APPENDIX

APPENDIX

A-1

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Opinion, 883 F.3d 1319, superseded.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

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A-2

918 F.3d 1174
United States Court of Appeals, Eleventh Circuit.

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

No. 16-10874
|
Date Filed: 03/19/2019

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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 ED CARNES, Chief Judge, TJOFLAT, MARCUS, WILSON, WILLIAM PRYOR, MARTIN, JORDAN, ROSENBAUM, JILL PRYOR, NEWSOM, and BRANCH, Circuit Judges. *

* Judge Grant did not participate in the decision to rehear this case en banc. Judge Julie Carnes participated in the en banc poll that was conducted in this case before taking senior status on June 18, 2018.

Opinion

BY THE COURT:

A member of this Court in active service having requested a poll on whether this case should be reheard by the Court sitting en banc, and a majority of the judges in active service on this Court having voted against granting a rehearing en banc, it is ORDERED that this case will not be reheard en banc.

TJOFLAT, Circuit Judge, joined by ED CARNES, Chief Judge, and WILLIAM PRYOR, NEWSOM, and BRANCH, Circuit Judges, concurring in the denial of rehearing en banc.

Two dissents—those by Judges Wilson and Martin—have seized upon this direct appeal case as an opportunity to criticize our Court's processing and publishing of orders on federal prisoners' applications to file successive motions under 28 U.S.C. § 2255(h). Those dissents not only distort the factual context but also contain unfounded attacks on the integrity of the Court as an institution. So, regrettably, a response is required to set the record straight.

These two dissents focus on only prisoners' post-conviction applications to file successive § 2255 motions. To place the subject matter of the dissents in context, it is necessary to describe first (1) the nature of the instant direct-appeal case and (2) how, after a direct appeal, a federal prisoner has yet another post-conviction opportunity ***1175** to challenge his sentence through an initial 28 U.S.C. § 2255 motion. Second, I explain how Congress has strictly limited prisoners' applications to file successive § 2255 motions that seek to challenge yet again a federal conviction and sentence that has long since become final.

Third, to correct the record about our Court's published orders ruling on such applications, I provide the statistics that show how our Court has published only 1 to 2% of its orders on post-conviction applications to file successive § 2255 motions, even in 2016, the year on which the dissenters focus. Lastly, contrary to what the dissents claim, I discuss how all published orders of this Court are always subject to further review, such as the en banc poll in this very case. As explained below, there simply isn't (nor has there ever been) any crisis about our Court's published orders.

I. INSTANT CASE IS DIRECT CRIMINAL APPEAL

Let's start with what type of proceeding the instant case is and is not. This criminal case is a direct appeal, wherein the appellant-defendant St. Hubert challenges his two federal firearm convictions under 18 U.S.C. § 924(c). St. Hubert has never disputed that he had and brandished a firearm while robbing an AutoZone store on January 21, 2015, and while attempting to rob another AutoZone store on January 27, 2015. *United States v. St. Hubert*, 909 F.3d 335, 338–40 (11th Cir. 2018).

Rather, St. Hubert contends that his admitted Hobbs Act robbery crimes do not qualify as predicate "crimes of violence" under § 924(c)(3)'s definitions. *Id.* at 340. After briefing and oral argument, a panel of this Court affirmed

St. Hubert's firearm convictions, concluding his predicate armed robbery offenses qualify as crimes of violence under § 924(c)(3)'s residual and elements clauses. *See id.* at 344–53. In affirming, the *St. Hubert* panel followed, in part, this Court's binding precedent in *In re Saint Fleur*, 824 F.3d 1337, 1340–41 (11th Cir. 2016), which held that Hobbs Act robbery qualifies as a crime of violence under 18 U.S.C. § 924(c)(3)(A)'s elements clause. *St. Hubert*, 909 F.3d at 345–46.

In doing so, our *St. Hubert* panel pointed out that five other circuits, like our *In re Saint Fleur* published order, had held that Hobbs Act robbery is a crime of violence under § 924(c)(3)(A)'s elements clause. *United States v. Barrett*, 903 F.3d 166, 174 (2d Cir. 2018), *petition for cert. filed*, No. 18-6985 (U.S. Dec. 11, 2018); *United States v. Melgar-Cabrera*, 892 F.3d 1053, 1064–66 (10th Cir.), *cert. denied*, —— U.S. ——, 139 S.Ct. 494, 202 L.Ed.2d 386 (2018); *Diaz v. United States*, 863 F.3d 781, 783–84 (8th Cir. 2017); *United States v. Gooch*, 850 F.3d 285, 291–92 (6th Cir.), *cert. denied*, —— U.S. ——, 137 S.Ct. 2230, 198 L.Ed.2d 670 (2017); *United States v. Rivera*, 847 F.3d 847, 848–49 (7th Cir.), *cert. denied*, —— U.S. ——, 137 S.Ct. 2228, 198 L.Ed.2d 669 (2017). Since that time, two other circuits have held the same. *United States v. Bowens*, 907 F.3d 347, 353–54 (5th Cir. 2018), *petition for cert. filed*, No. 18-7612 (U.S. Jan. 28, 2019); *United States v. Garcia-Ortiz*, 904 F.3d 102, 106–09 (1st Cir. 2018), *petition for cert. filed*, No. 18-7176 (U.S. Dec. 27, 2018). As to Hobbs Act robbery, our Court is simply not an outlier.

In addition to direct appeals like this case, a federal prisoner has a second post-conviction opportunity to challenge his sentence by timely filing an initial § 2255 motion in the district court. Section 2255(a) provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or ***1176** laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a). If the district court denies the initial § 2255 motion, the federal prisoner may directly appeal that ruling to this Court. *Id.* § 2255(d).

In short, as important factual context, the dissents do not address, or complain about, direct appeals or initial § 2255 motions, whereby a federal prisoner already has had two post-conviction opportunities to challenge his sentence. Rather, the dissents ignore those two avenues of redress and are using this direct-appeal case as a vehicle to write about only a third type of post-conviction proceeding: a federal prisoner's application to file a second or successive § 2255 motion pursuant to § 2255(h). I therefore turn to § 2255(h), which restricts prisoners' applications to file successive § 2255 motions.

II. PRISONERS' APPLICATIONS TO FILE SUCCESSIVE § 2255 MOTIONS

After a federal prisoner has used his two post-conviction opportunities to challenge his sentence (through a direct appeal and an initial § 2255 motion), Congress has narrowly and significantly limited the subsequent or successive times a federal prisoner can challenge his final sentence. 28 U.S.C. § 2255(h). In the § 2255(h) statute, Congress has restricted such successive post-conviction challenges to only two types of highly circumscribed claims: (1) claims based on "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense"; or (2) claims based on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id.*

Congress imposed these restrictions on successive § 2255 motions in order to achieve finality of federal criminal judgments and to stop an endless flow of post-conviction petitions by federal prisoners in the federal courts. *See Gonzalez v. Sec'y for Dep't of Corr.*, 366 F.3d 1253, 1269 (11th Cir. 2004) (en banc) ("The central purpose behind the [Antiterrorism and Effective Death Penalty Act ("AEDPA")] was to ensure greater finality of state and federal court judgments in criminal cases, and to that end its provisions

greatly restrict the filing of second or successive petitions."); *see also Williams v. Warden*, 713 F.3d 1332, 1338 (11th Cir. 2013) ("Congress expressed its clear intent to impose a jurisdictional limitation on a federal court's ability to grant a habeas petitioner what is effectively a third bite at the apple after failing to obtain relief on direct appeal or in his first postconviction proceeding."); *Gilbert v. United States*, 640 F.3d 1293, 1311 (11th Cir. 2011) (en banc) ("The statutory bar against second or successive motions is one of the most important AEDPA safeguards for finality of judgment.").

Significantly here, Congress required all federal prisoners to get advance permission from a federal appellate court in order to even file a successive post-conviction § 2255 motion in a federal district court. 28 U.S.C. § 2255(h) ("A second or successive motion must be certified ... by a panel of the appropriate court of appeals ...."). And Congress has limited the authority of this appellate Court to grant applications only to where the prisoner's ***1177** application "makes a prima facie showing that the application satisfies the requirements of [§ 2255(h)]." *See* 28 U.S.C. §§ 2244(b)(3)(C), 2255(h). Accordingly, as relevant here, for our Court to grant a federal prisoner's post-conviction application, the prisoner must make a prima facie showing that a new substantive rule of constitutional law retroactively applied to his case and invalidated his sentence. *Id.* Further, Congress has directed appellate courts to rule on such applications to file successive § 2255 motions within 30 days from the filing. *See id.* § 2244(b)(3)(D) ("The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.").

These substantial restrictions on federal prisoners filing successive § 2255 post-conviction motions are not our rules, but Congress's statutory mandates to federal courts. After a final judgment and an initial § 2255 post-conviction motion, there is no federal court jurisdiction to consider a successive § 2255 motion except for these two limited types of claims specified in § 2255(h).

Although Congress's statutory restrictions on federal court jurisdiction are substantial, the Supreme Court has at times, albeit not often, issued decisions that ultimately fall within the scope of § 2255(h)(2). As an example, in 2015, the U.S. Supreme Court issued its decision in *Johnson v. United States*, which held that the "residual clause" definition of a "violent felony" in the Armed Career Criminal Act ("ACCA") was unconstitutionally vague. —— U.S. ——, 135 S.Ct. 2551, 2555–58, 2563, 192 L.Ed.2d 569 (2015). The ACCA imposes a sentence enhancement if a convicted federal prisoner was already convicted of three prior "violent felonies." 18 U.S.C. § 924(e)(1). Thereafter, the Supreme Court in *Welch v. United States* held that *Johnson* announced a new substantive rule that applies retroactively on collateral review to federal sentences enhanced under the ACCA. 578 U.S. ——, ——, ——, 136 S.Ct. 1257, 1264–65, 1268, 194 L.Ed.2d 387 (2016).

After *Johnson* invalidated the ACCA's residual clause and as shown by this Court's statistics in Table 1 below, a large number of federal prisoners' applications—2,258 applications in our Court in 2016 alone—were filed seeking leave to file second or successive § 2255 motions based on *Johnson*'s ACCA ruling about the residual clause. And in 2016, our Court issued 2,282 orders on those 2,258 applications and a few applications carried over from the end of the prior year.

As required by Congress, the prisoners had to file in this Court before filing in the district court and had to show a prima facie case that *Johnson* applied to their sentences. The Court carefully reviewed each and every individual application. The Court determined that some of those federal prisoners who filed were not even sentenced under the ACCA, and *Johnson* did not apply to their cases at all. *See, e.g.*, *In re Griffin*, 823 F.3d 1350, 1354–56 (11th Cir. 2016) (holding that *Johnson*'s vagueness ruling does not apply to prisoners sentenced under the career offender sentencing guidelines). In its review, this Court also readily determined that other prisoners had an ACCA-enhanced sentence, but that—based on our prior Court precedent—the prisoners' prior convictions qualified as violent felonies under the ACCA's elements clause, without regard to the ACCA's residual clause invalidated in *Johnson*. *See, e.g.*, *In re Rogers*, 825 F.3d 1335, 1341 (11th Cir. 2016) (holding that, under this Court's prior precedent in *Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328 (11th Cir. 2013), the defendant's prior Florida convictions for aggravated ***1178** assault and aggravated battery qualified as violent felonies under the ACCA's elements clause); *In re Robinson*, 822 F.3d 1196, 1197 (11th Cir. 2016) (holding that, under this Court's prior precedent in *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011), *United States v. Hill*, 799 F.3d 1318 (11th Cir. 2015) (per curiam), and *Turner*, the defendant's prior Florida convictions for armed robbery and aggravated battery qualified as violent felonies under the ACCA's elements clause).

In addition, some prisoners claimed the ACCA sentencing decisions in *Johnson* and *Welch* invalidated their sentences (or convictions) under wholly separate federal statutes, such as 18 U.S.C. § 924(c) and its "crime of violence" definition. In those cases, this Court determined that *Johnson*'s residual clause holding did not apply to companion § 924(c) crimes and that, even assuming *Johnson* did, the prisoners' crimes qualified under § 924(c)'s elements clause, which likewise was not affected by *Johnson*. *See, e.g.*, *In re Sams*, 830 F.3d 1234, 1236, 1238–39 (11th Cir. 2016); *In re Colon*, 826 F.3d 1301, 1302–03, 1305 (11th Cir. 2016); *In re Saint Fleur*, 824 F.3d at 1338–40.

The dissents improperly criticize our Court for publishing some of our 2,282 orders in these cases in 2016. However, the dissents ignore that our Court published only 31, or 1.36%, of our large volume of 2,282 orders in 2016. In fact, taking the five-year period from April 1, 2013 to April 1, 2018, [1] our Court published only 1.2% of its orders in § 2255(h) applications.

1 This is the five-year period used in Judge Jordan's concurring opinion and Appendix. *See* Jordan, J., concurring op. at 1194–95.

To accurately show these facts, I include two tables of statistics below, which demonstrate that this Court published a total of 45 orders from April 1, 2013 to April 1, 2018. [2] Given the dissents primarily criticize our 2016 published orders as to applications to file successive § 2255(h) motions, Tables 1 and 2 separate the total 45 published orders by year and category of order: either § 2255(h) or § 2244(b). [3] Table 1 shows that 39 of those 45 orders were published in § 2255(h) applications from April 1, 2013 to April 1, 2018 and that 31 of those 39 orders were published in 2016. Table 2 shows that only 6 of those 45 orders were published in § 2244(b) applications from 2013 to 2018. [4]

2 As used in this opinion, the year is defined as April 1 of the listed year to March 31 of the subsequent year with April 1 as the applicable year date. For consistency, Tables 1 and 2 use the same timeframe and decision dates —April 1 to March 31—as Judge Jordan's Appendix attached to his concurring opinion. Thus, year 2013 is April 1, 2013 to March 31, 2014; year 2014 is April 1, 2014 to March 31, 2015; year 2015 is April 1, 2015 to March 31, 2016; year 2016 is April 1, 2016 to March 31, 2017; and year 2017 is April 1, 2017 to March 31, 2018.

3 Section 2244(b) governs the filing of successive habeas corpus applications by state prisoners under 28 U.S.C. § 2254. *See* § 2244(b).

4 To be clear and again for consistency, the 45 total number of our Court's published orders in Tables 1 and 2 below are the same as the number of orders listed in the Appendix of Judge Jordan's concurring opinion, which accurately and helpfully lists all of this Court's published orders in both § 2255(h) and § 2244(b) applications from April 1, 2013 to April 1, 2018. That Appendix combines them, and the tables separate the 45 published orders by category: 39 on § 2255(h) applications and 6 on § 2244(b) applications.

Table 1: Number of Applications for Leave to File Successive § 2255(h) in the Eleventh Circuit For Years from April 1, 2013 to April 1, 2018

***1179**

Year[5]	§ 2255(h) Applications	Orders of Terminations	Published	% of Published Orders
2013	264	273	1	0.37%
2014	219	224	1	0.45%
2015	226	187	4	2.14%
2016	2,258	2,282	31	1.36%
2017	293	294	2	0.68%
TOTAL	3,260	3,260	39	1.20%

[**Editor's Note:** The preceding image contains the reference for footnote [5]]

5 Defined as April 1 of the listed year to March 31 of the subsequent year with April 1 as the applicable year date. *See supra* note 2. For context, *Welch* was decided on April 18, 2016, which explains the increased volume of § 2255(h) applications in 2016 (*i.e.*, April 1, 2016 to March 31, 2017).
All six of the published § 2244(b) orders involved death penalty cases where appellate counsel represented the defendant. Thus, we primarily focus, as the dissents do, on our published orders in § 2255(h) cases.

Table 2: Number of Applications for Leave to

File Successive § 2244(b)
in the Eleventh Circuit
For Years from April 1,
2013 to April 1, 2018

Year	§ 2244(b) Applications	Orders of Terminations	Published	% of Published Orders
2013	344	336	1	0.30%
2014	310	316	3	0.95%
2015	320	324	2	0.62%
2016	274	270	0	0.00%
2017	283	290	0	0.00%
TOTAL	1,531	1,536	6	0.39%

In 2016 after the *Johnson* and *Welch* decisions, there was a heightened need to publish at least some of these 2,282 orders to establish precedent, to provide consistency in panel rulings in so many cases, and to facilitate the administration of these matters. In some cases, it was not hard to see the right answer. In 2016, 8 of the 31 published orders in § 2255(h) cases granted the applications and 23 denied the applications. [6] Further, the dissents fail to note that in all *pro se* application cases in our Circuit, including every single application in 2016 to file a successive § 2255 motion, our Court's Staff Attorney's Office prepared legal memoranda addressing the ***1180** *Johnson-Welch* issues and, in many cases, reviewed presentence investigation reports and sentencing transcripts. In addition, in some prisoners' cases, there were legal memoranda filed by a federal public defender or the government or both later on.

6 There were also four published orders during the 2015 year (April 1, 2015 to March 31, 2016), all of which involved claims based on *Johnson*. Three of those orders denied the applications, and one order held the application in abeyance. *In re Franks*, 815 F.3d 1281 (11th Cir. 2016) (denied), *abrogation recognized by In re Robinson*, 822 F.3d at 1199; *In re Johnson*, 814 F.3d 1259 (11th Cir. 2016) (held in abeyance), *vacated*, 815 F.3d 733 (11th Cir. 2016) (en banc); *In re Starks*, 809 F.3d 1211 (11th Cir. 2016) (denied); *In re Rivero*, 797 F.3d 986 (11th Cir. 2015) (denied).

Contrary to the dissents' criticisms, and as Table 1 demonstrates, our Court published a very small percentage of these orders ruling on applications to file successive § 2255 motions. Although our Court published more in 2016 than in other years, largely in the wake of *Johnson* and *Welch*, the percentage still stayed exceedingly small at 1.36%. [7] And to be clear, all of this Court's judges—including those who dissent today—have joined in these orders.

7 We recognize, as Judge Jordan's concurring opinion aptly points out, that other circuits together have published 80 orders on successive applications in this same 5-year time frame and only 20 orders in 2016. Jordan, J., concurring op. at 1191–92. The concurrence properly recommends that our Court should exercise caution in deciding to publish an order disposing of a successive § 2255 application, and "we [should] use the publication option sparingly." *Id.* at 1192. Given our heavy caseload, Table 1 shows a 1 to 2% publication rate in 2016, which indicates we did so.

Notably too, in 2016 alone, the dissenters—as at least two members of the assigned three-judge panel (and sometimes all three members)—published 14 of their own orders on prisoners' applications to file successive § 2255 motions based on *Johnson*. Thus, the dissenters published 14 of the 31 published orders in 2016. That is roughly 45%. *See In re Hunt*, 835 F.3d 1277 (11th Cir. 2016); *In re Parker*, 832 F.3d 1250 (11th Cir. 2016); *In re Chance*, 831 F.3d 1335 (11th Cir. 2016), *abrogation recognized by Curry v. United States*, 714 F. App'x 968 (11th Cir. 2018); *In re Jones*, 830 F.3d 1295 (11th Cir. 2016); *In re Gomez*, 830 F.3d 1225 (11th Cir. 2016); *In re Davis*, 829 F.3d 1297 (11th Cir. 2016); *In re Clayton*, 829 F.3d 1254 (11th Cir. 2016); *In re Sapp*, 827 F.3d 1334 (11th Cir. 2016); *In re Parker*, 827 F.3d 1286 (11th Cir. 2016); *In re McCall*, 826 F.3d 1308 (11th Cir. 2016); *In re Rogers*, 825 F.3d 1335 (11th Cir. 2016); *In re Adams*, 825 F.3d 1283 (11th Cir. 2016); *In re Pinder*, 824 F.3d 977 (11th Cir. 2016); *In re Robinson*, 822 F.3d 1196 (11th Cir. 2016).

Before that, in 2015, there were only four published orders in such § 2255(h) applications, yet the dissenters, as at least two members of the assigned three-judge panel, published two of those four orders—50% that year. [8] *In re Johnson*, 814 F.3d 1259; *In re Starks*, 809 F.3d 1211.

8 *See supra* notes 4 and 6.

None of the dissents tell the reader this full story. [9]

9 This is not the first time these dissenters have voiced criticisms of the judges of this Court as to its published orders and rulings on *Johnson*-based claims. For example, the dissenters themselves recently published an order denying a state prisoner's application for leave to file a successive § 2254 habeas petition, in which the petitioner argued he had received ineffective assistance of counsel. *See In re Williams*, 898 F.3d 1098 (11th Cir. 2018). The dissenters attached to that order separate "concurrences" (that are similar to the dissents

in this case) even though the *In re Williams* case had nothing to do with *Johnson*, *Welch*, or federal prisoners' successive § 2255 motions. *Id.* at 1099–1105 (Wilson, J., specially concurring); *id.* at 1105–10 (Martin, J., specially concurring). These concurrences also omit critical background facts, as do other opinions that the dissenters have filed in recent years. *See, e.g.*, *United States v. Seabrooks*, 839 F.3d 1326, 1349–50 (11th Cir. 2016) (Martin, J., concurring in the judgment); *In re Clayton*, 829 F.3d at 1263–67 (Martin, J., concurring in the result); *In re McCall*, 826 F.3d at 1311–12 (Martin, J., concurring); *In re Saint Fleur*, 824 F.3d at 1341–44 (Martin, J., concurring). It is now time for a response.

*1181 III. PUBLISHED PANEL ORDERS AS BINDING CIRCUIT PRECEDENT

Having placed this subject matter in context, I now turn to the dissents' attacks on our Court's rule: that published panel orders are binding precedent under our prior panel precedent rule.

First, that published panel orders are binding precedent is not a new rule. *See In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015) ("To be clear, 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."); *United States v. Kaley*, 579 F.3d 1246, 1255–56 (11th Cir. 2009) (applying *In re Provenzano*, 215 F.3d 1233 (11th Cir. 2000), a published three-judge order); *In re Provenzano*, 215 F.3d at 1235 (applying as binding prior-panel precedent *In re Medina*, 109 F.3d 1556 (11th Cir. 1997), a published three-judge order); *see also In re Hill*, 777 F.3d 1214, 1222–23 (11th Cir. 2015) (applying as binding precedent *In re Henry*, 757 F.3d 1151 (11th Cir. 2014), a published three-judge order); *St. Hubert*, 909 F.3d at 346 (concluding our Circuit already considers published three-judge orders as binding precedent).

Second, the dissenters incorrectly state that our Court's published orders are insulated from further review. Contrary to the dissents, no published panel order in any case in our Court is insulated from further review.

For example, whenever a panel publishes an order in any case in our Court, any one of the active members of this Court can *sua sponte* request an en banc poll in the exact same case asking that the published order be vacated and the case be heard en banc. *See Lambrix*, 776 F.3d at 794; *see also In re Johnson*, 815 F.3d 733, 733 (11th Cir. 2016) (en banc) (granting rehearing en banc in a successive application case after a member of this Court requested a poll); *In re Morgan*, 717 F.3d 1186, 1187 (11th Cir. 2013) (en banc) (denying rehearing en banc in a successive application case after a member of this Court requested a poll); 11th Cir. R. 35, I.O.P. 5 ("Any active Eleventh Circuit judge may request that the court be polled on whether rehearing en banc should be granted whether or not a petition for rehearing en banc has been filed by a party."). If the majority of the active judges vote to do so, this Court sitting en banc *sua sponte* can vacate that published panel order and rehear that same case. *See In re Johnson*, 815 F.3d at 733; 11th Cir. R. 35-10 ("[T]he effect of granting a rehearing en banc is to vacate the panel opinion and the corresponding judgment."). The real problem for the dissenters, it seems to me, is that they have not garnered the majority votes needed to vacate the particular published panel orders with which they disagree.

In addition, each and every subsequent case following that initial published order provides a second avenue of review. This direct appeal in St. Hubert's case aptly illustrates this second available avenue of review of binding precedent established in a published panel order.

Here, the *St. Hubert* panel relied on our binding precedent in *In re Saint Fleur*, a published panel order. *St. Hubert*, 909 F.3d at 345–46 (following *In re Saint Fleur*'s holding that Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A)'s elements clause, and thus Saint Fleur's sentence was valid even if *Johnson* rendered § 924(c)(3)(B)'s residual clause unconstitutional). Every time a panel applies this *In re Saint Fleur* precedent (as the *St. Hubert* panel did here), any active member of the Court can ask for en *1182 banc review of that *In re Saint Fleur* precedent established in our Court's published panel order. Such an en banc poll was taken in this very case. Simply put, our Circuit law established in published panel orders, such as the *In re Saint Fleur* precedent, is subject to an en banc poll request each and every time it is applied in a subsequent case (like St. Hubert's).

Again, the problem for the dissenters is that the law established in the *In re Saint Fleur* published order is sound, and thus the dissenters have been unable to garner the majority votes needed to change that *In re Saint Fleur* precedent by taking *St. Hubert* en banc. Moreover, after our Court's *In re Saint Fleur* published order in 2016, at least seven of our sister circuits have reached the same holding that

Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A)'s elements clause. *See Bowens*, 907 F.3d at 353–54; *Garcia-Ortiz*, 904 F.3d at 106–09; *Barrett*, 903 F.3d at 174; *Melgar-Cabrera*, 892 F.3d at 1064–66; *Diaz*, 863 F.3d at 783–84; *Gooch*, 850 F.3d at 291–92; *Rivera*, 847 F.3d at 848–49. [10]

10 Indeed, in this instant direct appeal case, the panel has not only followed *In re Saint Fleur*, but also has taken time to expand upon why Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A)'s elements clause. *See St. Hubert*, 909 F.3d at 345–51.

One dissent also points to, and criticizes by name, eight published orders by our Court from 2016 to 2018 about what constitutes a violent felony under the ACCA or a crime of violence under § 924(c). *See* Martin, J., dissenting at 14. But as Table 1 above makes obvious, this is a byproduct of the large number of cases that required and received our attention in 2016 to 2018. Surely, the number of published panel orders in 2016 to 2018 should be placed in the context of our 2016 to 2018 caseload in this regard.

It also bears mentioning that since we published these eight orders, other circuits have reached the same conclusions as many of them about what constitutes a violent felony or a crime of violence. For example, in *In re Hines*, 824 F.3d 1334, 1336–37 (11th Cir. 2016), cited in Judge Martin's dissent on page 19, this Court held that armed federal bank robbery under 18 U.S.C. § 2113(a) and (d) qualifies as a crime of violence under § 924(c)(3)(A)'s elements clause. In *In re Sams*, 830 F.3d at 1239, this Court further held that bank robbery solely under § 2113(a) qualifies as a crime of violence under § 924(c)(3)(A)'s elements clause. Like *In re Hines* and *In re Sams*, nine other circuits have held that companion federal convictions for bank robbery under § 2113(a) or armed bank robbery under § 2113(a) and (d) qualify as either violent felonies under the ACCA's elements clause or as crimes of violence under the elements clauses of § 924(c) or U.S.S.G. § 4B1.2(a). *See United States v. Deiter*, 890 F.3d 1203, 1210–13 (10th Cir. 2018) (holding bank robbery under § 2113(a) is a violent felony under the ACCA's elements clause); *United States v. Harper*, 869 F.3d 624, 625–27 (8th Cir. 2017) (holding bank robbery under § 2113(a) is a crime of violence under § 4B1.2(a)'s elements clause); *United States v. Brewer*, 848 F.3d 711, 713–16 (5th Cir. 2017) (same); *United States v. McBride*, 826 F.3d 293, 295–96 (6th Cir. 2016) (same); *United States v. Johnson*, 899 F.3d 191, 203–04 (3d Cir. 2018) (holding that both bank robbery and armed bank robbery qualify as crimes of violence under § 924(c)'s elements clause); *United States v. Watson*, 881 F.3d 782, 784–86 (9th Cir. 2018) (same); *Hunter v. United States*, 873 F.3d 388, 390 (1st Cir. 2017) (same); *United States v. Armour*, 840 F.3d 904, 907–09 (7th Cir. 2016) (same); *United States v. McNeal*, 818 F.3d 141, 151–57 (4th Cir. 2016) (same).

***1183** Similarly, in *In re Smith*, 829 F.3d 1276, 1280 (11th Cir. 2016), also cited in Judge Martin's dissent on page 1207, this Court held that federal carjacking under 18 U.S.C. § 2119 qualifies as a crime of violence under § 924(c)(3)(A)'s elements clause. Four other circuits have likewise held that federal carjacking under § 2119 qualifies as a crime of violence under § 924(c)(3)(A)'s elements clause. *See United States v. Cruz-Rivera*, 904 F.3d 63, 66 (1st Cir. 2018); *United States v. Gutierrez*, 876 F.3d 1254, 1255–57 (9th Cir. 2017), *cert. denied*, —— U.S. ——, 138 S.Ct. 1602, 200 L.Ed.2d 785 (2018); *United States v. Jones*, 854 F.3d 737, 740–41 & n.2 (5th Cir.), *cert. denied*, —— U.S. ——, 138 S.Ct. 242, 199 L.Ed.2d 155 (2017); *United States v. Evans*, 848 F.3d 242, 246–48 (4th Cir.), *cert. denied*, —— U.S. ——, 137 S.Ct. 2253, 198 L.Ed.2d 688 (2017).

The judges of this Court may have valid differences of opinion about the legal issues involving the ACCA's definition of a violent felony or § 924(c)'s definition of a crime of violence, as discussed in these 31 published orders during 2016 and the 4 published orders during 2015. However, it is incorrect to say, as the dissents do, that binding precedent established in published panel orders of this Court, like *In re Saint Fleur*, are insulated from all further review. In the wake of *Johnson* and *Welch*, the judges of this Court and the Court's dedicated staff attorneys and law clerks worked long hours faithfully reviewing and considering 2,282 prisoners' applications in 2016 alone. This concurrence is done to afford the needed context to the process and our Court's having published 31 orders on those applications to file successive § 2255 motions in 2016. [11]

11 In a similar vein, the dissenters have attacked our decisions ruling that *Johnson* applied to the ACCA but not to the advisory sentencing guidelines. *See In re Hunt*, 835 F.3d at 1278–80 (Wilson, J., concurring), 1280–84 (Rosenbaum, J., concurring), 1284–89 (Jill Pryor, J., concurring); *In re Anderson*, 829 F.3d 1290, 1294–97 (11th Cir. 2016) (Martin, J., dissenting); *In re Clayton*, 829 F.3d at 1257–64 (Martin, J., concurring), 1267–70 (Rosenbaum, J., concurring), 1274–76 (Jill Pryor, J., concurring); *In re McCall*, 826 F.3d at 1310–11 (Martin,

J., concurring); *In re Robinson*, 822 F.3d at 1198 n.2 (Martin, J., concurring); *United States v. Matchett*, 802 F.3d 1185, 1193–96 (11th Cir. 2015).

Despite these criticisms, the Supreme Court in *Beckles v. United States*, 580 U.S. ——, ——, 137 S.Ct. 886, 890, 197 L.Ed.2d 145 (2017), ultimately held, as we have, that *Johnson* does not apply to the advisory sentencing guidelines. Sometimes there is disagreement between judges about legal issues, but that should not give rise to the unfounded accusations in some of the dissents in the last few years about our rulings on applications to file successive motions.

For all of these reasons, I concur in this Court's denial of rehearing en banc (1) as to whether Hobbs Act robbery qualifies as a crime of violence under § 924(c)'s definitions and (2) as to our Court's rule that published panel orders constitute binding precedent. [12]

12 Judge Martin's dissent at pages 5–6 criticizes the "stacking" of St. Hubert's two § 924(c) sentences in South Florida. St. Hubert was sentenced to 7 years on his first § 924(c) conviction for using a firearm during a January 21 robbery and to the statutory mandatory consecutive 25 years on his second § 924(c) conviction for using a firearm during a January 27 robbery. *See St. Hubert*, 909 F.3d at 339–40.

The dissent fails to mention that St. Hubert was indicted for 13 crimes, including six separate § 924(c) firearm crimes, five separate armed robberies, and one attempted armed robbery between December 23, 2014, and January 27, 2015. *Id.* In exchange for St. Hubert's plea to just two § 924(c) crimes, the government agreed to dismiss the 11 other counts.

WILLIAM PRYOR, Circuit Judge, respecting the denial of rehearing en banc:

Consider a hypothetical. A defendant is convicted of a federal crime and sentenced ***1184** to a term of imprisonment. His conviction and sentence are affirmed on appeal. He brings a collateral challenge, *see* 28 U.S.C. § 2255(a), but it fails. Perhaps he brings more than one collateral challenge; all of them fail. Eventually, in some other case, the Supreme Court announces a new rule of law that applies retroactively to cases on collateral review. But the new rule plainly cannot benefit the prisoner—either because it does not apply to his situation or because applying it would make no difference to his conviction or sentence. Even so, he applies to this Court for permission to file a second, third, or umpteenth collateral challenge based on the new rule. Does the Antiterrorism and Effective Death Penalty Act require that we grant his application and create unnecessary work for the district court? Judge Martin's dissent appears to contend that the answer is "yes." Our Court has disagreed.

I join Judge Tjoflat's opinion in full, but I write separately to answer our colleague's challenge and to defend our commonsense practice of denying prisoners' applications to file doomed collateral challenges that cannot possibly bring them relief. The basis of our colleague's argument that denying these applications contravenes "the plain mandate" of the Act is not entirely clear. Dissenting Op. of Martin, J., at 1200–01. Her dissent draws an insistent but far from self-explanatory distinction between a "prima facie showing" and a "merits decision," and it suggests that we held in *In re Holladay*, 331 F.3d 1169 (11th Cir. 2003), that our prima facie assessment of a prisoner's application to file a second or successive collateral challenge must not touch "the merits" of the claims the prisoner wishes to raise. But we explained in *Holladay* itself—indeed, we said it was "manifestly obvious"—that we would deny applications that had no "reasonable likelihood" of resulting in relief. *Id.* at 1173. After all, whenever a circuit court denies an application for a second or successive motion, it *necessarily* decides that the application has no merit. And the circuit courts collectively deny thousands of these applications on the merits every year.

To vindicate the strong interest in the finality of fully litigated criminal convictions, the Antiterrorism and Effective Death Penalty Act imposes "stringent requirements for the filing of a second or successive [collateral challenge]," *id.* (quoting *Bennett v. United States*, 119 F.3d 468, 469–70 (7th Cir. 1997)), and, as Judge Martin's dissent acknowledges, it gives courts of appeals "a gatekeeping function" with respect to the enforcement of those requirements, Dissenting Op. of Martin, J., at 1210. Before a federal prisoner may file a second or successive section 2255 motion in the district court, he must apply to "the appropriate court of appeals" for permission to do so. 28 U.S.C. § 2244(b)(3)(A); *see id.* § 2255(h) (incorporating these procedures for federal prisoners). The court of appeals must then "certif[y] as provided in section 2244" that the motion will "contain—

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."

Id. § 2255(h); *see also id.* § 2244(b)(2) (analogous requirements for state prisoners with minor differences in wording). We are permitted to authorize a second or successive challenge *only* if we "determine[ ] that the application makes a prima ***1185** facie showing that [it] satisfies the[se] requirements." *Id.* § 2244(b)(3)(C).

Judge Martin's dissent revolves around the three words "prima facie showing," but that phrase does not interpret itself. Often, a "prima facie case" or "prima facie showing" refers to what a plaintiff must prove to shift the burden of proof or production to the defendant. *See* Dissenting Op. of Martin, J., at 1204 (citing *Black's Law Dictionary* for a definition in this vein). The dissent provides as two examples the burden-shifting frameworks that govern claims of racial discrimination in jury selection, *see Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and workplace discrimination under Title VII of the Civil Rights Act, *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See* Dissenting Op. of Martin, J., at 1204–05. In these frameworks, "prima facie showing" has a purely formal meaning: it defines the set of elements proof of which suffices to raise a presumption of liability, subject to rebuttal if the defense meets some specified burden of its own.

But this formal sense of the phrase "prima facie showing" does not fit section 2244(b)(3)(C). The statutory restrictions on second or successive collateral challenges plainly do not set up a burden-shifting framework. A prisoner's prima facie showing of compliance with section 2255(h) does not create any presumption that the government must rebut with an adequate showing of its own. Indeed, the prima facie showing does not even create a presumption of compliance with section 2255(h); the district court approaches that question *de novo*. *See In re Moss*, 703 F.3d 1301, 1303 (11th Cir. 2013). So how does our "prima facie" inspection of the prisoner's application differ from the district court's plenary assessment? The Act demands an answer to this question, but the dissent's analogies to burden-shifting frameworks do not help us find it.

When "prima facie showing" cannot bear a formal definition, it sometimes bears instead a functional meaning. For example, the Board of Immigration Appeals describes the standard for reopening of removal proceedings as requiring "a prima facie showing of eligibility" for the relief sought. *In re L-O-G-*, 21 I. & N. Dec. 413, 415 (BIA 1996); *see also Matter of Sipus*, 14 I. & N. Dec. 229, 230 (BIA 1972) (referring to "a prima facie case for reopening"). Judge Martin's dissent provides this example, *see* Dissenting Op. of Martin, J., at 1205–06, but it undermines the argument that "prima facie showing" has a rigid meaning that categorically excludes consideration of the merits. The Board has made clear that "[n]o hard and fast rule can be laid down as to what constitutes a sufficient showing of a prima facie case for reopening." *Sipus*, 14 I. & N. Dec. at 231; *accord L-O-G-*, 21 I. & N. Dec. at 418 ("[T]here are no easy rules for deciding what makes a prima facie case ... and what does not.").

Instead, in this context, a prima facie showing is simply whatever "satisf[ies] [the Board] that it would be worthwhile to develop the issues further at a plenary hearing on reopening." *Sipus*, 14 I. & N. Dec. at 231. This standard is not blind to the merits. On the contrary, it *requires* "a reasonable likelihood of success on the merits" in the judgment of the Board, and, under this standard, the Board has denied motions for reopening for a variety of merits-related reasons. *L-O-G-*, 21 I. & N. Dec. at 420. For example, in *Sipus*, the movant's "new facts" were plainly inadequate to support eligibility for relief, so the Board could not "infer ... that she [might] be able to prove [eligibility] if given a chance at a reopened hearing." 14 I. & N. Dec. at 231. The Board has also denied a ***1186** motion for reopening based on its discretionary determination in the first instance that the movant had been convicted of "a particularly serious crime," making him legally ineligible for relief. *In re S-V-*, 22 I. & N. Dec. 1306, 1309 (BIA 2000), *disapproved on other grounds by Amir v. Gonzales*, 467 F.3d 921, 927 (6th Cir. 2006).

In the foundational decision about section 2244(b)(3)(C), the Seventh Circuit interpreted it to include a similar "worthwhileness" standard: "By 'prima facie showing' we understand ... simply a sufficient showing of possible merit to warrant a fuller exploration by the district court." *Bennett*, 119 F.3d at 469. The Seventh Circuit made clear that this definition did not treat "prima facie showing" as a legal term of art with a formal meaning because it was articulated "without guidance in the statutory language or history or case law." *Id.* In *Holladay*, we adopted this language from *Bennett*, *see* 331 F.3d at 1173–74, and every other numbered circuit has done the same. *See Rodriguez v. Superintendent, Bay State Corr. Ctr.*, 139 F.3d 270, 273 (1st Cir. 1998); *Bell v. United States*, 296 F.3d 127, 128 (2d Cir. 2002); *Goldblum v. Klem*,

510 F.3d 204, 219 (3d Cir. 2007); *In re Williams*, 330 F.3d 277, 281 (4th Cir. 2003); *Reyes-Requena v. United States*, 243 F.3d 893, 899 (5th Cir. 2001); *In re Lott*, 366 F.3d 431, 432–33 (6th Cir. 2004); *Johnson v. United States*, 720 F.3d 720, 720 (8th Cir. 2013); *Woratzeck v. Stewart*, 118 F.3d 648, 650 (9th Cir. 1997); *United States v. Murphy*, 887 F.3d 1064, 1068 (10th Cir. 2018).

Although Judge Martin's dissent invokes the *Bennett-Holladay* standard to lament the supposed good old days "when this Court honored the statutorily imposed limitations of a prima facie review," Dissenting Op. of Martin, J., at 1206, the Seventh Circuit in *Bennett* did not describe its definition as especially permissive or as one that required courts of appeals to close their eyes to the impossibility of relief. On the contrary, when Donald Bennett sought permission to file a third section 2255 motion under the "newly discovered evidence" gateway for successive motions, *see* 28 U.S.C. § 2255(h)(1), the *Bennett* court stressed that he bore a "very heavy burden" of "ha[ving] to show, albeit only prima facie, that the newly discovered evidence would have established [his innocence] by clear and convincing evidence," and it denied his application because the evidence he relied on was plainly inadequate. 119 F.3d at 469. In part, Bennett's burden was especially heavy because he wanted to relitigate an insanity defense that itself required clear and convincing proof, so his burden of proof was clear-and-convincing squared. *See id.* But *Bennett* makes clear that a court of appeals' "prima facie" inspection of an application under section 2255(h) does not require it to close its eyes to the merits altogether. After all, how could "a fuller exploration" be "warrant[ed]," *id.*, when it would serve only to waste the district court's time and be of no use to the prisoner?

Perhaps our colleague would limit the *Bennett* court's willingness to acknowledge that a motion is certainly doomed to the "newly discovered evidence" gateway, but she cannot take that position and eulogize *Holladay* at the same time because *Holladay* followed the same approach with respect to the "new rule" gateway, 28 U.S.C. § 2255(h)(2); *see also id.* § 2244(b)(2)(A). When Alabama death-row inmate Glenn Holladay sought leave to file a second federal habeas petition based on the Supreme Court's novel holding that the Constitution bars the execution of the mentally retarded, *see Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), we held that *Atkins* provided a retroactive new rule of constitutional law, but "[i]mportantly" ***1187** that holding "[did] not terminate our analysis." 331 F.3d at 1173. Describing the identification of a new rule as "merely ... the minimum showing that [a petitioner] must make," we held that it was "manifestly obvious that in order to make a *prima facie* showing" based on *Atkins*, "Holladay also must demonstrate ... a reasonable likelihood that he [was] in fact mentally retarded." *Id.*; *accord In re Morris*, 328 F.3d 739, 740–41 (5th Cir. 2003); *In re Bowling*, 422 F.3d 434, 436 (6th Cir. 2005). "Were it otherwise," we reasoned, "literally any prisoner under a death sentence could bring an *Atkins* claim in a second or successive petition," and "[n]o rational argument can possibly be made" that the Act requires us to permit the inundation of the district courts with wholly meritless second or successive collateral challenges every time the Supreme Court announces a new rule. *Holladay*, 331 F.3d at 1173 n.1.

Under *Holladay*'s sensible regime, a prisoner cannot discharge his prima facie burden merely by invoking a new rule; as we phrased the standard in a later decision, he must also "show a reasonable likelihood that he would benefit from the new rule he seeks to invoke in a second or successive [challenge]." *In re Henry*, 757 F.3d 1151, 1162 (11th Cir. 2014); *cf. Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (distinguishing legal conclusions in a complaint from the "show[ing]" of entitlement to relief required by Federal Rule of Civil Procedure 8(a)(2)). To put it tersely, the prisoner must show that the new rule has some "bearing on his case." *Henry*, 757 F.3d at 1162.

Judge Martin may disagree with *Holladay*—as the Tenth Circuit did in a decision that her dissent cites favorably, *see Ochoa v. Sirmons*, 485 F.3d 538, 545 (10th Cir. 2007)—but in that case she should not invoke its authority while rejecting its rule, which we applied in all of the orders to which her dissent takes exception. *See* Dissenting Op. of Martin, J., at 1206–08. For example, a prisoner whose sentence under the Armed Career Criminal Act "does not turn on the validity of the residual clause," *In re Thomas*, 823 F.3d 1345, 1349 (11th Cir. 2016), is a prisoner who cannot possibly benefit from the Supreme Court's holding that the residual clause is unconstitutionally vague, *see Johnson v. United States*, —— U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015). So is a prisoner whose conviction for carrying a firearm during and in relation to a crime of violence, 18 U.S.C. § 924(c), or whose sentence under the former career-offender sentencing guideline, United States Sentencing Guidelines Manual §§ 4B1.1–4B1.2 (Nov. 2015), would stand whether or not *Johnson* affects section 924(c) or the career-offender guideline. In declining to permit "literally any prisoner under [an Armed Career Criminal Act, section 924(c), or career-

offender] sentence [to] bring a[ ] [*Johnson*] claim in a second or successive petition," *Holladay*, 331 F.3d at 1173 n.1, we have not "exceeded [our] statutory mandate," Dissenting Op. of Martin, J., at 1206. Instead, we have *executed* our statutory mandate as we interpreted it in *Holladay*, which, as the dissent reminds us, "is still binding precedent for our Circuit." *Id.* at 1206.

The logic of *Holladay* exposes any rigid dichotomy between a prisoner's "prima facie showing" and "the merits" of his claim as untenable. True, whether *Johnson* or any other new rule that a prisoner invokes really supports his claim is a question that relates to "the merits." But it is no less true that a prisoner's prima facie showing must include the demonstration that his motion will "contain," 28 U.S.C. § 2255(h)(2), or "rel[y] on," *id.* § 2244(b)(2)(A), a new rule of constitutional ***1188** law, and that requirement demands more than that the prisoner write the magic word "*Johnson*." If a new rule plainly does not apply to a prisoner's situation or applying it would make no difference to his conviction and sentence, then he necessarily cannot "show a reasonable likelihood that that he would benefit from the new rule," and his application fails at the starting gate for the same reason his collateral challenge would fail on the merits. *Henry*, 757 F.3d at 1162. So it is no wonder that we and other courts have frequently referred to "the merits" in asking whether an application satisfies section 2255(h). *See, e.g.*, *In re Baptiste*, 828 F.3d 1337, 1340 (11th Cir. 2016) (calling the denial of a previous application raising the same claim a "reject[ion] on the merits"); *Henry*, 757 F.3d at 1157 n.9 ("As the dissenting opinion sees the case, Henry should be entitled to file a second or successive petition under § 2244(b)(2) because he's made a sufficient merits showing."); *id.* at 1169 (Martin, J., dissenting) ("I must also address the merits of Mr. Henry's case."); *id.* at 1170 ("I view the merits ... differently than the Majority."); *Ezell v. United States*, 778 F.3d 762, 765 (9th Cir. 2015) ("reach[ing] the merits" of a prisoner's application for leave to file a second or successive motion).

There is nothing remotely strange about this partial overlap between a threshold inquiry and the merits. Consider "the somewhat analogous certificate of appealability ... context," *In re Saint Fleur*, 824 F.3d 1337, 1343 (11th Cir. 2016) (Martin, J., concurring), in which "[a] certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Supreme Court has "emphasized" that this inquiry "is not coextensive with a merits analysis." *Buck v. Davis*, —— U.S. ——, 137 S.Ct. 759, 773, 197 L.Ed.2d 1 (2017). But as the Court explained in the same discussion, "[o]f course when a court of appeals ... determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious." *Id.* at 774. Indeed, the Supreme Court itself has affirmed the denial of a certificate of appealability based on its determination that a habeas petitioner's claim failed as a matter of constitutional law. *See Weeks v. Angelone*, 528 U.S. 225, 234, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000) (posing the dispositive question "whether the Constitution requires anything more" than the jury instructions the petitioner challenged and "hold[ing] that it does not"). In the second-or-successive context as in the appealability framework, that a threshold procedural inquiry and the merits are not *coextensive* does not mean that they do not *overlap*.

Even in the *Batson* and Title VII examples—which, as I have explained, do not clarify what section 2244(b)(3)(C) means when it refers to "a prima facie showing"—a plaintiff's prima facie case is not independent of "the merits." If a court rejects a *Batson* claim because the claimant has failed to establish the requisite prima facie showing, nobody would dispute that the court has rejected that claim on the merits. *See Brown v. Alexander*, 543 F.3d 94, 103 (2d Cir. 2008) (applying the framework for claims "adjudicated on the merits in [s]tate court," 28 U.S.C. § 2254(d), to a "decision that a *prima facie* case had not been made out under *Batson*"); *Franklin v. Sims*, 538 F.3d 661, 666 (7th Cir. 2008) (same). And if a court grants summary judgment against a Title VII claim because the plaintiff has failed to discharge his prima facie burden under *McDonnell Douglas*, nobody would dispute that that claim too has been decided on the merits. *See Morón-* ***1189** *Barradas v. Dep't of Educ. of P.R.*, 488 F.3d 472, 478–80 (1st Cir. 2007) (granting preclusive effect to a Puerto Rico court's determination that a Title VII plaintiff had failed to establish a prima facie case of discrimination). In each of these cases, any distinction between "the merits question" and "the prima facie showing alone" collapses when the plaintiff fails at step one. Dissenting Op. of Martin, J., at 1204–05; *see also Jackson v. United States*, 875 F.3d 1089, 1091 n.4 (11th Cir. 2017) (explaining that the dismissal of a complaint with prejudice for failure to state a claim is ordinarily "an adjudication on the merits").

So what remains of Judge Martin's critique after we discard the mistaken premise that merits are merits, threshold inquiries are threshold inquiries, and never the twain shall meet? Her dissent objects to eight published orders because they decided that particular offenses were crimes of violence

or violent felonies, *see* Dissenting Op. of Martin, J., at 1206–08, but it never explains how it is inconsistent with our gatekeeping function under section 2255(h) to deny applications based on questions of law—which we usually think it is our job to answer—and a routine examination of judicial records—which we must often wade into in any event to determine whether a motion would indeed be "second or successive." *See Evans-García v. United States*, 744 F.3d 235, 240 (1st Cir. 2014) ("[A] circuit court should deny certification where it is clear as a matter of law, and without the need to consider contested evidence, that the petitioner's identified constitutional rule does not apply to the petitioner's situation."); *cf. S-V-*, 22 I. & N. Dec. at 1309 (finding no "prima facie eligibility for withholding of removal" based on the Board's discretionary first-instance determination that the movant's robbery conviction was for a "particularly serious crime"). The dissent protests that "the heavily abridged second or successive application procedures" impair our ability to make a reasoned decision, Dissenting Op. of Martin, J., at 1207, but it never explains why 30 days is too little time for three judges with the help of their law clerks and staff attorneys to research and decide the discrete legal issue whether a particular offense is or is not a crime of violence, an inquiry with which our Court has plenty of experience. *See id.* at 1201 (observing that "[t]he issue of what constitutes a crime of violence ... has been the subject of extensive consideration in this Circuit").

This Court is not the only circuit that has published orders denying prisoners' applications on the ground that *Johnson* could not benefit them because their predicate offenses were crimes of violence. *See In re Irby*, 858 F.3d 231 (4th Cir. 2017); *Dawkins v. United States*, 809 F.3d 953 (7th Cir. 2016). And, as long as we are on the subject of persuasive authority, several of our sister circuits have disagreed with Judge Martin's "permissive[ ]" notion of how the application process should work in other ways. Dissenting Op. of Martin, J., at 1206. For example, five circuits—four not counting ours—have held that the Act permits courts of appeals to deny second or successive collateral challenges based on manifest untimeliness, at least in certain circumstances. *See In re Williams*, 759 F.3d 66, 68–69 (D.C. Cir. 2014); *In re Vassell*, 751 F.3d 267, 271 (4th Cir. 2014); *In re Lewis*, 484 F.3d 793, 798 (5th Cir. 2007); *In re Hill*, 437 F.3d 1080, 1083 (11th Cir. 2006); *Outlaw v. Sternes*, 233 F.3d 453, 455 (7th Cir. 2000); *see also In re Jackson*, 826 F.3d 1343, 1350 & n.8 (11th Cir. 2016) (acknowledging that a "hands-off approach" with respect to timeliness "will not suit every application" and reaffirming *Hill*). The First Circuit has held that it can rely on judicial records to determine that an applicant is outside the scope of a new rule. *See Evans-García*, 744 F.3d at 240. And the Fifth and Eighth ***1190** Circuits have held that a second or successive collateral challenge does not "contain" or "rel[y] on" a new rule when it "depends on recognition of a second new rule" that would be an extension of the first. *Donnell v. United States*, 826 F.3d 1014, 1016 (8th Cir. 2016); *accord In re Arnick*, 826 F.3d 787, 788 (5th Cir. 2016). Now is not the time to examine whether all of these decisions were correct; lest we forget, the Court today is denying rehearing en banc of a *direct* appeal. But it is significant that the dissent's minimalist concept of our gatekeeping function would unsettle not just our own practices but also those of many of our sister circuits.

The dissent complains that "[t]he members of this Court are bound to treat [our published orders] as binding precedent in this Circuit, unless and until the Supreme Court or this Court sitting *en banc* reverses each of them, one by one," but the same is true of *all* of our precedents. Dissenting Op. of Martin, J., at 1210. Of course, Judge Martin and our other dissenting colleagues are free to disagree with the legal conclusions that panels have reached in the course of denying applications to file second or successive motions. But if they do, they would be better served by trying to persuade the rest of us to reconsider those holdings en banc, *see* Concurring Op. of Tjoflat, J., at 1181–83, than by rehashing their position that we cannot deny the doomed applications of prisoners who cannot achieve relief, *compare, e.g.*, Dissenting Op. of Wilson, J., at 1197–99, *and* Dissenting Op. of Martin, J., at 1202–10, *with Ovalles v. United States*, 905 F.3d 1231, 1266–73 (11th Cir. 2018) (en banc) (Martin, J., dissenting); *In re Williams*, 898 F.3d 1098, 1100–05 (11th Cir. 2018) (Wilson, J., specially concurring); *id.* at 1105–10 (Martin, J., specially concurring); *In re Hernandez*, 857 F.3d 1162, 1165–66 (11th Cir. 2017) (Martin, J., concurring in result); *In re Clayton*, 829 F.3d 1254, 1263–67 (11th Cir. 2016) (Martin, J., concurring in result); *In re McCall*, 826 F.3d 1308, 1311–12 (11th Cir. 2016) (Martin, J., concurring); *In re Colon*, 826 F.3d 1301, 1308 (11th Cir. 2016) (Martin, J., dissenting); *and Saint Fleur*, 824 F.3d at 1341–44 (Martin, J., concurring).

Finally, some of the complaints in Judge Martin's dissent less reflect disagreement with our precedents than dissatisfaction with Congress's policy choices. The dissent laments that the Act gives prisoners only "one chance to collaterally attack their sentence as a matter of right" and that the chance "comes too soon" for some convicts with lengthy sentences, Dissenting Op. of Martin, J., at 1202, but the statutory system

of alternating limitations periods constitutes an integral part of Congress's orderly regulation of federal postconviction review, *see* 28 U.S.C. §§ 2244(d), 2255(f). The dissent charges us with abusing our "gatekeeping function" "to lock the gate and throw away the key," Dissenting Op. of Martin, J., at 1210, but we have done no more than to execute our gatekeeping function under the Act as we have understood it at least ever since we held in *Holladay* that not every application that incants a new rule opens the lock. The dissent protests that "prisoners sentenced in Alabama, Florida and Georgia may be serving illegal sentences for which they have no remedy," *id.*, but Congress has emphatically rejected an error-correction-at-all-costs model of postconviction review.

Instead, Congress has decided that collateral litigation, like all things, must eventually come to an end. And we are bound to respect that mandate.

JORDAN, Circuit Judge, concurring in the denial of rehearing en banc.

The panel in this case has held that published orders issued by three-judge ***1191** panels on applications for leave to file second or successive habeas corpus petitions or motions to vacate, pursuant to 28 U.S.C. §§ 2244(b)(2)-(3), 2255(h), constitute binding precedent in our circuit. *See United States v. St. Hubert*, 909 F.3d 335, 345–46 (11th Cir. 2018). I voted against rehearing this case en banc because I cannot think of a workable common-law principle that denies precedential effect to such orders. If there is going to be some change in the effect given to these orders, I believe that will need to be done by way of a court rule (e.g., a rule providing [as we have done with unpublished opinions] that such orders do not have precedential effect, or a rule providing that such orders will only be binding in the second or successive application context, or a rule providing that such orders can be published only when there has been adversarial briefing). [1]

1 I am not aware of any rules in other circuits addressing this issue.

Nevertheless, I have institutional concerns about our recent practice of publishing so many of these orders. I include myself as part of the problematic trend, as I have authored one of these orders, *see In re Moss*, 703 F.3d 1301 (11th Cir. 2013), and have also been a member of panels which have issued others.

* * * * * *

Applications under §§ 2244(b)(2)-(3) and 2255(h) are different in significant respects from the matters usually handled by three-judge panels. Those differences strongly suggest that we should exercise more caution in deciding to publish an order disposing of an application, particularly on substantive issues of first impression.

First, the applications must be decided within 30 days of filing. *See* § 2244(b)(3)(D). Although this time limit is not mandatory in the jurisdictional sense, *see, e.g., In re Davis*, 565 F.3d 810, 813 (11th Cir. 2009) (order issued in April of 2009 for an application filed in October of 2008 asserting actual innocence), we try very hard to meet the compressed timeline imposed by Congress. But, practically speaking, we do not have 30 full days to do our work. The panel usually receives the staff attorney memorandum on the application (which is often pro se) a week or two from the date of filing, leaving only two to three weeks to rule on the application (while, of course, tending to numerous other matters, including other applications). This abbreviated schedule, which does not generally exist with respect to the other motions we handle on a daily or weekly basis, can lead to rulings without sufficient time for analysis and reflection. And that, in turn, can result in mistakes.

Second, in this circuit the applications are almost always ruled upon without adversarial participation or briefing. Sometimes we decide only on the basis of a pro se litigant's submission, as supplemented by a staff attorney memorandum. In a system like ours, that means that we may miss something important (e.g., critical parts of the district court record, or an issue we did not think of ourselves) on the quick road to decision and publication.

Third, the applications result in decisions that are not generally reviewable. Pursuant to § 2244(b)(3)(E), orders on applications are not appealable and cannot be the subject of a petition for rehearing or for a writ of certiorari. Panels have on occasion revisited their orders sua sponte (for example, when the staff attorney's office has called a panel's attention to a mistake), but relying on a panel to identify and recognize its own error without assistance from the parties once the application is adjudicated is certainly not the norm in appellate procedure. I recognize that it is an open question whether an order disposing ***1192** of an application can be the subject of a sua sponte en banc proceeding. But even if that limited avenue exists, the absence of typical channels of review provides an additional institutional reason to publish fewer of these now-binding orders.

In sum, when we review and rule on applications pursuant to §§ 2244(b) and 2255(h), "major aspects of the normal appellate process [are] absent." *United States v. Glover*, 731 F.2d 41, 49 (D.C. Cir. 1984) (Mikva, J., dissenting about then-existing summary affirmance procedures). "There are no briefs, no oral arguments, [and] no collegiality of the decisional process. There is no time for deliberation, and very little dialogue on the merits, on the process, or the result." *Id.* at 50. We are stuck with the 30-day limit that Congress has set for us, but that deadline should mean less published orders, not more.

* * * * *

In the last five years (2013–18) we lead the country by a significant margin in the number of published orders issued under §§ 2244(b)(2)-(3) and 2255(h). In that five-year period, ending April 1, 2018, we have published 45 such orders, while all of the other circuits combined have published 80 orders. The next closest circuits to ours in publication are the Fifth Circuit with 14 and the Sixth Circuit with 12. The remaining circuits have fewer than 10 each: First Circuit (7); Second Circuit (6); Third Circuit (3); Fourth Circuit (6); Seventh Circuit (8); Eighth Circuit (9); Ninth Circuit (7); Tenth Circuit (7); and D.C. Circuit (1). And a number of the published orders in the other circuits were issued only after adversarial briefing and/or oral argument. [2]

2 The published orders from our court and from the other circuits during this five-year period are listed in the attached appendix.

Two years ago, in the wake of *Johnson v. United States*, —— U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), and *Welch v. United States*, —— U.S. ——, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016), we received around 2,000 applications under §§ 2244(b)(2)-(3) and 2255(h) (mostly filed by federal prisoners under § 2255(h)). Given this avalanche of filings, and the 30-day clock, there were days when I (and probably every judge then on the court) would review 40–50 applications and have time for little else. Yet, despite the overwhelming number of applications we received, and the very limited time we had to resolve them, in 2016 we managed to publish 35 of our orders. In that same year, our sister circuits published a total of just 20 orders: First Circuit (0); Second Circuit (0); Third Circuit (0); Fourth Circuit (3); Fifth Circuit (4); Sixth Circuit (3); Seventh Circuit (4); Eighth Circuit (3); Ninth Circuit (1); Tenth Circuit (2); and D.C. Circuit (0). If the other circuits can get by without adding to the pages in the Federal Reporter, we should be able to as well.

* * * * * *

Publishing orders issued under §§ 2244(b)(2)-(3) and 2255(h) sometimes makes sense. For example, in *In re Holladay*, 331 F.3d 1169, 1173–74 (11th Cir. 2003), we explained what a "prima facie case" means under § 2244(b). Given that the "prima facie case" requirement applies to all applications filed, it was important to have a general governing standard for all panels to apply.

But there are downsides to publishing too many of these orders, which now constitute binding precedent. I hope that in the coming years we will use the publication option sparingly.

***1193 Appendix of Published Orders under 28 U.S.C. §§ 2244(b) & 2255(h) in the Circuit Courts of Appeals from April 1, 2013, to April 1, 2018**

First Circuit

Pagan-San Miguel v. United States, 736 F.3d 44 (1st Cir. 2013)

Evans-Garcia v. United States, 744 F.3d 235 (1st Cir. 2014)

Butterworth v. United States, 775 F.3d 459 (1st Cir. 2015)

Pakala v. United States, 804 F.3d 139 (1st Cir. 2015)

Bucci v. United States, 809 F.3d 23 (1st Cir. 2015)

Moore v. United States, 871 F.3d 72 (1st Cir. 2017)

Hardy v. United States, 871 F.3d 85 (1st Cir. 2017)

Second Circuit

Gallagher v. United States, 711 F.3d 315 (2d Cir. 2013)

United States v. Redd, 735 F.3d 88 (2d Cir. 2013)

Herrera-Gomez v. United States, 755 F.3d 142 (2d Cir. 2014)

Marmolejos v. United States, 789 F.3d 66 (2d Cir. 2015)

Carranza v. United States, 794 F.3d 237 (2d Cir. 2015)

Washington v. United States, 868 F.3d 64 (2d Cir. 2017)

Third Circuit

In re Pendleton, 732 F.3d 280 (3d Cir. 2013) (adversarial briefing/oral argument)

United States v. Winkelman, 746 F.3d 134 (3d Cir. 2014)

In re Hoffner, 870 F.3d 301 (3d Cir. 2017)

Fourth Circuit

In re Vassell, 751 F.3d 267 (4th Cir. 2014) (adversarial briefing/oral argument)

In re Hubbard, 825 F.3d 225 (4th Cir. 2016) (adversarial briefing/oral argument)

In re McFadden, 826 F.3d 706 (4th Cir. 2016) (adversarial briefing/oral argument)

In re Wright, 826 F.3d 774 (4th Cir. 2016) (adversarial briefing/oral argument)

In re Irby, 858 F.3d 231 (4th Cir. 2017) (adversarial briefing/oral argument)

In re Phillips, 879 F.3d 542 (4th Cir. 2018) (adversarial briefing/oral argument)

Fifth Circuit

In re Kemper, 735 F.3d 211 (5th Cir. 2013)

In re Campbell, 750 F.3d 523 (5th Cir. 2014)

In re Coleman, 768 F.3d 367 (5th Cir. 2014)

In re Jackson, 776 F.3d 292 (5th Cir. 2015)

In re Young, 789 F.3d 518 (5th Cir. 2015)

In re Chase, 804 F.3d 738 (5th Cir. 2015)

In re Williams, 806 F.3d 322 (5th Cir. 2015)

In re Fields, 826 F.3d 785 (5th Cir. 2016) (adversarial briefing)

In re Arnick, 826 F.3d 787 (5th Cir. 2016)

In re Hensley, 836 F.3d 504 (5th Cir. 2016)

In re Lott, 838 F.3d 522 (5th Cir. 2016)

In re Cathey, 857 F.3d 221 (5th Cir. 2017) (adversarial briefing)

In re Dockery, 869 F.3d 356 (5th Cir. 2017)

In re Rodriguez, 885 F.3d 915 (5th Cir. 2018)

Sixth Circuit

In re Liddell, 722 F.3d 737 (6th Cir. 2013)

***1194** *In re Mazzio*, 756 F.3d 487 (6th Cir. 2014) (adversarial briefing)

In re Watkins, 810 F.3d 375 (6th Cir. 2015)

In re Embry, 831 F.3d 377 (6th Cir. 2016) (adversarial briefing)

In re Patrick, 833 F.3d 584 (6th Cir. 2016) (adversarial briefing)

In re Sargent, 837 F.3d 675 (6th Cir. 2016) (adversarial briefing)

In re Tibbetts, 869 F.3d 403 (6th Cir. 2017) (adversarial briefing)

In re Coley, 871 F.3d 455 (6th Cir. 2017) (adversarial briefing)

In re Conzelmann, 872 F.3d 375 (6th Cir. 2017)

In re Campbell, 874 F.3d 454 (6th Cir. 2017) (adversarial briefing)

In re Lee, 880 F.3d 242 (6th Cir. 2018)

In re Black, 881 F.3d 430 (6th Cir. 2018) (adversarial briefing)

Seventh Circuit

Croft v. Williams, 773 F.3d 170 (7th Cir. 2014)

Price v. United States, 795 F.3d 731 (7th Cir. 2015) (adversarial briefing)

Dawkins v. United States, 809 F.3d 953 (7th Cir. 2016) (adversarial briefing)

Hill v. United States, 827 F.3d 560 (7th Cir. 2016) (adversarial briefing)

Morris v. United States, 827 F.3d 696 (7th Cir. 2016) (adversarial briefing)

Dawkins v. United States, 829 F.3d 549 (7th Cir. 2016) (adversarial briefing)

Kelly v. Brown, 851 F.3d 686 (7th Cir. 2017) (adversarial briefing)

Susinka v. United States, 855 F.3d 728 (7th Cir. 2017)

Eighth Circuit

Williams v. United States, 705 F.3d 293 (8th Cir. 2013)

Johnson v. United States, 720 F.3d 720 (8th Cir. 2013)

Woods v. United States, 805 F.3d 1152 (8th Cir. 2015)

Goodwin v. Steele, 814 F.3d 901 (8th Cir. 2014)

Donnell v. United States, 826 F.3d 1014 (8th Cir. 2016)

Holder v. United States, 836 F.3d 891 (8th Cir. 2016)

Allen v. United States, 836 F.3d 894 (8th Cir. 2016)

Davis v. Kelley, 854 F.3d 967 (8th Cir. 2017)

Williams v. Kelley, 858 F.3d 464 (8th Cir. 2017)

Ninth Circuit

Jones v. Ryan, 733 F.3d 825 (9th Cir. 2013)

Hughes v. United States, 770 F.3d 814 (9th Cir. 2014) (adversarial briefing/oral argument)

Ezell v. United States, 778 F.3d 762 (9th Cir. 2015) (adversarial briefing)

Gage v. Chappell, 793 F.3d 1159 (9th Cir. 2015) (adversarial briefing/oral argument)

Orona v. United States, 826 F.3d 1196 (9th Cir. 2016) (adversarial briefing)

Sherrod v. United States, 858 F.3d 1240 (9th Cir. 2017) (adversarial briefing)

Arazola-Galea v. United States, 876 F.3d 1257 (9th Cir. 2017) (adversarial briefing)

***1195 Tenth Circuit**

In re Graham, 714 F.3d 1181 (10th Cir. 2013)

In re Weathersby, 717 F.3d 1108 (10th Cir. 2013)

In re Payne, 733 F.3d 1027 (10th Cir. 2013)

In re Gieswein, 802 F.3d 1143 (10th Cir. 2015)

In re Encinias, 821 F.3d 1224 (10th Cir. 2016)

In re Barrett, 840 F.3d 1223 (10th Cir. 2016)

In re Jones, 847 F.3d 1293 (10th Cir. 2017)

Eleventh Circuit

In re Moss, 703 F.3d 1301 (11th Cir. 2013)

In re Morgan, 713 F.3d 1365 (11th Cir. 2013)

In re Hill, 715 F.3d 284 (11th Cir. 2013)

In re Henry, 757 F.3d 1151 (11th Cir. 2014)

In re Lambrix, 776 F.3d 789 (11th Cir. 2015)

In re Hill, 777 F.3d 1214 (11th Cir. 2015)

In re Rivero, 797 F.3d 986 (11th Cir. 2015)

In re Everett, 797 F.3d 1282 (11th Cir. 2015)

In re Starks, 809 F.3d 1211 (11th Cir. Jan. 8, 2016)

In re Bolin, 811 F.3d 403 (11th Cir. Jan. 4, 2016)

In re Johnson, 814 F.3d 1259 (11th Cir. Feb. 26, 2016)

In re Franks, 815 F.3d 1281 (11th Cir. Jan. 6, 2016)

In re Robinson, 822 F.3d 1196 (11th Cir. Apr. 19, 2016)

In re Thomas, 823 F.3d 1345 (11th Cir. May 25, 2016)

In re Griffin, 823 F.3d 1350 (11th Cir. May 25, 2016)

In re Pinder, 824 F.3d 977 (11th Cir. Jun. 1, 2016)

In re Hines, 824 F.3d 1334 (11th Cir. Jun. 8, 2016)

In re St. Fleur, 824 F.3d 1337 (11th Cir. Jun. 8, 2016)

In re Adams, 825 F.3d 1283 (11th Cir. Jun. 15, 2016)

In re Hires, 825 F.3d 1297 (11th Cir. Jun. 15, 2016)

In re Rogers, 825 F.3d 1335 (11th Cir. Jun. 17, 2016)

In re Colon, 826 F.3d 1301 (11th Cir. Jun. 24, 2016)

In re McCall, 826 F.3d 1308 (11th Cir. Jun. 17, 2016)

In re Jackson, 826 F.3d 1343 (11th Cir. Jun. 24, 2016)

In re Williams, 826 F.3d 1351 (11th Cir. Jun. 24, 2016)

In re Parker, 827 F.3d 1286 (11th Cir. Jul. 7, 2016)

In re Gordon, 827 F.3d 1289 (11th Cir. Jul. 8, 2016)

In re Sapp, 827 F.3d 1334 (11th Cir. Jul. 7, 2016)

In re Baptiste, 828 F.3d 1337 (11th Cir. Jul. 13, 2016)

In re Clayton, 829 F.3d 1254 (11th Cir. Jul. 18, 2016)

In re Smith, 829 F.3d 1276 (11th Cir. Jul. 18, 2016)

***1196** *In re Burgest*, 829 F.3d 1285 (11th Cir. Jul. 21, 2016)

In re Watt, 829 F.3d 1287 (11th Cir. Jul. 21, 2016)

In re Anderson, 829 F.3d 1290 (11th Cir. Jul. 22, 2016)

In re Davis, 829 F.3d 1297 (11th Cir. Jul. 21, 2016)

In re Gomez, 830 F.3d 1225 (11th Cir. Jul. 25, 2016)

In re Sams, 830 F.3d 1234 (11th Cir. Jul. 26, 2016)

In re Moore, 830 F.3d 1268 (11th Cir. Jul. 27, 2016)

In re Bradford, 830 F.3d 1273 (11th Cir. Jul. 27, 2016)

In re Jones, 830 F.3d 1295 (11th Cir. Jul. 27, 2016)

In re Chance, 831 F.3d 1335 (11th Cir. Aug. 2, 2016)

In re Parker, 832 F.3d 1250 (11th Cir. Aug. 10, 2016)

In re Hunt, 835 F.3d 1277 (11th Cir. Jul. 18, 2016)

In re Hernandez, 857 F.3d 1162 (11th Cir. 2017)

In re Welch, 884 F.3d 1319 (11th Cir. 2018)

D.C. Circuit

In re Williams, 759 F.3d 66 (D.C. Cir. 2014) (adversarial briefing/oral argument)

WILSON, Circuit Judge, joined by MARTIN and JILL PRYOR, Circuit Judges, joined as to Part II by ROSENBAUM, Circuit Judge, dissenting from the denial of rehearing en banc:

I.

Before the Supreme Court decided *Sessions v. Dimaya*, —— U.S. ——, 138 S.Ct. 1204, 200 L.Ed.2d 549 (2018), a panel of this Court attempted to sustain the constitutionality of 18 U.S.C. § 924(c) and Mr. St. Hubert's convictions under it. *See generally United States v. St. Hubert* (*St. Hubert I*), 883 F.3d 1319 (11th Cir. 2018), *vacated and replaced*, 909 F.3d 335 (11th Cir. 2018). In pursuit of that goal, the panel: (A) relied on two published panel orders, which had been decided based on forty-three and ninety-eight words of argument, respectively, *see id.* at 1328–29; (B) held that attempting to commit a crime of violence is itself a crime of violence, *see id.* at 1333–34; (C) suggested that we use the modified categorical approach instead of the categorical approach, *see id.* at 1334–36; and (D) attempted to predict what the Supreme Court would hold in *Dimaya*, concluding that "no matter the outcome" of *Dimaya*, § 924(c) would stand. *See id.* at 1336–37.

The panel has now backed away from some of those holdings. And for good reason—it is difficult to predict what the Supreme Court will do. The Supreme Court in *Dimaya* "demolished" the superficial differences between § 924(c), *Johnson*'s ACCA, and *Dimaya*'s § 16(b) on which the *St. Hubert I* opinion relied. [1] Likewise, the ***1197** panel now embraces the conduct-based approach that this Court adopted in *Ovalles II*, *see* 905 F.3d at 1251–52, without mention of its previous unwavering defense of the categorical approach and the modified categorical approach. *Compare United States v. St. Hubert* (*St. Hubert II*), 909 F.3d 335, 344–46 (11th Cir. 2018), *with St. Hubert I*, 883 F.3d at 1330–31, 1334–37; *see also Ovalles I*, 861 F.3d at 1268–69 (applying the categorical approach without question).

1 *See Ovalles v. United States* (*Ovalles II*), 905 F.3d 1231, 1233–34 (11th Cir. 2018)

(en banc); *see also* En Banc Oral Argument Recording for *Ovalles II*, 11th Cir. No. 17-10172, at 58:32, http://www.ca11.uscourts.gov/system/files_force/oral_argument_recordings/17-10172.mp3?download=1 ("With all due respect to the panel ... I think that *Dimaya* fairly well demolishes the textual differences that the panel here identified."). The original *St. Hubert* opinion incorporated the superficial distinctions proffered by the original *Ovalles* panel opinion in distinguishing § 924(c) from the ACCA. *See St. Hubert I*, 883 F.3d at 1328. *St. Hubert I* offered similar differences between § 924(c) and *Dimaya*'s § 16(b). *Compare id.* at 1336–37, *with Ovalles v. United States* (*Ovalles I*), 861 F.3d 1257, 1265–67 (11th Cir. 2017), *vacated*, 889 F.3d 1259 (11th Cir. 2018) (en banc). None of these distinctions survive *Dimaya*. *See generally Ovalles II*, 905 F.3d at 1239 ("In short, in the course of rebuffing the government's attempts to distinguish § 16's residual clause from the ACCA's, the *Dimaya* Court explicitly rejected the very same arguments that the panel in this case had adopted as a means of distinguishing § 924(c)(3)'s residual clause—calling them minor linguistic disparities that didn't make any real difference." (alteration adopted and internal quotation marks omitted)).

Neither *Ovalles II* nor *St. Hubert II* explain what has changed since *Ovalles I* or *St. Hubert I*, or since we first applied the categorical approach to § 924(c) in *United States v. McGuire*, 706 F.3d 1333 (11th Cir. 2013). This is, I suspect, because nothing has changed, except that Justice Thomas wrote a strong dissent in *Dimaya*. *See* 138 S.Ct. at 1242–59 (Thomas, J., dissenting). This dissent took issue with statutory language that has not changed in at least twelve years, well before *McGuire* issued. I find it odd, therefore, that this Court now holds that Justice Thomas's dissent drawing attention to the unchanged language could (or "must") suddenly and unexpectedly trigger the doctrine of constitutional doubt. *Cf. Ovalles II*, 905 F.3d at 1238–39. Indeed, no other circuit has so contorted itself to salvage § 924(c), despite our en banc finding that such an interpretation is legally *required*. *Id.* at 1244 (concluding that § 924(c)'s residual clause "must" be "read to incorporate a conduct-based interpretation" under the constitutional doubt cannon). *Contra United States v. Eshetu*, 898 F.3d 36, 37 (D.C. Cir. 2018) ("*Dimaya* nowise calls into question [the] requirement of a categorical approach [for § 924(c)]."); *United States v. Salas*, 889 F.3d 681, 685–86 (10th Cir. 2018) (applying categorical approach to § 924(c) and invalidating that provision, after *Dimaya*).

But Judge Jill Pryor eloquently and thoroughly explained the flaws in the *Ovalles II* opinion, and it is therefore unnecessary to reiterate those points here. *See Ovalles II*, 905 F.3d at 1277–79 (Jill Pryor, J., dissenting). Judge Jill Pryor has also cataloged the problems with the panel's adherence to its rule that attempting a crime of violence is necessarily itself a crime of violence, and I join her dissent in full. *See infra* at 1210–13 (Jill Pryor, J., dissenting from the denial of rehearing en banc); *see also Ovalles II*, 905 F.3d at 1297–99 (Jill Pryor, J., dissenting).

II.

What particularly troubles me, however, is the panel's reaffirmation of its rule that published panel orders from the second or successive context bind all panels of this Court, even those deciding fully briefed and argued merits appeals. *See St. Hubert II*, 909 F.3d at 345–46. I have previously explained the grave problems inherent in this rule, *In re Williams*, 898 F.3d 1098, 1100–05 (11th Cir. 2018) (Wilson, J., specially concurring), and Judge Martin has worked for years to expose our Court's indefensible overreach in deciding second or successive applications, *see, e.g.*, *id.* at 1105 (Martin, J., specially concurring). In light of their importance, I will briefly reiterate the major procedural flaws in allowing such hurried, uncontested, and unappealable orders to bind this Court.

***1198** When a prisoner asks this Court for permission to file a second or successive habeas petition pursuant to 28 U.S.C. §§ 2244 and 2255, we must grant or deny the request on an emergency thirty-day basis. 28 U.S.C. § 2244(b)(3)(D). We make our decision based on the prisoner's application, which is written with a pen or typewriter on an extremely constraining form. *See* 11th Cir. R. 22-3(a). Few prisoners manage to squeeze more than 100 words into the permitted space. Some have attorneys, but they are subject to the same restrictive form as are pro se litigants. Nothing else is filed on our docket. The government never files a responsive pleading, and we never grant oral argument. Most troublingly, the orders that come out of this lackluster process are unappealable.[2] 28 U.S.C. § 2244(b)(3)(E) ("The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.").

2 For a more in-depth discussion of these constraints. *See In re Williams*, 898 F.3d at 1101–05. For instance, sometimes the government files a "standing brief" or

writes an individualized brief *after* the panel order issues. *Id.* at 1102–03 n.9. And death cases have their own procedures in this Circuit. *See generally* 11th Cir. R. 22-4. Further, we have, on occasion, disregarded the thirty-day limit, in violation of our now-binding precedent. *In re Williams*, 898 F.3d at 1103 n.7.

This stands in stark contrast to the practices of the other circuits, which often hear oral argument and read particularized government briefs, and which consider the statutory thirty-day time limit to be optional. And, likely recognizing the unenviable process that generates these second or successive orders, all other circuits publish substantially fewer orders than we do.[3] This process also differs greatly from that of our merits appeals, in which we have no time constraints, we have government briefing (and, when issuing a published opinion, we have typically heard oral argument), and we have a full record. Of course, parties may appeal merits decisions to the Supreme Court and may ask for panel or en banc rehearing in this Court.

3 *See generally In re Williams*, 898 F.3d at 1102–10.

Incredibly, despite this alarming contrast in process, by declining to take this case en banc, the full Court has ratified the rule that these hastily-written, uncontested orders bind *all* panels, including merits panels. These super-precedents are *not* appealable to the Supreme Court, and may *not* be the subject of a petition for rehearing. Thus, a panel deciding a substantive issue in a published order insulates itself from essentially *any* review.[4] ***1199** Despite the inability to seek rehearing en banc or appeal to the Supreme Court, these published panel orders are now afforded the same precedential weight as merits decisions.

4 Sua sponte rehearing appears to be the only practically conceivable remedy for a mistake in a published panel order, and it is the remedy often proffered in asserting that these orders "are not beyond all review." *See, e.g.*, *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015). This is not much of a failsafe, considering that we have reheard only one out of our more than 10,000 panel orders en banc, *see In re Williams*, 898 F.3d at 1098, despite our unique decisional approach that is "fraught with hazard and subject to error." *In re Leonard*, 655 F. App'x 765, 778–79 (11th Cir. 2016) (Martin, J., concurring).
There is also a theoretical possibility of our certifying a question involving a published order to the Supreme Court, *see In re Williams*, 898 F.3d at 1110 (Martin, J., concurring); *see also* 28 U.S.C. § 1254(2); Sup. Ct. R. 19, and a now-retired Justice once implied that he would have been open to such a question. *See Felker v. Turpin*, 518 U.S. 651, 667, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996) (Souter, J., concurring). Although I would welcome any avenue of Supreme Court review of these orders, that Court has only accepted four certified questions since 1946, and has accepted none since 1981. *See United States v. Seale*, 558 U.S. 985, 985, 130 S.Ct. 12, 175 L.Ed.2d 344 (2009) (Stevens, J., respecting the dismissal of the certified question); Aaron Nielson, *The Death of the Supreme Court's Certified Question Jurisdiction*, 59 CATH. U. L. REV. 483, 484–85 (2010). So, if a panel declines to correct a mistake in a published panel order, that panel can be overruled only by: (A) sua sponte en banc rehearing by this court—which has happened for one out of more than 10,000 orders; or (B) the Supreme Court's acceptance of a certified question —which has happened four times in the last seventy-two years. This purported backstop is illusory, and it should not be used as a justification for allowing these orders to bind merits panels.

Such a decision should have weighed greatly on this Court, and it should have been sufficient for en banc consideration. It is inconceivable that this Court would want all motions panels, merits panels, and lower courts in the Circuit to be bound on substantive issues by an order decided on the basis of forty-three words of pro se argument, in under thirty-days, with no avenue of appeal or review. It is similarly inconceivable that this Court would establish this rule without rehearing en banc. Because I cannot support such a rule, I dissent from the denial of rehearing en banc.

Judge Tjoflat takes offense to my dissent, which sheds light on what I believe is an unfair process.[5] Thoughtful and respectful disagreement is essential to our constitutional directive—"[t]he premise of our adversarial system is that appellate courts ... [are] arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.). There is sometimes impassioned but collegial disagreement about the answers to those questions. But to turn substantive disagreement into a sweeping charge that contrary views are "attacks on the integrity of the court as an institution" is another thing entirely. It is the great respect for both this Court as an institution and the judicial role that leads members of this Court to dissent. And if anyone has the duty to raise concerns about the fairness of this Court's process for resolving a category of appeals, it is a member of this Court. Consistent with that duty, I will continue to express disagreement when important issues are at stake. In another

case, when Judge Tjoflat is in the minority, he will be entitled to do the same.

5 Judge Tjoflat says the dissenters here lack credibility to criticize our Court for publishing *Johnson* orders when we have done so ourselves. *See* Tjoflat Op. at 1178–79. He would apparently instead have us effectively forfeit our votes on *Johnson* entirely—ensuring that the majority's view of *Johnson* is the only view with the force of binding precedent. But once the Court decided to use published *Johnson* orders as the vehicle for developing our habeas law, we had little choice. Declining to participate would have abdicated our responsibility to develop Eleventh Circuit law by effectively assigning our votes to our colleagues who continued to insist on publishing such orders.

MARTIN, Circuit Judge, with whom JILL PRYOR, Circuit Judge, joins, dissenting from the denial of rehearing en banc: Federal judges who decide cases in groups are bound to have differences of opinions about how those cases are decided. I've always understood that it is the discussion of those differing views that furthers the development and evolution of the laws and precedent that govern us all. My understanding does not appear to be unique, because if there is any member of this court who has not written a dissenting opinion, they have not been on this court ***1200** for very long. As for this dissent, it is certainly not an attack on the institution of the federal courts, to which I have devoted the last eighteen years of my professional life. Rather, this dissent is intended to honor the role I have been given on this court. I understand my oath to require me to point out procedures or interpretations of the law that I view as hampering our ability to administer justice to the people who come before us. If I have distorted any fact in this opinion, I request that someone tell me what that fact is so that I can correct my mistake.

As my colleagues have pointed out, this case is the direct appeal of Michael St. Hubert, who was sentenced to serve a 32-year prison sentence in 2016. Although this is Mr. St. Hubert's first opportunity to challenge his conviction and sentence in this court, his opportunity is limited by rulings this court has made in our habeas jurisprudence. So while Mr. St. Hubert is sitting in prison, his case has generated what I view as a healthy discussion of how it came to pass that he will be required to serve the entirety of a sentence that could not be legally imposed upon him if he were sentenced today. Six of the twelve of the active judges on this court have written opinions about Mr. Hubert's case, so it seems to have merited a valuable exchange of viewpoints.

Michael St. Hubert was 37-years-old when he pled guilty to two firearms charges brought against him under 18 U.S.C. § 924(c). At that 2016 hearing, the District Judge explained that Mr. St. Hubert would not be a free man until after his 69th birthday. Then, in a sprawling opinion reviewing Mr. St. Hubert's direct appeal, a panel of this Court affirmed Mr. St. Hubert's convictions and 32-year sentence, holding that the offenses underlying his convictions—Hobbs Act robbery and attempted Hobbs Act robbery—qualify as crimes of violence under § 924(c)'s residual and use-of-force clauses. See United States v. St. Hubert ("St. Hubert II")[1], 909 F.3d 335 (11th Cir. 2018).

1 As the term St. Hubert II would indicate, we are not discussing the original opinion issued by the panel ruling on Mr. St. Hubert's direct appeal of his conviction and sentence. The panel originally issued an opinion ruling against Mr. St. Hubert on February 28, 2018. See United States v. St. Hubert, 883 F.3d 1319 (11th Cir. 2018). On November 15, 2018, the panel vacated its February 2018 opinion and issued its second and broader opinion ruling against Mr. St. Hubert. St. Hubert II, 909 F.3d at 335, 337. It is this second opinion which is now the subject of these dissents to denial of en banc review.

There are several problems with the panel opinion that I believe deserve the attention of the en banc Court. Judge Wilson and Judge Jill Pryor each cogently address some of those problems, and I am privileged to join their dissents in full. See Wilson, J., dissenting op. at 1196–99 (discussing the St. Hubert II panel's troubling reaffirmation of its ruling that published panel orders from the second or successive context bind all panels of this Court); Jill Pryor, J., dissenting op. at 1210–13 (arguing the panel erroneously held attempting a crime of violence itself equates to a crime of violence).

In writing separately, I echo some of my colleagues' concerns. But beyond that, Mr. St. Hubert's case offers a valuable illustration of why I've been concerned about how this Circuit has parlayed the limited authority given it under 28 U.S.C. § 2244(b) (statute governing second or successive habeas petitions) to stop thorough consideration of the issues presented by people like Mr. St. Hubert, even on his direct appeal. It is an aberration that a statute meant to govern the treatment of inmates who seek to file a second or successive § 2255 motion now serves as a tool for this Court to ***1201** limit the review of prison sentences on direct appeal. I am

convinced this aberration results from our Court failing to follow the plain mandate of 28 U.S.C. § 2244(b)(3)(C). Since this is his case, I will begin with Mr. St. Hubert.

I.

Michael St. Hubert pled guilty to two counts of using, carrying, and brandishing a firearm in violation of 18 U.S.C. § 924(c). A conviction under § 924(c) is warranted only if a defendant uses a firearm during a "crime of violence or drug trafficking crime." 18 U.S.C. § 924(c)(1)(A). Mr. St. Hubert appealed his convictions and 32-year sentence to this Court, arguing that his underlying offenses—Hobbs Act robbery and attempted Hobbs Act robbery—do not qualify as crimes of violence required to support a conviction under § 924(c).

His is no pro forma challenge. His appeal raises the now-hot topic, unresolved by the Supreme Court, of whether Hobbs Act robbery and attempted Hobbs Act robbery qualify as violent felonies so as to justify his convictions for using a firearm in connection with "any crime of violence." 18 U.S.C. § 924(c)(1)(A). The issue of what constitutes a crime of violence under § 924(c) has been the subject of extensive consideration in this Circuit as well as our sister circuits. See, e.g., Ovalles v. United States, 905 F.3d 1231, 1234 (11th Cir. 2018) (en banc) (prescribing a conduct-based approach for determining whether an offense qualifies as a crime-of-violence under § 924(c)(3)'s residual clause); id. at 1277–99 (Jill Pryor, J., dissenting, joined by three judges of this Court) (arguing the categorical approach must govern § 924(c)'s definition of "crime of violence" and contending § 924(c)'s residual clause is void for vagueness under this approach); see also, e.g., United States v. Eshetu, 898 F.3d 36, 37 (D.C. Cir. 2018) (per curiam) (vacating § 924(c) convictions in light of Sessions v. Dimaya, 584 U.S. ——, 138 S.Ct. 1204, 200 L.Ed.2d 549 (2018), and leaving for the full D.C. Circuit the question of whether a conduct-based construction might save § 924(c)'s residual clause); United States v. Salas, 889 F.3d 681, 684–86 (10th Cir. 2018) (vacating § 924(c) conviction in light of *Dimaya*).

For Mr. St. Hubert and others who were convicted of § 924(c) violations within the Eleventh Circuit, the answers to these questions may be especially consequential. Penalties for § 924(c) are notoriously harsh—requiring a 5-to-10-year sentence for a first conviction and a mandatory minimum and consecutive 25-year sentence for a second, and a third, etc. 18 U.S.C. § 924(c)(1)(A), (1)(C), (1)(D)(ii). Under the statute at the time of his conviction, each of Mr. St. Hubert's two § 924(c) convictions had to carry separate, consecutive sentences. Id. § 924(c)(1)(A), (1)(D)(ii). In south Florida, where Mr. St. Hubert was charged and convicted, prosecutors have routinely charged more than one § 924(c) count, which is sometimes referred to as "stacking" those charges. This charging decision leaves the sentencing court no choice but to add decades to sentences of defendants who took part in a crime spree that involved firearms in more than one location. Specifically, for Mr. St. Hubert, the decision to charge him with the second § 924(c) violation added 25 years to his sentence. Notably, the recently enacted First Step Act of 2018 would not have permitted this type of "stacking" of § 924(c) charges in Mr. St. Hubert's case. See S. Res. 756, 115th Cong. § 403 (2018) (enacted). To say it plainly, this new law would today prohibit 25 years of the 32-year sentence imposed on Mr. St. Hubert in 2016.

***1202** Also notable, available data indicates that federal prosecutors in different parts of the country have different practices related to charging a defendant with a § 924(c) violation for one, or two, or every incident in which a gun was used or carried during a crime spree. See U.S. Sentencing Comm'n, Report to Congress: Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System 22 (2018) (explaining, in fiscal year 2016, Southern Florida was one of only 8 districts out of 78 reporting any cases in which more than one count of § 924(c) was charged). Thus, the random factors of time and geography mean that Mr. St. Hubert will serve a significantly longer sentence than a person who committed precisely the same crime but did so more recently or in another part of the country.

The panel rejected Mr. St. Hubert's arguments about the nature of his prior convictions. It deemed both his Hobbs Act robbery and attempted Hobbs Act robbery to be crimes of violence under both § 924(c)'s residual clause and its use-of-force clause. See St. Hubert II, 909 F.3d at 344–53. By my count, the St. Hubert II panel opinion ruled against Mr. St. Hubert in four different ways. Two of those rulings alone would have ended his appeal by affirming his convictions and 32-year sentence. I say the alternative holdings reach beyond what was necessary to decide Mr. St. Hubert's case. Even so, those gratuitous rulings bind future panels of this Court in cases for which they should have been allowed a fresh look. Here, I will address one especially harmful holding: that the St. Hubert II panel was bound to characterize Mr. St. Hubert's crimes as "violent" because panels of this Court had done so in earlier rulings denying applications for leave to file second

or successive § 2255 motions. See St. Hubert II, 909 F.3d at 345–46.

II.

The ruling that causes Mr. St. Hubert to lose his direct appeal is mandated by this court's habeas jurisprudence. For that reason, my discussion will include a brief overview of the remedies available to inmates who are years into serving a long sentence, which they believe should be shortened due to a recent development in the law. Generally, a prisoner suffering under a sentence he contends is illegal must seek relief by way of motion authorized under 28 U.S.C. § 2255. However, the Antiterrorism and Effective Death Penalty Act of 1996 renders this quite a narrow path to relief. For example, prisoners are generally given one chance to collaterally attack their sentence as a matter of right, and this they must do within one year of when it became final. 28 U.S.C. § 2255(f)(1). For inmates like Mr. St. Hubert, who have been sentenced to serve decades-long terms in prison, this one-time right to review comes too soon. Almost always, the law that defined and governed an inmate's sentence when it was imposed develops and evolves during his many years behind bars. Even so, those prisoners who already filed a § 2255 motion within the one-year permitted by statute are strictly limited in their ability to bring to the courts any legal issue that later developed regarding their sentence. For starters, these inmates cannot file another motion (a "second or successive" motion, by the terms of the statute) without getting permission from this Court. See 28 U.S.C. § 2255(h).

And the statute governing this "get permission" process is quite specific. It directs that "[a] motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel ***1203** of the court of appeals." 28 U.S.C. § 2244(b)(3)(B). Also, "[t]he court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." 28 U.S.C. § 2244(b)(3)(C). The statute sets a time-limit for this authorization: "[t]he court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion." 28 U.S.C. § 2244(b)(3)(D). And although the statute does not expressly prohibit briefing in this context, the panel must rule within the 30-day time limit, so briefing is nearly impossible. Indeed, the statute makes no provision for the government having custody of the prisoner to even know that the inmate applied to file a second or successive petition. Returning to the statute, its remaining provision removes every possible avenue for the appeal of this "prima facie" determination: "[t]he grant or denial of an authorization to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E). From my point of view, it is this prohibition on review that most invites abuse.

The language of this statute simply does not authorize courts of appeal to make merits decisions about the correctness of an inmate's sentence when he is merely seeking permission to file a habeas petition in District Court. A panel presented with a second or successive application is not empowered by the statute to decide in the first instance whether an inmate is entitled to relief. I agree with Judge William Pryor that where Supreme Court or existing Eleventh Circuit precedent already obviously forecloses a prisoner's claim, we should deny his application. But where there is an open merits question, the statute calls for the case to go to the District Court for consideration of that question in the first instance.

I offer the example of a case brought by a man named Stony Lester, because it illustrates how our get-permission process should operate. See In re Stoney Lester, No. 16-11730-A, slip op. Mr. Lester sought leave to file a second or successive § 2255 motion in light of the Supreme Court's holding in Johnson. He sought to challenge his Sentencing Guideline-based, career-offender designation as unconstitutionally vague. Lester, No. 16-11730, slip op. at 2. Even though the panel disagreed about whether Mr. Lester would ultimately succeed on his claim, it granted his application. Id. at 9. The panel explained it wasn't entirely clear whether Eleventh Circuit precedent foreclosed Mr. Lester's claim. See id. at 4–5 (discussing whether prior precedent that would have foreclosed the claim had been abrogated by decisions of the Supreme Court). Without clear precedent dictating the outcome of Mr. Lester's case, and because the panel recognized that at the application stage, "we do not hear from the government, the application lacks a meaningful opportunity to brief the merits of his case, we have no record, and we do not have the time necessary to decide anything beyond the prima facie question," the panel sent the case to the District Court so it could take the first pass at answering the thorny, open question Mr. Lester's case presented. Id. at 5 (quotations marks and citations omitted).

Two judges on the panel authored concurrences to that order. Judge William Pryor stated Mr. Lester had "made a prima facie showing that he is entitled to relief and that the district court, with the assistance of adversarial briefing must address the merits in the first instance." But Judge Pryor "wrote separately to express [his] view that [Mr.] Lester [wa]s likely ***1204** not entitled to relief." Id. at 10 (William Pryor, J., concurring in result only). He did not, I note, "collapse[ ]" the distinction between Mr. Lester's prima facie showing and his case on the merits. William Pryor, J., concurring op. at 1189. Judge Jill Pryor also fully concurred in the order granting Mr. Lester's application. Lester, No. 16-11730, slip op. at 13 (Jill Pryor, J., concurring). She also wrote separately, but she explained why she believed Mr. Lester might be entitled to relief. Mr. Lester's panel properly acted as a gatekeeper, sending his case to the District Court to interpret our precedent, intervening Supreme Court decisions, and the disparate views of the two Judge Pryors.

Unfortunately, our Court has not proceeded in this manner for all of these cases. In considering hundreds of applications (particularly since the Supreme Court decided Samuel Johnson's case, Johnson v. United States, 576 U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015)), this Court has denied authorization to prisoners who plainly made out a prima facie case that they could meet the requirements of the statute, based on the panel's view that the prisoner would later lose on the merits anyway. See In re McCall, 826 F.3d 1308, 1311–12 (11th Cir. 2016) (Martin, J., concurring) (describing "[o]ur court's massive effort to decide the merits of hundreds of habeas cases within 30 days each, all over the span of just a few weeks" in the wake of the Supreme Court's decision rendering Johnson retroactive). These merits decisions are in direct violation of the text of § 2244(b)(3)(C), which vests the three-judge panels reviewing these applications with power only to "determine[ ]" that the prisoner has made a prima facie showing.

A "prima facie" showing is nothing more than a showing "[s]ufficient to establish a fact or raise a presumption unless disproved or rebutted; based on what seems to be true on first examination, even though it may later be proved to be untrue." Prima Facie, Black's Law Dictionary (10th ed. 2014); see also Prima Facie Case, Black's Law Dictionary (10th ed. 2014) (defining prima facie case as "[a] party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor."). "Prima Facie" is a term often used in the law, most familiarly in the employment context, and it ordinarily refers to an initial showing of a meritorious claim. See Texas Dep't of Comm. Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981) (describing the burden of establishing a prima facie case of employment discrimination as "not onerous"). Plainly the party making the prima facie showing is not required to show he has a winning case. He need only show enough to allow a preliminary determination that he could prevail, subject to further proof.

There are many contexts in which courts evaluate whether a case deserves to proceed on the merits by requiring a party to make a prima facie showing. For example, in the context of jury selection, a party can make a prima facie showing of "purposeful racial discrimination" by demonstrating "that the totality of the relevant facts gives rise to an inference of discriminatory purpose." Batson v. Kentucky, 476 U.S. 79, 93–94, 106 S.Ct. 1712, 1721, 90 L.Ed.2d 69 (1986). This prima facie showing then shifts the burden to the other side to "demonstrate that permissible racially neutral selection criteria and procedures have produced the monochromatic result." Id. (quotation marks omitted). And only if a neutral reason is offered does the trial court analyze the merits. See id. at 98, 106 S.Ct. at 1724; cf. Purkett v. Elem, 514 U.S. 765, 768, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995) (holding a Court of Appeals erred by combining Batson's second and ***1205** third steps). Thus, the merits question of whether a party engaged in racial discrimination when it selected a jury simply cannot be answered based on the prima facie showing alone. But of course in this context there is an opportunity for adversarial testing. And if a court were to overstep its authority by making a merits decision at the "prima facie showing" stage, the offended party can point out the error to that court or on appeal. Not so for an inmate erroneously forced to prove his merits case at the "get permission" stage.

Similarly, in employment cases, the prima facie showing is a tool for distributing the burden for producing evidence. A court considering claims of workplace discrimination first looks to the person alleging discrimination to show "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion illegal under Title VII." Young v. United Parcel Service, Inc., 575 U.S. ——, 135 S.Ct. 1338, 1354, 191 L.Ed.2d 279 (2015) (quotation marks omitted). Once this prima facie showing—not an onerous one—is made, the burden shifts to the employer to offer a nondiscriminatory reason for the employment action. See id. (quotation marks omitted). Again here, even though some adversarial testing can occur, courts

are not allowed to cut off the search for truth once the prima facie showing has been made. And here too, courts that force a merits decision at the prima facie evaluation stage can be challenged on rehearing and on appeal. Not so for inmates seeking to file a second or successive petition, however, because § 2244(b)(3)(E) does not provide them such recourse.

Judge William Pryor argues that my reference to these examples is misplaced because 28 U.S.C. § 2255, unlike Batson or employment discrimination challenges, does not implicate a burden shifting framework. William Pryor, J., concurring op. at 1184–86. But his fine distinction is too fine. The general principle that a prima facie showing exists separate and apart from a final determination of the merits applies with equal force to non-burden shifting schemes.

For example, a petitioner in the immigration context is required to make a prima facie showing when she is seeking to reopen either her asylum case; a withholding of removal ruling; or a waiver of inadmissibility ruling. And the Board of Immigration Appeals ("BIA") has long made clear that these types of relief "will not be granted unless the [petitioner] establishes a prima facie case of eligibility for the underlying relief sought." In re S-V-, 22 I. & N. Dec. 1306, 1307 (BIA 2000), disapproved on other grounds by Amir v. Gonzales, 467 F.3d 921, 927 (6th Cir. 2006). The "prima facie showing" sufficient to reopen proceedings is one that makes the petitioner's case seem "worthwhile" of further development. In re L-O-G-, 21 I. & N. Dec. 413, 419 (BIA 1996). More to the point, the BIA has explicitly cautioned that "[i]n considering a motion to reopen, the [BIA] should not prejudge the merits of a case before the alien has had an opportunity to prove the case." Id. The BIA has expressed its concern that "[f]requently, it will be difficult to assess from motion papers alone what ... will occur ... in a given case." Id.

This concern is real for Mr. St. Hubert's appeal too. He presents important (and certainly impactful) questions about whether his prior convictions for Hobbs Act Robbery and attempted Hobbs Act Robbery qualify as crimes of violence (as that term is used in 18 U.S.C. § 924(c)) so as to require his 32-year sentence. This Court did not decide these questions in the regular order. In ruling against Mr. St. ***1206** Hubert on these questions, the panel relied upon rulings made under the limited authority of § 2244(b)(3), instead of allowing the full and adversarial testing his arguments deserve on his direct appeal. Some time ago, a three-judge panel of this Court, without adversarial briefing, under a 30-day deadline, and in a process not subject to standard appeal or review, held that a Hobbs Act robbery conviction qualifies as a crime of violence under § 924(c)'s use-of-force clause. In re Saint Fleur, 824 F.3d 1337, 1340–41 (11th Cir. 2016) (per curiam); see also In re Colon, 826 F.3d 1301, 1305 (11th Cir. 2016) (per curiam) (relying on Saint Fleur to conclude that aiding and abetting Hobbs Act robbery qualifies as a crime of violence under § 924(c)'s use-of-force clause). This Court's decisions on whether attempted Hobbs Act robbery constitutes a crime of violence suffer from other shortcomings, well-articulated by Judge Jill Pryor in her dissent. Jill Pryor, J., dissenting op. at 1211–13.

There was a time when this Court honored the statutorily imposed limitations of a prima facie review. In In re Holladay, 331 F.3d 1169 (11th Cir. 2003), a decision that is still binding precedent for our Circuit, we said the "requisite showing" was "a sufficient showing of possible merit to warrant a fuller exploration by the district court." Id. at 1173–74 (quotation marks omitted) (adopting the standard set in Bennett v. United States, 119 F.3d 468, 469 (7th Cir.1997)); see also Cohen v. Office Depot, Inc., 204 F.3d 1069, 1072 (11th Cir. 2000) ("[W]here two prior panel decisions conflict we are bound to follow the oldest one."). Other courts agree that the standard for allowing a second or successive petition should be interpreted permissively and should not involve a merits analysis of the claim by the Court of Appeals. See In re Hoffner, 870 F.3d 301, 308 (3d Cir. 2017) (explaining that whether an application "relies on" a new rule cannot be based on "whether the claim has merit, because [the Third Circuit] does not address the merits at all in our gatekeeping function"); Ochoa v. Sirmons, 485 F.3d 538, 541 (10th Cir. 2007) (per curiam) ("This statutory mandate does not direct the appellate court to engage in a preliminary merits assessment. Rather, it focuses our inquiry solely on the conditions specified in § 2244(b) that justify raising a new habeas claim."); see also Holladay, 331 F.3d at 1173 ("[I]f in light of the documents submitted with the application it appears reasonably likely that the application satisfies the stringent requirements for the filing of a second or successive petition, we shall grant the application" (quotations omitted and alterations adopted)). The proper view is that in deciding whether to allow a second or successive petition, the three-judge panel is not empowered to speculate about what a District Court might do if the second or successive motion is allowed to proceed.

I view the Eleventh Circuit as having routinely exceeded its statutory mandate in this regard. Notwithstanding the narrowness of the inquiry authorized by the language of §

2244, this Circuit has regularly and unnecessarily reached beyond the questions of whether an inmate's request to file a § 2255 motion "contain[s]" a new rule, 28 U.S.C. § 2255(h), and whether he has made a "prima facie showing" to instead address the merits of his claim. Specifically, after receiving hundreds of applications seeking relief based on the Supreme Court's decision in Johnson v. United States, 576 U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569, "[t]he judges of this court, myself included, [started] combing through sealed records from the prisoner's original sentencing hearing and ... mak[ing] a decision about whether the prisoner w[ould] win if we let him file his § 2255 motion in district court." ***1207** In re Clayton, 829 F.3d 1254, 1257 (11th Cir. 2016) (Martin, J., concurring). Later, we codified this approach. See In re Thomas, 823 F.3d 1345, 1349 (11th Cir. 2016) (per curiam) (concluding an applicant failed to make a prima facie showing under § 2255 because the sentencing record indicated the District Court did not rely on the portion of the Armed Career Criminal Act invalidated in Johnson); see also Beeman v. United States, 871 F.3d 1215, 1221 & n.1 (11th Cir. 2017) (expressly adopting Thomas as providing the relevant approach to analyzing § 2255 motions brought pursuant to Johnson). To reiterate, In re Thomas was an opinion of great consequence for our Circuit and for people sentenced to prison terms here. Yet its holding was beyond the ability of the inmate to challenge. See 28 U.S.C. § 2244(b)(3)(E).

This Court has now issued hundreds of rulings on the merits of prisoners' claims in the context of their mere application to proceed in District Court. Before Mr. St. Hubert's appeal was decided, this Court published, by my count, eight opinions resolving, on review of an application to file a second or successive § 2255 motion, the important and often difficult question of whether certain offenses are "crime[s] of violence" or "violent felon[ies]" under the elements clauses in § 924(c)(3)(A), (e)(2)(B)(i), or United States Sentencing Guidelines § 4B1.2(a). See In re Welch, 884 F.3d 1319, 1323–25 (11th Cir. 2018) (per curiam) (Alabama first degree robbery and Alabama first degree assault); In re Hines, 824 F.3d 1334, 1337 (11th Cir. 2016) (per curiam) (bank robbery in violation of 18 U.S.C. § 2113(a), (d)); Saint Fleur, 824 F.3d at 1341 (Hobbs Act robbery); Colon, 826 F.3d at 1305 (aiding-and-abetting Hobbs Act robbery); In re Smith, 829 F.3d 1276, 1280–81 (11th Cir. 2016) (per curiam) (carjacking in violation of 18 U.S.C. § 2119); In re Watt, 829 F.3d 1287, 1289–90 (11th Cir. 2016) (per curiam) (aiding and abetting assault of a postal employee); In re Sams, 830 F.3d 1234, 1239 (11th Cir. 2016) (per curiam) (bank robbery in violation of 18 U.S.C. § 2113(a)); In re Burgest, 829 F.3d 1285, 1287 (11th Cir. 2016) (per curiam) (Florida manslaughter and kidnapping). Now in standing behind St. Hubert II, this Court has institutionalized these appeal-proof panel opinions as the precedent of this Circuit. It is notable that some of these opinions decided the merits of claims in the face of dissents by my colleagues and me warning that the heavily abridged second or successive application procedures are ill-suited to answering such questions. See, e.g., Colon, 826 F.3d at 1308 (Martin, J., dissenting) ("Deciding the merits of not-yet-filed § 2255 motions in this way is especially dangerous in cases like Mr. Colon's that turn on a complex question of first impression."); Smith, 829 F.3d at 1285 (Jill Pryor, J., dissenting) ("We certainly have never held that the [carjacking] statute would qualify categorically even setting aside the residual clause in § 924(c). It would be impractical and imprudent to decide this complex question in the first instance here."). Outside of the second or successive application setting, our Court rules would ordinarily require an oral argument panel to consider a topic upon which the panel could not reach unanimity. 11th Cir. R. 34-3(b)(3).

III.

In his concurrence, Judge Tjoflat attempts to mitigate the extent of the harm from this practice by saying that only a few of the orders deciding the merits of claims presented in second or successive applications have been published. Tjoflat, J., concurring op. at 1178. But it is not the number of published opinions I take issue with. I take issue with the practice itself. As Mr. St. Hubert's case illustrates, any ***1208** one published order that prematurely and in my view mistakenly resolves an open merits question forecloses that issue for all future panels. See Ovalles v. United States, 905 F.3d 1231, 1268 (11th Cir. 2018) (Martin, J., dissenting) (describing the outsized effect of a few published second or successive application rulings that resolved open questions of law). No critical mass of published merits orders is necessary to establish the law in our Circuit and affect hundreds of inmates.

Take for example In re Smith, which held for the first time that carjacking in violation of 18 U.S.C. § 2119 "clearly" qualifies as a crime of violence under § 924(c)'s use-of-force clause. 829 F.3d at 1280–81. As Judge Jill Pryor explained in a dissent to that decision, the Smith majority's conclusion was hardly obvious and only tenuously supported by our prior case law. In re Smith, 829 F.3d 1276, 1281–85 (11th Cir. 2016) (Jill Pryor, J., dissenting). Nevertheless, the rule set out in Smith

became the rule in this Circuit. All later panels considering denials of § 2255 motions and requests for authorization to file second or successive § 2255 motions must rely on Smith—as our prior panel precedent rule mandates—to decide the same issue. See, e.g., Grant v. United States, 694 F. App'x 756, 758 (11th Cir. 2017) (unpublished) (mem.) ("Grant's argument that carjacking is not a crime of violence under § 924(c)'s force clause is foreclosed by our opinion in Smith. Therefore, Grant's convictions under § 924(c) were proper because carjacking satisfies § 924(c)'s force clause, and the district court did not err in denying his § 2255 motion to vacate on this ground."). It is not the number of published orders that thwarts defendants' efforts to have our Court fully consider their claims, it is the breadth of their reach.

Judge Tjoflat says my dissenting colleagues and I engage in the very practice we criticize, because we have been on panels that published certain orders on prisoners' applications to file second or successive § 2255 motions. Tjoflat, J., concurring op. at 1179–80. But not one of the 14 orders he points to resolved for the first time a then-open question about whether a certain offense qualifies as a crime of violence or a violent felony under the elements clause of § 924(c)(3)(A), (e)(2)(B)(i), or United States Sentencing Guidelines § 4B1.2(a). None of our opinions bound future panels to grant relief to any prisoner based on their criminal history. To the contrary, eight of the fourteen orders denied the prisoner relief based on a straightforward application of existing Circuit precedent. In re Hunt, 835 F.3d 1277 (11th Cir. 2016); In re Parker, 832 F.3d 1250 (11th Cir. 2016); In re Jones, 830 F.3d 1295 (11th Cir. 2016); In re Clayton, 829 F.3d 1254 (11th Cir. 2016); In re Sapp, 827 F.3d 1334 (11th Cir. 2016); In re McCall, 826 F.3d 1308 (11th Cir. 2016); In re Rogers, 825 F.3d 1335 (11th Cir. 2016); In re Robinson, 822 F.3d 1196 (11th Cir. 2016). Six of those eight published orders featured at least one concurrence that offered criticism of the Circuit's existing precedent the panel was compelled to apply. See, e.g., In re Hunt, 835 F.3d 1277, 1279 (11th Cir. 2016) (Wilson, J., concurring) ("Although Hunt's Guidelines-based claim is currently foreclosed by [United States v.] Matchett, I write separately to explain why I disagree with the holding in Matchett."); In re Parker, 832 F.3d 1250, 1250–51 (11th Cir. 2016) (Rosenbaum, J., concurring) ("I agree that In re Baptiste requires us to dismiss Leslie Parker's request for authorization to file a second or successive habeas petition. I write separately because I continue to believe that Baptiste's interpretation of 28 U.S.C. 2244(b)(1) ... is incorrect as a matter of ***1209** law." (citation omitted)); In re Jones, 830 F.3d 1295, 1297–1305 (11th Cir. 2016) (Rosenbaum, J., concurring) (offering four reasons why Baptiste, the decision that precluded the prisoner's request for relief, was wrongly decided); In re Clayton, 829 F.3d 1254, 1256–76 (11th Cir. 2016) (Martin, J., concurring) (criticizing Matchett, which precluded the prisoner's request for relief); In re Sapp, 827 F.3d 1334, 1337 (11th Cir. 2016) (Jordan, Rosenbaum, & Jill Pryor, JJ., concurring) ("Although we are bound by Griffin, we write separately to explain why we believe Griffin is deeply flawed and wrongly decided."); In re McCall, 826 F.3d 1308 (11th Cir. 2016) (Martin, J., concurring) (criticizing Griffin and Matchett, which precluded the prisoner's request for relief).

The remaining six orders cited by Judge Tjoflat granted the prisoners' applications but did not decide the merits question. We sent the prisoners' cases to the District Court to resolve the unsettled merits question in the first instance. In re Chance, 831 F.3d 1335 (11th Cir. 2016); In re Gomez, 830 F.3d 1225 (11th Cir. 2016); In re Davis, 829 F.3d 1297 (11th Cir. 2016); In re Parker, 827 F.3d 1286 (11th Cir. 2016); In re Adams, 825 F.3d 1283 (11th Cir. 2016); In re Pinder, 824 F.3d 977 (11th Cir. 2016). For example in Pinder, we explained "the law [was] unsettled on whether the rule announced in *Johnson* invalidates Pinder's sentence," but "[w]hat's clear however is that Pinder has made a prima facie showing that his motion contains a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." 824 F.3d at 979 (omission adopted, quotation marks omitted, citation omitted). These orders are simply different than the published orders that resolved open merits questions.

Judge Tjoflat also writes that St. Hubert II merely echoed an already-clear rule in our Circuit about how to treat published orders resolving requests for authorization to file a second or successive § 2255 motion. Tjoflat, concurring op. at 1181. But the St. Hubert II panel opinion tells us this is not so. St. Hubert II decided, once and for all, that merits decisions reached in the second or successive application context are binding precedent on direct appeal. 909 F.3d at 346 ("Lest there be any doubt, we now hold in this direct appeal that law established in published three-judge orders issues 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." (alteration adopted, quotation omitted, citation omitted)). This decision

has great consequence. It curtails our review of claims made by prisoners like Mr. St. Hubert, even on direct appeal.

His criticisms aside, Judge Tjoflat seems to acknowledge our Court has reached beyond merely determining whether an application to file a second or successive § 2255 motion makes the required prima facie showing. He notes for example a series of orders in which "this Court determined that Johnson's residual clause holding did not apply to companion § 924(c) crimes and that, even assuming Johnson did, the prisoners' crimes qualified under § 924(c)'s elements clause, which likewise was not affected by Johnson." Tjoflat, J., concurring op. at 1178. Judge Tjoflat also recognizes that "[i]n 2016 after the Johnson and Welch decisions, there was a heightened need to publish at least some of these 2,282 orders to establish precedent." Id. at 1179. Both of these points demonstrate rather than refute my view. I know of no reason why these published ***1210** opinions should not have been the product of the usual robust process that ordinarily attends our Circuit precedent.

Judge Tjoflat and I disagree on the upshot of this overreach, however. While he may find it comforting that we've exceeded Congress's mandate only sparingly, I do not. Neither do I believe our Court can justify our overreach because the merits decisions we make in this context might match those made by other Circuits after more thorough review. In the same way, I do not share Judge Tjoflat's apparent comfort that we have our Staff Attorney's Office give us advice on merits issues better left to U.S. District Judges to decide. See Tjoflat, J., concurring op. at 1179–80, 1183. Finally in this regard, I take no comfort in the backstop of a sua sponte en banc call by an active member of this Court. See id. at 1181–82. This process would require a member of this Court to identify a wrongly decided merits order for which no petition for rehearing en banc has been filed; succeed in an en banc call; and persuade the full en banc court to reverse the panel decision. And this is a process the prisoner cannot himself initiate and generally is excluded from participating. I do not disagree with Judge Tjoflat when he says about us that "[t]he real problem for the dissenters" is that we "have not garnered the majority votes needed to vacate the particular published panel orders with which [we] disagree." Id. at 1181. But just because we hold a minority of the positions on this court does not necessarily mean we are wrong.

IV.

The members of this court are bound to treat the St. Hubert II panel's holdings as binding precedent in this Circuit, unless and until the Supreme Court or this Court sitting en banc reverses each of them, one by one. See United States v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008) (explaining that, under this Circuit's prior panel precedent rule, this Court is bound to follow a prior panel's holding unless it has been overruled or undermined to the point of abrogation by our en banc Court or by the Supreme Court). Nothing in the limited § 2255 authorization procedure was designed for resolving whether a given offense qualifies as a crime of violence or violent felony. See Wilson, J., dissenting op. at 1197–99 (describing the limited nature of § 2255 authorization procedures). This Court unnecessarily and prematurely addressed these issues and, in so doing, exceeded its statutory mandate. As a result, prisoners sentenced in Alabama, Florida and Georgia may be serving illegal sentences for which they have no remedy.

Congress gave us a gatekeeping function. We've used it to lock the gate and throw away the key. The full court should have taken up this matter of great consequence. I dissent from its decision not to do so.

JILL PRYOR, Circuit Judge, with whom WILSON and MARTIN, Circuit Judges, join, dissenting from the denial of rehearing en banc:

I join in full Judge Wilson's and Judge Martin's compelling dissents. The institutional (and, possibly, constitutional) problems with treating published panel orders as binding on all subsequent panels are significant and, at a minimum, worthy of en banc review. I write separately to express my disagreement with the panel opinion's holding that an attempt to commit an offense that qualifies under 18 U.S.C. § 924(c)'s elements clause itself necessarily constitutes an elements clause offense.

The statute at issue in Mr. St. Hubert's case, 18 U.S.C. § 924(c), criminalizes and imposes mandatory enhanced sentences ***1211** for using or carrying a firearm "during and in relation to any crime of violence or drug trafficking crime" or possessing a firearm in furtherance of such a crime. 18. U.S.C. § 924(c)(1)(A). Section 924(c)(3) defines "crime of violence" as "an offense that is a felony and":

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

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

Id. § 924(c)(3). Subsection (A) is known as the "elements clause," and subsection (B) is known as the "residual clause."

The panel opinion considered whether Mr. St. Hubert's conviction for attempted Hobbs Act robbery qualified as a violent felony under 18 U.S.C. § 924(c)'s elements clause. *See United States v. St. Hubert*, 909 F.3d 335, 351–53 (11th Cir. 2018). An individual commits Hobbs Act robbery when he "obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery ... 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" commit robbery under the statute. 18 U.S.C. § 1951(a). "[R]obbery," in turn, is defined as "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future." *Id.* § 1951(b)(1). Under federal law, to be convicted for an attempt crime, the defendant must (1) have the specific intent to engage in the criminal conduct he is charged with attempting and (2) engage in an overt act, defined as "a substantial step toward the commission of that crime and which strongly corroborates [his] criminal intent." *United States v. Rothenberg*, 610 F.3d 621, 626 (11th Cir. 2010); *see also United States v. Murrell*, 368 F.3d 1283, 1286 (11th Cir. 2004).

The panel opinion concluded that attempted Hobbs Act robbery qualifies as a predicate offense under § 924(c)'s elements clause.[1] *See St. Hubert*, 909 F.3d at 352. To get to that conclusion, the opinion made two right turns before it took a wrong turn, but the wrong turn led to a logical and legal dead end. First, the opinion said, "the definition of a crime of violence in [the elements clause] equates the use of force with attempted force, and thus the text of [the elements clause] makes clear that actual force need not be used for a crime to qualify" as a crime of violence. *Id.* No disagreement here. Second, "a completed Hobbs Act robbery itself qualifies as a crime of violence under [§ 924(c)'s elements clause] 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." *Id.* That is because "a defendant must intend to commit every element of the completed crime in order to be guilty of attempt." *Id.* So far so good.

1 I do not address the opinion's alternative holding that Mr. St. Hubert's attempted Hobbs Act robbery conviction falls within § 924(c)'s residual clause, a holding that rested upon the en banc Court's decision in *Ovalles v. United States*, 905 F.3d 1231 (11th Cir. 2018) (en banc). *See St. Hubert*, 909 F.3d at 346–47. I dissented in that case, *see Ovalles*, 905 F.3d at 1277–99 (Jill Pryor, J., dissenting), and continue to disagree with its holding and reasoning.

But then the opinion concluded: " '[A]n attempt to commit a crime should be treated ***1212** as an attempt to commit every element of that crime' "; thus, "when a substantive offense qualifies as a violent felony under [§ 924(c)'s elements clause], an attempt to commit that offense also is a violent felony." *Id.* (quoting *Hill v. United States*, 877 F.3d 717, 719 (7th Cir. 2017)). This is where the panel opinion (and the *Hill* opinion upon which it relied) went wrong. Logic permits no inference from the fact of a conviction for an attempt crime that the person attempted to commit every element of the substantive offense. The panel was able to bridge this logical gap only by converting *intent* to commit each element of the substantive offense (proof of which is necessary to convict someone of an attempt crime) into *attempt* to commit each element of the substantive offense (which is not necessary to convict someone of an attempt crime). *Intending* to commit each element of a crime involving the use of force simply is not the same as *attempting* to commit each element of that crime. By the alchemy of transmuting intent to commit each element into attempt to commit each element, the panel conjured the conclusion that anyone convicted of an attempt to commit a crime involving force must have been found beyond a reasonable doubt to have attempted to use force. That's the logical flaw.

Now the legal flaw: the panel's transformation of an attempted offense into an attempt to commit each element of the offense does not align with the actual elements of an attempt offense. *Rothenberg*, 610 F.3d at 626; *Murrell*, 368 F.3d at 1286. So it is incorrect to say that a person necessarily attempts to use physical force within the meaning of § 924(c)'s elements clause just because he attempts a crime that, if completed, would be violent.

Conviction for an attempt crime also requires an overt act, but that element does not fill the panel opinion's logical gap. We can easily imagine that a person may engage in an overt act—in the case of robbery, for example, overt acts might include renting a getaway van, parking the van a block from the bank, and approaching the bank's door before being thwarted—without having used, attempted to use, or threatened to use force. Would this would-be robber have *intended* to use, attempt to use, or threaten to use force? Sure. Would he necessarily have attempted to use force? No. So an individual's conduct may satisfy all the elements of an attempt to commit an elements-clause offense without anything more than intent to use elements-clause force and some act (in furtherance of the intended offense) that does not involve the use, attempted use, or threatened use of such force. The panel opinion's conclusion that an attempt to commit a crime of violence necessarily is itself a crime of violence simply does not hold up.

By declining to rehear this case en banc, our court not only ignores the serious institutional concerns my colleagues describe in their dissents, but it also misses the chance to reexamine the panel's flawed logic as to attempt crimes. This missed opportunity perpetuates unlawfully lengthy sentences for people convicted of attempt crimes. And the panel opinion's erroneous holding reaches beyond § 924(c) because this court already has applied that holding to the Armed Career Criminal Act, which increases the sentence for any person convicted of being a felon in possession of a firearm who has three prior convictions for violent felonies or serious drug offenses. *See Hylor v. United States*, 896 F.3d 1219, 1223 (11th Cir. 2018) (majority opinion); *id.* at 1224–27 (Jill Pryor, J., concurring in result) (making essentially the same argument I make today).

District courts within our circuit lead the pack in imposing sentences under ***1213** these enhancement statutes.[2] It is critically important that we of all circuits get this right. I dissent from the denial of rehearing en banc.

2 In 2016—the last year for which the United States Sentencing Commission has reported complete data—only the Fourth Circuit's district courts handed down more sentences under § 924(c) than ours did. *See* United States Sentencing Comm'n, *Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System* 72–74 (2018). That same year, district courts within our circuit imposed more sentences enhanced under the Armed Career Criminal Act than any other circuit. *Id.* at 36 (reporting that in 2016 the Eleventh Circuit's district courts handed down 26.6% of ACCA-enhanced sentences, by far the most of any circuit).

All Citations

918 F.3d 1174 (Mem)

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A-3

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-4

UNITED STATES DISTRICT COURT

Southern District of Florida
Miami Division

UNITED STATES OF AMERICA
v.
MICHAEL ST. HUBERT

JUDGMENT IN A CRIMINAL CASE

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

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

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

The defendant is adjudicated guilty of these offenses:

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

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

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

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

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

Federico A. Moreno
United States District Judge

Date: February 17, 2016

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

IMPRISONMENT

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

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

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

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
DEPUTY UNITED STATES MARSHAL

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

SUPERVISED RELEASE

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

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

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

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

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

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

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

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

STANDARD CONDITIONS OF SUPERVISION

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

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

CRIMINAL MONETARY PENALTIES

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

	Assessment	Fine	Restitution
TOTALS	$200.00	$0.00	$0.00

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

NAME OF PAYEE	TOTAL LOSS*	RESTITUTION ORDERED	PRIORITY OR PERCENTAGE

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

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

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

SCHEDULE OF PAYMENTS

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

A. Lump sum payment of $200.00 due immediately.

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

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

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

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

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

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

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

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

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

A-5

FEDERAL PUBLIC DEFENDER
Southern District of Florida

Michael Caruso
Federal Public Defender

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Chief Assistant

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Aimee Ferrer
Ayana Harris
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Margaret Y. Foldes
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Michael D. Spivack
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Caroline McCrae
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Robin C. Rosen-Evans

Fort Pierce:

Panayotta Augustin-Birch
R. Fletcher Peacock

February 5, 2018

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

Attention: David J. Smith, Clerk of Court

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

Dear Mr. Smith:

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

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

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

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

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

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

Respectfully submitted,

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

cc: AUSA Sivashree Sundaram

A-6

70.3

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

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

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

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

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

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

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

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

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

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

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

Annotations and Comments

18 U.S.C. § 1951(a) provides:

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

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

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

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

The commerce nexus for an attempt or conspiracy under § 1951 can be shown by evidence of a potential impact on commerce or by evidence of an actual, de minimis impact on commerce. *Kaplan*, 171 F.3d at 1354 (citations omitted). In the case of a substantive offense, the impact on commerce need not be substantial; it can be minimal. *See id.; see also United States v. Le*, 256 F.3d 1229 (11th Cir. 2001); *U.S. v. Verbitskaya*, 405 F.3d 1324 (11th Cir. 2005) (jurisdictional element can be met simply by showing this crime had a minimal effect on commerce); *U.S. v. White*, No. 07-11793, 2007 U.S. App. LEXIS 27819 (11th Cir. Nov. 29, 2007) (jurisdictional element can be met simply by showing this crime had a minimal effect on commerce); *U.S. v. Mathis*, 186 Fed. Appx. 971 (11th Cir. 2006); *U.S. v. Stamps*, 201 Fed. Appx. 759 (11th Cir. 2006).

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

A-7

FEDERAL PUBLIC DEFENDER
Southern District of Florida

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Federal Public Defender

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Panayotta Augustin-Birch
R. Fletcher Peacock

February 23, 2018

David J. Smith, Clerk of Court
United States Court of Appeals
For the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Re: *United States v. Michael St. Hubert*, Case No. 16-10874-GG
Supplemental Letter Brief

Dear Mr. Smith:

The Court has directed the parties to file supplemental letter briefs on whether *attempted* Hobbs Act robbery qualifies as a crime of violence under 18 U.S.C. § 924(c) and, more specifically, under § 924(c)(3)(A). The short answer is that an *attempted* Hobbs Act robbery does not categorically have the "use, attempted use, or threatened use of physical force against the person or property of another" as an element. There several reasons why.

A. *Attempted* Hobbs Act robbery is not categorically a crime of violence for the same reasons a completed Hobbs Act robbery is not a crime of violence.

In the Initial and Reply Briefs, at oral argument, and in his February 5, 2018 Rule 28(j) Letter of Supplemental Authority, Mr. St.

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Hubert set forth multiple reasons why a completed Hobbs Act robbery – the offense charged in Count 7 of the indictment – does not categorically require the use, attempted use, or threatened use of physical force against the person or property of another. In particular, he has emphasized that this Court's pattern instruction for Hobbs Act robbery confirms that one means of committing this indivisible offense is by causing the victim to "fear harm, either immediately or in the future," and for purposes of that means the term "fear" includes "*the fear of financial loss* as well as fear of physical violence." (Emphasis added). In light of that, the "least culpable conduct" for which someone may plausibly be convicted of committing an *attempted* Hobbs Act robbery is attempting to take someone's property by causing "*fear of financial loss*"—which plainly does not require the use of any force, let alone "violent force." *See In re Hernandez*, 857 F.3d 1162 (2017) (Martin, J., jointed by Jill Pryor, J. concurring in result) (noting, based on the same definition of "fear" in the pattern Hobbs Act extortion instruction, "the plausible applications of attempted Hobbs Act extortion might not "all require the [attempted] use or threatened use of force;" citing *United States v. McGuire*, 706 F.3d 1333, 1337 (11th Cir. 2014) (O'Connor, J.)).[1] And for that, or any other

[1] Notably, Florida strongarm robbery differs from the federal offense of Hobbs Act robbery in this particular regard. Since there is no indication in the Florida pattern § 812.13 instruction that "putting in fear" includes "fear of financial loss," the recent decision *in United States v. Joyner*, ___ F.3d ____, 2018 WL 1015765 (11th

reason a completed Hobbs Act robbery is not a crime of violence within § 924(c)(3)(A), an *attempted* Hobbs Act robbery is not a crime of violence within that provision either.

B. Even if the Court were to find that a completed Hobbs Act robbery categorically qualifies as a crime of violence, an *attempted* Hobbs Act robbery does not because the "substantial step" necessary for an attempt conviction need not involve the "use, attempted use, or threatened use of physical force against the person or property of another."

The government re-asserts in its Supplemental Letter Brief, as it did in its Response in Opposition to Mr. St. Hubert's Motion for Supplemental Briefing, that if a completed Hobbs Act robbery qualifies as a crime of violence under 18 U.S.C. § 924(c)(3)(A) under *In re Saint Fleur*, 824 F.3d 1337, 1340 (11th Cir. 2016), "by extension, attempted Hobbs Act robbery also qualifies as a crime of violence because § 924(c)(3)(A) encompasses the '*attempted* use, or *threatened* use' of force in its definition. *See* § 924(c)(3)(A)." Government's Response at 2 n.1;

(continued)
Cir. Feb. 22, 2018) has no persuasive value here. Moreover, *Joyner* is not persuasive for a host of other reasons including that the defendant in that case did not make any arguments such as those *infra* regarding the "substantial step" requirement in an attempt case. Nor did the *Joyner* panel consider any "substantial step" arguments on its own, since it found it was bound by prior precedents to declare attempted Florida strongarm robbery an ACCA "violent felony." The precedents the Court found controlling in *Joyner* do not control a Hobbs Act robbery case under § 924(c). To the extent district courts in several cases cited by the government failed to perceive any distinction between the Florida and federal robbery offenses, those district court decisions are likewise unpersuasive.

Supplemental Letter Brief at 1-2. That logic, however, has been specifically rejected by this Court in multiple decisions the government inexplicably ignores. *See In re Burke*, No. 16-12735, manuscript op. at 4, n. 1 (11th Cir. June 17, 2017) (defendant whose § 924(c) conviction was predicated upon convictions for conspiracy and attempt to commit Hobbs Act robbery made a *prima facie* showing that he may be entitled to relief under *Johnson*; holding that "Because *Saint Fleur* involved a substantive Hobbs Act robbery offense, not an attempt or conspiracy to commit a Hobbs Act robbery, it is not binding here"); *In re James*, 2016 WL 4608125 at *3 (11th Cir. July 21, 2016) (although the Court held in *Saint Fleur* that Hobbs Act robbery qualifies as a "companion crime of violence under § 924(c), we have not addressed whether attempted Hobbs Act robbery qualifies as a crime of violence under § 924(c);" since "it is not clear that James's companion attempted Hobbs Act robbery conviction qualifies as a crime of violence" under the § 924(c)'s elements clause without regard to its residual clause, "we are unable to say, at this stage, that James's sentence as to Count 16 would be valid even if *Johnson* makes the § 924(c)(3)(B) residual clause unconstitutional"); *In re Gomez*, 830 F.3d 1225, 1228 (11th Cir. 2016) ("Although we have held that Hobbs Act robbery qualifies as an elements-clause predicate, we have yet to consider *attempted* Hobbs Act robbery")(emphasis added).

Thus, even *if* the Court were to agree with the government that *Saint Fleur* controls the question – upon *de novo* review, in this direct appeal – of whether a substantive Hobbs Act robbery offense is a "crime of violence" (which would mean there is no error in Mr. St. Hubert's Count 8 conviction), *Burke*, *James*, and *Gomez* are clear that *Saint Fleur* does *not* control the distinct, and still-unsettled question of whether a mere *attempt* to commit a Hobbs Act robbery qualifies as a "crime of violence." Moreover, even if the Court were to hold for reasons independent of *Saint Fleur* that Hobbs Act robbery is categorically a crime of violence, that holding likewise would not control the separate and independent question here of whether an *attempted* Hobbs Act robbery qualifies, for reasons the Court clarified in *Gomez.* Specifically, the Court explained in *Gomez*, whether an attempted Hobbs Act robbery is a "crime of violence" has remained "unsettled" in the Circuit, because the Court had not yet settled

> whether a defendant can be convicted of attempted Hobbs Act robbery even if he did not take substantial steps toward using or threatening the use of force. In other words, "the plausible applications of" attempted Hobbs Act robbery might not "all require the [attempted] use or threatened use of force." *See* [*United States v. McGuire*, 706 F.3d 1333, 1336 (11th Cir. 2013)]. Hence, that type of conviction may not categorically qualify as an elements-clause predicate. *See id.*

830 F.3d at 1228. The Court should settle that question in this case, by considering the following.

A federal attempt crime only requires that the government prove (1) that the defendant had the specific intent to engage in the underlying criminal conduct, and (2) that he took a "substantial step toward commission of the offense" that strongly corroborates his criminal intent. *United States v. Murrell*, 368 F.3d 1283, 1286 (11th Cir. 2004). In that regard, "the federal courts have rather uniformly adopted the standard found in Section 5.01 of the American Law Institute's Model Penal Code." *United States v. Carmen Ramirez*, 823 F.2d 1 (1st Cir. 1987 (citation omitted). And notably, the Model Penal Code includes as conduct that will amount to a "substantial step" "strongly corroborative of the actor's criminal purpose:"

> (a) lying in wait, searching for or following the contemplated victim of the crime;
>
> (b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
>
> (c) reconnoitering the place contemplated for the commission of the crime;
>
> (d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;
>
> (e) possession of materials to be employed in the commission of the crime, that are specifically designed for such unlawful use or that can serve no lawful purpose of the actor under the circumstances;
>
> (f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, if such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances; and

(g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

Since none of the above-listed types of conduct are necessarily or categorically violent, the Model Penal Code itself confirms that an attempted Hobbs Act robbery can indeed "plausibly" be committed without the "use, attempted use, or threatened use of physical force against the person of another." *See McGuire*, 706 F.3d at 1337 (O'Connor, J.)(holding, in the context of a § 924(c) case, that "[o]nly if the plausible applications of the statute of conviction all require the use or threatened use of force," can the defendant "be held guilty of a crime of violence;" thus, the question the Court must ask is "whether the crime, in general, plausibly covers any non-violent conduct").

The government, notably, does not suggest that the *McGuire* "plausibility" test requires the defendant to identify a reported decision confirming an actual prosecution for a non-violent "substantial step." It does not. *See id.* at 1337 (considering the "possibilities" of purportedly non-violent means of "disabling an aircraft" on the ground or in the air suggested by the defendant – such as deflating the tires or disabling the ignition while the plane is on the ground, or disconnecting the onboard circuitry or the radio transponder while the plane is airborne – but finding that because each of these "minimally forceful acts" is calculated to seriously interfere with the freedom, safety and security of the passengers, or cause

damage to the plane, it involves the "use of force against that plane or its passengers").

Nor does the government suggest that whether or not the defendant's own conduct was violent has any relevance to the inquiry. For indeed, the government impliedly concedes, the Court held in *McGuire* that the "crime of violence" determination under § 924(c) must be made "categorically." *McGuire*, 706 F.3d at 1336 ("We employ this categorical approach because of the statute's terms: It asks whether McGuire committed 'an offense' that "has *as an element* the use, attempted use, or threatened use of physical force against the person or property of another;" the fact that McGuire "did attempt to damage, destroy, disable, or wreck an aircraft" by shooting at a helicopter in flight, was not relevant).

However, even *if* the "categorical approach" restricted the Court to surveying the reported decisional law on attempted Hobbs Act robbery in order to determine the "least culpable conduct" for conviction for that crime, it is clear from decisions both within and outside the Circuit that an *attempted* Hobbs Act robbery does *not* categorically require the use, attempted use, or threatened use of violent force against any person or property. In *United States v. Gonzalez*, 322 Fed. App'x. 963 (11th Cir. 2009), this Court upheld a conviction for attempting to commit a Hobbs Act robbery where the defendants simply planned a robbery, and travelled to a location in preparation for committing it. *See id.* at 969. *Gonzalez*

confirms that a defendant may "plausibly" attempt to commit a Hobbs Act robbery without using, attempting to use, or threatening to use violent, physical force. The defendants did not attempt to use force in any manner before their apprehension.

Other circuits have likewise upheld *attempted* Hobbs Act robbery convictions, and found the "substantial step" requirement met, where the defendants did no more than plan, prepare for, travel to – or begin their travel to – an agreed-upon robbery destination. *See, e.g.*, *United States v. Wrobel*, 841 F.3d 450, 455-456 (7th Cir. 2016) (upholding a conviction for attempted Hobbs Act robbery where defendants made plans to travel from Chicago to New York to rob a diamond merchant, they believed he would turn the diamonds over *without the need to do anything to him*, and they travelled as far as New Jersey in a rented van before they were arrested) (emphasis added); *United States v. Turner*, 501 F.3d 59, 68–69 (1st Cir. 2007) (upholding a conviction for attempted Hobbs Act robbery where a defendant and his compatriots planned a robbery, surveilled the target, prepared vehicles, and gathered at the designated assembly point on the day scheduled for the robbery). Even if the government were correct – which it is not – that the defendants in *Gonzalez* and *Turner* planned robberies "with the intent to engage in the use of force," Gvt. Supp. Ltr. Br. at 4, the government is stumped by *Wrobel*. It tellingly ignores that case, since the defendants there were clear that they did not believe there would be any need to do "anything" to their target.

Admittedly, there are many attempted Hobbs Act robbery cases in which someone has brought a gun on the way to a planned robbery. *See, e.g.*, *United States v. Williams*, 531 Fed. Appx. 270 (3rd Cir. 2013). But the act of merely possessing or carrying a firearm does not change the crime of violence calculus. This Court has definitively held that mere possession or carrying of a firearm does not itself constitute the "use, attempted use, or threatened use of physical force against the person of another." *United States v. Archer*, 531 F.3d 1347, 1349 (11th Cir. 2008) (holding that the mere act of "carrying" a concealed weapon "does *not* involve the use, attempted use, or threatened use of force, and so is *not* a crime of violence under [the elements clause]"). Were the Court to hold differently, in a "concealed carry" state anyone with gun on his person or in his car would be guilty of a "crime of violence." At most carrying a gun signifies the future capacity to use force if necessary; it is not, *itself*, an attempted or threated use force.

The above cases confirm that attempts to commit Hobbs Act robbery, by their nature, often fail to reach the stage where a defendant might use, attempt to use, or threaten to use physical force against a person or property, and that the "substantial step" requirement can be satisfied in a Hobbs Act robbery without any act that is itself violent. Many attempted Hobbs Act robbery cases, like *Gonzalez* and *Turner*, involve "reverse stings" at fake "stash houses" where the defendants are arrested before the participants are anywhere near the target location. In such

cases, some participants may be armed but others will not be. And some, depending upon their role and when they joined the plan, many not know that others will be armed. That is significant since the Model Penal Code suggests that any person who could be found guilty of a crime under an "aiding and abetting" theory, would also be guilty of an attempt to commit the crime. *See* Model Penal Code § 5.01(3) ("Conduct Designed to Aid Another in Commission of a Crime"). And in *Rosemond v. United States*, 134 S.Ct. 1240 (2014), the Supreme Court clarified that to convict a defendant of aiding and abetting a § 924(c) offense, the government must present specific proof that the defendant knew a confederate would possess a gun. *See id.* at 1249 (noting that an accomplice may know "nothing of a gun until it appears at the scene," and at that point, "he may already have completed his acts of assistance").

In these and other regards, an *attempted* Hobbs Act robbery differs substantially from the federal attempt offenses at issue in *McGuire* and *United States v. Ovalles*, 861 F.3d 1257 (11th Cir. 2017). In *McGuire*, the Court underscored that the "least culpable conduct" for conviction – attempting to disable an aircraft on the ground or in flight, such as by deflating the tires, or disconnecting the onboard circuitry – was an "'active crime' done 'intentionally' against the property of another, with extreme and manifest indifference to the owner of that property and the wellbeing of the passengers. 706 F.3d at 1338. The

damage actually caused by such conduct was "exacerbated by indifference to others' wellbeing." 706 F.3d at 1338. And the attempted carjacking crime at issue in *Ovalles* required *as an element* that the defendant have the "intent to cause death or serious bodily harm" in taking the motor vehicle. *See* 861 F.3d at 1268. According to *Ovalles*, "[p]roscribed criminal conduct where the defendant must take the car by intimidation and act with *intent to kill or cause serious bodily injury* is unmistakably a crime of violence." *Id.* (citing *McGuire*, 706 F.3d at 1336-38).[2]

[2] Contrary to the government's suggestion in the Supplemental Letter Brief at 5, *Hill v. United States*, 877 F.3d 717, 719 (7th Cir. 2017), an ACCA case predicated upon an Illinois attempted murder conviction has no relevance to whether the federal offense of attempted Hobbs Act robbery is a crime of violence within §924(c)(3)(A). As a threshold matter, attempted murder is not analogous to Hobbs Act robbery for the same reason attempted carjacking is not: there is no "intent to kill" requirement in Hobbs Act robbery. And notably, *Hill* is not even a final decision of the Seventh Circuit. The government fails to mention that a petition for rehearing en banc was filed on January 26, 2018, and on February 12th, the Seventh Circuit ordered the government to respond. As appellant's counsel has rightly pointed out in the pending *Hill* petition, the other-circuit cases the panel cited (including *United States v. Wade*, 458 F.3d 1273, 1278 (11th Cir. 2006)) were distinguishable; none focused upon whether an attempt should categorically be treated the same as the object of the attempt under the ACCA. And fatally for the government's argument here, all of the cited other-circuit cases cited in *Hill* were ACCA cases. Although the *Hill* panel adopted the concurring opinion in *Morris v. United States*, 827 F.3d 696 (7th Cir. 2016), the *Morris* concurrence proposed that an attempt to commit an ACCA violent felony should categorically be treated as an ACCA violent felony, based upon the unsupported assumption – of no relevance in a § 924(c) case – that Congress must have intended the ACCA to include attempts. See 827 F.3d at 699 ("I suspect the Congress that enacted ACCA would have wanted the courts to treat such attempts at violent felonies as violent felonies under the Act.").

There is no similar intent requirement in the Hobbs Act robbery statute. And indeed, as is clear from *Gonzalez*, a defendant may be convicted of attempted Hobbs Act robbery simply because he intended to commit a robbery, and travelled to a location where he was supposed to retrieve a vehicle to hide the cocaine he and his confederates intended to steal. Unlike the defendant *McGuire*, defendant Hartsfield in *Gonzalez* did not damage any property in any manner nor did he hurt any person. While he did have three black stockings in his pockets at the time of arrest, 322 Fed. Appx. at 769, possession of such "materials" is not itself an attempt to use violence, or a threat to use violence. Nor does it signify a future intent to use violence against the person or property of another. And again, there was demonstrably neither an attempt, nor an intent, to use violence in *Wrobel*.

It is thus clear under the *McGuire* "plausibility" test that an *attempted* Hobbs Act robbery is not categorically a "crime of violence" under § 924(c)(3)(A).

C. Since *attempted* Hobbs Act robbery is not a crime of violence, Count 12 charges a non-offense, and that defect is constitutional, jurisdictional, and unwaivable. It requires that Mr. St. Hubert's Count 12 conviction be vacated.

After the Court issued its supplemental briefing order, the Supreme Court confirmed in *Class v. United States*, 2018 WL 987347 (Feb. 21, 2018) that a challenge to the government's power to prosecute admitted conduct is *not* waived by a guilty plea. *Id.* at *6; *see also id.* at *8 (Alito, J., dissenting) (acknowledging

that according to the majority, constitutional challenges not subject to implicit waiver included challenges to the government's "power to prosecute" and that "'the facts alleged and admitted do not constitute a crime'"). And as Mr. St. Hubert argued in his motion for supplemental briefing, and the Court presumably has agreed by ordering supplemental briefing, such a defect in the indictment was jurisdictional and not subject to waiver by counsel's failure to raise it in the Initial Brief. *See United States v. Peter*, 310 F.3d 709, 713-14 (11th Cir. 2003); *United States v. Saac*, 632 F.3d 1203, 1208 (11th Cir. 2011); *United States v. Izurieta*, 710 F.3d 1176, 1178-79 (11th Cir. 2013). *See generally McCoy v. United States*, 266 F.3d 1245 (11th Cir. 2001) (defining a "jurisdictional defect" as "one that [strip[s] the court of its power to act and ma[kes] its judgment void." *Escareno v. Carl Nolte Sohne GmbH & Co.*, 77 F.3d 407, 412 (11th Cir. 1996). Because parties cannot by acquiescence or agreement confer jurisdiction on a federal court, a jurisdictional defect cannot be waived or procedurally defaulted – instead, a judgment tainted by a jurisdictional defect must be reversed. *See Harris* [*v. United States*], 149 F.3d [1304,] 1308-1309 (11th Cir. 1998)").

In *Izurieta*, the Court acknowleged that it was obligated to sua sponte raise and correct jurisdictional errors at any time before the mandate issues. *Izurieta*, 710 F.3d at 1178. And notably, in determining whether there is a jurisdictional defect in the indictment, the Court's review is *de novo* rather than for plain error

since the district court's subject-matter jurisdiction is a question of law, which is always reviewed *de novo*. *United States v. Iguaran*, 821 F.3d 1335, 1336 (11th Cir. 2016) ("The district court's subject matter jurisdiction is a question of law that we review *de novo* even when it is raised for the first time on appeal;" citing *McCoy v. United States*, 266 F.3d 1245, 1249 (11th Cir. 2001) ("[J]urisdictional errors are not subject to plain- or harmless-error analysis")); *see also Izurieta*, 710 F.3d at 1179 (distinguishing *United States v. Cotton*, 535 U.S. 625 (2002) where the error simply involved the omission of an element from the indictment, which is not jurisdictional and subject to plain error review); *United States v. Nahmani*, 696 Fed. Appx. 457, 469 n. 16 (11th Cir. 2017) (distinguishing an omission of an element from the indictment, such as that in *United States v. Brown*, 752 F.3d 1344, 1351 (11th Cir. 2014) which did not deprive the district court of jurisdiction and was subject to plain error review, from a jurisdictional defect such as charging conduct that is simply not a crime against the laws of the United States).

Here, as in *Izurieta*, the Court should notice the error in Count 12 of the indictment based upon the above supplemental arguments, and hold as a matter of first impression upon *de novo* review that *attempted* Hobbs Act robbery is not categorically a "crime of violence." Mr. St. Hubert's Count 12 conviction and consecutive sentence cannot stand, and should be vacated.

Respectfully submitted,

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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

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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:

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

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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

A-10

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October 26, 2018

David J. Smith, Clerk of Court
United States Court of Appeals, Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

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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