

Crimes of Violence in the Fourth Circuit

Jenny Leisten, Federal Public Defender's Office, Oct. 19, 2018

The offenses listed below are organized according to whether they qualify as crimes of violence for purposes of U.S.S.G. § 4B1.2, the Armed Career Criminal Act, 18 U.S.C. § 924(c) and 18 U.S.C. § 16(a).

Please see the accompanying citations list for specific decisions. For those offense categories without specific decisions, I have offered my “best guess” based on the logic of similar decisions. Given the rapidly-evolving nature of the law in this area, I encourage you to always double-check and do your own research before relying on the chart.

Offense	§4B1.2?	ACCA?	§924(c)?	§16(a)?
NC common law robbery	Yes	No	Unknown	No
NC robbery with a dangerous weapon	Yes	Yes	Yes	Yes
NC discharge of a firearm into occupied property	No	No	Probably	Probably
NC breaking & entering	No	Yes for now, but preserve	Probably not	No
Involuntary manslaughter	No	No	No	No
NC second-degree rape	No	No	No	No
NC burglary	No	Yes	Probably not	No
Fleeing to elude	No	No	Probably not	No
NC larceny from the person	No	No	Probably not	No
Sex trafficking under 18 U.S.C. § 1591(a)	No	No	No	No
NC conspiracy	No	No	Probably not	No
South Carolina 2 nd degree burglary	No	No	Unknown	No
NC assault on a female	No	No	Unknown	No
NC assault with intent to kill	Yes	Yes	Yes	Yes

Any other NC assault without intent to kill	No	No	Unknown	No
Virginia common law robbery	Yes	No	Unknown	No
Hobbs Act robbery	No	No	Probably	Probably
Hobbs Act conspiracy	No	No	Probably not	No
Kidnapping	Yes	No	No	No
Federal bank robbery	Yes	Yes	Yes	Yes
Federal carjacking	Yes	Yes	Yes	Yes
Arson	Maybe	Maybe	Maybe	Maybe
NC indecent liberties with a child	No	No	No	No

NC Common Law Robbery: *United States v. Gattis*, 877 F.3d 150 (4th Cir. 2017) (NC common law robbery is generic robbery under the Guidelines); *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016) (not an ACCA offense because lacks physical force as an element). Because common law robbery lacks physical force as an element, it will likewise not qualify under 16(a). It is unknown whether it would qualify under the residual clause of 924(c).

NC Robbery with Dangerous Weapon: *United States v. Burns-Johnson*, 864 F.3d 313 (4th Cir. 2017) (offense includes physical force as an element, so qualifies as ACCA offense). Therefore would qualify under Guidelines, 924(c), and 16(a).

NC Discharge of a Firearm into Occupied Property: *United States v. Parral-Dominguez*, 794 F.3d 440 (4th Cir. 2015) (offense lacks physical force against a person as an element, so not a crime of violence under Guidelines). Therefore would not qualify under ACCA. However, because force clause of 924(c) and 16(a) includes force against property, offense probably qualifies under 924(c) and 16(a).

NC B&E: *United States v. Mungro*, 754 F.3d 267 (4th Cir. 2014) (offense qualifies as generic burglary for ACCA) (BUT PRESERVE issue for upcoming Supreme Court decision in *Stitts/Sims*). The Guidelines have removed burglary as an offense, so no longer a crime of violence under 4B1.2 Does not include violent physical force as an element, so not a COV under 16(a). Unknown whether would qualify under the residual clause of 924(c) (you would want to argue that the residual clause of 924(c) is void under *Dimaya*)

Involuntary Manslaughter: *United States v. Peterson*, 629 F.3d 432 (4th Cir. 2011) (NC involuntary manslaughter not generic manslaughter under the Guidelines, so not a COV); *United States v. Middleton*, 883 F.3d 485 (4th Cir. 2018) (South Carolina involuntary manslaughter not an ACCA offense because lacks physical force as an element). Because offense can be committed without physical force and with mens rea of culpable negligence, offense also should not qualify under 924(c) or 16(a).

North Carolina Second-Degree Rape: *United States v. Shell*, 789 F.3d 335 (4th Cir. 2015) (offense lacks physical force and is not generic forcible sex offense, so not a crime of violence under Guidelines). For these same reasons, offense would not qualify under ACCA, 924(c), or 16(a).

NC Burglary: *United States v. Linney*, 819 F.3d 747 (4th Cir. 2016) (NC burglary is ACCA predicate). The Guidelines have removed burglary as an offense, so no longer a crime of violence under 4B1.2 Does not include violent physical force as an element, so not a COV under 16(a). Unknown whether would qualify under the residual clause of 924(c) (would argue that residual clause of 924(c) is void under *Dimaya*)

NC Indecent Liberties: *United States v. Vann*, 660 F.3d 771 (4th Cir. 2011) (offense not an ACCA predicate). Because offense does not have physical force as an element and is not generic forcible sex offense, also would not qualify under 4B1.2, 924(c), or 16(a).

Fleeing to Elude: *United States v. Barlow*, 811 F.3d 133 (4th Cir. 2015) (lacks force as an element so therefore not ACCA predicate). Therefore would not qualify under 4B1.2 or 16(a). Unknown whether would qualify under the residual clause of 924(c) (would argue that residual clause of 924(c) is void under *Dimaya*)

NC Larceny From the Person: *United States v. Taste*, 627 F. App'x 241 (4th Cir. 2015) (no longer an ACCA offense after Johnson, because only qualified under residual clause); *United States v. Jarmon*, 596 F.3d 228, 230-33 (4th Cir. 2010) (holding that the North Carolina crime of larceny from the person was a crime of violence but only under the now-defunct residual clause of 4B1.2). Because offense lacks physical force as an element, would not qualify as a COV under 4B1.2 or 16(a). Unknown whether would qualify under the residual clause of 924(c) (would argue that residual clause of 924(c) is void under *Dimaya*)

Sex Trafficking by Fraud, Force or Coercion: *United States v. Fuertes*, 805 F.3d 485 (4th Cir. 2015) (lacks physical force as an element and therefore not a COV under 924(c)). Thus would also not qualify under ACCA, 4B1.2, or 16(a).

NC Conspiracy: *United States v. Melvin*, 621 F. App'x 226 (4th Cir. 2015) (NC conspiracy to commit robbery with a dangerous weapon lacks physical force and therefore not an ACCA offense); *United States v. McCollum*, 885 F.3d 300 (4th Cir. 2018) (conspiracy to commit murder in aid of racketeering lacks overt act and therefore is not generic conspiracy under the Guidelines); *see also United States v. Whitley*, 737 F. App'x 147 (4th Cir. 2018) (federal drug conspiracy lacks overt act and is therefore not controlled substance offense under Guidelines). Because NC conspiracy lacks an overt

act, it does not qualify as a COV under the Guidelines. Would likewise not qualify under 16(a). Uncertain whether would qualify under the residual clause of 924(c) (you would want to argue that residual clause of 924(c) is void under *Dimaya*, and that under *Fuertes*, there would be no risk that the defendant himself would use force).

South Carolina Second-Degree Burglary: *United States v. McLeod*, 808 F.3d 972 (4th Cir. 2015) (SC burglary broader than generic burglary and therefore not an ACCA offense). The Guidelines have removed burglary as an offense, so no longer a crime of violence under 4B1.2 Does not include violent physical force as an element, so not a COV under 16(a). Unknown whether would qualify under the residual clause of 924(c) (would argue that residual clause of 924(c) is void under *Dimaya*)

NC Assault on a Female: *United States v. Vinson*, 805 F.3d 120 (4th Cir. 2015) (North Carolina assault can be committed through culpable negligence and is therefore not a misdemeanor crime of domestic violence under 922(j)). Would likewise not qualify under ACCA, 4B1.2, or 16(a). Unknown whether would qualify under the residual clause of 924(c) (would argue that residual clause of 924(c) is void under *Dimaya*)

NC Assault With Intent to Kill: *United States v. Townsend*, 886 F.3d 441 (4th Cir. 2018) (element of specific intent to kill removes offense from culpable negligence standard; the offense therefore qualifies as an ACCA predicate). Would therefore also qualify under 4B1.2, 16(a) and 924(c).

NC Assault (all others): *United States v. Vinson*, 805 F.3d 120 (4th Cir. 2015) (North Carolina assault offenses can be committed through culpable negligence). Would likewise not qualify under ACCA, 4B1.2, or 16(a). Unknown whether would qualify under the residual clause of 924(c) (would argue that residual clause of 924(c) is void under *Dimaya*)

Virginia common law robbery: *United States v. Winston*, 850 F.3d 677 (4th Cir. 2017) (offense lacks physical force as an element and therefore not an ACCA offense); *United States v. Parker*, 716 F. App'x 190 (4th Cir. 2018) (offense qualifies as generic robbery under the Guidelines). Because common law robbery lacks physical force as an element, it will likewise not qualify under 16(b). It is unknown whether it would qualify under the residual clause of 924(c).

Hobbs Act robbery: *United States v. O'Connor*, 874 F.3d 1147, 1148 (10th Cir. 2017) (Hobbs Act robbery not a COV under the Guidelines); *United States v. Camp*, 903 F.3d 594 (6th Cir. Sept. 7, 2018) (same). Because Hobbs Act robbery does not include physical force against a person, also does not qualify as an ACCA predicate. However, because the force clauses of 924(c) and 16(a) expressly include force against property, the offense probably qualifies under 924(c) and 16(a). We are waiting for the Fourth Circuit's decision in *United States v. Hassan Ali*, No. 15-4433, which is in abeyance for *US v. Simms* (argued en banc Sept. 26, 2018), to determine whether Hobbs Act robbery is a crime of violence under 924(c).

Hobbs Act Conspiracy: *US v. Simms* (argued en banc Sept. 26, 2018), will determine whether Hobbs Act conspiracy is a crime of violence under 924(c). The circuits are split on whether the residual clause of 924(c) is void for vagueness under *Dimaya*; thus, there is a strong likelihood that this issue will ultimately be resolved by the Supreme Court. Compare *United States v. Salas*, 889 F.3d 681 (10th Cir. 2018) (invalidating § 924(c)(3)(B) based on *Dimaya*); *United States v. Eshetu*, 898 F.3d 36 (D.C. Cir. 2018) (same) with *Ovalles v. United States*, 2018 WL 4830079 (11th Cir. Oct. 4, 2018) (en banc) (924(c) not void for vagueness); *United States v. Douglas*, 2018 WL 4941132 (1st Cir. Oct. 12, 2018) (same). But regardless of how the Supreme Court rules on 924(c), because Hobbs Act robbery is not a COV under the Guidelines, conspiracy will likewise not qualify under 4B1.2. Because force is not an element of the offense, conspiracy is also not an ACCA or 16(a) predicate.

Texas Aggravated Assault: *United States v. Barcenas-Yanez*, 826 F.3d 752 (4th Cir. 2016) (aggravated assault not a crime of violence under U.S.S.G. 2L1.2, the reentry guideline, because offense can be committed recklessly and is therefore broader than federal generic aggravated assault).

Interference with a flight crew not a crime of violence under § 16: *United States v. Diaz*, 865 F.3d 168 (4th Cir. 2017).

Kidnapping: Kidnapping lacks physical force as an element and therefore should not qualify as an ACCA predicate or as a COV under 16(a) or 924(c). See *United States v. Jenkins*, 849 F.3d 390 (7th Cir. 2017) (federal kidnapping is not a crime of violence for purposes of 924(c)). However, because kidnapping is one of the crimes enumerated in the Guidelines, kidnapping will qualify as a COV under 4B1.2. See *United States v. Harris*, 890 F.3d 480 (4th Cir. 2018) (NC 2nd-degree kidnapping a COV under Guidelines).

Bank Robbery: *United States v. McNeal*, 818 F.3d 141 (4th Cir. 2016) (offense includes physical force as an element and is therefore a crime of violence under 924(c)). For this reason, would also qualify as predicate for ACCA, 4B1.2, and 16(a).

Carjacking: *United States v. Evans*, 848 F.3d 242 (4th Cir. 2017) (carjacking a crime of violence for 924(c) purposes under force clause). For this reason, would also qualify as predicate for ACCA, 4B1.2, and 16(a).

Arson: Although arson is an enumerated offense under ACCA and 4B1.2, there is an argument that many forms of arson, including federal arson, encompass burning your own property. As such, the argument goes, these forms of arson do not require force directed against the “property of another” and thus do not qualify as generic arson or under the force clause. See, e.g., *United States v. Salas*, 889 F.3d 681 (10th Cir. 2018) (arson not a crime of violence under 924(c)).