UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[redacted]

Defendant.

Criminal Action No. [redacted] (RBW)
UNDER SEAL

MEMORANDUM OPINION

[redacted] Currently pending before the Court is the parties' dispute, raised at a March 9, 2022 hearing regarding this and other alleged violations of the defendant's conditions of supervised release, regarding whether the defendant's Maryland robbery conviction is a Grade A or Grade B violation under United States Sentencing Guideline ("U.S.S.G.") § 7B1.1(a). Upon careful consideration of the parties' submissions,[1] the Court concludes for the following reasons that the defendant's conviction for Maryland robbery is a Grade B violation.

[1] In addition to the filings already identified, the Court considered the following submissions in rendering its decision: (1) the Memorandum in Aid of Sentencing for Supervised Release Violation ("Def.'s Mem."), ECF No. 71; (2) the United States' Memorandum in Aid of Sentencing for Supervised Release Violation ("Gov't's Mem."), ECF No. 72; (3) the Supplement to United States' Memorandum in Aid of Sentencing for Supervised Release Violation ("Gov't's 1st Supp."), ECF No. 73; (4) the Reply in Support of Memorandum in Aid of Sentencing for Supervised Release Violation ("Def.'s Reply"), ECF No. 74; (5) the Sur-Reply in Support of United States' Memorandum in Aid of Sentencing for Supervised Release Violation ("Gov't's Surreply"), ECF No. 78; (6) the Reply to Government's Surreply ("Def.'s Surreply"), ECF No. 79-1; (7) the defendant's Notice of Additional Authority ("Def.'s Notice"), ECF No. 81; (8) the United States' Response to Court's July 12, 2022[] Order Requesting Supplemental Briefing Addressing Generic Definition of Robbery ("Gov't's 2d Supp."), ECF No. 85; and (9) the Defendant's Response to Court's Order ("Def.'s Supp."), ECF No. 86.

I. BACKGROUND

[redacted]

[redacted]

On March 9, 2022, the parties appeared before the Court for a hearing regarding the defendant's violations of his conditions of supervised release, see Min. Entry (Mar. 9, 2022), during which the parties represented that they disputed whether the defendant's robbery conviction under Maryland law ("Maryland robbery") was a "crime of violence" pursuant to U.S.S.G. § 4B1.2, and, therefore, whether the conviction was a Grade A or Grade B violation according to U.S.S.G. § 7B1.1. On July 11, 2022, after extensive briefing by the parties, see Def.'s Mem.; Gov't's Mem.; Gov't's 1st Supp.; Def.'s Reply; Gov't's Surreply; Def.'s Surreply; Def.'s Notice, the Court held another hearing, during which it indicated that it would issue its ruling in writing and directed the parties to file supplemental briefs, see Order at 1 (July 12, 2022), ECF No. 84. On July 15, 2022, the parties filed their supplemental briefs, see Def.'s Supp.; Gov't's 2d Supp., and the Court took the matter under advisement.

II. STANDARD OF REVIEW

The classification of supervised release violations is governed by U.S.S.G. § 7B1.1(a), which states that "[t]here are three grades of probation and supervised release violations:" Grade A violations, Grade B violations, and Grade C violations. U.S.S.G. § 7B1.1(a). Grade A violations are, inter alia, "federal, state, or local offense[s that are] punishable by a term of imprisonment exceeding one year that . . . [are] crime[s] of violence." Id. § 7B1.1(a)(1). In contrast, Grade B and Grade C violations constitute less serious offenses, namely, "conduct

constituting any other federal, state, or local offense punishable by a term of imprisonment exceeding one year[,]" id. § 7B1.1(a)(2) (Grade B violations), or "conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment of one year or less; or (B) a violation of any other condition of supervision[,]" id. § 7B1.1(a)(3) (Grade C violations).

Here, because the parties' dispute concerns whether the defendant's new offense is a Grade A violation as a "crime of violence[,]" id. § 7B1.1(a)(1), the Court focuses on U.S.S.G. § 7B1.1(a)(1). Pursuant to U.S.S.G. § 4B1.2, a "crime of violence" is a felony offense that falls within the parameters of at least one of the following two clauses: (1) the "elements clause[,]"[2] i.e., the offense "has as an element the use, attempted use, or threatened use of physical force against the person of another[,]" id. § 4B1.2(a)(1), or (2) the "enumerated clause[,]" i.e., the offense "is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c)[,]" id. § 4B1.2(a)(2) (emphasis added).

"When determining whether an offense qualifies as a 'crime of violence' under the enumerated and elements clauses, a sentencing court must" use the categorical approach, i.e., it must "'consider the offense generically' by examining the offense only 'in terms of how the law defines the offense and not in terms of how' the individual defendant 'might have committed it on a particular occasion.'" United States v. Sumner, __ F. Supp. 3d __, 2022 WL 951374, at *14 (D.D.C. 2022) (quoting United States v. Sheffield, 832 F.3d 296, 314 (D.C. Cir. 2016)). "Under the elements clause, the offense being analyzed as a crime of violence must have as an element

[2] The Court notes that the clause found in U.S.S.G. § 4B1.2(a)(1) is referred to interchangeably as the "elements clause" and the "force clause." In this Memorandum Opinion, the Court will refer to this clause as the elements clause.

the 'use, attempted use, or threatened use of physical force against the person of another[.]'" Id. (quoting U.S.S.G. § 4B1.2(a)(1)) (alteration in original). And, under the enumerated clause, the court must determine whether the elements of the offense at issue "are the same as, or narrower than, those of the generic [version of the] offense[,]" Mathis v. United States, 579 U.S. 500, 503 (2016), "i.e., the offense as commonly understood[,]" Descamps v. United States, 570 U.S. 254, 257 (2013).

III. ANALYSIS

The defendant argues that his conviction for the Maryland robbery is not a crime of violence under either the elements or enumerated clauses because "it can be committed recklessly."[3] Def.'s Reply at 1. In response, the government argues that Maryland robbery is a crime of violence under the elements clause because it "is a specific-intent crime and cannot be committed recklessly," Gov't's Surreply at 4, and under the enumerated clause because Maryland robbery matches the generic definition of robbery, which "require[s] property to be taken from a person or a person's presence by means of force or putting in fear[,]" id. at 2 (internal citations and quotation marks omitted). The Court will first address the parties' elements clause arguments, before proceeding to address their enumerated clause dispute.

[3] In his original sentencing memorandum, the defendant argued that Maryland robbery was not a crime of violence because it could "be committed by threats to injure property" or by "threatening to accuse another of having committed sodomy (a type of defamation)," Def.'s Mem. at 5, and therefore could be committed without "the use, attempted use, or threatened use of physical force[,]" U.S.S.G. § 4B1.2. However, as the government noted in its supplement, "the Fourth Circuit [ ] certified a question to the Maryland Court of Appeals asking whether Maryland robbery may be committed 'by means of threatening force against property or threatening to accuse the victim of having committed sodomy[,]" and, "[o]n April 25, 2022, the Maryland Court of Appeals issued its decision, definitively answering 'no.'" Gov't's 1st Supp. at 1. Under the Maryland Court of Appeals's decision in Dickson v. United States, robbery may only be committed by "the use or the threatened use of force against the person" and "has never included alternative modalities based on threats to property or threats to accuse another of sodomy[.]" 274 A.3d 366, 370 (Md. 2022). Consequently, as the defendant notes in his reply, "this holding largely forecloses the previous arguments [he] raised . . . for why Maryland robbery is not a crime of violence[,]" Def.'s Reply at 1, and the Court need not address them here.

A. The Elements Clause

The Court begins by considering whether Maryland robbery is a crime of violence under the elements clause. Citing the Supreme Court's decision in Borden v. United States, 141 S. Ct. 1817, 1825 (2021), the defendant argues that (1) "the [elements] clause's plain text requires proof that the defendant intended an application of force, not merely that he engaged in volitional conduct that happened to produce that result[,]" Def.'s Surreply at 1 (emphasis in original), and thus (2) because "Maryland robbery can be committed with a reckless application of force[,]" it "fails to satisfy the elements clause under the precepts set out in Borden[,]" id. at 6.[4] In response, the government argues that Maryland robbery falls under the elements clause because (1) "Maryland robbery is a specific-intent crime and cannot be committed recklessly[,]" Gov't's Surreply at 4, and (2) the "[d]efendant does not cite a single case where [conduct involving the reckless use of force was charged as robbery in Maryland,]" id. at 5. The Court begins by addressing whether Borden supports the conclusion that a crime that can be committed by a reckless use of force does not have as an element the "use, attempted use, or threatened use of physical force against the person of another[,]" U.S.S.G. § 4B1.2(a)(1), before proceeding to analyze whether Maryland robbery may be committed by a reckless use of force.

[4] In its surreply, the government argues that the defendant should be precluded from raising this argument because "it is a 'well-settled prudential doctrine that courts generally will not entertain new arguments first raised in a reply brief.'" Gov't's Surreply at 1 (quoting Lewis v. District of Columbia, No. CV 15-352 (RBW), 2020 WL 5254976, at *4 (D.D.C. Sept. 3, 2020)); see id. (citing Newspaper Ass'n of Am. v. Postal Regul. Comm'n, 734 F.3d 1208, 1212 (D.C. Cir. 2013), for the proposition that the District of Columbia Circuit "do[es] not consider arguments raised only in a reply brief"). However, the government does not cite a single criminal case in support of this proposition, see generally id., and also fails to note that the defendant raised this argument in his reply after the government identified a development in the law after briefing had concluded on the original issue—namely, the Maryland Court of Appeals' decision in Dickson mooting the original issue being briefed by the parties. In light of that development—coupled with this being a criminal, rather than civil, case—the Court concludes that deeming this argument forfeited would be unduly harsh, considering the potential sentencing consequences, and it will therefore consider this alternative argument raised by the defendant.

1. **The Supreme Court's Decision in Borden**

First, the Court determines whether Borden supports the conclusion that a crime that can be committed by a reckless use of force does not "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another[,]" U.S.S.G. § 4B1.2(a)(1). In Borden, the Supreme Court addressed the question of whether the "definition of 'violent felony'[in the elements clause of the Armed Career Criminal Act ("ACCA")[5]]—an offense requiring the 'use of physical force against the person of another'—include[d] offenses criminalizing reckless conduct." Borden, 141 S. Ct. at 1825 (plurality opinion). Five members of the Supreme Court—the four members of the plurality, as well as Justice Thomas, who concurred in the judgment—held that the elements clause did not apply to offenses criminalizing reckless conduct. See id. (plurality opinion); id. at 1834 (Thomas, J., concurring in the judgment).

The plurality—Justice Kagan, joined by Justices Breyer, Sotomayor, and Gorsuch—focused on the words of the second part of the elements clause, i.e., the "use of physical force against the person of another[.]" Borden at 1825 (plurality opinion) (emphasis added). The plurality held that reckless offenses do not fall within the elements clause because "[t]he phrase 'against another,' when modifying the 'use of force,' demands that the perpetrator direct his [or her] action at, or target, another individual[,]" whereas "[r]eckless conduct is not aimed in that prescribed manner[,]" id. (plurality opinion), because it "is not opposed to or directed at another[,]" id. at 1827 (plurality opinion).

---

[5] Although Borden addressed the meaning of the elements clause in the ACCA, see Borden, 141 S. Ct. at 1822 (plurality opinion), its analysis equally applies to the issue before the Court here because the elements clause in the ACCA and the elements clause in the Sentencing Guidelines are substantively identical. Compare 18 U.S.C. § 924(e)(2)(B)(i) (defining as a "violent felony" "any crime punishable by imprisonment for a term exceeding one year . . . that [ ] has as an element the use, attempted use, or threatened use of physical force against the person of another"), with U.S.S.G. § 4B1.2(a) (defining as a "crime of violence" "any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that [ ] has as an element the use, attempted use, or threatened use of physical force against the person of another").

In contrast, Justice Thomas, in concurring in the judgment, focused on the first part of the elements clause, i.e., the "use of physical force against the person of another[,]" id. at 1835 (Thomas, J. concurring in the judgment) (emphasis added), and concluded that "a crime that can be committed through mere recklessness does not have as an element the 'use of physical force' because that phrase 'has a well-understood meaning applying only to intentional acts designed to cause harm[,]'" id. (Thomas, J., concurring in the judgment) (quoting Voisine v. United States, 579 U.S. 686, 713 (2016) (Thomas, J., dissenting)).[6]

The defendant argues that "Borden made clear that the [elements] clause's plain text requires proof that [a] defendant intended an application of force, not merely that he [or she] engaged in volitional conduct that happened to produce that result[,]" Def.'s Surreply at 1 (emphasis in original), and, therefore, offenses that only require a reckless use of force do not qualify as crimes of violence under the elements clause, see id. The government does not respond to the defendant's interpretation of Borden, but rather focuses its argument only on whether Maryland robbery may be committed recklessly, which is discussed infra, see Section III.A.2. See Gov't's Surreply at 4–6.

The Court agrees with the defendant that Borden held that the "use of physical force against the person of another," U.S.S.G. § 4B1.2, requires a mens rea regarding the use of force that is greater than recklessness. As the plurality described in Borden,

> [t]he "use of physical force," as Voisine[, 579 U.S. at 687,] held, means the "volitional" or "active" employment of force. The fight begins with the word "against." According to Borden, that word means "in opposition to," and so "introduces the target of the preceding action." Examples are easy to muster: The

[6] Despite agreeing that Borden's offense did not constitute a crime of violence under the elements clause, Justice Thomas declined to join the plurality opinion because he would overrule the Supreme Court's prior decision in Johnson v. United States, 576 U.S. 591, 597 (2015), that the residual clause was unconstitutionally vague, and conclude that Borden's offense was a crime of violence under the residual clause. See Borden, 141 S. Ct. at 1835 (Thomas, J., concurring in the judgment).

> general deployed his forces against a rival regiment, or the chess master played the Queen's Gambit against her opponent. The [g]overnment responds that "against" instead means "mak[ing] contact with," and so introduces the mere recipient of force rather than its "intended target." . . . The difference in meaning, both parties agree, matters for this case. If "against," as used here, expresses a kind of directedness or targeting, then recklessness—as even the [g]overnment concedes—falls outside the elements clause. Only if the "against" phrase lacks that connotation—if, as the [g]overnment argues, it is indifferent to whether the conduct is directed at another—can the elements clause include reckless offenses.
>
> Borden's view of "against," as introducing the conscious object (not the mere recipient) of the force, is the right one given the rest of the elements clause. . . . The critical context here is the language that "against another" modifies—the "use of physical force." As just explained, "use of force" denotes volitional conduct. And the pairing of volitional action with the word "against" supports that word's oppositional, or targeted, definition. . . .
>
> On that understanding, the clause covers purposeful and knowing acts, but excludes reckless conduct[.] . . . Purposeful conduct is obvious. Suppose a person drives his car straight at a reviled neighbor, desiring to hit him. The driver has, in the statute's words, "use[d] . . . physical force against the person of another." The same holds true for knowing behavior. Say a getaway driver sees a pedestrian in his path but plows ahead anyway, knowing the car will run him over. That driver, too, fits within the statute: Although he would prefer a clear road, he too drives his car straight at a known victim. Or said otherwise, both drivers (even though for different reasons) have consciously deployed the full force of an automobile at another person. But that is not so of a reckless (or a negligent) actor. Imagine a commuter who, late to work, decides to run a red light, and hits a pedestrian whom he did not see. The commuter has consciously disregarded a real risk, thus endangering others. And he has ended up making contact with another person, as the [g]overnment emphasizes. But as the [g]overnment just as readily acknowledges, the reckless driver has not directed force at another: He has not trained his car at the pedestrian understanding he will run him over. To the contrary, his fault is to pay insufficient attention to the potential application of force. Because that is so—because his conduct is not opposed to or directed at another—he does not come within the elements clause. He has not used force "against" another person in the targeted way that clause requires.

Borden, 141 S. Ct. at 1825–27 (plurality opinion) (internal citations omitted). Accordingly, the Borden plurality's conclusion that the elements clause only applies to offenses with a mens rea greater than recklessness rests on its conclusion that the phrase "use of physical force against the

person of another[,]" id. at 1825 (plurality opinion), requires a purposeful or knowing use of force targeted at another individual. See generally id. at 1825–27 (plurality opinion).

Similarly, Justice Thomas concluded that the elements clause did not "encompass[Borden's] conviction under Tennessee law for reckless aggravated assault" because

> a crime that can be committed through mere recklessness does not have as an element the "use of physical force" because that phrase "has a well-understood meaning applying only to intentional acts designed to cause harm." Voisine[,] . . . 136 S. Ct. [at] 2279 . . . (Thomas, J., dissenting). The elements clause does not encompass [Borden's] conviction because the statute under which he was convicted could be violated through mere recklessness.

Id. at 1835 (Thomas, J., concurring in the judgment).

In their filings, neither party addresses the question of Borden's holding. See generally Def.'s Reply; Gov't's Surreply; Def.'s Surreply; Gov't's 2d Supp.; Def.'s Supp. Under the rule adopted in Marks v. United States, 430 U.S. 188 (1977), "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds[.]" Id. at 193 (internal citation and quotation marks omitted). The District of Columbia Circuit has interpreted the Marks rule to mean that the narrowest opinion "must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment." King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc).

When applied to Borden, the Marks rule prescribes that the phrase "use of physical force against the person of another" excludes reckless conduct because both the Justices joining the plurality opinion and Justice Thomas, in his concurrence, agree that the phrase "use of physical force against the person of another" excludes reckless conduct, although the Justices base their conclusions on different parts of that phrase. See Borden, 141 S. Ct. at 1825 (plurality opinion);

id. at 1834 (Thomas, J., concurring in the judgment); accord United States v. Dixon, 805 F.3d 1193, 1197 (9th Cir. 2015) (concluding, as the Supreme Court later held in Borden, that, to fall under the elements clause, "the use of force must be intentional, not just reckless or negligent"). Thus, Borden stands for the proposition that an offense only "has as an element the use, attempted use, or threatened use of physical force against the person of another[,]" U.S.S.G. § 4B1.2(a)(1), if the use of force is either purposeful or knowing, rather than merely reckless or negligent. Therefore, if Maryland robbery may be committed by a reckless use of force, it does not constitute a crime of violence under the elements clause.

2. Whether Maryland Robbery May Be Committed by a Reckless Use of Force

Having concluded that, under Borden, the use of force required by the elements clause must be purposeful or knowing, rather than merely reckless or negligent, the Court now turns to the question of whether Maryland robbery can be committed by a reckless use of force. The defendant argues that Maryland robbery has been defined by the Maryland courts as "a larceny from the person accomplished by an assault[, i.e.,]putting in fear[,] or battery[,]" Def.'s Reply at 6 (quoting Snowden v. State, 583 A.2d 1056, 1059 (Md. 1991)), and "Maryland courts 'have recognized that a criminal battery is committed . . . if the contact was the result of the defendant's recklessness or negligence[,]'"[7] id. (quoting Elias v. State, 661 A.2d 702, 709 (Md. 1995)). Thus, according to the defendant, because "someone can commit Maryland robbery if they intentionally grab someone's purse (larceny) and negligently/recklessly touch the victim in the process (battery)[,]" "the purported force requirement of Maryland robbery tolerates reckless conduct," and thus it is not a crime of violence under the elements clause. Id. In response, the

[7] Because the parties focus their argument on the version of robbery that includes battery, rather than assault, see Def.'s Reply at 6–8; Gov't's Surreply at 4–6, and, under the categorical approach, the Court need not address all of the means by which an offense can be committed, see Borden, 141 S. Ct. at 1822 (noting that the Court is charged with determining whether "any—even the least culpable—of the acts criminalized do not entail th[e] kind of force" set forth in the elements clause), the Court focuses its analysis on the version of the offense based on battery.

government argues that (1) "Maryland robbery is a specific intent crime [that] cannot be committed recklessly[,]" Gov't's Surreply at 4, and (2) the "[d]efendant does not cite a single case where" an individual has been charged with robbery that involved the reckless use of force, id. at 5. For the following reasons, the Court concludes that Maryland robbery may be committed by a reckless use of force.

To start, the Court agrees with the defendant, see Def.'s Reply at 6, that the definition of robbery as interpreted by the Maryland Court of Appeals allows a defendant to be convicted of robbery where his or her use of force was not intended to facilitate the taking of the victim's property. As the defendant correctly notes, see id., Maryland courts have defined robbery as a combination of (1) larceny and (2) battery or assault. See Snowden, 583 A.2d at 1059 (defining robbery as "a compound larceny" that "is a larceny from the person accomplished by either an assault (putting in fear) or a battery (violence)[,]" where "either combination produces a robbery"); see also Dickson v. United States, 274 A.3d 366, 378 (Md. 2022) (quoting this standard from Snowden). The relevant element for purposes of the elements clause is the second element, i.e., the "assault (putting in fear) or [the] battery (violence)[,]" Snowden, 583 A.2d at 1059, rather than the larceny, as larceny itself does not involve the use of force, cf. Metheny v. State, 755 A.2d 1088, 1104 (Md. 2000) (defining the larceny component of robbery as "the fraudulent taking and carrying away of a thing without claim of right with the intention of converting it to a use other than that of the owner without his consent" (internal citation and emphasis omitted)). According to the Maryland Court of Appeals, the assault or battery element of robbery "accomplishe[s]" the larceny, Snowden, 583 A.2d at 1059, even if it both precedes and is unrelated to the larceny element, because "robbery does not require 'that the defendant's violence-or-intimidation acts be done for the very purpose of taking the victim's property[, but

rather] it is enough that [the individual] takes advantage of a situation which he created for some other purpose[.]'" Metheny, 755 A.2d at 1105 (quoting Stebbing v. State, 473 A.2d 903, 914 (Md. 1984)). So long as "there [is] force followed by a taking with intent to steal as part of the same general occurrence or episode[,]" then "the intent to steal need not coincide with the force." Stebbing, 473 A.2d at 915.

In addition, as the defendant correctly notes, see Def.'s Reply at 6, Maryland courts have held that battery may be committed recklessly. See, e.g., Duckworth v. State, 594 A.2d 109, 112–13 (Md. 1991) ("[C]riminal battery is committed, in accordance with the prevailing view[,] . . . if the contact was the result of [the defendant's] recklessness or criminal negligence[.]"); Lamb v. State, 613 A.2d 402, 455 (Md. Ct. Spec. App. 1992) (holding that "[a]n unintended battery . . . requires only a general intent to do [ ] the criminally negligent act or [] the unlawful act, with no thought being necessary as to the consequences of such act").

Therefore, as the defendant correctly argues, see Def.'s Surreply at 6, because (1) Maryland robbery can entail a larceny plus a battery, where the battery is not committed with the intent of effectuating the larceny, and (2) battery under Maryland law may be committed recklessly or negligently, Maryland robbery condones the conviction of someone who recklessly used force and, "tak[ing] advantage of [the] situation[,]" Metheny, 755 A.2d at 1105 (internal quotation marks omitted), engaged in larceny. For example, as the Maryland Court of Appeals stated in Stebbing, "if the force results in death, a taking and asportation after [the] death is nevertheless robbery." 473 A.2d at 915. This hypothetical would involve two components: (1) the "force [that] result[ed] in death[,]" id.—i.e., the battery; and (2) the "taking and asportation after [the] death[,]" id.—i.e., the larceny. The battery need not have occurred intentionally—for example, a person recklessly running into someone and knocking them down

a flight of stairs, or striking someone while driving recklessly—for the entire offense to constitute robbery because it entailed larceny and battery "as part of the same general occurrence or episode[,]" id. Accordingly, the Court concludes that, as defined by the Maryland courts, Maryland robbery may be committed by the reckless use of force.

As noted earlier, the government raises two arguments in response to the defendant's position: (1) "Maryland robbery is a specific-intent crime and cannot be committed recklessly[,]" Gov't's Surreply at 4, and (2) there is not a "realistic probability" that the State would actually charge as robbery conduct where the use of force was only reckless or negligent, since the "[d]efendant does not cite a single case where this has happened[,]" id. at 5. For the following reasons, the Court rejects both arguments.

Regarding the government's argument that "Maryland robbery is a specific-intent crime and cannot be committed recklessly[,]" id. at 4–5, as the defendant correctly notes in his surreply, see Def.'s Surreply at 2, this argument misapprehends the relevant question. As discussed above, Maryland robbery contains two elements: (1) larceny and (2) assault or battery. See Snowden, 583 A.2d at 1059 (defining robbery as "a compound larceny" that "is a larceny from the person accomplished by either an assault (putting in fear) or a battery (violence)[,]" where "either combination produces a robbery"). The specific intent to which the government refers, i.e., the "intent to permanently deprive the owner of property[,]" Gov't's Surreply at 4 (internal citations and quotation marks omitted), concerns the larceny element, rather than the assault/battery element. As the Maryland Court of Appeals explained:

> Larceny is the fraudulent taking and carrying away of a thing without claim of right with the intention of converting it to a use other than that of the owner without his [or her] consent. . . . Because an intent to steal, the animus furandi, must be present, it follows that larceny, and therefore robbery, is classed as a specific intent crime.

> Hook v. State, . . . 553 A.2d 233, 236 ([Md.]1989). Furthermore, we have held that the intent to steal must occur at the time of the taking and not necessarily at the time the force is applied to neutralize the victim prior to the robbery. See Stebbing[, 473 A.2d at 914.] Indeed, we have adopted the view, also reached by a majority of other states, which holds that robbery does not require "that the defendant's violence-or-intimidation acts be done for the very purpose of taking the victim's property . . . [—it is] enough that he takes advantage of a situation which he created for some other purpose . . ." [] Stebbing, . . . 473 A.2d at 914 (citing W. LaFave & A. Scott, Criminal Law § 94, at 701–02 (1972)). We elaborated in Stebbing that:
>
> > If the force precedes the taking, the intent to steal need not coincide with the force. It is sufficient if there be force followed by a taking with intent to steal as part of the same general occurrence or episode. Even if the force results in death, a taking and asportation after the death is nevertheless robbery.
>
> . . . 473 A.2d at 915. Stebbing is an exception to the general requirement that the intent to commit a crime accompany a forbidden act. See Harris v. State, . . . 728 A.2d 180, 182–83 ([Md.]1999). This exception, however, is justified, in part, because a felon who applies force to neutralize a victim should be held responsible for that action if the felon later decides to take advantage of the situation by robbing the victim. In essence, we have allowed, in such circumstances, for a constructive concurrence of the force and intent to steal at the time of the taking.

Metheny, 755 A.2d at 1104–05. Accordingly, although the government is correct that Maryland robbery is a specific-intent crime requiring "an intent to steal[,]" Hook, 553 A.2d at 236, this specific intent "need not coincide with the force[,]" Stebbing,473 A.2d 915. Thus, because the specific intent involved in robbery does not concern the mens rea required for the use of force, the government's argument does not assist the Court in determining whether Maryland robbery may be committed with a reckless use of force.

Second, the government argues that, despite the Maryland case law discussed above, there is not a "realistic probability" that Maryland would actually charge as robbery conduct where the use of force was only reckless, since the "[d]efendant does not cite a single case where this has happened." Gov't's Surreply at 5. In response, the defendant argues that

> the vast majority of circuits have found—the First, Second, Third, Fourth, Sixth, Ninth, Tenth, and Eleventh—[that]there is no requirement that [a] defendant point to an actual prosecution or case when the state court decisions or the statutory language provide a realistic probability that the offense can be committed in the manner described[.]

Def.'s Surreply at 2–3. Therefore, according to the defendant, because "Maryland's highest court has repeatedly said that Maryland [robbery] is a compound crime that can involve larceny plus a battery" and "has also repeatedly stated that battery can be committed recklessly[,]" "nothing more is required." Id. at 5.

The "realistic probability" requirement cited by the government stems from Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007), in which the Supreme Court held that "aiding and abetting a theft offense" under California law fell under the enumerated clause of 8 U.S.C. § 1101(a)(43)(G), which included "a theft offense (including receipt of stolen property) . . . for which the term of imprisonment [is] at least one year." Id. at 185 (quoting 8 U.S.C. § 1101(a)(43)(G)). Duenas-Alvarez had argued that the California offense was broader than the enumerated offense because it "reache[d] beyond generic theft to cover certain nongeneric crimes." Id. at 190. In concluding that the California offense did not include offenses "that f[e]ll[] outside [of] the generic definition of 'theft[,]'" id. at 194, the Supreme Court stated:

> Moreover, in our view, to find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. To show that realistic probability, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues[,]

id. at 193. See also Moncrieffe v. Holder, 569 U.S. 184, 191 (2013) ("[O]ur focus on the minimum conduct criminalized by the state statute is not an invitation to apply 'legal

imagination' to the state offense; there must be 'a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.'").

Although Duenas-Alvarez addressed the enumerated clause—rather than the elements clause—other members of this court have subsequently applied the "realistic probability" test to the elements clause. See, e.g., United States v. Barnes, Criminal No. 19-CR-00027 (ESH), 2019 WL 5458789, at *2 (D.D.C. Oct. 24, 2019) (requiring a defendant to "demonstrate 'a realistic probability, not a theoretical possibility,' that the statute could be applied to conduct that does not include an element of force" and noting that "Barnes point[ed] the Court to no such cases and, to paraphrase the Fourth Circuit, 'it w[ou]l[d] be the rare [carjacker] who commits that offense with poison.'" (quoting United States v. McNeal, 818 F.3d 141, 156 (4th Cir. 2016)) (emphasis omitted)); United States v. Thomas, Criminal Action No. 17-194 (RDM), 2019 WL 1590101, at *3 (D.D.C. Apr. 12, 2019) ("The Supreme Court has cautioned that, when applying the categorical approach, however, there needs to be a realistic probability, not a theoretical possibility that the statute will be applied in the way a defendant contends, usually by pointing to his own case or other cases in which the . . . courts in fact did apply the statute in the special (nongeneric) manner for which he argues" (internal citation and quotation marks omitted)).

This Court sees no reason to depart from the position taken by its colleagues and concludes that there is a "realistic probability[,]" Duenas-Alvarez, 549 U.S. at 193; that Maryland prosecutors would charge someone with robbery for recklessly using force and thereafter committing a larceny. The government correctly notes, see Gov't's Surreply at 5, that the defendant has not identified a case where someone in Maryland has been charged with committing a robbery where the force used to commit the robbery was reckless. See generally

Def.'s Mem.; Def.'s Reply; Def.'s Surreply; Def.'s Supp. However, as discussed above, the Maryland Court of Appeals has been clear that (1) robbery can entail a larceny plus a battery, where the specific intent to steal "need not coincide with the force[,]" Stebbing, 473 A.2d at 915; and (2) a "battery is committed . . . if the contact was the result of [the defendant's] recklessness[,]" Duckworth, 594 A.2d at 112–13. And, although the District of Columbia Circuit has not clarified whether there is only a "realistic probability[,]" Duenas-Alvarez, 549 U.S. at 193, of an offense being charged for certain conduct if a defendant is able to identify a case where such conduct has been charged, at least seven other circuits have held that Duenas-Alvarez does not require the identification of a case if state law itself provides the requisite "reasonable probability[.]" See Def.'s Surreply at 3–4 (collecting cases).[8]

The Court agrees with the seven circuit courts of appeals that support the defendant's position, and therefore concludes that the defendant need not identify a particular case where

---

[8] As the defendant sets forth in his surreply, see Def.'s Surreply at 3–4, seven circuits have held that a defendant need not identify a particular case in order to satisfy Duenas-Alvarez's reasonable probability standard. See Swaby v. Yates, 847 F.3d 62, 66 (1st Cir. 2017) (holding that Duenas-Alvarez's "sensible caution against crediting speculative assertions regarding the potentially sweeping scope of ambiguous state law crimes has no relevance to" cases where "[t]he state crime at issue clearly does apply more broadly than the federally defined offense"); Hylton v. Sessions, 897 F.3d 57, 63 (2d Cir. 2018) (holding that "[t]here is no [ ] requirement" that a defendant identify a particular prosecution "when the statutory language itself, rather than the application of legal imagination to that language, creates the realistic probability that a state would apply the statute to conduct beyond the generic definition"); Salmoran v. Att'y Gen. U.S., 909 F.3d 73, 82 (3d Cir. 2018) (holding that, "because [the statute at issue in that case] plainly encompasse[d] more conduct than its federal counterpart, Salmoran d[id] not need to identify cases in which New Jersey actually prosecuted overbroad conduct"); United States v. Aparicio-Soria, 740 F.3d 152, 157 (4th Cir. 2014) (holding that a defendant need not identify a particular case where Maryland charged conduct that "falls outside the realm of violent force" when there was "precedent from Maryland's highest court stating that the degree of force required as an element of Maryland resisting arrest is offensive physical contact, and crimes requiring offensive physical contact are not crimes of violence containing an element of violent force" (internal citations and quotation marks omitted)); Chavez-Solis v. Lynch, 803 F.3d 1004, 1010 (9th Cir. 2015) (holding that "when a state statute's greater breadth is evident from its text, a petitioner need not point to an actual case applying the statute of conviction in a nongeneric manner" (internal citation and quotation marks omitted)); United States v. Titties, 852 F.3d 1257, 1274 (10th Cir. 2017) (holding that a "disparity between [a] statute and the [elements clause of the] ACCA was enough" and thus "[t]he [c]ourt [need] not seek or require instances of actual prosecutions for the means that did not satisfy the ACCA"); Ramos v. U.S. Att'y Gen., 709 F.3d 1066, 1071–72 (11th Cir. 2013) (holding that "Duenas-Alvarez does not require [a] showing [that Georgia would use its shoplifting statute to prosecute conduct falling outside the generic definition of theft,] when the statutory language itself, rather than the application of legal imagination to that language, creates the reasonable probability that a state would apply the statute to conduct beyond the generic definition" (internal quotation marks omitted)).

conduct outside of the elements clause was charged if state case law itself provides the "realistic probability[,]" Duenas-Alvarez, 549 U.S. at 193, that Maryland prosecutors could charge someone with robbery for recklessly using force and subsequently committing a larceny. As the Fourth Circuit stated in United States v. Aparicio-Soria, 740 F.3d 152 (4th Cir. 2014), when there is "precedent from [the state's] highest court" clarifying the scope of the offense at issue, id. at 157, resolving whether the offense requires the "use of physical force against the person of another," U.S.S.G. § 4B1.2, "does not require an exercise of [legal] imagination, [but rather] merely mundane legal research skills[,]" Aparicio-Soria, 740 F.3d at 157.

The Court therefore concludes that the Maryland Court of Appeals decisions discussed above provide the "realistic probability" that conduct that involved the mere reckless use of force could be charged as robbery under Maryland law. See Snowden, 583 A.2d at 1059; Elias, 661 A.2d at 709. Accordingly, because offenses that can be committed through the exercise of only reckless force do not qualify as crimes of violence under the elements clause, see Borden, 141 S. Ct. at 1825 (plurality opinion); id. at 1834 (Thomas, J., concurring in the judgment), the Court concludes that Maryland robbery does not qualify as a crime of violence under the elements clause.

B. The Enumerated Clause

Having concluded that Maryland robbery is not a crime of violence under the elements clause, the Court now turns to whether it constitutes a crime of violence under the enumerated clause. The defendant argues that "Maryland robbery categorically fails to satisfy the enumerated clause because generic robbery [ ] does not tolerate reckless conduct." Def.'s Reply at 7. In response, the government argues that "[t]he majority of states require property to be taken from a person or a person's presence by means of force or putting in fear[,]" Gov't's

Surreply at 2 (quoting United States v. Santiesteban-Hernandez, 469 F.3d 376, 380 (5th Cir. 2006), abrogated on other grounds by United States v. Rodriguez, 711 F.3d 541, 555 (5th Cir. 2013)), and do not specify a precise mens rea, exactly like Maryland robbery, see id. at 3. For the following reasons, the Court concludes that Maryland robbery also does not constitute a crime of violence under the enumerated clause.

In determining whether an offense falls under the enumerated clause, the Court must "compare[] the elements of the defendant's crime of conviction . . . with the elements of any potentially applicable § 4B1.2(a)(2) enumerated offenses . . . to see if they match." United States v. Crews, Crim. Action No. 11-372-1, 2021 WL 5798033, at *8 (D.D.C. Dec. 7, 2021), appeal filed, Case No. 21-3088 (Dec. 10, 2021) (internal citation omitted). If "the Guidelines do not supply a definition of the enumerated offense, as in the case of robbery[,]" the Court must determine "the generic, contemporary meaning[,]" Taylor v. United States, 495 U.S. 575, 598 (1990), by considering "a wide range of sources . . . [,] including federal and state statutes, the Model Penal Code, dictionaries, and treatises[,]" Crews, 2021 WL 5798033, at *8 (quoting United States v. O'Connor, 874 F.3d 1147, 1151 (10th Cir. 2017)). Although the Court should consider a "range of sources[,]" id., the generic definition of a crime "roughly correspond[s] to the definitions of [the crime] in a majority of the States' criminal codes[,]" Taylor, 495 U.S. at 589; see United States v. Graves, 877 F.3d 494, 504 (3d Cir. 2017) ("[T]he most important factor in defining the generic version of an offense is the approach of the majority of state statutes defining the crime."). If the Court determines that "the scope of conduct covered by the defendant's crime of conviction is broader than what the enumerated offense definition would cover," then the offense is not a "crime of violence" under the enumerated clause. Crews, 2021 WL 5798033, at *8.

As an initial matter, the Court notes that the parties dispute only the mens rea required by the generic definition of robbery. See, e.g., Def.'s Supp. at 3 (arguing that "the vast majority of states and relevant federal statutes have defined robbery to require more than a reckless application of force"); Gov't's 2d Supp. at 1 (arguing that courts "have repeatedly concluded that no force-specific mens rea is required for enumerated robbery, beyond the underlying mens rea for the theft" (underlines added)). Accordingly, the Court will focus its analysis exclusively on comparing the mens rea required for the application of force in the generic definition of robbery with the mens rea required for the application of force in Maryland robbery.[9] Because "the most important factor in defining the generic version of an offense is the approach of the majority of state statutes defining the crime[,]" Graves, 877 F.3d at 504, the Court begins by reviewing each state's definition of robbery.

Three states—Hawaii,[10] Maine,[11] and Texas[12]—have expressly defined robbery to include a mens rea of recklessness. Four states—Illinois,[13] North Dakota,[14] Ohio,[15] and

---

[9] The parties do not dispute that the remaining portion of the generic definition of robbery is "the taking of property from another person or from the immediate presence of another person by force or [by] intimidation." United States v. Lockley, 632 F.3d 1238, 1244 (11th Cir. 2011) (quoting United States v. Walker, 595 F.3d 441, 446 (2d Cir. 2010)) (emphasis in original). See generally Def.'s Reply; Gov't's Surreply; Def.'s Surreply; Gov't's 2d Supp.; Def.'s Supp.

[10] Under Hawaiian law, "[a] person commits the offense of robbery in the second degree if, in the course of committing theft or non-consensual taking of a motor vehicle[,] . . . [t]he person recklessly inflicts serious bodily injury upon another." Haw. Rev. Stat. § 708-841(1)(c) (emphasis added).

[11] Under Maine law, "[a] person is guilty of robbery if the person commits or attempts to commit theft and at the time of the person's actions[] [ ] [t]he actor recklessly inflicts bodily injury on another[.]" Me. Rev. Stat. Ann. tit. 17-A, § 651(1)(A) (emphasis added).

[12] Under Texas law, "[a] person commits [robbery] if, in the course of committing theft . . . and with intent to obtain or maintain control of the property, he[or she]: (1) intentionally, knowingly, or recklessly causes bodily injury to another; or (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death." Tex. Penal Code Ann. § 29.02(a) (emphasis added).

[13] Under Illinois law, "[a] person commits robbery when he or she knowingly takes property . . . from the person or presence of another by the use of force by threatening the imminent use of force[,]" 720 Ill. Comp. Stat. Ann. 5/18-1(a), and, "[i]f [an Illinois criminal] statute does not prescribe a particular mental state applicable to an element of an (continued . . .)

Pennsylvania[16]—do not expressly include a mens rea of recklessness in their definition of robbery, but do include a provision in their criminal code specifying that, if a criminal offense fails to provide a mens rea, the requisite mens rea includes recklessness. Only one state—California—charges as robbery theft combined with even an accidental application of force, which is a standard lower than recklessness.[17]

In contrast, eighteen states—Alabama,[18] Alaska,[19] Arizona,[20] Arkansas,[21] Connecticut,[22] Delaware,[23] Iowa,[24] Kentucky,[25] Nebraska,[26] New Hampshire,[27] New Jersey,[28] New York,[29]

(. . . continued)
offense (other than an offense which involves absolute liability), any mental state defined in [§§] 4-4, 4-5[,] or 4-6[—i.e., intent, knowledge, or recklessness—]is applicable[,]" id. 5/4-3(b) (emphasis added). Moreover, in People v. Jones, 595 N.E.2d 1071 (Ill. 1992), the Supreme Court of Illinois clarified that "either intent, knowledge[,] or recklessness is an element of robbery even though the statutory definition of robbery does not expressly set forth a mental state." Id. at 1075.

[14] Under North Dakota law, "[a] person is guilty of robbery if, in the course of committing a theft, he [or she] inflicts or attempts to inflict bodily injury upon another or threatens or menaces another with imminent bodily injury[,]" N.D. Cent. Code Ann. § 12.1-22-01(1), and, "[i]f a statute or regulation thereunder defining a crime does not specify any culpability and does not provide explicitly that a person may be guilty without culpability, the culpability that is required is willfully[,]" id. § 12.1-02-02(2) i.e., "engag[ing] in the conduct intentionally, knowingly, or recklessly[,]" id. § 12.1-02-02(1)(e) (emphasis added).

[15] Under Ohio law, "[n]o person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall . . . [i]nflict, attempt to inflict, or threaten to inflict physical harm on another" or "[u]se or threaten the immediate use of force against another[,]" Ohio Rev. Code Ann. § 2911.02(a)(2)–(3), and, "[w]hen language defining an element of an offense that is related to knowledge or intent or to which mens rea could fairly be applied neither specifies culpability nor plainly indicates a purpose to impose strict liability, the element of the offense is established only if a person acts recklessly[,]" id. § 2901.21(C)(1) (underline and emphasis added).

[16] Under Pennsylvania law, "[a] person is guilty of robbery if, in the course of committing a theft, he[or she] [ ] inflicts serious bodily injury upon another; [ ] threatens another with or intentionally puts him [or her] in fear of immediate serious bodily injury; [ ] commits or threatens immediately to commit any felony of the first or second degree; [ ] inflicts bodily injury upon another or threatens another with or intentionally puts him [or her] in fear of immediate bodily injury; [or] physically takes or removes property from the person or another by force however slight[.]" 18 Pa. Stat. and Cons. Stat. § 3701(a)(1)(i)–(v). Additionally, "[w]hen the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts intentionally, knowingly[,] or recklessly with respect thereto." Id. § 302(c) (emphasis added).

[17] In People v. Anderson, 252 P.3d 968 (Cal. 2011), the California Supreme Court held that robbery may be committed through an accidental use of force. See id. at 972 ("It was robbery, even if, as [Anderson] claim[ed], he did not intend to strike [the victim], but did so accidentally." (emphasis added)).

[18] Under Alabama law, "[a] person commits the crime of robbery in the third degree if in the course of committing a theft he[or she] [ ] [u]ses force against the person of the owner or any person present with intent to overcome his [or her] physical resistance or physical power of resistance; or [ ] [t]hreatens the imminent use of force against the (continued . . .)

(. . . continued)
person of the owner or any person present with intent to compel acquiescence to the taking of or escaping with the property." Ala. Code § 13A-8-43(a) (emphasis added).

[19] Under Alaska law, "[a] person commits the crime of robbery in the second degree if, in the course of taking or attempting to take property from the immediate presence and control of another, the person uses or threatens the immediate use of force upon any person with intent to (1) prevent or overcome resistance to the taking of the property or the retention of the property after taking; or (2) compel any person to deliver the property or engage in other conduct which might aid in the taking of the property." Alaska Stat. Ann. § 11.41.510(a) (emphasis added).

[20] Under Arizona law, "[a] person commits robbery if in the course of taking any property of another from his [or her] person or immediate presence and against his [or her] will, such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property." Ariz. Rev. Stat. Ann. § 13-1902(A) (emphasis added).

[21] Under Arkansas law, "[a] person commits robbery if, with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately after committing a felony or misdemeanor theft, the person employs or threatens to immediately employ physical force upon another person." Ark. Code Ann. § 5-12-102(a) (emphasis added).

[22] Under Connecticut law, "[a] person commits robbery when, in the course of committing a larceny, he [or she] uses or threatens the immediate use of physical force upon another person for the purpose of: (1) [p]reventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or (2) compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny." Conn. Gen. Stat. Ann. § 53a-133 (emphasis added).

[23] Under Delaware law, "[a] person is guilty of robbery in the second degree when, in the course of committing theft, the person uses or threatens the immediate use of force upon another person with intent to: (1) [p]revent or overcome resistance to the taking of the property or to the retention thereof immediately after the taking; or (2) [c]ompel the owner of the property or another person to deliver up the property or to engage in other conduct which aids in the commission of the theft." Del. Code Ann. tit. 11, § 831(a) (emphasis added).

[24] Under Iowa law, "[a] person commits a robbery when, having the intent to commit a theft, the person does any of the following acts to assist or further the commission of the intended theft or the person's escape from the scene thereof with or without the stolen property:" (1) "[c]ommits an assault upon another[,]" (2) "[t]hreatens another with or purposely puts another in fear of immediate serious injury[,]" or (3) "[t]hreatens to commit immediately any forcible felony." Iowa Code § 711.1(1) (emphasis added). Moreover, Iowa defines "assault" as (1) "[a]ny act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act[,]" (2) "[a]ny act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act[,]" (3) "[i]ntentionally point[ing] any firearm toward another, or display[ing] in a threatening manner any dangerous weapon toward another[,]" or (4) "[i]ntentionally point[ing] a laser emitting a visible light beam at another person with the intent to cause pain or injury to another." Id. § 708.1(2)(a)-(d)(1).

[25] Under Kentucky law, "[a] person is guilty of robbery in the first degree when, in the course of committing theft, he or she uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft[.]" Ky. Rev. Stat. Ann. § 515.020(1) (emphasis added).

[26] Under Nebraska law, "[a] person commits robbery if, with the intent to steal, he [or she] forcibly and by violence, or by putting in fear, takes from the person of another any money or personal property of any value whatever." Neb. Rev. Stat. Ann. § 28-324(1) (emphasis added). Moreover, the Nebraska Supreme Court's decision in State v. Welchel further supports the conclusion that Nebraska robbery requires intent to use force. See State v. Welchel, 299 N.W.2d 155, 159–60 (Neb. 1980) (holding that "[t]he trier of fact was entitled to find that" Welchel had
(continued . . .)

Oregon,[30] South Dakota,[31] Tennessee,[32] Utah,[33] Vermont,[34] and Wisconsin[35]—all explicitly require a knowing or intentional application of force associated with the taking of another's

---

(. . . continued)
committed robbery because the evidence permitted the inference that Welchel had intended to rob the victim while raping her).

[27] Under New Hampshire law, "[a] person commits the offense of robbery if, in the course of committing a theft," i.e., "in an attempt to commit theft, in an effort to retain the stolen property immediately after its taking, or in immediate flight after the attempt or commission[,]" "he: (a) [u]ses physical force on the person of another and such person is aware of such force; or (b) [t]hreatens another with or purposely puts him in fear of immediate use of physical force." N.H. Rev. Stat. Ann. § 636:1(I)-(II) (emphasis added).

[28] Under New Jersey law, "[a] person is guilty of robbery if, in the course of committing a theft," i.e., "in an attempt to commit theft or in immediate flight after the attempt or commission[,]" "he [or she]: (1) [i]nflicts bodily injury or uses force upon another; [ ] (2) [t]hreatens another with or purposely puts him [or her] in fear of immediate bodily injury; or (3) [c]ommits or threatens immediately to commit any crime of the first or second degree." N.J. Stat. Ann. § 2C:15-1(a) (emphasis added); see also id. § 2C:2-2(b)(2), (c)(3) ("A statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, should be construed as defining a crime with the culpability defined in paragraph b(2) of this section[,]" i.e., "[a] person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature, or that such circumstances exist, or he is aware of a high probability of their existence.").

[29] Under New York law, "[a] person forcibly steals property and commits robbery when, in the course of committing a larceny, he [or she] uses or threatens the immediate use of physical force upon another person for the purpose of" (1) "[p]reventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or" (2) "[c]ompelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny." N.Y. Penal Law § 160.00 (emphasis added).

[30] Under Oregon law, "[a] person commits the crime of robbery in the third degree if in the course of committing or attempting to commit theft or unauthorized use of a vehicle . . . [,] the person uses or threatens the immediate use of physical force upon another person with the intent of: (a) [p]reventing or overcoming resistance to the taking of the property or to retention thereof immediately after the taking; or (b) [c]ompelling the owner of such property or another person to deliver the property or to engage in other conduct which might aid in the commission of the theft or unauthorized use of a vehicle." Or. Rev. Stat. Ann. § 164.395(1) (emphasis added).

[31] Under South Dakota law, "[r]obbery is the intentional taking of personal property, regardless of value, in the possession of another from the other's person or immediate presence, and against the other's will, accomplished by means of force or fear of force, unless the property is taken pursuant to law or process of law." S.D. Codified Laws § 22-30-1 (emphasis added). The South Dakota Supreme Court has further clarified that "there is no such thing as a robbery caused by reckless force." State v. Farley, 290 N.W.2d 491, 493 (S.D. 1980).

[32] Under Tennessee law, "[r]obbery is the intentional or knowing theft of property from the person of another by violence or putting the person in fear." Tenn. Code Ann. § 39-13-401(a) (emphasis added). The United States Court of Appeals for the Sixth Circuit has clarified that "a mens rea of recklessness is clearly insufficient to commit robbery in Tennessee." United States v. Lester, 719 F. App'x 455, 459 (6th Cir. 2017) (underline added).

[33] Under Utah law, "[a] person commits robbery if: (a) the person unlawfully and intentionally takes or attempts to take personal property in the possession of another from his [or her] person, or immediate presence, against his [or her] will, by means of force or fear, and with a purpose or intent to deprive the person permanently or temporarily of the personal property; or (b) the person intentionally or knowingly uses force or fear of immediate force against
(continued . . .)

property for the commission of robbery. Five additional states—Massachusetts,[36] Michigan,[37] Minnesota,[38] Mississippi,[39] and New Mexico[40]—do not specify a mens rea in their robbery

---

(. . . continued)
another in the course of committing a theft or wrongful appropriation." Utah Code Ann. § 76-6-301(1) (emphasis added).

[34] In State v. Powell, 608 A.2d 45 (Vt. 1992), the Supreme Court of Vermont noted that robbery under Vermont law "consists of the combined elements of assault and larceny" and "[t]hus . . . the State's burden was to prove that [Powell] intentionally put the victim in fear of imminent, serious bodily injury and intentionally deprived him of money, intending to do so permanently[.]" Id. at 45–46 (emphasis added).

[35] Under Wisconsin law, "[w]hoever, with intent to steal, takes property from the person or presence of the owner by either of the following means is guilty of [robbery]: (a) [b]y using force against the person of the owner with intent thereby to overcome his or her physical resistance or physical power of resistance to the taking or carrying away of the property; or (b) [b]y threatening the imminent use of force against the person of the owner or of another who is present with intent thereby to compel the owner to acquiesce in the taking or carrying away of the property." Wis. Stat. Ann. § 943.32(1) (emphasis added).

[36] Under Massachusetts law, "[w]hoever, not being armed with a dangerous weapon, by force and violence, or by assault and putting in fear, robs, steals[,] or takes from the person of another, or from his [or her] immediate control, money or other property which may be the subject of larceny, shall be punished by imprisonment in the state prison for life or for any term of years." Mass. Gen. Laws. Ann. ch. 265, § 19(b). The Massachusetts Supreme Court has held that "[t]he essence of robbery is the exertion of force, actual or constructive, against another in order to take personal property of any value whatsoever, with the intention of stealing it from the protection which the person of that other affords." Commonwealth v. Jones, 426 N.E.2d 726, 727 (Mass. 1981) (quoting Commonwealth v. Weiner, 152 N.E. 359, 360 (1926)) (emphasis added).

[37] Under Michigan law, "[a] person who, in the course of committing a larceny of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years." Mich. Comp. Laws Ann. § 750.530(1). The Michigan Supreme Court has held that "[c]ase law makes clear that the defendant must have an intent to rob at a time contemporaneous with the application of force or violence or the conduct placing the victim in fear." People v. Himmelein, 442 N.W.2d 667, 673 (Mich. 1989) (emphasis added).

[38] Under Minnesota law, "[w]hoever, having knowledge of not being entitled thereto, takes personal property from the person or in the presence of another and uses or threatens the imminent use of force against any person to overcome the person's resistance or powers of resistance to, or to compel acquiescence in, the taking or carrying away of the property is guilty of robbery[.]" Minn. Stat. Ann. § 609.24. The Minnesota Supreme Court has held that "the force element of simple robbery is satisfied the moment an actor uses force for the purpose of overcoming another person's resistance to the taking or carrying away of property[.]" State v. Townsend, 941 N.W.2d 108, 112 (Minn. 2020) (emphasis added).

[39] Under Mississippi law, "[e]very person who shall feloniously take the personal property of another, in his [or her] presence or from his [or her] person and against his [or her] will, by violence to his [or her] person or by putting such person in fear of some immediate injury to his [or her] person, shall be guilty of robbery." Miss. Code Ann. § 97-3-73. The Mississippi Supreme Court has held that "[i]t is well settled that the three essential elements of robbery are as follows: (1) felonious intent; (2) force or putting in fear as a means of effectuating the intent, and (3) by that means taking and carrying away the property of another from his [or her] person or in his [or her] presence." Crocker v. State, 272 So.2d 664, 665 (Miss. 1973) (emphasis added).

statutes, but their highest courts have clarified that the act of force involved in robbery must be undertaken with the intent to steal. Furthermore, two states---Colorado[41] and Indiana[42]---have a mens rea of knowledge of the taking of another's property in their robbery statutes and have a separate statutory provision stating that, unless provided otherwise, the mens rea of an offense shall apply to each element in that offense.

In five states---North Carolina,[43] Rhode Island,[44] South Carolina,[45] Virginia,[46] and West Virginia[47]---the elements of robbery are derived from the common law. The common law

---

(. . . continued)

[40] Under New Mexico law, "[r]obbery consists of the theft of anything of value from the person of another or from the immediate control of another, by use or threatened use of force or violence." N.M. Stat. Ann. § 30-16-2. The New Mexico Supreme Court has held that "robbery does require a criminal intent[,]" including "the general criminal intent of conscious wrongdoing" and "the intent to steal[,]" and the force must be "done with[] an intent to steal[.]" State v. Puga, 510 P.2d 1075, 1076-77 (N.M. 1973) (emphasis added).

[41] Under Colorado law, "[a] person who knowingly takes anything of value from the person or presence of another by the use of force, threats, or intimidation commits robbery[,]" Colo. Rev. Stat. Ann. § 18-4-301(1) (emphasis added), and, "[w]hen a statute defining an offense prescribes as an element thereof a specified culpable mental state, that mental state is deemed to apply to every element of the offense unless an intent to limit its application clearly applies[,]" id. § 18-1-503(4).

[42] Under Indiana law, "a person who knowingly or intentionally takes property from another person or from the presence of another person: (1) by using or threatening the use of force on any person; or (2) by putting any person in fear; commits robbery[,]" Ind. Code Ann. § 35-42-5-1(a) (emphasis added), and, "[u]nless the statute defining the offense provides otherwise, if a kind of culpability is required for commission of an offense, it is required with respect to every material element of the prohibited conduct[,]" id. § 35-41-2-2(d).

[43] Under North Carolina law, "[r]obbery as defined at common law, other than robbery with a firearm or other dangerous weapon as defined by [N.C. Gen. Stat. §] 14-87, shall be punishable as a Class G felony." N.C. Gen. Stat. Ann. § 14-87.1. The North Carolina Supreme Court has held that "[c]ommon law robbery is defined as 'the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear.'" State v. Herring, 370 S.E.2d 363, 368 (N.C. 1988) (quoting State v. Smith, 292 S.E.2d 264, 270 (N.C. 1982)).

[44] Under Rhode Island law, "[e]very person who shall commit robbery or other larceny from the person by force or threat, where there is no weapon and no injury and the victim is neither a severely impaired person or an elderly person, shall be guilty of second degree robbery[.]" 11 R.I. Gen. Laws § 11-39-1(b). The Rhode Island Supreme Court has held that, "[i]n Rhode Island, the elements of the offense of robbery are the same as at common law. Accordingly, in the jurisdiction, robbery consists of the 'felonious and forcible taking from the person of another of goods or money [of] any value by violence or [by] putting [the victim] in fear.'" State v. Day, 925 A.2d 962, 977-78 (R.I. 2007) (quoting State v. Briggs, 787 A.2d 479, 487 (R.I. 2001)) (alterations in original).

[45] Under South Carolina law, "[t]he common law offense of robbery is a felony." S.C. Code Ann. § 16-11-325. The South Carolina Supreme Court has held that "[r]obbery is defined as the felonious or unlawful taking of money,

(continued . . .)

version of robbery adopted by each of these states incorporates four elements: (1) a felonious or unlawful taking, (2) of personal property, (3) from the person or presence of the victim, and (4) by force or intimidation. See, e.g., State v. Herring, 370 S.E.2d 363, 368 (N.C. 1988) ("Common law robbery is defined as 'the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear."). Although common law robbery does not explicitly include a mens rea, courts that have addressed this issue have held that these elements incorporate a requirement of knowledge as to the use of force associated with the taking of another's property. See, e.g., United States v. Doctor, 842 F.3d 306, 311 (4th Cir. 2016) (holding that South Carolina robbery did not include "robbery convictions based on accidental, negligent, or reckless conduct"); Shepperson v. Commonwealth, 454 S.E.2d 5, 8 (Va. Ct. App. 1995) ("[F]or theft by violence or intimidation to constitute robbery, the intent to steal must exist at the time of the violence or intimidation." (internal citation omitted)).

(. . . continued)
goods[,] or other personal property of any value from the person of another or in his [or her] presence by violence or by putting such person in fear." State v. Drayton, 361 S.E.2d 329, 335 (S.C. 1987) (internal citation omitted).

[46] Under Virginia law, "[r]obbery, a common-law offense, is defined as 'the taking, with intent to steal, of the personal property of another, from his [or her] person or in his [or her] presence, against his [or her] will, by violence or intimidation.'" Commonwealth v. Jones, 591 S.E.2d 68, 70 (Va. 2004) (internal citations omitted). The Virginia Supreme Court has held that "for theft by violence or intimidation to constitute robbery, the intent to steal must exist at the time of the violence or intimidation." Shepperson v. Commonwealth, 454 S.E.2d 5, 8 (Va. Ct. App. 1995) (emphasis added).

[47] Under West Virginia law, "[a]ny person who commits or attempts to commit robbery by: (1) [c]ommitting violence to the person, including, but not limited to, partial strangulation or suffocation or by striking or beating; or (2) uses the threat of deadly force by the presenting of a firearm or other deadly weapon, is guilty of robbery in the first degree[.] . . . Any person who commits or attempts to commit robbery by placing the victim in fear of bodily injury by means other than those set forth in subsection (a) of this section or any person who commits or attempts to commit robbery by the use of any means designed to temporarily disable the victim, including, but not limited to, the use of a disabling chemical substance or an electronic shock device, is guilty of robbery in the second degree[.]" W.Va. Code Ann. § 61-2-12(a)–(b). The West Virginia Supreme Court has held that "the elements of robbery, unaffected by the statute, are derived from the common law[,]" State v. Henson, 806 S.E.2d 822, 830 (W.Va. 2017) (internal citation and quotation marks omitted), and, "[a]t common law, the definition of robbery was (1) the unlawful taking and carrying away, (2) of money or goods, (3) from the person of another or in his [or her] presence, (4) by force or putting him [or her] in fear, (5) with intent to steal the money or goods[,]" id. (quoting State v. Harless, 285 S.E.2d 461, 463 (W.Va. 1981)).

The remaining eleven states have not addressed this issue. Three states—Georgia,[48] Montana,[49] and Wyoming[50]—define robbery based on the injury caused, threatened, or believed by the victim to be imminent; which leaves open the question of whether robbery could be charged for the reckless infliction of injury. The remaining eight states—Florida,[51] Idaho,[52] Kansas,[53] Louisiana,[54] Missouri,[55] Nevada,[56] Oklahoma,[57] and Washington[58]—have not clarified the mens rea required by their robbery statutes.

---

[48] Under Georgia law, "[i]f there is any injury done to the person, or if there is any struggle to keep possession of the property before it is taken from him [or her], there will be sufficient force or actual violence to constitute robbery." Henderson v. State, 70 S.E.2d 713, 714 (Ga. 1952) (internal quotation marks omitted).

[49] Under Montana law, "[a] person commits the offense of robbery if in the course of committing a theft, the person [ ] inflicts bodily injury upon another; [ ] threatens to inflict bodily injury upon any person or purposely or knowingly puts any person in fear of immediate bodily injury; or [ ] commits or threatens immediately to commit any felony other than theft." Mont. Code Ann. § 45-5-401(1).

[50] Under Wyoming law, "[a] person is guilty of robbery if in the course of committing a [theft], he[or she i]nflicts bodily injury upon another; or [ ] [t]hreatens another with or intentionally puts him [or her] in fear of immediate bodily injury." Wyo. Stat. Ann. § 6-2-401(a).

[51] Under Florida law, "'[r]obbery' means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear." Fla. Stat. Ann. § 812.13(1).

[52] Under Idaho law, "[r]obbery is the felonious taking of personal property in the possession of another, from his [or her] person or immediate presence, and against his [or her] will, accomplished by means of force or fear." Idaho Code Ann. § 18-6501.

[53] Under Kansas law, "[r]obbery is knowingly taking property from the person or presence of another by force or by threat of bodily harm to any person." Kan. Stat. Ann. § 21-5420(a).

[54] Under Louisiana law, "[s]imple robbery is the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by use of force or intimidation, but not armed with a dangerous weapon." La. Stat. Ann. § 14:65(A).

[55] Under Missouri law, "[a] person commits the offense of robbery in the second degree when he or she forcibly steals property and in the course thereof causes physical injury to another person." Mo. Rev. Stat § 570.025(1).

[56] Under Nevada law, "[r]obbery is the unlawful taking of personal property from the person of another, or in the person's presence, against his or her will, by means of force or violence or fear of injury, immediate or future, to his or her person, or the person of a member of his or her family, or of anyone in his or her company at the time of the robbery. A taking is by means of force or fear if force or fear is used to: (a) [o]btain or retain possession of the property; (b) [p]revent or overcome resistance to the taking; or (c) [f]acilitate escape." Nev. Rev. Stat. Ann. § 200.380(1). The Nevada Supreme Court has further clarified that "it is not necessary that [the] force or violence

(continued . . .)

Therefore, in sum, eight states explicitly or implicitly permit the charging of robbery for the reckless application of force; twenty-five states explicitly or implicitly do not permit the charging of robbery for the reckless application of force; five states look to the common law for the answer; and eleven states have not addressed the requisite mens rea for the use of force in their robbery statutes.

The other sources consulted by the Court similarly do not provide a uniform answer. The Model Penal Code states that

> [a] person is guilty of robbery if, in the course of committing a theft, he[or she]: (a) inflicts serious bodily injury upon another; or (b) threatens another with or purposely puts him [or her] in fear of immediate serious bodily injury; or (c) commits or threatens immediately to commit any felony of the first or second degree[,]

Model Penal Code § 222.1(1), which includes the reckless use of force, see id. § 2.02(3) ("When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly[,] or recklessly with respect thereto."). In contrast, in his treatise, Professor Wayne LaFave defines robbery as

> all six elements of larceny—a (1) trespassory (2) taking and (3) carrying away of the (4) personal property (5) of another (6) with intent to steal it—plus two additional requirements: (7) that the property be taken from the person or

---

(. . . continued)
involved in the robbery 'be committed with the specific intent to commit robbery.'" Leonard v. State, 17 P.3d 397, 412 (Nev. 2001) (quoting Chappell v. State, 972 P.2d 838, 841 (Nev. 1998)) (emphasis added).

[57] Under Oklahoma law, "[r]obbery is a wrongful taking of personal property in the possession of another, from his [or her] person or immediate presence, and against his [or her] will, accomplished by means of force or fear." Okla. Stat. Ann. tit. 21, § 791.

[58] Under Washington law, "[a] person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear." Wash. Rev. Code Ann. § 9A.56.190.

> presence of the other and (8) that the taking be accomplished by means of force or putting in fear.

Wayne R. LaFave, Substantive Criminal Law § 20.3 (3d ed. Dec. 2021). However, Professor LaFave notes that "there is a question as to the robbery liability of one who strikes another, perhaps intentionally but with no intent to steal (or who intimidates another, though without an intent to steal), and who then, seeing his [or her] adversary helpless, takes the latter's property from his [or her] person or his [or her] presence." Id. § 20.3(e); see also id. (noting that "[t]he great weight of authority in the earlier cases favors the latter view, holding that under the circumstances it is robbery[,]" but "[u]nder many of the modern codes, there would not be a robbery under the circumstances just described"). Professor LaFave does not provide a definitive answer to this hypothetical scenario, which would allow for the reckless use of force.

Declining to conduct the state survey that was requested by the Court,[59] the government argues that, "[f]ortunately, a number of courts have conducted surveys similar to the one

---

[59] Following the July 11, 2022 hearing, the Court directed the parties to file supplemental briefing, "addressing, inter alia, the generic definition of robbery, as reflected by a "'wide range of sources . . . including [current] federal and state statutes,[ ] the Model Penal Code, dictionaries, and treatises[.]" Order at 1 (July 12, 2022), ECF No. 84 (quoting United States v. Crews, Crim. Action No. 11-372-1 (EGS), 2021 WL 5798033, at *8 (D.D.C. Dec. 7, 2021)). Additionally, the Court noted the discrepancy between the survey of state definitions of robbery presented by the parties, which was taken from the government's brief before the Supreme Court in Borden and presented the versions of robbery in effect in the states in 1986, when the ACCA was enacted, see Brief for the United States at *17–18, Borden v. United States, 2020 WL 4455245 (June 8, 2020), and the Supreme Court's decision in Taylor, which instructed courts to determine "the generic, contemporary meaning" of the offense, Taylor, 495 U.S. at 598. See Order at 1 n.1 (July 12, 2022), ECF No. 84 (emphasis added). Consequently, the Court specifically directed the parties to "provide the Court with a survey of contemporary federal and state definitions of robbery, to include the requisite mens rea, if any[,]" and, recognizing the additional time that this survey might require, advised the parties that they could seek a further extension of the deadline for supplemental briefing if necessary. Id. (emphasis added).

On July 15, 2022, the original deadline set by the Court, the parties both filed their supplements. See Gov't's 2d Supp.; Def.'s Supp. Despite the Court's clear request in its July 12, 2022 Order for a contemporary state survey, the government declined to provide the Court with one, instead arguing that, "while this Court's [O]rder notes that the Borden survey took place at the time of [the] ACCA's enactment in 1986, that is essentially the same time when the [ ] Sentencing Guidelines defined generic 'robbery' to be a crime of violence[,] . . . [s]o there is no reason to think that the Borden survey misrepresents the relevant state of state robbery law." Gov't's 2d Supp. at 2 (citing U.S.S.G. § 4B1.2 cmt. appl. n.1) (emphasis added). Despite the government's entirely unsupported assertion that the Court should rely upon the state survey from Borden because the Sentencing Guidelines listed robbery in the enumerated clause at "essentially the same time" as the ACCA was enacted, id., the Supreme Court has been clear in charging the Court to look to the contemporary version of the crime in compiling a generic definition. See Taylor, 495 U.S.

(continued . . .)

requested by the Court, and they have repeatedly concluded that no force-specific mens rea is required for enumerated robbery, beyond the underlying mens rea for the theft." Gov't's 2d Supp. at 1 (underline added). However, all but one of the cases cited by the government fail to address the mens rea of robbery in any way. See United States v. Walker, 595 F.3d 441, 446, 447 (2d Cir. 2010) (holding that South Carolina strong-arm robbery matched the generic definition of robbery, i.e, "the taking of property from another person or from the immediate presence of another person by force or by intimidation[,]" because it "require[d] acts by the perpetrator that include[d] or constitute[d] a threat of bodily harm"); United States v. Yates, 866 F.3d 723, 734 (6th Cir. 2017) (defining generic robbery as the "misappropriation of property under circumstances involving immediate danger to the person" in order to resolve whether generic robbery, like Ohio robbery, criminalized a minimal use of force (internal citations and quotation marks omitted)); United States v. Gattis, 877 F.3d 150, 156 (4th Cir. 2017) (defining "generic robbery . . . as the misappropriation of property under circumstances involving immediate danger to the person" in holding that the amount of force required by North Carolina robbery matched the generic definition (internal citations and quotation marks omitted)); United States v. Lockley, 632 F.3d 1238, 1244 (11th Cir. 2011) (holding that generic robbery is defined as "the taking of property from another person or from the immediate presence of another person by force or intimidation" and thus matches Florida robbery, which also defines robbery to include theft by intimidation (internal citation and quotation marks omitted) (emphasis in

---

(. . . continued)
at 598 (requiring courts to look to "the generic, contemporary meaning" of the offense); accord United States v. Gattis, 877 F.3d 150, 156 (4th Cir. 2017) ("When comparing a potential predicate offense to an enumerated crime, [a court] must first ascertain the 'generally accepted contemporary meaning' of the enumerated crime" and "[w]hile the historical meaning of the crime at common law often provides the offense's 'core,' it is the 'contemporary usage of the term' that controls." (emphasis added)). Accordingly, absent any authority that supports the government's argument that the Court should confine its analysis to the meaning of robbery at the approximate time of the inclusion of robbery in the enumerated clause, the Court will assess the contemporary meaning of robbery and, therefore, will not rely on the historical state survey described in the government's brief in Borden.

original)). Therefore, given that the courts in the cases cited by the government did not address the pertinent issue of the mens rea requirement for robbery, the Court cannot conclude, as the government urges, that those courts have held "that no force-specific mens rea is required for enumerated robbery, beyond the underlying mens rea for the theft." Gov't's 2d Supp. at 1 (underlines added).

Moreover, as to the remaining case cited by the government, United States v. Adair, 16 F.4th 469 (5th Cir. 2021), the Court concludes that this case—and the line of case law on which the relevant part of Adair is based—is not persuasive. In United States v. Santiesteban-Hernandez, 469 F.3d 376 (5th Cir. 2006), the Fifth Circuit addressed "whether the use or threat of force is part of the generic, contemporary meaning of 'robbery.'" Id. at 379. In a footnote, the Fifth Circuit noted that Santiesteban-Hernandez

> d[id] not present the question of whether the mens rea differs between the statute governing [Santiesteban-Hernandez]'s offense and the generic, contemporary meaning of the offense[, h]owever, such a situation would not alter the analysis; rather, mens rea would be another basic element on which the two definitions must correspond.

Id. at 379 n.4 (underline added). Eight years later, in United States v. Ortiz-Rojas, the Fifth Circuit summarily dismissed Ortiz-Rojas's argument—which asserted that Santiesteban-Hernandez "reserved the question of differing mens rea standards" between Texas robbery and generic robbery—holding, without further explanation, that the "generic definition of robbery did not require a particular mens rea." United States v. Ortiz-Rojas, 575 F. App'x 494, 495 (5th Cir. 2014) (per curiam) (underlines added). And, seven years later, in Adair, the Fifth Circuit summarily dismissed Adair's argument that the footnote in Santiesteban-Hernandez "left open the possibility that generic robbery has a narrower mens rea element than Texas robbery[,]" stating that "Adair misconstrue[d] this footnote, which, . . . [as] explained in [Ortiz-Rojas],

simply recognize[d] that the generic definition of robbery did not require a particular mens rea." Adair, 16 F.4th at 470–71 (internal citation and quotation marks omitted) (underline added).

Despite the Fifth Circuit's statement in Adair that "the generic definition of robbery did not require a particular mens rea[,]" id. (internal citation and quotation marks omitted), it appears from the Court's review of Santiesteban-Hernandez, Ortiz-Rojas, and Adair, that the Fifth Circuit's conclusion was not based on the "wide range of sources[,] . . . including federal and state statutes, the Model Penal Code, dictionaries, and treatises[,]" that this Court agrees is prudent to consider when arriving at a generic definition of an offense, Crews, 2021 WL 5798033, at *8 (quoting O'Connor, 874 F.3d at 1151). Therefore, the Court concludes that Adair is unpersuasive regarding the generic definition of robbery.[60]

Here, the Court concludes that the weight of authority supports the conclusion that the generic version of robbery requires knowing or intending the use of force for the purpose of taking someone else's property. Certainly, the state survey conducted by the Court did not reveal a "substantial majority of states[,]" Graves, 877 F.3d at 502, coalescing around a shared definition, which other circuit courts have found sufficient to establish the generic definition of an offense, see, e.g., United States v. McCollum, 885 F.3d 300, 308 (4th Cir. 2018) (holding that "the definition adopted by thirty-two states, the federal government, and the District of Columbia established a 'broad consensus' sufficient to establish the generic, contemporary definition of a crime" (internal citation omitted)). However, the Court concludes that it is compelled to arrive at a generic definition in order to complete its analysis under the enumerated clause, and it is

[60] In Adair, the Fifth Circuit also stated that "Adair's reading of th[e] footnote [from Santiesteban-Hernandez] is at odds with the opinion's conclusion that Texas robbery and generic robbery 'substantially correspond.'" Adair, 16 F.4th at 471 (internal citation and quotation marks omitted). However, again, neither Ortiz-Rojas, Santiesteban-Hernandez, nor Adair conducted the requisite analysis that this Court deems appropriate regarding the issue that is currently before this Court.

confronted with a substantially higher number of states that do not authorize charging robbery based on the reckless use of force by the perpetrator, as compared to the small number of states that do. Indeed, half of the states do not sanction the reckless use of force as a sufficient predicate for charging an assailant with robbery. Accordingly, for the reasons outlined above, the Court concludes that the contemporary generic version of robbery includes an element of the intentional or knowing use of force exerted for the purpose of taking the property of another.

Having concluded that the generic version of robbery has as an element the intentional or knowing use of force, the Court now compares the generic definition to the definition of Maryland robbery. Because Maryland robbery criminalizes the reckless use of force, see supra Section III.A.2, it is not a match for the generic definition, and thus "the scope of conduct covered by the defendant's crime of conviction is broader than what the enumerated offense definition would cover[.]" Crews, 2021 WL 5798033, at *8. Accordingly, Maryland robbery is also not a crime of violence under the enumerated clause.

IV. CONCLUSION

Because the Court concludes that Maryland robbery is not a crime of violence under either the elements or enumerated clauses in U.S.S.G. § 4B1.2(a), the Court finds that the defendant's Maryland robbery conviction is a Grade B violation under U.S.S.G. § 7B1.1(a).

SO ORDERED this 29th day of August, 2022.[61]

REGGIE B. WALTON
United States District Judge

[61] The Court will contemporaneously issue an Order consistent with this Memorandum Opinion.