

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 21-11252

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN ARMSTRONG, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 6:19-cr-00224-WWB-EJK-1

Before ROSENBAUM, LUCK, and LAGOA, Circuit Judges.

PER CURIAM:

After pleading guilty, John Armstrong, Jr., was convicted of Hobbs Act robbery, *see* 18 U.S.C. § 1951(a), three counts of bank robbery or attempted bank robbery, *see* 18 U.S.C. § 2113(a), and three counts of brandishing a firearm during and in relation to a “crime of violence,” namely bank robbery or attempted bank robbery, *see* 18 U.S.C. § 924(c)(1)(A)(ii). He now appeals his § 924(c) convictions, arguing that the statute is unconstitutionally vague and that bank robbery under § 2113(a) is not a crime of violence. Because Armstrong’s arguments are foreclosed by binding precedent, we affirm.

Section 924(c) provides for a mandatory consecutive sentence for any defendant who uses or carries a firearm during and in relation to, or possesses a firearm in furtherance of, either a “crime of violence” or a “drug trafficking crime.” 18 U.S.C. § 924(c)(1)(A)(i)–(ii). More severe penalties apply if the firearm was “brandished” or “discharged.” *See id.* Here, for instance, Armstrong was sentenced to three consecutive seven-year sentences for the § 924(c) convictions, in addition to a 168-month sentence for the robbery convictions.

We review *de novo* whether an offense qualifies as a “crime of violence” under § 924(c). *United States v. McGuire*, 706 F.3d

1333, 1336 (11th Cir. 2013). For the purposes of § 924(c), “crime of violence” means 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 “use-of-force” or “elements” clause, while subsection (B) is known as the “residual” clause. *In re Fleur*, 824 F.3d 1337, 1339 (11th Cir. 2016).

In *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019), the Supreme Court extended its holdings in *Johnson v. United States*, 576 U.S. 591 (2015), and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), to § 924(c) and held that § 924(c)(3)(B)’s residual clause, like the residual clauses in the Armed Career Criminal Act and 18 U.S.C. § 16(b), is unconstitutionally vague. *Davis*, 139 S. Ct. at 2325–27, 2336. The Court did not, however, hold that the use-of-force clause was similarly unconstitutional, and we continue to apply § 924(c)(3)(A) after *Davis*. See, e.g., *Brown v. United States*, 942 F.3d 1069, 1075 (11th Cir. 2019); *Steiner v. United States*, 940 F.3d 1282, 1293 (11th Cir. 2019).

We use a categorical approach to decide if an offense satisfies § 924(c)(3)(A)’s definition. *McGuire*, 706 F.3d at 1336. Under that

approach, we look solely to the elements of the offense of conviction, assume that the conviction rested upon the least of the acts criminalized, and then determine if those acts qualify as a crime of violence. *United States v. Vail Bailon*, 868 F.3d 1293, 1296 (11th Cir. 2017) (*en banc*).

Armstrong contends that, following the Supreme Court's decision in *Davis*, § 924(c)(3)(A) is also unconstitutionally void for vagueness because, under the categorical approach, bank robbery under § 2113(a) can be committed without the use, attempted use, or threatened use of physical force.

As he acknowledges, however, we have held that bank robbery under § 2113(a), including "by intimidation," categorically qualifies as a crime of violence under § 924(c)(3)(A)'s use-of-force clause. *In re Sams*, 830 F.3d 1234, 1239 (11th Cir. 2016). We reasoned that federal bank robbery categorically qualifies as a crime of violence because "[a] taking 'by force and violence' entails the use of physical force [and] a taking 'by intimidation' involves the threat to use such force." *Id.* (quoting *United States v. McNeal*, 818 F.3d 141, 153 (4th Cir. 2016)). Moreover, we have held that a conviction for attempting to commit a crime of violence or for aiding and abetting a crime of violence also qualifies as a crime of violence for purposes of § 924(c)(3)(A)'s use-of-force clause. *See Steiner*, 940 F.3d at 1293 (aiding and abetting); *United States v. St. Hubert*, 909 F.3d 335, 351–52 (11th Cir. 2018) (attempt), *abrogated on other grounds by Davis*, 139 S. Ct. 2319. Thus, both attempted bank robbery and

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aiding and abetting a bank robbery under § 2113(a) likewise qualify as crimes of violence for purposes of § 924(c)(3)(A).

Based on our precedent, Armstrong's convictions under § 2113(a) count as crimes of violence for the purposes of § 924(c)(3)(A)'s use-of-force clause, which remains valid even after *Davis*'s invalidation of § 924(c)(3)(B)'s residual clause. *Sams*, 830 F.3d at 1239; *see Steiner*, 940 F.3d at 1293; *St. Hubert*, 909 F.3d at 351–52. Although Armstrong believes that *Sams* was wrongly decided, we are bound by that decision under the prior precedent rule because it has not been overruled or undermined to the point of abrogation by this Court sitting *en banc* or the Supreme Court. See *St. Hubert*, 909 F.3d at 345 (holding that the prior precedent rule "applies with equal force" to published decisions involving applications to file second or successive habeas petitions). Therefore, we affirm Armstrong's § 924(c) convictions.

AFFIRMED.

**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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December 15, 2021

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 21-11252-DD
Case Style: USA v. John Armstrong, Jr.
District Court Docket No: 6:19-cr-00224-WWB-EJK-1

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Bradly Wallace

Holland, DD at 404-335-6181.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Jeff R. Patch
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

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JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: December 15, 2021

For the Court: DAVID J. SMITH, Clerk of Court