No. 18-9325

IN THE
Supreme Court of the United States

DAVION JEFFERSON,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITIONER'S REPLY BRIEF

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This Court should grant Davion Jefferson's petition to address three issues. First, the district court impermissibly directed a verdict at trial on an essential element of the offenses charged under 18 U.S.C. § 924(c). Pet. 9-14. Second, in light of the First Step Act's enactment, this Court should overrule *Deal v. United States*, 508 U.S. 129 (1993). Pet. 14-17. And third, as this Court has done in two other analogous cases, this Court should grant, vacate, and remand to the Tenth Circuit to consider whether the First Step Act applies in this case. Supp. Pet. 2-4.

The government disagrees. But its response ignores the *constitutional* implications of a directed verdict, and it fails to provide a convincing reason not to overrule *Deal*. The government also fails to provide a meaningful distinction between this case and *Wheeler v. United States*, 139 S.Ct. 2664 (2019), and *Richardson v. United States*, 139 S.Ct. 2713 (2019). This Court granted the petitions in those two analogous cases, vacated the judgments, and remanded to the courts of appeals to consider the First Step Act's impact on those cases. It should do the same here.

I. This Court should review whether a district court may direct a verdict on § 924(c)'s crime-of-violence element.

In *Rosemond v. United States*, this Court held that § 924(c) has two "essential conduct *elements*": (1) the "commission of a *violent crime*"; and (2) "the use of a firearm." 572 U.S. 65, 74 (2014) (emphases added). A crime is a "violent crime" (or "crime of violence") under § 924(c) only if it "has as an *element* the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(c)(3)(A) (emphasis added). Juries, not judges, determine whether defendants

have committed elements of an offense. *United States v. Gaudin*, 515 U.S. 506, 510 (1995). Thus, it was up to the jury at Mr. Jefferson's trial to find (or not) that his underlying robberies were committed via the "use, attempted use, or threatened use of physical force against the person of another." *Id.* But, despite Mr. Jefferson's request, the district court did not instruct the jury that it had to find that Mr. Jefferson committed the robberies with violent force. Pet. App. 15a. Instead, it directed a verdict on this issue, instructing the jury that "robbery is a crime of violence." Pet. App. 5a.

The government reads *Rosemond* differently. BIO 8-9. According to the government, *Rosemond* only requires the jury to find that the defendant committed the underlying robbery, and not that the the defendant used, attempted to use, or threatened to use violent force during the robbery. BIO 8-9. The government cites no precedent to support this interpretation of *Rosemond*. BIO 8-9. Instead, it claims that this interpretation stems from lower courts' use of the categorical approach to determine whether, as a matter of law, crimes count as violent crimes under § 924(c). BIO 8. It also cites to this Court's use of a categorical approach in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), *Nijhawan v. Holder*, 557 U.S. 29, 35-36 (2009), and *United States v. Davis*, 139 S.Ct. 2319 (2019). BIO 6-7.

The lower court decisions (including the Tenth Circuit's decision below) treating this issue as one of law, and employing a categorical approach, do not square with the Constitution. The Fifth and Sixth Amendments "require criminal convictions to rest upon a jury determination that the defendant is guilty of every *element* of the crime

with which he is charged, beyond a reasonable doubt." *Gaudin*, 516 U.S. at 510. Again, whether the defendant has committed a violent crime is an *element* of a § 924(c) offense. *Rosemond*, 572 U.S. at 74. And in order for the underlying crime to qualify as a "violent crime," it must have an "element" of violent force. 18 U.S.C. § 924(c)(3)(A).

Section § 924(c) is not a recidivist-sentencing statute. It has nothing to do with "the fact of a prior conviction." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Thus, it is not excluded from the Constitution's reach. *Id.* The government must prove beyond a reasonable doubt "every fact necessary to constitute the crime with which [the defendant] is charged." *In re Winship*, 397 U.S. 358, 364 (1970). Whether the underlying crime has a violent-force *element* is just such a fact.

Leocal does not hold otherwise. That case involved whether a prior conviction qualified as an aggravated felony for immigration purposes. 543 U.S. at 3. Not only did the case involve "the fact of a prior conviction," but it also involved civil immigration proceedings, not a federal criminal prosecution. This Court's use of the categorical approach to decide an issue of law in *Leocal* has no bearing on this (very different) case.

For the same reasons, *Nijhawan* does not help the government. The government cites *Nijhawan* for its discussion of 18 U.S.C. § 924(e)(2)(B)(i)'s element-of-violent-force clause as a clause that "refers to crimes as generically defined." 557 U.S. at 36. But the government ignores the fact that § 924(e)(2)(B)(i) is a recidivist-sentencing provision involving "the fact of a prior conviction." That determination does not pose

constitutional problems under *Apprendi*. 460 U.S. at 490. In contrast, § 924(c) is not a recidivist-sentencing provision. Its violent-crime requirement is an element of § 924(c)'s substantive offense. *Rosemond*, 572 U.S. at 74. That is a constitutionally-relevant distinction. *Apprendi,* 460 U.S. at 490; *In re Winship*, 397 U.S. at 364. Moreover, *Nijhawan* itself rejected the use of a categorical approach (in the aggravated-felony civil immigration context). 557 U.S. at 36. Thus, that decision cannot possibly support the government's categorical-approach argument here.

Finally, the government overreads *Davis*. *Davis* held, as a matter of statutory interpretation, and without any mention of the Constitution, that Congress intended courts to use a categorical approach to determine whether a defendant committed a crime of violence under § 924(c)(3)(B)'s residual clause. 139 S.Ct. at 2327. This Court then struck down that clause as void for vagueness. *Id.* at 2336.

In litigating for a non-categorical approach in *Davis*, the government not once invoked the Fifth or Sixth Amendments (or any other constitutional provisions). But here, we have done just that. Pet. 4-5, 9-11. Because this Court in *Davis* was not asked whether the Constitution required a jury to determine whether the defendant's crime qualified under § 924(c)(3)(B)'s residual clause, *Davis* says nothing of that issue. And *Davis*'s silence on that constitutional issue means that the decision is inapposite here. *Davis* was a case about statutory interpretation, not the Constitution. Just the opposite here.

As a practical matter, the Tenth Circuit held below that the district court erred when it failed to instruct the jury that it had to find that the defendant committed

the underlying robberies with violent force. Pet. App. 15a. The Tenth Circuit held that the jury should have been instructed that the government had to "show the defendant used or threatened force capable of causing physical pain or injury to another person." Pet. App. 15a. Because the district court directed a verdict on this element in the § 924(c) context, Pet. App. 5a, the district court committed reversible structural error. Pet. 10-11 (citing cases). That error was costly. It took out of the jury's hands a decision that resulted in a combined 32-year mandatory minimum prison sentence here. Review is necessary.

II. This Court should overrule *Deal*.

Congress recently clarified, via a statutory amendment to § 924(c)(1)(C), that this Court's 5-4 decision in *Deal* was incorrectly decided. Pet. 15 (citing § 403 of the First Step Act, 132 Stat. 5194). The government's contrary contention that "the First Step Act did not alter the then-existing language of Section 924(c)(1)(C) that this Court interpreted in *Deal*" is patently incorrect. BIO 10.[1] The First Step Act deleted that language in its entirety. § 403, 132 Stat. 5194. The deletion of that language, via a "clarifying" amendment, is a clear signal that Congress recognized that this Court's decision in *Deal* was wrong.

In urging this Court not to overrule *Deal*, the government cites the "non-retroactivity" of § 403 of the First Step Act. BIO 10. But any non-retroactivity is the reason why this Court should overrule *Deal*. Otherwise, individuals (like Mr.

[1] The government relies on an unpublished decision from the Tenth Circuit for this incorrect proposition. BIO 10 (citing *United States v. Hunt*, __ Fed. Appx. __, 2019 WL 5700734 (10th Cir. Nov. 5, 2019)). But that decision acknowledges that § 403 amended the language at issue in *Deal* by removing that language and replacing it with new language. 2019 WL 5700734, at *2

Jefferson) sentenced to 25-year mandatory minimum sentences (and longer) may have to serve the entirety of those sentences, even though we now know that Congress did not intend for district courts to impose such sentences in a single prosecution.

The government also states that the Tenth Circuit has rejected an argument that § 403 is a reason to overrule *Deal*. BIO 11 (citing *Hunt*, 2019 WL 5700734, at *2). But the Tenth Circuit's decision in *Hunt* does not even cite *Deal*, let alone indicate that defendants are not entitled to relief via *Deal*'s overruling. *See generally Hunt*, 2019 WL 5700734.

Finally, the government criticizes our citation to *Schiro v. Summerlin*, 542 U.S. 348, 352 (2004), for the proposition that "decisions that narrow the scope of a criminal statute by interpreting its terms" are retroactive. But that is a direct quote from *Schiro*. 542 U.S. at 352 (citing *Bousley v. United States*, 523 U.S. 614, 620-621 (1998)). The fact that *Schiro* did not apply this rule of law is irrelevant. *Schiro* acknowledges that decisions that narrow the scope of a criminal statute "apply retroactively because they 'necessarily carry a significant risk that a defendant . . . faces a punishment that the law cannot impose upon him." *Id.* at 352. By way of analogy, a statutory amendment that narrows the scope of a criminal statute should apply retroactively for the same reasons. And although this Court rejected statutory retroactivity in *Dorsey v. United States*, 567 U.S. 260, 280 (2012), Congress did not pass the statute at issue in *Dorsey* (the Fair Sentencing Act) to overrule a prior incorrect decision by this Court, as it did here.

III. In light of intervening law, this Court should grant Mr. Jefferson's petition, vacate the judgment, and remand for further proceedings.

Mr. Jefferson has asked this Court to grant his petition, vacate the judgment, and remand for the Tenth Circuit to consider the application of intervening law – § 403 of the First Step Act – to his appeal. Supp. Pet. 1-8. The government does not deny that this Court did just that in two other cases this summer. BIO 12 (citing *Wheeler* and *Richardson*). The government instead notes that this Court denied petitions in three other cases. BIO 12-13 (citing *Nelson v. United States*, No. 19-5010 (Nov. 4, 2019); *Pizarro v. United States*, No. 18-9789; *Sanchez v. United States*, No. 18-9070)).

In *Wheeler* and *Richardson*, the defendants could not have sought First-Step-Act relief in the courts of appeals because the courts had already decided their appeals when Congress passed the First Step Act on December 21, 2018. *See United States v. Wheeler*, 742 Fed. Appx. 646 (3d Cir. July 12, 2018); *United States v. Richardson*, 906 F.3d 417 (3d Cir. Oct. 11, 2018). Their first realistic opportunity to seek First-Step-Act relief came in this Court.

In contrast, the petitioners in *Nelson*, *Pizarro*, and *Sanchez* each had an adequate amount of time to file a supplemental brief in the court of appeals. The petitioner in *Pizarro* had 76 days (from the date the First Step Act was enacted to the date the Fifth Circuit issued its decision) to file a supplemental brief in the Fifth Circuit. *United States v. Pizarro*, 756 Fed. Appx. 458 (5th Cir. Mar. 7, 2019). The petitioner in *Nelson* had 48 days to file a supplemental brief in the Eleventh Circuit. *United States v. Nelson*, 761 Fed. Appx. 917 (11th Cir. Feb. 7, 2019). The petitioner in *Sanchez* had 46 days to file a supplemental brief in the Sixth Circuit. *United States*

v. Sanchez, No. 18-1092 (6th Cir. Feb. 5, 2019). None of the petitioners filed supplemental briefs.

It is fair to assume that this Court held that these petitioners forfeited their First-Step-Act claims by not raising them in the courts of appeals. *See* BIO 13. Such an outcome would be consistent with this Court's decision in *Rent-A-Center v. Jackson*, 561 U.S. 63, 76 n.5 (2010), which held a claim forfeited where the defendant had "a *year and a half* between this Court's [intervening] decision . . . and the Ninth Circuit's judgment" to file a supplemental brief. (emphasis in original).

While it is true that Mr. Jefferson's appeal was still pending in the Tenth Circuit on December 21, 2018 (the date the President signed the First Step Act into law), this Court should not view Mr. Jefferson's First-Step-Act claim as forfeited. Mr. Jefferson did not have 46, 48, or 76 days (and nowhere near a year and a half) to file a supplemental brief. He had all of *six* days after the triggering date (December 21, 2018). Those six days were:

- Saturday, December 22, 2018;
- Sunday, December 23, 2018;
- Monday, December 24, 2018 (Christmas Eve – FPD closed);
- Tuesday, December 25, 2018 (Christmas Day – FPD closed);
- Wednesday, December 26, 2018; and
- Thursday, December 27, 2018.[2]

The government never explains why it is reasonable to assume that anyone, let alone competent counsel representing an indigent defendant, would be able to file a supplemental brief, on newly enacted legislation, under this timeline. The

[2] We do not include Friday, December 28, 2018 because the Tenth Circuit issued the decision that morning at 9:25 a.m.

government never explains why it believes competent counsel could pull off such a feat over the Christmas Holiday, in just two working days.

As importantly, the government never explains why competent counsel *should* file a supplemental brief under such circumstances. An appellate lawyer "may not ignore his or her professional obligations." *McCoy v. Court of Appeals of Wisconsin, Dist. 1*, 486 U.S. 429, 436 (1988). An appointed appellate attorney must make a "diligent and thorough evaluation" of an appeal. *Id.* at 438. "The appellate lawyer must master the trial record, thoroughly research the law, and exercise judgment in identifying the arguments that may be advanced on appeal." *Id.* "Although a defense attorney has a duty to advance all colorable claims and defenses, the canons of professional ethics impose limits on permissible advocacy. It is the obligation of any lawyer–whether privately retained or publicly appointed–not to clog the courts with frivolous motions or appeals." *Id.*

With respect, it would, and should, take more than two working days for competent counsel to weigh whether to file a supplemental brief on newly enacted legislation like the First Step Act. This Court should not send a different signal. Competent counsel should have a sufficient amount of time to conduct a "diligent and thorough evaluation" of that issue before filing anything related to it. The week of Christmas is not a sufficient amount of time. Under these unique circumstances, Mr. Jefferson should not be held to have forfeited his First Step Act claim.

The government has cited no case remotely similar to this one, where a court has held a new claim forfeited because not raised within two working days. Indeed, in the

one case cited by the government as an example of a proper supplemental brief filed in the Tenth Circuit, the attorney waited three months to file the supplemental brief. *United States v. Sillas-Cebreros*, 148 Fed. Appx. 684 (10th Cir. 2005) (supplemental brief filed on April 11, 2005, raising a *Booker*[3] claim, where *Booker* was decided on January 12, 2005). Nor does the government cite a federal rule that includes a deadline of less than seven days (we can't think of such a rule either). Because Mr. Jefferson did not have an adequate amount of time to file a supplemental brief in the Tenth Circuit, he has not forfeited this issue, and this Court should grant, vacate, and remand, just as it did in *Wheeler* and *Richardson*.

The government resists for a second reason. BIO 14. According to the government, the Tenth Circuit has already held that the First Step Act does not apply to defendants, like Mr. Jefferson, who had direct appeals pending when the First Step Act was enacted. BIO 14. But this argument is incorrect for two reasons.

First, the government cites nothing more than an unpublished decision from the Tenth Circuit, BIO 14 (citing *Hunt*, 2019 WL 5700734), but "unpublished decisions are not controlling authority," *United States v. Hansen*, 929 F.3d 1238, 1248 n.3 (10th Cir. 2019). In the Tenth Circuit, unpublished decisions "provide little support for the notion that the law is clearly established." *Knopf v. Williams*, 884 F.3d 939, 947 (10th Cir. 2018) (quotations omitted). It is not uncommon for the Tenth Circuit to disagree with an unpublished decision. *See*, *e.g.*, *Hansen*, 929 F.3d at 1248 n.3; *United States v. Johnson*, 911 F.3d 1062, 1071 (10th Cir. 2018); *Allen v. United Servs. Auto. Ass'n*,

[3] *United States v. Booker*, 543 U.S. 220 (2005).

907 F.3d 1230, 1239 n.5 (10th Cir. 2018). It could do so here.

Second, and more importantly, *Hunt* is inapposite. *Hunt* involved a defendant who was sentenced in 2007. 2019 WL 5700734, at *1. The Tenth Circuit affirmed in January 2009, 2009 WL 175063 (10th Cir. Jan. 27, 2009) (unpublished), and this Court denied certiorari in March 2009, *Hunt v. United States*, 556 U.S. 1160 (Mar. 20, 2009). The decision in *Hunt* has no relevance to the question presented here: whether the First Step Act applies to defendants who had pending appeals when the Act was enacted. As we have already explained, our position draws a firm line between cases on direct review and cases on collateral review. Supp. Pet. 7. The Tenth Circuit has not addressed that issue in any decision (unpublished or published).

The government also cites four decisions outside of the Tenth Circuit in support of its position. One decision, however, is unpublished. *United States v. Garcia*, 778 Fed. Appx. 779 (11th Cir. 2019) (unpublished). There is no reason to think that the Tenth Circuit would give serious weight to an unpublished decision from another Circuit. *See*, *e.g.*, *United States v. Chavez-Morales*, 894 F.3d 1206, 1218 n.10 (10th Cir. 2018) (giving no weight to "an unpublished, out of circuit decision"). Two others involve § 401, not § 403, of the First Step Act. *United States v. Aviles*, 938 F.3d 503, 510-511 (3d Cir. 2019); *United States v. Wiseman*, 932 F.3d 411, 417 (6th Cir. 2019). That leaves one Circuit – the Seventh Circuit – that has issued a published decision at odds with our position here. *United States v. Pierson*, 925 F.3d 913 (7th Cir. 2019), pet. for cert. filed, No. 19-566 (Oct. 28, 2019). The Tenth Circuit does not inexorably follow the Seventh Circuit's lead. *See*, *e.g.*, *United States v. Pullen*, 913 F.3d 1270,

1283-1284 (10th Cir. 2019) (disagreeing with the Seventh Circuit that the mandatory guidelines' residual clause is void for vagueness). This issue is still open in the Tenth Circuit. As this Court did in *Wheeler* and *Richardson*, it should grant the petition, vacate the judgment, and remand so that the Tenth Circuit can address this issue in the first instance.

CONCLUSION

This Court should grant the petition. Otherwise, in light of the First Step Act's enactment, this Court should grant Mr. Jefferson's petition, vacate the judgment, and remand this case to the Tenth Circuit for further proceedings.

Respectfully submitted,

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December 3, 2019