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Beyond the Residual Clause: Challenging Your Client's "Crime of Violence" under Sessions v. Dimaya

Presentation Outline

I. Description of Presentation

On April 17, 2018 the Supreme Court issued its decision in Sessions v. Dimaya, 138 S. Ct. 1204 (2018), holding that the residual clause of 18 U.S.C. § 16's definition of "crime of violence" is unconstitutionally vague. In this presentation, we will explore the impact of Dimaya on federal criminal statutes, and particularly its applicability to 18 U.S.C. § 924(c). We will identify the many reasons why Dimaya should apply to § 924(c) cases and provide you with the responses needed to refute the government's contrary position. Presentation materials will also include ways to challenge your client's predicate conviction under the remaining portion of the "crime of violence" definition – the force clause.

II. Additional resource materials

A. Attached to this outline

1. Handout with statutory text for 18 U.S.C. §§ 16, 924(c), and 924(e)
2. Sessions v. Dimaya, 138 S. Ct. 1204 (2018).

III. Presentation Outline

A. Overview

1. Dimaya's holding
2. Dimaya's application to other statutes
3. Dimaya's reasoning
4. Dimaya's application to § 924(c)
5. Bonus material: challenges to the force clause

B. PART 1: Dimaya's Holding

1. Dimaya's issue and holding:

a) Issue: Petitioner argued that § 16(b), as incorporated into the Immigration and Nationality Act's definition of aggravated felony, was void for vagueness.

b) Holding: The residual clause of the 18 U.S.C. § 16(b) "crime of violence" definition is unconstitutionally vague in violation of the Due Process Clause.

2. What is the 18 U.S.C. § 16(b) residual clause?

"any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

3. What's left? The force clause at § 16(a):

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

- No enumerated crimes like ACCA!

C. PART II: Dimaya's application to other statute's using § 16(b)

1. In Dimaya, SCOTUS acknowledged that its decision would impact statutes outside of the INA:

"[A]lthough this particular case involves removal, § 16(b) is a criminal statute, with criminal sentencing consequences. [] And this Court has held (it could have hardly have done otherwise) that we must interpret the statute consistently whether we encounter its application in a criminal or noncriminal context."

2. 17 other statutes that incorporate 18 U.S.C. § 16 or replicate the clause in its text:

- Use of firearm in connection with "crime of violence," 18 U.S.C. § 924(c)
- Bail Reform Act, 18 U.S.C. § 3156(a)(4)(B)
- Extradition, 18 U.S.C. § 3181
- Failure to register under SORNA, 18 U.S.C. § 2250(c)
- Money laundering, 18 U.S.C. § 1956(c)(7)(B)(ii)
- Violent crime in aid of racketeering, 18 U.S.C. § 1959
- Body armor (18 U.S.C. § 931(a)(1))
- Use of minors in crimes of violence (18 U.S.C. § 25)
- Armor-piercing ammunition enhancement (18 U.S.C. § 929(a)(1))
- Protection of individuals performing certain duties (18 U.S.C. § 119(b)(3))

- Explosive materials (18 U.S.C. § 844(o) and 18 U.S.C. § 842(p))
- Interstate Domestic Violence (18 U.S.C. § 2261)
- Aggravated felony enhancements under unlawful re-entry, 8 U.S.C. § 1326(b)(2)
- Juvenile delinquency proceedings, 18 U.S.C. § 5032
- Mandatory Victims Restitution Act, 18 U.S.C. § 3663A(c)(1)(A)(i)
- Three strikes statute, 18 U.S.C. § 3559(c)
- Travel Act, 18 U.S.C. § 1952

D. PART III: Dimaya's reasoning

1. Majority: "straightforward" application of Johnson v. United States.

2. Johnson v. United States, 135 S. Ct. 2551 (2015): Residual clause of ACCA's "violent felony" definition is unconstitutionally vague.

a) *ACCA's residual clause*: "otherwise involves conduct that presents serious potential risk of physical injury."

b) *Categorical approach/ordinary case inquiry*: "how is this offense committed in the ordinary case?"

3. **Two reasons** the ACCA's residual clause is constitutionally vague:

a) *Uncertainty about the "ordinary case":* what is it?? How do we figure out how offenses are ordinarily committed??

b) *Uncertainty about the "quantum of risk":* does the risk posed by the ordinary case qualify as "serious potential risk"?? Cannot tell if we cannot determine the ordinary case.

4. Section 16's residual clause is unconstitutionally vague for the same two reasons outlined in Johnson.

a) *Same categorical approach/ordinary case inquiry.*

b) *Same quantum of risk problems*

5. In Dimaya, the government argued that the ACCA's residual clause and § 16's residual clause are textually distinct in 4 ways and because of these differences, § 16's residual clause should survive even if ACCA's was struck down in Johnson.

a) §16(b) requires that the risk of force be used "in the course of committing the offense," whereas ACCA's residual clause included risk even after the offense was committed.

b) § 16(b) requires risk of "physical force," whereas ACCA requires risk of "physical injury."

c) § 16(b) does not have a list of enumerated offenses like the ACCA.

d) § 16(b) does not share ACCA's history of interpretive failures by the courts.

6. The Dimaya majority rejected this argument. Even with these textual differences, § 16(b) suffers from the same constitutional flaws as the ACCA's residual clause.

E. PART IV: Dimaya's application to § 924(c)

1. 18 U.S.C. § 924(c):

[A]ny person who, during and in relation to any **crime of violence** or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime - [be sentenced to a certain number of years depending on the facts of the crime] . . . .

2. 18 U.S.C.§ 924(c)(3) defines "crime of violence" as "an offense that is a felony and –

has as an element the use, attempted use, or threatened use of physical force against the person or property of another [**force clause**], or

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

the offense [**residual clause**].

3. Section § 924(c)'s "crime of violence" definition is virtually identical to § 16 so Dimaya should control:

a) *Same language as § 16(b)'s residual clause.*

b) *Same categorical/ordinary case inquiry.*

4. Several circuits, both before and after Dimaya have acknowledged that § 924(c)(3)(B) is void for vagueness:

D.C. Circuit:	United States v. Eshetu, No. 15-3020 (D.C. Cir. Aug. 3, 2018) (pet. rhrg. pending)
Fifth Circuit:	United States v. Davis, 903 F.3d 483 (5th Cir. 2018) (USA cert. pet. pending)
Tenth Circuit:	United States v. Salas, 889 F.3d 681 (10th Cir. 2018) (USA cert. pet. pending)
(Seventh Circuit):	United States v. Cardena, 842 F.3d 959 (7th Cir. 2016); United States v. Jenkins, 849 F.3d 390 (7th Cir. 2017) (cert. granted but remanded back to Circuit at government's request for supplemental briefing); United States v. Jackson, 865 F.3d 9246 (7th Cir. 2017) (cert. granted but remanded back to Circuit at USA's request for supplemental briefing)

5. Beware of the circuits that held, **pre-Dimaya**, that § 924(c)'s residual clause is **not** void for vagueness:

Fifth Circuit:	United States v. Jones, 854 F.3d 737 (5th Cir. 2017)
Sixth Circuit:	United States v. Taylor, 814 F.3d 340 (6th Cir. 2016) (cert. denied)

Eighth Circuit: United States v. Prickett, 839 F.3d 697 (8th Cir. 2016) (cert. denied)

Eleventh Circuit: United States v. St. Hubert, 883 F.3d 1319 (11th Cir. 2018)

a) *But remember*, as explained by the Tenth Circuit in Salas, these cases holding that § 924(c)'s residual clause is **not** unconstitutionally vague are mostly abrogated by Dimaya. They relied on the same textual differences argument raised by the government that the Supreme Court rejected.

6. **Beware** of the circuits **Post-Dimaya** that have held that § 924(c) is **not** void for vagueness**:**

First Circuit: United States v. Douglas --- F.3d ---, 2018 WL 4941132 (1st Cir. Oct. 12, 2018) (post-Dimaya and upholding constitutionality of § 924(c)'s residual clause)

Second Circuit: United States v. Barrett, 903 F.3d 166 (2d. Cir. 2018) (same)

Eleventh Circuit: Ovalles v. United States, --- F.3d ---, 2018 WL 4830079 (11th Cir. Oct. 4, 2018) (en banc) (same).

7. Government's position

a) *Old position*: the categorical approach applies to 18 U.S.C. § 924(c). See Petition for Panel Rehr'g, United States v. Prickett, No. 15-3486 (Sept. 9, 2016) (collecting cases in support of application of the categorical approach)

b) *New position:* the categorical approach **does not** apply to 18 U.S.C. § 924(c)

(1) Since § 924(c) is a conviction that deals with the circumstances of the **instant offense** (as opposed to a prior conviction), the jury can make a factual determination whether there was a substantial risk of force involved or not.

(2) A factual conduct-based approach is appropriate here because § 924(c) does not deal with prior convictions. Therefore, there is no Sixth Amendment fact-finding problem and there is no digging through prior records.

8. **Nine reasons** why the categorical approach applies to 18 U.S.C. § 924(c):

a) *Reason #1:* "By its nature" has been interpreted by the Supreme Court to require the categorical approach. See Taylor v. United States, 495 U.S. 575, 583-90(1990) Leocal v. Ashcroft, 543 U.S. 1, 7 (2004); James v. United States, 550 U.S. 192, 209 (2007); Sessions v. Dimaya, 138 S. Ct. 1204, 1235 (2018) (Roberts, C.J, dissenting).

b) *Reason #2:* lower courts have uniformly held that the categorical approach applies. Examples from each available circuit include:

First Circuit:	United States v. Taylor, 848 F.3d 476, 491 (1st Cir. 2017)
Second Circuit:	United States v. Acosta, 470 F.3d 132, 135 (2d Cir. 2006)
Fourth Circuit:	United States v. Fuertes, 805 F.3d 485, 497-99 (4th Cir. 2015)
Fifth Circuit:	United States v. Jennings, 195 F.3d 795, 797-98 (5th Cir. 1999)
Sixth Circuit:	United States v. Taylor, 814 F.3d 340 (6th Cir. 2016); but see Shuti v. Lynch, 828 F.3d 440, 446 (6th Cir. 2016) (dicta)
Seventh Circuit:	United States v. Williams, 864 F.3d 826 (7th Cir. 2017)
Eighth Circuit:	United States v. Moore, 38 F.3d 977, 979 (8th Cir. 1994)
Ninth Circuit:	United States v. Amparo, 68 F.3d 1222, 1225 (9th Cir. 1995)

Tenth Circuit:	United States v. Salas, 889 F.3d 681 (10th Cir. 2018)
Eleventh Circuit:	United States v. McGuire, 706 F.3d 1333, 1336-37 (11th Cir. 2013)
D.C. Cir.:	United States v. Kennedy, 133 F.3d 53, 56-57 (D.C. Cir. 1998)
But see	United States v. Barrett, 903 F.3d 166 (2d. Cir. 2018) (applying real conduct approach); Ovalles v. United States, --- F.3d ---, 2018 WL 4830079 (11th Cir. Oct. 4, 2018) (en banc) (same); United States v. Douglas --- F.3d ---, 2018 WL 4941132 (1st Cir. Oct. 12, 2018) (same); Shuti v. Lynch, 828 F.3d 440, 446 (6th Cir. 2016) (dicta)

c) *Reason #3:* pattern jury instructions have always required the categorical approach. The instructions clearly tell the jury that whether an offense is a "crime of violence" is a matter of law decided by the judge. See e.g., First Cir. Pattern Jury Instr. 4.07; Third Cir. Model Crim. Jury Instr. 6.18.924A; Fifth Cir. Pattern Crim. Jury. Instr. 2.48; Sixth Cir. Pattern Crim. Jury Instr. 12.92; Seventh Cir. Pattern Crim. Jury Instr. 18 U.S.C. § 924(c)(1)(A); Eighth Cir. Model Crim. Jury Instr. 6.18.924C; Ninth Cir. Model Crim. Jury. Instr. 8.71; Tenth Cir. Pattern Crim. Jury Instr. 2.45; Eleventh Cir. Pattern Crim. Jury Instr. 35.2.

d) *Reason #4:* Courts have applied the categorical approach to plenty of other statutes and to the sentencing guidelines even when dealing with contemporaneous crimes of violence. See e.g., United States v. Ellison, 866 F.3d 32 (1st Cir. 2017); United States v. Dillard, 214 F.3d 88 (2d Cir. 2000) (assumed without deciding); United States v. Chapman, 866 F.3d 129 (3d Cir. 2017); United States v. Aragon, 983 F.2d 1306 (4th Cir. 1993); United States v. Brewer, 848 F.3d 711 (5th Cir. 2017); United States v. Tibbs, 685 F. App'x 456 (6th Cir. 2017); United States v. Piccolo, 441 F.3d 1084 (9th Cir. 2006); United States v. Ingle, 454 F.3d 1082 (10th Cir. 2006) United States v. Shuck, 481 F.

App'x 600 (11 Cir. 2012); United States v. Singleton, 182 F.3d 7 (D.C. Cir. 1999)

e) *Reason #5:* Congressional intent/acquiescence supports the application of the categorical approach. Congress is aware of the settled consensus among the courts that the categorical approach applies to § 924(c) and it has declined to change the statute's language -- even after Leocal.

This inaction indicates Congress intends for the categorical approach to continue to apply. See also United States v. Amparo, 68 F.3d 1222 (9th Cir. 1995) (reviewing legislative history of § 924(c), which supports that congress intended a categorical approach).

f) *Reason #6:* The constitutional avoidance doctrine does not apply here.

Constitutional Avoidance Doctrine: when there are two plausible readings of a statute and one reading avoids constitutional complications, the constitutional avoidance doctrine instructs that the courts should adopt the interpretation that does not cause constitutional problems. See e.g., Clark v. Martinez, 543 U.S. 371 (2005.

This doctrine does not apply here because the adoption of a fact-based approach to § 924(c) is not a plausible reading of the statute and would require courts to ignore the "by its nature" language that the Supreme Court has already said ***requires*** the categorical approach in Leocal.

But see Ovalles v. United States, --- F.3d ---, 2018 WL 4830079 (11th Cir. Oct. 4, 2018) (en banc) (applying constitutional avoidance doctrine because § 924(c) can "reasonably" and "plausibly" be read to embody a conduct-based approach).

But wait: Ovalles, --- F.3d ---, 2018 WL 4830079 (11th Cir. Oct. 4, 2018) (Jill Pryor, J., dissenting) (great discussion on why majority misapplied the constitutional avoidance doctrine and why there is no plausible reading of § 924(c) that merits a conduct-based approach).

g) *Reason #7:* Congress knows how to write a statute requiring a fact-based approach, and it didn't do so here. See e.g., Nijhawan v. Holder, 557 U.S. 29 (2009); United States v. Hayes, 555 U.S. 415 (2009).

h) *Reason #8:* The government makes no sense. If the government's position was adopted, the courts would be required to apply a fact-based approach to § 924(c)'s residual clause but continue to apply the categorical approach to § 924(c)'s force clause – surely this analytical flip-flopping was not Congress's intent.

i) *Reason #9:* Don't make life harder. The practical difficulties of removing the categorical approach will result in a parade of horribles. For example:

(1) The two § 924(c) elements would collapse into one.

(2) Jury instruction chaos.

(3) Plea-bargaining challenges.

(4) New onslaught of post-conviction litigation.

See e.g., Ovalles, --- F.3d ----, 2018 WL 4830079 (11th Cir. Oct. 4, 2018) (Jill Pryor, J., dissenting) (outlining the practical and constitutional concerns that result with a conduct-based approach)

9. Caution: United States v. Barrett, 903 F.3d 166 (2d. Cir. 2018) is a very bad post-Dimaya case.

a) *Holding 1:* conspiracy to commit Hobbs Act robbery qualifies under the elements clause and the residual clause by referencing only the elements of Hobbs Act robbery and not employing the "ordinary case" analysis.

b) *Holding 2:* §924(c)'s residual clause is not unconstitutionally vague after Dimaya because the statute can be construed to warrant a conduct-based application by the jury (and the categorical approach doesn't need to apply).

10. **Caution:** Ovalles v. United States, --- F.3d ---, 2018 WL 4830079 (11th Cir. Oct. 4, 2018) (en banc) (misusing constitutional avoidance doctrine to save § 924(c))

11. **Caution:** United States v. Douglas --- F.3d ---, 2018 WL 4941132 (1st Cir. Oct. 12, 2018) (agreeing with Barrett and adopting the reasoning of Ovalles to hold that § 924(c)'s residual clause is constitutional).

12. **Caution:** the government may argue that because § 924(c) requires a nexus between the instant offense and the gun, that the types of crimes that can qualify under the residual clause are limited and therefore the statute cannot be vague. See United States v. Salas, 889 F.3d 681 (10th Cir. 2018) (rejecting this argument)

a) *Still have ordinary case problem.*

b) *Statute applying in fewer instances ≠ less vague.*

13. **Practice Tip**: the government will likely argue that the categorical approach should not apply to any other statute that has a §16(b) residual clause and that deals with a contemporaneous crime of violence. Respond using the 9 reasons above AND case law specific to that statute.

a) *For example (not exhaustive):*

The Bail Report Act, 18 U.S.C. § 3156

- United States v. Singleton, 182 F.3d 7 (D.C. Cir. 1999)
- United States v. Bowers, 432 F.3d 518, 520 (3rd Cir. 2005)
- United States v. Rogers, 371 F.3d 1225 (10th Cir. 2004)
- United States v. Ingle, 454 F.3d 1082 (10th Cir. 2006)
- United States v. Johnson, 399 F.3d 1297 (11th Cir. 2004)
- United States v. Oliveira, 2017 WL 690185 (D. Mass. 2017)

Explosive Materials, 18 U.S.C. § 842(p)

- United States v. Hull, 456 F.3d 133 (3rd Cir. 2006)

VICAR, 18 U.S.C. §1959(a)(4)

- United States v. Lyttle, 2010 WL 5175168 (S.D.W.Va. 2010) (unpublished)

The Travel Act, 18 U.S.C. § 1952(a)(2)

- United States v. Aragon, 983 F.2d 1306 (4th Cir. 1993)

MVRA, 18 U.S.C. §3663A

- United States v. Diaz, 865 F.3d 168 (4th Cir. 2017)
- United States v. Keelan, 786 F.3d 865 (11th Cir. 2015)

Body Armor, 18 U.S.C. § 931

- United States v. Studhorse, 883 F.3d 1198 (9th Cir. 2018)
- United States v. Fish, 758 F.3d 1 (1st Cir. 2014)
- United States v. Stout, 706 F.3d 704 (6th Cir. 2013)
- United States v. Moses, 2005 WL 3454317 (E.D. Wis. 2005) (unpublished)

Juvenile Proceedings, 18 U.S.C. § 5032

- United States v. Juvenile Female, 566 F.3d 943 (9th Cir 2009)

14. **Practice Reminder**: make sure to argue that the government **WAIVED** its right to argue that the categorical approach does not apply to § 924(c).

General Rule: a party cannot raise new arguments it affirmatively abandoned earlier in the case (either on appeal or in the district court).

Favorable law in ALL circuits! See e.g., United States v. Robinson, 744 F.3d 293, 298 (4th Cir. 2014) ("[a] party who identifies an issue, and then explicitly withdraws it, has waived the issue" and "when a claim is waived, it is not reviewable on

appeal, even for plain error.").

15. **Frosting**: after Johnson, many § 16(b) cases were GVRed (granted, vacated, and remanded) by the Supreme Court and Justice Kagan in Dimaya acknowledged these GVRs as evidence that SCOTUS intended Johnson's reasoning to apply to § 16.

After Dimaya, numerous § 924(c) cases have been GVRed, similarly indicating that Dimaya and Johnson should apply to § 924(c):

For example (not an exhaustive list):

- Carreon v. United States, No. 17-6926
- Davis v. United States, No. 16-8997
- Ecourse-Westbrook v. United States, No. 17-6368
- Eizember v. United States, No. 17-6117
- Enix v. United States, No. 17-6340
- Glover v. United States, No. 16-8777
- Lin v. United States, No. 17-5767
- McCoy v. United States, No. 17-5484
- Taylor (Brannon) v. United States, No. 16-8996
- Winters v. United States, No. 17-5495

F. PART V: Five challenges to the force clause

The § 924(c) force clause: "has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

Apply the categorical approach: the "most innocent" conduct must include an element of force for the conviction to qualify.

1. Challenge #1: the force clause requires *violent* force.

a) ***What is force?*** must be "violent force," "strong physical force" or "substantial degree of force" that is "capable of causing injury or pain." Johnson v. United States, 559 U.S. 133 (2010). NOT de minimis force or unwanted/offensive touching. See also United States v. Castleman, 134 S. Ct. 1404, 1412 (2014) ("hitting, slapping, shoving, grabbing, pinching, biting, and hair pulling" or "a

squeeze of the arm that causes a bruise" is not violent).

b) ***Beware!*** Jones v. United States, 870 F.3d 750 (8th Cir. 2017) (relying solely on the "capable of causing physical injury or pain" language to hold that a Wisconsin statute for battery of a law enforcement officer that criminalized throwing urine on eyes was violent physical force). *But see* United States v. Vail-Bailon, 868 F.3d 1293 (11th Cir. 2017) (dissent) ("capable of causing physical injury or pain" is not enough – must also be "strong physical force" or a "substantial degree of force.")

c) *Assaults or batteries:* state and federal offenses that can be violated with de minimis force do not have an element of violent force (not an exhaustive list):

- **Federal Assault:** United States v. Ama, 684 Fed. App'x 736 (10th Cir. 2017); United States v. Bell, 158 F. Supp. 3d 906 (N.D. Cal. 2016) (§ 924(c))
- **Florida Battery:** United States v. Johnson, 559 U.S. 133 (2010)
- **South Carolina Aggravated Assault/Battery:** United States v. Montes-Flores, 736 F.3d 357 (4th Cir. 2013)
- **Massachusetts Assault/Battery:** United States v. Holloway, 630 F.3d 252 (1st Cir. 2011); United States v. Lattanzio, 232 F. Supp. 3d 220 (D. Mass. 2017) (assault with a dangerous weapon); United States v. Fish, 758 F.3d 1 (1st Cir. 2014) (assault with a dangerous weapon)
- **Maryland Assault:** United States v. Royal, 731 F.3d 333 (4th Cir. 2013)

d) *Robberies:* state and federal offenses that can be committed by de minimis force do not have an element of violent force (not an exhaustive list):

- **Federal Robbery of Government Property:** United States v. Bell, 158 F. Supp.3d 906 (N.D. Cal. 2016) (§ 924(c))

- **Alabama (armed):** United States v. Walton, 881 F.3d 768 (9th Cir. 2018)
- **Arizona (armed):** United States v. Jones, 877 F.3d 884 (9th Cir. 2017)
- **Arkansas:** United States v. Eason, 829 F.3d 633 (8th Cir. 2016)
- **District of Columbia:** In re Sealed Case, 548 F.3d 1085 (D.C. 2008)
- **Florida (armed):** United States v. Geozos, 870 F.3d 890 (9th Cir. 2017)
- **Kansas:** United States v. Nicholas, 686 Fed. App'x. 570 (10th Cir. 2017)
- **Maine:** United States v. Mulkern, 854 F.3d 87 (1st Cir. 2017)
- **Maryland:** United States v. Martin, 657 Fed App'x 193 (4th Cir. Sept. 16, 2016)
- **Massachusetts (armed):** United States v. Starks, 861 F.3d 306 (1st Cir. 2017); United States v. Parnell, 818 F.3d 974 (9th Cir. 2016)
- **North Carolina:** United States v. Gardner, 823 F.3d 793 (4th Cir. 2016)
- **Ohio:** United States v. Yates, 866 F.3d 723 (6th Cir. 2017)
- **Oregon:** United States v. Strickland, 860 F.3d 1224 (9th Cir. 2017)
- **Pennsylvania:** United States v. Peppers, 899 F.3d 211 (3rd Cir. 2018)
- **Puerto Rico:** United States v. Castro-Vasquez, 802 F.3d 28 (1st Cir. 2015)

- **Texas:** United States v. Burris, 896 F.3d 320 (5th Cir. 2018)

- **Virginia Robbery:** United States v. Winston, 850 F.3d 677 (4th Cir. 2017)

e) ***Cert Alert***: United States v. Stokeling, No. 17-5554 (Florida)

> *Question presented:* "Whether a state robbery offense that includes 'as an element' the common law requirement of overcoming 'victim resistance' is categorically a 'violent felony' under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i), when the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance."

f) ***Caution:*** Hobbs Act robbery and federal bank robbery – although they can be accomplished by threatening economic harm, i.e. without violent physical force against person or property, **every court to address the argument has rejected it.** These courts have ruled that there is no realistic probability that these offenses can be violated by threat of economic harm. (Bad cases in Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits).

g) *Kidnapping, false imprisonment, and hostage taking*: "physical restraint," "detention," or "holding" do not necessarily equal physical force.

Federal kidnapping (all § 924(c) cases):

- United States v. Taylor, 848 F.3d 476 (1st Cir. 2017)
- United States v. Bustos, No. 1:08-CR-297-LJO-3, 2016 WL 6821853 (E.D. Cal. Nov. 17, 2016)
- United States v. Rubio, 1:08-CR-297-LJO-2, 2016 WL 6821854 (E.D. Cal. Nov. 17, 2016)
- See also Torres v. Lynch, 136 S. Ct. 1619 (2016)

Federal hostage taking

- United States v. Carrion-Caliz, 944 F.2d 220 (5th Cir. 1991)
- United States v. Si Lu Tian, 339 F.3d 143 (2d Cir. 2003)
- Hernandez v. United States, No. 16-CV-22657-PCH 06-CR-20340-PCH, 2016 WL 8078311 & 8078310 (S.D. Fla. 2016) (§ 924(c))

h) *Sex offenses: offenses based on the absence of legally valid consent do not qualify under the force clause.*

TIP: if "force" is an element in the statute, look for case law including non-physical force or constructive force such as mental compulsion.

Sex trafficking:

- United States v. Fuertes, 805 F.3d 485 (4th Cir. 2015) (federal sex trafficking) (§ 924 (c))

Statutory rape:

- United States v. Rangel-Castaneda, 709 F.3d 373 (4th Cir. 2013) (Tennessee aggravated statutory rape)
- United States v. Daye, 571 F.3d 225 (2d Cir. 2009) (Vermont statutory rape)
- United States v. Madrid, 805 F.3d 1204 (10th Cir. 2015) (Texas aggravated sexual assault of a child)

i) *Murder for hire*: should never qualify as a "crime of violence" under the force clause because the defendant never has to use or attempt to use force. United States v. Boman, 873 F.3d 1035, 1042 (8th Cir. 2017) (§ 924(c) case).

j) *Conspiracies*: should never qualify under the force clause regardless of the object of the conspiracy. The elements of a conspiracy are: (1) an unlawful agreement; and (2) sometimes an overt act. There is no element of force or attempted force.

Favorable ACCA conspiracy cases:

- United States v. White, 571 F.3d 365 (4th Cir. 2009)
- United States v. Gore, 636 F.3d 728 (5th Cir. 2011)
- United States v. Fell, 511 F.3d 1035 (10th Cir. 2007)

- United States v. King, 979 F.2d 801 (10th Cir. 1992)
- United States v. Gonzalez-Ruiz, 794 F.3d 832 (7th Cir. 2015)
- United States v. Melvin, 621 Fed. App'x 226 (4th Cir. Oct. 26, 2015)

Favorable § 924(c) conspiracy cases:

- United States v. Davis, 903 F.3d 483 (5th Cir. 2018) (cert. petition pending)
- United States v. Smith, No. 2:11–cr–00058–JAD–CWH, 2016 WL 2901661 (D. Nev. May 18, 2016)
- United States v. Luong, No. 2:99-00433 WBS, 2016 WL 1588495 (E.D. Cal. Apr. 20, 2016)
- United States v. Edmundson, 153 F. Supp.3d 857 (D. Md. 2015)
- United States v. Baires-Reyes, 191 F. Supp.3d 1046 (N. D. Cal. 2016)
- Duhart v. United States, No. 08-60309-CR-MARRA, 2016 WL 4720424 (S. D. Fla. Sept. 9, 2016)
- United States v. Benitez, No. 13-cr-20606-UU2017 WL 2271504 (S.D. Fla. Apr. 6, 2017)
- United States v. Hunter, No. 2:12–cr–132–JAD–CWH–1, 2017 WL 3159985 (D. Nev. July 25, 2017)
- United States v. Meza, No. CR 11–133–BLG–DLC, 2018 WL 2048899 (D. Mont. May 2, 2018)
- Toussaint v. United States, Case No. 12-CR-00407-CW-1 (N.D. Cal. May 11, 2018)
- Alvarado v. United States, No. CV 16-4411-GW, 2016 WL 6302517 (C.D. Cal. Oct. 14, 2016)
- United States v. Shumilo, CR 09-939-GW-51, 2016 WL 6302524 (C.D. Cal. Oct. 24, 2016)
- United States v. Chavez, No. 15-CR-00285-LHK, 2018 WL 3609083 (N.D. Cal. Jul. 27, 2018)
- United States v. Rossetti, No. 99-CR-10098, 2018 WL 3748161 (D. Mass. Aug. 7, 2018)

BUT BEWARE: United States v. Barrett, 903 F.3d 166 (2d Cir. 2018) ("It has long been the law in this circuit that a conspiracy to commit a crime of violence is itself a crime of violence under § 924(c)(3).")

2. Challenge #2: the force must be directed at "the person or property of another."

a) *Federal arson*: does not qualify under the force clause. It does not require force against the property of another because it can be violated by burning down one's own property. See United States v. Salas, 889 F.3d 681 (10th Cir. 2018).

3. Challenge #3: causing physical injury does not equate to using violent force.

a) *Causation of injury or even death ≠ "violent force"*:

- Poison
- Laying a trap
- Exposure to hazardous chemicals
- Withholding medicine
- Locking someone in a car on a hot day
- Starvation, neglect
- Placing a barrier in front of a car
- Abandoning an unconscious person

b) *State assaults causing injury or death:*

- **Connecticut:** *Chrzanoski v. Ashcroft, 327 F.3d 188 (2d Cir. 2003); Whyte v. Lynch, 807 F.3d 463 (1st Cir. 2015)
- **Colorado:** *United States v. Perez-Vargas, 414 F.3d 1282 (10th Cir. 2005); *United States v. Rodriguez-Enriquez, 518 F.3d 1191 (10th Cir. 2008)
- **North Carolina:** United States v. Brown, 249 F. Supp.3d 287 (D. D. C. 2017)
- **Pennsylvania:** United States v. Fisher, No. 01-769-01, 2017 WL 1426049 (E. D. Pa. 2017)
- **Puerto Rico:** Matter of Guzman-Polanco, 26 I & N Dec. 713 (BIA 2016), *clarified by* 26 I & N Dec. 806 (BIA 2016)
- **Texas:** United States v. Zuniga-Soto, 527 F.3d 1110, 1125 n.3 (10th Cir. 2008); United States v. Villegas-Hernandez, 468 F.3d 874, 879 (5th Cir. 2006)

c) *Threat offenses*

- *United States v. Torres-Miguel,701 F.3d 165 (4th Cir. 2012)
- United States v. Rico-Mejia, 859 F.3d 318 (5th Cir. 2017)

d) *Child abuse offenses*

- United States v. Gomez, 690 F.3d 194 (4th Cir. 2012)
- United States v. Andino-Ortega, 608 F.3d 305 (5th Cir. 2010)
- *United States v. Lopez-Patino, 391 F.3d 1034, 1037 (9th Cir. 2004)

e) *Manslaughter offenses*

- *United States v. Reyes-Contreras, 882 F.3d 113 (5th Cir. 2018) (en banc granted and pending)
- United States v. Garcia-Perez, 779 F.3d 278 (5th Cir. 2015)

f) *Murder offenses*

- United States v. Hernandez-Montes, 831 F.3d 284, 289 n.13 (5th Cir. 2016) (USA concession)
- United States v. Watts, No. 14-CR-20118-0022017, WL 411341 (D. Kan. Jan. 31, 2017)
- United States v. Martinez, Case No. 07-cr-00236-REB-1 (D. Co. Feb. 1, 2017)
- United States v. Nicks, Case No. WJM-15-0321 (D. Co. April 4, 2016)

g) *Federal crimes*: Hobbs Act robbery, bank robbery, VICAR, carjacking, murder, assault, use if a weapon of mass destruction ALL can be accomplished by threatening to cause or causing physical injury – does not require the use of physical force.

But see e.g., United States v. McNeal, 818 F.3d 141 (4th Cir. 2016) (bank robbery qualifies); United States v. Evans, 848 F.3d 242 (4th Cir. 2016) (federal carjacking qualifies)

****IMPORTANT NOTE**** asterisked cases mean that panels from these circuits have said the cases have been overruled or abrogated by United States v. Castleman, 134

S. Ct. 1405 (2014). But one panel cannot overrule another panel's decision (only en banc or the Supreme Court can do that).

h) *United States v. Castleman*,134 S. Ct. 1405 (2014)

Held: For purposes of 18 U.S.C. § 922(g)(9) "misdemeanor crimes of domestic violence," the definition of "force" includes de minimis touching, *unlike* the "violent physical force" defined in ACCA/2010 Johnson.

Also held: an element that causes physical injury necessarily includes the force necessary to qualify under § 922(g)(9)'s force clause. **BUT**, SCOTUS affirmatively stated that it was *not* deciding whether a physical injury element necessarily requires violent physical force as required under the ACCA force clause.

Castleman Extends	**Castleman does not Extend**
First: United States v. Edwards, 857 F.3d 420 (1st Cir. 2017)	**First:** Whyte v. Lynch, 807 F.3d 463 (1st Cir. 2015)
Second: United States v. Hill, 890 F.3d 51 (2d Cir. 2018); Villanueva v. United States, 893 F.3d 123 (2d Cir. 2018) (but see great dissent)	
Third: United States v. Chapman, 866 F.3d 129 (3d Cir. 2017)	**Third:** United States v. Mayo, 901 F.3d 218 (3d Cir. 2018)
Fourth: United States v. Burns-Johnson, 864 F.3d 313 (4th Cir. 2017); United States v. Reid, 861 F.3d 523 (4th Cir. 2017); In re Irby, 858 F.3d 231 (4th Cir. 2017)	**Fourth:** United States v. McNeal, 818 F.3d 141, n.10 (4th Cir. 2016); United States v. Middleton, 883 F.3d 485 (4th Cir. 2018)
	Fifth: United States v. Burris, 896 F.3d 320 (5th Cir. 2018); United States v. Reyes Contreras, 882 F.3d 113 (5th Cir. 2018) (pending *en banc*)
Sixth: United States v. Verwiebe, 874 F.3d 258 (6th Cir. 2017)	
Seventh: United States v. Waters, 823 F.3d 1062 (7th Cir. 2016); United States v. Jennings, 860 F.3d 450, 458-60 (7th Cir. 2017)	
Eighth: United States v. Schaffer, 818 F.3d 796 (8th Cir. 2016); United States	

v. Rice, 813 F.3d 704 (8th Cir. 2016) (but great dissent rejecting USA's Castleman theory)	
Ninth: Hernandez v. Lynch, 831 F.3d 1127 (9th Cir. 2016)	
Tenth: United States v. Ontiveros, 875 F.3d 533 (10th Cir. 2017)	
Eleventh: United States v. Deshazior, 882 F.3d 1352, 1357-58 (11th Cir. 2018)	
D.C. Circuit: United States v. Haight, 892 F.3d 1271 (D.C. Cir. 2018)	

4. Challenge #4: an act of omission does not require violent force.

a) *Favorable omission cases*:
- United States v. Mayo, 901 F.3d 218 (3d Cir. 2018) (aggravated assault)
- United States v. Harris, 205 F. Supp. 3d 651 (M. D. Penn. 2016) (resisting arrest)
- United States v. Fisher, No. 01-769-01, 2017 WL 1426049 (E. D. Pa. 2017) (aggravated assault)

b) *Unfavorable omission cases*:
- United States v. Peeples, 879 F.3d 282 (8th Cir. 2016) (Iowa attempted murder)
- United States v. Ontiveros, 879 F.3d 533 (10th Cir. 2017) (Colorado second degree assault)
- United States v. Waters, 823 F.3d 1062 (7th Cir. 2016) (Illinois enhanced domestic battery conviction)

5. Challenge #5: the violent force must be intentional.

a) *Cases requiring intentional mens rea (ACCA/GL)*:
- United States v. Bennett, 868 F.3d 1 (1st Cir. 2017), *withdrawn as moot by*, 870 F.3d 34 (1st Cir. 2017)
- Garcia v. Gonzales, 455 F.3d 465 (4th Cir. 2006)
- *United States v. Armijo, 651 F.3d 1226 (10th Cir. 2011)

- *United States v. Zuniga-Soto, 527 F.3d 1110 (10th Cir. 2008)
- *United States v. Boose, 739 F.3d 1185 (8th Cir. 2014)
- *United States v. McMurray, 653 F.3d 367, 374-75 (6th Cir. 2011)
- Fernandez-Ruiz v. Gonzales, 466 F.3d 1121, 1132 (9th Cir. 2006)
- *United States v. Vargas-Duran, 356 F.3d 598 (5th Cir. 2004)
- Purohit v. Holder, 441 Fed. App'x. 458 (9th Cir. 2011)
- United States v. Middleton, 883 F.3d 485 (4th Cir. 2018)
- United States v. Windley, 864 F.3d 36 (1st Cir. 2017)
- United States v. Rose, 896 F.3d 104 (1st Cir. 2018)
- United States v. Kennedy, 881 F.3d 14 (1st Cir. 2018)
- *United States v. Fields, 863 F.3d 1012 (8th Cir. 2017)
- United States v. Dixon, 805 F.3d 1193 (9th Cir. 2015)
- United States v. Parnell, 818 F.3d 974 (9th Cir. 2016)
- United States v. Barcenas-Yanez, 826 F.3d 752 (4th Cir. 2016)
- United States v. Benally, 843 F.3d 350 (9th Cir. 2016)
- *United States v. Hernandez-Montes, 831 F.3d 284 (5th Cir. 2016)

b) *Cases requiring intentional mens rea (§ 924(c))*:

- United States v. Johnson, 227 F. Supp. 3d 1078 (N. D. Cal. 2016)

NOTE: cases that asterisked cases have been characterized by other panels of that circuit as abrogated or overruled pursuant to Voisine v. United States, 136 S. Ct. 2272 (2016). But one panel cannot overrule another panel.

c) *Threats must have intentional mens rea*: intimidation or putting someone in fear of bodily injury is not always the

same as an intentional threat. The defendant must intend to put another in fear in order to qualify under the force clause. See e.g., United States v. King, 979 F.2d 801, 803 (10th Cir. 1992) (threat under force clause "means both an intent to use the force and a communication of that threat.")

d) *Federal bank robbery*: no intentional mens rea

Bank robbery committed without proof of intent to intimidate

- United States v. Doriety, Case No. C16-0924-JCC (W. D. Wash. Nov. 10, 2016)
- United States v. Knox, No. C16-5502 BHS, 2017 WL 347469 (W. D. Wash. Jan. 24, 2017)
- Dissent in Holder v. United States, 836 F.3d 891 (8th Cir. 2016)

Committed without intentional threat of force

- United States v. Yockel, 320 F.3d 818 (8th Cir. 2003)
- United States v. Kelley, 412 F.3d 1240 (11th Cir. 2005)
- United States v. Woodrup, 86 F.3d 359 (4th Cir. 1996)

But beware for example:

- United States v. Harper, 869 F.3d 624 (8th 2017)
- United States v. McNeal, 818 F.3d 141 (4th Cir. 2016)
- United States v. Armour, 840 F.3d 904 (7th Cir. 2016)
- In re Sams, 830 F.3d 1234 (11th Cir. 2016)

e) *Other examples*:

- Federal first-degree murder: includes felony murder, which does not require the intentional use of force.
- Federal second-degree murder: can be committed with reckless disregard for human life.

f) *Voisine v. United States*, 136 S. Ct. 2272 (2016)

Held: force clause of § 922(g)(9) (misdemeanor crime of domestic violence) only requires mens rea of recklessness

But: citing Castleman, the Court recognized that the domestic crime of violence definition is different from the force clause of other statutes like 18 U.S.C. § 16(b), which has a force clause analogous to the ACCA. The Court said it was not overruling all those cases which have said that the force clause in these other contexts requires an intentional mens rea.

Voisine Extends	**Voisine does not Extend**
	First: United States v. Windley, 864 F.3d 36 (1st Cir. 2017)
Second: open	
Third: open	**Third:** United States v. Fisher, 2017 WL 1426049 (E. D. Pa. 2017); United States v. Hill, 225 F. Supp. 3d 328 (W. D. Penn. 2016)
	Fourth: United States v. Middleton, 883 F.3d 485 (4th Cir. 2018) (concurrence)
Fifth: United States v. Howell, 838 F.3d 489 (5th Cir. 2016); United States v. Mendez-Henriquez, 847 F.3d 214 (5th Cir. 2017)	
Sixth: United States v. Verwiebe, 883 F.3d 485 (6th Cir. 2018)	
Seventh: open	
Eighth: United States v. Fogg, 836 F.3d 951 (8th Cir. 2016)	**Eighth:** United States v. Fields, 863 F.3d 1012 (8th Cir. 2017)
Ninth: open	**Ninth:** United States v. Johnson, 227 F. Supp. 3d 1078 (N. D. Cal. 2016)
Tenth: United States v. Pam, 867 F.3d 1191 (10th Cir. 2017); United States v. Hammons, 862 F.3d 1052 (10th Cir. 2017)	
	Eleventh: Jefferson v. United States, No. 10-00141-KD 2016 WL 6023331 (S. D. Ala. Oct. 13, 2016)
D.C. Circuit: United States v. Haight, 892 F.3d 1271 (D.C. Cir. 2018)	

G. Notable § 924(c) Wins (not an exhaustive list)

1. Hobbs Act robbery conspiracies

- United States v. Davis, 903 F.3d 483 (5th Cir. 2018) (cert. petition pending)
- United States v. Smith, 215 F.Supp.3d 1026 (D. Nev. 2016)
- United States v. Luong, No. 2:99-00433 WBS, 2016 WL 1588495 (E.D. Cal. 2016)
- United States v. Edmundson, 153 F. Supp.3d 857 (D. Md. 2015)
- United States v. Baires-Reyes, 191 F. Supp.3d 1046 (N. D. Cal. 2016)
- Duhart v. United States, No. 08-60309-CR-MARRA, 2016 WL 4720424 (S. D. Fla. Sept. 9, 2016)
- United States v. Benitez, No. 13-cr-20606-UU, 2017 WL 2271504 (S.D. Fla. 2017)
- United States v. Hunter, No. 2:12–cr–132–JAD–CWH–1, 2017 WL 3159985 (D. Nev. 2017)
- United States v. Meza, No. CR 11–133–BLG–DLC, 2018 WL 2048899 (D. Mont. May 2, 2018)
- United States v. Johnson, No. BLG-SPW-11-CR-140 (D. Mont. May 7, 2018)
- Toussaint v. United States, No. 12-CR-00407-CW-1 (N.D. Cal. May 11, 2018)
- United States v. Rossetti, No. 99-CR-10098, 2018 WL 3748161 (D. Mass. Aug. 7, 2018)
- United States v. Chavez, No. 15-CR-00285-LHK, 2018 WL 3609083 (N.D. Cal. Jul. 27, 2018)

2. RICO conspiracies

- Alvarado v. United States, No. CV 16-4411-GW, 2016 WL 6302517 (C.D. Cal. Oct. 14, 2016)
- United States v. Shumilo, 2016 WL 6302524 (C.D. Cal. Oct. 24, 2016)
- United States v. Chavez, No. 15-CR-00285-LHK, 2018 WL 3609083 (N.D. Cal. Jul. 27, 2018)

3. Armed bank robbery conspiracies

- United States v. Chavez, No. 15-CR-00285-LHK, 2018 WL 3609083 (N.D. Cal. Jul. 27, 2018)

4. Federal kidnapping

- United States v. Jenkins, 849 F.3d 390 (7th Cir. 2017)

- United States v. Bustos, No. 1:08-CR-297-LJO-3, 2016 WL 6821853 (E.D. Cal. Nov. 17, 2016)
- United States v. Rubio, 1:08-CR-297-LJO-2, 2016 WL 6821854 (E.D. Cal. Nov. 17, 2016)

5. Federal hostage taking

- Hernandez v. United States, No. 16-CV-22657-PCH 06-CR-20340-PCH, 2016 WL 8078311 & 8078310 (S.D. Fla. 2016)

6. Federal assault

- United States v. Bell, 158 F. Supp.3d 906 (N.D. Cal. 2016)

7. VICAR

- United States v. Chavez, No. 15-CR-00285-LHK, 2018 WL 3609083 (N.D. Cal. Jul. 27, 2018) (conspiracy to assault with dangerous weapon; conspiracy to commit murder)

8. Robbery of government property

- United States v. Bell, 158 F. Supp.3d 906 (N. D. Cal. 2016)

9. Arson

- United States v. Salas, 889 F.3d 681 (10th Cir. 2018)
- United States v. Johnson, 227 F. Supp. 3d 1078 (N. D. Cal. 2016)
- Evey v. United States, Case No. SVW-97-CR-00468 (C. D. Cal. May 10, 2018) (attempt)

10. Murder for hire

- United States v. Boman, 873 F.3d 1035 (8th Cir. 2017)

11. Sex trafficking/sex trafficking of minors

- United States v. Fuertes, 805 F.3d 485 (4th Cir. 2015)
- United states v. Jackson, 865 F.3d 946 (7th Cir. 2017)

12. Voluntary manslaughter

- United States v. Morrison, Case No. BLG-SPW-04-CR-126 (D. Mont. May 7, 2018)