

NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2025

NIGEL RICHARDSON,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

HECTOR A. DOPICO
Federal Public Defender
Brenda G. Bryn
Assistant Federal Public Defender
Counsel of Record for Petitioner
1 E. Broward Boulevard, Suite 1100
Ft. Lauderdale, Florida 33301
Telephone No. (954) 356-7436

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NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-11921

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

NIGEL RICHARDSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:19-cr-60129-RAR-1

Before ROSENBAUM, NEWSOM, and LUCK, Circuit Judges.

LUCK, Circuit Judge:

Nigel Richardson placed delivery orders with two restaurants so he could rob their drivers at gunpoint. For his crimes, he was charged with committing: two counts of Hobbs Act robbery; two counts of brandishing a firearm during a crime of violence; and

one count of being a felon in possession of a firearm. After a four-day jury trial, Richardson was convicted as charged.

He now appeals his convictions on four grounds. First, as to the brandishing counts, Richardson argues that Hobbs Act robbery is not categorically a crime of violence. Second, he contends that his trial on the felon-in-possession count violated the Grand Jury Clause because the grand jury didn't allege he knew about his status as a felon. Third, as to the three firearm counts, he asserts that the evidence was insufficient to show he possessed a firearm. Finally, Richardson maintains that the district court's exclusion of expert psychiatric evidence violated his right to a fair trial. After careful review, and with the benefit of oral argument, we affirm Richardson's convictions.

FACTUAL BACKGROUND

The robberies

CC Chinese Cooking—a restaurant in Pembroke Pines, Florida—received a call at around 8:30 P.M. on June 19, 2018. The caller placed a delivery order and asked that the delivery driver “have change for a hundred-dollar bill.”

The driver, Michael Pearce, took the food and went to the address given by the caller—a house in nearby Miramar. Pearce testified that two men were waiting for him outside the house. Both men were black, one being “shorter,” around five-foot-eight, and the other being “a little bit taller, maybe [five-foot-ten].” “The shorter one” then “pulled a gun on” Pearce and told him to give

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the men everything. The gunman, Pearce explained, pointed the gun at his “chest or above.”

Pearce described the gun as “a black handgun.” He said he wasn’t “familiar with guns, but it was definitely black, a smaller handgun.” There was “nothing out of the ordinary about it.” Although he couldn’t tell what the gun was made of, it appeared to him to be a real gun.

Pearce “panicked” and told the two men to take whatever they wanted. The men patted him down, took everything out of his pockets, took the food, and then ran off.

About a week later, at around 10:30 P.M. on June 25, a Miramar Domino’s Pizza received a delivery order over the phone. The caller’s phone number and delivery address were the same as those used for the order placed with CC Chinese on June 19.

The Domino’s delivery driver, Even Madero, testified that two men were waiting for him when he parked his car in front of the house. He described one of the men as “not that tall, and his head was covered up with some clothing.” The other man was “[t]aller.” Madero got out of the car with the four boxes of pizza that they ordered.

Madero explained that when he approached the two men, “[t]he shorter one” pointed a gun at Madero’s chest. The gun was black and “not that big.” Madero said the gun “was made of iron or steel or whatever material they make it from.” To him, the gun appeared real.

The gunman demanded Madero hand over his wallet, his phone, and the pizzas, and Madero complied. Later that night, at 11:16 P.M., surveillance footage captured Richardson in a hallway at his apartment complex. He was carrying four boxes of Domino's pizza.

The investigation

Miramar officers learned that the phone number used to call CC Chinese and Domino's "was assigned to a texting app called TextNow." TextNow informed the officers that the caller's username was "Trinidad Tiger" and that his email was "gunman-laflare@yahoo.com." With the information from TextNow, the officers Google-searched the email address and found a Facebook account for "Trinidad Tiger."

Officers ran Trinidad Tiger's Facebook pictures through a facial recognition software, which matched the photos to Richardson. After the match, officers prepared photo lineups to show Pearce and Madero. The lineups included pictures of Richardson and five other men. Pearce didn't select any photo as showing the gunman. But Madero identified Richardson as the gunman; he wrote next to Richardson's photo, "I recognized this person that pointed me with a gun." The officers then obtained a warrant to arrest Richardson at his apartment complex.

After the arrest, Detectives Joe Tomlin and Jonathan Zeller interviewed Richardson about the robberies. Richardson denied any involvement. He told the detectives that he lived with his grandmother in North Miami, and he repeatedly told them that he

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was at her house on June 19 and 25. Richardson also told the detectives that the last time he held a gun was when he visited “Big Al’s” gun range “like a month” before. He explained that he didn’t bring his own gun but instead used one that his friend rented. When asked about his cell phone—an LG phone—Richardson told the detectives that he “just got it.”

Following the interview, the government obtained a warrant to search Richardson’s phone, and Detective Zeller analyzed it. He found that TextNow was installed on the phone. He also found “photographs and videos of [Richardson] holding a firearm.”

Two of the photos showed Richardson shirtless in his apartment wearing blue underwear or shorts, black pants, and with a red bandana. These photos also showed a black handgun holstered in Richardson’s pants. For these two photos, Detective Zeller was able to recover metadata from the phone. The data revealed that these two photos had capture times of June 17, 2018, at 5:07 A.M. and 5:08 A.M.

The capture time, Detective Zeller explained, indicates the date and time that someone took the picture on the phone. He acknowledged that it might be theoretically possible for the capture time not to reflect the true creation date if someone used their phone to take “a picture of the picture.” But he also testified that the data for the two June 17 photos didn’t show they were screen-shotted or transferred over from another phone.

A similar photo showed Richardson shirtless, wearing blue underwear or shorts, black pants, and with the same hairstyle, but

outside and without a gun holstered. The metadata showed that the picture was originally taken using an iPhone and had a capture time of March 30, 2018, at 11:24 A.M. It also listed a “[m]odified” date of June 15, 2018. Detective Zeller explained that the modified entry showed this picture was taken on March 30 with the iPhone but transferred over to Richardson’s newer LG phone on June 15.

Three other photos recovered from the LG phone showed Richardson holding a black handgun. One of these photos showed that the gun had an orange, safety-off indicator dot above and behind the trigger. Detective Zeller was unable to recover metadata for these photos. Also, four videos showed Richardson with a black handgun. Detective Zeller was unable to recover metadata for them.

Law enforcement forwarded the photos to Hi-Point Firearms, an Ohio gun manufacturer, to ask whether the gun pictured with Richardson was a Hi-Point gun. Hi-Point president Joseph Strassell, who described himself as “[i]ntimately” familiar with Hi-Point’s firearms and their parts, reviewed the photos. Strassell verified that the photos of Richardson showed him carrying a Hi-Point handgun—specifically, Hi-Point’s model C9. The C9 is a black handgun that expels a projectile through explosive action.

Strassell explained at trial that Hi-Point “work[s] very closely with law enforcement [to] mak[e its] firearms uniquely identifiable.” He pointed out that a C9 is marked “‘Hi-Point Firearms’ on the slide” and “has a triangular logo up near the front of the slide.” But, he explained, those aren’t the only unique features. A C9 also

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has “a large, heavy slide to absorb the recoil It’s not square and small.” The C9 has “some scallop serrations” on the back “that are unique to [Hi-Point] firearms.” The same is true as to the size and rounded shape of the C9’s magazine shoe. Lastly, the C9’s safety-off indicator’s location is unique.

Strassell then testified that the pictures of Richardson showed him with a handgun that has all of the C9’s unique features. In one of the June 17 photos, Strassell showed how the gun had the C9’s unique serrations and magazine shoe. He said that “the overall shape of the pistol [wa]s very familiar” and “look[ed] like a Hi-Point C9.” The handgun pictured in Richardson’s other photos, he continued, also had the C9’s unique features, including the serrations, the large slide, the magazine shoe’s shape, and the orange active-firing indicator’s location.

Hi-Point has never approved any replicas, airsoft guns, or BB guns that look like the C9. Although Hi-Point’s attorneys “actively search[] for any infringement,” they have never found any unapproved replicas on the market.

PROCEDURAL HISTORY

A grand jury indicted Richardson on five counts. Count one alleged that Richardson committed Hobbs Act robbery as to Pearce, in violation of 18 U.S.C. section 1951(a). Count two alleged that Richardson brandished a firearm in furtherance of a crime of violence, in violation of section 924(c)(1)(A). The indictment identified the crime of violence as the Pearce Hobbs Act robbery.

Counts three and four mirrored counts one and two, but they were related to the Madero robbery.

Count five alleged that, “[o]n or about June 19, 2018,” Richardson “possessed a firearm in and affecting interstate and foreign commerce, having previously been convicted of a crime punishable by imprisonment for a term exceeding one year, and did so knowingly, in violation of [s]ection 922(g)(1).” The case proceeded to trial.

Competency to stand trial and psychiatric evidence

But before the trial began, a number of psychologists assessed whether Richardson was competent to stand trial. One of them was Dr. Evan Du Bois. Dr. Du Bois evaluated Richardson in 2020 and prepared a report with his opinion that, although Richardson had a mental health condition, he was competent to proceed. Dr. Du Bois reported that Richardson told him, “Oh I’ve taken plea deals in the past so I guess that made me guilty.”

The district court held a competency hearing, and Dr. Du Bois testified. When Dr. Du Bois was asked if Richardson discussed his defense strategy, Dr. Du Bois answered, “Somewhat. . . . But from my recollection he had kind of a limited understanding of what even happened. And part of that, I think, stemmed from perhaps mental illness at the time.” Dr. Du Bois also testified that Richardson had discussed his earlier attempted robbery conviction “to some degree” and had spoken about having previous convictions or “taking plea deals in the past.” Based on

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Dr. Du Bois's report and testimony, the district court found that Richardson was competent to stand trial.

After Richardson was found competent, the government moved to exclude any evidence that "Richardson suffered from a mental condition or diminished capacity that negate[d] the intent element of the charged offenses, or improperly invoke[d] sympathy." While psychiatric evidence can be used to support an insanity defense, the government contended, Richardson did not intend to raise insanity. Psychiatric evidence, the government argued, could not be used to negate Richardson's mens rea because the indictment only alleged general intent crimes, not specific intent crimes. Richardson responded that Dr. Du Bois's evaluation was admissible to "rebut [section 922(g)(1)'s] element . . . of knowledge of prohibited status," which the government must prove after *Rehaif v. United States*, 588 U.S. 225 (2019).

The district court granted the government's motion. The competency evidence, it found, would create "a massive [Federal Rule of Evidence] 403 concern." The district court explained that diminished capacity defenses do not apply to general intent crimes, and the evidence would be misleading because a "snapshot" of Richardson's mental health at a particular time would not necessarily reflect "his mental state throughout not only the commission of this offense but prior to that." The district court also concluded that *Rehaif* "doesn't change the calculus . . . for letting in diminished capacity evidence."

During the trial, Richardson moved to introduce a stipulation about Dr. Du Bois's evaluation and competency-hearing testimony:

A doctor at the Federal Bureau of Prisons, who has previously been accepted as an expert in mental health by the parties in this case and the Court, performed an evaluation on the defendant to determine his mental health status.

Based upon the findings, the expert determined that the defendant has a mental health history, to include involuntary hospitalization and forced medications since approximately 2015.

Based upon that evaluation, the doctor testified under oath and was questioned by the parties in this case. The doctor testified that the defendant has a limited understanding of the events that happened partially stemming from his mental illness at the time.

Further, the doctor testified, upon questioning by the Government, that the defendant's mental illness had an effect on his ability to make rational and informed decisions without his medication.

Finally, the doctor testified that the defendant only had some degree of memory about a prior criminal history and may have incorrectly stated he had accepted plea deals, plural, in the past.

The government objected, and the district court sustained the objection for the same reasons it granted the government's motion to exclude Dr. Du Bois's report and testimony.

Richardson's motion to dismiss and for judgment of acquittal

Also during trial, Richardson moved to "hold . . . [s]ection 922(g) unconstitutionally vague after the *Rehaif* ruling as it applies to this case," and to dismiss the felon-in-possession count, "which charges a violation of [section] 922(g) but not a violation of [section] 924(a)(2)." The district court denied the motion, finding there was no basis to dismiss the felon-in-possession count "as unconstitutional or void for vagueness."

Then, after the government rested, Richardson moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29. First, as to the firearm counts, Richardson argued that, although the government "attempted to prove that the firearm in the photographs was a real firearm manufactured by Hi-Point," it failed to prove that gun was "the same alleged firearm used" in the robberies. Specifically, as to the felon-in-possession count, Richardson asserted that although "it's alleged that [he] possessed the firearm on June 19th," there was no proof that the firearm in the photos was the same as the "alleged firearm used on June 19th."

Second, Richardson argued that the government failed to prove he knew about his felon status, citing his mental health condition. And third, Richardson maintained that the district court should dismiss the felon-in-possession count because it "doesn't allege a federal action here because it doesn't charge any violation of

[section 924](a)(2),” and “never alleges or accuses [Richardson] of not knowing that he was a prohibited person, as required in *Rehaif*.”

The district court denied the rule 29 motion. The district court concluded that a reasonable jury could find Richardson committed each offense. As for Richardson’s challenge to the felon-in-possession count, the district court relied on *United States v. Leonard*, 4 F.4th 1134 (11th Cir. 2021), as involving an “almost identical” indictment that “was found sufficient.”

Richardson rested without presenting a case and renewed his rule 29 motion. The district court denied that motion too.

Verdict and sentence

The jury found Richardson guilty as charged. The jury found Richardson guilty of Hobbs Act robbery against both Pearce and Madero. On the brandishing counts, the jury found that Richardson brandished, used, carried, and possessed a firearm. It also found that he performed those acts during, in relation to, and in furtherance of the Pearce and Madero Hobbs Act robberies. And on the felon-in-possession count, the jury found that Richardson knowingly possessed a firearm as a convicted felon.

After the district court imposed a 192-month prison sentence, Richardson appealed his convictions.

DISCUSSION

We divide our analysis in four parts. First, we conclude that Richardson’s Hobbs Act robbery convictions are valid predicate

crimes of violence for his brandishing convictions. Second, as to the felon-in-possession count, we address why Richardson hasn't shown a Grand Jury Clause violation. Third, we explain that a reasonable jury could find Richardson brandished a firearm during his Hobbs Act robberies and knowingly possessed a firearm as a convicted felon. And fourth, we decide that the district court's exclusion of Dr. Du Bois's evaluation, testimony, and the proposed stipulation didn't deny Richardson a fair trial.

Hobbs Act robbery as a crime of violence

Richardson first argues that we must vacate his convictions for brandishing a firearm in furtherance of a crime of violence because the district court lacked jurisdiction as to those charges. He maintains that the only predicate offenses alleged in those counts—Hobbs Act robberies—do not qualify as crimes of violence under section 924(c)(3)(A)'s elements clause. Thus, he contends, the indictment didn't charge an "offense against the United States" under 18 U.S.C. section 3231. We conclude that the district court had jurisdiction as to the section 924(c) counts because Hobbs Act robbery is a crime of violence.¹

Section 924(c) makes it unlawful for any person to brandish a firearm "in furtherance of" "any crime of violence." 18 U.S.C. § 924(c)(1)(A). A "crime of violence" is a term of art that means

¹ We review de novo whether an offense qualifies as a crime of violence under the elements clause. *Alvarado-Linares v. United States*, 44 F.4th 1334, 1341 (11th Cir. 2022).

any felony offense that “has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” *Id.* § 924(c)(3)(A). This definition is known as the elements or use-of-force clause.² *Brown v. United States*, 942 F.3d 1069, 1071 (11th Cir. 2019). To determine whether an offense is a crime of violence, “[t]he only relevant question is whether [it] always requires the government to prove—beyond a reasonable doubt, as an element of its case—the use, attempted use, or threatened use of force.” *United States v. Taylor*, 596 U.S. 845, 850 (2022).

Here, the jury found Richardson guilty of brandishing a firearm in furtherance of two Hobbs Act robberies. A Hobbs Act robbery is: (1) “the unlawful taking or obtaining of personal property”; (2) “from the person or in the presence of another, against his will”; (3) “by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property.” 18 U.S.C. § 1951(b)(1). So, the question is whether—to convict a person of Hobbs Act robbery—the government must prove, beyond a reasonable doubt, that the person used, attempted to use, or threatened to use physical force as required by section 924(c).

We answered that question in *In re Saint Fleur*, 824 F.3d 1337 (11th Cir. 2016). There, we held that a “conviction for Hobbs Act robbery . . . clearly qualifies as a ‘crime of violence’ under the use-of-force clause in [section] 924(c)(3)(A)” because “the elements

² The other part of the definition, section 924(c)(3)(B)’s residual clause, is unconstitutionally vague. See *United States v. Davis*, 588 U.S. 445, 448 (2019).

of . . . [section] 1951 robbery . . . require the use, attempted use, or threatened use of physical force ‘against the person or property of another.’” *Id.* at 1340–41 (quoting 18 U.S.C. § 924(c)(3)(A)). *Saint Fleur* directly connected the Hobbs Act robbery elements, “as replicated in the indictment,” to the definition of a crime of violence. *Id.* at 1341. Twice after *Saint Fleur* we reaffirmed that Hobbs Act robbery was a crime of violence. *See In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016) (holding that aiding and abetting Hobbs Act robbery is a crime of violence); *United States v. St. Hubert*, 909 F.3d 335, 345–46 (11th Cir. 2018) (holding that Hobbs Act robbery is a crime of violence under our binding precedent in *Saint Fleur* and *Colon*).

Richardson, as he must, acknowledges these decisions. But, he argues, our holdings that Hobbs Act robbery is a crime of violence under the elements clause did not survive the Supreme Court’s decision in *Taylor*. We considered—and rejected—the same argument in *United States v. Solomon*, 136 F.4th 1310 (11th Cir. 2025). There, we explained that “our cases—both before and after *Taylor*—say that Hobbs Act robbery cannot be accomplished without the use, attempted use, or threatened use of force.” *Id.* at 1321. To reach that conclusion, we relied on *United States v. Wiley*, 78 F.4th 1355 (11th Cir. 2023), which explained that the Supreme Court’s analysis in *Taylor* was limited to attempted Hobbs Act robbery. *Solomon*, 136 F.4th at 1319–20; *see Wiley*, 78 F.4th at 1363–65. Thus, the *Wiley* court said, aiding and abetting a Hobbs Act robbery was a crime of violence “because *Taylor* did not disturb our holding that completed Hobbs Act robbery is a crime of violence.” *Wiley*, 78 F.4th at 1365. Following *Wiley*, *Solomon* reaffirmed that

our earlier holding—that a completed Hobbs Act robbery was categorically a crime of violence under the elements clause—was still good law post-*Taylor*. *Solomon*, 136 F.4th at 1321. Indeed, in a supplemental authority letter, Richardson concedes that *Solomon* “rejected the same challenge” he raises here. We agree that it did.

Felon-in-possession charge and the Grand Jury Clause

Richardson’s second argument on appeal is that the felon-in-possession count did not cite section 924(a)(2) or allege he knew about his status as a felon when he possessed the gun. Thus, he contends, we “cannot be assured from the face of the indictment that the grand jury found *Rehaif*’s knowledge-of-status element, as the Fifth Amendment [Grand Jury C]lause requires.”³

The Grand Jury Clause “confer[s] a right not to be tried” for an offense “when there is no grand jury indictment.” *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 802 (1989). “A grand jury can perform its function of determining probable cause and returning a true bill only if all elements of the offense are contained in the indictment.” *United States v. Outler*, 659 F.2d 1306, 1310 (5th Cir. Unit B Oct. 1981)⁴ (citations omitted) (“There is no question that a

³ We review de novo challenges to an indictment, see *United States v. Johnson*, 981 F.3d 1171, 1178 (11th Cir. 2020) (citations omitted), including those arising under the Grand Jury Clause, see *United States v. McIntosh*, 704 F.3d 894, 900, 903–05 (11th Cir. 2013).

⁴ We adopted as binding precedent all Fifth Circuit Unit B decisions issued on any date. See *Stein v. Reynolds Sec., Inc.*, 667 F.2d 33, 34 (11th Cir. 1982).

grand jury indictment must set forth each essential element of an offense in order for a resulting conviction to stand.”).

In determining whether an indictment contains each element of an offense, we give it “a common sense construction.” *Leonard*, 4 F.4th at 1143 (quoting *United States v. Jordan*, 582 F.3d 1239, 1245 (11th Cir. 2009)). We do not ask if the indictment “could have been drafted with more clarity.” *Id.* Instead, it is usually enough that the indictment tracks the relevant statutory language. *See Jordan*, 582 F.3d at 1246.

Here, the indictment tracked the language of sections 922(g)(1) and 924(a)(2). It alleged that: (1) Richardson “possessed a firearm”; (2) his possession was “in and affect[ed] interstate and foreign commerce”; and (3) he had “previously been convicted of a crime punishable by imprisonment for a term exceeding one year.” *Cf.* 18 U.S.C. § 922(g)(1) (“It shall be unlawful for any person . . . who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year . . . [to] possess in or affecting commerce[] any firearm or ammunition . . .”).

Then, after alleging Richardson possessed the gun as a felon, the indictment alleged that he “did so knowingly.” *Cf. id.* § 924(a)(2) (2018) (“Whoever knowingly violates [section 922(g)(1)] shall be fined . . . , imprisoned not more than [ten] years, or both.”), *amended by*, Bipartisan Safer Communities Act, Pub. L. No. 117-159, § 12004(c), 136 Stat. 1313, 1329 (2022). “Reasonably read,” the phrase “did so knowingly” applies to each material element spelled

out before it—including Richardson’s felon status. *See Leonard*, 4 F.4th at 1143.

“Knowingly” modifies the transitive verb “did,” and that verb’s direct object (“so”) naturally refers back to all that preceded it: “possessed a firearm . . . , having previously been convicted of a crime punishable by imprisonment for a term exceeding one year.” Thus, an ordinary reader would understand that “knowingly” modifies how Richardson “performed the entire action.” *See Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009) (“In ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence.”). The alternative reading, limiting “did so knowingly” to “possessed” and nothing more, is precisely the type of strained construction of an indictment that we’ve repeatedly cautioned against. *See, e.g., Leonard*, 4 F.4th at 1143 (explaining that we “give [an indictment] a common sense construction” (quoting *Jordan*, 582 F.3d at 1245)).

Giving the indictment a common sense construction, it shows that the grand jury found probable cause that Richardson “knew both that he engaged in the relevant conduct (that he possessed a firearm) and also that he fell within the relevant status (that he was a felon[]).” *See Rehaif*, 588 U.S. at 227. For that reason, there was no Grand Jury Clause violation.

Richardson makes two arguments to the contrary. First, he contends that the indictment here mirrors the one we held was fatally deficient in *United States v. Martinez*, 800 F.3d 1293 (11th Cir. 2015). Second, he argues that, under *Stirone v. United States*, 361 U.S. 212 (1960), and *Russell v. United States*, 369 U.S. 749 (1962), the grand jury’s failure to charge knowledge of status is structural error that “mandate[s] automatic vacatur.” Neither of these arguments supports vacating Richardson’s felon-in-possession conviction.

First, Richardson’s indictment doesn’t suffer the same flaw as the *Martinez* indictment. The *Martinez* indictment charged a violation of 18 U.S.C. section 875(c) for knowingly transmitting a threatening communication. See 800 F.3d at 1294. Although the Supreme Court had held that proving a section 875(c) violation required showing more than that the defendant knowingly sent a communication, see *Elonis v. United States*, 575 U.S. 723, 737–39 (2015) (concluding section 875(c)’s “mental state requirement must [also] apply to the fact that the communication contains a threat”), the *Martinez* indictment alleged only that the defendant knowingly sent an email, without alleging that the defendant knew the email “contained a threat,” 800 F.3d at 1294. Here, on the other hand, Richardson’s indictment alleged that he knew he was a felon. The phrase “did so knowingly” modified the felon-status portion of the indictment.

Second, Richardson’s reliance on *Stirone* and *Russell*—and his call for structural error—assumes that there was an error. But, as we’ve explained, there was no Grand Jury Clause violation here.

So, even if Richardson was right that *Stirone* and *Russell* require “automatic vacatur” where an indictment did not allege knowledge of felon status—we’re not saying that he is—they plainly don’t require automatic vacatur of Richardson’s felon-in-possession conviction because his indictment did allege he knew his felon status.

Sufficiency of the evidence on the firearm counts

Although the jury found Richardson guilty on the five counts alleged in the indictment, he challenges the sufficiency of evidence only as to the firearm counts. Richardson contends that the government’s evidence fell short “on the crucial ‘firearm’ element” of his brandishing and felon-in-possession convictions. Pointing to how no firearm was ever recovered, he contends the government failed to prove that he possessed a “firearm” as defined in 18 U.S.C. section 921(a)(3).⁵

We review de novo whether sufficient evidence supported a conviction, *United States v. Charles*, 313 F.3d 1278, 1284 (11th Cir. 2002), drawing all reasonable inferences in the government’s favor, *United States v. Friske*, 640 F.3d 1288, 1290–91 (11th Cir. 2011). “The evidence need not be inconsistent with every reasonable hypothesis except guilt, and the jury is free to choose between or among

⁵ A “firearm,” as used in the brandishing and felon-in-possession statutes, is “(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device.” 18 U.S.C. § 921(a)(3).

the reasonable conclusions to be drawn from the evidence presented at trial.” *Id.* (quoting *United States v. Poole*, 878 F.2d 1389, 1391 (11th Cir. 1989)).

We first review the evidence supporting Richardson’s conviction for possessing a firearm as a convicted felon. Then, we consider his convictions for brandishing a firearm in furtherance of a crime of violence.

Felon-in-possession count

A reasonable jury could conclude Richardson possessed a Hi-Point C9, which is a “firearm” as defined in 18 U.S.C. section 921(a)(3). Detective Zeller extracted five photos and four videos from Richardson’s LG cell phone showing that he flashed a black handgun. Strassell testified that the gun in the photos was a C9. He explained that the C9 has many unique features that distinguish it from other handguns on the market, including its scalloped serrations, the magazine shoe’s shape and size, the active indicator’s location, and the Hi-Point logo. Strassell then showed how Richardson’s gun had the C9’s unique features, confirming that the gun pictured was a C9. He also explained that Hi-Point hasn’t approved any replicas, including airsoft guns, and the company is not aware of any infringing products on the market.

That wasn’t enough, Richardson contends, because the government had to show that he possessed the C9 as a felon during the June 19 robbery. Or, in his words, “viewing the metadata . . . in the light most favorable to [the government] (*i.e.*, that [a] photo was taken on June 17th)” doesn’t establish that the C9 “was used in a

robbery two days later.” Citing how he wore the same clothes and hairstyle in a photo with a March 30 capture date, Richardson argues that the June 17 photos could’ve been pictures of pictures taken earlier with another phone.

The premise of Richardson’s contention is that the government had to show he possessed the firearm as charged on June 19—but this is wrong. We’ve held that “it suffices if a date reasonably near [the on-or-about designation] is established” at trial. *See United States v. Grapp*, 653 F.2d 189, 195 (5th Cir. Unit A Aug. 1981) (concluding no variance existed where the indictment alleged May 27, 1977, but the trial evidence reflected “the middle of 1977”); *see also*, *e.g.*, *Russell v. United States*, 429 F.2d 237, 238 (5th Cir. 1970) (“It seems well settled that an allegation as to the time of the offense is not an essential element of the offense charged in the indictment”); *Winslett v. United States*, 124 F.2d 302, 303 (5th Cir. 1941) (“It has been held too often . . . that the date of an alleged offense as stated in the indictment is not binding so as to limit the proof to that specific date”).

The metadata for two of the photos from Richardson’s phone was sufficient evidence that he possessed a C9 within a reasonable time—two days—of the indictment’s June 19 allegation. The metadata showed a capture time of June 17, 2018 after 5:00 A.M. The capture time, Detective Zeller testified, reflects the date that someone took the picture on that phone. The jury was free to credit that testimony, especially considering Detective Zeller’s additional testimony that there was no indication that the

June 17 photos were screenshots, were transferred over from another phone, or were pictures of other pictures. Plus, the March 30 photo's metadata listed a modified date of June 15. The metadata for the two June 17 photos, in contrast, didn't mention any modified or download date, which showed that Richardson posed for them on June 17.

Brandishing counts

Next, we consider whether there was sufficient evidence that Richardson brandished a firearm in furtherance of the Hobbs Act robberies. 18 U.S.C. § 924(c). We have held that “lay opinion is sufficient to establish that a device is a firearm.” *United States v. Hunt*, 187 F.3d 1269, 1270 (11th Cir. 1999). That's true even when, as here, no firearm is introduced at trial. *See id.* at 1270–71; *United States v. Woodruff*, 296 F.3d 1041, 1049 (11th Cir. 2002); *United States v. King*, 751 F.3d 1268, 1274–75 (11th Cir. 2014).

Here, the delivery drivers testified that Richardson robbed them with a black handgun “at close range”—specifically, pointing it at their chest or higher. *Hunt*, 187 F.3d at 1271; *cf. King*, 751 F.3d at 1274 (noting how the “weapon [was] thrust directly in [the witnesses'] faces”). The drivers testified that they believed the weapons pointed at them were real guns.

Pearce, for example, explained that there was “nothing out of the ordinary about” the gun pointed at him. And Madero testified that he “would swear that it was made of iron or steel or whatever material they make it from.” This testimony creates “a reasonable inference that the object in [Richardson]'s hand was a real

gun and not a toy.” See *Hunt*, 187 F.3d at 1271; see also *United States v. Beverly*, 99 F.3d 570, 572–73 (3d Cir. 1996) (affirming a section 924(c) conviction, although “the only evidence presented with respect to the firearms charge was the testimony of [a lay witness] that [the defendant] threatened him with a gun”); *United States v. Taylor*, 54 F.3d 967, 975–76 (1st Cir. 1995) (same, relying on three eyewitnesses’ testimony); *United States v. Lankford*, 196 F.3d 563, 567–68, 575–76 (5th Cir. 1999) (same, relying solely on one eyewitness’s testimony); *United States v. Lawson*, 810 F.3d 1032, 1039–40 (7th Cir. 2016) (same, although “the only evidence that there was a ‘firearm’” was one eyewitness’s testimony).

In addition, the C9 matched the drivers’ descriptions of the gun pointed at them. Because Richardson was pictured carrying the C9 two days before the first robbery, a reasonable jury could find he used the same C9 during the robberies instead of a toy replica.

In response, Richardson argues that neither Pearce nor Madero could conclusively identify the gun from the robberies as a real gun. The drivers testified, Richardson contends, that they were not familiar with guns and that Richardson’s gun only “appeared” or “looked” real. And Pearce was shown pictures of seven black handguns on cross-examination, including one airsoft, but he couldn’t identify which ones were real.

But Richardson’s arguments miss the mark. The drivers didn’t have to testify “to a scientific certainty” that Richardson’s gun could have fired a projectile through explosive action. *Hunt*,

187 F.3d at 1271. It was enough that the drivers testified Richardson’s gun appeared real and that they reacted as if it wasn’t a toy. See *United States v. De Leon-Quinones*, 588 F.3d 748, 752 (1st Cir. 2009) (reasoning that evidence showing “the [victims] reacted as if the gun was real, following [the defendant]’s various orders,” supported the firearm element); *Parker v. United States*, 801 F.2d 1382, 1384 (D.C. Cir. 1986) (“The act of threatening others with a gun is tantamount to saying that the gun is loaded and that the gun wielder will shoot unless his commands are obeyed.” (quotation omitted)).

Despite Richardson’s insistence that lay testimony can’t establish a fact if the witness qualifies his perception of it by saying something “*appeared*” or “*looked*” real, we and other circuits have accepted such testimony as proof the underlying fact existed. See *United States v. Seastrunk*, 580 F.2d 800, 801–02 (5th Cir. 1978) (affirming 18 U.S.C. section 2113(d) conviction for robbery with a dangerous weapon, reasoning victim’s testimony that the defendant displayed what “*looked to [her]* like a gun butt of an automatic weapon, dark in color” allowed an inference that the defendant used a gun (emphasis added)).⁶ Indeed, the drivers’ testimony that

⁶ See also *United States v. Buggs*, 904 F.2d 1070, 1075–76 (7th Cir. 1990) (officers’ lay testimony that “they had seen what ‘*appeared* to them to be a large pistol[, i]t *appeared* to each of them to be a .357 magnum but neither was sure,” supported section 924(c) conviction (emphasis in original)); *Lawson*, 810 F.3d at 1039–40 (eyewitness testimony that “the gun looked like a Cobra .380” supported section 924(c) conviction although the witness “admitted that [the gun] ‘could have been’ a well-made replica”).

the gun “appeared” real was the sort of competent lay opinion testimony the federal rules of evidence contemplate. See *Asplundh Mfg. Div. v. Benton Harbor Eng’g*, 57 F.3d 1190, 1196–98 (3d Cir. 1995) (explaining that “prototypical” lay testimony “relates to the appearance of persons or things,” such that courts have allowed lay testimony to establish, for example, a person’s drunkenness or speeding in a car).

Psychiatric evidence

Richardson’s final contention on appeal is that the district court violated his right to a fair trial by excluding Dr. Du Bois’s evaluation and competency-hearing testimony, and the proposed stipulation. He argues that this evidence showed his mental condition causes a “lack of memory,” meaning he might’ve forgotten about his felon status when he possessed the C9. We conclude the district court’s exclusion of the evidence didn’t violate his right to a fair trial.⁷

Embodied in the right to due process “is the idea that criminal defendants must be afforded the opportunity to present evidence in their favor.” *United States v. Hurn*, 368 F.3d 1359, 1362 (11th Cir. 2004). A defendant’s “right to a fair trial is violated” if excluded evidence “is material in the sense of a crucial, critical,

⁷ “Whether the exclusion of evidence violated a constitutional guarantee is a legal question reviewed de novo.” *United States v. Litzky*, 18 F.4th 1296, 1302 n.2 (11th Cir. 2021) (quoting *United States v. Sarras*, 575 F.3d 1191, 1209 n.24 (11th Cir. 2009)).

highly significant factor.” *United States v. Ramos*, 933 F.2d 968, 974 (11th Cir. 1991).

When a defendant argues that the exclusion of evidence denied him due process, we apply a two-step framework. First, we ask whether “th[e] right was actually violated.” *Hurn*, 368 F.3d at 1362. If yes, we consider “whether th[e] error was ‘harmless beyond a reasonable doubt.’” *Id.* at 1362–63 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

Richardson’s argument fails at both steps. At step one, Richardson did not have the right to present Dr. Du Bois’s findings. In *Clark v. Arizona*, 548 U.S. 735 (2006), the Supreme Court upheld a state rule that categorically excluded evidence “about a defendant’s mental incapacity owing to mental disease or defect” unless he pleaded an insanity defense. *Id.* at 756–57, 776. The Court explained that the “rule serves to preserve the [s]tate’s chosen standard for recognizing insanity as a defense and to avoid confusing and misunderstanding on the part of jurors.” *Id.* at 779. That’s because “allowing mental-disease evidence on *mens rea* can . . . easily mislead” a jury. *Id.* at 776.

We applied this same reasoning to the Insanity Defense Reform Act in *United States v. Litzky*, 18 F.4th 1296 (11th Cir. 2021). Absent raising an insanity defense, the Act makes psychiatric evidence inadmissible “to excuse conduct.” *Id.* at 1303 (quoting *United States v. Westcott*, 83 F.3d 1354, 1358 (11th Cir. 1996)). Although the defendant in *Litzky* disavowed any insanity defense, she attempted to present psychiatric evidence to negate the *mens rea* of

a specific intent crime. *Id.* We held that excluding the proffered psychiatric evidence was not a due process violation because the report did not focus on the defendant’s state of mind during the alleged crimes. *Id.* The psychiatric evidence, we found, “would only confuse the jury and distract from the relevant issues.” *Id.* at 1305.

Here, like the report in *Litzky*, nothing about Dr. Du Bois’s findings spoke to Richardson’s knowledge at the time he possessed the C9. Dr. Du Bois evaluated Richardson’s competency in 2020, but the robberies occurred two years earlier, in June 2018. Dr. Du Bois didn’t evaluate Richardson to determine if he remembered his 2013 conviction during the 2018 robberies. Dr. Du Bois evaluated whether Richardson’s condition—in 2020—rendered him “unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.” 18 U.S.C. § 4241; *cf. Litzky*, 18 F.4th at 1305 (“[W]hether [the defendant] knew what she was doing [at the time of the offense,] not whether, as a general matter, she had mental health issues . . . [,] was the relevant question.”). For that reason, admitting Dr. Du Bois’s report and testimony “would only confuse the jury and distract from the relevant issues.” *See Litzky*, 18 F.4th at 1305.

In addition, the felon-in-possession charge is a general-intent offense. *United States v. Vereen*, 920 F.3d 1300, 1308 (11th Cir. 2019); *United States v. Moore*, 76 F.4th 1355, 1362 (11th Cir. 2023) (citing *Vereen*, 920 F.3d at 1308). “In the vast majority of cases, psychiatric

evidence is inadmissible to negate *mens rea* in general-intent prosecutions.” *United States v. Bates*, 960 F.3d 1278, 1288 (11th Cir. 2020).

Richardson contends that *United States v. Russell*, 957 F.3d 1249 (11th Cir. 2020), controls our step-one analysis, but it doesn’t. *Russell* vacated a felon-in-possession conviction—appealed while *Rehaif* was pending—because “[t]he jury was never given the opportunity to decide whether [the defendant] knew [about his prohibited status].” *Id.* at 1254. The district court had excluded any evidence about the defendant’s subjective state of mind because the felon-in-possession statute required applying “an ‘objective standard.’” *Id.* at 1253.

Here, unlike in *Russell*, the district court explained to the jury that Richardson’s knowledge of his felon status was an element of the felon-in-possession charge. And the district court did not exclude all evidence bearing on Richardson’s knowledge of his felon status in 2018. The district court only excluded the report and testimony from Dr. Du Bois about Richardson’s mental state in 2020.

In any event, at step two, any error in excluding Dr. Du Bois’s findings was harmless beyond a reasonable doubt. *See Hurn*, 368 F.3d at 1362–63. The content of Dr. Du Bois’s evaluation was inculpatory rather than exculpatory. Both his report and testimony mentioned that Richardson remembered his prior conviction despite his mental condition because he mentioned that he had taken plea deals in the past. There was also evidence Richardson served thirty-three months in prison for his 2013 conviction,

and we’ve said that fact isn’t easily forgotten. *Cf. United States v. Roosevelt Coats*, 8 F.4th 1228, 1238 (11th Cir. 2021) (concluding that a felon generally knows he is a felon because a felony “is simply not the kind of thing that one forgets” (quotation omitted)).

CONCLUSION

Hobbs Act robbery is a crime of violence. Richardson hasn’t shown any Grand Jury Clause violation as to the felon-in-possession count because the indictment alleged that he knew about his prohibited status. The government’s evidence—the drivers’ testimony and photos of Richardson with his C9 before the robberies—was sufficient to show Richardson possessed and brandished a firearm. And the district court did not deny Richardson a fair trial by excluding the expert psychiatric evidence. For these reasons, we affirm his convictions.

AFFIRMED.

A-2

May 16, 2019

ANGELA E. NOBLE
CLERK U.S. DIST. CT.
S.D. OF FLA. - FT. LAUD.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
19-60129-CR-RUIZ/SELTZER
CASE NO. _____

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

UNITED STATES OF AMERICA

vs.

NIGEL RICHARDSON,

Defendant.

INDICTMENT

The Grand Jury charges that:

COUNT 1
Hobbs Act Robbery
(18 U.S.C. § 1951(a))

On or about June 19, 2018, in Broward County, in the Southern District of Florida, the defendant,

NIGEL RICHARDSON,

did knowingly and unlawfully obstruct, delay, and affect commerce and the movement of articles and commodities in commerce by means of robbery, as the terms “robbery” and “commerce” are defined in Title 18, United States Code, Section 1951(b)(1) and (b)(3), in that the defendant did take United States currency from the person and in the presence of a person employed by CC Chinese Cooking, located at 6627 Pembroke Road, Pembroke Pines, Florida, a business and company operating in interstate and foreign commerce, against the will of that person, by means

of actual and threatened force, violence, and fear of injury to said person, in violation of Title 18, United States Code, Sections 1951(a) and 2.

COUNT 2
Brandishing a Firearm in Furtherance of a Crime of Violence
(18 U.S.C. § 924(c)(1)(A)(ii))

On or about June 19, 2018, in Broward County, in the Southern District of Florida, the defendant,

NIGEL RICHARDSON,

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, that is, a violation of Title 18, United States Code, Section 1951(a), as charged in Count 1 of the Indictment, in violation of Title 18, United States Code, Sections 924(c)(1)(A) and 2.

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

COUNT 3
Hobbs Act Robbery
(18 U.S.C. § 1951(a))

On or about June 25, 2018, in Broward County, in the Southern District of Florida, the defendant,

NIGEL RICHARDSON,

did knowingly and unlawfully obstruct, delay, and affect commerce and the movement of articles and commodities in commerce by means of robbery, as the terms “robbery” and “commerce” are defined in Title 18, United States Code, Section 1951(b)(1) and (b)(3), in that the defendant did take United States currency from the person and in the presence of a person employed by the

Domino's Pizza, located at 9915 Miramar Parkway, Miramar, Florida, a business and company operating in interstate and foreign commerce, against the will of that person, by means of actual and threatened force, violence, and fear of injury to said person, in violation of Title 18, United States Code, Sections 1951(a) and 2.

COUNT 4
Brandishing a Firearm in Furtherance of a Crime of Violence
(18 U.S.C. § 924(c)(1)(A)(ii))

On or about June 25, 2018, in Broward County, in the Southern District of Florida, the defendant,

NIGEL RICHARDSON,

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, that is, a violation of Title 18, United States Code, Section 1951(a), as charged in Count 3 of the Indictment, in violation of Title 18, United States Code, Sections 924(c)(1)(A) and 2.

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

COUNT 5
Possession of a Firearm by a Convicted Felon
(18 U.S.C. § 922(g)(1))

On or about June 19, 2018, in Broward County, in the Southern District of Florida, the defendant,

NIGEL RICHARDSON,

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

It is further alleged that the firearm is one (1) Hi-Point Model C9 9mm handgun.

FORFEITURE ALLEGATIONS

1. The allegations of this Indictment are re-alleged and by this reference fully incorporated herein for the purpose of alleging criminal forfeiture to the United States of America of certain property in which the defendant, **NIGEL RICHARDSON**, has an interest.

2. Upon conviction of any violation of Title 18, United States Code, Section 1951(a), as alleged in this Indictment, the defendant shall forfeit to the United States of America, 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 922(g)(1), as alleged in this Indictment, the defendant shall forfeit to the United States of America, pursuant to Title 18, United States Code, Section 924(d)(1), any firearm and ammunition involved in or used in such violation.

4. The property that is subject to criminal forfeiture includes, but is not limited to, the following:

(a) One (1) Hi-Point Model C9 9mm handgun.

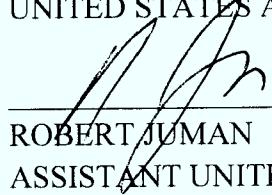
All pursuant to Title 18, United States Code, Sections 924(d)(1) and 981(a)(1)(C), and the procedures set forth at Title 21, United States Code, Section 853, made applicable by Title 28, United States Code, Section 2461(c).

A TRUE BILL

FOREPERSON



ARIANA FAJARDO ORSHAN
UNITED STATES ATTORNEY



ROBERT JUMAN
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

CASE NO. _____

vs.

NIGEL RICHARDSON,

CERTIFICATE OF TRIAL ATTORNEY*

Defendant.

/ Superseding Case Information:

Court Division: (Select One)

New Defendant(s) _____ Yes _____ No

Number of New Defendants _____

Total number of counts _____

Miami _____ Key West _____
FTL X WPB _____ FTP _____

I do hereby certify that:

1. I have carefully considered the allegations of the indictment, 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 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
II 6 to 10 days _____
III 11 to 20 days _____
IV 21 to 60 days _____
V 61 days and over _____Petty _____
Minor _____
Misdem. _____
Felony X6. Has this case been previously filed in this District Court? NO (Yes or No)

If yes:

Judge: _____

Case No. _____

(Attach copy of dispositive order)

Has a complaint been filed in this matter? No

If yes:

Magistrate Case No. _____

Related Miscellaneous numbers: _____

Defendant(s) in federal custody as of _____

Defendant(s) in state custody as of 08/15/2018

Rule 20 from the District of _____

Is this a potential death penalty case? No (Yes or 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 No8. 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 NoROBERT JUMAN
ASSISTANT UNITED STATES ATTORNEY
Florida Bar No./Court A5502228

Penalty Sheet(s) attached

REV 4/8/08

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: NIGEL RICHARDSON

Case No: _____

Counts: 1, 3

Hobbs Act Robbery

18 U.S.C. § 1951(a)

***Max. Penalty:** 20 years' imprisonment; \$250,000 fine; 3 years' supervised release.

Counts: 2, 4

Brandishing of a firearm in furtherance of a crime of violence

18 U.S.C. § 924(c)(1)(A)(ii)

***Max. Penalty:** Life Imprisonment, 7 year mandatory minimum consecutive term of imprisonment; \$250,000 fine; 3 years' supervised release.

Count: 5

Possession of a Firearm by a Convicted Felon

18 U.S.C. § 922(g)(1)

***Max. Penalty:** 10 years' imprisonment; \$250,000 fine; 3 years' supervised release.

Count:

***Max. Penalty:**

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

UNITED STATES OF AMERICA

v.

NIGEL RICHARDSON§ **JUDGMENT IN A CRIMINAL CASE**

§

§

§ Case Number: **0:19-CR-60129-RAR(1)**§ USM Number: **20032-104**

§

§ Counsel for Defendant: **Jan Christopher Smith II**

§

§ Counsel for United States: **M. Catherine Koontz****THE DEFENDANT:**

☒	was found guilty after a plea of not guilty	On Counts 1, 2, 3, 4, and 5 of the Indictment
-------------------------------------	---	--

The Defendant is adjudicated guilty of these offenses:

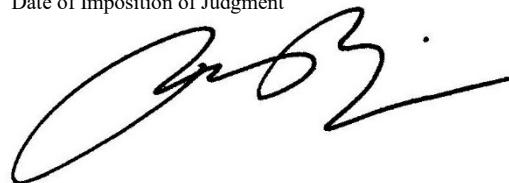
<u>Title & Section / Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 1951(a), Hobbs Act robbery	06/19/2018	1
18 U.S.C. § 924(c)(1)(A)(ii), Brandishing a firearm in furtherance of a crime of violence	06/18/2018	2
18 U.S.C. § 1951(a), Hobbs Act robbery	06/25/2018	3
18 U.S.C. § 924(c)(1)(A)(ii), Brandishing a firearm in furtherance of a crime of violence	06/25/2018	4
21 U.S.C. § 922(g)(1), Possession of a firearm by a convicted felon	06/19/2018	5

The Defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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.

May 26, 2022

Date of Imposition of Judgment



Signature of Judge

RODOLFO A. RUIZ II
UNITED STATES DISTRICT JUDGE

Name and Title of Judge

May 26, 2022

Date

DEFENDANT: **NIGEL RICHARDSON**
CASE NUMBER: **0:19-CR-60129-RAR(1)**

IMPRISONMENT

Defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **192 months**. This sentence consists of 24 months as to Counts 1, 3, 5 to be run concurrently with each other, and 168 months as to Counts 2 and 4, to be served consecutively to each other and to Counts 1, 3, and 5.

- ☒ The Court makes the following recommendations to the Bureau of Prisons:
- Designation in or as near to the Southern District of Florida as possible.
 - Placement in the Residential Drug Abuse Treatment Program (i.e. 500-hour drug treatment program) at a designated Bureau of Prisons institution.
- ☒ 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: **NIGEL RICHARDSON**
CASE NUMBER: **0:19-CR-60129-RAR(1)**

SUPERVISED RELEASE

Upon release from imprisonment, the Defendant shall be on supervised release for a term of **five (5) years**. This term consists of three years as to Counts 1, 3, and 5 of the Indictment, and five years as to Count 2 and 4 of the Indictment, all terms to be served concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must 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 above drug testing condition is suspended, based on the Court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☒ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901 et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

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

DEFENDANT: **NIGEL RICHARDSON**
CASE NUMBER: **0:19-CR-60129-RAR(1)**

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the Court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the Court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the Court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the Court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the Court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at www.flsp.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: **NIGEL RICHARDSON**
CASE NUMBER: **0:19-CR-60129-RAR(1)**

SPECIAL CONDITIONS OF SUPERVISION

Financial Disclosure Requirement: The Defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

Mental Health Treatment: The Defendant shall participate in an approved inpatient/outpatient mental health treatment program. The Defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

Permissible Search: The Defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Unpaid Restitution, Fines, or Special Assessments: If the Defendant has any unpaid amount of restitution, fines, or special assessments, the Defendant shall notify the probation officer of any material change in the Defendant's economic circumstances that might affect the Defendant's ability to pay.

DEFENDANT: **NIGEL RICHARDSON**
CASE NUMBER: **0:19-CR-60129-RAR(1)**

CRIMINAL MONETARY PENALTIES

The Defendant must pay the total criminal monetary penalties under the schedule of payments page.

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
TOTALS	\$500.00	TBD	\$.00		

- ☒ The determination of restitution is deferred until **June 22, 2022 at 11:30 A.M.** An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.
- ☐ The Defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the Defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

- ☐ Restitution amount ordered pursuant to plea agreement \$
- ☐ The Defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the schedule of payments page may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☐ The Court determined that the Defendant does not have the ability to pay interest and it is ordered that:
- ☒ the interest requirement is waived ☐ fine ☒ restitution
for the
- ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

Restitution with Imprisonment - It is further ordered that the Defendant shall pay restitution in the amount of **\$TBD**. During the period of incarceration, payment shall be made as follows: (1) if the Defendant earns wages in a Federal Prison Industries (UNICOR) job, then the Defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the Defendant does not work in a UNICOR job, then the Defendant must pay a minimum of \$25.00 per quarter toward the financial obligations imposed in this order. Upon release of incarceration, the Defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the Court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the Court any material change in the Defendant's ability to pay. These payments do not preclude the government from using other assets or income of the Defendant to satisfy the restitution obligations.

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, 18 U.S.C. §2259.

** Justice for Victims of Trafficking Act of 2015, 18 U.S.C. §3014.

*** 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.

DEFENDANT: **NIGEL RICHARDSON**
CASE NUMBER: **0:19-CR-60129-RAR(1)**

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 payments of \$500.00 due immediately, balance due

It is ordered that the Defendant shall pay to the United States a special assessment of **\$500.00** for Counts 1, 2, 3, 4, and 5, which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court. Payment is to be addressed to:

**U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716**

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.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTa assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

[PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-11488

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CURTIS SOLOMON,
JAMAUR LEWIS,
DEVON CHANCE,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:08-cr-60090-DMM-1

Before GRANT, LAGOA, and WILSON, Circuit Judges.

LAGOA, Circuit Judge:

Curtis Solomon, Devin Chance, and Jamaur Lewis were convicted of one count of Hobbs Act conspiracy; multiple counts of Hobbs Act Robbery; and multiple counts of carrying a firearm during a crime of violence, each predicated on one of their Hobbs Act convictions. On collateral review, their convictions for conspiracy to carry a firearm during a crime of violence, predicated on their Hobbs Act conspiracy count, were vacated in light of *Johnson v. United States*, 576 U.S. 591 (2015)—by this Court, as to Solomon and Chance, and by the district court as to Lewis. All three appellants requested *de novo* resentencing, but the district court declined without explanation and entered amended judgments that omitted the vacated counts and reimposed the same terms of imprisonment on the remaining counts.

The appellants now appeal their amended judgments for two reasons. First, they argue that the district court erred by failing to explain why it denied their requests for *de novo* resentencing. Second, they contend that Hobbs Act robbery is not a crime of violence and therefore cannot be a predicate crime to support the corresponding firearm charges. After careful review, and with the benefit of oral argument, we affirm in part and dismiss in part for lack of jurisdiction.

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I. FACTUAL & PROCEDURAL BACKGROUND

A. The Appellants' Convictions and Sentences

We briefly recount the relevant facts to the issues on appeal. In 2008, a federal grand jury charged Solomon, Chance, and Lewis in a 36-count second superseding indictment related to a series of armed robberies of businesses from late 2007 to early 2008. Count 1 charged conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a). Count 2 charged conspiracy to carry a firearm during a crime of violence, in violation of 18 U.S.C. § 924(o), predicated on Count 1. Counts 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35 alleged completed Hobbs Act robberies, in violation of 18 U.S.C. §§ 1951(a) and 2. Counts 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 26, 28, 30, 32, 34, and 36 charged the appellants with carrying a firearm during a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1) and 2, each count predicated on a corresponding count of Hobbs Act robbery.¹ The appellants proceeded to trial, at which the jury found them guilty of all but two counts.

Before sentencing, Solomon filed a memorandum challenging the application of § 924(c)(1)'s stacking rule² to his case. He

¹ Solomon was charged in all 36 counts. Chance was charged in Counts 1, 2 and 17–36. Lewis was charged in Counts 1, 2, 9, 10, and 13–24. Before trial, the government dismissed Counts 17–22 as to Chance and Counts 21 and 22 as to Lewis.

² “In the case of a . . . [subsequent] conviction under this subsection . . . , the person shall . . . be sentenced to a term of imprisonment of not less than 25 years; and . . . no term of imprisonment imposed . . . under this subsection shall run concurrently with any other . . . term of imprisonment imposed for

acknowledged that his challenge was contrary to (unidentified) binding precedent from the Supreme Court. However, he asserted that the Supreme Court's holding was erroneous because Congress's original intent was for the stacking rule to apply only to recidivists with prior finalized convictions, not to defendants like him who were convicted of multiple § 924(c) charges stemming from one indictment. Solomon asked the district court to consider a proposed Congressional bill that would amend § 924(c)'s stacking rule to this effect. On that basis, he asked the district court to forgo the mandatory 25-year stacked, consecutive sentences and "instead impose a reasonable sentence pursuant to 18 U.S.C. § 3553." Chance and Lewis adopted Solomon's arguments on the stacking rule.

At the sentencing hearing, the district court stated that it did not "have any authority to deal with" the stacking rule and, later in the hearing, noted its "hope [that] Congress looks at" the stacking issue to "figure out a better way to craft the statute" because the sentences here were "just unrealistic in terms of life times."

The district court sentenced Solomon to 4,641 months' imprisonment. The term consisted of 57 months for each of the Hobbs Act counts, to be served concurrently; 84 months for the first § 924(c) firearm count, to be served consecutive to the Hobbs Act counts; and 300 months as to each of the remaining § 924(c) firearm counts, to be served consecutive to the other counts—under the stacking rule—all followed by 5 years of supervised release.

the crime of violence." 18 U.S.C. § 924(c)(1)(C)–(D) (2006) (the "stacking rule").

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The district court explained its view that “[b]ased on the consecutive sentences . . . the low end of the advisory guidelines is adequate” for the concurrent Hobbs Act robbery sentences.

The district court then sentenced Chance to 1,794 months’ imprisonment. His term consisted of 210 months for each of the Hobbs Act counts, to be served concurrently; 84 months for the first § 924(c) firearm count, to be served consecutive to the Hobbs Act counts; and 300 months for each of the remaining § 924(c) firearm counts, to be served consecutively to all other counts—followed by 5 years of supervised release.

Lastly, the district court sentenced Lewis to 1,347 months’ imprisonment. Lewis’s sentence consisted of 63 months for each of the Hobbs Act counts, to be served concurrently; 84 months for the first § 924(c) firearm count, to be served consecutively to the Hobbs Act counts; and 300 months for each of the remaining § 924(c) firearm counts, to be served consecutively to all other counts—followed by 5 years of supervised release. As with Solomon, the district court noted that the 63-month concurrent sentences for the Hobbs Act robbery counts were at the low end of the advisory guidelines and found this to be “adequate in terms of the lengthy consecutive sentences.” The district court also stated its belief that “even in view of the consecutive sentences,” it would not “be appropriate to go below the advisory guidelines with respect to [the concurrent] counts.”

On direct appeal, we affirmed all three appellants’ sentences, and the Supreme Court later denied their petitions for writs of

certiorari. *United States v. Lewis*, 433 F. App'x 844 (11th Cir. 2011), *cert. denied* 565 U.S. 1069 (2011).

B. The Appellants' Collateral Proceedings

The appellants then filed *pro se* motions to vacate under § 2255, all of which were denied and not appealed. A few years later, Solomon, Chance, and Lewis each sought leave to file a successive § 2255 motion. The appellants argued that, after the Supreme Court decided *Johnson v. United States*, 576 U.S. 591 (2015), neither Hobbs Act robbery nor conspiracy to commit Hobbs Act robbery qualified as a crime of violence under § 924(c)'s elements clause or residual clause.³ We denied Lewis's request, but granted Chance's and Solomon's in part, acknowledging that conspiracy to commit Hobbs Act robbery may no longer qualify as a crime of violence under § 924(c) post-*Johnson*. *In re: Jamaur Lewis*, No. 16-12874 slip op. (11th Cir. June 22, 2016); *In re: Curtis Solomon*, No. 16-13456 slip op. (11th Cir. July 8, 2016); *In re: Devon Chance*, No. 16-13918 slip op. (11th Cir. Aug. 2, 2016). We thus allowed Solomon and Chance to challenge their Count 2 convictions, which were predicated on the Hobbs Act conspiracy charged in Count 1. *Solomon*, slip op. at 7–8; *Chance*, slip op. at 3–4.⁴ The district court

³ In *Johnson*, the Court held that ACCA's residual clause was void for vagueness and violated the constitutional guarantee of due process. 576 U.S. at 606. In *Welch v. United States*, 578 U.S. 120 (2016), the Court held that *Johnson* was a substantive decision and thus applied retroactively to cases on collateral review. *Id.* at 130.

⁴ We also permitted Chance to challenge his other convictions because the cumulative fines imposed on each count supported a "pecuniary interest in

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ultimately denied the § 2255 motions but granted both Solomon and Chance certificates of appealability as to whether *Johnson* applies to the residual clause in § 924(c)(3)(B). On appeal, we affirmed the district court's denial of both motions to vacate the Count 2 convictions. *Solomon v. United States*, 911 F.3d 1356, 1361 (11th Cir. 2019); *Chance v. United States*, 769 F. App'x 893, 895–96 (11th Cir. 2019).

After all this collateral litigation, the Supreme Court held that § 924(c)'s residual clause is unconstitutionally vague. See *United States v. Davis*, 588 U.S. 445, 470 (2019). Accordingly, the Supreme Court granted both Solomon and Chance's petitions for writs of certiorari, vacated our prior opinions that affirmed the denials of their successive § 2255 motions, and remanded for us to reconsider in light of *Davis*. See *Solomon v. United States*, 140 S. Ct. 103 (2019); *Chance v. United States*, 140 S. Ct. 556 (2019).

On remand, we held that Solomon and Chance's § 924(o) convictions, charged in Count 2 of the indictment, were invalid because they were predicated on conspiracy to commit Hobbs Act robbery—and Hobbs Act conspiracy no longer qualified as a crime of violence under § 924(c)'s elements clause. *Solomon v. United States*, 796 F. App'x 681, 684 (11th Cir. 2020); *Chance v. United States*, 791 F. App'x 165, 167 (11th Cir. 2020).

securing review of his conviction on each of the counts.” *Chance*, slip op. at 5–6 (quoting *Pinkus v. United States*, 436 U.S. 293, 305 (1978)).

In Solomon’s case, we reversed “the district court’s denial of Solomon’s § 2255 motion as to his claim challenging his Count 2 conviction and issue[d] [a] limited remand for the district court to vacate Solomon’s conviction and sentence on Count 2.” *Solomon*, 796 F. App’x at 684. In Chance’s case, we “reverse[d] the district court’s denial of Chance’s § 2255 motion as to Count 2 only, vacate[d] Chance’s conviction on Count 2, and remand[ed] for resentencing in accordance with [our] opinion.” *Chance*, 791 F. App’x at 167.

Solomon and Chance each moved for an order on the mandate and asked the district court to resentence them *de novo* on all remaining counts, under § 2255(b) and the sentencing package doctrine. They based their requests for new sentences on two grounds: First, they pointed to *Dean v. United States*, 581 U.S. 62 (2017), in which the Supreme Court clarified that a district court may consider the severity of § 924(c)’s stacking rule in order to impose a “just sentence” on the predicate, concurrent counts. Second, they asserted that in § 403 of the First Step Act of 2018,⁵ Congress amended § 924(c) to clarify that the consecutive 25-year sentences provided for were only intended to punish recidivists with “second or subsequent conviction[s],” not to punish defendants who were convicted of multiple firearm offenses at the same time. In light of this clarification, they contended, they should receive

⁵ First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, § 403 (“First Step Act”).

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consecutive terms of 7 years, rather than 25 years, on each of their unvacated § 924(c) convictions.⁶

Lewis’s collateral proceedings played out a little differently. After *Davis*, we granted in part Lewis’s request to file a third successive § 2255 motion challenging his Count 2 conviction. Lewis filed his motion, asking the district court to vacate his § 924(o) conviction and resentence him *de novo* on his remaining counts of conviction. The district court granted Lewis’s motion in part, vacating his conviction and sentence as to Count 2. In the order, the district court noted the government’s opposition to Lewis’s request for full resentencing and stated that it was “more appropriate to address this and any other issue related to [Lewis’s] resentencing in the underlying criminal case.” In a footnote, the district court noted that Lewis’s case was “intertwined” with Solomon’s and Chance’s cases and stated that it would “address any other resentencing issues for those defendants in their underlying criminal case.”⁷

In all three cases—after a two-year delay and no further comment on the appellants’ requests for *de novo* resentencing—the district court entered amended judgments that removed the Count

⁶ During the pendency of this appeal, this Court issued a published opinion in *United States v. Hernandez*, 107 F.4th 965 (11th Cir. 2024), holding that where an appellant was originally sentenced “before the First Step Act’s passage in 2018 but [the sentence was] thereafter vacated . . . [the appellant] is not entitled to the benefit of § 403(a)’s new stacking rule.” *Id.* at 968.

⁷ The district court entered a similar order in Solomon’s civil case, acknowledging his request for *de novo* resentencing and explaining that it would be “more appropriate to address these issues in the underlying criminal case.”

2 convictions and reimposed the same sentences on all other counts.

Solomon, Chance, and Lewis timely appealed the amended judgments.

II. STANDARDS OF REVIEW

We review our appellate jurisdiction *de novo*. *Thomas v. Phoebe Putney Health Sys., Inc.*, 972 F.3d 1195, 1200 (11th Cir. 2020).

In an appeal from a proceeding on a motion to vacate, set aside, or correct a sentence, we review legal issues *de novo*. *United States v. Brown*, 879 F.3d 1231, 1234 (11th Cir. 2018). We review a district court’s choice of a § 2255 remedy for an abuse of discretion. *Id.* at 1235.

Whether a prior conviction is a “crime of violence” for § 924(c) purposes is a conclusion of law reviewed *de novo*. *United States v. Bates*, 960 F.3d 1278, 1285 (11th Cir. 2020).

III. ANALYSIS

The appellants raise two issues on appeal.⁸ First, they contend that the district court erred in failing to explain why it declined

⁸ As a preliminary matter, the government disputes the propriety of Chance and Lewis adopting Solomon’s briefing. In a case involving more than one appellant or appellee, “any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another’s brief.” Fed. R. App. P. 28(i). In some fact-specific circumstances, however, adoption of a co-appellant’s brief will not suffice. *See, e.g., United States v. Khoury*, 901 F.2d 948, 963 nn.13, 14 (11th Cir. 1990). We conclude that the issues we reach below involve legal principles that are not so fact-specific as to preclude adopted

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to resentence them *de novo* (Issue 1). Second, they assert that the district court erred by finding that completed Hobbs Act robbery qualifies as a § 924(c) crime of violence after *United States v. Taylor*, 596 U.S. 845 (2022) (Issue 2). We first discuss our jurisdiction and then address the merits of the second issue on appeal.

A. Our Jurisdiction

In a supplemental notice filed before oral argument, the government argued for the first time that we lack jurisdiction to consider either of the appellants' issues on appeal. The appellants, in response, conceded that we lack jurisdiction to hear the resentencing challenge but maintained that we have jurisdiction to hear the Hobbs Act robbery challenge. Because "subject matter jurisdiction cannot be waived or conferred on a court by consent of the parties," *Eagerton v. Valuations, Inc.*, 698 F.2d 1115, 1118 (11th Cir. 1983), we examine our jurisdiction anew as to both issues.

First, the government argues that we lack jurisdiction to address the appellants' challenge to "the district court's refusal to conduct a full *de novo* resentencing, or, at a minimum, its purported failure to sufficiently explain its reasoning for refusing to do so." We agree.

In *United States v. Cody*, this Court held that, "until a certificate of appealability has been issued[,] federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas

briefing and thus we consider Solomon's briefing to speak for all three appellants, supplemented by their additional submissions.

petitioners.” 998 F.3d 912, 915 (11th Cir. 2021) (alteration adopted and quoting *Miller-El v. Cockrell*, 527 U.S. 322, 336 (2003)). This “requirement applies not only to an appeal from the final order in a proceeding under section 2255 but also to an appeal from an amended criminal judgment, to the extent it raises section 2255 issues.” *Id.* In this case, as both parties acknowledge, no court has issued a COA on the question of whether the district court erred when it refused to resentence the appellants *de novo*, so we lack jurisdiction to consider Issue 1.

To be sure, the appellants do not, here, appeal the merits of their § 2255 petitions but, instead, focus on the narrower issue of whether the district court erred in *failing to explain why* it denied *de novo* resentencing as a remedy under § 2255. We find this to be a distinction without a difference. In *Cody*, we explained that our jurisdiction over the appeal turned on whether the defendant was challenging “aspects of his proceeding” under § 2255 (as opposed to errors in his new sentence). 998 F.3d at 915. And we concluded that the district court’s “choice of statutory remedy”—there, the “district court’s choice between correcting a sentence and performing a full resentencing”—was part of that proceeding and could not be challenged without a COA. *Id.* Whether our appellants’ resentencing challenge is framed as a challenge to the court’s choice of remedy or to the reasoning behind that choice of remedy, it plainly concerns the appellants’ “proceedings” under § 2255. In other words, the explanation for a district court’s choice of remedy is no less an “aspect[] of the proceeding” than the ultimate decision.

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Without a COA on the relevant question, we lack jurisdiction to consider the first issue raised on appeal.

Second, the government contends that we lack subject matter jurisdiction over the appellants' challenge to their convictions under § 924(c). In the government's view, the appellants' *Taylor* argument amounts to an unauthorized second or successive § 2255 petition—and we, therefore, lack jurisdiction to entertain it. But we understand the procedural posture differently. The appellants' *Taylor* challenge to their robbery-related firearms convictions arises as a direct appeal of their amended judgments and thus no COA was required. See *Cody*, 998 F.3d at 915 (“[D]irect appeal matter[s]” that relate to the criminal case and “arise after the proceeding under section 2255 . . . do not require a certificate of appealability.”); *United States v. Futch*, 518 F.3d 887, 895 (11th Cir. 2008) (“Futch also timely appealed his new 215-month sentence. Because that part of his appeal relates to his criminal case and is a direct appeal matter, Futch did not need to obtain a COA, and we have jurisdiction to address this issue.”).

We take the government's point that, by launching a new attack on the legality of their convictions, the appellants come close to crossing the line of “appeal[ing] the denial of [their] section 2255 motion[s] as to [their] conviction[s],” which would indeed be “part of [their] section 2255 proceedings,” falling beyond our jurisdiction in the absence of a COA. *Cody*, 998 F.3d at 915 (alterations adopted and quoting *Futch*, 518 F.3d at 895). But here, the appellants are not appealing the denial of their § 2255 motions—which, as far as

the Hobbs Act robbery issue, depended only on *Johnson v. United States*, 576 U.S. 591 (2015). Instead, they raise new arguments about the definition of “crime of violence” under *Taylor*, which the Supreme Court issued only after the district court entered the amended judgments. We thus conclude that the appellants’ second issue—whether Hobbs Act robbery is a crime of violence under *Taylor*—is properly understood as a direct appellate issue in their criminal case, arising after the § 2255 proceedings, and not an end-run appeal of the unsuccessful portions of their § 2255 motions. See *Cody*, 998 F.3d at 915. And so, we proceed to the merits on Issue 2.

B. Hobbs Act Robbery is a Crime of Violence

The appellants contend that Hobbs Act robbery is not a “crime of violence” under § 924(c)(3)(A), creating an unwaivable jurisdictional defect in their § 924(c) convictions predicated on those robberies. They say this outcome is the necessary result of the Supreme Court’s opinion in *Taylor*, in which the Court held that attempted Hobbs Act robbery is not a crime of violence because it does not “always require[] the government to prove—beyond a reasonable doubt, as an element of its case—the use, attempted use, or threatened use of force.” 596 U.S. at 850. But *Taylor* says nothing of the completed crime of Hobbs Act robbery and thus does not disturb our precedent holding that Hobbs Act robbery is a crime of violence. See *In re Saint Fleur*, 824 F.3d 1337, 1340 (11th Cir. 2016) (second or successive context) (“Hobbs Act robbery . . . clearly 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

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(11th Cir. 2016) (“[A]iding and abetting a Hobbs Act robbery . . . clearly qualifies as a ‘crime of violence’ under the use-of-force clause in § 924(c)(3)(A).”); *see also United States v. Wiley*, 78 F.4th 1355, 1363–64 (11th Cir. 2023) (“Because Hobbs Act robbery itself qualifies as a crime of violence under § 924(c)’s elements clause, so does aiding and abetting Hobbs Act robbery.”).

Section 924(c) provides for a mandatory consecutive sentence for any defendant who uses a firearm during a crime of violence. 18 U.S.C. § 924(c)(1). Section 924(c)’s elements clause defines a “crime of violence” as a felony that “has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” § 924(c)(3)(A).

The Hobbs Act robbery statute punishes anyone who “obstructs . . . commerce . . . , by robbery . . . or threatens physical violence to any person or property in furtherance of a plan . . . to do anything in violation of this section.” § 1951(a). “Robbery” is defined as “the unlawful . . . 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 the person or property of . . . anyone in his company at the time of the . . . obtaining.” § 1951(b)(1).

Under our prior-panel-precedent rule, “a prior panel’s holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this [C]ourt sitting *en banc*.” *United States v. Archer*, 531

F.3d 1347, 1352 (11th Cir. 2008). “To constitute an ‘overruling’ for the purposes of this prior panel precedent rule, the Supreme Court decision ‘must be clearly on point.’” *United States v. Kaley*, 579 F.3d 1246, 1255 (11th Cir. 2009) (quoting *Garrett v. Univ. of Ala. at Birmingham Bd. of Trs.*, 344 F.3d 1288, 1292 (11th Cir. 2003)). “In addition to being squarely on point, the doctrine of adherence to prior precedent also mandates that the intervening Supreme Court case actually abrogate or directly conflict with, as opposed to merely weaken, the holding of the prior panel.” *Id.* at 1255. In other words, “[e]ven if the reasoning of an intervening high court decision is at odds with a prior appellate court decision, that does not provide the appellate court with a basis for departing from its prior decision.” *United States v. Vega-Castillo*, 540 F.3d 1235, 1237 (11th Cir. 2008).

First, we turn to *Taylor*: in that case, the Supreme Court resolved a circuit split and held that attempted Hobbs Act robbery is not a predicate crime of violence under § 924(c)(3)(A)’s elements clause. 596 U.S. at 852. As the outset, the Court reiterated that when taking a categorical approach, “[t]he only relevant question is whether the federal felony at issue always requires the government to prove—beyond a reasonable doubt, as an element of its case—the use, attempted use, or threatened use of force.” *Id.* at 850. From there, the Court turned to the elements of a *completed* Hobbs Act robbery: “unlawful taking or obtaining of personal property from the person . . . of another, against his will, by means of actual or threatened force.” *Id.* (quoting § 1951(b)). To prove an *attempted* Hobbs Act robbery, therefore, the government must

prove “two things: (1) [t]he defendant intended to unlawfully take or obtain personal property by means of actual or threatened force, and (2) he completed a ‘substantial step’ toward that end.” *Id.* at 851. That second prong—the “substantial step”—became the pivotal question. And, of it, the Court determined that “whatever a substantial step requires, it does not require the government to prove that the defendant used, attempted to use, or even threatened to use force against another person or his property.” *Id.* “Simply put,” the Court concluded, “no element of attempted Hobbs Act robbery requires proof that the defendant used, attempted to use, or threatened to use force.” *Id.* at 852. Accordingly, Taylor’s § 924(c)(3)(A) conviction could not stand because the underlying offense—attempted Hobbs Act robbery—was not a categorical crime of violence. *Id.* at 860.

Less than a year ago—and after *Taylor*—we concluded that aiding and abetting a completed Hobbs Act robbery constitutes a crime of violence. *Wiley*, 78 F.4th at 1363–64. In saying so, we relied on (1) our precedent in *Colon*, 826 F.3d at 1305, holding that aiding and abetting a completed Hobbs Act robbery is a crime of violence; and (2) our precedent in *Saint Fleur*, 824 F.3d at 1341, holding that completed Hobbs Act robbery is a crime of violence. *See Wiley*, 78 F.4th at 1363–64. We recognized and reaffirmed our prior precedents, stating that “Hobbs Act robbery itself qualifies as a crime of violence” and thus held the same to be true of aiding and

abetting Hobbs Act robbery.⁹ *Id.* at 1363–64. And, notably, we reached this conclusion over the appellant’s contention that *Taylor* compelled a different outcome. *Id.* at 1364. Because Wiley argued that *Taylor* disturbed our prior precedents, we examined that case and recounted how, in *Taylor*, the Court “distinguished between the *completed* offense—which requires the government to prove the use, attempted use, or threatened use of force—and an *attempt* to complete that offense” for which “the government need only show that the defendant intended to complete the offense and performed a ‘substantial step’ toward that end.” *Id.* (quoting *Taylor*, 596 U.S. at 851). Attempt, however, is an entirely different creature from aiding and abetting, which, as we explained, requires the government to prove that all of the elements of the completed crime were satisfied. *Id.* We concluded that *Taylor* therefore did not pass on the question of aiding and abetting a completed Hobbs Act robbery. *Id.* at 1365.

Several of our sister circuits have reached the same result after *Taylor*, concluding that its reach is limited to the inchoate

⁹ We have previously held—both before and after *Taylor*—that “[o]ne who aids and abets a crime of violence ‘necessarily commits a crime that has as an element the use, attempted use, or threatened use of physical force against the person or property of another.’” *Alvarado-Linares v. United States*, 44 F.4th 1334, 1348 (11th Cir. 2022) (quoting *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016)). We have reached this conclusion because aiding and abetting “is not a separate federal crime, but rather an alternative charge that permits one to be found guilty as a principal for aiding or procuring someone else to commit the offense.” *Id.* (quoting *United States v. Sosa*, 777 F.3d 1279, 1292 (11th Cir. 2015)).

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“attempt” offense. *See, e.g., United States v. Worthen*, 60 F.4th 1066, 1070 (7th Cir. 2023) (“*Taylor* hinged on the fact that attempt is a separate crime from the underlying offense, with the distinct element of a ‘substantial step.’” (internal quotation marks omitted)); *United States v. Draven*, 77 F.4th 307, 318 (4th Cir. 2023) (“[T]he Supreme Court did not explicitly instruct on *Taylor*’s reach beyond the purview of *attempted* Hobbs Act robbery.”); *see also United States v. Stoney*, 62 F.4th 108, 113 (3d Cir. 2023) (“Prior to the *Taylor* decision, this Court held that a completed Hobbs Act robbery is a valid § 924(c) predicate That finding was also unanimous among our sister Circuits. *Taylor* does not change our position.”).

In sum, we concluded in *Wiley* that “*Taylor* did not disturb our holding [in *Saint Fleur*] that completed Hobbs Act robbery is a crime of violence.” 78 F.4th at 1365. Under our prior-panel-precedent rule, we may not diverge from that position here. *See Archer*, 531 F.3d at 1352.

The appellants nonetheless contend that *Wiley* is inapposite. In particular, the appellants argue that *Wiley* addressed only aiding and abetting, which is not the charge at issue. That is irrelevant, since aiding and abetting a Hobbs Act robbery is a crime of violence because a completed Hobbs Act robbery is, itself, a crime of violence. *Wiley*, 78 F.4th at 1363–64 (“Because Hobbs Act robbery itself qualifies as a crime of violence under § 924(c)’s elements clause, so does aiding and abetting Hobbs Act robbery.”); *cf. Alvarado-Linares*, 44 F.4th at 1348 (“[A]iding and abetting is not a separate federal crime, but rather an alternative charge that permits one to be

found guilty as a principal for aiding or procuring someone else to commit the offense.” (internal quotations omitted)).

Second, the appellants say *Wiley* cannot control because this appeal raises at least three new arguments that we did not consider in *Wiley*. First, they say *Wiley* did not argue—as the appellants do now—that *Taylor* abrogated *Colon*. Second, they say *Taylor* explicitly rejected the “realistic probability” test underpinning our decision in *United States v. St. Hubert*, 909 F.3d 335 (11th Cir. 2018). And third, they say that *Wiley* did not consider the language of our pattern jury instructions, which they contend supports their challenge. They assert that these are “questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, [and which] are not to be considered as having been so decided as to constitute precedents,” *United States v. Jackson*, 55 F.4th 846, 853 (11th Cir. 2022) (quoting *Webster v. Fall*, 226 U.S. 507, 511 (1925) (alteration adopted)), and that we must consider them anew. But we have “categorically rejected an overlooked reason or argument exception to the prior-panel-precedent rule.” *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015). And these two principles work in harmony: under *Webster* and *Jackson*, we will not read precedent to have resolved an *issue* that was not before the court, but *Lambrix* focuses more narrowly on *arguments*. What the appellants ask of us here—to avoid *Wiley*’s resolution of an issue, based on unraised arguments—is foreclosed by *Lambrix* and does not implicate *Jackson* and *Webster*.

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In any event, each of these other arguments about *Taylor* fails to persuade because we held plainly in *Wiley* that “*Taylor* did not disturb our holding that completed Hobbs Act robbery is a crime of violence,” 78 F.4th at 1365, and we stand by that conclusion until the Supreme Court or this Court *en banc* says otherwise, *see Kaley*, 579 F.3d at 1255. Because *Wiley*—which we issued after the briefing here was complete—resolves the issue, we need not wade into the arguments first raised in the papers. That said, we consider and reject the appellants’ original contentions in turn.

First, the appellants contend that Hobbs Act robbery is not a crime of violence after *Taylor* because *Taylor* abrogated our previous precedent in *St. Hubert*. This is true: *Taylor* expressly abrogated *St. Hubert*. But our subsequent publication of *Wiley* renders that point without merit.

Second, and relatedly, the appellants contend that *Taylor* rejected the “realistic probability” methodology that we applied in *St. Hubert*. Again, true. But in *Saint Fleur*, we held that “the elements of . . . § 1951 robbery, as replicated in [Saint Fleur’s] indictment, require the use, attempted use, or threatened use of physical force,” 824 F.3d at 1341, and we reiterated the same in *Wiley*, 78 F.4th at 1363–64. *Taylor*’s rejection of *St. Hubert*’s “realistic probability” methodology, therefore, does not advance the appellants’ cause.

Third, the appellants say that the Hobbs Act statute is indivisible as to robbery and attempted robbery and that, because attempted Hobbs Act robbery does not require proof that the defendant used, attempted to use, or threatened to use force, neither does

robbery. Not so. The statute lists the completed acts and the attempt in the disjunctive, indicating that they are elements in the alternative. See *Mathis v. United States*, 579 U.S. 500, 505 (2016). And we have consistently treated the attempt and the completed crime as separate offenses. See, e.g., *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.”).

Fourth, the appellants suggest we should ignore *Saint Fleur* because it arose in a collateral context without true adversarial briefing. This argument is unavailing as “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.” See *Lambrix*, 776 F.3d at 794

Fifth, the appellants point to our pattern jury instructions, under which they argue the least culpable conduct to sustain a conviction is taking personal property against the victim’s will by threatening the victim’s intangible property e.g., threat of financial harm. But jury instructions are not binding law, *United States v. Carter*, 776 F.3d 1309, 1324 (11th Cir. 2015), and our cases—both before and after *Taylor*—say that Hobbs Act robbery cannot be accomplished without the use, attempted use, or threatened use of force.

Because we conclude that none of the appellants’ arguments move the needle and *Wiley* controls—Hobbs Act robbery remains

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a crime of violence—there is no jurisdictional defect in the appellants’ § 924(c) convictions arising from those Hobbs Act robberies.

IV. CONCLUSION

For the foregoing reasons, we affirm the appellants’ § 924(c) convictions arising from their Hobbs Act robberies. However, the appeal is dismissed in part for lack of jurisdiction to the extent that it challenges the district court’s failure to explain why it denied the appellants’ requests for *de novo* resentencing.

AFFIRMED in part and DISMISSED in part for lack of jurisdiction.

NO. 22-11488-A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

CURTIS SOLOMON,

Defendant/Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

PETITION FOR REHEARING *EN BANC*
OF APPELLANT CURTIS SOLOMON

HECTOR A. DOPICO

Federal Public Defender

BRENDA G. BRYN

Assistant Federal Public Defender

Attorney for Appellant

One E. Broward Blvd., Suite 1100

Fort Lauderdale, Florida 33301

Telephone No. (954) 356-7436

THIS CASE IS ENTITLED TO PREFERENCE
(CRIMINAL APPEAL)

**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

**United States of America v. Curtis Solomon
Case No. 22-11488-A**

Appellant Curtis Solomon states that the Certificate of Interested Persons and Corporate Disclosure Statements previously filed in this appeal accurately lists all of the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1.

s/Brenda G. Bryn
Brenda G. Bryn

STATEMENT OF COUNSEL REGARDING EN BANC REVIEW

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court and this Court, and consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court:

United States v. McGuire, 706 F.3d 1333, 1336 (11th Cir. 2013)

Mathis v. United States, 579 U.S. 500, 518-19 (2016)

United States v. St. Hubert, 909 F.3d 335, 347-48 (11th Cir. 2018)

Ovalles v. United States, 905 F.3d 1300, 1302-03 (11th Cir. 2018)

United States v. Davis, 588 U.S. 445, 456-57 (2019)

Brown v. United States, 942 F.3d 1069, 1075 (11th Cir. 2019)

United States v. Taylor, 596 U.S. 845, 859 (2022).

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following questions of exceptional importance:

I. Can *In re Saint Fleur*, 824 F.3d 1337 (11th Cir. June 8, 2016)—and subsequent decisions like *United States v. Wiley*, 78 F.4th 1355 (11th Cir. 2023) adhering to *Fleur* under the “prior-panel-precedent rule”—remain binding precedent in this Circuit if the *Fleur* panel demonstrably and admittedly did not apply the categorical approach in analyzing whether

Hobbs Act robbery was a “crime of violence” within 18 U.S.C. §924(c)(3)(A)?

II. After the clarification of the categorical approach in *Mathis v. United States*, 579 U.S. 500 (2016) and *United States v. Taylor*, 596 U.S. 845 (2022), and given the language of this Circuit’s pattern instruction on Hobbs Act robbery, 18 U.S.C. §1951(b)(1), which advises juries that the offense may be committed by *causing fear of financial loss without physical violence*, is Hobbs Act robbery categorically a “crime of violence” for §924(c)(3)(A)?

s/Brenda G. Bryn

Brenda G. Bryn

Attorney of Record for Appellant Solomon

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**STATEMENT OF THE ISSUES
MERITING EN BANC CONSIDERATION**

I. Can *In re Saint Fleur*, 824 F.3d 1337 (11th Cir. June 8, 2016)—and subsequent decisions like *United States v. Wiley*, 78 F.4th 1355 (11th Cir. 2023) adhering to *Fleur* under the “prior-panel-precedent rule”—remain binding precedent in this Circuit if the *Fleur* panel demonstrably and admittedly did not apply the categorical approach in analyzing whether Hobbs Act robbery was a “crime of violence” within 18 U.S.C. §924(c)(3)(A)?

II. After the clarification of the categorical approach in *Mathis v. United States*, 579 U.S. 500 (2016) and *United States v. Taylor*, 596 U.S. 845 (2022), and given the language of this Circuit’s pattern instruction on Hobbs Act robbery, 18 U.S.C. §1951(b)(1), which advises juries that the offense may be committed by *causing fear of financial loss without physical violence*, is Hobbs Act robbery categorically a “crime of violence” for §924(c)(3)(A)?

**COURSE OF PROCEEDINGS
AND DISPOSITION OF THE CASE**

On April 29, 2009, Curtis Solomon and two co-defendants were convicted after a jury trial of: conspiracy to commit Hobbs Act robbery under 18 U.S.C. §1951(a) (Count 1); conspiracy to use and carry a firearm during a crime of violence under 18 U.S.C. §924(c)(1)(A) and §924(o) (Count 2, predicated on the Count 1 conspiracy to commit Hobbs Act robbery); multiple counts of substantive Hobbs Act robbery under 18 U.S.C. §1951(a) and §2; and carrying a firearm during a crime of violence under 18 U.S.C. §924(c)(1) and §2, which counts were predicated on those substantive Hobbs Act robberies. (DE94, DE213, DE216, DE217). Under the law at the time which required the stacking of separate 25-year terms for each of Solomon's §924(c) counts, he was sentenced to 4,641 months imprisonment. (DE236; DE270:22-22).

After the decision in *Johnson v. United States*, 576 U.S. 591 (2015) which found the ACCA's residual clause void for vagueness, this Court authorized Solomon to file a second-or-successive §2255 motion challenging (only) his Count 2 §924(o) conviction predicated on Hobbs

Act conspiracy. *In re Solomon*, No. 16-13456, DE4:8 (11th Cir. July 8, 2016).

When the district court denied that §2255, and this Court affirmed, *Solomon v. United States*, 911 F.3d 1356 (11th Cir. 2019), Solomon sought certiorari. And on October 7, 2019, the Supreme Court granted certiorari, vacated this Court's judgment, and remanded for further consideration in light of *United States v. Davis*, 588 U.S. 445 (2019) which held §924(c)'s residual clause unconstitutionally vague. *Solomon v. United States*, 140 S.Ct. 103 (2019) (No. 18-9201).

Upon further consideration, this Court reversed. *Solomon v. United States*, 796 F. App'x 681, 684 (11th Cir. Jan. 13, 2020). On remand, the district court vacated Solomon's §924(o) count, *Solomon v. United States*, No. 16-cv-61410-DMM, DE37 (S.D. Fla. Mar. 17, 2020), and issued an amended judgment deleting the concurrent sentence previously imposed on that count, but reimposing 4,641 months on the other counts. *United States v. Solomon*, No. 08-cr-60090-DMM, DE330 (S.D. Fla. Apr. 27, 2022).

Solomon appealed from the amended judgment. As relevant here,

he argued the court lacked jurisdiction to convict him on the §924(c) counts and re-impose the stacked sentences for those offenses. *United States v. Solomon, et al.*, No. 22-11488, DE33:42-57 (11th Cir. July 27, 2022). He explained the jurisdictional error in those counts had become clear when the Supreme Court in *United States v. Taylor*, 596 U.S. 845, 857-59 (June 21, 2022) rejected the “realistic probability” methodology used in *United States v. St. Hubert*, 909 F.3d 335, 350 (11th Cir. 2018) to conclude substantive Hobbs Act robbery was categorically a “crime of violence” for §924(c). What controlled under the categorical approach post-*Taylor* was simply element-to-element matching, for which the Court needed to determine the “elements” of §1951(b)(1), and the least culpable “means” of conviction. On that issue, Solomon argued, the Court’s pattern instruction on Hobbs Act robbery (Instruction O70.3) should be considered, as it informs the offense can be committed by a taking of property (including intangible rights) that causes *fear of purely financial loss, without fear of any physical violence*.

That instruction, Solomon argued, confirmed the elements of Hobbs Act robbery did *not* match §924’s elements clause as *Taylor* required, and

was overbroad. As such, Hobbs Act robbery was *not* categorically a “crime of violence;” without a categorical “crime of violence” his §924(c) counts effectively charged a non-offense; as per *St. Hubert*, 909 F.3d 342-44, that was a jurisdictional defect that could be raised at any time; and it was reviewable *de novo* on direct review from the amended criminal judgment. *Id.* at 42-57. Solomon’s co-defendants joined that argument.

In its Answer Brief, the government did *not* dispute this post-*Taylor* challenge was jurisdictional and reviewable *de novo*. And it conceded *Taylor* abrogated *St. Hubert*’s “realistic probability” methodology for the categorical approach. *United States v. Solomon et al.*, No. 22-11488, DE 55:26 (11th. Cir. Jan. 23, 2023). However, the government argued, *Taylor*’s abrogation of that portion of *St. Hubert* was not dispositive of the appellants’ jurisdictional challenge, since the Court had not used the “realistic probability” rationale in *In re Saint Fleur*, 824 F.3d 1337 (11th Cir. 2016), which held (prior to *St. Hubert*) that Hobbs Act robbery was a “crime of violence” for purposes of § 924(c)’s elements clause. *Id.* at 1341. “[S]o even if that part of *St. Hubert* is abrogated,” the government argued, “it did not undermine *In re Saint Fleur*’s [earlier] holding.” DE55:26-27.

After briefing, the government filed a Rule 28(j) letter (DE78) informing the Court that in *United States v. Wiley*, 78 F.4th 1355 (11th Cir. Aug. 29, 2023), where the question was whether aiding and abetting Hobbs Act robbery was a “crime of violence,” the panel noted the language in *Taylor*, 596 U.S. at 851, stating “Whatever one might say about completed Hobbs Act robbery, attempted Hobbs Act robbery does not satisfy the elements clause.” And therefore, *Wiley* held, “because *Taylor* did not disturb this Court’s holding [in *Fleur*] that completed Hobbs Act robbery is a crime of violence, aiding and abetting a completed Hobbs Act robbery also qualifies as a crime of violence under §924(c)(3)(A).” 78 F.4th at 1365.

Solomon responded that *Wiley* had no bearing on his jurisdictional challenge as *Wiley* did not argue (as he had) that *Taylor* rejected *St. Hubert*’s “realistic probability” methodology for the categorical approach, or that this Court’s pattern instruction for completed Hobbs Act robbery must inform a post-*Taylor* analysis under the categorical approach. (DE78). Moreover, Solomon pointed out in his own Rule 28(j) letter, the *Fleur* panel had acknowledged in a subsequent order that it had ***not***

applied the categorical approach in concluding Hobbs Act robbery was a “crime of violence.” (DE97, attaching *In re Saint Fleur*, No. 16-14022, DE 5-1 (11th Cir. July 22, 2016)(explaining that the categorical approach as articulated in *Mathis v. United States*, 579 U.S. 500 (2016) was “inapposite” to the elements clause analysis in §924(c)(3)(A)). Solomon noted that the *Fleur* panel’s view that the categorical approach did not apply to §924’s elements clause had been definitively rejected by both the Supreme Court and this Court. And, he argued, because *Fleur*’s analysis was demonstrably inconsistent with *Mathis* which governed the categorical approach, neither *Fleur* (nor *Wiley* which followed *Fleur*) should be followed—even under the prior-panel precedent rule. (DE97, DE99).

But the panel disagreed. While granting that *Taylor* “expressly abrogated” “our previous precedent in *St. Hubert*,” *United States v. Solomon*, ___ F.4th ___, 2025 WL 1405203, at *8 (11th Cir. May 15, 2025), the panel found the “subsequent publication of *Wiley* render[ed] that point without merit,” and *St. Hubert*’s abrogation on the “realistic probability” test failed to “advance the appellants’ cause,” *id.*, because:

(1) *Wiley* stated “*Taylor* did not disturb our holding [in *Saint Fleur*] that completed Hobbs Act robbery is a crime of violence;” (2) “in *Saint Fleur*, we held that ‘the elements of ... §1951 robbery, as replicated in [Saint Fleur’s] indictment, require the use, attempted use, or threatened use of physical force,” 824 F.3d at 1341, and reiterated the same in *Wiley*, 78 F.4th at 36-64;” (3) although the appellants “point to our pattern jury instructions” under which the “least culpable conduct” is a “threat of financial harm,” “jury instructions are not binding law, *United States v. Carter*, 776 F.3d 1309, 1324 (11th Cir. 2015), and our cases—both before and after *Taylor*—say that Hobbs Act robbery cannot be accomplished without the use attempted use, or threatened use of force;” *id.* at *8, and (4) the fact that the *Wiley* panel did not consider the language of the pattern instruction the appellants emphasized did not render *Wiley* non-precedential on that point under *United States v. Jackson*, 55 F.4th 846, 853 (11th Cir. 2022), because the appellants had simply raised a new argument—not a new issue—and the Court had “categorically rejected an overlooked reason or argument exception to the prior-panel-precedent rule.” *Id.* at **7 (citing *In re Lambrix*, 776 F.3d 789, 794 (11th Cir.

2015)).

Thus, the panel concluded, “none of the appellants’ arguments move the needle and *Wiley* controls;” “Hobbs Act robbery remains a crime of violence;” and “there is no jurisdictional defect in the appellants’ §924(c) convictions arising from those Hobbs Act robberies.” *Id.* at *8.

ARGUMENT AND CITATIONS OF AUTHORITY

- I. The Court should declare *In re Saint Fleur*, 824 F.3d 1337 (11th Cir. June 8, 2016)—and subsequent decisions like *United States v. Wiley*, 78 F.4th 1355 (11th Cir. 2023) adhering to *Fleur* under the “prior-panel-precedent rule”—abrogated, without either precedential or persuasive value on the question of whether Hobbs Act robbery is categorically a “crime of violence” for 18 U.S.C. §924(c)’s elements clause, since the *Fleur* panel demonstrably and admittedly did not apply the categorical approach.

The panel decision was resolved by the prior-panel-precedent rule. But even if that rule bound the panel to follow *In re Saint Fleur*, 824 F.3d 1337, 1340 (11th Cir. June 8, 2016) and *United States v. Wiley*, 78 F.4th 1355 (11th Cir. 2023), the prior-panel-precedent rule does not govern in *en banc* proceedings. *United States v. Watkins*, 10 F.4th 1179, 1181 (11th Cir. 2021). And sitting *en banc*, this Court should decide anew whether under Supreme Court precedent clarifying proper application of the categorical approach, namely, *Mathis v. United States*, 579 U.S. 500 (June 23, 2016) and *United States v. Taylor*, 596 U.S. 845 (2022), Hobbs Act robbery is a “crime of violence” within the elements clause of 18 U.S.C. §924(c)(3)(A).

On that issue, neither *Fleur* nor *Wiley* (which adhered to *Fleur*) should have any persuasive value for a simple reason: It is clear not only from the language of *Fleur* itself, but from a subsequent order by the *Fleur* panel, that the *Fleur* panel majority did **not** apply the categorical approach in holding Hobbs Act robbery was a “crime of violence” for §924(c)(3)(A). In its view, the categorical approach simply did not apply to 18 U.S.C. §924(c). While admittedly, there were conflicting views on that point—at least vis-à-vis §924(c)’s residual clause—for a brief period in this Circuit, subsequent Circuit and Supreme Court authority have proven the view of the *Fleur* panel majority that the categorical approach does not govern the “crime of violence” determination in §924(c), decidedly wrong.

A telltale sign the *Fleur* panel majority did not apply the categorical approach is that neither the word “categorically” nor the term “categorical approach” appears anywhere in the opinion. Rather, the majority found the language of the disjunctively-worded Hobbs Act robbery statute, 18 U.S.C. §1951(b)(1), which was “replicated in [Fleur’s] indictment” (which charged robbery “by means of actual or threatened

force, or violence, or fear of injury”), *itself* confirmed Fleur’s underlying offense “require[]d the use, attempted use, or threatened use of physical force ‘against the person or property of another,’ and as such met the elements clause “definition of a crime of violence under §924(c)(3)(A).” 824 F.3d at 1341.

In so reasoning, the *Fleur* panel did not yet have the Supreme Court’s guidance in *Mathis*. *Mathis* explained the difference between “elements” and “means,” and set forth a precise methodology for distinguishing between the two in a disjunctively-worded statute—a methodology necessary for correct application of the categorical approach to a statute like §1951(b)(1). *See* 579 U.S. at 519 (noting that an indictment that tracks all of the words in a statute, and correlative jury instructions that reference all alternatives, is “as clear an indication as any that each alternative is only a possible means of commission, not an element that the prosecutor must prove to a jury beyond a reasonable doubt”).

The *Fleur* panel did precisely what *Mathis* prohibited two weeks later. Specifically, it presumed every word in a disjunctively-worded

statute was an “element,” and the mere “replication” of the statutory term “force” in Fleur’s indictment was dispositive of the “crime of violence” determination in §924(c)(3)(A). It did not determine as a threshold matter whether “force” was a “means” or an “element,” or base its “crime of violence” determination on the least culpable “means” of violating §1951(b)(1), after considering jury instructions. *Mathis* plainly abrogated the surface-level mode of analysis in *Fleur*.

After *Mathis* clarified proper application of the categorical approach to a statute like §1951(a) and (b)(1), Fleur filed a second (counseled) application to file a successive §2255, pointing out the inconsistency between the panel’s “crime of violence” approach, and the categorical approach dictated by both *Descamps v. United States*, 570 U.S. 254 (2013), and *Mathis*. And notably, in rejecting this second application, the panel majority was clear that it believed the “categorical approach” simply did **not** govern the “crime of violence” determination for **either** clause in §924(c)(3). See Appendix B, *In re Fleur*, No. 16-14022, at 10-11 (11th Cir. July 22, 2016)(“*Fleur II*”)(subsequent order rejecting *Descamps* and *Mathis* as “inapposite” decisions, because “many of the

reasons proffered by the Supreme Court for employing a categorical approach to state court convictions in ACCA cases simply do not apply in the §924(c) context where the §924(c) offense and its federal companion conviction are in the same federal indictment, and both charges are before the same judge;” thus “***Descamps* and *Mathis* do not apply to our previous June 8, 2016 order, let alone render that order clearly erroneous**”); *see also id.* at 11 n. 4 (rejecting as “incorrect” the assertion in Fleur’s second, counseled petition that “this Court is bound to apply the same categorical approach used in ACCA cases to determine whether a conviction for Hobbs Act robbery qualifies as a crime of violence under §924(c)”).

That was incorrect, even under the prior-panel-precedent rule. Indeed, in *United States v. McGuire*, 706 F.3d 1333 (11th Cir. 2013), former Justice O’Connor writing for the Court squarely recognized that the question of whether a predicate offense qualifies as a “crime of violence” under either clause of §924(c)(3) is one that the Court “must answer ‘categorically’—that is, by reference to the elements of the offense, and not the actual facts of [the defendant’s] conduct,” “because of

the statute’s terms” which asks whether the defendant 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,” or that “*by its nature*, involves a substantial risk that physical force against the person or property of another may be used.”). *Id.* at 1336 (emphasis in original).

Although the *Fleur II* majority attempted to limit *McGuire* to its facts, *see Fleur II*, at 11 n.4, when the same judges were faced with *Mathis* and other categorical approach precedents in *United States v. St. Hubert*, 883 F.3d 1319 (11th Cir. Feb. 28, 2018)(“*St. Hubert I*”), they backtracked from their previous view that the “categorical approach” did not apply to the elements clause. Instead, the *St. Hubert* panel acknowledged—at least implicitly—that the categorical approach applied to §924(c)(3)(A) and had not been applied in *Fleur*. That is why the panel attempted to perform the “categorical approach” anew using the “realistic probability” test applied by *United States v. Hill*, 832 F.3d 135, 139-40 (2d Cir. 2016), which justified adhering to the elements clause result—if not the reasoning—of *Fleur*. *See St. Hubert I*, 883 F.3d at 1329-33.

Soon thereafter, the en banc Court in *Ovalles v. United States*, 905 F.3d 1231, 1248-52 (11th Cir. 2018)(en banc) overruled *McGuire* “to the extent that it require[d] application of the categorical approach to determine whether an offense constitutes a ‘crime of violence’ within the meaning of §924(c)(3)(B).” *See id.* at 1248-52 (holding §924(c)’s residual clause “is different” from the ACCA because it serves a different function from a recidivist statute; thus, the “crime-of-violence determination” under §924(c)(3)(B) requires a “conduct-based approach”). However, the *Ovalles* panel separately reaffirmed, citing *McGuire*, 705 F.3d at 1336, that “We apply the categorical approach to decide whether a predicate conviction satisfies the elements-clause definition” in §924(c)(3)(A).” *Ovalles v. United States*, 905 F.3d 1300, 1302 (11th Cir. 2018)(*Ovalles II*).

Thereafter, the *St. Hubert* panel vacated and superseded its original decision, to hold Hobbs Act robbery was a “crime of violence” under *Ovalles*’ newly-mandated conduct-based approach to the residual clause. *United States v. St. Hubert*, 909 F.3d 335, 344-35 (11th Cir. Nov. 15, 2018). Notably, though, the panel reaffirmed that the “categorical approach” applied to the alternative elements clause definition of “crime

of violence” in §924(c)(3)(A). *See id.* at 347-51 (reaffirming that *Fleur* did not “squarely rule” on the elements clause issue; agreeing with counsel that the Supreme Court’s decisions in *Descamps*, *Mathis*, as well as *Moncrieffe v. Holder*, 569 U.S. 184 (2013) which applied the categorical approach were “relevant to St. Hubert’s appeal;” under the categorical approach, the court looks to the elements not the facts of the underlying offense; continuing to apply the “realistic probability” test to hold Hobbs Act robbery was categorically a “crime of violence” under §924(c)(3)(A)).

If there could have been any doubt after *Ovalles II* and *St. Hubert* as to whether the “categorical approach” governed §924(c)’s elements clause, it was laid to rest by *United States v. Davis*, 588 U.S. 445 (2019). *See id.* at 456 (noting “everyone agrees that, in connection with the elements clause [in §924(c)(3)(A)], the term ‘offense’ carries” the generic meaning, rather than referring to the offender’s specific acts). Notably, almost immediately after *Davis* overruled the en banc *Ovalles* decision—confirming the categorical approach applied to both clauses of §924(c)(3), and declaring §924(c)(3)(B) unconstitutionally vague, *see* 588 U.S. at 453-71—the Court reaffirmed in *Brown v. United States*, 942 F.3d

1069, 1075 (11th Cir. 2019) that “We apply the categorical approach when determining whether an offense constitutes a ‘crime of violence’ under the elements clause” in §924(c)(3)(A). *Id.* at 1075.

There can be no dispute from the above that the *Fleur* panel majority wrongly believed—and articulated expressly in *Fleur II*—that the “categorical approach” did **not** apply to §924(c)’s elements clause. *Mathis* and *Descamps* were not “inapposite,” as the *Fleur II* panel declared. Rather, these precedents directly controlled the required categorical analysis under §924(c)(3)(A), which *Fleur* failed to perform. As such, the Court should declare *Fleur*, and any panel decisions like *Wiley* adhering to *Fleur*’s wrong mode of elements clause analysis, abrogated without either binding or persuasive force at this time.

II. The language of this Circuit’s pattern instruction on Hobbs Act robbery, 18 U.S.C. § 1951(b)(1), which advises juries that the offense may be committed by *causing fear of financial loss without physical violence*, confirms that after *Mathis* and *Taylor* Hobbs Act robbery is *not* categorically a “crime of violence” for §924(c)(3)(A).

Post-*Taylor*, a defendant need no longer point to a “reported case” of prosecution for a non-violent act. If there is no element-to-element

“match” between the alleged “crime of violence” and the elements clause, *Taylor* clarified, the alleged “crime of violence” does not qualify as a §924(c) predicate. And this Court’s pattern Hobbs Act robbery instruction (O70.3) easily confirms this offense is categorically overbroad vis-a-vis §924(c)’s elements clause.

The pattern instruction states a defendant can be found guilty of Hobbs Act robbery, only if he:

- (1) knowingly acquired someone else’s personal ***property***; and
- (2) 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.

The instruction then defines “property” to “include money, tangible things of value, ***and intangible rights that are a source or element of income or wealth,***” and “fear” to mean “a state of anxious concern, alarm, or anticipation of harm. ***It includes the fear of financial loss as well as fear of physical violence.***” According to this instruction, a defendant’s taking of intangible rights such as a stock option, or the right to conduct business, by causing a victim to simply “fear” financial loss—

but not “physical violence”—is a recognized means (and the least culpable means) of committing Hobbs Act robbery.

The panel decision wrongly implies, without authority, that this instruction is not a correct statement of law. The opposite is the case. The Eleventh Circuit pattern is not an outlier. Both the Tenth and Third Circuits define “fear of injury”—an undefined, unqualified term in the statute—in an identically-broad way. *See* Third Circuit Model Instruction 6.18.1951-4; Tenth Circuit Pattern Criminal Jury Instruction 2.70.

Notably, this Circuit has had this precise pattern instruction since 2010—meaning 15 years for both the “property” and “fear” definitions—while the “property” definition including “intangible rights” has existed in both the robbery and extortion instructions since 1997 (almost 30 years). That is significant. *Davis* recognized that absent evidence to the contrary, the presumption is that the same term wherever used in a statute has the same meaning. 588 U.S. at 457.

However, even *if* the Court were to now hold that this longstanding definition of both “property” and “fear” is somehow defective, that would

not impact the categorical approach. While indeed, jury instructions are not “binding law,” *United States v. Carter*, 776 F.3d 1309, 1324 (11th Cir. 2015), *Carter* is inapposite where, as here, there is no argument an erroneous instruction requires reversal. What the panel ignored is that under both Supreme Court and Circuit law, jury instructions are a recognized tool in applying the categorical approach. In this regard, *Mathis* confirmed the correctness of *United States v. Lockett*, 810 F.3d 1262 (11th Cir. 2016) which—applying *Descamps*—recognized that the least culpable conduct for conviction can often be determined by pattern jury instructions. *See id.* at 1271 (model instructions confirmed jury did not need to agree on any particular “means” of violating the statute including the one that matched the elements clause; as such, the conviction was categorically overbroad). And that is the case here.

Based on the language of the pattern instruction, never considered in *Fleur* or *Wiley*, the Court should hold on *de novo* review that Hobbs Act robbery is *not* categorically an exact fit with §924(c)’s elements clause. With no qualifying “crime of violence” after *Mathis* and *Taylor*, the §924(c) counts in the indictment did not charge an “offense[] against

the United States” as required in 18 U.S.C. §3231. As such, the Court should hold the district court lacked jurisdiction to try or sentence the appellants on those counts. *See St. Hubert*, 909 F.3d at 343-44.

CONCLUSION

For the foregoing reasons, the Court should vacate the panel’s decision, rehear this case en banc, and direct the district court to dismiss the §924(c) counts predicated on Hobbs Act robbery.

Respectfully submitted,

HECTOR A. DOPICO
FEDERAL PUBLIC DEFENDER

s/Brenda G. Bryn
Brenda G. Bryn
Assistant Federal Public Defender
One E. Broward Blvd., Suite 1100
Fort Lauderdale, Florida 33301
Telephone No. (954) 356-74360
Brenda_Bryn@fd.org

CERTIFICATE OF COMPLIANCE

I CERTIFY that this pleading complies with the type-volume limitation and typeface requirements of FED. R. APP. P. 27(d)(2)(A), because it contains 3,890 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

This pleading also complies with the requirements of Fed. R. App. P. 32(a)(5) and (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point, Century Schoolbook.

s/Brenda G. Bryn
Brenda G. Bryn
Attorney for Appellant Solomon

CERTIFICATE OF SERVICE

I HEREBY certify that on this 5th day of June, 2025, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and sent four copies to the Clerk of the Court via third party commercial carrier for delivery within three days. I also certify that the foregoing document is being served this day via CM/ECF on Jay A. Yagoda, United States Attorney's Office, 99 N.E. 4th Street, Miami, Florida 33132.

s/Brenda G. Bryn
Brenda G. Bryn

APPENDIX A

[PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-11488

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CURTIS SOLOMON,
JAMAUR LEWIS,
DEVON CHANCE,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:08-cr-60090-DMM-1

Before GRANT, LAGOA, and WILSON, Circuit Judges.

LAGOA, Circuit Judge:

Curtis Solomon, Devin Chance, and Jamaur Lewis were convicted of one count of Hobbs Act conspiracy; multiple counts of Hobbs Act Robbery; and multiple counts of carrying a firearm during a crime of violence, each predicated on one of their Hobbs Act convictions. On collateral review, their convictions for conspiracy to carry a firearm during a crime of violence, predicated on their Hobbs Act conspiracy count, were vacated in light of *Johnson v. United States*, 576 U.S. 591 (2015)—by this Court, as to Solomon and Chance, and by the district court as to Lewis. All three appellants requested *de novo* resentencing, but the district court declined without explanation and entered amended judgments that omitted the vacated counts and reimposed the same terms of imprisonment on the remaining counts.

The appellants now appeal their amended judgments for two reasons. First, they argue that the district court erred by failing to explain why it denied their requests for *de novo* resentencing. Second, they contend that Hobbs Act robbery is not a crime of violence and therefore cannot be a predicate crime to support the corresponding firearm charges. After careful review, and with the benefit of oral argument, we affirm in part and dismiss in part for lack of jurisdiction.

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I. FACTUAL & PROCEDURAL BACKGROUND

A. The Appellants' Convictions and Sentences

We briefly recount the relevant facts to the issues on appeal. In 2008, a federal grand jury charged Solomon, Chance, and Lewis in a 36-count second superseding indictment related to a series of armed robberies of businesses from late 2007 to early 2008. Count 1 charged conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a). Count 2 charged conspiracy to carry a firearm during a crime of violence, in violation of 18 U.S.C. § 924(o), predicated on Count 1. Counts 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35 alleged completed Hobbs Act robberies, in violation of 18 U.S.C. §§ 1951(a) and 2. Counts 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 26, 28, 30, 32, 34, and 36 charged the appellants with carrying a firearm during a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1) and 2, each count predicated on a corresponding count of Hobbs Act robbery.¹ The appellants proceeded to trial, at which the jury found them guilty of all but two counts.

Before sentencing, Solomon filed a memorandum challenging the application of § 924(c)(1)'s stacking rule² to his case. He

¹ Solomon was charged in all 36 counts. Chance was charged in Counts 1, 2 and 17–36. Lewis was charged in Counts 1, 2, 9, 10, and 13–24. Before trial, the government dismissed Counts 17–22 as to Chance and Counts 21 and 22 as to Lewis.

² “In the case of a . . . [subsequent] conviction under this subsection . . . , the person shall . . . be sentenced to a term of imprisonment of not less than 25 years; and . . . no term of imprisonment imposed . . . under this subsection shall run concurrently with any other . . . term of imprisonment imposed for

acknowledged that his challenge was contrary to (unidentified) binding precedent from the Supreme Court. However, he asserted that the Supreme Court's holding was erroneous because Congress's original intent was for the stacking rule to apply only to recidivists with prior finalized convictions, not to defendants like him who were convicted of multiple § 924(c) charges stemming from one indictment. Solomon asked the district court to consider a proposed Congressional bill that would amend § 924(c)'s stacking rule to this effect. On that basis, he asked the district court to forgo the mandatory 25-year stacked, consecutive sentences and "instead impose a reasonable sentence pursuant to 18 U.S.C. § 3553." Chance and Lewis adopted Solomon's arguments on the stacking rule.

At the sentencing hearing, the district court stated that it did not "have any authority to deal with" the stacking rule and, later in the hearing, noted its "hope [that] Congress looks at" the stacking issue to "figure out a better way to craft the statute" because the sentences here were "just unrealistic in terms of life times."

The district court sentenced Solomon to 4,641 months' imprisonment. The term consisted of 57 months for each of the Hobbs Act counts, to be served concurrently; 84 months for the first § 924(c) firearm count, to be served consecutive to the Hobbs Act counts; and 300 months as to each of the remaining § 924(c) firearm counts, to be served consecutive to the other counts—under the stacking rule—all followed by 5 years of supervised release.

the crime of violence." 18 U.S.C. § 924(c)(1)(C)–(D) (2006) (the "stacking rule").

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The district court explained its view that “[b]ased on the consecutive sentences . . . the low end of the advisory guidelines is adequate” for the concurrent Hobbs Act robbery sentences.

The district court then sentenced Chance to 1,794 months’ imprisonment. His term consisted of 210 months for each of the Hobbs Act counts, to be served concurrently; 84 months for the first § 924(c) firearm count, to be served consecutive to the Hobbs Act counts; and 300 months for each of the remaining § 924(c) firearm counts, to be served consecutively to all other counts—followed by 5 years of supervised release.

Lastly, the district court sentenced Lewis to 1,347 months’ imprisonment. Lewis’s sentence consisted of 63 months for each of the Hobbs Act counts, to be served concurrently; 84 months for the first § 924(c) firearm count, to be served consecutively to the Hobbs Act counts; and 300 months for each of the remaining § 924(c) firearm counts, to be served consecutively to all other counts—followed by 5 years of supervised release. As with Solomon, the district court noted that the 63-month concurrent sentences for the Hobbs Act robbery counts were at the low end of the advisory guidelines and found this to be “adequate in terms of the lengthy consecutive sentences.” The district court also stated its belief that “even in view of the consecutive sentences,” it would not “be appropriate to go below the advisory guidelines with respect to [the concurrent] counts.”

On direct appeal, we affirmed all three appellants’ sentences, and the Supreme Court later denied their petitions for writs of

certiorari. *United States v. Lewis*, 433 F. App'x 844 (11th Cir. 2011), *cert. denied* 565 U.S. 1069 (2011).

B. The Appellants' Collateral Proceedings

The appellants then filed *pro se* motions to vacate under § 2255, all of which were denied and not appealed. A few years later, Solomon, Chance, and Lewis each sought leave to file a successive § 2255 motion. The appellants argued that, after the Supreme Court decided *Johnson v. United States*, 576 U.S. 591 (2015), neither Hobbs Act robbery nor conspiracy to commit Hobbs Act robbery qualified as a crime of violence under § 924(c)'s elements clause or residual clause.³ We denied Lewis's request, but granted Chance's and Solomon's in part, acknowledging that conspiracy to commit Hobbs Act robbery may no longer qualify as a crime of violence under § 924(c) post-*Johnson*. *In re: Jamaur Lewis*, No. 16-12874 slip op. (11th Cir. June 22, 2016); *In re: Curtis Solomon*, No. 16-13456 slip op. (11th Cir. July 8, 2016); *In re: Devon Chance*, No. 16-13918 slip op. (11th Cir. Aug. 2, 2016). We thus allowed Solomon and Chance to challenge their Count 2 convictions, which were predicated on the Hobbs Act conspiracy charged in Count 1. *Solomon*, slip op. at 7–8; *Chance*, slip op. at 3–4.⁴ The district court

³ In *Johnson*, the Court held that ACCA's residual clause was void for vagueness and violated the constitutional guarantee of due process. 576 U.S. at 606. In *Welch v. United States*, 578 U.S. 120 (2016), the Court held that *Johnson* was a substantive decision and thus applied retroactively to cases on collateral review. *Id.* at 130.

⁴ We also permitted Chance to challenge his other convictions because the cumulative fines imposed on each count supported a "pecuniary interest in

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ultimately denied the § 2255 motions but granted both Solomon and Chance certificates of appealability as to whether *Johnson* applies to the residual clause in § 924(c)(3)(B). On appeal, we affirmed the district court's denial of both motions to vacate the Count 2 convictions. *Solomon v. United States*, 911 F.3d 1356, 1361 (11th Cir. 2019); *Chance v. United States*, 769 F. App'x 893, 895–96 (11th Cir. 2019).

After all this collateral litigation, the Supreme Court held that § 924(c)'s residual clause is unconstitutionally vague. See *United States v. Davis*, 588 U.S. 445, 470 (2019). Accordingly, the Supreme Court granted both Solomon and Chance's petitions for writs of certiorari, vacated our prior opinions that affirmed the denials of their successive § 2255 motions, and remanded for us to reconsider in light of *Davis*. See *Solomon v. United States*, 140 S. Ct. 103 (2019); *Chance v. United States*, 140 S. Ct. 556 (2019).

On remand, we held that Solomon and Chance's § 924(o) convictions, charged in Count 2 of the indictment, were invalid because they were predicated on conspiracy to commit Hobbs Act robbery—and Hobbs Act conspiracy no longer qualified as a crime of violence under § 924(c)'s elements clause. *Solomon v. United States*, 796 F. App'x 681, 684 (11th Cir. 2020); *Chance v. United States*, 791 F. App'x 165, 167 (11th Cir. 2020).

securing review of his conviction on each of the counts.” *Chance*, slip op. at 5–6 (quoting *Pinkus v. United States*, 436 U.S. 293, 305 (1978)).

In Solomon’s case, we reversed “the district court’s denial of Solomon’s § 2255 motion as to his claim challenging his Count 2 conviction and issue[d] [a] limited remand for the district court to vacate Solomon’s conviction and sentence on Count 2.” *Solomon*, 796 F. App’x at 684. In Chance’s case, we “reverse[d] the district court’s denial of Chance’s § 2255 motion as to Count 2 only, vacate[d] Chance’s conviction on Count 2, and remand[ed] for resentencing in accordance with [our] opinion.” *Chance*, 791 F. App’x at 167.

Solomon and Chance each moved for an order on the mandate and asked the district court to resentence them *de novo* on all remaining counts, under § 2255(b) and the sentencing package doctrine. They based their requests for new sentences on two grounds: First, they pointed to *Dean v. United States*, 581 U.S. 62 (2017), in which the Supreme Court clarified that a district court may consider the severity of § 924(c)’s stacking rule in order to impose a “just sentence” on the predicate, concurrent counts. Second, they asserted that in § 403 of the First Step Act of 2018,⁵ Congress amended § 924(c) to clarify that the consecutive 25-year sentences provided for were only intended to punish recidivists with “second or subsequent conviction[s],” not to punish defendants who were convicted of multiple firearm offenses at the same time. In light of this clarification, they contended, they should receive

⁵ First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, § 403 (“First Step Act”).

consecutive terms of 7 years, rather than 25 years, on each of their unvacated § 924(c) convictions.⁶

Lewis’s collateral proceedings played out a little differently. After *Davis*, we granted in part Lewis’s request to file a third successive § 2255 motion challenging his Count 2 conviction. Lewis filed his motion, asking the district court to vacate his § 924(o) conviction and resentence him *de novo* on his remaining counts of conviction. The district court granted Lewis’s motion in part, vacating his conviction and sentence as to Count 2. In the order, the district court noted the government’s opposition to Lewis’s request for full resentencing and stated that it was “more appropriate to address this and any other issue related to [Lewis’s] resentencing in the underlying criminal case.” In a footnote, the district court noted that Lewis’s case was “intertwined” with Solomon’s and Chance’s cases and stated that it would “address any other resentencing issues for those defendants in their underlying criminal case.”⁷

In all three cases—after a two-year delay and no further comment on the appellants’ requests for *de novo* resentencing—the district court entered amended judgments that removed the Count

⁶ During the pendency of this appeal, this Court issued a published opinion in *United States v. Hernandez*, 107 F.4th 965 (11th Cir. 2024), holding that where an appellant was originally sentenced “before the First Step Act’s passage in 2018 but [the sentence was] thereafter vacated . . . [the appellant] is not entitled to the benefit of § 403(a)’s new stacking rule.” *Id.* at 968.

⁷ The district court entered a similar order in Solomon’s civil case, acknowledging his request for *de novo* resentencing and explaining that it would be “more appropriate to address these issues in the underlying criminal case.”

2 convictions and reimposed the same sentences on all other counts.

Solomon, Chance, and Lewis timely appealed the amended judgments.

II. STANDARDS OF REVIEW

We review our appellate jurisdiction *de novo*. *Thomas v. Phoebe Putney Health Sys., Inc.*, 972 F.3d 1195, 1200 (11th Cir. 2020).

In an appeal from a proceeding on a motion to vacate, set aside, or correct a sentence, we review legal issues *de novo*. *United States v. Brown*, 879 F.3d 1231, 1234 (11th Cir. 2018). We review a district court’s choice of a § 2255 remedy for an abuse of discretion. *Id.* at 1235.

Whether a prior conviction is a “crime of violence” for § 924(c) purposes is a conclusion of law reviewed *de novo*. *United States v. Bates*, 960 F.3d 1278, 1285 (11th Cir. 2020).

III. ANALYSIS

The appellants raise two issues on appeal.⁸ First, they contend that the district court erred in failing to explain why it declined

⁸ As a preliminary matter, the government disputes the propriety of Chance and Lewis adopting Solomon’s briefing. In a case involving more than one appellant or appellee, “any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another’s brief.” Fed. R. App. P. 28(i). In some fact-specific circumstances, however, adoption of a co-appellant’s brief will not suffice. *See, e.g., United States v. Khoury*, 901 F.2d 948, 963 nn.13, 14 (11th Cir. 1990). We conclude that the issues we reach below involve legal principles that are not so fact-specific as to preclude adopted

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to resentence them *de novo* (Issue 1). Second, they assert that the district court erred by finding that completed Hobbs Act robbery qualifies as a § 924(c) crime of violence after *United States v. Taylor*, 596 U.S. 845 (2022) (Issue 2). We first discuss our jurisdiction and then address the merits of the second issue on appeal.

A. Our Jurisdiction

In a supplemental notice filed before oral argument, the government argued for the first time that we lack jurisdiction to consider either of the appellants' issues on appeal. The appellants, in response, conceded that we lack jurisdiction to hear the resentencing challenge but maintained that we have jurisdiction to hear the Hobbs Act robbery challenge. Because "subject matter jurisdiction cannot be waived or conferred on a court by consent of the parties," *Eagerton v. Valuations, Inc.*, 698 F.2d 1115, 1118 (11th Cir. 1983), we examine our jurisdiction anew as to both issues.

First, the government argues that we lack jurisdiction to address the appellants' challenge to "the district court's refusal to conduct a full *de novo* resentencing, or, at a minimum, its purported failure to sufficiently explain its reasoning for refusing to do so." We agree.

In *United States v. Cody*, this Court held that, "until a certificate of appealability has been issued[,] federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas

briefing and thus we consider Solomon's briefing to speak for all three appellants, supplemented by their additional submissions.

petitioners.” 998 F.3d 912, 915 (11th Cir. 2021) (alteration adopted and quoting *Miller-El v. Cockrell*, 527 U.S. 322, 336 (2003)). This “requirement applies not only to an appeal from the final order in a proceeding under section 2255 but also to an appeal from an amended criminal judgment, to the extent it raises section 2255 issues.” *Id.* In this case, as both parties acknowledge, no court has issued a COA on the question of whether the district court erred when it refused to resentence the appellants *de novo*, so we lack jurisdiction to consider Issue 1.

To be sure, the appellants do not, here, appeal the merits of their § 2255 petitions but, instead, focus on the narrower issue of whether the district court erred in *failing to explain why* it denied *de novo* resentencing as a remedy under § 2255. We find this to be a distinction without a difference. In *Cody*, we explained that our jurisdiction over the appeal turned on whether the defendant was challenging “aspects of his proceeding” under § 2255 (as opposed to errors in his new sentence). 998 F.3d at 915. And we concluded that the district court’s “choice of statutory remedy”—there, the “district court’s choice between correcting a sentence and performing a full resentencing”—was part of that proceeding and could not be challenged without a COA. *Id.* Whether our appellants’ resentencing challenge is framed as a challenge to the court’s choice of remedy or to the reasoning behind that choice of remedy, it plainly concerns the appellants’ “proceedings” under § 2255. In other words, the explanation for a district court’s choice of remedy is no less an “aspect[] of the proceeding” than the ultimate decision.

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Without a COA on the relevant question, we lack jurisdiction to consider the first issue raised on appeal.

Second, the government contends that we lack subject matter jurisdiction over the appellants' challenge to their convictions under § 924(c). In the government's view, the appellants' *Taylor* argument amounts to an unauthorized second or successive § 2255 petition—and we, therefore, lack jurisdiction to entertain it. But we understand the procedural posture differently. The appellants' *Taylor* challenge to their robbery-related firearms convictions arises as a direct appeal of their amended judgments and thus no COA was required. *See Cody*, 998 F.3d at 915 (“[D]irect appeal matter[s]” that relate to the criminal case and “arise after the proceeding under section 2255 . . . do not require a certificate of appealability.”); *United States v. Futch*, 518 F.3d 887, 895 (11th Cir. 2008) (“Futch also timely appealed his new 215-month sentence. Because that part of his appeal relates to his criminal case and is a direct appeal matter, Futch did not need to obtain a COA, and we have jurisdiction to address this issue.”).

We take the government's point that, by launching a new attack on the legality of their convictions, the appellants come close to crossing the line of “appeal[ing] the denial of [their] section 2255 motion[s] as to [their] conviction[s],” which would indeed be “part of [their] section 2255 proceedings,” falling beyond our jurisdiction in the absence of a COA. *Cody*, 998 F.3d at 915 (alterations adopted and quoting *Futch*, 518 F.3d at 895). But here, the appellants are not appealing the denial of their § 2255 motions—which, as far as

the Hobbs Act robbery issue, depended only on *Johnson v. United States*, 576 U.S. 591 (2015). Instead, they raise new arguments about the definition of “crime of violence” under *Taylor*, which the Supreme Court issued only after the district court entered the amended judgments. We thus conclude that the appellants’ second issue—whether Hobbs Act robbery is a crime of violence under *Taylor*—is properly understood as a direct appellate issue in their criminal case, arising after the § 2255 proceedings, and not an end-run appeal of the unsuccessful portions of their § 2255 motions. See *Cody*, 998 F.3d at 915. And so, we proceed to the merits on Issue 2.

B. Hobbs Act Robbery is a Crime of Violence

The appellants contend that Hobbs Act robbery is not a “crime of violence” under § 924(c)(3)(A), creating an unwaivable jurisdictional defect in their § 924(c) convictions predicated on those robberies. They say this outcome is the necessary result of the Supreme Court’s opinion in *Taylor*, in which the Court held that attempted Hobbs Act robbery is not a crime of violence because it does not “always require[] the government to prove—beyond a reasonable doubt, as an element of its case—the use, attempted use, or threatened use of force.” 596 U.S. at 850. But *Taylor* says nothing of the completed crime of Hobbs Act robbery and thus does not disturb our precedent holding that Hobbs Act robbery is a crime of violence. See *In re Saint Fleur*, 824 F.3d 1337, 1340 (11th Cir. 2016) (second or successive context) (“Hobbs Act robbery . . . clearly 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) (“[A]iding and abetting a Hobbs Act robbery . . . clearly qualifies as a ‘crime of violence’ under the use-of-force clause in § 924(c)(3)(A).”); *see also United States v. Wiley*, 78 F.4th 1355, 1363–64 (11th Cir. 2023) (“Because Hobbs Act robbery itself qualifies as a crime of violence under § 924(c)’s elements clause, so does aiding and abetting Hobbs Act robbery.”).

Section 924(c) provides for a mandatory consecutive sentence for any defendant who uses a firearm during a crime of violence. 18 U.S.C. § 924(c)(1). Section 924(c)’s elements clause defines a “crime of violence” as a felony that “has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” § 924(c)(3)(A).

The Hobbs Act robbery statute punishes anyone who “obstructs . . . commerce . . . , by robbery . . . or threatens physical violence to any person or property in furtherance of a plan . . . to do anything in violation of this section.” § 1951(a). “Robbery” is defined as “the unlawful . . . 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 the person or property of . . . anyone in his company at the time of the . . . obtaining.” § 1951(b)(1).

Under our prior-panel-precedent rule, “a prior panel’s holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this [C]ourt sitting *en banc*.” *United States v. Archer*, 531

F.3d 1347, 1352 (11th Cir. 2008). “To constitute an ‘overruling’ for the purposes of this prior panel precedent rule, the Supreme Court decision ‘must be clearly on point.’” *United States v. Kaley*, 579 F.3d 1246, 1255 (11th Cir. 2009) (quoting *Garrett v. Univ. of Ala. at Birmingham Bd. of Trs.*, 344 F.3d 1288, 1292 (11th Cir. 2003)). “In addition to being squarely on point, the doctrine of adherence to prior precedent also mandates that the intervening Supreme Court case actually abrogate or directly conflict with, as opposed to merely weaken, the holding of the prior panel.” *Id.* at 1255. In other words, “[e]ven if the reasoning of an intervening high court decision is at odds with a prior appellate court decision, that does not provide the appellate court with a basis for departing from its prior decision.” *United States v. Vega-Castillo*, 540 F.3d 1235, 1237 (11th Cir. 2008).

First, we turn to *Taylor*: in that case, the Supreme Court resolved a circuit split and held that attempted Hobbs Act robbery is not a predicate crime of violence under § 924(c)(3)(A)’s elements clause. 596 U.S. at 852. As the outset, the Court reiterated that when taking a categorical approach, “[t]he only relevant question is whether the federal felony at issue always requires the government to prove—beyond a reasonable doubt, as an element of its case—the use, attempted use, or threatened use of force.” *Id.* at 850. From there, the Court turned to the elements of a *completed* Hobbs Act robbery: “unlawful taking or obtaining of personal property from the person . . . of another, against his will, by means of actual or threatened force.” *Id.* (quoting § 1951(b)). To prove an *attempted* Hobbs Act robbery, therefore, the government must

prove “two things: (1) [t]he defendant intended to unlawfully take or obtain personal property by means of actual or threatened force, and (2) he completed a ‘substantial step’ toward that end.” *Id.* at 851. That second prong—the “substantial step”—became the pivotal question. And, of it, the Court determined that “whatever a substantial step requires, it does not require the government to prove that the defendant used, attempted to use, or even threatened to use force against another person or his property.” *Id.* “Simply put,” the Court concluded, “no element of attempted Hobbs Act robbery requires proof that the defendant used, attempted to use, or threatened to use force.” *Id.* at 852. Accordingly, Taylor’s § 924(c)(3)(A) conviction could not stand because the underlying offense—attempted Hobbs Act robbery—was not a categorical crime of violence. *Id.* at 860.

Less than a year ago—and after *Taylor*—we concluded that aiding and abetting a completed Hobbs Act robbery constitutes a crime of violence. *Wiley*, 78 F.4th at 1363–64. In saying so, we relied on (1) our precedent in *Colon*, 826 F.3d at 1305, holding that aiding and abetting a completed Hobbs Act robbery is a crime of violence; and (2) our precedent in *Saint Fleur*, 824 F.3d at 1341, holding that completed Hobbs Act robbery is a crime of violence. *See Wiley*, 78 F.4th at 1363–64. We recognized and reaffirmed our prior precedents, stating that “Hobbs Act robbery itself qualifies as a crime of violence” and thus held the same to be true of aiding and

abetting Hobbs Act robbery.⁹ *Id.* at 1363–64. And, notably, we reached this conclusion over the appellant’s contention that *Taylor* compelled a different outcome. *Id.* at 1364. Because Wiley argued that *Taylor* disturbed our prior precedents, we examined that case and recounted how, in *Taylor*, the Court “distinguished between the *completed* offense—which requires the government to prove the use, attempted use, or threatened use of force—and an *attempt* to complete that offense” for which “the government need only show that the defendant intended to complete the offense and performed a ‘substantial step’ toward that end.” *Id.* (quoting *Taylor*, 596 U.S. at 851). Attempt, however, is an entirely different creature from aiding and abetting, which, as we explained, requires the government to prove that all of the elements of the completed crime were satisfied. *Id.* We concluded that *Taylor* therefore did not pass on the question of aiding and abetting a completed Hobbs Act robbery. *Id.* at 1365.

Several of our sister circuits have reached the same result after *Taylor*, concluding that its reach is limited to the inchoate

⁹ We have previously held—both before and after *Taylor*—that “[o]ne who aids and abets a crime of violence ‘necessarily commits a crime that has as an element the use, attempted use, or threatened use of physical force against the person or property of another.’” *Alvarado-Linares v. United States*, 44 F.4th 1334, 1348 (11th Cir. 2022) (quoting *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016)). We have reached this conclusion because aiding and abetting “is not a separate federal crime, but rather an alternative charge that permits one to be found guilty as a principal for aiding or procuring someone else to commit the offense.” *Id.* (quoting *United States v. Sosa*, 777 F.3d 1279, 1292 (11th Cir. 2015)).

“attempt” offense. *See, e.g., United States v. Worthen*, 60 F.4th 1066, 1070 (7th Cir. 2023) (“*Taylor* hinged on the fact that attempt is a separate crime from the underlying offense, with the distinct element of a ‘substantial step.’” (internal quotation marks omitted)); *United States v. Draven*, 77 F.4th 307, 318 (4th Cir. 2023) (“[T]he Supreme Court did not explicitly instruct on *Taylor*’s reach beyond the purview of *attempted* Hobbs Act robbery.”); *see also United States v. Stoney*, 62 F.4th 108, 113 (3d Cir. 2023) (“Prior to the *Taylor* decision, this Court held that a completed Hobbs Act robbery is a valid § 924(c) predicate That finding was also unanimous among our sister Circuits. *Taylor* does not change our position.”).

In sum, we concluded in *Wiley* that “*Taylor* did not disturb our holding [in *Saint Fleur*] that completed Hobbs Act robbery is a crime of violence.” 78 F.4th at 1365. Under our prior-panel-precedent rule, we may not diverge from that position here. *See Archer*, 531 F.3d at 1352.

The appellants nonetheless contend that *Wiley* is inapposite. In particular, the appellants argue that *Wiley* addressed only aiding and abetting, which is not the charge at issue. That is irrelevant, since aiding and abetting a Hobbs Act robbery is a crime of violence because a completed Hobbs Act robbery is, itself, a crime of violence. *Wiley*, 78 F.4th at 1363–64 (“Because Hobbs Act robbery itself qualifies as a crime of violence under § 924(c)’s elements clause, so does aiding and abetting Hobbs Act robbery.”); *cf. Alvarado-Linares*, 44 F.4th at 1348 (“[A]iding and abetting is not a separate federal crime, but rather an alternative charge that permits one to be

found guilty as a principal for aiding or procuring someone else to commit the offense.” (internal quotations omitted)).

Second, the appellants say *Wiley* cannot control because this appeal raises at least three new arguments that we did not consider in *Wiley*. First, they say *Wiley* did not argue—as the appellants do now—that *Taylor* abrogated *Colon*. Second, they say *Taylor* explicitly rejected the “realistic probability” test underpinning our decision in *United States v. St. Hubert*, 909 F.3d 335 (11th Cir. 2018). And third, they say that *Wiley* did not consider the language of our pattern jury instructions, which they contend supports their challenge. They assert that these are “questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, [and which] are not to be considered as having been so decided as to constitute precedents,” *United States v. Jackson*, 55 F.4th 846, 853 (11th Cir. 2022) (quoting *Webster v. Fall*, 226 U.S. 507, 511 (1925) (alteration adopted)), and that we must consider them anew. But we have “categorically rejected an overlooked reason or argument exception to the prior-panel-precedent rule.” *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015). And these two principles work in harmony: under *Webster* and *Jackson*, we will not read precedent to have resolved an *issue* that was not before the court, but *Lambrix* focuses more narrowly on *arguments*. What the appellants ask of us here—to avoid *Wiley*’s resolution of an issue, based on unraised arguments—is foreclosed by *Lambrix* and does not implicate *Jackson* and *Webster*.

In any event, each of these other arguments about *Taylor* fails to persuade because we held plainly in *Wiley* that “*Taylor* did not disturb our holding that completed Hobbs Act robbery is a crime of violence,” 78 F.4th at 1365, and we stand by that conclusion until the Supreme Court or this Court *en banc* says otherwise, *see Kaley*, 579 F.3d at 1255. Because *Wiley*—which we issued after the briefing here was complete—resolves the issue, we need not wade into the arguments first raised in the papers. That said, we consider and reject the appellants’ original contentions in turn.

First, the appellants contend that Hobbs Act robbery is not a crime of violence after *Taylor* because *Taylor* abrogated our previous precedent in *St. Hubert*. This is true: *Taylor* expressly abrogated *St. Hubert*. But our subsequent publication of *Wiley* renders that point without merit.

Second, and relatedly, the appellants contend that *Taylor* rejected the “realistic probability” methodology that we applied in *St. Hubert*. Again, true. But in *Saint Fleur*, we held that “the elements of . . . § 1951 robbery, as replicated in [Saint Fleur’s] indictment, require the use, attempted use, or threatened use of physical force,” 824 F.3d at 1341, and we reiterated the same in *Wiley*, 78 F.4th at 1363–64. *Taylor*’s rejection of *St. Hubert*’s “realistic probability” methodology, therefore, does not advance the appellants’ cause.

Third, the appellants say that the Hobbs Act statute is indivisible as to robbery and attempted robbery and that, because attempted Hobbs Act robbery does not require proof that the defendant used, attempted to use, or threatened to use force, neither does

robbery. Not so. The statute lists the completed acts and the attempt in the disjunctive, indicating that they are elements in the alternative. See *Mathis v. United States*, 579 U.S. 500, 505 (2016). And we have consistently treated the attempt and the completed crime as separate offenses. See, e.g., *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.”).

Fourth, the appellants suggest we should ignore *Saint Fleur* because it arose in a collateral context without true adversarial briefing. This argument is unavailing as “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.” See *Lambrix*, 776 F.3d at 794

Fifth, the appellants point to our pattern jury instructions, under which they argue the least culpable conduct to sustain a conviction is taking personal property against the victim’s will by threatening the victim’s intangible property e.g., threat of financial harm. But jury instructions are not binding law, *United States v. Carter*, 776 F.3d 1309, 1324 (11th Cir. 2015), and our cases—both before and after *Taylor*—say that Hobbs Act robbery cannot be accomplished without the use, attempted use, or threatened use of force.

Because we conclude that none of the appellants’ arguments move the needle and *Wiley* controls—Hobbs Act robbery remains

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a crime of violence—there is no jurisdictional defect in the appellants’ § 924(c) convictions arising from those Hobbs Act robberies.

IV. CONCLUSION

For the foregoing reasons, we affirm the appellants’ § 924(c) convictions arising from their Hobbs Act robberies. However, the appeal is dismissed in part for lack of jurisdiction to the extent that it challenges the district court’s failure to explain why it denied the appellants’ requests for *de novo* resentencing.

AFFIRMED in part and DISMISSED in part for lack of jurisdiction.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 16-13974-J; 16-14022-J

IN RE: MARCKSON SAINT FLEUR,

Petitioner.

Application for Leave to File a Second or Successive
Motion to Vacate, Set Aside,
or Correct Sentence, 28 U.S.C. § 2255(h)

Before: HULL, MARCUS, and MARTIN, Circuit Judges.

BY THE PANEL:

In these consolidated proceedings pursuant to 28 U.S.C. §§ 2255(h) and 2244(b)(3)(A), Marckson Saint Fleur has filed two applications—one *pro se* and the other through counsel—seeking an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct his federal sentence, 28 U.S.C. § 2255. Such authorization may be granted only if we certify that the second or successive motion contains a claim involving:

(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.

28 U.S.C. § 2255(h). “The 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.” *Id.* § 2244(b)(3)(C); *see also* *Jordan v. Sec’y, Dep’t of Corr.*, 485 F.3d 1351, 1357-58 (11th Cir. 2007) (explaining that our determination that an applicant has made a *prima facie* showing that the statutory criteria have been met is simply a threshold determination).

In his two applications, which are identical in substance, Saint Fleur indicates that he wishes to raise one claim in a second or successive § 2255 motion. Saint Fleur asserts that his claim relies upon the new rule of constitutional law announced in *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015), and made retroactively applicable to cases on collateral review by *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257, ___ L. Ed. 2d ___ (2016). Specifically, he asserts that his consecutive sentence for using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c), must be set aside in light of *Johnson* and *Welch*.

I. THE ACCA

A felon in possession of a firearm who has at least three prior convictions “for a violent felony or a serious drug offense, or both, committed on occasions different from one another,” is subject to an enhanced statutory penalty under the ACCA. 18 U.S.C. § 924(e)(1). The ACCA defines the term “violent felony” as any crime punishable by a term of imprisonment exceeding one year that:

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

Id. § 924(e)(2)(B). The first prong of this definition is sometimes referred to as the “elements clause,” while the second prong contains the “enumerated crimes” and, finally, what is commonly called the “residual clause.” *United States v. Owens*, 672 F.3d 966, 968 (11th Cir. 2012).

II. *JOHNSON AND WELCH*

On June 26, 2015, the Supreme Court in *Johnson* held that the residual clause of the ACCA is unconstitutionally vague. *Johnson*, 576 U.S. at ___, ___, 135 S. Ct. at 2557-58, 2563. The Supreme Court clarified that, in holding that the residual clause is void, it did not call into question the application of the elements clause and the enumerated crimes clause of the ACCA’s definition of a violent felony. *Id.* at ___, 135 S. Ct. at 2563. On April 18, 2016, the Supreme Court held in *Welch* that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. *Welch*, 578 U.S. at ___, 136 S. Ct. at 1264-65.¹

In light of the Supreme Court’s holdings in *Johnson* and *Welch*, many federal prisoners now seek to make a *prima facie* showing that they previously were sentenced, at least in part, in reliance on the ACCA’s now-voided residual clause, and seek to file a second or successive § 2255 motion in the district court. However, merely alleging a basis that meets § 2255(h)’s requirements in the abstract only “represent[s] the minimum showing” necessary to file a successive § 2255 motion because, under § 2244(b)(3)(C), the applicant also must make “a *prima facie* showing that the application satisfies the requirements of this subsection.” *In re Holladay*, 331 F.3d 1169, 1173 (11th Cir. 2003). Accordingly, it is not enough for a federal prisoner to

¹Although the Supreme Court held that *Johnson*’s invalidation of the residual clause applied retroactively, the Supreme Court remanded *Welch*’s § 2255 proceedings to this Court to determine whether the district court’s denial of the § 2255 motion was correct “on other grounds,” noting that “the parties continue to dispute whether *Welch*’s strong-arm robbery conviction qualifies as a violent felony under the elements clause of the Act, which would make *Welch* eligible for a 15-year sentence regardless of *Johnson*.” *Welch*, 578 U.S. at ___, 136 S. Ct. at 1268.

merely cite *Johnson* as the basis for his claims; he also must make a *prima facie* showing that he was sentenced, at least in part, under the residual clause, and thus falls within the scope of the new substantive rule announced in *Johnson*. See, e.g., *id.*; see also 28 U.S.C. § 2244(b)(3)(C).

III. SAINT FLEUR'S CONVICTIONS AND SENTENCE

Saint Fleur pled guilty to committing the following two offenses, both of which were charged in the same Second Superseding Indictment: (1) one count of Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Count 4) and (2) one count of using, carrying, and discharging a firearm in furtherance of a crime of violence, that is the Hobbs Act robbery offense charged in Count 4 of the indictment, in violation of 18 U.S.C. § 924(c)(1)(A)(iii) (Count 5).² As to Count 4, the Hobbs Act robbery count, the district court sentenced Saint Fleur to 30 months' imprisonment. As to Count 5, the § 924(c) count, the district court sentenced Saint Fleur to a 120 months' imprisonment to run consecutive to the sentence imposed in Count 4.

IV. SAINT FLEUR'S PRIOR SUCCESSIVE § 2255 APPLICATION

On May 9, 2016, Saint Fleur filed in this Court an application seeking an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct his federal sentence, 28 U.S.C. § 2255. In that application, Saint Fleur, citing *Johnson* and *Welch*, sought to challenge the validity of his § 924(c) conviction. In a June 8, 2016 order, this Court

²Count 4 charged that Saint Fleur “did knowingly and unlawfully obstruct, delay and affect commerce . . . by means of robbery, as the term[] . . . ‘robbery’ [is] defined in Title 18, United States Code, Sections 1951(b)(1) and (b)(3), in that [Saint Fleur] did take United States currency from individuals . . . by means of actual and threatened force, violence, and fear of injury to said persons.”

Count 5 charged that Saint Fleur “did knowingly use, carry and discharge a firearm during and in relation to a crime of violence, and did possess a firearm in furtherance of a crime of violence, which is a felony prosecutable in a court of the United States, specifically, a violation of Title 18, United States Code, Section 1951(a), as set forth in Count[] . . . 4 of the Second Superseding Indictment.”

denied Saint Fleur’s application because his companion conviction for Hobbs Act robbery clearly qualifies as a “crime of violence” under the § 924(c)(3)(A) use-of-force clause without regard to the § 924(c)(3)(B) residual clause. *See In re Saint Fleur*, ___ F.3d ___, ___, No. 16-12299, 2016 U.S. App. LEXIS 10395, at *9-10 (11th Cir. June 8, 2016).

V. SECTION 2244(b)(1) and (b)(3)(E)

Because we have already denied Saint Fleur’s *Johnson* claim on the merits once, his subsequent challenge here is barred by statute. First, 28 U.S.C. § 2244(b)(1) provides that “[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application *shall* be dismissed.” 28 U.S.C. § 2244(b)(1) (emphasis added). We have held that “§ 2244(b)(1)’s mandate applies to applications for leave to file a second or successive § 2255 motion presenting the same claims we have already rejected on their merits in a previous application.” *In re Baptiste*, No. 16-13959, manuscript op. at 4 (11th Cir. July 13, 2016). As Saint Fleur continues to argue that *Johnson* invalidates his 924(c) sentences, his applications raise the same claim as before and we must dismiss them. *See id.* at 2, 4 (“[A] claim is the same where the basic gravamen of the argument is the same, even where new supporting evidence or legal arguments are added.”).

Second, § 2244(b)(3)(E) prohibits prisoners from filing motions for reconsideration of the denial of their successive applications. 28 U.S.C. § 2244(b)(3)(E). Saint Fleur argues in his instant applications that our prior June 8, 2016 order was wrong. However, under § 2244(b)(3)(E), we are barred from “permitting a prisoner to file what amounts to a motion for reconsideration under the guise of a separate and purportedly ‘new’ application when the new application is the same as the old one.” *In re Baptiste*, No. 16-13959, manuscript op. at 5.

VI. LAW OF THE CASE

Alternatively, even if we were not required by statute to deny Saint Fleur's second § 2255(h) application, the law-of-the-case doctrine would constrain us to do so. "Under the law-of-the-case doctrine, an appellate decision binds all subsequent proceedings in the same case." *In re Lambrix*, 776 F.3d 789, 793-94 (11th Cir. 2015) (quotation marks omitted). As we wrote in *Lambrix*, "We enforce this judge-made doctrine in the interests of efficiency, finality and consistency: failure to honor its commands can only result in chaos." *Id.* at 794. That said, the doctrine is not absolute. Indeed, we have recognized three exceptions to our ordinary rule where: "(1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to that issue, or (3) the prior appellate decision was clearly erroneous and would work manifest injustice." *Id.* at 793-94 (quotation marks omitted).

Saint Fleur has made no showing at all as to the first exception. The thrust of Saint Fleur's new applications appear to be that: (1) our decision that his Hobbs Act robbery conviction counts as a companion crime of violence under the § 924(c)(3)(A) use-of-force clause was clearly erroneous; and (2) this Court's decisions in *In re Pinder*, ___ F.3d ___, ___, No. 16-12084, 2016 U.S. App. LEXIS 10395 (11th Cir. June 1, 2016) and *In re Rogers*, ___ F.3d ___, ___, No. 16-12626, manuscript op. at 9 (11th Cir. June 17, 2016) are controlling authority that make our prior ruling wrong. Passing over whether this amounts to a petition for rehearing that would be prohibited under 28 U.S.C. § 2244(b)(3)(E), we read this as an attempt to meet the second and/or third exceptions to the law-of-the-case doctrine. Saint Fleur's arguments, however, fail.

Saint Fleur’s argument that *Pinder* and *Rogers* amount to controlling authority that makes our prior ruling wrong fails. See *In re Gordon*, ___ F.3d ___, ___, Nos. 16-13681-J & 16-13803-J, manuscript op. at 6-7 & n.4 (11th Cir. July 8, 2016) (concluding that *Saint Fleur* does not conflict with *Pinder*, rejecting the claim that under the prior panel precedent rule, *Pinder*, not *Saint Fleur*, controls the outcome of an applicant’s *Johnson*-based § 924(c) claim, and stating that “*Rogers* neither conflicts with our holding[] in *Saint Fleur* . . . , nor informs our analysis of *Johnson*-based § 924(c) claims.”).

Additionally, Saint Fleur has failed to show that our prior June 8, 2016 order was erroneous, much less that it was clearly erroneous at the time and would work a manifest injustice. For starters, our published June 8, 2016 order has not been abrogated or overruled by the Supreme Court or this Court sitting en banc. See *In re Lambrix*, 776 F.3d at 794 (stating that this Court’s prior-panel-precedent is binding “unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting en banc” (quotation marks omitted)). Accordingly, our June 8, 2016 order was not clearly erroneous.

Our concurring colleague wishes to revisit *de novo* the merits of Saint Fleur’s *Johnson* claim, which we cannot do. But even assuming *arguendo* that we could, it is clear that we correctly held that Saint Fleur’s Hobbs Act robbery conviction qualifies as a crime of violence under the § 924(c)(3)(A) use-of-force clause. Other circuits addressing the § 924(c) issue raised by Saint Fleur have concluded that Hobbs Act robbery qualifies as a crime of violence under the § 924(c)(3)(A) use-of-force clause. See *United States v. Mendez*, 992 F.2d 1488, 1491 (9th Cir. 1993) (concluding that Hobbs Act robbery “indisputably qualifies as a crime of violence” because § 1951(b)(1) contains an element of actual or threatened force, or violence); *United States v.*

Farmer, 73 F.3d 836, 842 (8th Cir. 1996) (“Hobbs Act robbery . . . has as an element the use, attempted use, or threatened use of physical force against the person of another.”). Indeed, as far as we can tell, no other circuit court case has held otherwise, and Saint Fleur and the concurrence cite to no such case.

Additionally, Saint Fleur and the concurrence’s focus on the “fear of injury” language contained in § 1951 is misplaced. This Court has held that similar language still satisfies the § 924(c)(3)(A) use-of-force clause. *See United States v. Moore*, 43 F.3d 568, 572-573 (11th Cir. 1994) (concluding, in the context of the federal carjacking statute, 18 U.S.C. § 2119, that “[t]aking or attempting to take by force and violence *or by intimidation* . . . encompasses the use, attempted use, or threatened use of physical force.” (emphasis added) (quotation marks omitted)). Other circuits have reached similar conclusions in the post-*Johnson* context. *See, e.g., United States v. McNeal*, 818 F.3d 141, 153 (4th Cir. 2016) (concluding that the federal armed bank robbery statute, 18 U.S.C. § 2113, qualifies as a “crime of violence” under the § 924(c)(3)(A) use-of-force clause because (1) bank robbery “by force and violence” requires the use of physical force, (2) bank robbery “by intimidation” requires the threatened use of physical force, and (3) “either of those alternatives includes an element that is the use, attempted use, or threatened use of physical force.”).

The concurrence also references *Johnson v. United States*, 559 U.S. 133, 130 S. Ct. 1265, 176 L. Ed. 2d 1 (2010) (“*Curtis Johnson*”), but that decision has no application to this case for two reasons. First, the Supreme Court in *Curtis Johnson* analyzed the meaning of “physical force” as used in the ACCA’s elements clause, not as used in the § 924(c)(3)(A) use-of-force clause. However, the ACCA’s elements clause only involves the use of physical force “against the person

of another,” while the § 924(c)(3)(A) use-of-force clause involves the use of physical force “against the person *or property* of another.” Compare 18 U.S.C. § 924(e)(2)(B)(i), with 18 U.S.C. § 924(c)(3)(A) (emphasis added). This material distinction renders *Curtis Johnson* inapposite, as the Supreme Court only defined “physical force” in the context of its use against a person, not property. Indeed, the Supreme Court’s definition of “physical force” as “force capable of causing physical pain or injury to another person” clearly has no application when considering the meaning of “physical force” as used against property. See *Curtis Johnson*, 559 U.S. at 140, 130 S. Ct. at 1271.

Second, in *Curtis Johnson*, the Supreme Court considered whether “the Florida felony offense of battery by actually and intentionally touching another person ha[d] as an element the *use* of physical force.” *Id.* at 135, 130 S. Ct. at 1268 (emphasis added) (quotation marks, alterations, and citations omitted). Here, however, we must consider whether the unlawful taking of property from another by “actual or threatened force, or violence, or fear of injury . . . to his person or property” has as an element “the use, *attempted use*, or *threatened use* of physical force against the person or property of another.” See 18 U.S.C. §§ 924(c)(3)(A) and 1951(a) (emphasis added). Because the Supreme Court in *Curtis Johnson* did not contemplate the meaning of “attempted use” and “threatened use” of physical force against the person or property of another, that decision has

little relevance to the issue before us.³

Finally, the concurrence and Saint Fleur’s citations to *Descamps v. United States*, 570 U.S. ___, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013) and *Mathis v. United States*, 579 U.S. ___, 136 S. Ct. 2243, 195 L. Ed. 2d 604 (2016)—in which the Supreme Court outlined its categorical methodology for determining whether a predicate state crime qualifies as a violent felony under the ACCA—are inapposite here. In *Gordon*, we concluded that the legal principles underlying ACCA cases do not apply in the § 924(c) context and explained why:

In ACCA cases . . . , the federal sentencing court must examine prior state court convictions, often from multiple state jurisdictions, to determine whether those convictions qualify as violent felonies for the purposes of applying a federal sentencing enhancement.

In contrast, in § 924(c) cases, the federal sentencing court and this Court examine whether a contemporaneous companion federal conviction, charged in the same federal indictment as the § 924(c) charge itself, qualifies as a crime of violence. As in *Gordon*’s case, the § 924(c) charge expressly identifies the companion crime of violence. Then, the federal sentencing judge either accepts a guilty plea of, or conducts a trial on, the § 924(c) charge and its companion crime of violence. This makes the determination of whether a defendant has made a prima facie case of a *Johnson*-based claim decidedly easier and clearer in § 924(c) cases.

Gordon, manuscript op. at n.4. Indeed, many of the reasons proffered by the Supreme Court for employing a categorical approach to state court convictions in ACCA cases simply do not apply in the § 924(c) context where the § 924(c) offense and its federal companion conviction are in the

³In *Curtis Johnson*, the Supreme Court relied, in part, on its previous precedent in *Leocal v. Ashcroft*, 543 U.S. 1, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004). In *Leocal*, the Supreme Court held that driving under the influence of alcohol and causing serious bodily injury, in violation of Fla. Stat. § 316.193(3)(c)(2), was not a crime of violence under 18 U.S.C. 16(a)’s use-of-force clause because the “use of physical force” implied intentional conduct, and the Florida offense could be committed by mere negligence. *Id.* at 11, 125 S. Ct. at 383-84. The Supreme Court specifically noted, “We do not deal here with an *attempted* or *threatened* use of force.” *Id.* at 8-9, 125 S. Ct. at 382.

same federal indictment, and both charges are before the same judge.⁴ *See Descamps*, 570 U.S. at ___, 533 S. Ct. at 2289 (noting the “daunting difficulties” of “expend[ing] resources [to] examin[e] (often aged) documents” and recognizing the inequity of a defendant’s non-objection to “superfluous factual allegations” in his state court proceedings that would “come back to haunt him in an ACCA sentencing 30 years in the future.”); *see also Mathis*, 579 U.S. at ___, 136 S. Ct. at 2252 (noting that the Sixth Amendment “prohibit[s] [the sentencing judge] . . . from making a disputed determination about ‘what the defendant and state judge must have understood as the factual basis of the prior plea’ or ‘what the jury in a prior trial must have accepted as the theory of the crime.’”). Accordingly, *Descamps* and *Mathis* do not apply to our previous June 8, 2016 order, let alone render that order clearly erroneous.⁵

VII. CONCLUSION

In short, where we have already denied an application for leave to file a second or successive motion under § 2255, we are required by statute and our caselaw to reject a subsequent application raising the same claim. Here, because Saint Fleur’s applications do no more than

⁴The concurrence incorrectly asserts that, under *United States v. McGuire*, 706 F.3d 1333 (11th Cir. 2013), this Court is bound to apply the same categorical approach used in ACCA cases to determine whether a conviction for Hobbs Act robbery qualifies as a crime of violence under § 924(c). For starters, the holding in *McGuire* is very narrow. *McGuire* did not involve a Hobbs Act robbery conviction, but a conviction for attempting to damage or disable an aircraft under 18 U.S.C. § 32(a)(1). If anything, *McGuire* illustrates that the § 924(c)(3)(A) use-of-force clause is satisfied by merely “an intentional act against another’s property.” *Id.* at 1338. In any event, *McGuire* merely requires that courts look to “the elements of the offense, and not the actual facts of [the defendant’s] conduct,” which is precisely what we did in our analysis of Saint Fleur’s applications.

⁵In any event, the decisions the concurrence mainly relies upon were all decided after Saint Fleur’s sentencing in 2011 and involve rules of statutory interpretation, not rules of constitutional law or constitutional rules made retroactive to Saint Fleur’s sentence.

restate his previous claim and argue that our prior order rejecting that claim was erroneous, his applications are DENIED.

MARTIN, Circuit Judge, concurring in judgment:

On May 9, 2016, Mr. Saint Fleur filed his initial pro se application seeking leave to raise a Johnson-based challenge to his § 924(c) conviction. I was part of the panel that considered Mr. Saint Fleur's application and concurred in its decision that his crime of Hobbs Act robbery "has as an element the use, attempted use, or threatened use of physical force." In re Saint Fleur, No. 16-12299-J, 2016 WL 3190539, at *3 (11th Cir. June 8, 2016). But I said at the time that I was "increasingly wary of deciding whether to grant leave to file a second or successive § 2255 petition based on a conclusion that the applicant's proposed claim will fail on the merits." Id. at *4 (Martin, J., concurring). As I explained:

Forgoing a detailed merits review makes sense because our decisions at this stage are typically based on nothing more than a form filled out by a prisoner. Without any briefing or other argument made by a lawyer, we are ill equipped to decide the merits of the claim. On top of that, we are expected to decide these applications within 30 days of their filing. Things are different in the district court. That court has the benefit of submissions from both sides, has access to the record, has an opportunity to inquire into the evidence, and usually has time to make and explain a decision about whether the petitioner's claim truly does meet the § 2244(b) requirements. Given those limitations, it would be much more prudent, I believe, to allow the District Court to decide the merits of these cases in the first instance. . . . While the merits of Mr. Saint Fleur's proposed claim seem easier than in some other cases, it is hard to be sure based on the limited record we have at this stage.

Id. at *4–*6 (citations omitted). Saint Fleur was decided within a month of the filing of a pro se application form filled out by a prisoner, and without the benefit of advocacy or argument from a lawyer. Given the benefit of more than thirty days to think about it, I have since realized that the issue that seemed easy in Saint Fleur wasn't so clear-cut after all. But now Mr. Saint Fleur has

lost his opportunity for review. And, the decision in his case remains binding precedent that has been used to deny countless applications.

The Saint Fleur panel held that Hobbs Act robbery qualifies as a crime of violence under § 924(c)'s elements clause without citing any caselaw or other authority on that crime. In our haste to rule on Mr. Saint Fleur's application, I overlooked the possibility that Hobbs Act robbery can be committed without any actual, attempted, or threatened use of force. For example, the Eleventh Circuit's pattern jury instructions show that a jury can convict a defendant of Hobbs Act robbery so long as it believes 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." 11th Cir. Pattern Jury Instructions 70.3 (emphasis added). This "causing the victim to fear harm" can include causing fear of "financial loss," which "includes . . . intangible rights that are a source or element of income or wealth." Id.; see also United States v. Local 560 of the Int'l Bhd. of Teamsters, 780 F.2d 267, 281 (3d Cir. 1986) (noting that "other circuits which have considered this question are unanimous in extending Hobbs Act to protect intangible as well as intangible property").

The Supreme Court has held that the term "physical force" as used in § 924(c)(3)(A) requires "violent force" which means "strong physical force" or force "capable of causing physical pain or injury to another person." Curtis Johnson v. United States, 559 U.S. 133, 139, 130 S. Ct. 1265, 1270 (2010). And years before that, the Supreme Court explained that the § 924(c)(3)(A) language's "emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes." Leocal v.

Ashcroft, 543 U.S. 1, 11, 125 S. Ct. 377, 383 (2004).¹ Causing someone to fear that they may lose their intangible property does not come close to meeting that definition. It is true, of course, that a particular defendant may use more “physical force” than that. But what matters is whether his crime “has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” 18 U.S.C. § 924(c)(3)(A) (emphasis added). Indeed, whether a crime is

within the ambit of 18 U.S.C. § 924(c) . . . is a question . . . we must answer “categorically”—that is, by reference to the elements of the offense, and not the actual facts of [the defendant]’ conduct. We employ this categorical approach because of the statute’s terms: It asks whether [the defendant] 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.

United States v. McGuire, 706 F.3d 1333, 1336 (11th Cir. 2013) (O’Connor, J.) (citation omitted) (emphasis in original).

If Hobbs Act robbery can be committed without “the use, attempted use, or threatened use of physical force,” then that crime obviously can’t have “as an element the use, attempted use, or threatened use of physical force.” It bears repeating that Hobbs Act robbery can be committed “by means of actual or threatened force, or violence, or fear of injury.” 18 U.S.C. § 1951(b)(1). Even though this language says Hobbs Act robbery can be committed either with violence or mere intimidation, “our inquiry can’t end with simply looking at whether the statute is written

¹ The majority points to United States v. Moore, 43 F.3d 568 (11th Cir. 1994), as holding that “[t]aking or attempting to take by force and violence or by intimidation . . . encompasses the use, attempted use, or threatened use of physical force.” Id. at 572–73. Even if that statement in Moore could be treated as a holding that “intimidation” meets § 924(c)(3)(A)’s “elements clause” definition, Moore was decided long before the Supreme Court’s Leocal and Curtis Johnson decision clarified the meaning of the word “force” in § 924(c)(3)(A). Mr. Saint Fleur was sentenced after both Leocal and Curtis Johnson.

disjunctively (with the word “or”). The text of a statute won’t always tell us if a statute is listing alternative means or definitions, rather than alternative elements.” United States v. Lockett, 810 F.3d 1262, 1268 (11th Cir. 2016).² When deciding whether a predicate conviction “has as an element” the “use of physical force” required by § 924(c),

The first task for a sentencing court faced with an alternatively phrased statute is [] to determine whether its listed items are elements or means. If they are elements, the court should do what we have previously approved: review the record materials to discover which of the enumerated alternatives played a part in the defendant's prior conviction, and then compare that element (along with all others) to those of the generic crime. But if instead they are means, the court has no call to decide which of the statutory alternatives was at issue in the earlier prosecution.

Mathis v. United States, No. 15-6092, 2016 WL 3434400, at *10 (U.S. June 23, 2016).

Mathis examined this distinction between elements and means in reference to a statute’s use of the word “burglary.” But this distinction may even be more significant for § 924(c)’s “elements clause.” The “elements clause” expressly requires a particular kind of “element”—the use, attempted use, or threatened use of physical force against the person or property of another. The law has long been clear that alternative means in a federal criminal statute are not alternative “elements.” See, e.g., Richardson v. United States, 526 U.S. 813, 817, 119 S. Ct. 1707, 1710 (1999) (explaining that “a jury in a federal criminal case cannot convict unless it unanimously

² Even when an indictment just repeats that statutory language but with the word “and” in lieu of “or,” “every federal circuit allows prosecutors” “to charge a defendant in the conjunctive (though the statute is framed in the disjunctive) and prove their case in the disjunctive.” United States v. Howard, 742 F.3d 1334, 1343 n.3 (11th Cir. 2014) (collecting cases). This is because “prosecutors usually are not required to select from multiple statutory phrases or alternative means a single one to include in an indictment or to prove at trial. When conducting a plea colloquy trial courts do not always focus on a selected phrase or alternative means in the information or indictment when accepting a defendant's guilty plea. Jury instructions often list all of the charged alternatives, and juries are rarely asked to specify in their verdict which of the alternatively charged means they unanimously found beyond a reasonable doubt.” Id. at 1343 n.3.

finds that the Government has proved each element,” but a “jury need not always decide unanimously . . . which of several possible means the defendant used to commit an element of the crime”). And again, whether a crime is “within the ambit of 18 U.S.C. § 924(c) . . . is a question . . . we must answer ‘categorically’—that is, by reference to the elements of the offense.” McGuire, 706 F.3d at 1336 (emphasis added).

The majority says that “many of the reasons proffered by the Supreme Court for employing a categorical approach to state court convictions in ACCA cases simply do not apply in the § 924(c) context.” Even if that is true, our precedent in McGuire requires us to use a categorical approach in § 924(c) cases. The majority says that I “incorrectly assert[] that, under [McGuire], this Court is bound to apply the same categorical approach” because “McGuire did not involve a Hobbs Act robbery conviction, but a conviction for attempting to damage or disable an aircraft.” McGuire did not say the categorical approach in § 924(c) cases is limited to the crime of attempting to damage or disable an aircraft. Rather, Justice O’Connor’s opinion for our court said:

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,” or that “by its nature, involves a substantial risk that physical force against the person or property of another may be used.” 18 U.S.C. § 924(c)(3)(A)–(B) (emphasis added).

706 F.3d at 1336–37. Mr. Saint Fleur’s case construes the same statutory terms that Justice O’Connor construed in McGuire. I see no legal basis for suddenly discarding our precedent in McGuire, at least until the Supreme Court tells us to.

If our decision on Mr. Saint Fleur’s first application was wrong (and I fear it might be), then his § 924(c) sentence may be unlawful. Then and now, all Mr. Saint Fleur asked is that we let the District Court look to see if his sentence is illegal. As I wrote in considering his first application:

The stakes in these cases are very high, since many of these applicants claim they are in prison beyond the lawful limit of their sentence. And the margin for error is very low, since the “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.” Federal judges are rarely authorized to make legal decisions that are not subject to review. In the few circumstances for which Congress has given us this authority, we ought to wield it with extreme caution.

Saint Fleur, 2016 WL 3190539, at *6 (Martin, J., concurring) (citation omitted). I regret the part I played in turning Mr. Saint Fleur away from this court, and my hope is there may be another way for him to find relief.

**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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July 09, 2025

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 22-11488-AA
Case Style: USA v. Curtis Solomon, et al
District Court Docket No: 0:08-cr-60090-DMM-1

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

REHG-1 Ltr Order Petition Rehearing

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-11488

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CURTIS SOLOMON,
JAMAUR LEWIS,
DEVON CHANCE,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:08-cr-60090-DMM-1

2

Order of the Court

22-11488

ON PETITIONS FOR REHEARING AND FOR REHEARING
EN BANC

Before GRANT, LAGOA, and WILSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 40. The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. FRAP 40; 11th Cir. IOP 2.