson*, 559 U.S. at 140, 130 S.Ct. 1265 (emphasis removed), and *Castleman*, 134 S.Ct. at 1414–15, counsel that the definition of “physical force” in the “force clause,” § 924(c)(3)(A), means “violent force—that is, force capable of causing physical pain or injury to another person[.]” whether that force be directly or indirectly applied.

1. Whether the Use, Attempted Use, or Threatened Use of Physical Force Is an Element of Hobbs Act Robbery Committed by Placing Another in “Fear of Injury”

[5] Under the *Descamps* standard, the specific question presented here is whether the predicate statute’s “elements are the same as, or narrower than, those of the generic offense.” *Descamps*, 133 S.Ct. at 2281. Here, the predicate offense statute, 18 U.S.C.A. § 1951(b)(1), satisfies this standard in relation to the “force clause,” § 924(c)(3)(A), because every method of committing a Hobbs Act robbery, as defined in the statute, involves the use, attempted use, or threatened use of physical force against the person or property of another. Title 18 U.S.C.A. § 1951 defines “robbery” as “the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property[.]” 18 U.S.C.A. § 1951(b)(1).

*152 It is self-evident that a Hobbs Act robbery committed by means of “actual or threatened force” or “violence” meets the required “physical force” element. Contrary to Douglas’ argument, the statute’s remaining means of committing a robbery—through “fear of injury, immediate or future”—also meets the element of physical force. A “fear of injury” means fearing injury that will be produced by violent force, that is, force capable of causing physical pain or injury. As another court recently explained, “the text, history, and context of the Hobbs Act compel a reading of the phrase ‘fear of injury’ that is limited to fear of injury from the use of force.” *Pena*, 161 F.Supp.3d at 279, 2016 WL 690746, at *8. The court in *Pena* reasoned that “actual or threatened force” and “violence,” which precede “fear of injury” in the list of means of robbery in § 1951(b)(1), all involve force and applied the canon of *noscitur a sociis*¹⁴ to interpret “fear of injury” to “share this attribute, meaning that it is best understood as fear of injury from the use of force.” *Id.* (citation omitted) (emphasis in text). The court further observed that “Hobbs Act robbery is modeled on

common law robbery, and robbery implies ‘the notion of a forcible dispossession of property.’ ” *Id.* at 280, 2016 WL 690746, at *9 (citation omitted). Moreover, “fear of injury” must be read in the context of the statute’s requirement that the unlawful taking of property must be “from the person or in the presence of another[.]” *Id.* The Hobbs Act robbery provision’s “emphasis on proximity to the victim implies that the threatened injuries are of the sort that require proximity—*i.e.*, injuries from the use of force.” *Id.* This point is especially persuasive viewing the Hobbs Act robbery provision in juxtaposition to the definition of Hobbs Act extortion, which does not suggest any requirement of physical proximity. *Id.*

Douglas raises additional hypothetical examples in support of his view that fear of injury, for purposes of Hobbs Act robbery, does not satisfy the element of physical force. It is worth noting that “in assessing whether the elements of the candidate proposed as a predicate crime are overbroad, we need not consider fanciful, hypothetical scenarios.” *Fish*, 758 F.3d at 6 (citing *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193, 127 S.Ct. 815, 166 L.Ed.2d 683 (2007) (“[T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute’s language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute....”)); *James v. United States*, 550 U.S. 192, 208, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007), *overruled on other grounds by Samuel Johnson v. United States*, — U.S. —, 135 S.Ct. 2551, 2563, 192 L.Ed.2d 569 (2015)); *see also Voisine*, 778 F.3d at 185; *Whyte v. Lynch*, 807 F.3d 463, 467 (1st Cir.2015).

Douglas posits that a person can be placed in fear of injury without a threat of physical force, such as a robbery committed by the offender threatening to lock a person up in a car on a hot day, or by threatening to lock a person at an abandoned site without food or shelter. *See* ECF No. 112 at 7-8. As the Supreme Court noted in *Castleman*, however, “physical force” is “force exerted by and through concrete bodies, as opposed to intellectual force or emotional force.” *Castleman*, 134 S.Ct. at 1414 (quoting *Curtis Johnson*, 559 U.S. at 138, 130 S.Ct. 1265) (internal quotation marks omitted). A person locked in a hot car or abandoned without food or shelter would fear injuries from physical forces that were indirectly produced by the physical actions of the offender. *See*

*153 *Pena*, 161 F.Supp.3d at 282, 2016 WL 690746, at *10 (“Poison and hazardous chemicals are physical forces strong enough to cause injury, as is extreme heat.”).¹⁵ Hobbs Act robbery encompasses a fear of injury produced by physical force that is one step removed from, but caused by, the physical force of the offender.

Although not cited by Douglas or the Government, *Whyte v. Lynch*, 807 F.3d 463 (1st Cir.2015), recently considered a hypothetical that demonstrates that it is possible for criminal conduct to involve injury to a person without the offender having used or threatened force. The issue in *Whyte* was whether Connecticut’s third-degree assault statute qualified as a predicate “crime of violence” under 18 U.S.C.A. § 16, incorporated by reference into a provision of the Immigration and Nationality Act (“INA”). *Id.* at 464–66. The opinion cited the following hypothetical: “[A] person could intentionally cause physical injury by telling the victim he can safely back his car out while knowing an approaching car driven by an independently acting third party will hit the victim.” *Id.* at 469 (quoting *United States v. Villegas-Hernandez*, 468 F.3d 874, 879 (5th Cir.2006)) (internal quotation marks omitted). The court concluded that there was a “realistic probability” that the Connecticut statute could punish conduct resulting in physical injury that did not involve physical force and, therefore, the third-degree assault conviction could not serve as a predicate offense under the “force clause” of 18 U.S.C.A. § 16. *Id.* at 469, 471–72. This conclusion is inapposite to the issue presented here because a Hobbs Act robbery by means of “fear of injury” requires proof that the victim feared injury, which necessarily requires proof of actual or threatened force sufficient to cause injury. Thus, there is not a realistic probability that the hypothetical scenario considered in *Whyte* could give rise to a charge of Hobbs Act robbery involving fear of injury. *See id.* at 467.

Under the modified categorical approach, Hobbs Act robbery categorically qualifies as a “crime of violence” under the “force clause,” § 924(c)(3)(A), because the offense as defined in § 1951(b)(1), carried out by any of the listed means, including by “fear of injury,” “has as an element the use, attempted use, or threatened use of physical force against the person or property of another[.]”

2. Whether Hobbs Act Robbery Requires Intentional Use of Force

Douglas next argues that a victim of a Hobbs Act robbery could have fear of injury without the defendant having intentionally caused it and contends that § 924(c)(3)(A) requires an intentional use of force. ECF No. 112 at 8-10. He analogizes to the commission of bank robbery by means of intimidation, which, as several circuits have interpreted the relevant federal provision, does not require that the defendant intended the intimidation, and advances that “robbery” as defined in the Hobbs Act similarly does not require a defendant’s intent that the victim be put in “fear of injury.”¹⁶ *Id.* at 9-10 (citing, e.g., *154 *United States v. Woodrup*, 86 F.3d 359, 363-64 (4th Cir.1996) (defining the test for “intimidation” under 18 U.S.C.A. § 2113(a) as “whether an ordinary person in the teller’s position reasonably could infer a threat of bodily harm from the defendant’s acts” and interpreting the provision as not requiring that the defendant intended the intimidation) (internal quotation marks and citation omitted); *United States v. Yockel*, 320 F.3d 818, 824 (8th Cir.2003)).

Douglas cites a Fourth Circuit case, *Garcia v. Gonzales*, 455 F.3d 465, 468 (4th Cir.2006), for the proposition that under the “force clause” of § 924(c)(3), the physical force or threat thereof must be used intentionally for the offense to qualify as a “crime of violence.” ECF No. 112 at 9. In *Garcia*, the Fourth Circuit considered whether second-degree reckless assault under New York state law qualified as a “crime of violence” under 18 U.S.C.A. § 16 for purposes of an Immigration and Nationality Act provision. *Garcia*, 455 F.3d at 467-69. The court concluded that § 16(a) did not apply because the New York statute defined the offense as “recklessly caus[ing] serious physical injury to another person by means of a deadly weapon or a dangerous instrument,” and found that this definition “does not contain an element that there be the intentional employment of physical force against a person or thing[.]” *Id.* at 468; see also *Leocal*, 543 U.S. at 9, 125 S.Ct. 377 (“The key phrase in § 16(a)—the ‘use ... of physical force against the person or property of another’—most naturally suggests a higher degree of intent than negligent or merely accidental conduct.”) (citations omitted), quoted in *Whyte*, 807 F.3d at 468.

Unlike the predicate offense statute that criminalized reckless assault that was at issue in *Garcia*, the predicate

offense at issue here, Hobbs Act robbery, requires proof that a defendant “knowingly and willfully” obtained property from the person or corporation robbed by means of robbery, see First Circuit Pattern Jury Instructions at 4.18.1951, and thus requires a defendant to have acted intentionally. See *United States v. Boylan*, 898 F.2d 230, 253 (1st Cir.1990) (finding no error in challenged mens rea instruction for Hobbs Act violations by extortion where court instructed jury “that the government had to prove that ‘defendant willfully and knowingly obtained property from the person[]’ ”); see also *United States v. Cruzado-Laureano*, 404 F.3d 470, 480 (1st Cir.2005) (stating that to establish a Hobbs Act violation, the Government must prove beyond a reasonable doubt that the defendant induced someone to part with property, the defendant knowingly and willfully did so by extortionate means, and the extortionate transaction affected interstate commerce). Because a Hobbs Act violation requires that a defendant knowingly and willfully obtained property from another by robbery, a Hobbs Act violation committed by robbery does not, as Douglas argues, allow for something less than intentional conduct by the offender.

3. Conspiracy

Finally, Douglas also points to the fact that it is not a Hobbs Act robbery, but rather conspiracy to commit Hobbs Act robbery, that is charged in Count Two and cites cases from two Circuits as examples of courts limiting their categorical analysis to the elements of the conspiracy itself, and not considering the elements of the underlying offense that was the object of the conspiracy. ECF No. 112 at 17-19 & n.9 (citing, among others, *155 *United States v. Whitson*, 597 F.3d 1218, 1222 (11th Cir.2010) (per curiam) (analyzing predicate offense of conviction for purposes of a sentence enhancement under U.S.S.G. § 4B1.1); *United States v. Fell*, 511 F.3d 1035, 1039-41 (10th Cir.2007) (analyzing predicate offense of conviction for purposes of applying ACCA)).¹⁷ He argues that that is the appropriate analysis in relation to the “force clause” because, unlike the “residual clause,” it does not involve a “broader risk analysis.” *Id.* at 18-19.

I find that this issue is resolved simply by reference to the statute—the Hobbs Act itself includes a conspiracy as an element: “Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion

or attempts or conspires so to do[.]” 18 U.S.C.A. § 1951(a) (emphasis added). Under the statute, interference with commerce by robbery is not a distinct offense from conspiracy to interfere with commerce by robbery. Therefore, the categorical analysis does not differ with respect to a charge of Hobbs Act robbery or a charge of conspiracy to commit a Hobbs Act robbery.

C. Whether the Definition of “Crime of Violence” in 18 U.S.C.A. § 924(c)(3)(B) (“Residual Clause”) Is Constitutionally Void for Vagueness

[6] Having concluded that a conspiracy to commit a Hobbs Act robbery may serve as a predicate “crime of violence” under the “force clause,” 18 U.S.C.A. § 924(c)(3)(A), I do not reach Douglas' second major argument: that the “residual clause,” § 924(c)(3)(B), is unconstitutionally vague, and, therefore, void. Whether or not the residual clause is constitutional has no bearing on the Government's reliance on conspiracy to commit a Hobbs Act robbery as the predicate offense under the “force clause.” The constitutional review of a statute is not appropriate where it is not necessary to decide the case. See *Sony BMG Music Entm't v. Tenenbaum*, 660

F.3d 487, 511 (1st Cir.2011) (“It is bedrock that the long-standing principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.”) (internal quotation marks and citations omitted).

II. CONCLUSION

For the reasons stated above, Douglas' motion to dismiss a portion of Count Six of the Indictment (ECF No. 112) is **DENIED**. In addition, Defendant Williams' motion to dismiss a portion of Count Four of the Indictment (ECF No. 149) and Defendant Lara's motion to dismiss a portion of Count Seven of the Indictment (ECF No. 155) are **DENIED**.

SO ORDERED.

All Citations

179 F.Supp.3d 141

Footnotes

- 1 For purposes of discussion, I refer only to Count Six in this order, but the same analysis applies to the respective portions of Counts Four and Seven in relation to Defendants Williams and Lara.
- 2 Subsection 924(j)(1) specifies penalties for “[a] person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm ... if the killing is a murder[.]” and therefore incorporates the definition of “crime of violence” in § 924(c)(3) by reference to § 924(c). See 18 U.S.C.A. §§ 924(c), (j). The court in *Jiménez-Torres* stated that the indictment charged the defendant with violation of § 924(j)(1) and, as a matter of law, with the lesser-included offense of using a firearm during a federal crime of violence, in violation of § 924(c)(1)(A). *Jiménez-Torres*, 435 F.3d at 10.
- 3 In *Turner*, the defendant challenged his conviction under § 924(c) arguing that conspiracy under the Hobbs Act is not a predicate “crime of violence” because an overt act is not required for a conspiracy conviction under the Hobbs Act. *Turner*, 501 F.3d at 67. Addressing the argument as a question of statutory interpretation, the court stated: “The overwhelming weight of authority holds that a Hobbs Act conspiracy is a ‘crime of violence’ for purposes of Section 924(c).” *Id.* (citing *United States v. Taylor*, 176 F.3d 331, 337–38 (6th Cir.1999); *United States v. Phan*, 121 F.3d 149, 152–53 (4th Cir.1997); *United States v. Elder*, 88 F.3d 127, 129 (2d Cir.1996); *United States v. Mendez*, 992 F.2d 1488, 1491 (9th Cir.1993)). The First Circuit continued:

These courts reason:
A conspiracy, by its very nature, is a collective criminal effort where a common goal unites two or more criminals. Such a meeting of the minds enhances the likelihood that the planned crime will be carried out. Thus, when a conspiracy exists to commit a crime of violence, ... the conspiracy itself poses a substantial risk of violence, which qualifies it under Section 924(c)(1) and Section 924(c)(3)(B) as a crime of violence.
Id. (quoting *Elder*, 88 F.3d at 129). By quoting *Elder* and citing to *Taylor* and *Mendez*, the court had in mind the definition of “crime of violence” in § 924(c)(3)(B), “by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”
- 4 As another court observed, “[p]rior to 2015, the argument that Hobbs Act robbery is not a crime of violence under 18 U.S.C. § 924(c)(3) would have been futile because ... robbery is an offence ‘that by its nature, involves a substantial

risk that physical force against the person or property of another may be used in the course of committing the offense' under the Residual Clause[.]” *United States v. Pena*, 161 F.Supp.3d 268, 273, 2016 WL 690746, at *4 n. 3 (S.D.N.Y. Feb. 11, 2016) (citations omitted). However, the Supreme Court’s decision in *Samuel Johnson v. United States*, — U.S. —, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), holding the residual clause of the Armed Career Criminal Act in § 924(e)(2)(B)(ii) unconstitutionally vague, has caused defendants to “challenge the constitutionality of similarly-worded crime of violence residual clauses in other statutes, including Section 924(c)(3),” and thereby also generated litigation around the “force clause,” § 924(c)(3)(A). See *Pena*, 161 F.Supp.3d at 274 n. 3, 2016 WL 690746, at *4 n. 3.

5 Section 16 of Title 18 contains a generally applicable definition of “crime of violence,” which is nearly identical to the definition of “crime of violence” in § 924(c)(3). Section 16 reads:

The term “crime of violence” means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

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

18 U.S.C.A. § 16 (2015). Section 924(c)(3) is slightly different in that it specifies “felony” in the clause introducing subsections (A) and (B). See 18 U.S.C.A. § 924(c)(3).

6 The Eastern District of Virginia, in *United States v. McDaniels*, 147 F.Supp.3d 427, 428–32, 2015 WL 7455539, at *1–4 (E.D.Va. Nov. 23, 2015), faced with the question of whether Hobbs Act robbery qualifies as a predicate crime of violence for purposes of § 924(c)(1)(A), in the same pre-trial posture as this case, observed that the categorical approach developed in *Taylor* arose in and was “[u]ntil very recently” limited to the sentencing context. The court concluded that that approach is not appropriate in the context of a pre-trial motion to dismiss counts of an indictment, basing its conclusion in part on the distinct “practical considerations” that hold at the pre-trial and sentencing stages. *Id.* at 431–33, 2015 WL 7455539, at *3–4; see also *United States v. D–1 Bijan Woodley*, 2015 WL 7770859, at *4 (E.D.Mich. Dec. 3, 2015); *United States v. Watson*, 2016 WL 866298, at *4 n. 3 (D.Haw. Mar. 2, 2016). The court stated, “the categorical approach is necessary, for example, in the context of ACCA sentencing enhancements in order to avoid the difficult, and in some cases impossible, situations where a sentencing court would be required to re-try the factual basis for prior convictions.” *McDaniels*, 147 F.Supp.3d at 433, 2015 WL 7455539, at *4 (citation and footnote omitted). Accordingly, the court concluded that, in the pre-trial context of a motion to dismiss an indictment, it “can—and indeed must—allow the jury to decide whether the government has proved the elements of the alleged crime beyond a reasonable doubt, including specifically in this case, whether the facts of the robberies establish that they were crimes of violence.” *Id.* *McDaniels* suggests a sound basis to reconsider the use of the categorical framework when a case is at the pre-trial stage, as this case is. However, I decline to adopt that approach here because it has not been recognized as a valid approach in the First Circuit.

7 Some of these cases preceded *Samuel Johnson v. United States*, — U.S. —, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), and involved application of the residual clause of ACCA. However, the respective courts’ analysis in relation to the divisibility of the predicate offense statute under the categorical framework stands apart from whether the relevant generic crime was defined in the ACCA residual clause.

8 The Supreme Court granted certiorari on the Eighth Circuit case, *United States v. Mathis*, 786 F.3d 1068 (8th Cir.2015), on January 19, 2016, with oral argument scheduled for April 26, 2016, to address the issue of whether divisibility is determined by the existence of alternative means or alternative elements of the offense. “15-6092 *Mathis v. United States*,” on “Granted & Noted List: Cases for Argument in October Term 2015,” <http://www.supremecourt.gov/grantednotedlist/15grantednotedlist>.

The “Question Presented” reads as follows:

Whether a predicate prior conviction under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), must qualify as such under the elements of the offense simpliciter, without extending the modified categorical approach to separate statutory definitional provisions that merely establish the means by which referenced elements may be satisfied rather than stating alternative elements or versions of the offense?

Id.

9 In *Scheidler* the Supreme Court held, with respect to the phrase “commits or threatens physical violence to any person or property[.]” that the Hobbs Act prohibits acts or threats of physical violence in furtherance of a plan or purpose to engage in robbery or extortion to affect interstate commerce. *Scheidler*, 547 U.S. at 22–23, 126 S.Ct. 1264. In reaching its conclusion, the Court agreed with the Government’s position in that case that the clause “would apply to a defendant who injured bystanders during a robbery, permitting the Government to charge that defendant with the Hobbs Act crime

of robbery and the separate Hobbs Act crime of using violence in furtherance of the robbery." *Id.* at 22, 126 S.Ct. 1264 (citing Tr. of Oral Arg. 22).

- 10 Count Two of the Indictment leaves no doubt that Douglas is charged with Hobbs Act robbery and not Hobbs Act extortion:

COUNT TWO

Conspiracy to Commit Hobbs Act Robbery

From about July 26, 2014 until about August 2, 2014, in the District of Maine, Defendants [Williams, Lara, and Douglas] knowingly and intentionally conspired with one another and others known and unknown to obstruct, delay and affect commerce and the movement of articles in commerce, namely illegal drugs and drug trafficking proceeds, by robbery. Specifically, the defendants agreed together and with others to steal Percocet (oxycodone) pills and any proceeds from the trafficking of such illegal drugs from a Minot, Maine residence. On about August 2, 2014, the defendants entered the Minot home with the intent to take such personal property using actual and threatened force, violence, and fear of immediate and future injury. At the time of the robbery, Williams and Douglas were each armed with a dangerous weapon, namely, a handgun, and Lara was armed with a dangerous weapon, namely, a crowbar, which all the defendants knew. At the time, the Defendants had reason to believe the home owner was engaged in illegal drug trafficking, an industry that affects interstate commerce.

Thus, the Defendants violated Title 18, United States Code, Section 1951(a).

ECF No. 25 at 1-2.

- 11 I address in Section I.B.3, *infra*, why conspiracy to commit a Hobbs Act robbery does not warrant a different analysis from a Hobbs Act robbery.
- 12 Sentencing Guideline § 2L1.2 cmt. n.1(B)(iii) defines "[c]rime of violence" to include a number of enumerated offenses under federal, state, or local law and "any other offense under federal, state, or local law that *has as an element the use, attempted use, or threatened use of physical force against the person of another.*" U.S.S.G. § 2L1.2 cmt. n.1(B)(iii) (emphasis added). The last clause is nearly identical to the definition of "crime of violence" in § 924(c)(3)(A).
- 13 Although *Castleman* dealt with a different statutory provision, and, as the Court itself stated, was construing the phrase "physical force" in the context of the definition of a "misdemeanor crime of domestic violence," which in fact mandated the broader, common-law-based scope of meaning of the phrase "physical force," *see Castleman*, 134 S.Ct. at 1409–13, the Court's reasoning relates to the meaning of "use" of force, *see id.* at 1414–15. It is equally applicable to violent or non-violent force. *See Bell*, 158 F.Supp.3d at 917–18, 2016 WL 344749, at *8.
- 14 Meaning, "it is known by its associates[.]" Black's Law Dictionary 1224 (10th ed. 2014).
- 15 The court in *Pena* concluded that the definition of "physical force" as "violent force" in *Curtis Johnson* was specific to the "force clause" of the ACCA, § 924(e)(2)(B)(i), and applied a different definition of the term "physical force" for purposes of § 924(c). *Pena*, 161 F.Supp.3d at 272–75, 2016 WL 690746, at *3–4. I find its reasoning regarding the basic concept of "physical force" nevertheless valid to invoke here.
- 16 The federal bank robbery statute defines the offense, in part, as follows:
Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to ... any bank, credit union, or any savings and loan association[.]
18 U.S.C.A. § 2113(a) (2015).
- 17 These decisions address in part the "residual clause" definition of the relevant generic offense and preceded *Samuel Johnson v. United States*, — U.S. —, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015).