No. 21-5248

IN THE
Supreme Court of the United States

DAVION JEFFERSON,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITIONER'S REPLY BRIEF

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We have asked this Court to grant this petition to address three questions. Pet. i. Two of those questions involve Congress's recent amendment to 18 U.S.C. § 924(c) in Section 403 of the First Step Act. The government, in its four-page memorandum in opposition, responds to just one of these questions – whether § 403 applies to cases pending on direct appeal at the time of its enactment – and its only response is that this Court has denied prior petitions raising this question. MIO 3-4. The government makes no effort to address the merits of our argument. The government's response shows that this is a recurring question that this Court should resolve.

The other question presented asks this Court to resolve whether a district court can direct a verdict on § 924(c)'s crime-of-violence element, as the district court did in this case. Pet. i. The government does not respond to that question directly, but instead argues that the underlying crime here – robbery under 18 U.S.C. § 1951(b)(1) – is categorically a crime of violence. MIO 2-3. That argument just begs the question presented. The government assumes that the district court determines whether a crime categorically qualifies as a crime of violence, without addressing our primary claim that it is a jury who must find this element of the offense under the Fifth Amendment. Pet. 11-15. The government's unresponsive response should not deter this Court from addressing the critically important directed-verdict question presented by Mr. Jefferson.

Finally, the government disagrees that this Court, at a minimum, should hold this petition pending its decision in *United States v. Taylor*, No. 20-1459 (cert. granted

July 2, 2021). MIO 1-2. According to the government, whether attempted robbery under 18 U.S.C. § 1951(a) qualifies as a crime of violence could not possibly have any impact on Mr. Jefferson's case. *Id.* We've explained that the government's position is correct if robbery under § 1951(b)(1) involves different elements than attempted robbery under § 1951(a) (which we think it obviously does). Pet. 29-30. But the government's brief in *Taylor* takes a different view.

According to the government, an attempt to commit robbery under § 1951(a) "entails the use, attempted use, or threatened use of physical force." Gov't Br. at 14, *United States v. Taylor*, No. 20-1459 (Sept. 7, 2021). As the government sees it, to obtain an attempt-to-commit-robbery conviction, it must prove that the defendant used, attempted to use, or threatened to use physical force. This must mean that, in the government's view, an attempt to commit a robbery has the same force element as a completed robbery. *See* 18 U.S.C. § 1951(b)(1). And if that is true, if this Court holds than an attempt to commit robbery is not a crime of violence because it lacks a *violent* force element, then it follows that a completed robbery is not a crime of violence because it too lacks a *violent* force element. It is the government's litigation strategy in *Taylor* that supports our minimal request to hold this petition pending the decision in *Taylor*.

With that said, there is a serious problem with the government's position in *Taylor*: the government substitutes the word "entails" for the phrase "has as an element" in § 924(c)(3)(A). Under the statute's plain text, a crime only counts as a crime of violence under § 924(c)(3)(A) if it "has as an element the use, attempted use,

or threatened use of physical force against the person or property of another." An "element" is "what 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 v. United States*, 136 S.Ct. 2243, 2248 (2016). "'Elements' are the 'constituent parts' of a crime's legal definition,'" or more succinctly, "the crime's legal requirements." *Id.* The question is not what a prior crime "entails," but more simply, whether the crime "has as an element" the use (attempted or threatened use) of force.

An attempt offense obviously does not have an "element" of force. As the government readily admits in *Taylor*, a federal attempt offense only has two elements: (1) an intent to commit each element of the completed crime; and (2) a "substantial step" toward the crime's completion. Gov't Br. at 18, *Taylor*, No. 20-1459. Neither of these elements requires the government to prove that the defendant used, attempted to use, or threatened to use any amount of force whatsoever. While a jury must find that the defendant had the intent to use or threaten force to be convicted of an attempt to commit robbery under § 1951, the jury need not find that the defendant actually used or threatened to use (or attempted to use) such force. Under blackletter attempt law, the government need only prove that the defendant committed "an 'overt act' that constitutes a 'substantial step' toward completing the offense." *United States v. Resendiz-Ponce*, 549 U.S. 102, 107 (2007).

While this "overt act" might "involve" force, as the government explains, Gov't Br. 21-22, *Taylor*, No. 20-1459, a non-forceful "overt act" can also support an attempt-to-commit-robbery offense. *See*, *e.g.*, *United States v. Villegas*, 655 F.3d 662, 669 (7th

Cir. 2011) (attempt to commit robbery conviction upheld where the defendant was arrested one mile away from the target when meeting a government informant on the day of the planned robbery); *United States v. Stallworth*, 543 F.2d 1038, 1041 (2d Cir. 1976) (upholding an attempted bank robbery conviction where the defendants "moved ominously toward the bank" before being arrested). Indeed, the government concedes that a defendant need only "engage[] in a course of action that was sufficiently certain, if unchecked, to culminate in taking property through physical harm or the threat of it." Gov't Br. at 22, *Taylor*, No. 20-1459. Perhaps someone "observing" such a "course of action" would "naturally describe it as involving at least 'threatened use' of force" (or perhaps not – we fail to see how a defendant who walks "ominously toward the bank" has threatened force). But that's not the question. The question is whether the jury must find that the defendant used, attempted to use, or threatened to use force. And it need not do so. Indeed, the jury would never be instructed to do so because there is simply no force element of any federal attempt offense, including an attempt under § 1951(a).

In any event, in light of the government's atextual reading of § 924(c)(3)(A), if this Court does not grant this petition, it is best to hold the petition pending a decision in *Taylor*. Because the government effectively argues that an attempt-to-commit-robbery offense requires the same level of force as a completed robbery, there is no reason not to hold this petition pending *Taylor*.

Respectfully submitted,

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