

SUPREME COURT & FOURTH CIRCUIT UPDATE

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Has your client committed a crime of violence?



Crimes of Violence Analysis

PEACE

Predicates: identify the two predicates—what are you comparing?

Elements: know the elements of both predicates—what does each predicate require?

Analyze: analyze the elements—how do courts define and apply them?

Categorical Comparison: compare the predicates categorically

Evaluate: Does the offense at issue categorically fit within the federal predicate?

CRIMES OF VIOLENCE

Conspiracy to Commit Murder

North Carolina Assault With A Deadly
Weapon With Intent To Kill

Hobbs Act Robbery

Voluntary Manslaughter

Involuntary Manslaughter

Conspiracy to Commit Murder



United States v. McCollum,
885 F.3d 300 (4th Cir. 2018)

Conspiracy to Commit Murder

Question: Whether conspiracy to commit murder in aid of racketeering, 18 U.S.C. § 1959(a)(5), is a crime of violence under Section 4B1.2 of the Sentencing Guidelines

McCollum

- ◆ McCollum pled guilty to 18 U.S.C. § 922(g), felon in possession of a firearm
- ◆ At sentencing, his offense level was increased under U.S.S.G. § 2K2.1 based on his prior federal conviction for conspiracy to commit murder in aid of racketeering

McCollum

On appeal, McCollum argued that conspiracy to commit murder in aid of racketeering does not qualify as a crime of violence under U.S.S.G. § 4B1.2.

- ◆ Because conspiracy does not include physical force as an element (thus does not qualify under the force clause) and
- ◆ Because conspiracy under § 1959(a)(5) does not require an overt act and is therefore broader than generic conspiracy (thus does not qualify under the enumerated offenses clause)

McCollum

The Fourth Circuit reluctantly agreed with *McCollum* that generic conspiracy under the Guidelines must be defined according to its contemporary meaning, and that the prevailing contemporary meaning of conspiracy requires proof of an overt act.

Because § 1959(a)(5) conspiracy does not require an overt act, the offense is overbroad and does not categorically qualify as generic conspiracy. Therefore, conspiracy to commit murder in aid of racketeering is not a crime of violence under the Guidelines.

McCollum

Judge Duncan authored the opinion, Judge Traxler concurred, and Judge Wilkinson dissented.

The government is seeking en banc review, but given the panel composition and straightforward analysis, reversal is unlikely.

McCollum

◆ Important Takeaway

McCollum's definition of conspiracy applies to both crimes of violence and controlled substance offenses.

Like § 1959(a)(5) conspiracy, North Carolina conspiracy does not require an overt act. *See, e.g., State v. Bindyke*, 288 N.C. 608, 616, 220 S.E.2d 521, 526 (1975); *State v. Horton*, 275 N.C. 651, 170 S.E. 2d 651 (1969); *State v. Shelly*, 176 N.C. App. 575, 627 S.E.2d 287 (2006). For this reason, under the reasoning of *McCollum*, North Carolina conspiracy offenses will not qualify as “crimes of violence” or “controlled substance offenses” under § 4B1.2.

Assault with a Deadly Weapon With Intent to Kill Inflicting Serious Injury



United States v. Townsend,
__F.3d __ (4th Cir. Mar. 30, 2018)

North Carolina Assault With A Deadly Weapon
With Intent To Kill Inflicting Serious Injury

Question: Whether North Carolina assault with a deadly weapon with intent to kill inflicting serious injury is a violent felony under the force clause of the Armed Career Criminal Act.

Townsend

Townsend argued that his prior North Carolina convictions for assault with a deadly weapon with intent to kill inflicting serious injury could be committed through culpable negligence and therefore did not qualify under the ACCA's force clause.

Townsend

On appeal, the Fourth Circuit agreed that to qualify under the force clause, the offense must have “a mens rea more culpable than negligence or recklessness.”

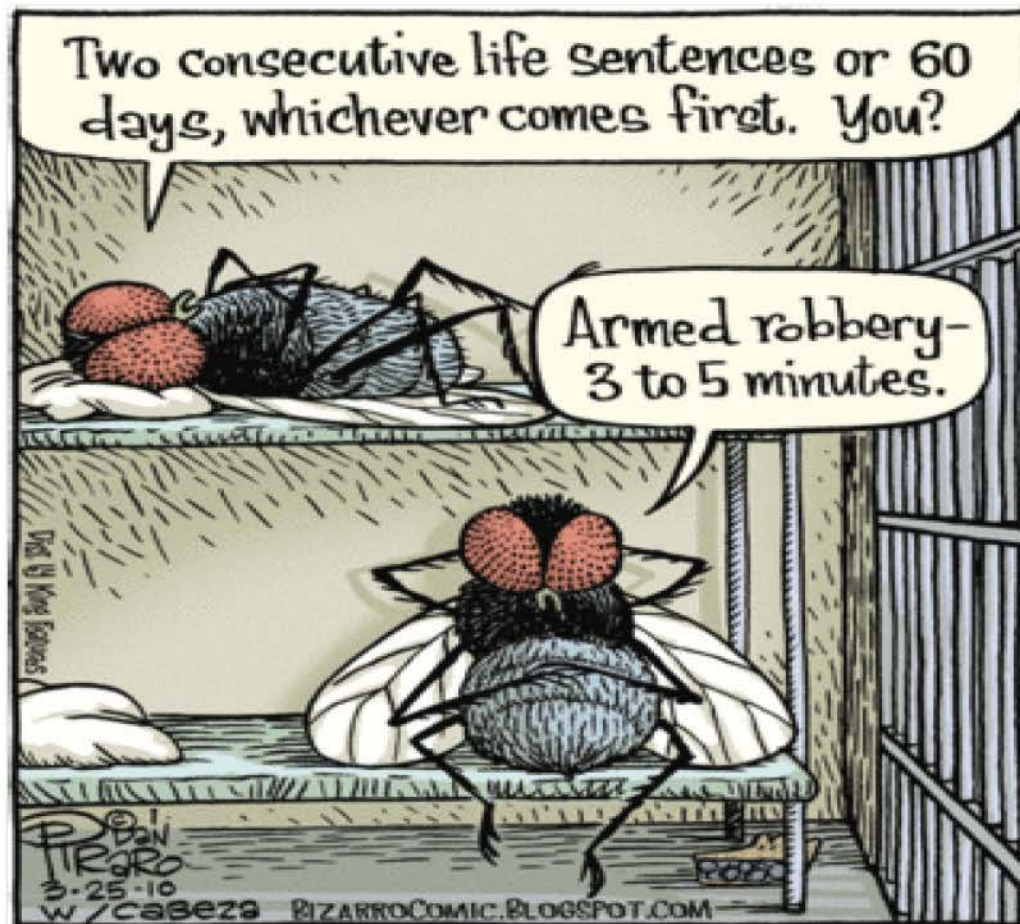
However, the Court found that the “intent to kill” element of the offense required proof of specific intent to kill that could not be satisfied with evidence of culpable negligence.

Townsend

Unlike assault with intent to kill, most other forms of North Carolina assault *can* be committed through culpable negligence.

By reaffirming that the force clause requires a mens rea of more than negligence or recklessness, *Townsend* supports the argument that other North Carolina assault offenses, which may be satisfied by proof of culpable negligence, do not qualify.

Hobbs Act Robbery



Hobbs Act Robbery

United States v. O'Connor,

874 F.3d 1147 (10th Cir. 2017)

United States v. Hunt,

701 F. App'x 288 (4th Cir. 2017)

O'Connor

Question: Whether Hobbs Act robbery under 18 U.S.C. § 1951(b)(1) qualifies as a crime of violence under the Sentencing Guidelines

O'Connor

- ◆ O'Connor pled guilty to 18 U.S.C. § 922(g), felon in possession of a firearm
- ◆ At sentencing, his offense level was increased under U.S.S.G. § 2K2.1 based on his prior conviction for Hobbs Act robbery

O'Connor

On appeal, Tenth Circuit held that Hobbs Act robbery is *not* a crime of violence under the Guidelines because:

- (1) Hobbs Act robbery can be committed by means of actual or threatened physical force to property, which is broader than § 4B1.2's force clause, which is restricted to physical force against a person and
- (2) Hobbs Act robbery is broader than generic robbery and generic extortion because it includes threats to property, while robbery and extortion are limited to threats to a person

United States v. Hunt,
701 F. App'x 288 (4th Cir. 2017)

The issue of whether Hobbs Act robbery is a crime of violence under the Guidelines was raised in *Hunt*, but the case was vacated on procedural grounds.

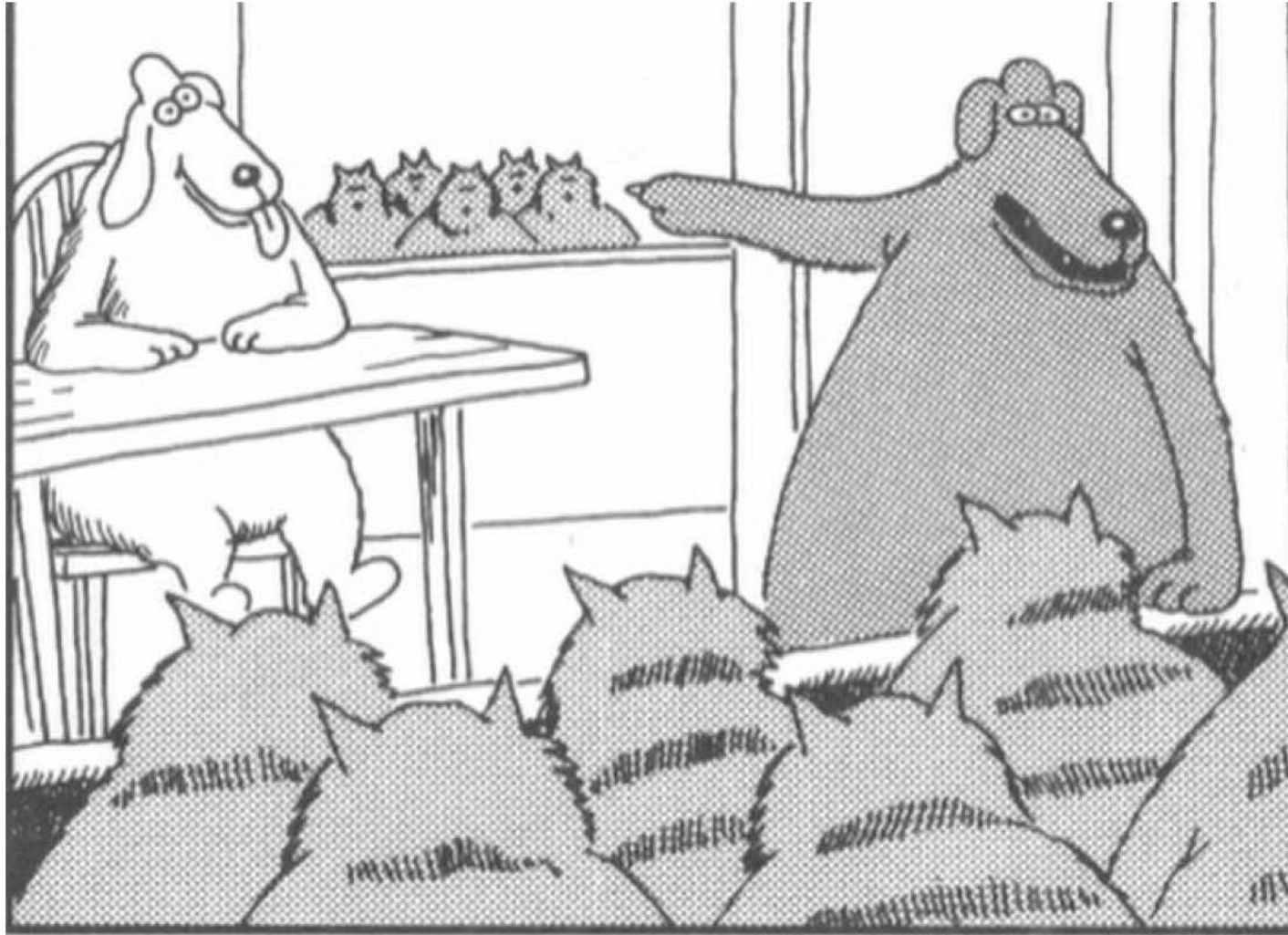
Nonetheless, the transcript of the oral argument in *Hunt* indicates that the panel (Judges Niemeyer, King and Floyd) agreed with the substantive argument that Hobbs Act robbery is not a crime of violence under the Guidelines.

O'Connor/Hunt

Be sure to object to career offender enhancement based on Hobbs Act robbery.

Keep in mind that whether Hobbs Act robbery qualifies as a crime of violence for purposes of 18 U.S.C. § 924(c) is a different question, because the force clause of § 924(c)(3)(B) includes threats against property.

Voluntary Manslaughter



“A cat killer? Is that the face of a cat killer?
Cat chaser maybe. But hey—who isn’t?”

United States v. Smith,
882 F.3d 460 (4th Cir. 2018)

Voluntary Manslaughter

Question: Whether North Carolina voluntary manslaughter is a violent felony under the force clause of the Armed Career Criminal Act.

Smith

Smith argued, like the defendant in *Townsend*, that North Carolina voluntary manslaughter can be committed through culpable negligence and therefore does not categorically fall with the ACCA's force clause

Smith

Just like the panel in *Townsend*, the Fourth Circuit agreed that the force clause requires more than the negligent application of force, but determined that voluntary manslaughter is an intentional crime.

Smith

Like *Townsend*, *Smith* acknowledges that the force clause requires a mens rea of more than negligence or recklessness. In this regard, *Smith*, like *Townsend*, supports the argument that other North Carolina offenses that can be satisfied by proof of culpable negligence, do not qualify.

Involuntary Manslaughter



United States v. Middleton
883 F.3d 485 (4th Cir. 2018)

Involuntary Manslaughter

Question: Whether South Carolina involuntary manslaughter qualifies as a violent felony under the ACCA's force clause

Middleton

Middleton challenged his sentence post-*Johnson* under 28 U.S.C. § 2255, arguing that he no longer qualified for ACCA enhancement. The district court found that he was properly designated an armed career criminal, but granted a COA on whether his prior conviction for South Carolina involuntary manslaughter remained an ACCA predicate.

Middleton

On appeal, Middleton relied on a South Carolina case, *State v. Hambright*, in which the defendant was convicted of involuntary manslaughter after illegally selling alcohol to high school students, who then died in a drunk-driving accident.

Based on *Hambright*, Middleton argued that South Carolina involuntary manslaughter does not fall within the ACCA's force clause because (1) it can be committed with only minimal force and (2) it can be committed negligently.

Middleton

The Fourth Circuit agreed that South Carolina involuntary manslaughter does not qualify as an ACCA predicate.

However, the panel reached this result in different ways.

Chief Judge Gregory found that because involuntary manslaughter can be committed through de minimus force, it could not qualify under the force clause. In reaching this conclusion, Chief Judge Gregory rejected the government's argument that equated causation of injury and use of violent force.

Middleton

The Court concluded that the defendant's action of selling alcohol did not involve violent force:

“It does not follow that any action leading to bodily injury, through however attenuated a chain of causation, necessarily qualifies as a use of violent physical force against the person of another. To hold otherwise would allow any illegal sale—be it alcohol, cigarettes, fireworks, or even a fake identification card—to trigger the ACCA's force clause, simply because physical pain or injury eventually results from the sale. The ACCA's force clause is written too narrowly to encompass such a broad range of criminal behavior.”

Middleton

In other words, just because injury results, doesn't mean that violent force has been used. *United States v. Torres-Miguel*, 701 F.3d 165 (4th Cir. 2012). Chief Judge Gregory concluded that the Supreme Court's decision in *United States v. Castleman*, 134 S. Ct. 1405 (2014) and the Fourth Circuit's decisions in *In re Irby*, 858 F.3d 231 (4th Cir. 2017) and *United States v. Reid*, 861 F.3d 523 (4th Cir. 2017), did not overrule *Torres-Miguel*, and that *Torres-Miguel* "must prevail as binding precedent."

Judge Floyd disagreed with this point, concluding that *Irby* and *Reid* "undermine the majority's reasoning that South Carolina involuntary manslaughter can be committed with de minimis force and by simply causing injury without using force."

Middleton

Judge Floyd found, however, that “South Carolina involuntary manslaughter sweeps more broadly than the ACCA because an individual can be convicted of this offense based on reckless conduct, whereas the ACCA force clause requires a higher degree of mens rea.”

Judge Floyd additionally concluded “that the Supreme Court’s recent decision in *Voisine v. United States*, 136 S. Ct. 2272, 2278, 195 L. Ed. 2d 736 (2016), which ‘conclude[d] that a reckless domestic assault qualifies as a ‘misdemeanor crime of domestic violence’ under [18 U.S.C.] § 922(g)(9),’ does not control how we should construe the ACCA force clause.”

Judge Harris joined this part of Judge Floyd’s concurrence.

Middleton

Middleton is important in several respects:

First, it reconfirms that *de minimus* force is insufficient.

Second, it revives *Torres-Miguel's* distinction between direct and indirect force and rejects the government's reliance on *Castleman*.

Third, it reaffirms the force clause *mens rea* argument and rejects the government's reliance on *Voisine*.

Happy ending!

Government agreed that Jarnaro Middleton was entitled to immediate release and resentencing; filed a motion for immediate issuance of the mandate, which was granted.

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