No. 19-_____

IN THE

Supreme Court of the United States

YAMIL VEGA,
***Petitioner*,**

v.

UNITED STATES OF AMERICA,
***Respondent*.**

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL CARUSO
Federal Public Defender
ANSHU BUDHRANI
Assistant Federal Public Defender
Counsel of Record
150 West Flagler Street
Suite 1700
Miami, FL 33130
305-530-7000

Counsel for Petitioner

APPENDIX

TABLE OF APPENDICES

APPENDIX A

794 Fed.Appx. 918
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

Yamil M. VEGA, Petitioner-Appellant,
v.
UNITED STATES of America, Respondent-Appellee.

No. 17-13933
|
Non-Argument Calendar
|
(December 23, 2019)

Synopsis

Background: Defendant, who had been convicted of Hobbs Act robbery, moved to vacate his sentence. The United States District Court for the Southern District of Florida, Nos. 1:16-cv-22119-RNS and 1:15-cr-20056-RNS-1, Robert N. Scola, J., 2017 WL 2822072, adopted the report and recommendation of a magistrate judge, 2017 WL 2822071, and denied such motion. Defendant appealed.

Holdings: The Court of Appeals held that:

defendant's Hobbs Act robbery conviction was a crime of violence, and

defendant failed to assert exceptional circumstances to expand his certificate of appealability to consider his argument that his case should be remanded for resentencing based on a Supreme Court case.

Affirmed.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Codenotes

Recognized as Unconstitutional

18 U.S.C.A. § 924(c)(3)(B), (e)

Attorneys and Law Firms

Anshu Budhrani, Federal Public Defender's Office, Miami, FL, Vanessa Louise Chen, Michael Caruso, Federal Public Defender, Federal Public Defender's Office, Miami, FL, for Petitioner - Appellant

Emily M. Smachetti, U.S. Attorney Service - Southern District of Florida, U.S. Attorney Service - SFL, Miami, FL, Sivashree Sundaram, U.S. Attorney's Office, Fort Lauderdale, FL, for Respondent - Appellee

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket Nos. 1:16-cv-22119-RNS; 1:15-cr-20056-RNS-1

Before MARTIN, ROSENBAUM, and ANDERSON, Circuit Judges.

Opinion

PER CURIAM:

***919** Yamil Moises Vega, a federal prisoner represented by counsel, appeals the district court's denial of his 28 U.S.C. § 2255 motion to vacate. Vega argued in the district court that his Hobbs Act robbery conviction, a violation of 18 U.S.C. § 1951(a), was not a qualifying crime of violence under 18 U.S.C. § 924(c) because *Johnson v. United States*, ––– U.S. ––––, 135 S. Ct. 2551, 192 L.Ed.2d 569 (2015), should be extended so as to make that residual clause unconstitutional; he also argued that his Hobbs Act conviction did not otherwise qualify under the elements clause. On appeal, Vega reargues that *Johnson* invalidated § 924(c)'s residual clause and that Hobbs Act robbery does not qualify under § 924(c)'s elements clause. He also argues that our decision in *In re Saint Fleur*, 824 F.3d 1337 (11th Cir. 2016), holding that Hobbs Act robbery is a crime of violence under the elements clause, should not be given preclusive effect. Lastly, he argues for the first time that his case should be remanded for resentencing based on *Dean v. United States*, ––– U.S. ––––, 137 S. Ct. 1170, 197 L.Ed.2d 490 (2017).

I.

When reviewing the district court's denial of a § 2255 motion, we review findings of fact for clear error and questions of law *de novo*. *Rhode v. United States*, 583 F.3d 1289, 1290 (11th Cir. 2009). Under the prior precedent rule, we are bound by our prior decisions unless and until they are overruled by the Supreme Court or this Court *en banc*. *United States v. Brown*, 342 F.3d 1245, 1246 (11th Cir. 2003). This includes decisions rendered in the case of a second or successive habeas application. *In re Hill*, 777 F.3d 1214, 1223 (11th Cir. 2015); *United States v. St. Hubert*, 909 F.3d 335, 346 (11th Cir. 2018), *cert. denied*, —— U.S. ——, 139 S. Ct. 1394, 203 L.Ed.2d 625 (2019). We may affirm for any reason supported by the record. *Castillo v. United States*, 816 F.3d 1300, 1303 (11th Cir. 2016).

A federal prisoner may move the sentencing court to vacate his sentence under 28 U.S.C. § 2255 on the ground that, *inter alia*, his sentence was imposed in violation of federal law or the Constitution or exceeds the maximum time allowed by law. 28 U.S.C. § 2255(a). However, a federal prisoner who fails to raise an issue on direct appeal is procedurally barred from raising it in a § 2255 motion, absent a showing of "cause" and "prejudice," or a showing of actual innocence. *Lynn v. United States*, 365 F.3d 1225, 1234 (11th Cir. 2004).

Federal law imposes a seven-year mandatory minimum sentence if a person "brandished" a firearm "during and in relation to any crime of violence or drug trafficking crime ... in furtherance of any such crime ... in addition to the punishment ***920** provided for such crime of violence or drug trafficking crime." 18 U.S.C. § 924(c)(1)(A). A "crime of violence" is defined as a felony offense 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) (emphasis added). The first clause is referred to as the elements clause, while the second clause is referred to as the residual clause. *United States v. Davis*, —— U.S. ——, 139 S. Ct. 2319, 2324, 204 L.Ed.2d 757 (2019).

The Hobbs Act itself criminalizes:

> Whoever in any way or degree 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 do anything in violation of this section....

18 U.S.C. § 1951(a). In *Saint Fleur*, a case involving a second or successive § 2255 motion, we determined that Hobbs Act robbery qualified as a crime of violence under § 924(c)'s elements clause. *In re Saint Fleur*, 824 F.3d at 1340. We later applied *Saint Fleur* in a direct criminal appeal and, applying a categorical approach, confirmed that Hobbs Act robbery was a crime of violence under § 924(c)'s elements clause. *St. Hubert*, 909 F.3d at 337, 349–53.

In *Johnson*—decided shortly after Vega was indicted—the Supreme Court held that a similar residual clause in another subsection, § 924(e), was unconstitutionally vague. *Johnson*, 135 S. Ct. at 2557–58, 2563. In 2018, however, we held, *en banc*, that *Johnson* did not support a vagueness-based challenge to § 924(c)'s residual clause. *See Ovalles v. United States*, 905 F.3d 1231, 1234, 1253 (11th Cir. 2018) (*en banc*), *abrogated by United States v. Davis*, 588 U.S. ——, 139 S. Ct. 2319, 2324, 2326, 204 L.Ed.2d 757 (2019); *In re Garrett*, 908 F.3d 686, 689 (11th Cir. 2018) (denying a federal prisoner's successive § 2255 application and holding that "neither *Johnson* nor [*Sessions v. Dimaya*, —— U.S. ——, 138 S. Ct. 1204, 200 L.Ed.2d 549 (2018)] supplies any 'rule of constitutional law'—'new' or old, 'retroactive' or nonretroactive, 'previously unavailable' or otherwise—that can support a vagueness-based challenge to the residual

clause of section 924(c)"), *abrogated in part by* *Davis*, 139 S. Ct. at 2324, 2326.

By contrast, in *Davis*—decided after the district court denied Vega's § 2255 motion—the Supreme Court overruled the *Ovalles en banc* decision and held, consistent with *Johnson*, that § 924(c)'s residual clause was also unconstitutionally vague. *Davis*, 139 S. Ct. at 2323, 2326, 2336. And we recently held that *Davis* announced a "new substantive rule of constitutional law in its own right, separate and apart from (albeit primarily based on) *Johnson* and *Dimaya*." *In re Hammoud*, 931 F.3d 1032, 1040 (11th Cir. 2019).

Vega's challenge to his § 924(c) conviction fails. We are bound by our prior holding in *Saint Fleur* that Hobbs Act robbery is a crime of violence under § 924(c)'s elements clause. *See* *St. Hubert*, 909 F.3d at 353; *In re Saint Fleur*, 824 F.3d at 1340. Accordingly, we affirm in this respect.

II.

In reviewing the district court's ruling on a prisoner's § 2255 motion, appellate ***921** review is limited to the issues specified in the COA. *Murray v. United States*, 145 F.3d 1249, 1250–51 (11th Cir. 1998). However, in exceptional cases, we may *sua sponte* expand the COA to include issues that reasonable jurists would find debatable. *Mays v. United States*, 817 F.3d 728, 733 (11th Cir. 2016).

"[R]elief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice." *Lynn*, 365 F.3d at 1232 (quotation marks omitted). A non-constitutional error that may justify reversal on direct appeal generally does not support a collateral attack on a final judgment. *Id.* at 1232–33.

In *Dean*, the Supreme Court determined that it was reversible error for the district court to determine that it could not vary from the guideline range based on the mandatory minimum sentence the defendant would also receive under § 924(c). *Dean*, 137 S. Ct. at 1175–78.

Our review of a district court's ruling on a § 2255 motion is generally limited to the issues specified in the COA and Vega has not asserted exceptional circumstances suggesting that we should expand his COA to consider this issue. *See* *Mays*, 817 F.3d at 733; *Murray*, 145 F.3d at 1250–51. This is especially true where Vega has not argued that this was a constitutional error or how this purported non-constitutional error would result in a complete miscarriage of justice. *See* *Lynn*, 365 F.3d at 1232–33. Accordingly, we affirm.

AFFIRMED.

All Citations

794 Fed.Appx. 918

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APPENDIX B

2017 WL 2822072
Only the Westlaw citation is currently available.
United States District Court, S.D. Florida.

Yamil Moises VEGA, Petitioner,
v.
UNITED STATES of America, Respondent.

Civil Action No. 16-22119-Civ-Scola
|
Signed 06/28/2017
|
Filed 06/29/2017

Attorneys and Law Firms

Ayana N. Harris, Vanessa Chen, Julie Holt, Federal Public Defender's Office, Miami, FL, for Petitioner.

Timothy J. Abraham, United States Attorneys Office, Miami, FL, for Respondent.

Order Adopting Magistrate Judge's Report And Recommendation

Robert N. Scola, Jr., United States District Judge

***1** This case was referred to United States Magistrate Judge Patrick A. White, consistent with Administrative Order 2003-19 of this Court, for a ruling on all pre-trial, nondispositive matters and for a report and recommendation on any dispositive matters. On June 16, 2017, Judge White issued a report, recommending that the Court deny Vega's motion to correct, set aside, or vacate his sentence pursuant to 28 U.S.C. § 2255 and dismiss the case. (Report of Magistrate, ECF No. 12.) On June 26, 2017, the Petitioner filed objections to the report (ECF No. 13).

The basis for Vega's motion to vacate his sentence is that, following the Supreme Court's ruling in *Johnson v. United States*, 135 S. Ct. 2551 (2015), his conviction for brandishing a firearm in furtherance of a crime of violence should be vacated because his predicate Hobbs Act robbery conviction does not qualify as a "crime of violence" as defined by 18 U.S.C. § 924(c)(3). Judge White found that Vega's conviction for Hobbs Act robbery still qualifies as a "crime of violence" for purposes of 18 U.S.C. § 924(c)(3). (Report at 12.) Judge White primarily relied on *In re Saint Fleur*, 824 F.3d 1337, 1340 (11th Cir. 2016), in which the Eleventh Circuit held that a conviction for Hobbs Act robbery "clearly qualifies as a 'crime of violence' under ... § 924(c)(3)(A)."

In relevant part, Vega argues that *Saint Fleur* is not controlling or persuasive for several reasons. (Obj.'s at 14-20.) First, Vega argues that *Saint Fleur* was a ruling on a pro se applicant's application to file a second or successive § 2255 motion, and thus the Eleventh Circuit did not have the benefit of "counseled briefing or the adversarial process." (*Id.* at 14.) Vega also argues that the decision-making process on applications to file second or successive § 2255 motions "is simply not conducive to conclusive or precedential decisions" and that such rulings "have never had binding effect." (*Id.* at 15-16.) However, the Eleventh Circuit has held that published panel decisions on applications to file second or successive petitions "are binding precedent in our circuit." *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015). Moreover, the Eleventh Circuit has cited to *Saint Fleur* as controlling in subsequent cases and has repeatedly confirmed, albeit in the context of applications to file second or successive petitions, that Hobbs Act robbery is a crime of violence. *See, e.g.*, *In re Gordon*, 827 F.3d 1289 (11th Cir. 2016) ("*Saint Fleur* controls ... This Court has held that a companion Hobbs Act robbery conviction ... qualifies as a 'crime of violence' under the use-of-force clause in § 924(c)(3)(A) ...."); *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016) (citing to *Saint Fleur* in support of the statement that "[t]his Court has held that a companion substantive Hobbs Act robbery conviction qualifies as a 'crime of violence' under the use-of-force clause in § 924(c)(3)(A)."); *In re James*, No. 16-13772, 2016 WL 4608125, at *2 (citing to *Saint Fleur* in support of the statement that "[i]n some cases, it has been clear that the § 924(c) companion conviction qualifies as a crime of violence under § 924(c)."). Thus, this Court is bound by *Saint Fleur*.

***2** Vega next argues that *Saint Fleur* did not apply the categorical approach required by Eleventh Circuit precedent in determining whether Hobbs Act robbery is a crime of violence and that *Saint Fleur* was somehow incorrectly decided because it was issued before the Supreme Court's decision in *Mathis v. U.S.*, 136 S.Ct. 2243 (2016). (*Id.* at 17-18.) However, as stated above, whether *Saint Fleur* was decided incorrectly or not, it, as well as the

subsequent Eleventh Circuit decisions confirming that Hobbs Act robbery is a crime of violence, are binding on this Court.

Finally, Vega argues that in *Davenport v. United States of America*, No. 16-15939-G (Mar. 28, 2017), the Eleventh Circuit issued a certificate of appealability on the issue of whether the district court erred in concluding that Hobbs Act robbery was a crime of violence within the meaning of § 924(c). (Obj.'s at 19.) This ruling does not disturb the Court's finding that Eleventh Circuit precedent establishes that Hobbs Act robbery is a crime of violence. However, in keeping with *Davenport*, the Court will issue a certificate of appealability.

The Court has considered Judge White's report, the Petitioner's objections, the record, and the relevant legal authorities. The Court finds Judge White's report and recommendation cogent and compelling. The Court **affirms and adopts** Judge White's report and recommendation, with the exception of his recommendation not to issue a certificate of appealability (ECF No. 12). The Court **denies** the petition for writ of habeas corpus (ECF No. 1). The Court issues a certificate of appealability. Finally, the Court directs the Clerk to **close** this case.

Done and ordered, at Miami, Florida, on June 28, 2017.

All Citations

Not Reported in Fed. Supp., 2017 WL 2822072

APPENDIX C

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

APPLICATION FOR LEAVE TO FILE A SECOND OR SUCCESSIVE MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE
28 U.S.C. § 2255
BY A PRISONER IN FEDERAL CUSTODY

Name Markson Saint Fleur Prisoner Number 83708-004

Institution Bennettsville-FCI

Street Address P.O. Box 52020, Bennettsville, SC 29512

City Bennettsville State S.C. Zip Code 27893

INSTRUCTIONS--READ CAREFULLY

(1) This application must be legibly handwritten or typewritten and signed by the applicant under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury.

(2) All questions must be answered concisely in the proper space on the form.

(3) The Judicial Conference of the United States has adopted the 8½ x 11 inch paper size for use throughout the federal judiciary and directed the elimination of the use of legal size paper. All pleadings must be on 8½ x 11 inch paper, otherwise we cannot accept them.

(4) All applicants seeking leave to file a second or successive petition are required to use this form, except in capital cases. In capital cases only, the use of this form is optional.

(5) Additional pages are not permitted except with respect to additional grounds for relief and facts which you rely upon to support those grounds. DO NOT SUBMIT SEPARATE PETITIONS, MOTIONS, BRIEFS, ARGUMENTS, ETC., EXCEPT IN CAPITAL CASES.

(6) In accordance with the "Antiterrorism and Effective Death Penalty Act of 1996," as codified at 28 U.S.C. § 2255, effective April 24, 1996, before leave to file a second or successive motion can be granted by the United States Court of Appeals, it is the applicant's burden to make a prima facie showing that he satisfies either of the two conditions stated below.

> A second or successive motion must be certified as provided in [28 U.S.C.] section 2255 by a panel of the appropriate court of appeals to 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.

(7) When this application is fully completed, the original and three copies must be mailed to:

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

APPLICATION

1. (a) State and division of the United States District Court which entered the judgment of conviction under attack United States District Court for Southern District of Florida (Miami Division)

   (b) Case number 1:09-cr-21075-MGC-2

2. Date of judgment of conviction March 30, 2011

3. Length of sentence 150 months Sentencing Judge Marcia G. Cooke

4. Nature of offense or offenses for which you were convicted: Count Four(4) Interference with commerce 1951(a) and Count Five(5) Discharging firearm in furtherance pursuant to §924(c)(iii).

5. Related to this conviction and sentence, have you ever filed a motion to vacate in any federal court?

   Yes (X) No ( ) If "yes", how many times? _____ (if more than one, complete 6 and 7 below as necessary)

   (a) Name of court U.S. District Court (Miami Division)

   (b) Case number 12-cv-21412-MGC

   (c) Nature of proceeding Motion to vacate under U.S.G. §2255

   (d) Grounds raised (list all grounds; use extra pages if necessary) Ineffective Assistance of Counsel claim #1 for advising Movant to plead guilty, Claim #2 for improperly investigatingadditional brought in 2nd superseding indictment, Claim #3 for failing to interview witnesses, Claim #4 for failing to advise Movant of Double Jeoperdy Violation, Claim #5 District Court Abused Discretion when denying AFPD Caridad's motion to withdraw counsel

   (e) Did you receive an evidentiary hearing on your motion? Yes ( ) No (X)

   (f) Result N/A

   (g) Date of result January 20, 2014 DKT #319

6. As to any second federal motion, give the same information:

   (a) Name of court _____

   (b) Case number _____

   (c) Nature of proceeding _____

(d) Grounds raised (list all grounds; use extra pages if necessary)_____

(e) Did you receive an evidentiary hearing on your motion? Yes ( ) No ( )

(f) Result _____

(g) Date of result _____

7. As to any third federal motion, give the same information:

(a) Name of court _____

(b) Case number _____

(c) Nature of proceeding _____

(d) Grounds raised (list all grounds; use extra pages if necessary)_____

(e) Did you receive an evidentiary hearing on your motion? Yes ( ) No ( )

(f) Result _____

(g) Date of result _____

8. Did you appeal the result of any action taken on your federal motion? (Use extra pages to reflect additional petitions if necessary)

(1) First motion No ( ) Yes (x) Appeal No. 11-11691

(2) Second motion No ( ) Yes ( ) Appeal No. _____

(3) Third motion No ( ) Yes ( ) Appeal No. _____

9. If you did not appeal from the adverse action on any motion, explain briefly why you did not: N/A

10. State concisely every ground on which you now claim that you are being held unlawfully. Summarize briefly the facts supporting each ground.

A. Ground one: Count #5 for 18 U.S.C. §924(c) must be vacated

Supporting FACTS (tell your story briefly without citing cases or law):

In light of two recent Supreme Court ruling(s) The Hobbs Act Robbery under 1951(a) is no longer a violent offense therefore the §924(c) in furtherance must be dismissed according to Johnson, and retroactively applied under Welch.

Was this claim raised in a prior motion? Yes ( ) No (X)

Does this claim rely on a "new rule of law?" Yes (X) No ( )

If "yes," state the new rule of law (give case name and citation):

Johnson v. U.S., 135 S.Ct. 2551, 192 L.Ed.2d 569(2015)
Welch v. U.S., No. 15-6418 4/18/16

Does this claim rely on "newly discovered evidence?" Yes ( ) No (X)

If "yes," briefly state the newly discovered evidence, and why it was not previously available to you

N/A

B. Ground two: N/A

Supporting FACTS (tell your story briefly without citing cases or law):

N/A

Was this claim raised in a prior motion? Yes ( ) No (X)

Does this claim rely on a "new rule of law?" Yes ( ) No (X)
If "yes," state the new rule of law (give case name and citation):

N/A

Does this claim rely on "newly discovered evidence?" Yes ( ) No (X)
If "yes," briefly state the newly discovered evidence, and why it was not previously available to you

N/A

[Additional grounds may be asserted on additional pages if necessary]

11. Do you have any motion or appeal now pending in any court as to the judgment now under attack? Yes ( ) No (X)
If "yes," name of court N/A Case number

Wherefore, applicant prays that the United States Court of Appeals for the Eleventh Circuit grant an Order Authorizing the District Court to Consider Applicant's Second or Successive Motion to Vacate under 28 U.S.C. § 2255.

Marckson St-Fleur
Applicant's Signature

I declare under Penalty of Perjury that my answers to all the questions in this Application are true and correct.

Executed on 5/5/16
[date]

Marckson St-Fleur
Applicant's Signature

PROOF OF SERVICE

Applicant must send a copy of this application and all attachments to the United States Attorney's office in the district in which you were convicted.

I certify that on May 5, 2016 [date], I mailed a copy of this Application* and all attachments to _____

at the following address:

AUSA Evelyn Baltodano Sheehan
U.S. Attorney's Office

99 NE 4 Street
Miami, FL 33132

Marckson St-Fleur
Applicant's Signature

* Pursuant to Fed.R.App.P. 25(a), "Papers filed by an inmate confined in an institution are timely filed if deposited in the institution's internal mail system on or before the last day of filing. Timely filing of papers by an inmate confined in an institution may be shown by a notarized statement or declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid."

APPENDIX D

O70.3
Interference with Commerce by Robbery
Hobbs Act – Racketeering
(Robbery)
18 U.S.C. § 1951(a)

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

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

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

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

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

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

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

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

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

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

ANNOTATIONS AND COMMENTS

18 U.S.C. § 1951(a) provides:

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

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

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

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

The commerce nexus for an attempt or conspiracy under § 1951 can be shown by evidence of a potential impact on commerce or by evidence of an actual, de minimis impact on commerce. *Kaplan*, 171 F.3d at 1354 (citations omitted). In the case of a substantive offense, the impact on commerce need not be substantial; it can be minimal. *See id.; see also United States v. Le*, 256 F.3d 1229 (11th Cir. 2001); *U.S. v. Verbitskaya*, 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.

APPENDIX E

O70.1
Interference with Commerce by Extortion
Hobbs Act: Racketeering
(Force or Threats of Force)
18 U.S.C. § 1951(a)

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

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

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

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

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

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

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

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

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

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

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

ANNOTATIONS AND COMMENTS

18 U.S.C. § 1951(a) provides:

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

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

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

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

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