No. _____

IN THE

Supreme Court of the United States

DAVION L. 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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the district court violate the Fifth Amendment's Due Process Clause and the Sixth Amendment's Jury Trial Clause when it directed a verdict on 18 U.S.C. § 924(c) 's "crime-of-violence" element, without instructing the jury that it had to find an element of violent force to convict on the underlying robbery counts?

II. Whether Section 403 of the First Step Act of 2018 applies to defendants with direct appeals pending at the time of the Act's enactment?

III. In light of Congress's enactment of Section 403 of the First Step Act, should this Court overrule *Deal v. United States*, 508 U.S. 129 (1993)?

RELATED PROCEEDINGS

United States v. Jefferson, Case No. 2:15-cr-20012-CM-1 (D. Kan. June 21, 2017)

United States v. Jefferson, Case No. 17-3150 (10th Cir. Mar. 9, 2021)

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES CITED

PAGE

Cases

Statutes

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioner Davion Jefferson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's decision is published at 989 F.3d 1173 and is included as Appendix A. The Tenth Circuit's earlier decision is published at 911 F.3d 1290 and is included as Appendix B. The Tenth Circuit's unpublished order denying rehearing en banc in the earlier appeal is included as Appendix C. The portions of the trial transcript related to the jury instructions at issue here are included as Appendix D.

JURISDICTION

The Tenth Circuit's judgment was entered on March 9, 2021. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, *inter alia*:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

18 U.S.C. § 924(c)(1)(A)(ii) provides:

> Except to the extent that a greater minimum sentence is otherwise provided by

this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime . . . if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years.

18 U.S.C. § 924(c)(1)(C)(i) (2016) provides:

In the case of a second or subsequent conviction under this subsection, the person shall . . . be sentenced to a term of imprisonment of not less than 25 years.

18 U.S.C. § 924(c)(1)(C)(i) (2018) provides:

In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall . . . be sentenced to a term of imprisonment of not less than 25 years.

18 U.S.C. § 924(c)(3) provides:

For purposes of this subsection the term "crime of violence" means an offense that is a felony and--

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

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

Section 403(b) of the First Step Act, 132 Stat. 5194, 5221-5222 (2018), provides:

(b) APPLICABILITY TO PENDING CASES.—This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.

STATEMENT OF THE CASE

It is well established that the government must prove to a jury "that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 510 (1995). In *Rosemond v. United States*, this Court held that 18 U.S.C. § 924(c)'s crime-of-violence requirement is "an essential conduct element" of the offense. 572 U.S. 65, 74 (2014). Thus, it follows that this element must be proved to a jury beyond a reasonable doubt. Yet here, the district court directed a verdict on this element, instructing the jury that "robbery is a crime of violence." And the district court did so without instructing the jury that, to convict of the underlying robbery counts, it had to find that the defendant used (attempted or threatened to use) physical force against the person or property of another. Because the Tenth Circuit's decision affirming the district court's directed verdict conflicts with precedent from this Court, review is necessary.

This issue is also critically important. As in *Apprendi v. New Jersey*, "[a]t stake in this case are constitutional protections of surpassing importance." 530 U.S. 466, 476 (2000). Below, the district court effectively found Mr. Jefferson guilty of two § 924(c) offenses, taking that determination away from the jury. Review is necessary.

This case also raises an important question about the application of Section 403 of the First Step Act. 132 Stat. 5194, Pub. L. No. 115-391, § 403 (2018). Read as a whole, and in light of the history and purpose of the provision, Section 403 was meant to apply to cases pending on direct appeal at the time of enactment. The Tenth Circuit erred in holding otherwise. And in so holding, the Tenth Circuit affirmed a 25-year

mandatory consecutive sentence that Congress has clearly recognized as unnecessary and unjust. In light of the length of the term of imprisonment, and the impact of an adverse determination, this Court should grant this petition.

Finally, this Court should grant this petition to determine the correctness of this Court's prior decision in *Deal v. United States*, 508 U.S. 129 (1993). Because of *Deal*, Mr. Jefferson's mandatory minimum sentence on his two § 924(c) convictions was set at a combined 32 years' imprisonment (7 years on one count; 25 years on the other count). But in Section 403 of the First Step Act, Congress recently clarified that § 924(c)(1)(C) 's 25-year statutory minimum provision was meant to apply only to acts committed after a first § 924(c) conviction. 132 Stat. 5194, Pub. L. No. 115-391, § 403 (2018). *Deal*'s incorrect holding increased Mr. Jefferson's mandatory minimum sentence from a combined 14 years' imprisonment to 32 years' imprisonment. *Deal* has wrought similar havoc on other defendants. This Court should grant this petition and overrule *Deal*.

A. Legal Background

The Sixth Amendment guarantees the right to a jury trial. *Duncan v. Louisiana*, 391 U.S. 153 (1968). The Fifth Amendment's Due Process Clause requires the government to 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). Together, "these provisions 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*, 515 U.S. at 510 (emphasis added).

The lone exception is "the fact of a prior conviction." *Apprendi*, 530 U.S. at 490. It is reversible error for the district court to direct a verdict on an element of an offense. *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993).

The statute at issue here, 18 U.S.C. § 924(c)(1)(A), generally prohibits the use (or possession) of a firearm during and in relation to (or in furtherance of) a crime of violence or drug trafficking offense (this case does not involve drug trafficking). A crime of violence is defined as an offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). As drafted, the provision also has a residual clause that covers an offense "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3)(B). But this Court struck this residual clause as void for vagueness in *United States v. Davis*, 139 S.Ct. 2319 (2019).

This Court has described § 924(c)(1)(A) as a "combination crime." *Rosemond v. United States*, 572 U.S. 65, 75 (2014). The statute has two overarching elements. "It punishes the temporal and relational conjunction of two separate acts." *Id.* "In enacting the statute, Congress proscribed both the use of the firearm and the commission of acts that constitute" a crime of violence. *Id.* at 74 (quotations omitted). The "commission of a . . . violent crime is—no less than the use of a firearm—an 'essential conduct element of the § 924(c) offense.'" *Id.* Importantly, the commission of a crime of violence under § 924(c) is not "the fact of a prior conviction." At the time of trial, the defendant has not yet been convicted of a crime of violence. Whether the

defendant has committed a violent crime is one of two dispositive issues (the other whether the defendant possessed/used/carried a firearm during/in furtherance of the crime of violence).

At the time Mr. Jefferson was convicted and sentenced, 18 U.S.C. § 924(c)(1)(C) provided for a 25-year consecutive sentence "[i]n the case of a second or subsequent conviction." In *Deal*, this Court interpreted this phrase to require a 25-year consecutive sentence for a second § 924(c) conviction, even if the defendant had not been convicted of a first § 924(c) conviction when he committed the conduct underlying the second § 924(c) conviction. 508 U.S. at 135-136. Congress recently enacted a "clarification" to this provision, amending it to make clear that this provision applies only "[i]n the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final." § 403, 132 Stat. 5194, 5221-5222. Section 403 applies to "pending cases," namely, "any offense that was committed before the date of enactment [], if a sentence for the offense has not been imposed as of such date of enactment." § 403(b), 132 Stat. at 5222. The meaning of Section 403(b), and *Deal*'s continued viability, is at the heart of this petition.

B. Factual Background

Davion Jefferson (and an accomplice) robbed five convenience stores in a span of eleven days. Pet. App. 12a-13a, 27a-31a. The first two robberies did not involve weapons. Pet. App. 27a-29a. The store clerk from the third robbery testified that Mr. Jefferson had a weapon, although surveillance video did not capture it. Pet. App. 29a. During the fourth and fifth robberies (which occurred close in time), surveillance

footage captured Mr. Jefferson with a gun. Pet. App. 30a. During the fourth robbery, Mr. Jefferson and his accomplice pointed their guns at the store clerk from a short distance away. Pet. App. 30a. During the fifth robbery, Mr. Jefferson held a gun close to the store clerk's head and chest. Pet. App. 30a. But immediately following the fourth robbery, the store clerk told officers that the guns "may have been BB guns." Pet. App. 32a.

C. Proceedings Below

A federal grand jury indicted Mr. Jefferson with five counts of federal robbery, 18 U.S.C. § 1951(b), and three counts of brandishing a firearm during a crime of violence, 18 U.S.C. § 924(c)(1)(A)(ii). Pet. App. 13a. At trial, Mr. Jefferson did not dispute his participation in the robberies, but instead argued that he did not possess an actual firearm during any of the robberies. Pet. App. 13a. The jury agreed with him on the third robbery, but convicted him of two § 924(c) counts related to the fourth and fifth robberies. Pet. App. 13a-14a, 13a n.1.

But the jury was not asked whether Mr. Jefferson's robberies were crimes of violence. Although Mr. Jefferson asked the district court to instruct the jury that it had to find force to convict under § 924(c) (and § 1951(b)), the district court refused to do so. Pet. App. 16a. Specifically, the district court refused to instruct the jury that, to convict Mr. Jefferson of robbery under § 1951, it had to find that Mr. Jefferson used violent force. Pet. App. 15a-16a. And the district court further directed a verdict on the § 924(c) crime-of-violence element, instructing the jury that "robbery is a crime of violence." Pet. App. 16a.

At sentencing, the district court imposed a 70-month concurrent sentence for each robbery, a 7-year consecutive mandatory minimum sentence for one of the § 924(c) counts, and a 25-year consecutive mandatory minimum sentence for the other § 924(c) count, for a total sentence of 454 months' imprisonment. Pet. App. 14a n.2. Mr. Jefferson was eighteen years old at the time of the robberies and had minimal criminal history (a misdemeanor trespassing conviction).

On appeal, Mr. Jefferson asserted, *inter alia*, that the district court violated his constitutional rights under the Fifth and Sixth Amendments when it directed a verdict on the § 924(c) crime-of-violence element. Pet. App. 16a-19a. Citing *Apprendi* and *Rosemond*, Mr. Jefferson explained that the jury had to find each element of the offense, and § 924(c)'s crime-of-violence requirement was one such element. Pet. App. 17a-18a. The Tenth Circuit rejected the argument. Pet. App. 18a-19a. It held that this Court in *Rosemond* did not "assign to the jury the task of determining whether an offense satisfies the 'crime of violence' definition of § 924(c)(3)(A)." Pet. App. 18a. Citing *Taylor v. United States*, 495 U.S. 575 (1990), which involved a violent-crimes recidivist-sentencing statute (the Armed Career Criminal Act, 18 U.S.C. § 924(e)), the Tenth Circuit held that the categorical approach applied, and under this approach, courts "ignor[e] the particular facts of the case" when deciding whether [a prior conviction] satisfies the 'crime of violence' definition." Pet. App. 18a. From this, the Tenth Circuit held that "deciding whether a crime is a 'crime of violence' under § 924(c) is largely a matter of statutory interpretation, a legal task for the judge, not a factual one for the jury." Pet. App. 18a-19a. "The judge was not obliged and, in fact,

ought never submit the 'crime of violence' issue to the jury." Pet. App. 19a. The Tenth Circuit affirmed Mr. Jefferson's convictions and sentence. Pet. App. 39a.

But the Tenth Circuit agreed with Mr. Jefferson that the district court erred when it refused to instruct the jury that, to convict him of the robberies (as opposed to the § 924(c) counts), it had to find that he used violent force. Pet. App. 26a. As Mr. Jefferson requested, the jury in this case 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. 26a. Despite this instructional error, the Tenth Circuit found this omitted element harmless in light of the evidence. Pet. App. 27a-31a. According to the Tenth Circuit, Mr. Jefferson used violent force in each instance of robbery, including when he did nothing other than grab the store's doors to prevent the store clerk from chasing him from the store. Pet. App. 27a-31a.

Mr. Jefferson filed a petition for rehearing en banc, noting, *inter alia*, the recent passage of the First Step Act (just one week prior to the issuance of the Tenth Circuit's initial decision in this appeal), its clarification of § 924(c)(1)(C), and his belief that "the First Step Act makes clear that the Supreme Court incorrectly interpreted § 924(c) in *Deal*." Pet. For Rhr'g 3. The Tenth Circuit denied the petition for rehearing.

Mr. Jefferson then sought a writ of certiorari from this Court. He asked this Court, *inter alia*, to grant the petition, vacate the judgment, and remand for the Tenth Circuit to determine whether Section 403 of the First Step Act applied to cases pending on direct appeal at the time of the Act's enactment. In January 2020, this Court granted, vacated, and remanded to the Tenth Circuit "for the court to consider

the First Step Act of 2018." *Jefferson v. United States*, 140 S.Ct. 861, 862 (2020).

On remand, Mr. Jefferson argued that Section 403(b) of the First Step Act applied to cases pending on appeal and, thus, that the Court should vacate the erroneously imposed 25-year consecutive sentence on the second § 924(c) conviction. The Tenth Circuit rejected that argument under what it termed "the plain and unambiguous language of the First Step Act." Pet. App. 5a.

Mr. Jefferson also invoked intervening Circuit precedent to argue that federal robbery is not a crime of violence because it can be committed via non-violent threats to property. Pet. App. 3a-4a n.1 (discussing *United States v. Bowen*, 936 F.3d 1091 (10th Cir. 2019)) (holding that federal witness retaliation is not a crime of violence because it can be committed via non-violent threats to property, such as threatening to spray paint a person's car). The Tenth Circuit held that it could not consider intervening precedent because this Court's GVR was limited to the First-Step-Act issue. Pet. App. 3a-4a. In a footnote, however, the Tenth Circuit rejected Mr. Jefferson's claim on the merits, stating that federal robbery is only a crime of violence if it is committed via "violent force against a person or property." Pet. App. 3a-4a n.1. Thus, non-violent property damage is insufficient to convict under § 924(c)(1)(A) because it is insufficient to convict a defendant under the federal robbery statute (18 U.S.C. § 1951(b)). In so holding, the Tenth Circuit again ignored the fact that Mr. Jefferson's jury was not instructed that it had to find an element of violent force (against a person or property) to convict in this case.

This timely petition follows.

REASONS FOR GRANTING THE WRIT

I. Review is necessary to resolve whether a district court may direct a verdict on § 924(c)(1)(A)'s crime-of-violence element.

The Tenth Circuit held below that whether a defendant commits a crime of violence for purposes of § 924(c)(1)(A) is "a legal task for the judge, not a factual one for the jury." Pet. App. 19a. "The judge was not obliged and, in fact, ought never submit the 'crime of violence' issue to the jury." Pet. App. 19a. For four reasons, this Court should review the Tenth Circuit's decision.

First, the decision conflicts with well-established precedent from this Court. It is blackletter law that a jury must find beyond a reasonable doubt all elements of an offense. *Gaudin*, 515 U.S. at 510. This Court held in *Rosemond* that the "commission of a . . . violent crime is—no less than the use of a firearm—an 'essential conduct element of the § 924(c) offense.'" 572 U.S. at 74. A crime is violent under § 924(c) only if it "has as an *element* the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A) (emphasis added). Thus, it necessarily follows that an element of any § 924(c) offense is the commission of an offense that has an element of force. This element must be found by a jury beyond a reasonable doubt. The Constitution requires it. *Gaudin*, 515 U.S. at 510.

That did not happen in this case. The government conceded below, and the Tenth Circuit found, that the jury in this case was not instructed that the underlying robberies had to be committed with violent force. Pet. App. 26a. More importantly, the district court directed a verdict on this element with respect to the § 924(c) counts. Pet. App. 16a. The district court instructed the jury that "robbery is a crime of

violence." Pet. App. 16a. Although the Tenth Circuit found the instructional omission for the underlying robberies harmless, a directed verdict on the § 924(c) charges cannot be harmless error. *Sullivan*, 508 U.S. at 280 (1993) ("The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty."); *Rose v. Clark*, 478 U.S. 570, 578 (1986) ("harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury"); *Connecticut v. Johnson*, 460 U.S. 73, 84 (1983) ("a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelmingly the evidence may point in that direction"); *United States v. McKye*, 734 F.3d 1104, 1110 (10th Cir. 2013) (acknowledging that an instruction that directs a verdict for the government is not harmless); *United States v. DeFries*, 129 F.3d 1293, 1311-1312 (D.C. Cir. 1997) (directing a verdict on an element of the offense is reversible error); *United States v. Johnson*, 71 F.3d 139, 144 (4th Cir. 1995) (never harmless where a district court conclusively instructs a jury to find an element of the offense); *United States v. Bass*, 784 F.2d 1282, 1284-1285 (5th Cir. 1986) (reversing conviction where the district court directed a verdict on one element of the offense).

Second, the Tenth Circuit erroneously relied on decisions interpreting recidivist-sentencing statutes to hold that § 924(c)'s crime-of-violence element is a question for the judge, not the jury. Pet. App. 18a-19a. Because those decisions involved "the fact of a prior conviction," the juries were not required to find beyond a reasonable doubt

whether the prior convictions qualified as violent crimes. *Apprendi*, 530 U.S. at 490. But here, § 924(c) is not a recidivist sentencing enhancement. The statute has nothing to do with "the fact of a prior conviction." *Apprendi*, 530 U.S. at 490. Thus, it is not excluded from the Constitution's reach. *Id.* The crime-of-violence requirement is "an essential conduct element" of every § 924(c) offense. *Rosemond*, 572 U.S. at 74. Under the Fifth and Sixth Amendments, this element must be found by a jury beyond a reasonable doubt. *Gaudin*, 515 U.S. at 510.

This Court's recent decision in *Davis* does not undermine this argument. *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 advocating for a jury-trial 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. 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.

Moreover, unlike the residual clause, there is no reason to think that Congress, in § 924(c)(3)(A), did not intend to task a jury with determining whether the defendant's

conduct included an *element* of force. Indeed, the plain language of the statute compels such a conclusion. The statute plainly requires a finding that the defendant's conduct have "an element" of force. 18 U.S.C. § 924(c)(3)(A). As an *element* of the offense, Congress would have understood that the element's resolution is one for the jury, not the judge. *In re Winship*, 397 U.S. at 364. Because the judge, not the jury, resolved this issue below, review is necessary.

Third, this Court should grant review because this issue is exceptionally important. The Tenth Circuit's decision undermines centuries of precedent requiring that a jury find each element of an offense beyond a reasonable doubt. *Apprendi*, 530 U.S. at 476-477. "[T]rial by jury has been understood to require that '*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours.'" *Id.* at 477 (emphasis in original). "[T]he historical foundation for our recognition of these principles extends down centuries into the common law." *Id.* Despite this precedent, the Tenth Circuit held below that the determination of this element of the offense was "a legal task for the judge, not a factual one for the jury." Pet. App. 19a. "The judge was not obliged and, in fact, ought never submit the 'crime of violence' issue to the jury." Pet. App. 19a. And it did so in a case where the jury was never instructed that it had to find an element of force for any of the charged offenses. Pet. App. 26a. Review is necessary.

Fourth, Mr. Jefferson properly preserved this issue below. He requested the appropriate jury instructions in the district court and challenged the district court's

inappropriate jury instructions on appeal. Pet. App. 26a-27a. There are no procedural hurdles to this Court's review. This Court should grant this petition.

II. Review is necessary to determine whether Section 403 of the First Step Act applies to defendants with direct appeals pending at the time of the Act's enactment.

Consistent with the Tenth Circuit's decision below, the lower federal courts have uniformly held (at this point) that Section 403 does not apply to cases pending on appeal. Pet. App. 8a-9a (citing cases). Because those decisions are incorrect, this Court should grant review.

When interpreting a statute, this Court looks to "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). The statute's history and purpose are also relevant to its meaning. *United States v. Quality Stores, Inc.*, 134 S.Ct. 1395, 1401 (2014).

To begin with the text, Section 403(b), which is entitled "Applicability to Pending Cases," provides: "This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment." 132 Stat at 5222. Thus, § 403 applies "to any offense committed" before the Act's passage, "if a sentence for the offense has not been imposed" as of that date. *Id.*

Although the most literal meaning of the word "imposed" might refer to the date a court sentences a defendant, Pet. App. 6a, "[i]t is a well-established canon of statutory construction that a court should go beyond the literal language of a statute

if reliance on that language would defeat the plain purpose of the statute." *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983). "And it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute and the objects and policy of the law." *Id.* (ellipsis omitted).

In other words, the literal interpretation of a statute does not always carry the day. *See, e.g.*, *Bond v. United States*, 572 U.S. 844, 857, 858-861 (2014) (interpreting the phrase "chemical weapon" not to reach the use of a chemical weapon); *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 316-320 (2014) (interpreting the phrase "any air pollutant" not to reach all air pollutants); *Dolan v. USPS*, 546 U.S. 481, 486 (2006) (interpreting "negligent transmission" not to include a negligent transmission); *Bob Jones Univ.*, 461 U.S. at 586-589 (interpreting the phrase "religious, charitable . . . or educational purposes" not to include a religious school); *see also United States v. Ontiveros*, 875 F.3d 533, 538 (10th Cir. 2017) (in the violent-crimes context, interpreting the phrase "use of physical force" to include omissions). Again, the "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan*, 546 U.S. at 486. "The definition of words in isolation . . . is not necessarily controlling in statutory construction." *Id.*

The (entire) text of § 403, the statutory context, the statutory history, relevant background principles, and the statute's remedial purpose all dictate that the provision must be read to apply to defendants whose sentences were pending on direct

appeal when the First Step Act was passed. At the least, the (entire) text of § 403 is ambiguous on this point, and doubt must be resolved in favor of Mr. Jefferson under the rule of lenity.

Start with § 403(b)'s text. While a sentence could be considered "imposed" when announced, it is also possible to think of an "imposed" sentence as one that has reached final disposition in the highest reviewing court. *See United States v. Clark*, 110 F.3d 15, 17-18 (6th Cir. 1997), *superseded by regulation on other grounds*, U.S.S.G. §1B1.10(b)(2). In *Clark*, the Sixth Circuit held that changes to a different statute, which applied "to all sentences imposed on or after" the date of enactment, applied to cases pending on direct review. *See id.* The court reasoned that "[a] case is not yet final when it is pending on appeal. The initial sentence has not been finally 'imposed' . . . because it is the function of the appellate court to make it final after review or see that the sentence is changed if in error." *Id.* at 17; *but see United States v. Richardson*, 948 F.3d 733, 751-752 (2020) (holding that *Clark*'s interpretation does not apply to § 403).

Courts, including the Tenth Circuit, have also interpreted the phrase "sentence imposed" in the Sentencing Guidelines to include a sentence originally imposed for an offense, plus any sentence imposed upon any subsequent revocation of probation, parole, or supervised release. *See United States v. Ruiz-Gea*, 340 F.3d 1181, 1185 (10th Cir. 2003); *United States v. Compian-Torres*, 320 F.3d 514 (5th Cir. 2003); *United States v. Hidalgo-Macias*, 300 F.3d 281 (2nd Cir. 2002). And recently, a plurality of this Court endorsed a similar interpretation in *United States v. Haymond*,

139 S.Ct. 2369, 2380 n.5 (2019), suggesting that a final sentence is not finally "imposed" until a defendant has served any term of supervised release, because until then the original sentence is subject to being adjusted. The same logic applies to a sentence that is pending on direct appeal. Until affirmed, that sentence is subject to being adjusted.

Congress also titled § 403(b), "Applicability to Pending Cases." 132 Stat. at 5222. A "pending case" includes one on direct appeal. *See generally Landgraf v. USI Film Products*, 511 U.S. 244 (1994); Black's Law Dictionary (11th ed. 2019) (defining "pending" as "[r]emaining undecided; awaiting decision"). Thus, Congress's use of the phrase "pending cases" as the title for § 403(b) indicates that it meant to apply the statutory changes to § 924(c) to cases pending on appeal. *Almendarez-Torrez v. United States*, 523 U.S. 224, 234 (1998) ("the title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute"); *see also Yates v. United States*, 135 S.Ct. 1074, 1083 (2015).

The legislative history reinforces this point. A prior version of § 403(b) of the First Step Act distinguished between "pending cases" and "past cases," with a "sentence reduction" available for the latter category of cases "on motion of the defendant or the Director of the Bureau of Prison, or on [the court's] on motion."[1] This latter language mirrors language in other statutes that authorize relief from final sentences. *See, e.g.*, 18 U.S.C. §§ 3582(c)(1)(A), (c)(2). Although Congress deleted the "past cases" subsection from the final version of the First Step Act, this deletion does nothing to

[1] S.1917 (115th Cong.). This version is available here (§ 104): https://www.congress.gov/bill/115th-congress/senate-bill/1917/text#toc-idc66ef2f3-411e-4fca-9f6b-11589219c9df

undermine Congress's understanding of the dichotomy between "pending" and "past" cases. Because cases pending on appeal are "pending cases," and not "past cases," Congress meant § 403 to apply to cases pending on appeal at the time of the First Step Act's enactment.

The title of § 403 further reinforces this point. Congress titled Section 403 "Clarification of Section 924(c) of Title 18, United States Code." 132 Stat. at 5222. The legislative history confirms that Congress had to "clarify" § 924(c) because of this Court's incorrect interpretation of the statute in *Deal*. *See* H.R. REP. 114-888, 20, 2016 WL 7471588, at *20. This House Report states that the bill "revises section 924(c) of title 18 to address inappropriate 'stacking' of Federal firearms charges." *Id*. The report notes that "courts have interpreted 'second or subsequent' to include multiple charges in the same indictment," which resulted in defendants receiving "inappropriately lengthy sentences." *Id*. Thus, the report provides, § 403 "clarifies" that a § 924(c) enhancement "can only apply after a defendant has had an intervening conviction." *Id*.; *see also Marinello v. United States*, 138 S.Ct. 1101, 1107 (2018) (discussing House and Senate Reports when interpreting a federal criminal statute).

It is important that § 403 is a "clarification" of an existing statute because "decisions that narrow the scope of a criminal statute by interpreting its terms" are retroactive on direct appeal. *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004). This is a familiar concept in sentencing law. For example, "clarifying" amendments to the guidelines apply to cases pending on direct appeal, whereas "substantive" amendments do not. *See United States v. Groves*, 369 F.3d 1178, 1182 (10th Cir.

2004). There is good reason to think that Congress meant to incorporate this dichotomy in § 403 of the First Step Act –Congress labeled § 403 a "clarification" that applies to "pending cases," signaling its clear intent that the provision applies to cases pending on direct appeal at the time of the Act's enactment.

The statutory context supports this reading of § 403. When Congress intended certain sections of the Act not to apply to cases pending on appeal, it said so. For example, § 402(b) provides that the amendments to 18 U.S.C. § 3553(f) "shall apply ***only to a conviction entered on or after the date of enactment*** of this act." 132 Stat. at 5121 (emphasis added). A conviction is entered when the judgment of conviction and sentence is entered on the district court's criminal docket. *See* Fed.R.Crim.P. 32(k)(1); Fed.R.App.P. 4(b)(6); *see Deal*, 508 U.S. at 131 ("It is certainly correct that the word 'conviction' can mean either the finding of guilt or the entry of a final judgment on that finding."). Unlike § 403(b), then, § 402(b) applies only if the district court had not yet entered a conviction when the First Step Act took effect. Section 403(b), by contrast, takes a different approach, applying to all cases in which a "sentence for the offense has not been imposed."

When Congress uses different language in different provisions, the text should be given a different meaning. *Russello v. United States*, 464 U.S. 16, 23 (1983). If § 402(b) applies when a conviction has not yet been entered, which typically occurs after sentencing in a criminal case, then § 403(b)'s different language must mean something different. Particularly when contrasted with § 402(b), § 403(b) is best read to apply to all pending cases, including those cases pending on appeal.

This interpretation of § 403 is also consistent with a number of default retroactivity rules in criminal cases. For starters, this Court has declared that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). Indeed, "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Id.* at 322. It makes sense that Congress would draw the same line when determining § 403's applicability to pending cases here, where it enacted § 403 to effectively overrule this Court's decision in *Deal*.

It is also true that, at common law, both federal and state courts generally followed the principle that, "where a criminal statute is amended, lessening the punishment, a defendant is entitled to the benefit of the new act, although the offense was committed prior thereto." *Moorehead v. Hunter*, 198 F.2d 52, 53 (10th Cir. 1952). The amended provision was "rather to be considered as a continuance and modification of old laws than as an abrogation of those old and the reenactment of new ones." *Steamship Co. v. Jolliffe*, 69 U.S. 450, 458-459 (1864) (quotation and citation omitted); *see also Gulf, Co. & Santa Fe Ry. Co. v. Dennis*, 224 U.S. 503, 506-07 (1912) ("it becomes our duty to recognize the changed situation, and . . . to apply the intervening law"); *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 841 (1990) (Scalia, J., concurring) (noting "presumption of retroactivity" with respect to amendments to criminal statutes).

The Tenth Circuit has read § 403(b) in derogation of this common-law rule. This Court should not. "The rule that statutes in derogation of the common law are to be strictly construed does not require such an adherence to the letter as would defeat an obvious legislative purpose or lessen the scope plainly intended to be given to the measure." *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)." "No rule of construction precludes giving a natural meaning to legislation like this that obviously is of a remedial, beneficial and amendatory character." *Id.*; *United States v. Texas*, 507 U.S. 529, 534 (1993) ("In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law."); s*ee also United States v. McGarr*, 461 F.2d 1, 4 (7th Cir. 1972) ("we should not read a saving clause so broadly that it encompasses much more than is necessary to achieve its general purpose – preventing the abatement of prosecutions which, at common law, would otherwise have resulted from the repeal of a statute or from a change in the definition of an offense.").

Additionally, had Congress wanted to draw the line at sentencing, it did not need to include § 403(b) at all. The modern background principle is that, when Congress amends a criminal penalty provision, and does not include a specific savings clause, that amendment applies to defendants not yet sentenced, but does not apply to defendants who have already been sentenced. *Dorsey v. United States*, 567 U.S. 260, 280 (2012). By including a specific savings clause (§ 403(b)), rather than relying on this modern background principle that would have applied absent § 403(b), Congress signaled its intent to draw the line at some point other than sentencing. Otherwise,

§ 403(b) is surplusage. *See, e.g.*, *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S.Ct. 1002, 1014 (2017) ("Were we to accept petitioner's argument that the only protectable features are those that play absolutely no role in an article's function, we would effectively abrogate the rule of *Mazer* and read 'applied art' out of the statute.").

And this is particularly true here, where Congress was well aware of *Dorsey*'s holding when it enacted the First Step Act. We know this because § 404 of the First Step Act makes retroactive the statutory penalties at issue in *Dorsey*. 132 Stat. at 5222. It makes little sense to think that Congress made retroactive those penalties in § 404, yet enacted a specific savings statute in the immediately preceding section (§ 403), that does nothing other than mirror the otherwise-applicable default rule discussed in *Dorsey*.

This interpretation of § 403 is also consistent with the First Step Act's remedial purpose. Section 403 is a remedial statute that reduces criminal penalties, and it "should be construed liberally to carry out the wise and salutary purposes of its enactment." *Stewart v. Kahn*, 78 U.S. 493, 504 (1870); *see also Peyton v. Rowe*, 391 U.S. 54, 65 (1968) (describing "the canon of construction that remedial statutes should be liberally construed"). Precluding its reach to defendants whose convictions are still pending on appeal frustrates that remedial purpose.

Finally, any doubt or ambiguity must be resolved in favor of Mr. Jefferson. The rule of lenity instructs that, when a criminal statute has two possible readings, courts should not "choose the harsher alternative" unless Congress has "spoken in language that is clear and definite." *United States v. Bass*, 404 U.S. 336, 347 (1971). The rule

exists to ensure "that legislatures, not courts, define criminal liability." *Crandon v. United States*, 494 U.S. 152, 158 (1990). While §403(b) can and should be read to apply to pending cases as a matter of text, context, history, and purpose, any "ambiguity concerning the ambit of [the Act] should be resolved in favor of lenity." *Skilling v. United States*, 561 U.S. 358, 410 (2010).

That conclusion also would avoid anomalous results. If the application of § 403's changes really is dependent on the happenstance of when a defendant's sentencing took place, defendants who committed the same offense on the same day are potentially subject to two different sentencing regimes, depending on the happenstance of scheduling (or perhaps even worse, depending on the foresight of counsel seeking to delay sentencing or not). While some potential for disparate results may exist between defendants whose sentences are already final and those whose are not, that disparity is consistent with established rules treating finality as the dividing point between who gets the benefit of changes in the law and who does not. *See Griffith*, 479 U.S. at 328. But those same rules cut exactly the opposite direction when it comes to treating two defendants differently even though neither of their cases is final.

Rather than consider all of this, the Tenth Circuit erroneously limited itself to its plain-text interpretation of the word "imposed." Pet. App. 6a-7a, 9a. According to the Tenth Circuit, it was prohibited from considering the "traditional canons of statutory construction" because the statute was not "ambiguous." Pet. App. 10a (quoting *Bd. of Cty. Comm'rs Boulder Cty. v. Suncor Energy, Inc.*, 965 F.3d 792, 804 (10th Cir. 2020)).

But the case relied upon by the Tenth Circuit for this (incorrect) proposition was just vacated by this Court. *Suncor Energy, Inc. v. B'd Comm'rs Boulder Cty.*, __ S.Ct. __, 2021 WL 2044533, at *1 (May 24, 2021). The proper rule is not that the canons of statutory construction are off limits without a finding of ambiguity, but instead that the canons of construction are used to resolve the meaning of statutes (whether those statutes are ultimately deemed ambiguous or not). *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The *plainness or ambiguity* of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.") (emphasis added); *Facebook, Inc. v. Duguid*, 141 S.Ct. 1163, 1170 n.5 (2021) (instructing courts to use canons of construction "to confirm their assumptions about the 'common understanding' of terms"). The Tenth Circuit should not have ignored Section 403's broader context, history, and purpose when interpreting Section 403(b).

The only canon the Tenth Circuit employed in support of its interpretation was the inconsistent-usage canon, noting that Congress used the phrase "after a prior conviction . . . has become final" in Section 403(a), but not in Section 403(b). Pet. App. 7a-8a. But Section 403(a) was a substantive clarification to § 924(c) (effectively overruling *Deal*). Congress used that terminology to effectively overrule this Court's decision in *Deal*; Section 403(a) has nothing to do with Section 403's applicability. *See* § 403(b) (titled "Applicability to Pending Cases"). As explained above, when compared to other "applicability" provisions within the First Step Act, it becomes clear that Congress did not draw the line at sentencing in Section 403(b). *See* § 402(b)

("Applicability. "The amendments made by this section shall apply only to a conviction entered on or after the date of enactment of this Act.")

Moreover, looking to substantive provisions within the First Step Act creates an inconsistent usage problem of its own. The lower federal courts have unanimously held that the phrase "impose a reduced sentence" within Section 404(b) of the First Step Act (the provision that made the Fair Sentencing Act's lower penalties for crack-cocaine offenses retroactive) does not mean that a district court must resentence a defendant who is eligible for relief under that provision. Despite Congress's use of the verb "impose," the lower federal courts have interpreted Section 404(b) to authorize a limited procedure where the defendant does not have to be present, where intervening changes in the law and judicial decisions can be ignored, and where courts do not even have to consider the 18 U.S.C. § 3553(a) sentencing factors, despite the fact that those factors must be considered "in determining the particular sentence to be imposed." 18 U.S.C. § 3553(a); *see*, *e.g.*, *United States v. Fowowe*, 1 F.4th 522, 531 (7th Cir. 2021) (citing cases from the First, Second, Fifth, Sixth, Ninth, and Eleventh Circuits that hold "that a district court is not required to apply a judicial decision issued after the defendant was initially sentenced when calculating the movant's new sentencing range"; citing cases from the First, Second, Third, Fourth, Sixth, Tenth, and D.C. Circuits that hold that district courts may, but need not, consider the § 3553(a) factors in a Section 404(b) procedure); *United States v. Lawrence*, 1 F.4th 40, 48 (D.C. Cir. 2021) (referring to Section 404(b) proceedings as

"sentence-reduction proceedings" where allocution and the right to be present are unavailable, and citing cases).

If the phrase "impose a reduced sentence" in Section 404(b) does not trigger a sentencing proceeding, then it should come as no surprise that the phrase "a sentence for the offense has not been imposed" in Section 403(b) is not tied to the initial sentencing proceeding. What matters is context. And here, context (as well as, *inter alia*, history and purpose) make clear that Congress tied Section 403's applicability to non-final "pending cases," including those on direct appeal. Especially considering the severe adverse consequences of a contrary holding (a 25-year *mandatory consecutive* sentence), review is necessary.

III. This Court should grant this petition to overrule *Deal*.

Deal holds that a defendant with no prior § 924(c) convictions is subject to a mandatory consecutive 25-year term of imprisonment under § 924(c)(1)(C) if the government obtains two § 924(c) convictions at the same trial. 508 U.S. at 135-136. *Deal* was incorrectly decided. For four reasons, this Court should overrule it.

First, as already addressed, Congress recently enacted a "clarification" to § 924(c)(1)(C), amending the statute in a manner directly contrary to *Deal*'s holding. As of December 2018, § 924(c)(1)(C) applies only "[i]n the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final." First Step Act, 132 Stat. 5194, 5221-5222 § 403. In light of this clarifying language, Mr. Jefferson should not have been subject to § 924(c)(1)(C)'s 25-year mandatory minimum sentence, as none of his robberies occurred after a prior § 924(c)

conviction. But, as just explained, the Tenth Circuit has held that the § 403 itself does not provide an avenue for relief, as it applies only to defendants not yet sentenced. Pet. App. 5a-11a. Hence the need for this Court to overrule *Deal*.

Second, overruling *Deal* would be consistent with this Court's recent decision in *Dean v. United States*, 137 S.Ct. 1170 (2017). That case also involved § 924(c). This Court refused the government's proposed interpretation in that case because Congress could have, but did not, amend the statute in a manner consistent with the government's position. *Id.* at 1177-1178. The inverse is true here. Congress not only amended § 924(c), but did so as a "clarification," sending an unmistakable message that this Court interpreted § 924(c) incorrectly in *Deal*.

Third, overruling *Deal* is consistent with this Court's precedent on statutory retroactivity. "[D]ecisions that narrow the scope of a criminal statute by interpreting its terms" are retroactive. *Schriro*, 542 U.S. at 352. The same rule should apply in this context, where Congress has clarified that this Court's prior interpretation of a statute was incorrect. The First Step Act not only makes clear that § 924(c)(1)(C) "does not reach certain conduct," *Bousley v. United States*, 523 U.S. 614, 620 (1998), but it also makes clear that Congress never intended it to reach such conduct (like Mr. Jefferson's).

Fourth, recently, this Court has not hesitated to overrule its precedents when those precedents were wrongly decided. *See, e.g.*, *Knick v. Township of Scott*, 139 S.Ct. 2162, 2170 (2019); *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S.Ct. 1485, 1499 (2019); *Janus v. Am. Fed'n of State, Cty., & Mun. Emp.*, 138 S.Ct. 2448, 2460 (2018); *South*

Dakota v. Wayfair, Inc., 138 S.Ct. 2080, 2098 (2018). So too here. The First Step Act confirms that four-Justice dissent in *Deal* had the better reading of the statute. Congress meant § 924(c)(1)(C) to apply only to defendants who commit § 924(c) offenses after having already been convicted of an earlier § 924(c) offense. "Stare decisis is not an inexorable command." *Hyatt*, 139 S.Ct. at 1499 (cleaned up). With the benefit of the First Step Act, it is now clear that Congress's use of the phrase "[i]n the case of a second or subsequent conviction" referred to subsequent convictions *committed after* a first § 924(c) conviction.

The difference here is stark. Mr. Jefferson's mandatory consecutive sentence increased 18 years because of this Court's erroneous decision in *Deal*. For over twenty years, criminal defendants like Mr. Jefferson have been subject to draconian sentences because of *Deal*'s misreading of § 924(c)(1)(C). This Court should use this case to correct this mistake. This Court should grant this petition and overrule *Deal*.

IV. If nothing else, this Court should hold this petition pending its decision in *United States v. Taylor*.

On July 2, 2021, this Court granted certiorari in *United States v. Taylor*, __ S.Ct. __, 2021 WL 2742792 (July 2, 2021), to resolve whether an attempt to commit federal robbery under 18 U.S.C. § 1951(a) qualifies as a crime of violence under § 924(c)(3)(A). *Taylor* admittedly involves a different provision -- § 1951(a) and not § 1951(b) – with different elements (as an attempt crime, the government need only prove a specific intent to commit federal robbery and a substantial step towards the completion of the robbery; it need not prove any use, attempted use, or threatened use of force). *See, e.g.*, *United States v. Taylor*, 979 F.3d 203, 207 (4th Cir. 2020). But some of the lower

federal courts have inexplicably used § 1951(b)'s completed-robbery elements to define a § 1951(a) attempt offense, concluding that "an attempt to commit a 'crime of violence' *necessarily* constitutes an attempt to use physical force." *See id.* at 208 (citing cases). Although we do not think it would, if this Court were to impute § 1951(b)'s force element into § 1951(a), the question would then become whether that force element constitutes an element of violent force. Mr. Jefferson has consistently and repeatedly argued below that § 1951(b) does not have an element of violent force. *See* Pet. App. 16a, 19a-25a. If this Court were to agree with that proposition in *Taylor*, Mr. Jefferson should get the benefit of that decision. Thus, at a minimum, if this Court does not grant this petition, it should hold the petition pending *Taylor*'s disposition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. DAVION L. JEFFERSON, Defendant - Appellant.	No. 17-3150

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D.C. NO. 2:15-CR-20012-CM-1)

Daniel T. Hansmeier, Appellate Chief (Melody Brannon, Federal Public Defender, with him on the supplemental briefs), Office of the Federal Public Defender, Kansas, City, Kansas, for Appellant.

Jared S. Maag, Assistant United States Attorney (Stephen R. McAllister, United States Attorney, and James A. Brown, Assistant United States Attorney, Chief, Appellate Division, with him on the supplemental briefs), Office of the United States Attorney, Kansas City, Kansas, for Appellee.

Before **TYMKOVICH**, Chief Judge, **O'BRIEN**, and **MATHESON**, Circuit Judges.

TYMKOVICH, Chief Judge.

This court previously affirmed Davion L. Jefferson's conviction of Hobbs Act robbery in violation of 18 U.S.C. § 1951(a), (b)(1), and brandishing a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii). *See United States v. Jefferson*, 911 F.3d 1290 (10th Cir. 2018). As we set forth in *Jefferson I*, Jefferson committed five robberies in eleven days, and during the last two he brandished a gun. For his crimes, Jefferson was sentenced to 454 months' imprisonment. Part of this calculation included a mandatory minimum sentence of 25 years' imprisonment imposed under 18 U.S.C. § 924(c)(1)(C)(i) based on his violent felonies.

Following our decision, Jefferson filed a petition for certiorari in the Supreme Court of the United States. On January 13, 2020, the Supreme Court granted Jefferson's petition, vacated our judgment, and remanded Jefferson's case to this court for the limited purpose of considering the applicability of the newly-enacted First Step Act of 2018, Pub. L. No. 115-391 (2018), to Jefferson's case. *See Jefferson v. United States*, 140 S. Ct. 861 (2020). Under the First Step Act, eligible defendants may file motions for sentence reductions based on the Act's retroactive amendment of 18 U.S.C. § 924(c), which eliminated enhanced sentences for defendants who did not have a prior § 924(c) conviction. We then ordered the parties to file supplemental briefing to address the First Step Act, as well as whether remand to the district court was appropriate for it to consider the

applicability of the First Step Act or the effect of *United States v. Bowen*, 936 F.3d 1091 (10th Cir. 2019), an intervening decision issued by this court.

Analysis

We consider two issues: first, the scope of the Supreme Court's remand; and second, because we conclude the scope is limited, whether the First Step Act affords Jefferson relief.

A. Limited Remand

The Supreme Court's remand is limited. In its remand order, the Court stated that "[t]he judgment is vacated, and the case is remanded to the United States Court of Appeals for the Tenth Circuit for the court to consider the First Step Act of 2018, Pub. L. No. 115-391." *Jefferson*, 140 S. Ct. at 862. This language does not open up the entire case for reconsideration. Instead, it requires us to consider only the applicability of the First Step Act. As a result, our only job on remand is to determine whether the First Step Act affords Jefferson relief and we therefore cannot address his additional arguments concerning intervening case law.[1]

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[1] Jefferson argues *United States v. Bowen*, 936 F.3d 1091 (10th Cir. 2019), is an intervening decision that overruled our holding in *United States v. Melgar-Cabrera*, 892 F.3d 1053 (10th Cir. 2018), that Hobbs Act robbery is categorically a crime of violence under 18 U.S.C. § 924(c)(3)(A). If correct, Jefferson would not be subject to the 25-year mandatory minimum sentence under § 924(c)(1)(C)(i) for his Hobbs Act robbery convictions. But even if this issue is

(continued...)

Jefferson disagrees. He argues that the Supreme Court "could have, but did not, vacate the judgment in part." Aplt. Second Supp. Br. at 6. Instead, because the Supreme Court simply "vacated" the judgment, *see Jefferson*, 140 S. Ct. at 862, Jefferson contends the entirety of our prior judgment is not law of the case and we therefore can, and should, now consider all intervening changes in law.

But Jefferson's contention ignores the Supreme Court's direct language vacating our judgment: "The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Tenth Circuit for the court *to consider the First Step Act of 2018, Pub. L. No. 115-391 (2018)*." *Id*. (emphasis added). Although the Supreme Court did not explicitly state that it vacated our judgment "in part," its limitation of our consideration to the First Step Act did as much.

Thus, we only consider whether the First Step Act affords Jefferson relief.

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[1](...continued)
within the scope of the remand—and it is not—*Bowen* had no such effect. Section 924 imposes mandatory minimum sentences for defendants who commit "crimes of violence." In *Bowen*, we held the federal witness-retaliation statute, 18 U.S.C. § 1513(b), does not qualify as a crime of violence under § 924(c)(3)(A) because it includes witness retaliation through *non-violent property damage*. 936 F.3d at 1104. Indeed, one can be convicted of § 1513(b) for spray painting a car. *Id*. But the same is not true of Hobbs Act robbery. In *Melgar-Cabrera*, we explained that Hobbs Act robbery necessarily entails the use or threatened use of *violent force against a person or property*. 892 F.3d at 1065. Without violent force, there is no Hobbs Act robbery and no "crime of violence." Thus, *Melgar-Cabrera* is undisturbed by *Bowen*.

B. First Step Act

The First Step Act affords some criminal defendants relief in the form of reduced sentences. If applicable to Jefferson, the First Step Act would eliminate the 25-year mandatory minimum sentence that is part of his current sentence.[2] But we need only look to the plain and unambiguous language of the First Step Act to conclude that it does not afford Jefferson relief. The First Step Act provides:

> **SEC. 403. CLARIFICATION OF SECTION 924(C) OF TITLE 18, UNITED STATES CODE.**
>
> (a) IN GENERAL.—Section 924(c)(1)(C) of title 18, United States Code, is amended, in the matter preceding clause (i), by striking "second or subsequent conviction under this subsection" and inserting "violation of this subsection that occurs after a prior conviction under this subsection has become final".
>
> (b) APPLICABILITY TO PENDING CASES.—This section, and the amendments made by this section, shall apply to any offense that was *committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.*

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[2] Jefferson was convicted of two counts of violating 18 U.S.C. § 924(c). Section 924(c)(1)(C)(i) imposes a mandatory minimum sentence of 25 years' imprisonment if "a violation of this subsection . . . occurs after a prior conviction under this subsection has become final." Because of this, his two convictions were stacked, resulting in a mandatory minimum sentence of 25 years' imprisonment. The First Step Act amended this language in certain circumstances to eliminate stacking § 924(c) convictions, also eliminating the mandatory minimum sentence.

First Step Act § 403 (emphasis added).

By its plain language, § 403 is inapplicable to defendants whose sentences were imposed on or before the First Step Act's enactment on December 20, 2018. *See* First Step Act § 403(b). Jefferson's sentence was imposed on June 21, 2017—a year and a half too early. The First Step Act therefore affords him no relief.

Jefferson makes numerous arguments disputing this conclusion. All of them center around his contention that the First Step Act applies to defendants like him who had pending cases on appeal when the First Step Act was enacted. None of these arguments are persuasive.

Jefferson first argues he is eligible for First Step Act relief because his sentence was not yet "imposed" within the meaning of § 403(b) at the time of enactment because his appeals had not yet been fully exhausted. Jefferson's interpretation of "imposed" contradicts the term's plain meaning and common usage in federal sentencing law. Indeed, a sentence is "imposed" "when the district court announces it, not when appeals are exhausted." *United States v. Jordan*, 952 F.3d 160, 172 (4th Cir. 2020), *cert. denied*, No. 20-256, 2021 WL 78100 (U.S. Jan. 11, 2021); *see also United States v. Garduno*, 506 F.3d 1287, 1290 (10th Cir. 2007) (holding a sentence is imposed within the meaning of Rule 11 when the district court announces the sentence); *United States v. Kinney*, 915

F.2d 1471, 1472 (10th Cir. 1990) ("Defendant . . . appeals his sentence *imposed* following his plea of guilty . . . ." (emphasis added)); *Robinson v. United States*, 147 F.2d 915, 915–16 (10th Cir. 1945) (discussing circuit court's prior remand "with instructions to vacate the sentences and *impose* new sentences" (emphasis added)); *Young v. United States*, 943 F.3d 460, 463 (D.C. Cir. 2019) ("In standard usage . . . a sentence is 'imposed' when the district court passes sentence on a defendant."); Fed. R. Crim. P. 32(a)(2) (applicable to offenses committed prior to Nov. 1, 1987) ("After *imposing* sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal . . . ." (emphasis added)); Fed. R. Crim. P. 11(e) ("After the court *imposes* sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack." (emphasis added)).

Moreover, Jefferson's argument is weakened by a comparison of §§ 403(a) and (b). These subsections demonstrate Congress's ability to differentiate between the imposition of a sentence and the finality of a sentence. In § 403(a), Congress amended 18 U.S.C. § 924(c) to include language about final convictions. *See* First Step Act § 403(a) (amending § 924(c)(1)(C) language to add ". . . after a prior conviction . . . has become final"). Such language is absent in § 403(b). "Where Congress includes particular language in one section of a

statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted; alteration incorporated). As a result, we presume that the absence of finality language in § 403(b) was an intentional and purposeful act of Congress to limit the First Step Act's application to defendants whose sentences were imposed—or announced by the district court—after enactment, not also to defendants whose sentences were pending on appeal.

Our conclusion that the First Step Act is inapplicable to defendants whose sentences were pending on appeal at the time of the Act's enactment joins the unified current of circuit courts addressing the issue. *See United States v. Gonzalez*, 949 F.3d 30, 43 (1st Cir. 2020), *cert. denied*, 1451 S. Ct. 327 (rejecting defendant's First Step Act eligibility argument that a sentence is imposed when it is final because a "sentence is imposed before an appeal from that sentence can be taken"); *id.* at 42 ("[Defendant's] contention conflates finality with imposition, and the [First Step] Act's plain language defeats it."); *United States v. Aviles*, 938 F.3d 503, 510 (3d Cir. 2019) ("'Imposing' sentences is the business of district courts, while courts of appeals are tasked with reviewing them . . . ."); *id.* ("Congress's use of the word 'imposed'[in § 403(b)] . . . clearly excludes cases in which a sentencing order has been entered by a district court from the reach of the

amendments made by the First Step Act."); *Jordan*, 952 F.3d at 172 ("[W]e think [the defendant's] sentence was 'imposed' in the district court, rendering § 403(a) inapplicable to his case."); *United States v. Richardson*, 948 F.3d 733, 749 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 344 (rejecting defendant's argument that he was eligible for First Step Act relief even though his appeal was pending at the time of enactment because "an appeal follows the imposition of a sentence; it is not part of it"); *United States v. Pierson*, 925 F.3d 913, 927 (7th Cir. 2019), *vacated on other grounds*, 140 S. Ct. 1291 (2020) (finding defendant sentenced prior to First Step Act's enactment ineligible for First Step Act relief because "[i]n common usage in federal sentencing law, a sentence is 'imposed' in the district court, regardless of later appeals").

The remainder of Jefferson's arguments rest on a false premise: that the First Step Act is ambiguous. Section 403(b)'s plain language is capable of one reasonable interpretation, that § 403's amendments only apply to defendants whose sentences were imposed after the enactment of the First Step Act. *See* First Step Act § 403(b). So, Jefferson's arguments that his counter interpretation is supported by the title of § 403, by the remedial purpose of the First Step Act, and by the rule of lenity all fail because each of these interpretive aids may only enter the statutory interpretation analysis if the First Step Act's plain language is ambiguous—and it is not. *See Bd. of Cty. Commissioners of Boulder Cty. v.*

Suncor Energy (U.S.A.) Inc., 965 F.3d 792, 804 (10th Cir. 2020) (The interpreting court must first "turn to the statute's plain meaning, as a statute clear and unambiguous on its face must be interpreted according to its plain meaning."); *id.* (Only if a statute is ambiguous—"capable of being understood by reasonably well-informed persons in two or more different senses"—may the court "also look to traditional canons of statutory construction to inform [its] interpretation, and . . . seek guidance from Congress's intent, a task aided by reviewing the legislative history . . . [or] by knowing the purpose behind the statute."); *I.N.S. v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("[T]he title of a statute or section *can aid in resolving an ambiguity* in the legislation's text." (emphasis added)); *United States v. Wilson*, 10 F.3d 734, 736 (10th Cir. 1993) ("[The rule of lenity] is not to be invoked lightly. It is not applicable *unless there is a grievous ambiguity* or uncertainty in the language and structure of the Act." (internal quotation marks omitted) (emphasis added)).

A purpose of the First Step Act undoubtedly is to reform and reduce federal incarceration. But with § 403(b), Congress made clear these reforms do not benefit every defendant. Congress drew a line between defendants whose sentences were imposed on or after the First Step Act's enactment—who may benefit—and defendants whose sentences were imposed before the First Step

Act's enactment—who may not benefit. The role of this court is not to redraw that line, and we accordingly decline Jefferson's invitation to do so here.

For the reasons outlined above, we conclude the First Step Act does not afford Jefferson relief and AFFIRM his sentence.

FILED
United States Court of Appeals
Tenth Circuit

December 28, 2018

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DAVION L. JEFFERSON,

Defendant - Appellant.

No. 17-3150

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 2:15-CR-20012-CM-1)

Daniel T. Hansmeier, Assistant Federal Public Defender (Melody Brannon, Federal Public Defender, with him on the briefs), Kansas City, Kansas, for Defendant - Appellant.

Carrie N. Capwell, Assistant United States Attorney (Stephen R. McAllister, United States Attorney, with her on the brief), Kansas City, Kansas, for Plaintiff-Appellee.

Before **TYMKOVICH**, Chief Judge, **O'BRIEN**, and **MATHESON**, Circuit Judges.

O'BRIEN, Circuit Judge.

In a span of eleven days, Davion L. Jefferson committed five robberies. Each was captured by multiple surveillance cameras. The first three robberies occurred on separate

occasions but, strange as it may seem, at the same Fast Trip convenience store. All three involved Jefferson and an unnamed minor male accomplice (hereinafter accomplice). The last two robberies occurred less than two hours apart on the same date but at different locations—a Fast Stop convenience store and a 7-Eleven gas station. Jefferson's cohort during these robberies was Nicholas Lolar. Both Jefferson and Lolar were armed. After these robberies, Jefferson posted "Can't wake up broke" on his Facebook page. (Supp. R. Vol. 1 at 30.) He included a picture of a hand holding a wad of cash and a number of emojis, including a firearm emoji.

Jefferson was indicted with five counts of Hobbs Act robbery (Counts 1-3, 5, and 7) in violation of 18 U.S.C. § 1951(a), (b)(1) and three counts of use and carry of a firearm in violation of 18 U.S.C. § 924(c) (Counts 4, 6, and 8).[1] At trial, he did not dispute his participation in all five robberies but tried to plant seeds of reasonable doubt with the jury as to the § 924(c) counts by suggesting the weapons used during the last two robberies were not actual firearms. Considering the very real possibility of a mandatory 32 years in prison if found to have twice brandished an actual firearm, *see infra* n.2, it was sound trial strategy. The jury, however, was not convinced and he was sentenced to

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[1] Counts 1-3 pertained to the first three robberies (with the minor accomplice) at the Fast Trip. Count 4 pertained to the use and carry of a firearm during the third robbery. The store clerk testified to Jefferson telling him he had a gun while lifting his shirt to reveal the handle of a weapon in his waist. But the jury acquitted him on that count; we do not discuss it.

Counts 5 and 7 pertained to the last two robberies (with Lolar) at the Fast Stop and 7-Eleven, respectively. Their use of a gun during these robberies resulted in two § 924(c) counts, Counts 6 and 8.

the mandatory 32 years plus a consecutive 70 months for the robberies, for a total sentence of 454 months.[2]

Jefferson changes strategy on appeal. He does not now quarrel with the jury's findings; instead he claims various legal errors. As we explain, his alleged errors are either foreclosed by precedent or harmless.

A. *Counts 6 and 8 - § 924(c) counts*

Section 924(c) calls for increased penalties if a firearm is used or carried "during and in relation to any crime of violence . . . ." 18 U.S.C. § 924(c)(1)(A). Relevant here, the statute defines "crime of violence" as a felony offense having "as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A).[3] This statutory language is often referred to as the

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[2] The judge imposed a total sentence of 70 months on the robbery counts. He also imposed (1) a mandatory consecutive sentence of 84 months (7 years) on the first § 924(c) count (Count 6), because the jury specifically found Jefferson "brandished" the firearm, *see* 18 U.S.C. § 924(c)(1)(A)(ii), and (2) a mandatory consecutive 300 months (25 years) on the second § 924(c) count (Count 8), *see* 18 U.S.C. § 924(c)(1)(C)(i). (R. Vol. 1 at 269).

[3] Section 924(c)(3) also defines "crime of violence" as a felony offense which "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3)(B). This statutory language is known as the risk-of-force or residual clause. In its brief, the government argued even if Hobbs Act robbery is not a "crime of violence" under § 924(c)(3)'s elements clause, it still qualifies as such under the residual clause. However, as it acknowledges in a Rule 28(j) letter, we have since decided § 924(c)(3)'s residual clause—like its counterparts in the Armed Career Criminal Act (ACCA) (18 U.S.C. § 924(e)(2)(B)(ii)) and 18 U.S.C. § 16(b)—is unconstitutionally vague. *See United States v. Salas*, 889 F.3d 681, 686 (10th Cir. 2018) (citing *Sessions v. Dimaya*, —— U.S. ——, 138 S. Ct. 1204 (2018) (§ 16(b)), and *Johnson v. United States (Johnson II)*, —— U.S. ——, 135 S. Ct. 2551 (2015) (§ 924(e)(2)(B)(ii))). For that reason, we ignore § 924(c)(3)'s

force or elements clause (hereinafter elements clause).

The "crime[s] of violence" referred to in the § 924(c) counts (Counts 6 and 8) were the Hobbs Act robberies charged in Counts 5 and 7, respectively. *See supra* n.1. The Hobbs Act robbery statute, 18 U.S.C. § 1951(a), (b)(1), prohibits one from "obstruct[ing], delay[ing] or affect[ing] commerce or the movement of any article or commodity in commerce, by robbery . . . ." 18 U.S.C. § 1951(a). It defines robbery as "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property . . . ." 18 U.S.C. § 1951(b)(1).

Prior to trial, Jefferson submitted proposed jury instructions for Counts 6 and 8 which would have required the jury to find (1) he "committed robbery by force capable of causing physical pain or injury to another person or the person's property" as charged in Counts 5 and 7, respectively, and (2) he "knowingly used or carried a firearm . . . during and in relation to [those] robber[ies]." (R. Vol. 1 at 187, 189.) According to him, such an instruction was necessary if the robberies were to qualify as "crime[s] of violence" under § 924(c)(3)(A) because "physical force" in that statute is equivalent to "physical force" as used in the "violent felony" definition in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(i). The Supreme Court defined "physical force" in § 924(e)(2)(B)(i) as "*violent* force—that is, force capable of causing physical pain or

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residual clause but that does not resolve the matter; Hobbs Act robbery qualifies as a "crime of violence" under the elements clause.

injury to another person." *See United States v. Johnson (Johnson I)*, 559 U.S. 133, 140 (2010).

The judge refused the proposed instructions. Instead, he told the jury (for Counts 6 and 8) the government had to prove beyond a reasonable doubt he (1) "committed the crime of robbery" as charged in Counts 5 and 7, respectively, and (2) "knowingly used or carried a firearm . . . during and in relation to [those] robber[ies]." (R. Vol. 1 at 254-55.) He also told the jury: "robbery is a crime of violence." (*Id*. at 256.) After trial, Jefferson moved for a judgment of acquittal on Counts 6 and 8, again chanting his mantra—Hobbs Act robbery is not a "crime of violence" under § 924(c)(3)(A). The judge denied the motion.

According to Jefferson, the judge was wrong for two reasons. First, Hobbs Act robbery is not a "crime of violence" under § 924(c)(3)(A) because the statute requires the predicate offense have a force element and Hobbs Act robbery has only a force means. Second, even if Hobbs Act robbery has a force element, the judge erred in directing a verdict on that element; he should have instead submitted the issue to the jury. We start with his latter argument.

1. Directed Verdict on "Crime of Violence" Issue

Jefferson tells us a "crime of violence" is "an essential conduct element" of § 924(c), *see Rosemond v. United States*, 572 U.S. 65, 74 (2014) (quotation marks omitted), which the government is required to prove to the jury beyond a reasonable doubt under *Apprendi v. New Jersey*, 530 U.S. 466, 477, 490 (2000) (other than the fact of a prior

conviction, a defendant is entitled to "a jury determination that he is guilty of every element of the crime with which he is charged beyond a reasonable doubt" (quotation marks omitted)). We rejected that very argument in *United States v. Morgan*, 748 F.3d 1024 (10th Cir. 2014).

In *Morgan*, co-defendant Ford was indicted with (1) kidnapping, (2) conspiracy to commit kidnapping, and (3) use of a firearm during a crime of violence under § 924(c). *Id*. at 1030. For purposes of the § 924(c) count, the judge instructed the jury, "kidnapping [and] conspiracy to kidnap . . . are crimes of violence." *Id*. at 1034 (quotation marks omitted). Like Jefferson in this case, Ford argued "crime of violence" is an element of § 924(c) which the prosecutor is required to prove to the jury beyond a reasonable doubt. *Id*. at 1032. We saw it differently. "Whether a crime fits the § 924(c) definition of a 'crime of violence' . . . requires examination of the legal elements of the crime, not an exploration of the underlying facts." *Id*. at 1034. As a result, it is a "question of law" for the judge, not the jury. *Id*. at 1034-35. *Morgan* is well-reasoned and persuasive but even if it were not, we are bound by its holding. *See United States v. Springer*, 875 F.3d 968, 975 (10th Cir. 2017) (under the "principles of horizontal stare decisis," we are bound by published opinions of prior panels "absent en banc reconsideration or a superseding contrary decision by the Supreme Court" (quotation marks omitted)).

Jefferson acknowledges *Morgan* but argues we may not follow it because it effectively overrules *Apprendi* and *Rosemond*. *See United States v. Mirabal*, 876 F.3d

1029, 1039 (10th Cir. 2017) ("[W]e cannot overrule a Supreme Court opinion."). But *Morgan* did no such thing. Neither *Apprendi* nor *Rosemond* spoke to whether a judge or a jury is to decide whether an offense is a "crime of violence." Rather, as used in this case, *Apprendi* stands for the unremarkable proposition that a criminal defendant is entitled to "a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." 530 U.S. at 477 (quotation marks omitted). And, in *Rosemond*, the Supreme Court addressed what the government must show to convict a defendant of aiding and abetting a § 924(c) offense. 572 U.S. at 67. In doing so, it stated the commission of a violent crime is an essential element of § 924(c). *Id*. at 74. It did not, however, assign to the jury the task of determining whether an offense satisfies the "crime of violence" definition of § 924(c)(3)(A).

Actually, *Morgan* is consistent with Supreme Court precedent. In *United States v. Taylor*, the Supreme Court made the categorical approach applicable in deciding whether an offense qualifies as a "violent felony" under the ACCA. 495 U.S. 575, 600 (1990). We have applied the same approach in deciding whether a crime qualifies as a "crime of violence" under § 924(c)(3). *United States v. Serafin*, 562 F.3d 1105, 1107 (10th Cir. 2009); *see also United States v. Munro*, 394 F.3d 865, 870 (10th Cir. 2005). Using the categorical approach, we focus solely on the statute of conviction, "while ignoring the particular facts of the case," to decide whether it satisfies the "crime of violence" definition. *See Mathis v. United States*, --- U.S. ---, 136 S. Ct. 2243, 2248 (2016); *see also Taylor*, 495 U.S. at 600. In other words, deciding whether a crime is a "crime of

violence" under § 924(c) is largely a matter of statutory interpretation, a legal task for the judge, not a factual one for the jury. *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980) (courts are charged with construing statutes); *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

The judge was not obliged and, in fact, ought never submit the "crime of violence" issue to the jury. We now consider whether Hobbs Act robbery is a "crime of violence" under § 924(c)(3)(A).

2. Hobbs Act Robbery—Crime of Violence

Jefferson argues Hobbs Act robbery is not a "crime of violence" under § 924(c)(3)(A) because force is a means of committing the crime, not an element of the crime. But in *United States v. Melgar-Cabrera*, we decided Hobbs Act robbery is categorically a "crime of violence" under § 924(c)(3)(A)'s elements clause because the clause requires the use of violent force, i.e., force capable of causing physical pain or injury to another person, and the force element in Hobbs Act robbery can be satisfied only by violent force. 892 F.3d 1053, 1064-65 (10th Cir. 2018).[4]

Jefferson acknowledges *Melgar-Cabrera*, yet says we can ignore it because it did

[4] Other circuits have concluded the same. *See, e.g., United States v. Garcia-Ortiz*, 904 F.3d 102, 109 (1st Cir. 2018); *United States v. Hill*, 890 F.3d 51, 56-59 (2d Cir. 2018); *Diaz v. United States*, 863 F.3d 781, 783–84 (8th Cir. 2017); *United States v. Gooch*, 850 F.3d 285, 291-92 (6th Cir. 2017); *United States v. Rivera*, 847 F.3d 847, 848-49 (7th Cir. 2017); *In re Fleur*, 824 F.3d 1337, 1340-41 (11th Cir. 2016).

not address his "elements versus means" argument, but rather assumed Hobbs Act robbery has a force element. Even if we were of a mind to, we are not at liberty to ignore *Melgar-Cabrera*. It remains the law of this Circuit "absent en banc reconsideration or a superseding contrary decision by the Supreme Court," neither of which has occurred here. *See Springer*, 875 F.3d at 975 (quotation marks omitted). In any event, his "elements versus means" argument does not help him.

In a Hobbs Act robbery, the government must prove: (1) "the taking of property from another against that person's will"; (2) "the use of actual or threatened force, violence or fear of injury"; and (3) "the conduct obstructed, delayed, interfered with or affected commerce." *United States v. Wiseman*, 172 F.3d 1196, 1215 (10th Cir. 1999) (quotation marks omitted), *abrogated on other grounds by Rosemond v. United States*, 572 U.S. 65 (2014); *see also* 18 U.S.C. § 1951(a), (b)(1); 10th Cir. Crim. Pattern Jury Instruction No. 2.70. Jefferson insists the alternatives listed in the second element—(1) actual or threatened force, (2) violence, and (3) fear of injury—are various means of committing the second element, not themselves elements. Because they are means, not elements, he says Hobbs Act robbery cannot satisfy § 924(c)(3)'s elements clause. We agree the statutory alternatives are means,[5] but our agreement ends there.

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[5] "Elements are the constituent parts of a crime's legal definition—the things . . . the jury must find beyond a reasonable doubt to convict the defendant [at trial] . . . and what the defendant necessarily admits when he pleads guilty." *Mathis*, 136 S. Ct. at 2248 (citations and quotation marks omitted). Means, on the other hand, are "various factual ways of committing some component of the offense [and] a jury need not find (or a defendant admit) any particular item." *Id*. at 2249. In making the determination of

When faced with an alternatively phrased statute like § 1951(a), (b)(1), we must decide whether the alternatives are elements or means. *Mathis*, 136 S. Ct. at 2256. But concluding some alternatives are means, not elements, does not end the inquiry as to whether a statute "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." Rather, the determination is important only in deciding whether to apply the pure categorical approach or the modified categorical approach. *Id*. at 2256; *see also United States v. Rivera*, 847 F.3d 847, 849 (7th Cir. 2017) ("Contrary to Rivera's belief, the [Supreme] Court [in *Mathis*] did not distinguish between means and elements to dictate which parts of a statute matter in a

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whether statutory alternatives are elements or means, *Mathis* gives us several tools. First, a "court decision [may] definitely answer[] the question." *Id*. at 2256. Second, "the statute on its face may resolve the issue"—"If statutory alternatives carry different punishments, then under *Apprendi* they must be elements. Conversely, if a statutory list is drafted to offer illustrative examples, then it includes only a crime's means of commission." *Id*. (citations and quotation marks omitted). Finally, if the case law and statute "fail[] to provide clear answers," we can "peek at" the record "for the sole and limited purpose" of answering the elements versus means conundrum. *Id*. at 2256 (quotation marks omitted).

In this case, the language of § 1951(a), (b)(1) and the case law interpreting it suggest "actual or threatened use of force, or violence, or fear of injury" are means, not elements. *See* 18 U.S.C. § 1951(b)(1) ("*by means of* actual or threatened force, or violence, or fear of injury" (emphasis added)); *Wiseman*, 172 F.3d at 1215 (approving jury instruction that Hobbs Act robbery "require[s] proof of *three elements*: first, the taking of property from another against that person's will; *second, the use of actual or threatened force, violence, or fear of injury*; and third, that the conduct obstructed, delayed, interfered with or affected interstate commerce." (emphasis added) (quotation marks omitted)). Moreover, taking a peek at the indictment and jury instructions in this case reveals they reiterate all of the statutory alternatives, which "is as clear an indication as any that each alternative is only a possible means of commission, not an element that the prosecutor must prove to a jury beyond a reasonable doubt." *Mathis*, 136 S. Ct. at 2257.

predicate-offense analysis. The Court instead made this distinction to explain when it is appropriate to use the categorical approach versus a modified categorical approach—an issue that is irrelevant here." (quotation marks omitted)).

Because the statutory alternatives in this case are means, the pure categorical approach applies.[6] Looking only to the statute of conviction, § 1951(a), (b)(1), we "ask whether it can be violated without the use, attempted use, or threatened use of physical force." *United States v. Degeare*, 884 F.3d 1241, 1246 (10th Cir. 2018) (quotation marks omitted). If so, then a conviction under the statute will not satisfy § 924(c)'s elements clause. *Id*. And, whether the statute reaches conduct not satisfying the elements clause depends upon whether each of the means in the second element—actual or threatened force, or violence, or fear of injury—can be satisfied without the use, threatened use, or attempted use of force. *See United States v. Higley*, 726 F. App'x 715, 717 (10th Cir. 2010) (unpublished) (although federal bank robbery can be committed by "force and violence" or by "intimidation," "[t]he critical point is . . . these alternative means of committing bank robbery each have an element [involving] 'the use, attempted use, or threatened use of physical force,' and are therefore crimes of violence as defined in § 924(c)(3)(A)"); *see also Rivera*, 847 F.3d at 849 ("The distinction between means and

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[6] In contrast, if statutory alternatives are elements, the modified categorical approach applies and a court can look "to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of." *See Mathis*, 136 S. Ct. at 2249. It can then decide whether the crime satisfies the "crime of violence" definition.

elements would matter only if one of the ways to commit Hobbs Act robbery, say, putting another in fear of injury, did not involve force, so that a juror could find a defendant guilty irrespective of whether he used force to commit the crime."). Stated differently, "we look to the least of the acts criminalized" by § 1951(a), (b)(1) to decide whether it "reaches any conduct that does not" satisfy § 924(c)'s elements clause. *United States v. Hammons*, 862 F.3d 1052, 1054 (10th Cir. 2017) (citing *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013)); *see also United States v. Harris*, 844 F.3d 1260, 1266, 1268 & n.2 (10th Cir. 2017) (because Colorado's robbery statute sets forth alternative means of committing robbery, i.e., "force, threats, *or* intimidation," we focus on the least culpable conduct—robbery by threats or intimidation—and decide whether it satisfies the ACCA's elements clause (quotation marks omitted)).

While his argument is not a model of clarity,[7] Jefferson appears to suggest the taking of property via "fear of injury" does not involve physical force and therefore Hobbs Act robbery does not contain a force element. He faces an uphill battle. In *Melgar-Cabrera*, we rejected the argument that Hobbs Act robbery does not have as an element the use, threatened use, or attempted use of physical force because it can be committed by causing the victim to part with his property due to "fear of injury," which

[7] In his opening brief and Rule 28(j) letter, Jefferson argues the mere fact "actual or threatened force, or violence, or fear of injury" are various means of committing Hobbs Act robbery, not elements, ends the inquiry. Yet, he also criticizes cases deciding that the taking of property by "fear of injury" satisfies § 924(c)'s elements clause because it requires the threatened use of physical force.

can include placing the victim "in fear of injury by threatening the indirect application of physical force." 892 F.3d at 1065-66 (quotation marks omitted). In doing so, we favorably cited *United States v. Hill*, 832 F.3d 135, 140-44 (2d Cir. 2016), for the proposition that placing one in "fear of injury" requires "the threatened use of physical force." *Id*. at 1066 (quotation marks omitted).

Jefferson balks. He tells us to interpret the phrase "fear of injury" as requiring the "threatened use of physical force" would render the phrase impermissibly superfluous because the statute already prohibits taking property from the victim against his will via "threatened force." *See Loughrin v. United States*, 573 U.S. 351, 357 (2014) (words or phrases joined by the word "or" should not be construed as having the same meaning). He is too ambitious.

Assuming substantial overlap between the two phrases, such overlap is not "uncommon in criminal statutes." *Id*. at 358 n.4. It's especially true when Congress sets forth various factual means of violating a statute. *See*, *e.g.*, 18 U.S.C. § 1462 (prohibiting the importation or transportation in interstate commerce of, *inter alia*, "any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character"); 18 U.S.C. § 1519 ("Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter . . . shall be fined under this title, imprisoned not more than 20 years, or both.").

Moreover, the canon of statutory construction requiring terms connected by a disjunctive be given separate meanings is not absolute; "context [can] dictate" a different result. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). In this case, § 1951(a), (b)(1) prohibits bank robbery by "threatened force," which overlaps with robbery by "fear of injury." However, it also prohibits robbery by "actual . . . force," which overlaps with robbery by "violence." *See* https://www.merriam-webster.com/dictionary/violence (defining "violence" as, among other things, "*the use of physical force* so as to injure, abuse, damage, or destroy" (emphasis added)). Taken in context, one thing is clear: Congress sought to prohibit the taking of property from a victim against his will by actual or threatened use of physical force. That satisfies § 924(c)(3)(A).

B. *Hobbs Act Robbery Jury Instructions—Counts 1-3, 5, and 7*

Jefferson's proposed instructions on the robbery counts would require the jury to decide whether they were committed by (1) "force—actual or threatened—or violence against [the store clerk's] person" or (2) "fear of injury—immediate or future—to [the store clerk's] person." (R. Vol. 1 at 182-84, 186, 188.) If the jury were to find they were committed by the actual or threatened use of force, the proposal would then instruct the jury to decide "whether the force used or threatened was force capable of causing physical pain or injury to another person or the person's property." (*Id.*) The judge refused those instructions; he instead told the jury the government had to prove beyond a reasonable doubt, *inter alia*, Jefferson took or obtained property "by wrongful use of actual or threatened force, violence, or fear." (*Id.* at 247-51.) He further instructed:

"Robbery is the unlawful taking of personal property from another against his or her will. This is done by threatening or actually using force, violence, or fear of injury, immediately or in the future, to person or property." (*Id*. at 252.)

Jefferson says the jury should have been told that "force" in Hobbs Act robbery means "violent force." The government agrees and so do we.[8] In *Melgar-Cabrera* and *Thomas*, we held Hobbs Act robbery requires violent force, as that term was defined in *Johnson I*. *Melgar-Cabrera*, 892 F.3d at 1064-65; *United States v. Thomas*, 849 F.3d 906, 909 (10th Cir. 2017). In other words, the government must show the defendant used or threatened "'force capable of causing physical pain or injury to another person.'" *Thomas*, 849 F.3d at 909 (quoting *Johnson I*, 559 U.S. at 140). "This requires more than the 'slightest offensive touching' . . . but may 'consist of only the degree of force necessary to inflict pain—a slap in the face, for example.'" *Id.* at 909 (quoting *Johnson I*, 559 U.S. at 139, 143). Because this case is on direct review, *Melgar-Cabrera* and *Thomas* apply. *See Griffith v. Kentucky*, 479 U.S. 314, 322-23 (1987).

The government's admission of error leaves it to show the error was harmless beyond a reasonable doubt. *See United States v. Sierra–Ledesma*, 645 F.3d 1213, 1217 (10th Cir. 2011) ("An instruction that omits an element of the offense . . . does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for

[8] In its brief, the government was equivocal as to whether the judge's Hobbs Act robbery instructions were error. When pressed at oral argument, however, it admitted error but claimed it to be harmless.

determining guilt or innocence. Therefore, when a defendant protests the omission of an element at trial and on appeal, we must decide whether that error is harmless, that is, whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (citation and quotation marks omitted)). The government claims the evidence provided exactly that—uncontroverted proof of "violent force" being used in each robbery. We agree. "On the facts of this case, . . . the district court's error worked no reversible harm." *Id.* at 1224.

During the first robbery on December 30, 2014, Jefferson and his accomplice arrived at the Fast Trip store in a white Dodge Caravan, which they stole the previous day.[9] In the course of that robbery, Jefferson hit the store clerk "hard" on the left side of the head causing swelling for several days. (R. Vol. 2 at 540.) That is "violent force" because it was not only capable of causing physical pain or injury but did, in fact, cause injury. *See Johnson I*, 559 U.S. at 143 (identifying "a slap in the face" as conduct rising to the level of violent force); *see also Castleman v. United States*, 572 U.S. 157, 182 (2014) (Scalia, J., concurring) ("hitting, slapping, shoving, grabbing, pinching, biting, and hair pulling" are all "capable of causing physical pain or injury" (quotation marks omitted)).[10]

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[9] No direct evidence implicated Jefferson and his accomplice as the individuals who stole the van but an abundance of circumstantial evidence did: the van's owner testified it was stolen the night before the first robbery and the van was later used by Jefferson and his accomplice during the robberies.

[10] "Although a concurring opinion is not binding on us, we may consider it for its persuasive value. *See* Bryan A. Garner, et al., The Law of Judicial Precedent 183 (2016).

During the second robbery on January 1, 2015, Jefferson's accomplice dropped the cash drawer just inside the front door while running out of the store. The store clerk attempted to hold the door shut to safeguard the scattered cash and cash drawer while his co-worker retrieved the key to lock the door. Jefferson and his accomplice returned to the store, "overpowered" the clerk's resistance, opened the door, and swept up the loose cash and drawer from the floor. (R. Vol. 2 at 587.) The surveillance video from the robbery taken from a camera mounted outside the store shows the accomplice pulling at the front door and then Jefferson joining him in order to successfully pry the door open. The video taken from the camera mounted inside the store shows the clerk holding the door with both hands while leaning back with all his weight to prevent Jefferson and his accomplice from opening the door. Such "grabbing" at the front door with the clerk clinging to it in resistance "has the capacity to inflict physical pain, if not concrete physical injury, upon the victim." *See United States v. Garcia*, 877 F.3d 944, 955 (10th Cir. 2017) (quotation marks omitted). The struggle over the door could easily have caused the clerk to fall to the ground, pull a muscle, or suffer other injury; it is "certainly force capable of causing pain or injury." *Id*. That the clerk was not injured is immaterial; *the capacity* to cause physical pain or injury matters. *Id*. (citing *New Mexico v. Verdugo*, 164 P.3d 966, 974 (N.M. Ct. App. 2007) (defendant's jerking at victim's purse attached

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We find Justice Scalia's concurrence in *Castleman* persuasive on the quantum of force required to constitute 'violent' force." *United States v. Garcia*, 877 F.3d 944, 950 n.4 (10th Cir. 2017).

to her arm while defendant is driving a car is "certainly capable of causing physical pain or injury to the victim"), and *New Mexico v. Segura*, 472 P.2d 387, 387-88 (N.M. Ct. App. 1970) (grabbing a shopping bag from victim and pulling it away so hard as to cause the victim to fall to the ground "is certainly force capable of causing pain or injury")); *see also United States v. Jennings*, 860 F.3d 450, 456-57 (7th Cir. 2017) (citing "snatching gold chains from victim's neck, leaving scratches," "push[ing] a victim against a wall and tak[ing] his wallet" and "running up to and pounding on window of victim's car" as examples of violent force; although "these instances of force might result in minor injuries, such as scratches or reddened skin, or none at all," they "qualify as violent force [because] they have the capacity to inflict physical pain, if not concrete physical injury, upon the victim").

During the third robbery on January 4, 2015, the clerk, who was aware of the first two robberies, including the use of a white Dodge Caravan, became "scared" when he saw a similar van pull into the store's parking lot. (R. Vol. 2 at 627.) He unsuccessfully tried to hold the door to prevent Jefferson and his accomplice from entering the store. Once inside the store, Jefferson told the clerk he had a gun while lifting his shirt to reveal the handle of weapon. Although the store clerk testified to Jefferson having a weapon, the surveillance videos (which did not contain audio) did not capture it. The government relies on the use of a firearm to establish the third robbery involved the threatened use of violent force. But the jury acquitted Jefferson of use or carry of a firearm during the third robbery. *See supra* n.1. While a host of reasons could explain the jury's acquittal,

including reasons unrelated to whether Jefferson actually had a gun, we nevertheless cannot confidently say the government proved beyond a reasonable doubt the third robbery involved violent force based on the use of a gun. But there is more. The surveillance videos reveal Jefferson and his accomplice in a "tug-of-war" with the store clerk over the door. Like the second robbery, the struggle with the clerk at the door could have caused injury to the clerk. The third robbery also involved force capable of causing physical pain or injury.

The fourth and fifth robberies (both on January 9, 2015) also involved firearms.[11] During the fourth robbery (Fast Stop), the clerk testified Jefferson and Lolar pointed their guns at his face from a short distance away and the surveillance video supports his testimony. He also testified to Lolar threatening to shoot him and there was no evidence to the contrary. During the fifth robbery (7-Eleven), the clerk was not available to testify but the surveillance videos and the still images derived from them show Jefferson holding a "gun" close to the clerk's head and then to his chest. It is hard to imagine a more obvious threatened use of violent force. *United States v. Maldonado-Palma*, 839 F.3d 1244, 1250 (10th Cir. 2016) ("Employing a weapon that is capable of producing death or great bodily harm . . . necessarily threatens the use of physical force, i.e., force capable of

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[11] Unlike the third robbery, the jury convicted Jefferson of use or carry of a firearm during the fourth and fifth robberies (Counts 6 and 8). While Jefferson tried to persuade the jury he did not use or carry an actual firearm during those robberies, the jury did not buy it. Jefferson does not contest the sufficiency of the evidence on those counts, only other errors which we have discussed.

causing physical pain or injury to another person" (quotation marks omitted)).

The instructional error was harmless beyond a reasonable doubt.

C. *Government's Closing Rebuttal Argument*

The government did not introduce the guns used in the two January 9 robberies. It did, however, present the surveillance videos and still images derived from them. Those videos and images show Jefferson and Lolar brandishing "guns" during those robberies. The government also presented testimony from Lloyd Coon, the store clerk present during the January 9 robbery of the Fast Stop.[12] He claimed to be familiar with guns because he "come[s] from a family that likes to hunt a lot" and has personally shot at least six different types of guns throughout his lifetime (he was 50 at the time of trial) and attended numerous gun shows. (R. Vol. 2 at 715.) He was looking down at a computer when Jefferson and Lolar entered the store. He looked up when he heard two guns being cocked by pulling the slide back. When he did so, Jefferson and Lolar had their weapons pointed at his face. One gun was black and one was silver. Both were made of metal. Based on the distinctive sound made when the weapons were cocked, he concluded they were semi-automatic pistols.[13] He believed them to be real firearms, not BB guns, because of the diameter of the openings in their barrels. The diameter of a BB gun's

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[12] As alluded to previously, the store clerk working at the 7-Eleven store when it was robbed on January 9 was not available to testify.

[13] Pulling the slide back on a semi-automatic pistol (1) ejects any round or empty casing in the chamber, (2) cocks the hammer, and (3) strips a new round from the magazine and inserts it into the chamber.

opening is "itty bitty"; the barrel openings of the guns pointed at him were larger than a BB gun and were consistent with a 9 mm (.35 inches) or .45 caliber (.45 inches). (*Id*. at 757.) Although he once owned a BB gun with a slide, it was spring-loaded and made a "clunky sound" when the slide was pushed forward. (*Id*. at 763.) The guns used in this case, in contrast, made a "smooth sound and a high pitched click" when cocked. (*Id*.) In addition to this detailed knowledge, he said he considered the weapons to be actual firearms when Lolar threatened to shoot him. He was "reasonably certain . . . [they] were real firearms." (*Id*. at 765.)

On cross-examination, he acknowledged having told a detective on the night of the robbery he heard only one gun being cocked and the guns may have been BB guns because one of them had a silver ring at the end of its barrel (yet he later testified he had never seen a BB gun with a silver ring). He did say some BB guns and pellet guns resemble actual firearms, including BB guns cocked by pulling the slide back. His testimony set the stage for the alleged prosecutorial misconduct.

During closing argument, the prosecutor recounted the evidence establishing Jefferson to have brandished an actual firearm (not a fake gun, toy gun, or BB gun) during the January 9 robberies. For his part, defense counsel argued the government had not established, beyond a reasonable doubt, the weapon to be an actual firearm, which requires one to focus not on its looks but its operation, i.e., whether it will expel a projectile via an explosion. *See* 18 U.S.C. § 921(a)(3) (defining "firearm" as "any weapon . . . which will or is designed to or may readily be converted to expel a projectile

by the action of an explosive"). He emphasized the government's failure to produce the weapons, a BB gun's resemblance to a real firearm, and Coon's initial statement to the police. In doing so, he told the jury Coon's testimony was not "dispositive" as to whether the weapons were actual firearms, because he assumed they were real and "rightfully so." (*Id*. at 873.) He suggested proof beyond a reasonable doubt would include a police officer testifying he test-fired, felt, or heard the gun or "the testimony of some other person that they saw the firearm, they heard it even . . . or they smelled the explosive, or there was a casing or a bullet, or not even a bullet, but a bullet hole, or something . . . they could measure it by." (*Id*. at 874.) "But you have nothing near that." (*Id*.) He then stressed to the jury "we don't have to prove anything[;] . . . it's not Mr. Jefferson's burden to prove himself innocent. [The government] bring[s] these charges. [It has] to prove every element of every offense beyond a reasonable doubt, not just lump them together because you're mad, and you feel like he's a bad guy. It's their burden." (*Id*. at 875.)

In rebuttal, the prosecutor began by responding to defense counsel's argument that detailed evidence, not merely superficial appearance, was necessary to prove Jefferson used an actual firearm. She told the jury the government did not need to "have the firearm" in order to satisfy its burden but could instead rely on circumstantial evidence. (*Id*. at 878.) She said "[t]he nature of the weapon can be established in this case by the testimony of the witnesses along with all the other evidence, including the Facebook, including the videos." (*Id*.) She went on: "The possibility that the gun is fake is not

something that [the government has] to overcome. Possibilities do not equate to reasonable doubt." (*Id.*) Defense counsel objected.

At side-bar, he explained: "She's saying [the government doesn't] have to . . . disprove . . . the possibility . . . these were not real firearms, and in fact, there has been testimony . . . they aren't, and so, when she says that, [it] is burden shifting." (*Id.* at 878.) The prosecutor defended herself, claiming the statements were legally correct: "[The government does not] have to . . . disprove possibilities. That does not equate to reasonable doubt . . . . [T]he possibility . . . the gun is fake does not establish reasonable doubt . . . ." (*Id.* at 879.) The judge overruled the objection, concluding "there's a basis in the law for [the prosecutor] to make the argument . . . at this time." (*Id.*)

Returning to the jury, the prosecutor continued:

> [W]e do not have to disprove theoretical possibilities that a gun is fake or not real. What we do have to prove is . . . it was firearm, and you heard that from a variety of sources. You heard it from Detective Rice when he said . . . it was a pistol or a firearm or a gun or that you saw it on the video. You get to use your common experience, your common sense, and your good judgment to draw reasonable inferences. Is it possible it could have been a fake or toy gun? Might it have been a fake or toy gun? But that's not the burden. The burden is . . . we only have to prove beyond a reasonable doubt those elements.

(*Id.* at 879-80.) She finished by asking "[D]o you really truly believe [Jefferson is] going to bring a toy or fake gun there?" (*Id.* at 880.)

Jefferson argues the prosecutor's rebuttal closing argument improperly shifted the burden of proof to him. He says the prosecutor's statements to the jury—"the possibility that the gun is fake is not something that [the government has] to overcome" and "possibilities do not equate to reasonable doubt"—were improper because the Tenth

Circuit's criminal pattern jury instructions make clear a jury should not convict if "'there is a real possibility that the defendant is not guilty.'" (Appellant's Op. Br. at 36-37 (quoting 10th Cir. Pattern Jury Instruction 1.05).) Moreover, "the Supreme Court has made clear . . . only 'fanciful' and 'imaginary' possibilities, or possibilities based on 'fanciful conjecture' do not amount to reasonable doubt." (*Id*. at 37 (quoting *Victor v. Nebraska*, 511 U.S. 1, 17, 20 (1994)).) In this case, Jefferson tells us, there was a real possibility, not merely a fanciful one, the "guns" displayed were not actual firearms: Coon told an officer after the robbery he thought the guns may have been BB guns. And, contrary to the prosecutor's rebuttal closing argument, the government had the burden to overcome that possibility.

"We review allegations of prosecutorial misconduct de novo." *Sierra-Ledesma*, 645 F.3d at 1227; *see also United States v. Anaya*, 727 F.3d 1043, 1052 (10th Cir. 2013) ("When [as here] the defendant objects at trial based on prosecutorial misconduct and the district court overrules the objection, we conduct a de novo review for error."). "In conducting [our] review, we first decide whether the conduct was improper and then, if so, whether the Government has demonstrated that error was harmless beyond a reasonable doubt."[14] *Sierra-Ledesma*, 645 F.3d at 1227.

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[14] Jefferson says harmless error review has no place here: Because the judge overruled his objection to the prosecutor's improper statements regarding reasonable doubt, he placed the court's imprimatur on those statements. As a result, the error is structural and harmless error does not apply. He relies primarily on *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

In *Sullivan*, the judge provided jury instructions equating reasonable doubt with

"We will not overturn a conviction on account of improper argument by the prosecutor unless the prosecutor's misconduct was enough to influence the jury to render a conviction on grounds beyond the admissible evidence presented." *United States v. Oberle*, 136 F.3d 1414, 1421 (10th Cir. 1998) (quotation marks omitted). "In so deciding, we do not consider the prosecutor's remarks in a vacuum." *United Sates v. McBride*, 656 F. App'x 416, 422 (10th Cir. 2016) (unpublished). Rather, "we consider the trial as a whole, including the curative acts of the district court, the extent of the misconduct, and the role of the misconduct within the case." *Id*. (quotation marks omitted); *see also Sierra-Ledesma*, 645 F.3d at 1227 ("To determine whether prosecutorial misconduct is harmless, we must look to the curative acts of the district court, the extent of the misconduct, and the role of the misconduct within the case as a whole." (quotation marks omitted)). Factors relevant to determining whether a prosecutor's argument deprived the defendant of fair trial include "whether the instance was singular and isolated, whether the district court instructed the jury that the attorneys'

"grave uncertainty" and "substantial doubt;" such instructions had previously been found to be improper because they "suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." *Id.* at 277; *Cage v. Louisiana*, 498 U.S. 39, 41 (1990). The *Sullivan* Court decided instructions misstating the reasonable doubt standard are "structural defects in the constitution of the trial mechanism, which defy analysis by harmless error standards." 508 U.S. at 281 (quotation marks omitted).

Sullivan is inapposite. It involved an improper jury instruction; this case involves the government's closing rebuttal argument. The Supreme Court has not extended *Sullivan* to our context and we decline to do so in this case. *See Bartlett v. Battaglia*, 453 F.3d 796, 801-02 (7th Cir. 2006) (declining to extend *Sullivan* to a prosecutor's misstatements regarding reasonable doubt).

argument was not evidence, and whether there was substantial evidence of the defendant's guilt." *Oberle*, 136 F.3d at 1421. "The ultimate question is whether the jury was able to fairly judge the evidence in light of the prosecutors' conduct." *Wilson v. Sirmons*, 536 F.3d 1064, 1117 (10th Cir. 2008) (quotation marks omitted).

The challenged statements, while inartful, did not shift the burden of proof from the government to Jefferson, but they may have misstated the law as to the government's burden of proof, i.e., reasonable doubt. The prosecutor essentially told the jury any possibility the gun is fake does not equate to reasonable doubt. But in some of her argument she failed to make the important distinction between "fanciful" or "imaginary" possibilities and "real" possibilities, as called for by *Victor* and 10th Cir. Crim. Pattern Jury Instr. No. 1.05. The alleged error, however, was harmless beyond a reasonable doubt.

The judge instructed the jury: "The lawyers' statements and arguments are not evidence." (R. Vol. 1 at 232.) He also told the jury prior to closing arguments "[t]he government has the burden of proving [Jefferson] guilty beyond a reasonable doubt" and Jefferson did not have "to prove his innocence." (R. Vol. 1 at 240.) He also correctly instructed the jury "[i]f . . . you think there is a real possibility that [Jefferson] is not guilty, you must give him the benefit of the doubt and find him not guilty." (*Id.*) And he reminded the jury of the government's burden after closing arguments and before it retreated to the jury room for deliberations. The jury was told to follow the instructions and we assume it did because there is no reason to think otherwise. *See United States v.*

Urbano, 563 F.3d 1150, 1155 (10th Cir. 2009) ("This court generally assumes jurors follow jury instructions."). Its acquittal on Count 4 demonstrates its ability to weigh the evidence and apply the law as to each count. *See supra* n.1.

Second, the extent of the misconduct was minimal. The challenged statements constituted only two sentences of the government's lengthy closing argument and a 4-day trial. *See Sierra-Ledesma*, 645 F.3d at 1227.

Third, the role of the misconduct was negligible. The prosecutor made the alleged offending remarks in response to defense counsel's suggestion that anything less than admission of the actual firearm or proof the firearm was test-fired or felt was not enough to satisfy the government's burden. She correctly responded the government did not need either to satisfy its burden; the nature of the weapon could be established by the testimony of the witnesses, the Facebook post, and the videos. And while she may have arguably misstated the law, she later corrected herself: "[W]e do not have to disprove *theoretical* possibilities that a gun is fake or not real." (R. Vol. 2 at 879-80 (emphasis added).) She also reiterated the government's burden to prove beyond a reasonable doubt that the weapon used was an actual firearm.

Finally, but importantly, the evidence of guilt was substantial. Jefferson did not dispute to having participated in all five robberies. The only issue was whether he possessed an actual firearm during the last two robberies. The surveillance videos show Jefferson and Lolar armed with guns during those robberies, as well as the manner in which they handled them, which strongly suggests they were actual firearms. Coon

testified to his belief the guns were real based on the size of their barrels and the sound they made when cocked. Not only that, Coon told the jury Lolar threatened to shoot him. And the jury was provided a screenshot of Jefferson's Facebook post made after the January 9 robberies, which included a firearm emoji.

Admittedly, Coon told a detective the night of the robbery he thought the guns might be BB guns. But he did so because one of the weapons had a silver ring around it. Yet, he conceded he had never seen a BB gun with a silver ring. Moreover, because Jefferson was charged not only with the substantive § 924(c) offenses but also aiding and abetting those offenses, the jury could find Jefferson guilty of the § 924(c) counts even in the (unlikely) event he possessed a BB gun (the one with the silver ring) and Lolar possessed an actual firearm. *See Rosemond*, 572 U.S. at 74-78 (holding (1) a defendant's active participation in the underlying violent crime is sufficient to establish the affirmative act requirement of aiding and abetting liability and (2) defendant's advance knowledge his confederate would be armed satisfies the intent requirement).

We trust that the properly-instructed jury acted upon the evidence and was not misled by the prosecutor's stray remarks.

AFFIRMED.

FILED
United States Court of Appeals
Tenth Circuit

February 14, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DAVION L. JEFFERSON,

Defendant - Appellant.

No. 17-3150

ORDER

Before **TYMKOVICH**, Chief Judge, **O'BRIEN**, and **MATHESON**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

10:06:00 the court?

10:06:01 MR. BURDICK: Judge, at this time, we would
10:06:03 ask for judgment of acquittal on all counts with regard
10:06:08 to Mr. Jefferson at the end of the government's case.
10:06:14 Specifically, we would argue that as to Counts 4, 6, and
10:06:20 8, the government has not put forth a sufficient case to
10:06:25 be submitted to a jury, and so, we would ask for
10:06:28 judgment of acquittal at the end of the case.

10:06:31 THE COURT: Any response from the
10:06:33 government?

10:06:34 MS. MOREHEAD: Judge, our -- our response is
10:06:36 that we believe that there has been sufficient evidence
10:06:41 on all counts. With regards specifically to 4, 6, and
10:06:46 8, the government did produce video footage of each of
10:06:51 those robberies. You had testimony from two individuals
10:06:57 who testified about the firearms and their respective
10:07:05 events. The fourth -- Counts 6 and 8, there's actually
10:07:12 video footage that shows the display of weapons.
10:07:17 Count 4, the witness himself testified about that, and
10:07:22 there is sufficient evidence based upon the video as
10:07:26 well as the testimony that these were real firearms.
10:07:34 While Mr. Coon indicated he wasn't certain, that is not
10:07:39 the burden of proof in a criminal case. It's only proof
10:07:44 beyond a reasonable doubt, and he's testified that he
10:07:49 believed they were real guns. There were comments made

10:07:53 by the individuals at the time which made -- and -- and
10:07:59 the manner in which the firearms were displayed during
10:08:02 these events, that made them believe that they would be
10:08:07 harmed, and also the jury will be able to see the manner
10:08:11 in which these items were handled, and making their
10:08:16 determination because they actually have again the video
10:08:19 of that. So, we believe there's sufficient evidence to
10:08:22 establish -- obviously, we somewhat litigated this in
10:08:27 our pretrial motions in limine, but there is no
10:08:31 requirement that the firearm be produced, and there also
10:08:36 is no requirement that -- or -- or the fact that there's
10:08:42 a possibility that it's a fake or toy gun also is not --
10:08:48 does not create reasonable doubt, and there's case law
10:08:54 to support that.
10:08:56 THE COURT: Anything else from defendant?
10:08:57 MR. BURDICK: Umm, I do disagree with the --
10:09:00 the argument of the government that the fact that it is
10:09:05 -- or it may have been a toy gun does not create
10:09:07 reasonable doubt. I think that's a question for the
10:09:09 jury. The standard for the court obviously at this
10:09:12 point is lower than that, and we will rest on -- on what
10:09:17 we argued earlier.
10:09:18 THE COURT: Your comments are both noted for
10:09:22 the record. The government has informed the court that
10:09:25 they have rested their case-in-chief. Defendant has

10:09:28 moved for judgment of acquittal pursuant to Rule 29
10:09:36 after the government closes its evidence on
10:09:40 case-in-chief, defendant's motion for -- motion for
10:09:45 judgment of acquittal on any offense for which the
10:09:48 evidence is insufficient to sustain a conviction. When
10:09:52 considering a motion for judgment of acquittal, the
10:09:55 court cannot weigh the evidence or consider the
10:09:58 credibility of witnesses. Instead, the court construes
10:10:02 both direct and circumstantial evidence as well as all
10:10:09 reasonable inferences that can be drawn therefrom in the
10:10:13 light most favorable to the government in this case. In
10:10:16 light of the evidence presented by the government in
10:10:18 their case-in-chief, the court finds the government has
10:10:21 presented sufficient evidence such that a reasonable
10:10:26 jury could find -- could find defendant guilty in
10:10:31 regards to counts in the indictment. Unless there's
10:10:38 anything else, what I'll do is if you want the recess,
10:10:41 we'll go ahead and take the recess, and then let us
10:10:43 know, and then we'll call the jury back, or you let us
10:10:46 know first, and then we'll find out where we're going.
10:10:49 MR. BURDICK: Right. Okay. Thank you.
10:10:51 (Proceedings continued in open court.)
10:11:00 THE COURT: Thank you, jury members. At
10:11:02 this time, we're going to take our morning recess just
10:11:04 earlier than we do, but I am going to ask if you would

13:44:38 Defendant makes three arguments why the additional
13:44:42 language is important. Number 1, use of the words,
13:44:47 quote, firmly convinced, end quote, in the first
13:44:52 sentence of the second paragraph confuses the standard
13:44:57 and lessens the government's burden. Two, in the
13:45:03 sentence that begins, quote, it is only required that
13:45:07 the government's proof, and goes on, end quote, use of
13:45:14 the word, quote, only, end quote, tends to diminish the
13:45:21 burden of proof. Addition of defendant's proposed
13:45:27 language would clarify the standard. And three, the
13:45:33 instruction does not include the language informing the
13:45:36 jury that reasonable doubt may arise from the lack of
13:45:41 evidence, which is important to accurately instruct them
13:45:44 on the law. The court overrules defendant's objection,
13:45:53 finding that the instruction as written is sufficient to
13:45:57 give the jury the necessary understanding of the law.
13:46:20 Third, for Instructions 13 through 17, the robbery
13:46:26 elements instructions, defendant asks that the court
13:46:32 instead give his proposed instructions which are
13:46:36 included in Document 55, Pages 2 through 4, 6, and 8.
13:46:43 Mr. Burdick, I've been advised of your position
13:46:46 regarding this, but for the record, would you like to
13:46:49 put your argument so it's preserved for the record here?
13:46:55 MR. BURDICK: Yes, Judge. I think I can
13:46:57 summarize it relatively briefly. It's our position that

13:47:00 based on the Supreme Court decision in 2010 of Johnson
13:47:04 versus the United States where the court defines
13:47:09 physical force, and then the second Supreme Court
13:47:13 decision last year of United States versus Johnson where
13:47:18 the court found a portion of the definition of a violent
13:47:24 felony to be unconstitutional, as a result of those two
13:47:28 decisions, we believe that the jury instruction for
13:47:33 robbery in each of these counts should include the
13:47:39 opportunity for the jury to find particular means in
13:47:44 which the robbery was ultimately committed by the
13:47:49 defendant, and then if in fact, the particular means
13:47:54 that were listed as the first option in the instruction
13:47:58 were found by the jury, then they would also find
13:48:01 whether or not the way in which that was done
13:48:03 constituted violent force. Without that, it's our
13:48:08 position that the jury's finding then on any 924 C
13:48:13 instruction would not comport with the Supreme Court
13:48:18 cases that we've previously referenced, and so, we
13:48:23 believe that in order to accurately reflect the state of
13:48:26 the law in terms of a crime of violence, at this point
13:48:31 would require a jury finding as we've indicated in the
13:48:35 proposed instructions.
13:48:38 THE COURT: Thank you. The court
13:48:40 understands defendant's position. It's also been set
13:48:44 out here at our charge conference on the record. The

13:48:48 court determines that the additional proposed
13:48:51 instructions and questions are unnecessary. Johnson
13:48:57 does not require the court to ask these questions of the
13:49:01 jury. The court overrules defendant's objection.
13:49:09 Fourth, for Instructions 19 through 22, defendant makes
13:49:19 two arguments. The first relates to the elements of the
13:49:24 charges post-Johnson. Defendant asks that the court
13:49:29 instead give his proposed instructions which are
13:49:33 included in Document 55, Pages 5, 7, and 9. And again,
13:49:41 Mr. Burdick, I understand that your argument for these
13:49:44 instructions is very similar or essentially the same as
13:49:49 the arguments you were making for Instructions 13
13:49:51 through 17, but again, if you want to highlight that for
13:49:55 the record or summarize that, please do so.
13:49:57 MR. BURDICK: That's correct, Judge. It
13:49:59 would again be in response to the same Supreme Court
13:50:01 decisions, and they would correspond with the proposed
13:50:04 jury instructions on the robbery counts, that the 924 C
13:50:12 instructions would correspond with the robbery
13:50:15 instructions, meaning that only if the jury found in the
13:50:18 second element of the proposed jury instruction for
13:50:21 robbery that it was committed by force, actual or
13:50:27 threatened, or violence against the individual, and that
13:50:31 the jury found that the use of force was capable of
13:50:34 causing physical pain or injury, and this is a summary,

13:50:38 only upon those two findings would they have the ability
13:50:42 to consider finding defendant guilty of the 924 C
13:50:46 counts, and so that would again -- they kind of work
13:50:49 hand in hand based on the two Supreme Court decisions,
13:50:52 Johnson of 2010 and Johnson of 2015.
13:50:57 THE COURT: Again, the court understands
13:50:59 defendant's position, but determines that the additional
13:51:04 proposed instructions and questions are unnecessary.
13:51:09 Again, court would find Johnson does not require the
13:51:11 court to ask these questions of the jury. Court
13:51:16 overrules defendant's objection. For defendant's second
13:51:23 argument regarding Instructions 19 through 22, he
13:51:29 initially objected to language proposed by the
13:51:32 government regarding the definition of firearms. The
13:51:36 government proposed an instruction that states, for
13:51:40 purposes of the offense charged in Counts 4, 6, and 8,
13:51:45 the term, quote, firearm, end quote -- the term, quote,
13:51:50 firearm, end quote, means any weapon, parentheses,
13:51:54 including a starter gun, closed parentheses, which will
13:51:58 or is designed to or may be readily converted to expel a
13:52:03 projectile by the action of an explosive. To establish
13:52:09 that a firearm was used, the government is not required
13:52:12 to offer the firearm itself into evidence. The nature
13:52:16 of the weapon may be proved through testimony such as
13:52:20 from witnesses who observed the weapon during the