APPENDIX

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909 F.3d 335
United States Court of Appeals, Eleventh Circuit.

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

No. 16-10874
|
(November 15, 2018)

Synopsis

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

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

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

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

[3] defendant's Hobbs Act robbery conviction qualified as "crime of violence" under federal firearm statute's "risk-of-force" clause;

[4] Hobbs Act robbery qualifies as crime of violence under statute's "use-of-force" clause;

[5] defendant's attempted Hobbs Act robbery conviction qualified as crime of violence under statute's risk-of-force clause; and

[6] attempted Hobbs Act robbery qualifies as a crime of violence under statute's use-of-force clause.

Affirmed.

Opinion, 883 F.3d 1319, superseded.

West Headnotes (14)

[1] **Criminal Law**
⇦ Review De Novo

Court of Appeals reviews de novo whether defendant's unconditional guilty plea waives his right to bring particular claim on appeal.

1 Cases that cite this headnote

[2] **Criminal Law**
⇦ Issues considered

Defendant's unconditional guilty plea to using, carrying, and brandishing firearm during, in relation to, and in furtherance of crime of violence did not waive appellate review of his claim that statute of conviction was unconstitutional. 18 U.S.C.A. § 924(c).

Cases that cite this headnote

[3] **Criminal Law**
⇦ Issues considered

Defendant's claim that Hobbs Act robbery and attempted robbery were not predicate "crimes of violence" under statute prohibiting use, carrying, and brandishing of firearm during, in relation to, and in furtherance of crime of violence was jurisdictional, and thus defendant did not waive claim by entering unconditional plea of guilty to using, carrying, and brandishing firearm during, in relation to, and in furtherance of crime of violence. 18 U.S.C.A. §§ 924(c), 1951(a).

2 Cases that cite this headnote

[4] **Constitutional Law**
⇦ Weapons and explosives

Weapons
⇦ Violation of other rights or provisions

"Risk-of-force" clause in statute providing specified mandatory minimum sentences for persons convicted of using or carrying firearm in furtherance of crime of violence was not

void for vagueness. 18 U.S.C.A. § 924(c)(3)(B).

Cases that cite this headnote

[5] **Weapons**
⇨ Crimes of violence

Defendant's admitted conduct during robbery involved a substantial risk that physical force may have been used against a person or property, and thus defendant's conviction for Hobbs Act robbery constituted a "crime of violence" under "risk-of-force" clause in statute prohibiting use, carrying, and brandishing of firearm during, in relation to, and in furtherance of crime of violence; defendant admitted in plea hearing that he robbed an auto parts store, and that he brandished a firearm at store employees and threatened to shoot them before stealing about $2,300. 18 U.S.C.A. §§ 924(c)(3)(B), 1951(b).

3 Cases that cite this headnote

[6] **Weapons**
⇨ Crimes of violence

Hobbs Act robbery qualifies as a "crime of violence" under use-of-force clause in statute prohibiting use, carrying, and brandishing of firearm during, in relation to, and in furtherance of crime of violence. 18 U.S.C.A. §§ 924(c)(3)(A), 1951(a).

11 Cases that cite this headnote

[7] **Courts**
⇨ Number of judges concurring in opinion, and opinion by divided court

Law established in published three-judge orders issued in context of applications for leave to file second or successive § 2255 motions to vacate are binding precedent on all subsequent Court of Appeals panels, including those reviewing direct appeals and collateral attacks, unless and until they are overruled or undermined to point of abrogation by Supreme Court or by Court of Appeals sitting en banc. 28 U.S.C.A. §§ 2244(b), 2255.

7 Cases that cite this headnote

[8] **Weapons**
⇨ Crimes of violence

Defendant's admitted conduct during attempted robbery involved a substantial risk that physical force may have been used against a person or property, and thus defendant's conviction for attempted Hobbs Act robbery constituted a "crime of violence" under "risk-of-force" clause in statute prohibiting use, carrying, and brandishing of firearm during, in relation to, and in furtherance of crime of violence; defendant admitted in plea hearing that he entered auto parts store, brandished a firearm, and held the firearm against one store employee's side while directing a second employee to open the store's safe, but fled the store when a police car appeared outside the store. 18 U.S.C.A. §§ 924(c)(3)(B), 1951(b).

Cases that cite this headnote

[9] **Weapons**
⇨ Crimes of violence

In applying categorical approach to determine whether offense qualifies as predicate "crime of violence" under statute prohibiting use, carrying, and brandishing of firearm during, in relation to, and in furtherance of crime of violence, court may look only to elements of predicate offense statute and may not look at particular facts of defendant's offense conduct, and, in doing so, must presume that conviction rested upon nothing more than least of acts criminalized, and then determine whether even those acts qualify as "crimes of violence." 18 U.S.C.A. § 924(c).

2 Cases that cite this headnote

[10] **Criminal Law**
⇨ Attempts

To be convicted of an "attempt" of a federal crime, a defendant must: (1) have the specific

intent to engage in the criminal conduct with which he is charged, and (2) have taken a substantial step toward the commission of the offense that strongly corroborates his criminal intent.

Cases that cite this headnote

[11] **Criminal Law**
⇦ Attempts

The intent element of a federal attempt offense requires the defendant to have the specific intent to commit each element of the completed federal offense.

Cases that cite this headnote

[12] **Criminal Law**
⇦ Attempts

Substantial step toward commission of offense, as required to support federal attempt conviction, can be shown when defendant's objective acts mark his conduct as criminal and, as a whole, strongly corroborate required culpability.

Cases that cite this headnote

[13] **Criminal Law**
⇦ Attempts

To constitute a "substantial step" toward the commission of an offense, as required to support federal attempt conviction, the defendant must do more than merely plan or prepare for the crime; he or she must perform objectively culpable and unequivocal acts toward accomplishing the crime.

Cases that cite this headnote

[14] **Weapons**
⇦ Crimes of violence

Attempted Hobbs Act robbery qualifies as a "crime of violence" under "use-of-force" clause in statute prohibiting use, carrying, and brandishing of firearm during, in relation to, and in furtherance of crime of violence. 18 U.S.C.A. §§ 924(c)(3)(A), 1951(b)(1).

11 Cases that cite this headnote

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

Before MARCUS, ANDERSON and HULL, Circuit Judges.

Opinion

HULL, Circuit Judge:

We sua sponte vacate our panel opinion, United States v. St. Hubert, 883 F.3d 1319 (11th Cir. 2018) ("St. Hubert I"), and issue this new opinion. In this direct appeal, Michael St. Hubert challenges his two firearm convictions under 18 U.S.C. § 924(c) claiming his predicate Hobbs Act robbery and attempted robbery offenses do not constitute crimes of violence under § 924(c)(3). After oral argument in 2018, we affirmed St. Hubert's § 924(c) firearm convictions, concluding his predicate robbery offenses qualified as crimes of violence under both the residual and elements clauses in § 924(c)(3). St. Hubert I, 883 F.3d at 1327-34.

Below we expressly readopt and reinstate in full Sections I, II, III(A), and III(C) of our panel opinion in St. Hubert I just as previously written. Section III(B) of our prior opinion affirmed St. Hubert's convictions under the residual clause based on the panel opinion in Ovalles v. United States, 861 F.3d 1257 (11th Cir. 2017). In Section III(B), we again affirm under the residual clause, but do so based on our en banc decision in Ovalles v. United States, 905 F.3d 1231 (11th Cir. Oct. 4, 2018) (en banc) ("Ovalles II"). We also readopt and reinstate Section IV

of our prior panel opinion with some additional analysis along the way. [1]

1 For clarity, we have vacated and have not readopted Sections V and VI of our prior panel opinion in St. Hubert I.

I. BACKGROUND FACTS

A. Indictment

On August 11, 2015, St. Hubert was indicted on thirteen counts in connection ***338** with a series of five robberies and one attempted robbery committed in southern Florida between December 23, 2014 and January 27, 2015. Counts 1, 3, 5, 7, 9, and 11 contained the six robbery counts. Five counts charged that St. Hubert committed a Hobbs Act robbery, and one count charged an attempted robbery, all in violation of 18 U.S.C. § 1951(b).

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

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

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

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

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

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

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

(emphasis added).

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

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

in Count 11 of this *339 Indictment, in violation of Title 18, United States Code, Section 924(c)(1)(A).

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

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

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

(emphasis added).

B. Motion to Dismiss Indictment

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

C. Guilty Plea Colloquy Outlined the Offense Conduct

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

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

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

As this was occurring, the second employee noticed a City of Miami Police Department vehicle outside the store and ran out of the door to request help. St. Hubert then fled in a blue Mercury sedan which was registered in his name and to his *340 home address. A subsequent car chase led law enforcement officials to St. Hubert, who was arrested at his residence. Both AutoZone employees later identified St. Hubert in a showup.

During subsequent valid and authorized searches of St. Hubert's residence, law enforcement officers located both the gray and yellow striped hoodie worn by St. Hubert during the January 21st robbery, and the gray Old Navy hoodie worn by St. Hubert during the January 27th attempted robbery. DNA recovered from both hoodies matched St. Hubert's DNA. During the execution of a

search warrant for St. Hubert's vehicle, law enforcement officials located a firearm and ammunition. [2]

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

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

D. Sentencing

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

St. Hubert timely appealed.

II. WAIVER BY GUILTY PLEA

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

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

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

[1] St. Hubert's statutory claim involves § 924(c)(3)(A). Specifically, St. Hubert says that Hobbs Act robbery and attempted robbery categorically do not qualify as crimes of violence under the other statutory definition of crime of violence in § 924(c)(3)(A)'s use-of-force clause. Consequently, before we can address ***341** the merits of St. Hubert's § 924(c) claims, we must first determine whether St. Hubert has waived them. [3]

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

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

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

In Class v. United States, the defendant pled guilty and was convicted under 40 U.S.C. § 5104(e), which prohibits the carrying of a firearm "on the Grounds or in any of the Capitol Buildings." Class v. United States, 583 U.S. ——, 138 S.Ct. 798, 802, 200 L.Ed.2d 37 (2018). On appeal, the defendant argued that this statute violated the Second Amendment and the Due Process Clause. Id. The Supreme Court concluded that the defendant's voluntary and unconditional guilty plea by itself did not waive his right to challenge on direct appeal the constitutionality of that statute of conviction. Id. at 805-07.

Prior to Class, this Court had already reached the same conclusion in United States v. Saac, 632 F.3d 1203, 1208 (11th Cir. 2011) (concluding that the "defendants did not waive their argument" that Congress exceeded its authority under Article I, Section 8, Clause 10 of the Constitution when it enacted the Drug Trafficking

Vessel Interdiction Act, 18 U.S.C. § 2285, the statute of conviction, "insofar as this claim goes to the legitimacy of the offense that defendants' indictment charged").

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

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

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

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

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

Because the government relies on ***342** United States v. Cotton, 535 U.S. 625, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002), we discuss it first. In Cotton, the defendants were charged with a cocaine conspiracy under 21 U.S.C. §§ 841(a)(1) and 846, but the indictment charged only a "detectable amount" of cocaine and cocaine base and not a threshold amount needed for enhanced penalties under § 841(b). 535 U.S. at 627-28, 122 S.Ct. at 1783. The Supreme Court had held in United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), that if drug quantity is used to increase a defendant's sentence above the statutory maximum sentence for an § 841 drug offense, then that drug quantity must be charged in the indictment and decided by a jury. 543 U.S. at 235-44, 125 S.Ct. at 751-56 (extending the holding of Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), to federal sentencing proceedings under the Sentencing Guidelines).

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

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

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

The problem for the government is that this Court has narrowly limited Cotton's overruling of Bain and jurisdictional holding to only omission of elements from the indictment. See United States v. Peter, 310 F.3d 709, 713-14 (11th Cir. 2002). In Peter, the defendant pled guilty to an indictment charging a Racketeer Influenced and Corrupt Organizations Act conspiracy with the sole predicate act being mail fraud, in violation of 18 U.S.C. § 1341, by making misrepresentations on state license applications he mailed to a state agency. Id. at 711, 715. Later, the Supreme Court in Cleveland v. United States, 531 U.S. 12, 121 S.Ct. 365, 148 L.Ed.2d 221 (2000), held that state and municipal licenses did not qualify as "property in the hands of the victim" as required for the offense of mail fraud. Id. at 711. Therefore, Peter had ***343** pled guilty to the predicate act of alleged mail fraud in the very form held in Cleveland not to constitute an offense under § 1341. Id. at 715. The Peter Court concluded that the defendant's claim that his conduct was never a crime under § 1341 was a jurisdictional error and could not be procedurally defaulted. Id. at 711-15. In reaching this conclusion, the Court in Peter relied on pre-Cotton precedent and concluded that "the decision in United States v. Meacham, 626 F.2d 503 (5th Cir. 1980), establishes that a district court is without jurisdiction to accept a guilty plea to a 'non-offense.' " Id. at 713 (footnote omitted). [4]

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

Based on our pre-Cotton precedent in Meacham, the Peter Court decided that when an indictment "affirmatively alleged a specific course of conduct that is outside the reach" of the statute of conviction—or stated another way, "alleges only a non-offense"—the district court has no jurisdiction to accept the guilty plea. Id. at 715 (holding that the pre-Cotton "rule of Meacham, that a district court lacks jurisdiction when an indictment alleges only a non-offense, controls" even after Cotton). In following Meacham, the Peter Court rejected the government's claim that the language of Cotton rejected the rule of Meacham. Id. at 713. The Peter Court limited Cotton's holding to an omission from the indictment, reasoning that "Cotton involved only an omission from the indictment: the failure to allege a fact requisite to the imposition of defendants' sentences, namely, their trade in a threshold quantity of cocaine base." Id. at 714. [5]

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

Our best determination is that in this case we are bound by our circuit precedent in Peter. St. Hubert's claim is not, as in Cotton, that his indictment omitted a necessary fact. Rather, like in Peter, the error asserted by St. Hubert is that "the indictment consisted only of specific conduct"—carrying, using, and brandishing a firearm during a Hobbs Act robbery and an attempted Hobbs Act robbery—that, according to St. Hubert, is "as a matter of law, ... outside the sweep of the charging statute." Id. at 714. Said another way, because "the Government affirmatively alleged a specific course of conduct that [at least in St. Hubert's view] is outside the reach" of § 924(c)(3)(A), "the Government's proof of th[at] alleged conduct, no matter how overwhelming, would have brought it no closer to showing the crime charged than would have no proof at all." Id. at 715 (emphasis added).

Moreover, we see nothing in the Supreme Court's recent Class decision that undermines Peter, much less undermines it to the point of abrogation. See United States v. Kaley, 579 F.3d 1246, 1255 (11th Cir. 2009) (explaining that for a subsequent Supreme Court opinion to abrogate our prior precedent, it must "directly conflict with" that prior precedent). Indeed, while the Supreme Court in Class did not speak in terms of jurisdiction or jurisdictional indictment defects, it suggested, albeit in dicta, that a claim that the facts alleged in the indictment and admitted by the defendant do not constitute a crime at all cannot be waived by a defendant's guilty plea because that kind of claim challenges ***344** the district court's power to act. See Class, 583 U.S. at ——, 138 S.Ct. at 805. Notably, the Supreme Court in Class, in its discussion of historical examples of claims not waived by a guilty plea, included cases in which the defendant argued that the charging document did not allege conduct that constituted a crime. Id. at 804 (citing United States v. Ury, 106 F.2d 28, 28-30 (2d Cir. 1939); Hocking Valley Ry. Co. v. United States, 210 F. 735, 738-39 (6th Cir. 1914); Carper v. Ohio, 27 Ohio St. 572, 575-76 (1875); Commonwealth v. Hinds,

101 Mass. 209, 210 (1869)). Thus, if anything, the dicta in Class supports Peter's analysis.

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

III. HOBBS ACT ROBBERY IN COUNT 8

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

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

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

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

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

As to the second definition, St. Hubert argues that Hobbs Act robbery no longer can qualify under the risk-of-force clause in § 924(c)(3)(B) because that clause is unconstitutional in light of Sessions v. Dimaya, 584 U.S. ——, 138 S.Ct. 1204, 200 L.Ed.2d 549 (2018), and Johnson v. United States, 576 U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015).

[4] After Dimaya and Johnson, this Court en banc in Ovalles II rejected a void-for-vagueness challenge to § 924(c)(3)(B). Ovalles II held that the constitutional-doubt canon of statutory construction requires that § 924(c)(3)(b) be interpreted to incorporate a conduct-based approach. 905 F.3d at 1240, 1244, 1251. Ovalles II thus engaged in a statutory interpretation of the text of § 924(c)(3)(B), and set forth a rule of statutory interpretation, not a rule of constitutional law. See id. at 1240, 1244, 1245-48, 1252. The conduct-based approach adopted in Ovalles II accounts for "actual, real-world facts of the crime's commission" in determining if that crime qualifies under § 924(c)(3)(B)'s residual clause. Id. at 1252-53. Two other circuits have likewise adopted a conduct-based interpretation of § 924(c)(3)(B) and held § 924(c)(3)(B) is constitutional. See *345 United States v. Douglas, 907 F.3d 1, 2-9 (1st Cir. 2018); United States v. Barrett, 903 F.3d 166, 178-84 (2d Cir. 2018). We follow Ovalles II and conclude that St. Hubert's constitutional challenge to § 924(c)(3)(B) lacks merit.

Because the district court did not have the benefit of Ovalles II's statutory interpretation of § 924(c)(3)(B), it did not apply the conduct-based approach Ovalles II adopted. Nonetheless, a remand is not necessary in this case because the relevant facts are admitted by the defendant, the record is thus sufficiently developed, and any review of such a determination by the district court would be de novo in any event. See United States v. Taylor, 88 F.3d 938, 944 (11th Cir. 1996); United States v. Jones, 52 F.3d 924, 927 (11th Cir. 1995); Macklin v. Singletary, 24 F.3d 1307, 1310-1313 (11th Cir. 1994); see also Ovalles II, 905 F.3d at 1253 (applying in the first instance the conduct-based approach to admitted, "real-life" facts "embodied in a written plea agreement and detailed plea colloquy").

[5] That leaves us to apply § 924(c)(3)(B)'s conduct-based approach to St. Hubert's admitted conduct. Specifically, at his plea hearing, St. Hubert admitted he robbed an AutoZone store on January 21, and that he brandished a firearm at store employees and threatened to shoot them, before stealing approximately $2,300. Based on the facts that St. Hubert expressly admitted, we readily conclude that St. Hubert's admitted conduct during his January 21 Hobbs Act robbery involved a substantial risk that physical force may have been used against a person or property, and thus his Hobbs Act robbery constituted a crime of violence within the meaning of § 924(c)(3)(B)'s

risk-of-force clause. We affirm St. Hubert's conviction and sentence on Count 8 based on Ovalles II.

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

[6] Even assuming that Dimaya and Johnson invalidated § 924(c)(3)(B)'s risk-of-force clause as unconstitutionally vague, we conclude St. Hubert's challenge to his first § 924(c) conviction (Count 8) fails because this Court has already held that Hobbs Act robbery (the predicate for Count 8) independently qualifies as a crime of violence under § 924(c)(3)(A)'s use-of-force clause. See In re Saint Fleur, 824 F.3d 1337, 1340-41 (11th Cir. 2016) (addressing Hobbs Act robbery); In re Colon, 826 F.3d 1301, 1305 (11th Cir. 2016) (addressing aiding and abetting Hobbs Act robbery). Accordingly, as an independent and alternative ground for affirmance, we hold that St. Hubert's Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A)'s use-of-force clause, and thus we affirm his first § 924(c) conviction in Count 8.

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

[7] St. Hubert next argues that these Lambrix and Hill decisions themselves involved second or successive applications ***346** and thus cannot bind this Court in St. Hubert's direct appeal. We disagree because the rulings in Lambrix and Hill were squarely about the legal issue of whether the prior panel precedent rule encompasses earlier published three-judge orders under § 2244(b). Lest there be any doubt, we now hold in this direct appeal that law established in published three-judge orders issued pursuant to 28 U.S.C. § 2244(b) in the context of applications for leave to file second or successive § 2255 motions is binding precedent on all subsequent panels of this Court, including those reviewing direct appeals and collateral attacks, "unless and until [it is] overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting en banc." See Archer, 531 F.3d at 1352. [6]

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

Accordingly, in this direct appeal, this panel is bound by Saint Fleur and Colon and concludes that St. Hubert's Hobbs Act robbery is a crime of violence under § 924(c)(3)(A)'s use-of-force clause. [7]

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

IV. ATTEMPTED ROBBERY IN COUNT 12

We now turn to St. Hubert's second § 924(c) conviction (Count 12), where the predicate offense is attempted Hobbs Act robbery. Again, we examine the two crime-of-violence definitions separately.

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

[8] Employing the conduct-based approach from Ovalles II, we hold that St. Hubert's attempted Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(B)'s risk-of-force clause. Although the district court did not apply the conduct-based approach, we need not remand. Rather, here, as in Ovalles II, "there is no need for imagination" or remand because the "real-life details" of St. Hubert's attempted Hobbs Act robbery, all of which he admitted, confirm that it qualifies under § 924(c)(3)(B)'s residual clause. See Ovalles II, 905 F.3d at 1253.

In fact, at his plea hearing, St. Hubert admitted that, on January 27, he entered an AutoZone store, brandished a firearm, and held the firearm against one employee's side while directing a second employee to open the store's safe, but fled the store before he could take any money when a police car appeared outside the store. Given the way in which St. Hubert admitted committing the attempted AutoZone robbery, ***347** we easily conclude that his offense involved a substantial risk that physical force may be used against a person or property. Thus, we affirm St. Hubert's § 924(c) conviction and sentence on Count 12 on that ground.

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

Alternatively, we address whether St. Hubert's attempted Hobbs Act robbery in Count 12 qualifies as a crime of violence under § 924(c)(3)(A)'s use-of-force clause. Our circuit precedent has not squarely ruled on that precise offense. Nonetheless, Saint Fleur and Colon are our starting point for that crime too.

St. Hubert's brief argues that Saint Fleur and Colon are inconsistent with the Supreme Court's decisions in Descamps v. United States, Mathis v. United States, Moncrieffe v. Holder and Leocal v. Ashcroft, which applied the categorical approach.[8] St. Hubert contends that when the categorical approach is properly applied, Hobbs Act robbery and attempted robbery fail to qualify as crimes of violence because these offenses can be committed by putting a victim in "fear of injury, immediate or future" and do not require a threat of physical force.

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

We agree that the Supreme Court's discussion of the categorical approach in these decisions is relevant to St. Hubert's appeal, which is why, in analyzing his attempted Hobbs Act robbery, as well as his Hobbs Act robbery, we take time to apply the categorical approach to the applicable statutes in more detail than Saint Fleur and Colon did.[9] First, we compare the statutory texts of § 1951 and § 924(c)(3)(A), and then set forth the tenets of the categorical approach.

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

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

Fleur and Colon in light of these Supreme Court decisions.

C. Statutory Text and Categorical Approach

The Hobbs Act provides that:

> ***348** Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

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

We agree with the Sixth Circuit's conclusion that (1) the Hobbs Act is a divisible statute that sets out multiple crimes, and (2) robbery and extortion are distinct offenses, not merely alternative means of violating § 1951(a). See United States v. Gooch, 850 F.3d 285, 290-92 (6th Cir.) (discussing Mathis, 579 U.S. ——, 136 S.Ct. 2243), cert. denied, —— U.S. ——, 137 S.Ct. 2230, 198 L.Ed.2d 670 (2017). Under the categorical approach, we thus consider only the portion of the Hobbs Act defining "robbery" for the elements of St. Hubert's predicate offenses.[10] See Mathis, 579 U.S. at ——, 136 S.Ct. at 2248.

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

"Robbery" under the Hobbs Act is defined as:

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

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

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

[9] In applying the categorical approach, we look only to the elements of the predicate offense statute and do not look at the particular facts of the defendant's offense conduct. See, e.g., United States v. Keelan, 786 F.3d 865, 870-71 (11th Cir. 2015) ("Under the categorical approach, a court must look to the elements and the nature of the offense of conviction, rather than to the particular facts of the defendant's record of conviction." (quotation ***349** marks omitted)). In doing so, "we must presume that the conviction rested upon [nothing] more than the least of th[e] acts criminalized, and then determine whether even those acts" qualify as crimes of violence. See Moncrieffe, 569 U.S. at 190-91, 133 S.Ct. at 1684 (quotation marks

omitted). Thus, under the categorical approach, each of the means of committing Hobbs Act robbery—"actual or threatened force, or violence, or fear of injury"—must qualify under the use-of-force clause in § 924(c)(3)(A).

Reaching the same conclusion as Saint Fleur, four other circuits have applied the categorical approach, listing each of these means, and concluded that Hobbs Act robbery is categorically a crime of violence under the use-of-force clause in § 924(c)(3)(A). [11] See Gooch, 850 F.3d at 291-92; United States v. Rivera, 847 F.3d 847, 848-49 (7th Cir. 2017); United States v. Anglin, 846 F.3d 954, 964-65 (7th Cir.), cert. granted & judgment vacated on other grounds, —— U.S. ——, 138 S.Ct. 126, 199 L.Ed.2d 1 (2017); United States v. Hill, 832 F.3d 135, 140-44 (2d Cir. 2016); United States v. House, 825 F.3d 381, 387 (8th Cir. 2016). [12]

11 Although we readopt this Section IV of our prior panel opinion, since that time another circuit (the Tenth Circuit) has concluded that Hobbs Act robbery is categorically a crime of violence under the elements clause, which, with our Saint Fleur, makes the total six circuits so holding. See United States v. Melgar-Cabrera, 892 F.3d 1053, 1064-66 (10th Cir. 2018). The Second and Eighth Circuits have reaffirmed their earlier, above-cited decisions to that effect. See Barrett, 903 F.3d at 174; Diaz v. United States, 863 F.3d 781, 783-84 (8th Cir. 2017).

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

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

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

First, this argument is inconsistent not only with Saint Fleur and Colon, but also with our precedent in In re Sams, 830 F.3d 1234, 1238-39 (11th Cir. 2016) and United States v. Moore, 43 F.3d 568, 572-73 (11th Cir. 1994), in which this Court concluded that federal bank robbery "by intimidation," in violation of 18 U.S.C. § 2113(a), and federal carjacking "by intimidation," in violation of 18 U.S.C. § 2119, both have as an element the use, attempted use, or threatened use of physical force and thus qualify as crimes of violence under § 924(c)(3)(A). See also United States v. Robinson, 844 F.3d 137, 151 n.28 (3d Cir. 2016) (Fuentes, J., concurring) (applying the categorical approach and equating "intimidation" in the federal bank robbery statute with "fear of injury" in Hobbs Act robbery, noting that the legislative history of § 924(c) identified federal bank robbery as the prototypical crime of violence, and reasoning that Congress therefore intended § 924(c)'s physical force element to be satisfied by intimidation or fear of injury), cert. denied, —— U.S. ——, 138 S.Ct. 215, 199 L.Ed.2d 141 (2017); ***350** United States v. Gutierrez, 876 F.3d 1254, 1257 (9th Cir. 2017) (holding "intimidation as used in the federal bank robbery statute requires that a person take property in such a way that would put an ordinary, reasonable person in fear of bodily harm, which necessarily entails the threatened use of physical force" (quotation marks omitted)).

Second, we agree with the Second Circuit's decision in Hill, which explained why that court rejected the argument, like St. Hubert's, that one could commit Hobbs Act robbery by "putting the victim in fear" without any physical force or threat of physical force. Hill, 832 F.3d at 141-43. The Second Circuit noted that a hypothetical nonviolent violation of the statute, without evidence of actual application of the statute to such conduct, is insufficient to show a "realistic probability" that Hobbs Act robbery could encompass nonviolent conduct. [13] Id. at 139-40, 142-43. The Second Circuit added that "there must be 'a realistic probability, not a theoretical possibility,' that the statute at issue could be applied to conduct that does not constitute a crime of violence," and, to that end, "a defendant 'must at least point to his own case or other cases in which the ... courts in fact did apply the statute in the ... manner for which he argues.' " Id. at 140 (quoting in part Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193, 127 S.Ct. 815, 822, 166 L.Ed.2d 683 (2007)); see also McGuire, 706 F.3d at 1337 (citing Duenas-Alvarez and explaining that to determine whether an offense is categorically a crime of

violence under § 924(c), courts must consider whether "the plausible applications of the statute of conviction all require the use or threatened use of force ...." (emphasis added)).

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

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

14 In citing Curtis Johnson, we note that it was an ACCA case where the use-of-force clause in the definition of violent felony required that the physical force be "against the person of another" only. 18 U.S.C. § 924(e)(2)(B)(i); Curtis Johnson, 559 U.S. at 135-36, 130 S.Ct. at 1268.
In contrast, § 924(c)(3)(A)'s use-of-force clause in the definition of crime of violence is broader and includes threatened physical force "against the person or property of another." 18 U.S.C. § 924(c)(3)(A). As discussed above, the definition of robbery in the Hobbs Act parallels § 924(c)(3)(A), as it likewise refers to actual or threatened force against a person or property. See Robinson, 844 F.3d at 144. Thus, in the § 924(c) context, Curtis Johnson may be of limited value in assessing the quantum of force necessary to qualify as a "use, attempted use, or threatened use of physical force" against property within the meaning of § 924(c)(3)(A). Nonetheless, even strictly applying Curtis Johnson's definition of physical force, we conclude that Hobbs Act robbery categorically qualifies as a crime of violence.

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

E. Attempt Crimes

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

[10] **[11]** To be convicted of an "attempt" of a federal crime, a defendant must: (1) have the specific intent to engage in the criminal conduct with which he is charged; and (2) have taken a substantial step toward the commission of the offense that strongly corroborates his criminal intent. United States v. Jockisch, 857 F.3d 1122, 1129 (11th Cir.), cert. denied, — U.S. ——, 138 S.Ct. 284, 199 L.Ed.2d 181 (2017); United States v. Yost, 479 F.3d 815, 819 (11th Cir. 2007). The intent element of a federal attempt offense requires the defendant to have the specific intent to commit each element of the completed federal offense. See United States v. Murrell, 368 F.3d 1283, 1286-87 (11th Cir. 2004).

[12] **[13]** "A substantial step can be shown when the defendant's objective acts mark his conduct as criminal and, as a whole, 'strongly corroborate the required culpability.' " Yost, 479 F.3d at 819 (quoting Murrell, 368 F.3d at 1288). To constitute a substantial step, the defendant must do more than merely plan or prepare for the crime; he or she must perform objectively culpable and unequivocal acts toward accomplishing the crime. See United States v. Ballinger, 395 F.3d 1218, 1238 n.8 (11th Cir. 2005) (en banc) (citing United States v. Mandujano, 499 F.2d 370, 377 (5th Cir. 1974), which concluded that a substantial step "must be more than remote preparation," and must be conduct "strongly corroborative of the firmness of the defendant's criminal

intent"); United States v. McDowell, 705 F.2d 426, 427-28 (11th Cir. 1983).

[14] Like completed Hobbs Act robbery, attempted Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A)'s use-of-force clause because that clause expressly includes "attempted use" of force. Therefore, because the taking of property from a person against his will in the forcible manner required by § 1951(b)(1) necessarily includes the use, attempted use, or threatened use of physical force, then by extension the attempted taking of such property from a person in the same forcible manner must also include at least the "attempted use" of force. Cf. United States v. Wade, 458 F.3d 1273, 1278 (11th Cir. 2006) (explaining that an attempt to commit a crime enumerated as a violent felony under § 924(e)(2)(B)(ii) is also a violent felony), cert. denied, 550 U.S. 905, 127 S.Ct. 2096, 167 L.Ed.2d 816 (2007); see also Hill v. United States, 877 F.3d 717, 718-19 (7th Cir. 2017) ("When a substantive offense would be a violent felony under § 924(e) and similar statutes, an attempt to commit that offense also is a violent felony."), cert. denied, —— U.S. ——, 139 S.Ct. 352, —— L.Ed.2d ——, 2018 WL 4334874 (U.S. Oct. 9, 2018); United States v. Armour, 840 F.3d 904, 908-09 (7th Cir. 2016) (holding that attempted ***352** armed bank robbery qualifies as a crime of violence under § 924(c)(3)(A)).

In reaching this conclusion, our initial panel opinion followed the Seventh Circuit's analysis about why it concluded that an attempt to commit a violent felony under the ACCA is also a violent felony. See St. Hubert, 883 F.3d at 1332 (citing Hill, 877 F.3d at 719). We do so again. As to attempt crimes, the Seventh Circuit observed in Hill that (1) a defendant must intend to commit every element of the completed crime in order to be guilty of attempt, and (2) thus, "an attempt to commit a crime should be treated as an attempt to commit every element of that crime." Id. Also as to attempt crimes, the Seventh Circuit explained that "[w]hen the intent element of the attempt offense includes intent to commit violence against the person of another, ... it makes sense to say that the attempt crime itself includes violence as an element." Id. Importantly too, the Seventh Circuit then pointed out that the elements clause in the text of § 924(e) equates actual force with attempted force, and this means that the attempted use of physical force against the person of another suffices and that the text of § 924(e) thus tells us that actual force need not be used for a crime to qualify under the ACCA. Id.; see also Morris, 827 F.3d at 698-99 (Hamilton, J. concurring) ("Even though the substantial step(s) may have fallen short of actual or threatened physical force, the criminal has, by definition, attempted to use or threaten[ed] physical force because he has attempted to commit a crime that would be violent if completed. That position fits comfortably within the language of the elements clause of the definition."). "Given the statutory specification that an element of attempted force operates the same as an element of completed force, and the rule that conviction of attempt requires proof of intent to commit all elements of the completed crime," the Seventh Circuit concluded that when a substantive offense qualifies as a violent felony under the ACCA, an attempt to commit that offense also is a violent felony. See Hill, 877 F.3d at 719.

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

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

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

We recognize that St. Hubert argues that a robber could plan the robbery and ***353** travel with a gun to the

location of the robbery but be caught before entering the store and still be guilty of attempted Hobbs Act robbery. St. Hubert argues that the substantial step required for an attempt conviction will not always involve an actual or threatened use of force and thus attempted Hobbs Act robbery does not qualify under § 924(c)(3)(A). However, as before, we agree with the Seventh Circuit that even if the completed substantial step falls short of actual or threatened force, the robber has attempted to use actual or threatened force because he has attempted to commit a crime that would be violent if completed. See Hill, 877 F.3d at 718-19. Thus, we reject St. Hubert's claim that the substantial step itself in an attempt crime must always involve the actual or threatened use of force for an attempt to commit a violent crime to qualify under § 924(c)(3)(A)'s elements clause.

V. CONCLUSION

In sum, we conclude that St. Hubert's guilty plea did not waive his particular claims here that Counts 8 and 12 failed to charge an offense at all. Further, § 924(c)(3)(B)'s risk-of-force clause is constitutional, see Ovalles II, 905 F.3d at 1253, and St. Hubert's predicate Hobbs Act robbery and attempted Hobbs Act robbery qualify as crimes of violence under § 924(c)(3)(B)'s risk-of-force clause. Finally, as an independent, alternative ground for affirming St. Hubert's convictions and sentences on Counts 8 and 12, we conclude that St. Hubert's predicate offenses of Hobbs Act robbery and attempted Hobbs Act robbery categorically qualify as crimes of violence under § 924(c)(3)(A)'s elements clause.

AFFIRMED.

All Citations

909 F.3d 335, 27 Fla. L. Weekly Fed. C 1509

End of Document

A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

15-20621-CR-MORENO/O'SULLIVAN

CASE NO. _____

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

UNITED STATES OF AMERICA

vs.

MICHAEL ST. HUBERT,

Defendant.
_____/

INDICTMENT

The Grand Jury charges that:

COUNT 1

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

MICHAEL ST. HUBERT,

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

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

COUNT 2

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

MICHAEL ST. HUBERT,

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

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

COUNT 3

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

MICHAEL ST. HUBERT,

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

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

COUNT 4

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

MICHAEL ST. HUBERT,

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

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

COUNT 5

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

MICHAEL ST. HUBERT,

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

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

COUNT 6

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

MICHAEL ST. HUBERT,

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

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

COUNT 7

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

MICHAEL ST. HUBERT,

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

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

COUNT 8

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

MICHAEL ST. HUBERT,

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

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

COUNT 9

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

MICHAEL ST. HUBERT,

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

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

COUNT 10

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

MICHAEL ST. HUBERT,

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

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

COUNT 11

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

MICHAEL ST. HUBERT,

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

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

COUNT 12

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

MICHAEL ST. HUBERT,

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

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

COUNT 13

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

MICHAEL ST. HUBERT,

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

CRIMINAL FORFEITURE ALLEGATIONS

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

property in which the defendant has an interest.

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

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

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

A TRUE BILL

WIFREDO A. FERRER
UNITED STATES ATTORNEY

OLIVIA S. CHOE
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

vs.

MICHAEL ST. HUBERT,

Defendant. /

CASE NO. _____

CERTIFICATE OF TRIAL ATTORNEY*

Superseding Case Information:

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

Court Division: (Select One)

X Miami ____ Key West
____ FTL ____ WPB ____ FTP

I do hereby certify that:

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

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

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

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

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

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

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

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

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

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

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

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

*Penalty Sheet(s) attached

REV.9/11/07

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: MICHAEL ST. HUBERT

Case No:

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

Hobbs Act Robbery

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

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

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

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

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

***Max. Penalty:** Life imprisonment

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

Count 13:

Possession of Firearm and Ammunition by a Convicted Felon

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

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

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

A-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-20621-CR-MORENO

UNITED STATES OF AMERICA,
Plaintiff,

v.

MICHAEL ST. HUBERT,
Defendant.
_____/

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

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

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

INTRODUCTION

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

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

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

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

PERTINENT STATUTES

This motion primarily concerns the following two federal statutes:

1) **18 U.S.C. § 1951(b)**

Section 1951, in pertinent part, provides:

> (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining shall [be punished in accordance with the remainder of the statute]

2) **18 U.S.C. § 924(c)**

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

Johnson, is void for vagueness.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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be used in the course of committing the offense."

CONCLUSION

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

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

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

BY: s/*Christy O'Connor*
Christy O'Connor
Assistant Federal Public Defender
Florida Bar No. A5501358
150 West Flagler Street
Suite 1700
Miami, Florida 33130-1556
Tel: 305-530-7000/Fax: 305-536-4559
E-Mail Address: christy_o'connor@fd.org

CERTIFICATE OF SERVICE

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

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

A-4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-20621-CR-MORENO

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL ST. HUBERT,

Defendant.
_____/

ORDER DENYING MOTION TO DISMISS

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

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

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

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies furnished to:

All counsel of record

A-5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-CR-20621-MORENO

UNITED STATES OF AMERICA

vs.

MICHAEL ST. HUBERT,

Defendant.
_____/

PLEA AGREEMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Five (5) rounds of CCI .25 caliber ammunition

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

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

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

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

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

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

WIFREDO A. FERRER
UNITED STATES ATTORNEY

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

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

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

A-6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NUMBER 15-20621-CR-MORENO

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL ST. HUBERT,

Defendant.

Courtroom 13-3

Miami, Florida

February 16, 2016

CHANGE OF PLEA AND SENTENCING PROCEEDINGS
BEFORE THE HONORABLE FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT: **OLIVIA S. CHOE, AUSA**
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REPORTED BY: **GILDA PASTOR-HERNANDEZ, RPR, FPR**
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gphofficialreporter@gmail.com

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EXHIBITS

Exhibits	Marked for Identification		Received in Evidence	
Description	Page	Line	Page	Line

(The following proceedings were at 3:15 p.m.:)

THE COURT: Here's another case on the calendar call, but we have the defendant here. So suspect it's the same thing. United States of America versus Michael St. Hubert, 15-20621-Criminal. On behalf of the Government.

MS. CHOE: Good afternoon, Your Honor. Olivia Choe on behalf of the United States.

THE COURT: On behalf of the defendant.

MS. O'CONNOR: Good afternoon, Your Honor. Christy O'Connor, Assistant Federal Defender.

THE COURT: And he's in custody.

MS. O'CONNOR: That's correct.

THE COURT: Why doesn't he wear the typical prison garb?

MS. O'CONNOR: It must have been that my investigator got clothes from his family and provided them to the jail. I didn't ask him to do that.

THE COURT: For a guilty plea. I know. Okay. No problem.

MS. O'CONNOR: He looks nice, though.

THE COURT: It does like nice.

Good afternoon, Mr. St. Hubert. How are you?

THE DEFENDANT: I'm doing good. How are you doing, Your Honor?

THE COURT: You've heard me go through a couple of

pleas.

THE DEFENDANT: Yes, I have.

THE COURT: I understand that's what you want to do. Is that what you desire to do?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Raise your right hand as much as you can.

(The defendant was sworn in by the Court.)

THE COURT: Okay. Lower your hand, please, sir. Tell me your name and your age.

THE DEFENDANT: Michael St. Hubert, 37.

THE COURT: How far did you go in school?

THE DEFENDANT: Junior college.

THE COURT: What college?

THE DEFENDANT: Florida Memorial University.

THE COURT: Have you ever been to a psychiatrist or a mental institution?

THE DEFENDANT: No, Your Honor.

THE COURT: In the last couple of days have you taken any drugs, alcohol or medication?

THE DEFENDANT: No, Your Honor.

THE COURT: And have you discussed possible defenses, the consequences of your guilty plea and the sentencing guidelines with your lawyer?

THE DEFENDANT: No, Your Honor.

THE COURT: Pardon?

THE DEFENDANT: You said have I what?

THE COURT: Have you discussed --

THE DEFENDANT: Oh, yes.

THE COURT: -- possible defenses, what you should do in this case --

THE DEFENDANT: Yes, Your Honor.

THE COURT: -- the punishment, the sentencing guidelines, any minimum mandatories, everything about this case with your lawyer?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Are you happy with her?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you need any more time to speak with her?

THE DEFENDANT: No, Your Honor.

THE COURT: When you plead guilty, you give up the right to fight the case. No trial, no appeal, no witnesses. Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Now you know with why all these lawyers, nobody applies to be a Federal judge, right?

When you plead guilty, you give up the right to trial by jury, trial before a judge, right to appeal, right to remain silent, right to confront and cross-examine witnesses, right to call your own witnesses, right to vote if you're a United States

citizen -- Are you a United States citizen?

THE DEFENDANT: Yes, Your Honor.

THE COURT: -- the right to hold elected office, to sit on a jury, to carry a firearm. You may lose the right to some housing from the Government, welfare. Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you still want to plead guilty knowing all of that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: You give up the right to be presumed innocent, to require the prosecutor to prove her accusations beyond a reasonable doubt in front of a jury.

THE DEFENDANT: Yes, Your Honor.

THE COURT: Are you pleading guilty because you are guilty?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Which count is he pleading guilty to?

MS. CHOE: Two counts; Counts 8 and 12.

THE COURT: Count 8 is that you, Michael St. Hubert, on January 21st, 2015 in Broward County in the Southern District of Florida, you knowingly used and carried a firearm and in relation to a crime of violence and knowingly possessed a firearm in furtherance of a crime of violence, and the crime of violence was, in fact, Count 7 which is a robbery of AutoZone located at 1513 North State Road 7, Hollywood, Florida. You are

not pleading guilty to that robbery. You're pleading guilty to this knowingly used and carrying a firearm in relation and in furtherance of that robbery. Do you understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: How do you plead to that, guilty or not guilty?

THE DEFENDANT: Guilty, Your Honor.

THE COURT: Did you do it?

THE DEFENDANT: Yes, Your Honor.

THE COURT: I can give you a sentence of life imprisonment for that. Do you understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: The other count is count what, 12?

MS. CHOE: Count 12.

THE COURT: Count 12 is that on January 27, 2015, you, Michael St. Hubert, knowingly used and carried a firearm during and in relation to a crime of violence and you knowingly possessed the firearm in furtherance of a crime of violence. That crime of violence is the robbery alleged in Count 11. That is the robbery of AutoZone at 59 Northeast 79th Street, Miami, Florida 33138. Did you do that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Are you pleading guilty to that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Because this is a consecutive count, I have

to give you -- well, I have to give you seven years minimum mandatory on the first one?

MS. CHOE: Correct, Your Honor.

THE COURT: And 25 years on the second one?

MS. CHOE: Consecutive, yes, Your Honor.

THE COURT: So we're talking about 25 and seven is 32 years. Do you understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: How old are you?

THE DEFENDANT: I am 37.

THE COURT: 37 and 32 is 69. Do you understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: That means you'll be in prison until you're eligible to collect and I guess you can collect Social Security while you're in prison if you put in. Do you understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: No coming back from this guilty plea, either. Do you understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Are you sure you want to do this?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Has anyone forced you or threatened you to do this?

THE DEFENDANT: No, Your Honor.

THE COURT: Is there a Plea Agreement in this case?

MS. O'CONNOR: There is, Your Honor, and I've executed a written copy.

THE COURT: Is that your signature?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Did you read it before you signed it?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. Let me see it.

Did you understand it?

THE DEFENDANT: Yes, I understand it.

THE COURT: All right. What a sad afternoon you've given me, Mrs. Christie.

Well, once again, the sentencing guidelines I suspect start at the bottom which is the minimum mandatory.

MS. CHOE: Yes, Your Honor.

THE COURT: Which is?

MS. CHOE: 32 years.

THE COURT: 32 years. And the maximum is life, right?

MS. CHOE: Correct.

THE COURT: And you all think the guidelines will show 35 years to life because of prior record?

MS. CHOE: 32, yes.

THE COURT: 32. I'm sorry.

MS. CHOE: Yes, Your Honor.

THE COURT: Do you agree?

MS. O'CONNOR: Yes, Your Honor.

THE COURT: Okay. So, and then he has priors.

MS. CHOE: I believe he has at least one prior felony conviction.

THE COURT: Okay. So you're giving up the right to the gun, obviously -- you're a convicted felon -- and the rounds. And if I go above the guidelines, which I can't possibly because the guidelines are up to life, so I can't give you more than life, you could appeal that. So that's kind of superfluous I think in the Plea Agreement, probably.

And are you a United States citizen?

THE DEFENDANT: Yes, Your Honor.

THE COURT: If you weren't, you could be deported, but we don't have to do that in your case.

MS. CHOE: I would just note, Your Honor, I believe that Mr. St. Hubert is naturalized which is why the Plea Agreement has the language about the possibility of denaturalization, but he is a citizen.

THE COURT: Where were you born?

THE DEFENDANT: I was born in Haiti.

THE COURT: When were you naturalized?

THE DEFENDANT: 2007, January.

THE COURT: Of 2007, you said?

THE DEFENDANT: Yes.

THE COURT: Okay. I don't know how that works. If you did this afterwards, I don't think they can vacate the

citizenship. If you had not disclosed some wrongdoing, then they could. But I'm not sure about that and if they find that you really shouldn't have been a citizen because you didn't tell the truth before that -- you know, they do that to some people from the Ukraine and Russia where they don't disclose that they did things in Europe in World War II and even though they've been here for 50 years, they'll take away their citizenship and send them back. I'm not saying they would send you to Haiti, but they could. And if they do, even as unlikely as that is, you can't come back to me and say, you know what, I didn't care about the sentence, but I didn't want to go to Haiti. I wouldn't have pled guilty. That won't work for you. Do you understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: You still want to plead guilty?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. Listen carefully. The prosecutor is going to tell me about these two incidents, these two crimes. If you disagree with anything she says, let me know, please.

THE DEFENDANT: Yes, Your Honor.

MS. CHOE: Should I hand a copy up to the court reporter, Your Honor?

THE COURT: How long is it?

MS. O'CONNOR: I already did, Your Honor.

THE COURT: Okay.

MS. CHOE: The Government and the defendant hereby stipulate and agree that if the case were to proceed to trial, the following facts among others would be proven beyond a reasonable doubt: On January 21st, 2015 at approximately 8:00 p.m., the defendant entered the AutoZone store located at 1513 North State Road 7 in Hollywood, Florida in Broward County. AutoZone is a business operating in interstate and foreign commerce. The defendant, who was wearing a gray and yellow striped hoodie, brandished a firearm and directed three store employees to the rear of the store. He demanded that the employees place money from the store's safe inside one of the store's plastic bags and threatened to shoot them. Approximately $2,300 was stolen during the robbery. Two of the three employees subsequently identified the defendant in a six-person photographic array.

On January 27, 2015 at approximately 7:00 p.m., the defendant entered the AutoZone store located at 59 Northeast 79th Street in Miami, Florida in Miami-Dade County. The defendant, who was wearing a gray Old Navy hoodie, held a firearm against the side of one employee and directed a second employee to open the store safe.

During the attempted robbery, the second employee noticed a City of Miami Police Department vehicle outside and ran out of the door to request help. The defendant then fled in a blue Mercury sedan which was registered in his name and to his

home address. A subsequent car chase led law enforcement to the defendant who was arrested at his residence. Both employees later identified the defendant in a showup.

During subsequent valid and authorized searches of the residence, law enforcement located both the gray and yellow striped hoodie worn by the defendant during the January 21st robbery and the gray Old Navy hoodie worn by the defendant during the January 27th attempted robbery. DNA recovered from both hoodies matched the defendant's DNA.

During the execution of a search warrant for the defendant's vehicle, law enforcement located a firearm and ammunition.

Cell site records show that on January 27th, 2015, the defendant's phone was in the immediate vicinity of the AutoZone store at 59 Northeast 79th Street, Miami, Florida shortly before the attempted robbery and then returned to the immediate vicinity of his residence shortly thereafter.

THE COURT: Do you agree with everything the prosecutor has stated?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Are you satisfied, Ms. O'Connor, that your client is entering this plea freely, voluntarily and that he's competent to do so?

MS. O'CONNOR: Yes, Your Honor.

THE COURT: Will you stipulate there's a factual basis

for this guilty plea after having reviewed the discovery?

MS. O'CONNOR: Yes, Your Honor.

THE COURT: Any questions I have forgotten to ask?

MS. CHOE: I don't think so, Your Honor.

THE COURT: How do you plead to both of these counts, guilty or not guilty?

THE DEFENDANT: Guilty, Your Honor.

THE COURT: Are you sure?

THE DEFENDANT: Yes, Your Honor.

THE COURT: I find that your guilty plea is freely and voluntarily entered, you're intelligent and alert, represented by competent counsel with whom you have expressed satisfaction; that there is a factual basis upon the proffer of the prosecutor and your acknowledgement of such. Thus, I accept your guilty plea, find you guilty, adjudicate you guilty.

Do you want to be sentenced today or in a couple of months?

THE DEFENDANT: Today is fine.

THE COURT: Okay. I accept that as a waiver of the Presentence Investigation Report.

The first obligation of the Court is to properly calculate the guidelines. The guidelines for Count 2 and Count 4 combined are at the bottom, the minimum mandatory, which is 32 years, 7 plus 25, and at the top, life imprisonment. Government agrees?

MS. CHOE: I believe the top -- I think it may just be 32 years straight, but definitely the bottom is 32 years.

THE COURT: And the top is what?

MS. CHOE: I believe it may also be 32 years.

THE COURT: Okay.

MS. O'CONNOR: No objection.

THE COURT: Okay. And the defense agrees.

MS. O'CONNOR: Yes, Your Honor.

THE COURT: In view of that, applying 3553(a) factors and with the constraints that I have because of the minimum mandatory passed by Congress, what is the Government's position?

MS. CHOE: We recommend 32 years.

THE COURT: What is the defense counsel's position?

MS. O'CONNOR: 32 years.

THE COURT: What do you want to say before you are sentenced, sir?

THE DEFENDANT: Just I apologize to anyone in this situation and if I hurt anyone, any victims. It's all in God's hands from here.

THE COURT: Yeah, it is.

After having heard from all parties, it is the judgment of this Court that you, Michael St. Hubert, as to Count 2, will be sentenced to seven years; as to Count 12, to 25 years. The sentences will be consecutive equaling 32 years. You'll be placed on supervised release -- for Count 2, what's the maximum

supervised release?

MS. CHOE: I believe it is five years maximum for both.

THE COURT: Five years. And count --

MS. CHOE: Count 8 and Count 12, five years for each.

THE COURT: I thought it was Count 2. Is it Count 8?

MS. CHOE: Count 8.

THE COURT: Count 8 and Count 12. Is it five years only?

MS. CHOE: I believe they're each five years.

THE COURT: Okay. Five years. If you're going to screw up, you're going to screw-up within the first year of the five years. That will be concurrent, the supervised release. $200 special assessment. No fine and no restitution. Do you understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: That's the sentence. Do you wish to appeal this sentence which is the minimum mandatory for these two counts?

THE DEFENDANT: No, Your Honor.

THE COURT: Are you happy with your lawyer?

THE DEFENDANT: Yes, very.

THE COURT: Anyone force you to give up the right to appeal?

THE DEFENDANT: No, Your Honor.

THE COURT: Do you understand the Notice of Appeal must

be filed within 14 days?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right.

MS. CHOE: Thank you, Judge.

THE COURT: Anything else? Good luck to you.

(The hearing was concluded at 3:30 p.m.)

C E R T I F I C A T E

I hereby certify that the foregoing is an accurate transcription of proceedings in the above-entitled matter.

04-01-16
DATE

GILDA PASTOR-HERNANDEZ, RPR, FPR
Official United States Court Reporter
Wilkie D. Ferguson Jr. U.S. Courthouse
400 North Miami Avenue, Suite 13-3
Miami, Florida 33128 305.523.5118
gphofficialreporter@gmail.com

A-7

UNITED STATES DISTRICT COURT

Southern District of Florida
Miami Division

UNITED STATES OF AMERICA
v.
MICHAEL ST. HUBERT

JUDGMENT IN A CRIMINAL CASE

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

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

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

The defendant is adjudicated guilty of these offenses:

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

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

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

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

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

Federico A. Moreno
United States District Judge

Date: February 17, 2016

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

IMPRISONMENT

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

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

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

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
DEPUTY UNITED STATES MARSHAL

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

SUPERVISED RELEASE

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

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

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

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

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

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

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

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

STANDARD CONDITIONS OF SUPERVISION

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

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

CRIMINAL MONETARY PENALTIES

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

	Assessment	Fine	Restitution
TOTALS	$200.00	$0.00	$0.00

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

NAME OF PAYEE	TOTAL LOSS*	RESTITUTION ORDERED	PRIORITY OR PERCENTAGE

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

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

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

SCHEDULE OF PAYMENTS

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

A. Lump sum payment of $200.00 due immediately.

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

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

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

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

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

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

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

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

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

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

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

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

Attorneys and Law Firms

***1320** Sivashree Sundaram, U.S. Attorney's Office, Fort Lauderdale, FL, Olivia Choe, Wifredo A. Ferrer, Emily M. Smachetti, Nalina Sombuntham, U.S. Attorney's Office, Miami, FL, for Plaintiff-Appellee.

Brenda Greenberg Bryn, Federal Public Defender's Office, Fort Lauderdale, FL, Christine Carr O'Connor, Michael Caruso, Federal Public Defender, Federal Public Defender's Office, Miami, FL, for Defendant-Appellant.

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

Before MARCUS, ANDERSON and HULL, Circuit Judges.

Opinion

HULL, Circuit Judge:

On February 16, 2016, Michael St. Hubert pled guilty to two counts of using, carrying, and brandishing a firearm during, in relation to, and in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c). The district court sentenced St. Hubert to 84 months' imprisonment for the first § 924(c) conviction and 300 consecutive months' imprisonment for the second § 924(c) conviction. St. Hubert appeals his § 924(c) convictions and sentences claiming his predicate Hobbs Act robbery and attempted robbery do not constitute crimes of violence under either the risk-of-force (residual) clause in § 924(c)(3)(B) or the use-of-force clause in § 924(c)(3)(A).

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

I. BACKGROUND FACTS

A. Indictment

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

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

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

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

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

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

in Count 7 of this Indictment, in violation of Title 18, United States Code, Section 924(c)(1)(A).

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

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

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

(emphasis added).

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

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

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

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

(emphasis added).

B. Motion to Dismiss Indictment

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

C. Guilty Plea Colloquy Outlined the Offense Conduct

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

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

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

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

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

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

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

D. Sentencing

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

St. Hubert timely appealed.

II. WAIVER BY GUILTY PLEA

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

In response, the government argues that St. Hubert waived those claims when he knowingly and voluntarily pled guilty to Counts 8 and 12. St. Hubert counters that his § 924(c) claim is jurisdictional and thus not waivable. At

the outset, we point out that St. Hubert's appeal actually raises two distinct claims, one constitutional and the other statutory in nature.

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

St. Hubert's statutory claim involves § 924(c)(3)(A). Specifically, St. Hubert says that Hobbs Act robbery and attempted robbery categorically do not qualify as crimes of violence under the other statutory definition of crime of violence in § 924(c)(3)(A)'s use-of-force clause. Consequently, before we can address the merits of St. Hubert's § 924(c) claims, we must first determine whether St. Hubert has waived them. [2]

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

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

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

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

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

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

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

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

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

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

Because the government relies on United States v. Cotton, 535 U.S. 625, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002), we discuss it first. In Cotton, the defendants were charged with a cocaine conspiracy under 21 U.S.C. §§ 841(a)(1) and 846, but the indictment charged only a "detectable amount" of cocaine and cocaine base and not a threshold amount needed for enhanced penalties under § 841(b). 535

U.S. at 627–28, 122 S.Ct. at 1783. The Supreme Court had held in *1325 United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), that if drug quantity is used to increase a defendant's sentence above the statutory maximum sentence for an § 841 drug offense, then that drug quantity must be charged in the indictment and decided by a jury. 543 U.S. at 235–44, 125 S.Ct. at 751–56 (extending the holding of Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), to federal sentencing proceedings under the Sentencing Guidelines).

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

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

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

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

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

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

the indictment: the failure to allege a fact requisite to the imposition of defendants' sentences, namely, their trade in a threshold quantity of cocaine base." Id. at 714. [4]

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

Our best determination is that in this case we are bound by our circuit precedent in Peter. St. Hubert's claim is not, as in Cotton, that his indictment omitted a necessary fact. Rather, like in Peter, the error asserted by St. Hubert is that "the indictment consisted only of specific conduct"—carrying, using, and brandishing a firearm during a Hobbs Act robbery and an attempted Hobbs Act robbery—that, according to St. Hubert, is "as a matter of law, ... outside the sweep of the charging statute." Id. at 714. Said another way, because "the Government affirmatively alleged a specific course of conduct that [at least in St. Hubert's view] is outside the reach" of § 924(c)(3)(A), "the Government's proof of th[at] alleged conduct, no matter how overwhelming, would have brought it no closer to showing the crime charged than would have no proof at all." Id. at 715 (emphasis added).

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

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

III. HOBBS ACT ROBBERY IN COUNT 8

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

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

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

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

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

As to the second definition, St. Hubert argues that Hobbs Act robbery no longer can qualify under the risk-of-force clause in § 924(c)(3)(B) because that definition is unconstitutional in light of Johnson v. United States, 576 U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015),

in which the Supreme Court declared unconstitutionally vague similar language in the "residual clause" of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii). [5]

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

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

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

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

Under our prior panel precedent rule, we are bound to follow Ovalles and conclude that St. Hubert's constitutional challenge to § 924(c)(3)(B) lacks merit. See U.S. v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008). St. Hubert does not deny that Hobbs Act robbery qualifies as a crime of violence if that risk-of-force or residual clause in § 924(c)(3)(B) is constitutional. Thus, we affirm St. Hubert's convictions and sentences based on Ovalles.

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

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

St. Hubert argues that Saint Fleur and Colon are not binding precedent in his direct appeal because they were adjudications of applications for leave to file a second or successive § 2255 motion. St. Hubert refers to these adjudications as "SOS applications" and as decisions "occurring in a procedurally distinct context." We reject that claim because this Court has already held that "our prior-panel-precedent rule applies with equal force as to prior panel decisions published in the context of applications to file second or successive petitions. In other words, published three-judge orders issued under § 2244(b) are binding precedent in our circuit." In re

Lambrix, 776 F.3d 789, 794 (11th Cir. 2015); see also In re Hill, 777 F.3d 1214, 1223–24 (11th Cir. 2015).

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

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

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

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

IV. ATTEMPTED ROBBERY IN COUNT 12

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

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

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

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

10 Mathis and Descamps addressed burglary under the enumerated crimes clause of the ACCA's violent felony definition, not the definition of crime of violence under § 924(c)(3)(A)'s use-of-

force clause. See Mathis, 579 U.S. at ——, 136 S.Ct. at 2248; Descamps, 570 U.S. at 258, 133 S.Ct. at 2282. Similarly, Moncrieffe and Leocal, which involved immigration removal proceedings, addressed different predicate offenses and statutory provisions from this case. See Moncrieffe, 569 U.S. at 189, 133 S.Ct. at 1683; Leocal, 543 U.S. at 3–4, 125 S.Ct. at 379. Moncrieffe addressed whether a prior state drug conviction qualified as a "drug trafficking crime" under § 924(c)(2) and, therefore, as an "aggravated felony" under the Immigration and Nationality Act ("INA"). Moncrieffe, 569 U.S at 187–90, 133 S.Ct. at 1682–84. And Leocal addressed whether a prior conviction for driving under the influence qualified as a "crime of violence" under 18 U.S.C. § 16 and, therefore, as an "aggravated felony" under the INA. Leocal, 543 U.S. at 3–6, 125 S.Ct. at 379–80.

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

A. Statutory Text and Categorical Approach

The Hobbs Act provides that:

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

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

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

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

"Robbery" under the Hobbs Act is defined as:

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

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

person or property." 18 U.S.C. § 924(c)(3)(A) (emphasis added).

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

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

Reaching the same conclusion as Saint Fleur, four other circuits have applied the categorical approach, listing each of these means, and concluded that Hobbs Act robbery is categorically a crime of violence under the use-of-force clause in § 924(c)(3)(A). See Gooch, 850 F.3d at 291–92; United States v. Rivera, 847 F.3d 847, 848–49 (7th Cir. 2017); United States v. Anglin, 846 F.3d 954, 964–65 (7th Cir.), cert. granted & judgment vacated on other grounds, —— U.S. ——, 138 S.Ct. 126, 199 L.Ed.2d 1 (2017); United States v. Hill, 832 F.3d 135, 140–44 (2d Cir. 2016); United States v. House, 825 F.3d 381, 387 (8th Cir. 2016). [12]

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

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

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

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

Second, we agree with the Second Circuit's decision in Hill, which explained why that court rejected the argument, like St. Hubert's, that one could commit Hobbs Act robbery by "putting the victim in fear" without any physical force or threat of physical force. Hill, 832 F.3d at 141–43. The Second Circuit noted that a hypothetical nonviolent violation of the statute, without evidence of actual application of the statute to such conduct, is insufficient to show a "realistic probability" that Hobbs Act robbery could encompass nonviolent conduct.[13] Id. at 139–40, 142–43. The Second Circuit added that "there must be 'a realistic probability, not a theoretical possibility,' that the statute at issue could be applied to conduct that does not constitute a crime of violence," and, to that end, "a defendant 'must at least point to his own case or other cases in which the ... courts in fact did apply the statute in the ... manner for which he argues.' " Id. at 140 (quoting in part Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193, 127 S.Ct. 815, 822, 166 L.Ed.2d 683 (2007)); see also United States v. McGuire, 706 F.3d 1333, 1337 (11th Cir. 2013) (citing Duenas-Alvarez and explaining that to determine whether an offense is categorically a crime of violence under § 924(c), courts must consider whether "the plausible applications of the statute of conviction all require the use or threatened use of force ...." (emphasis added)).

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

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

14 In citing Curtis Johnson, we note that it was an ACCA case where the use-of-force clause in the definition of violent felony required that the physical force be "against the person of another" only. 18 U.S.C. § 924(e)(2)(B)(i); Curtis Johnson, 559 U.S. at 135–36, 130 S.Ct. at 1268.
In contrast, § 924(c)(3)(A)'s use-of-force clause in the definition of crime of violence is broader and includes threatened physical force "against the person or property of another." 18 U.S.C. § 924(c)(3)(A). As discussed above, the definition of robbery in the Hobbs Act parallels § 924(c)(3)(A), as it likewise refers to actual or threatened force against a person or property. See Robinson, 844 F.3d at 144. Thus, in the § 924(c) context, Curtis Johnson may be of limited value in assessing the quantum of force necessary to qualify as a "use, attempted use, or threatened use of physical force" against property within the meaning of § 924(c)(3)(A). Nonetheless, even strictly applying Curtis Johnson's definition of physical force, we conclude that Hobbs Act robbery categorically qualifies as a crime of violence.

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

C. Attempt Crimes

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

To be convicted of an "attempt," a defendant must: (1) have the specific intent to engage in the criminal conduct with which he is charged; and (2) have taken a substantial step toward the commission of the offense that strongly corroborates his criminal intent. United States v. Jockisch, 857 F.3d 1122, 1129 (11th Cir.), cert. denied, —— U.S.

——, 138 S.Ct. 284, 199 L.Ed.2d 181 (2017); United States v. Yost, 479 F.3d 815, 819 (11th Cir. 2007). "A substantial step can be shown when the defendant's objective acts mark his conduct as criminal and, as a whole, 'strongly corroborate the required culpability.' " Yost, 479 F.3d at 819 (quoting United States v. Murrell, 368 F.3d 1283, 1288 (11th Cir. 2004)).

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

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

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

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

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

V. MODIFIED CATEGORICAL APPROACH

Although under our precedent we have applied and base our holding on the categorical approach, we pause to mention another approach that makes good sense. ***1335** The Third Circuit has aptly explained why a modified categorical approach is more appropriate in § 924(c) firearm cases, where the federal district court evaluates a contemporaneous federal crime charged in the same

indictment and has an already developed factual record as to both offenses. In United States v. Robinson, the Third Circuit, like five other circuits, held that Hobbs Act robbery is a crime of violence under § 924(c)(3)(A). 844 F.3d at 141.

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

The Third Circuit then contrasted the material differences between the ACCA and § 924(c) and determined that "[t]he remedial effect of [that] approach is not necessary" in § 924(c) cases for several reasons. Id. at 141–43. For example, in § 924(c) cases, the predicate offense and the § 924(c) offense are companion contemporaneous crimes, charged in the same indictment before the same federal judge; whereas the ACCA involves a prior crime committed long ago in different state jurisdictions with divergent laws. Id. at 141, 143. The Third Circuit explained that, unlike in the ACCA context, in § 924(c) cases, "the record of all necessary facts are before the [federal] district court" as to both offenses. Id. at 141. Consequently, the contemporaneous "§ 924(c) conviction will shed light on the means by which the predicate offense was committed." Id. at 143.

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

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

The same is true in St. Hubert's case. Indeed, in his guilty plea before the district court, St. Hubert admitted that he used a firearm in both robberies and even held a firearm against the side of one employee during the attempted robbery on January 27. Thus, St. Hubert's

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

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

VI. SESSIONS V. DIMAYA

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

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

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

Third, in the ACCA and § 16(b) immigration context, federal courts must try to "discern some sort of cross-jurisdictional common character for an offense that could be articulated fifty different ways by fifty different States." United States v. Eshetu, 863 F.3d 946, 960 (D.C. Cir. 2017) (Millett, J., concurring in part and concurring in the judgment that conspiracy to commit Hobbs Act robbery is a crime of violence under § 924(c)). In contrast, in § 924(c) cases, as explained above, federal courts are evaluating a contemporaneous companion federal crime in the same indictment where the relevant record is directly before the district court. As one judge adroitly explained:

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

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

For these reasons, we conclude that no matter the outcome about § 16(b)'s residual clause in Dimaya, St.

Hubert's § 924(c) convictions and sentences must be affirmed under both clauses in § 924(c)(3)(A) and (B).

AFFIRMED.

All Citations

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
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October 16, 2018

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 16-10874-GG
Case Style: USA v. Michael St. Hubert
District Court Docket No: 1:15-cr-20621-FAM-1

The parties are directed to file supplemental letter briefs addressing the following issue:

> Whether, in light of Ovalles v. United States, ___ F.3d ___, 2018 WL 4830079 (Oct. 4, 2018) (en banc), St. Hubert's predicate Hobbs Act robbery and attempted Hobbs Act robbery, as he admitted committing them in his written plea agreement and plea colloquy, constitute a crime of violence under 18 U.S.C. § 924(c)(3)(B)'s residual clause?

The letter briefs shall not exceed ten pages double-spaced. The letter briefs shall be filed simultaneously on or before noon on Friday, October 26, 2018.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Joe Caruso, GG
Phone #: (404) 335-6177

LetterHead Only

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October 26, 2018

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Re: *United States v. Michael St. Hubert*
Case No. 16-10874

Dear Mr. Smith:

This Court directed the parties to address the following question via letter brief:

> Whether, in light of *Ovalles v. United States*, ___ F.3d ___, 2018 WL 4830079 (Oct. 4, 2018) (en banc), St. Hubert's predicate Hobbs Act robbery and attempted Hobbs Act robbery, as he admitted committing them in his written plea agreement and plea colloquy, constitute a crime of violence under 18 U.S.C. § 924(c)(3)(B)'s residual clause?

This Court raises this issue having already determined Mr. St. Hubert's Hobbs Act robbery and attempted Hobbs Act robbery predicates to be crimes of violence under § 924(c)(3)(A)—the elements clause. *See United States v. St. Hubert*, 883 F.3d 1319 (11th Cir. 2018), *cert. denied*, ___ S. Ct. ___, 2018 WL 3497087 (Oct. 1, 2018). In answering this Court's

question now, Mr. St. Hubert maintains that his Hobbs Act robbery and attempted Hobbs Act robbery predicates do not qualify as "crimes of violence" under either clause—elements or residual—of § 924(c)(3).

I. THIS COURT ERRONEOUSLY APPLIED A CONDUCT-BASED APPROACH TO THE CRIME-OF-VIOLENCE DETERMINATION UNDER § 924(C)(3)(B) IN AN EFFORT TO SAVE IT FROM BEING VOID FOR VAGUENESS

In *Ovalles*, this Court abandoned the categorical approach with regard to § 924(c)(3)'s residual clause and instead adopted a "conduct-based approach that accounts for the actual, real-world facts of the crime's commission." ___ F.3d ___, 2018 WL 4830079, at *18 (11th Cir. Oct. 4, 2018). This Court did so under the canon of constitutional avoidance in order to save § 924(c)(3)'s residual clause from being void for vagueness. But in relying upon the canon of constitutional avoidance to save § 924(c)(3)(B), this Court ignored Supreme Court precedents to the contrary dictating that the text of § 924(c)(3)'s residual clause clearly requires application of the categorical approach. Had this Court faithfully applied the Supreme Court's precedents, it would have had no choice but to strike § 924(c)(3)(B) as unconstitutional.

The Supreme Court has specifically addressed language "essentially identical" to the language of § 924(c)(3)(B) in a pair of cases: *Leocal v. Ashcroft*, 543 U.S. 1 (2004), and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). In *Leocal*, the Supreme Court made clear that the language of the residual clause in 18 U.S.C. § 16—§ 16 (b)—"requires [courts] to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to [a] crime." 543

U.S. at 7. That is, the express language of § 16(b) requires application of the categorical approach. And in *Dimaya*, the Supreme Court faithfully applied the categorical approach to the language of § 16(b) and struck down the clause as void for vagueness. 138 S. Ct. at 1216. In so holding, a plurality of the Court expressly noted that "§ 16's residual clause . . . has no plausible fact-based reading." *Id.* at 1218 (internal quotation marks omitted); *see id.* at 1235-36 (Roberts, C.J., dissenting) (reaffirming the validity of the Supreme Court's unanimous holding in *Leocal* and applying the categorical approach to § 16(b)).

These two cases, taken together, mandate that the language of § 924(c)(3)(B) also be stricken as void for vagueness. *Leocal* tells us that the categorical approach applies to the essentially-identical language of § 924(c)(3)(B), while *Dimaya* makes clear that application of the categorical approach renders the clause void for vagueness, a fact that this Court acknowledged in *Ovalles*. This Court's reliance upon the canon of constitutional avoidance to salvage § 924(c)(3)'s residual clause is erroneous because its text cannot plausibly be read to permit a conduct-based approach. Text cannot "require[ ]" a categorical approach in one instance, and then suddenly not. *Leocal*, 543 U.S. at 7. "That is not how the canon of constitutional avoidance works." *Jennings v. Rodriguez*, 138 S. Ct. 830, 843 (2018). The canon is meant for avoiding certain questions about newly-enacted statutes, not "rewrite[ing]" well-established laws felled by subsequent jurisprudence. *Id.*

The Supreme Court has already instructed that the express language of § 924(c)(3)(B) requires application of the categorical approach, and doing so unquestionably renders the clause void for vagueness. It was error for this Court to circumvent the Supreme Court's clear guidance by applying the canon of constitutional avoidance to save § 924(c)(3)(B) from being void for vagueness.

II. THIS COURT'S APPLICATION OF A CONDUCT-BASED APPROACH IN THE FIRST INSTANCE—AKIN TO HARMLESS-ERROR REVIEW—IS ALSO IMPROPER

The harmless-error review sanctioned by this Court's opinion in *Ovalles* is also improper. In *Ovalles*, this Court, sitting as an appellate court, affirmed Ms. Ovalles's conviction under § 924(c)(3)(B) even though Ms. Ovalles did not admit, and no fact-finder found, that her conduct created a substantial risk that physical force may have been used in the course of committing her predicate offense. This Court decided as a matter of law that the "substantial risk" element had been satisfied by examining the elements of the predicate offense to which she pleaded guilty, even though, under this Court's own holding, the question of whether the defendant engaged in conduct that satisfies the "substantial risk" standard is an element that must be decided by the jury or admitted by the defendant. The attempt to engage in a similar analysis here is likewise erroneous when there has been no jury finding or express admission by Mr. St. Hubert that his predicate offenses involve a substantial risk that force might be used.

"Harmless-error review looks . . . to the basis on which the jury *actually* rested its verdict . . . . That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (emphasis in original) (internal quotation marks and citation omitted). Because Mr. St. Hubert never had a trial, there is no "actual jury finding of guilty . . . no *object*, so to speak, upon which harmless-error scrutiny can operate." *Id.* at 280 (emphasis in original). And his guilty plea does not fill the void because he was never asked if the particular way he committed the underlying offenses of Hobbs Act robbery and attempted Hobbs Act robbery posed a "substantial risk" that physical force may be used. That particular element is a factual question for the jury to decide, not for an appellate court to decide in the first instance. "The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action . . . it requires an actual jury finding of guilt." *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993).

III. EVEN APPLYING A CONDUCT-BASED APPROACH, MR. ST. HUBERT'S PREDICATE OFFENSES DO NOT CONSTITUTE CRIMES OF VIOLENCE UNDER § 924(C)(3)(B) BECAUSE THE RECORD EVIDENCE IS INSUFFICIENT TO SUPPORT A FINDING THAT MR. ST. HUBERT'S CONDUCT "INVOLVED A SUBSTANTIAL RISK THAT PHYSICAL FORCE AGAINST THE PERSON OR PROPERTY OF ANOTHER MAY BE USED IN THE COURSE OF COMMITTING THE OFFENSE"

After "jettison[ing] the categorical interpretation in favor of the conduct-based approach for cases arising under § 924(c)(3)'s residual clause," this Court laid out the four elements the government would have to prove in order to convict a

defendant of a § 924(c) charge, including that the offense "constitute[ ] a 'crime of violence' within the meaning of § 924(c)(3)." *Ovalles*, 2018 WL 4830079, at *17. Put another way, the government has the burden of proving beyond a reasonable doubt that both Hobbs Act robbery and attempted Hobbs Act robbery, "*as [Mr. St. Hubert] has admitted [they] actually occurred* . . . 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[s]." *Id.* (emphasis in original) (internal quotation marks omitted). The government cannot meet its burden here.

At Mr. St. Hubert's change of plea, the government's factual proffer noted the following pertinent facts with regard to the Hobbs Act robbery and attempted Hobbs Act robbery, respectively: (1) "On January 21st, 2015 . . . [t]he defendant . . . brandished a firearm and directed three store employees to the rear of the store. He demanded that the employees place money from the store's safe inside one of the store's plastic bags and threatened to shoot them"; (2) "On January 27, 2015 . . . the defendant . . . held a firearm against the side of one employee and directed a second employee to open the store safe"; and (3) "During execution of a search warrant for the defendant's vehicle, law enforcement located a firearm and ammunition." [DE 39:12-13.]

What the government's factual proffer fails to note, however, is whether the firearm was loaded at the time of Mr. St. Hubert's brandishing in either incident (or even whether the same firearm was at issue in (1), (2), and (3) above). The record is devoid of such information. And without any evidence that that St. Hubert

brandished a loaded firearm, the government cannot demonstrate beyond a reasonable doubt that his conduct "involved a substantial risk that physical force" may be used. Without bullets, the gun is rendered impotent and poses no "substantial risk that physical force against the person or property of another may be used in the course of committing the offense." This Court has already acknowledged that mere possession of a gun is insufficient to demonstrate that the offense "involved a substantial risk of physical force." *Ovalles*, 2018 WL 4830079, at *15 n.8. And brandishing an unloaded gun is akin to mere possession of a gun.

In *Ovalles*, this Court easily concluded that Ms. Ovalles's acknowledged conduct "posed a very real 'risk' that physical force 'may' be used," because, in fact, violent force was actually used when Ms. Ovalles and her coconspirators hit a child in the face with a baseball bat, and in making their escape, had fired an AK-47 assault rifle at the family and someone who had come to their aid. *Id.* at *18. The same conclusion is impossible on the very different record before the Court here. Under this Court's conduct-based approach, the question is whether Mr. St. Hubert's conduct, as admitted in his plea agreement and plea colloquy, actually did "involve a substantial risk" that physical force may be used. But here, by contrast to *Ovalles*, the answer is no. The record is devoid of any evidence that the firearm was loaded. As a threshold matter, Mr. St. Hubert admitted *no* factual conduct whatsoever in his plea agreement. He admitted only the bare elements of the two § 924(c) charges. *Descamps v. United States*, 570 U.S. 254, 2699-70 (2013). And although he did agree to the correctness of the factual proffer by the AUSA at his

plea colloquy, the conduct the AUSA proffered does *not* indicate that Mr. St. Hubert employed the sort of "violent force" necessary for the government to meet its burden. *See Johnson v. United States*, 559 U.S. 133, 140 (2010) (drawing from its interpretation of § 16(b) in *Leocal* to conclude that the term "physical force" means "violent force").

This Court's conduct-based approach requires the government to prove every element of a violation of § 924(c) beyond a reasonable doubt. And the sparse proffer of facts made here fails to meet that heavy burden on the "crime of violence" element. As such, neither predicate offense in this case constitutes a crime of violence under § 924(c)(3)(B)'s residual clause, even under a fact-based approach. And because the categorical approach indisputably continues to govern the analysis under 18 U.S.C. § 924(c)(3)(A)'s elements clause – and neither Hobbs Act robbery nor attempted Hobbs Act robbery categorically qualify as "crimes of violence" under the elements clause for the reasons previously argued and the additional reasons below – the Court should vacate both of Mr. St. Hubert's convictions.

IV. HOBBS ACT ROBBERY IS NOT CATEGORICALLY A "CRIME OF VIOLENCE" UNDER THE ELEMENTS CLAUSE

In this Court's prior opinion, it followed several other circuits that had held Hobbs Act robbery categorically met the "crime of violence" definition in § 924(c)(3)(A). *St. Hubert*, 883 F.3d at 1331-1333. But notably, none of the circuit decisions followed had ever considered the specific question raised by Mr. St. Hubert, namely, whether a Hobbs Act robbery is categorically overbroad if juries are routinely instructed pursuant to a

pattern Hobbs Act robbery instruction that the offense can be committed without the use, threat, or fear of any physical violence. That, notably, is true in this particular circuit since district court judges instruct juries every day pursuant to Eleventh Circuit Pattern Instruction O70.3 juries that a defendant can be found guilty of Hobbs Act robbery if the government proves that he took property by causing "the victim to fear harm, either immediately or in the future;" that such "fear" "means a state of anxious concern, alarm, or anticipation of harm," including "the *fear of financial loss* as well as fear of physical injury;" and the "harm" feared, can be simply to "property" which "includes money, tangible things of value, and *intangible rights that are a source or element of wealth*." The Firth and Tenth Circuits, notably, have nearly identical instructions.

In its prior decision, the Court erroneously followed an inapposite decision of the Second Circuit, holding that to show a "realistic probability" that a statue "could encompass nonviolent conduct" as required by *Gonzalez v. Duenas-Alvarez*, 549 U.S. 1183, 192-93 (2007), a defendant must point to a case in which the Hobbs Act was actually applied to non-violent conduct. 883 F.3d at 1332-1333. But the Second Circuit does not have a pattern instruction like our O70.3 (or any pattern instructions for that matter). The plain language of our pattern Hobbs Act instruction *itself* creates a "reasonable probability" sufficient for *Duenas-Alvarez* that a Hobbs Act robbery conviction may "plausibly" be based on non-violent conduct. *See United States v. McGuire*, 706 F.3d 1333, 1337 (11th Cir. 2013) (interpreting *Duenas-Alvarez* to only require that a defendant show that the statute could "plausibly" be applied to non-violent conduct). A reported appellate "case" involving a conviction on such a theory is *not* additionally necessary.

V. ATTEMPTED HOBBS ACT ROBBERY IS NOT CATEGORICALLY A "CRIME OF VIOLENCE" UNDER THE ELEMENTS CLAUSE

The Court's holding in its prior decision that any and every attempt to commit a crime of violence under § 924(c) is itself a crime of violence, 883 F.3d at 1333-1334, is likewise erroneous and should be reconsidered. In *James v. United States*, 550 U.S. 192, 201 (2007), *overruled on other grounds* by *Johnson v. United States*, 135 S.Ct. 2551 (2015), the Supreme Court rejected that precise type of logic by this Court, which had presumed that every attempt to commit an enumerated "violent felony" (such as burglary) in 18 U.S.C. § 924(e)(2)(B)(ii), was necessarily a "violent felony" within the residual clause. 430 F.3d at 1155-58. Upon certiorari, the Supreme Court rejected such presumptive reasoning. The Court was clear that "preparatory conduct that does not pose the same risk of violent confrontation and physical harm posed by an attempt to enter a structure" would not even meet the then-all-inclusive residual clause. *Id.* at 204-05. As such, similar preparatory conduct for a Hobbs Act robbery offense (temporally or locationally separated from the crime scene or designated victim) such as that in *United States v. Wrobel*, 841 F.3d 450, 455-456 (7th Cir. 2016), should not meet the much-narrower elements clause. Plainly, if Congress intended that all attempts to commit "crimes of violence" themselves qualify as crimes of violence, it would have stated so specifically as it did in 18 U.S.C. § 3559(c)(2)(F)(defining "serious violent felony" to include any attempt, conspiracy, or solicitation to commit any of the enumerated offenses). That it did not is significant.

Respectfully submitted,

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