In the

Supreme Court of the United States

MAURICE LAMONT DAVIS,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT,

PETITION APPENDIX

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 26, 2021
Lyle W. Cayce
Clerk

No. 20-10228

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ANDRE LEVON GLOVER; MAURICE LAMONT DAVIS,

Defendants—Appellants.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:15-CR-94-1

Before KING, SMITH, and HAYNES, *Circuit Judges*.

PER CURIAM:*

Appellants Andre Levon Glover and Maurice Lamont Davis were convicted of multiple offenses for a series of robberies committed in June 2014. They appealed, and we affirmed all but one of their convictions, vacated their sentences in full, and remanded to the district court for entry of

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

a revised judgment and for resentencing.[1] *United States v. Davis*, 784 F. App'x 277, 278 (5th Cir. 2019) (per curiam).[2] On remand, the district court resentenced Glover to 271 months of imprisonment and three years of supervised release and Davis to 300 months of imprisonment and three years of supervised release. Appellants timely appealed their new sentences. We AFFIRM the district court's judgments.

I. Glover's Challenge

On appeal, Glover argues that the district court erred in applying a six-level firearm enhancement under U.S. Sentencing Guideline § 2B3.1(b)(2)(B) for three of his four Hobbs Act robbery convictions (Counts Three, Four, and Five, but not Count Six). He contends that because he was convicted of a § 924(c) violation in connection with his fourth Hobbs Act conviction (Count Six), the firearm enhancement cannot be applied to Counts Three, Four, and Five under U.S. Sentencing Guideline § 2K2.4. As Glover objected to the application of this enhancement before the district court, we review the district court's application de novo. *United States v. Valdez*, 726 F.3d 684, 692 (5th Cir. 2013).

The sentencing guideline for § 924(c) convictions is Guideline § 2K2.4. U.S. SENT'G GUIDELINES MANUAL § 2K2.4 (U.S. SENT'G COMM'N 2018). Note 4 of that guideline explains that when a sentence under that guideline is imposed in conjunction with a sentence for an underlying offense, no weapon enhancement, such as Guideline § 2B3.1, is to be applied for that underlying offense. *Id.* cmt. n.4. For further

[1] Before we made this holding, the Supreme Court had remanded this case to our court twice in *Davis v. United States*, 138 S. Ct. 1979, 1979 (2018) (mem.), and *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019).

[2] We vacated Count Two, an 18 U.S.C. § 924(c) conviction. *Davis*, 784 F. App'x at 278.

clarification, note 4 provides an example: "if a defendant is convicted of two armed bank robberies, but is convicted under 18 U.S.C. § 924(c) in connection with only one of the robberies, a weapon enhancement would apply to the bank robbery which was not the basis for the 18 U.S.C. § 924(c) conviction." *Id.*

Just like the example, Glover's six-level enhancement was applied to only those robbery convictions which were not the basis for his § 924(c) conviction. Therefore, we hold that the district court did not err in applying the six-level enhancement to Glover's convicted robberies charged in Counts Three, Four, and Five, and we affirm his sentence.

II. Davis's Challenge

Turning to Davis's appeal, he argues that his conviction for Count Eight—being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2)—should be vacated in light of the Supreme Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019).[3] After a panel of our court affirmed Davis's Count Eight conviction twice,[4] the

[3] Davis makes two additional arguments on appeal, but he agrees that those arguments are foreclosed. First, he argues that the district court erred in enhancing his sentence for Count Eight by concluding that his three previous burglary convictions under Texas Penal Code § 30.02(a)(1), (3) were "violent felon[ies]" under the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e). However, we have already held that burglary under Texas Penal Code § 30.02(a)(1), (3) is a "violent felony." *United States v. Herrold*, 941 F.3d 173, 182 (5th Cir. 2019) (en banc), *cert. denied*, 141 S. Ct. 273 (2020) (mem.). Second, Davis argues that the district court erred in concluding that Count Six (a Hobbs Act robbery conviction) was a "crime of violence" under 18 U.S.C. § 924(c). A panel of our court has already rejected that argument. *United States v. Davis*, 903 F.3d 483, 485 (5th Cir. 2018) (per curiam), *aff'd in part, vacated in part on other grounds*, 139 S. Ct. 2319 (2019). Accordingly, both of Davis's additional arguments are foreclosed by precedent and lack merit. *See Jacobs v. Nat'l Drug Intel. Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008).

[4] *United States v. Davis*, 677 F. App'x 933 (5th Cir. 2017) (per curiam), *vacated on other grounds*, 138 S. Ct. 1979 (2018) (mem.); *Davis*, 784 F. App'x at 277.

Supreme Court held in *Rehaif* that a defendant charged with violating § 922(g) must "kn[o]w he belonged to the relevant category of persons barred from possessing a firearm" at the time of his offense. *Id.* at 2200. Davis contends that three *Rehaif* errors occurred: (1) the Government presented no evidence at trial that Davis knew he was a felon at the time he committed the offenses, (2) the grand jury did not find that Davis had such knowledge, and (3) the district court did not instruct the jury that it must find that Davis had such knowledge.

On the sufficiency-of-the-evidence issue, the question is whether, based on the evidence presented at trial, any reasonable jury could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Staggers*, 961 F.3d 745, 756 (5th Cir.), *cert. denied*, 141 S. Ct. 388 (2020) (mem.); *see also United States v. Burden*, 964 F.3d 339, 348 (5th Cir.), *petition for cert. filed,* No. 20-5939 (U.S. Sept. 30, 2020), *and petition for cert. filed sub nom. Scott v. United States*, No. 20-5949 (U.S. Sept. 30, 2020). Assuming arguendo that de novo review applies,[5] we hold that a reasonable jury would have found beyond a reasonable doubt that Davis knew of his felon status at the time of the offense. At trial, Davis stipulated that he was a felon and a witness confirmed his status. Davis does not claim that he was ignorant of his status as a felon when he committed his § 922(g) offense, much less point to any evidence showing that such a claim was viable. As Davis concedes, we have previously held, on two occasions, that a defendant's stipulation to his felon status at trial was legally sufficient to support his § 922(g)(1) conviction. *Staggers*, 961 F.3d at 757; *Burden*, 964 F.3d at 348. Accordingly,

[5] In *Burden*, we observed that there may be inconsistency in our case law on whether de novo or plain error review applies for a *Rehaif* sufficiency-of-the-evidence claim when, as here, the defendant raised general objections but not *Rehaif* objections to the sufficiency of the evidence. *See* 964 F.3d at 347 & n.6. Because we need not resolve this issue today, we decline to do so.

we reach the same conclusion here. *See Jacobs v. Nat'l Drug Intel. Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008) (explaining that "one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our *en banc* court").

On the indictment and jury instruction issues, we review Davis's challenges for plain error, as Davis did not raise them in district court. *Staggers*, 961 F.3d at 754. Under that standard of review, Davis must show that "there was (1) error, (2) that is plain, and (3) that affects [his] substantial rights." *Id.* (internal quotation marks and citations omitted). If those conditions are met, then we may exercise our discretion to correct the error if the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 755. Because *Rehaif* errors in the indictment and jury instructions are plain errors, *see Burden*, 964 F.3d at 347, our analysis turns on whether the errors affected Davis's substantial rights.

To show that an error affected his substantial rights, Davis must "show a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Staggers*, 961 F.3d at 755 (internal quotation marks and citations omitted). Assessing the record as a whole, we conclude that Davis cannot meet this burden. First, as we determined above, there was legally sufficient evidence—Davis's stipulation to being a felon at trial and the witness's confirmation of his felon status—for a reasonable jury to convict Davis for Count Eight. *See id.* (stating that a *Rehaif* error does not affect a defendant's substantial rights unless "there is a reasonable probability that a properly instructed jury viewing the evidence actually admitted at trial would have returned a different verdict"). Additionally, in assessing this prong, we can consider judicially noticeable facts, which further support the conclusion that Davis was not ignorant of his status; for example, not long before his § 922(g) offense, Davis had been sentenced to

18 months of imprisonment for a felony burglary. *United States v. Huntsberry*, 956 F.3d 270, 285-86 (5th Cir. 2020); *see also Burden*, 964 F.3d at 348 (holding that a defendant could not show that *Rehaif* errors in the indictment and jury instructions affected his substantial rights when he "stipulated at trial [to being a] felon[]" and had recently been released from prison for the felony offense). It is thus "unrealistic" to believe "that the government would have been unable to prove" that Davis was unaware of his convicted-felon status. *Burden*, 964 F.3d at 348. Accordingly, Davis failed to establish that the *Rehaif* errors in the indictment and jury instructions affected his substantial rights.

The judgments of the district court are AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fif h Circuit
FILED
January 31, 2017
Lyle W. Cayce
Clerk

No. 16-10330

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

MAURICE LAMONT DAVIS; ANDRE LEVON GLOVER,

Defendants - Appellants

Appeals from the United States District Court
for the Northern District of Texas
USDC No. 3:15-CR-94

Before HIGGINBOTHAM, JONES, and HAYNES, Circuit Judges.

PER CURIAM:*

Andre Levon Glover appeals his conviction and sentence and Maurice Lamont Davis appeals his sentence[1] in this case arising out of a series of similar robberies at Murphy Oil locations across the Dallas Metroplex area during June of 2014.[2] We AFFIRM.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] Although his prayer styles his challenges as directed only to his sentence, Davis seeks to vacate the convictions on Counts 2 and 7 as part of his requested resentencing.

[2] Counts 1 and 3–6 charged conspiracy and aiding and abetting Hobbs Act (18 U.S.C. § 1951) robberies; Counts 2 and 7 were firearms charges under 18 U.S.C. § 924(c)(1). Count

Glover's Challenge to his Hobbs Act Convictions. Glover challenges his convictions charging robberies in violation of the Hobbs Act which makes it unlawful to "in any way or degree obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce, by robbery." 18 U.S.C. § 1951(a). Glover contends that the Government failed to prove the necessary impact on interstate commerce because all the robberies occurred within one state and only impacted merchandise (cartons of cigarettes) at local stores.[3] While conceding that the cigarettes themselves were manufactured out of state, Glover argues that the inventory and replacement inventory came from local Murphy Oil distribution centers or other stores. He also contends that the evidence was insufficient to connect him to two of the robberies (June 16 and 21).

This court reviews a challenge to the sufficiency of the evidence supporting a conviction by reviewing the evidence in the "light most favorable to the verdict to determine whether a rational trier of fact could have found that the evidence established the essential elements of the offense beyond a reasonable doubt." *United States v. Lewis*, 774 F.3d 837, 841 (5th Cir. 2014) (citation omitted).

The Hobbs Act requires an effect on interstate commerce that is "identical with the requirements of federal jurisdiction under the Commerce Clause." *United States v. Villafranca*, 260 F.3d 374, 377 (5th Cir. 2001) (citation omitted). The defendant's activity on interstate commerce "need only be slight" but cannot be "attenuated." *Id.* (citation omitted). Here, cigarettes,

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8, asserted only against Davis, was for felon-in-possession of a firearm under 18 U.S.C. § 922(g)(1).

[3] Glover also argues that the Government should be required to prove a "substantial effect" on interstate commerce but concedes that this argument is foreclosed by precedent. *United States v. Robinson*, 119 F.3d 1205, 1215 (5th Cir. 1997).

a highly regulated commodity, travelled in interstate commerce and, following the robberies, had to be replaced by cigarettes that were manufactured and shipped from other states. While the Murphy Oil stores were local, the company itself is headquartered outside of Texas and conducts business in half the states. We conclude that the evidence was sufficient to support the interstate commerce nexus.

With respect to Glover's other sufficiency challenge, we note that Glover was apprehended following the second robbery on June 22. The similarities of the vehicles used, the clothing worn, the weapons employed, the items stolen, and the modus operandi between the June 22 robberies on the one hand and the June 16 and 21 robberies on the other are sufficient to support a conclusion by a rational juror beyond a reasonable doubt that the same person committed all of the robberies.

Glover's and Davis's Challenges to Counts 2 and 7. Both Glover and Davis contend that their convictions under 18 U.S.C. § 924(c) cannot stand in light of *Johnson v. United States,* 135 S. Ct. 2551 (2015), which found a different statutory section to be unconstitutionally vague. In *Johnson*, the Court found the following portion of 18 U.S.C. § 924(e)(2)(B)(ii), known as the residual clause, defining "violent felonies" unconstitutionally vague: "or otherwise involves conduct that presents a serious potential risk of physical injury to another." In contrast to that language, § 924(c) involves the phrase "crime of violence" which, in turn, is defined, in relevant part, as a felony "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).

Sitting en banc, we recently considered a similar argument involving 18 U.S.C. § 16(b), which contains the exact language of § 924(c)(3)(B), and held that the language is not unconstitutionally vague in light of *Johnson*. *United*

States v. Gonzalez-Longoria, 831 F.3d 670, 677 (5th Cir. 2016) (en banc), *petition for cert. filed*, (Sept. 29, 2016)(No. 16-6259). We reasoned that in contrast to the residual clause language at issue in *Johnson*, the risk of physical *force* in 18 U.S.C. § 16(b)—as opposed to the risk of physical *injury*—is more definite. *Id*. at 676. We concluded that by requiring the risk of physical force to arise "in the course of committing" the offense, the provision "does not allow courts to consider conduct or events occurring after the crime is complete." *Id*. (citation omitted).

We recognize the possibility that identical language in two different statutes could be differently construed but see no reason to do so here. We join several other circuits in concluding that *Johnson* does not invalidate § 924(c)(3)(B). *See United States v. Prickett*, 839 F.3d 697, 699–700 (8th Cir. 2016); *United States v. Hill*, 832 F.3d 135, 145–49 (2d Cir. 2016); *United States v. Taylor*, 814 F.3d 340, 376–79 (6th Cir. 2016), *petition for cert. filed*, (Oct. 6, 2016)(16-6392).[4] We therefore do not reach the question of whether the Hobbs Act robbery charges would include a "use of force" element under 18 U.S.C. § 924(c)(3)(A).

Davis's Challenge to the Armed Career Criminal Act (ACCA) Enhancement. Davis argues that his prior convictions under Texas law for burglary of a building are not "crimes of violence" for purposes of the ACCA because the statutes under which he was convicted, Texas Penal Code § 30.01(a)(1) and (a)(3), are not divisible under *Mathis v. United States*, 136 S. Ct. 2243 (2016), and some parts of these statutes do not qualify as "crimes of

[4] Glover's alternative argument that the jury should decide what constitutes a crime of violence is meritless. A determination of whether a Hobbs Act robbery and respective conspiracy offenses should be classified as a crime of violence is a question of law reserved for the judge. *United States v. Credit*, 95 F.3d 362, 364 (5th Cir. 1996).

violence." However, he concedes that this challenge is foreclosed by our recent decision in *United States v. Uribe*, 838 F.3d 667, 669 (5th Cir. 2016).

Glover's Challenge to the "Abduction" Sentencing Enhancement. Glover contends that the district court erroneously enhanced his sentence for abduction in the June 16 (Lancaster), June 21 (Dallas), and June 22 (Mansfield) robberies because the movement of store clerks does not constitute a forced accompaniment to a "different location" within the meaning of U.S.S.G. § 2B3.1(b)(4)(A). Glover notes that the original PSR, which listed a criminal history score of I and an offense level of 28, did not contain the enhancement, presumably referring to the June 21 robbery (Dallas) because the enhancement was present for the Lancaster and Mansfield robberies. After the Government objected, the probation officer agreed that the enhancement was appropriate for the June 21 robbery. However, both the Government and the probation officer noted that, because of groupings of multiple counts, the enhancement for June 21 (Dallas) did not affect the guidelines calculation.[5] Indeed, Glover was sentenced on Counts 1 and 3–6 premised on Guidelines calculations that yielded a criminal history score of I and an offense level of 28, the same as it was before the enhancement for the June 21 (Dallas) robbery. Glover was sentenced to 78 months, the bottom of the Guidelines range, for

[5] Glover does nothing to explain the math underlying the alleged error. However, an examination of the PSR illuminates the issue. The page to which Glover cites to support his argument that his sentence was enhanced by the abduction enhancement is a page from the Addendum to the PSR which states: "The inclusion of such [abduction] enhancement . . . does not affect the guideline computations." His brief states that his total offense level was increased by two levels due to this enhancement. This statement presumably refers to the two counts premised on the Lancaster and Mansfield robberies where the enhancement caused his offense level to be 24 which, in turn, was the "highest offense" level to which the multiple count adjustment of four was added. Had the enhancement not been in place for any count, the next "highest offense level" was 22. In turn, with the addition of the multiple count adjustment of four levels, his offense level would have been 26, rather than 28.

those counts.[6] Given the specifics of the calculations in this case, if either the June 16 (Lancaster) or the June 22 (Mansfield) enhancements were proper, then there would be no effect on his guidelines range making any error as to any other count harmless. *United States v. Castro-Alfonso*, 841 F.3d 292, 294 (5th Cir. 2016) (harmless error review applies to procedural sentencing errors).

We review the district court's application of the Sentencing Guidelines de novo and its factual findings for clear error. *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008) (citation omitted). "There is no clear error if the district court's finding is plausible in light of the record as a whole." *Id.* (citation omitted).

The Guidelines direct a court to enhance a defendant's sentence by four levels "[i]f any person was abducted to facilitate commission of the offense or to facilitate escape." U.S.S.G. § 2B3.1(b)(4)(A). The Guidelines define "abducted" to mean that "a victim was forced to accompany an offender to a different location. For example, a bank robber's forcing a bank teller from the bank into a getaway car would constitute an abduction." § 1B1.1 cmt.n.1.

The term "different location" is interpreted on a case-by-case basis. *United States v. Hawkins*, 87 F.3d 722, 726–28 (5th Cir. 1996). The term is "flexible and thus susceptible of multiple interpretations" and is "not mechanically based on the presence or absence of doorways, lot lines, thresholds, and the like." *Id.* at 728. In *Hawkins*, this court held that, despite escaping, the victims were "abducted" when a gunman forced them to walk approximately 40 to 50 feet from a location near his truck to a location near a van in the same parking lot. *Id.* at 728.

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[6] Glover received consecutive sentences of 120 months and 300 months on Counts 2 and 7, respectively, for a total of 498 months.

During the robbery of the Lancaster Murphy Oil on June 16, the store clerk testified that Glover's accomplice grabbed her from behind and forced her to go from the main kiosk "to the back part of the storage building" where the inventory is kept. The clerk was told to open the door and then "he forced [her] down once [she] got in the [storage] room." The robbery of the Mansfield Murphy Oil on June 22 occurred under similar circumstances. The clerk testified that as she was dragging the candy rack out of the storage room, a robber held a gun to her head and told her to get back into the storage room. The PSR concluded from the Lancaster and Mansfield robberies that the clerks were forced "to move from one area to another area, namely, the outside of the kiosk to the inside of the storage room," constituting abduction under § 2B3.1(b)(4)(A). We agree and conclude that the district court did not err in applying this enhancement.

Concluding that all of Davis's and Glover's challenges fail, we AFFIRM.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
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No. 16-10330

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

MAURICE LAMONT DAVIS; ANDRE LEVON GLOVER,

Defendants - Appellants

Appeals from the United States District Court
for the Northern District of Texas

ON REMAND FROM THE UNITED STATES SUPREME COURT

Before HIGGINBOTHAM, JONES, and HAYNES, Circuit Judges.

PER CURIAM:

On January 31, 2017, we issued an opinion in this case denying Andre Levon Glover's challenge to his conviction and sentence and Maurice Lamont Davis's (Davis and Glover, collectively, "Defendants") challenge to his sentence, affirming the district court's entry of judgment from the charges under 18 U.S.C. § 1951 and 18 U.S.C. § 924(c). *United States v. Davis*, 677 F. App'x 933, 935–36 (5th Cir. 2017) (per curiam). Defendants petitioned the Supreme Court for certiorari. Following its decision in *Sessions v. Dimaya*, 584 U.S. ___, 138 S. Ct. 1204 (2018), the Court remanded this case to our court "for further consideration" in light of *Dimaya*. *Davis v. United States*, 138 S. Ct.

1979, 1979–80 (2018). We requested supplemental briefing from the parties on the effect of the Court's decision and now (1) continue to affirm Defendants' conviction under Count Seven; (2) vacate Defendants' conviction under Count Two; and (3) leave the remainder of our prior opinion intact.[1]

The first question is whether *Dimaya* affects Defendants' convictions on Count Seven for illegally using or carrying a firearm in relation to a crime of violence, that is, Hobbs Act robbery. *See* 18 U.S.C. § 924(c). The conviction depends on whether Hobbs Act robbery is a "crime of violence" subsumed by § 924(c)(3)(a). Defendants urge us to extend *Dimaya* to reconsider our precedent on this question. In *United States v. Buck*, we held that "[i]t was not error—plain or otherwise—"to classify Hobbs Act robbery as a crime of violence under the § 924(c) elements clause, citing cases in the Second, Third, Eighth, Ninth, and Eleventh Circuits. 847 F.3d 267, 274–75 (5th Cir.), *cert. denied*, 138 S. Ct. 149 (2017). Nonetheless, Defendants argue that Hobbs Act robbery can be committed without the use, attempted use, or threatened use of physical force, because "fear of injury" is included in the definition of robbery. *See* 18 U.S.C. § 1951(b)(1).

We decline to extend *Dimaya*'s holding that far. Section 924(c) contains both an elements clause and a residual clause; the elements clause defines an offense as a crime of violence if it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another,"

[1] Specifically, Davis individually argues that his ACCA sentencing enhancement based upon multiple burglary convictions under Texas Penal Code § 30.02 cannot stand in light of *United States v. Herrold*, 883 F.3d 517 (5th Cir. 2018) (en banc), *petitions for cert. filed*, (U.S. Apr. 18, 2018) (No. 17-1445), *and* (U.S. May 21, 2018) (No. 17-9127). He notes that his case is still on direct appeal, and therefore, he is entitled to the benefit of *Herrold*. *See Griffith v. Kentucky*, 479 U.S. 314, 322–23 (1987). However, addressing that issue would exceed the scope of the Supreme Court remand, and therefore, we decline to do so at this time. *See Aladdin's Castle, Inc. v. City of Mesquite*, 713 F.2d 137, 138–39 (5th Cir. 1983). To be clear, we thus are not addressing *Herrold* on remand nor are we directing the district court to do so.

whereas the residual clause defines an offense as a crime of violence if it, "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." *See* § 924(c)(3). *Dimaya* only addressed, and invalidated, a residual clause mirroring the residual clause in § 924(c); it did not address the elements clause. Whatever arguments may be made opposing Hobbs Act robbery's inclusion under the elements clause as a crime of violence, *Dimaya* has not affected them, and therefore, they are foreclosed to us in light of *Buck*. Thus, we affirm our prior judgment regarding Davis and Glover's convictions for violations of § 924(c) as predicated on Hobbs Act robbery.

Defendants' firearms convictions for knowingly using, carrying, or brandishing a firearm to aid and abet conspiracy to interfere with commerce by robbery under Count Two present a less clear question. We have held that conspiracy to commit an offense is merely an agreement to commit an offense. *United States v. Gore*, 636 F.3d 728, 731 (5th Cir. 2011). Therefore, here, the conspiracy offense does not necessarily require proof that a defendant used, attempted to use, or threatened to use force. Accordingly, the Government concedes that Defendants could only have been convicted as to Count Two under the residual clause.

The Government attempts to change its prior approach to these cases on remand by abandoning its longstanding position that 18 U.S.C. § 924(c)(3)(B) should be analyzed under the categorical approach. In light of *Dimaya*, the Government argues we can, and should, adopt a new "case specific" method when applying the residual clause; this method would compare § 924(c)'s residual definition to the "defendant's actual conduct" in the predicate offense. Regardless of whether *Dimaya* would otherwise permit us to do so, we do not find a suggestion by a minority of justices in that case sufficient to overrule our

prior precedent.[2] *See United States v. Williams*, 343 F.3d 423, 431 (5th Cir. 2003) ("We use the so-called categorical approach when applying [§ 924(c)(3)(B)] to the predicate offense statute. 'The proper inquiry is whether a particular defined offense, in the abstract, is a crime of violence.'" (quoting *United States v. Chapa–Garza*, 243 F.3d 921, 924 (5th Cir. 2001))). Therefore, we must address the serious constitutional questions apparent in the residual clause of § 924(c)(3)(B) in light of *Dimaya*.

The Supreme Court rested its decision in *Dimaya* on its concerns about the language of the statute itself. Although § 16(b) contained linguistic differences to the Armed Career Criminal Act ("ACCA") residual clause the Court had previously invalidated in *Johnson v. United States*, 135 S. Ct. 2551 (2015), it noted that each statute contained "both an ordinary-case requirement and an ill-defined risk threshold," and this "'devolv[ed] into guesswork and intuition,' invited arbitrary enforcement, and failed to provide fair notice." *Dimaya*, 138 S. Ct. at 1223 (alteration in original) (quoting *Johnson*, 135 S. Ct. at 2559). Because the language of the residual clause here and that in § 16(b) are identical, this court lacks the authority to say that, under the categorical approach, the outcome would not be the same. We hold that § 924(c)'s residual clause is unconstitutionally vague. Therefore,

[2] Justice Gorsuch, in concurrence, along with Justice Thomas, joined by Justices Kennedy and Alito, in dissent, suggested that an alternative approach to the categorical approach may be preferable in analyzing residual clauses. *Dimaya*, 138 S. Ct. at 1233 (Gorsuch, J., concurring in part and concurring in the judgment); *id.* at 1252–53 (Thomas, J., dissenting). However, the holding in *Dimaya* addressed § 16(b) as interpreted via the categorical approach, without deciding whether the statute could be interpreted under alternative approaches. *See id.* at 1217–18 (plurality opinion) (interpreting the categorical approach as the "best read[ing]" of the statutory text); *id.* at 1233 (Gorsuch, J., concurring in part and concurring in the judgment) (noting that other interpretive approaches may be possible, but that the parties conceded application of the categorical approach in this case).

Defendants' convictions and sentences under Count Two must be vacated.[3] We conclude this decision does not implicate the sentences on the other counts. *U.S. v. Clark*, 816 F.3d 350, 360 (5th Cir. 2016).

Accordingly, we AFFIRM the judgment of the district court except with respect to the conviction and sentence as to Count Two; as to Count Two, we VACATE the conviction and REMAND for entry of a revised judgment consistent herewith.

[3] Davis received a 120-month sentence as to Count Two, to run consecutively with a concurrent 188-month sentence as to Counts One, Five, and Six and a 300-month sentence as to Count Seven, along with a concurrent 120-month sentence as to Count Eight, for an aggregate sentence of 608 months. Glover also received a 120-month sentence as to Count Two, to run consecutively with a concurrent seventy-eight-month sentence as to Counts One, Three, Four, Five, and Six and a 300-month sentence as to Count Seven, for an aggregate sentence of 498 months.

PATRICK E. HIGGINBOTHAM, Circuit Judge, concurring in part and dissenting in part:

I concur only in the vacating of the Count Two conviction. With respect, the remedy afforded Davis is deeply flawed by two basic errors of law interlaced in effect.

First, in the majority's suggestion that we are here barred from considering issues beyond the scope of the Supreme Court's remand order. *Supra* at 2 n.1. After granting certiorari in this case, the Court vacated our previous opinion and remanded for consideration in light of the *Dimaya* decision. *Davis v. United States*, 138 S. Ct. 1979 (2018). In this circumstance we have jurisdiction to consider issues not addressed in the Supreme Court's mandate on remand. *Hill v. Black*, 920 F.2d 249, 250 (5th Cir. 1990), *modified on other grounds on denial of reh'g*, 932 F.2d 369 (5th Cir. 1991); *see also Moore v. Zant*, 885 F.2d 1497, 1503 (11th Cir. 1989).

Second, the majority errs in frustrating the district court's duty to construct proper sentences from a holistic examination of the intertwined acts of criminality for which the defendants were convicted. The majority remedies the error with respect to Davis and Glover's convictions under § 924(c)'s residual clause by reaching into their sentences and excising a period of time. But the aggregate sentences here—combinations of concurrent and consecutive sentences for different counts—resulted from a sentencing judgment by the district court. "'A criminal sentence is a package of sanctions that the district court utilizes to effectuate its sentencing intent.'" *Pepper v. United States*, 562 U.S. 476, 507 (2011) (quoting *United States v. Stinson*, 97 F.3d 466, 469 (11th Cir. 1996) (per curiam)). It is for the district court—not this court—to reach sentencing decisions in the first instance. "[A] district court's 'original sentencing intent may be undermined by altering one portion

of the calculus'"—here reductions by 120 months of the defendants' 608-month and 498-month sentences. *Id.* (quoting *United States v. White*, 406 F.3d 827, 832 (7th Cir. 2005)). The majority concludes that excision of the sentences associated with Davis and Glover's Count Two convictions does not implicate their sentences relative to other counts, citing to our *Clark* decision. *Supra* at 5. But *Clark* was an appeal from a *district court's* decision. *Clark*, 816 F.3d at 354. There, the district court had determined that, after excision of time associated with a dismissed conviction, the petitioner's remaining aggregate sentence entailed an appropriate package without further adjustment. *Id.* at 360. If the instant case were an appeal from a district court's resentencing of Davis and Glover, I would find *Clark* controlling and reliance upon it sound. Today's decision, however, involves the Court of Appeals making that determination. A district court declining to adjust the remaining parts of its original sentencing package does not speak to an appellate invasion of the district court's sentencing prerogatives.

The appropriate remedy is to vacate Davis and Glover's entire sentences and remand for resentencing. *See United States v. Aguirre*, 926 F.2d 409, 410 (5th Cir. 1991) (Rubin, Politz, Davis) ("The proper remedy . . . is to vacate the entire sentence and remand for resentencing."). Such a disposition is especially appropriate where the district court in any event under current law may well be faced with constructing a new sentencing package. This because, lurking in the background of the majority's disposition in this case is another issue: the sentencing package here also included Davis's ACCA sentence enhancement predicated on convictions for Texas burglary. Were Davis resentenced, the district court would consider current law, including *United States v. Herrold*. 883 F.3d 517 (5th Cir. 2018) (en banc), *petitions for cert. filed*, (U.S. Apr. 18, 2018) (No. 17-1445), and (U.S. May 21, 2018) (No. 17-9127); *see Griffith v.*

Kentucky, 479 U.S. 314, 322–23 (1987). Management of the sentencing process is best left to the court charged with the task and best situated to accommodate it. Here it should have the opportunity to revisit the entirety of the sentencing package including whether to defer resentencing pending the Supreme Court's disposition of petitions for certiorari in *Herrold*. The district court has been denied that opportunity. District courts are not mere "gatekeepers," and sentences often—as here—present as packages effectuating the district court's sentencing intent, as Chief Justice Rehnquist would remind.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
November 12, 2019
Lyle W. Cayce
Clerk

No. 16-10330

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

MAURICE LAMONT DAVIS; ANDRE LEVON GLOVER,

Defendants - Appellants

Appeals from the United States District Court
for the Northern District of Texas
USDC No. 3:15-CR-94-2
USDC No. 3:15-CR-94-1

ON REMAND FROM THE UNITED STATES SUPREME COURT

Before HIGGINBOTHAM, JONES, and HAYNES, Circuit Judges.

PER CURIAM:*

Appellants Andre Levon Glover and Maurice Lamont Davis were convicted for a series of robberies committed in June 2014 at Murphy Oil locations in the Dallas area. Both Appellants were convicted under the Hobbs Act, 18 U.S.C. § 1951(a), for conspiracy to interfere with and aiding and

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

abetting interference with commerce by robbery.[1] They were also convicted on firearms charges under 18 U.S.C. § 924(c).[2] Davis alone was convicted for being a felon in possession of a firearm in violation of 18 U.S.C. § 924(a)(2). In their original appeals, we affirmed the district court's judgment in full. *United States v. Davis*, 677 F. App'x 933, 935–36 (5th Cir. 2017) (per curiam). The Appellants petitioned the Supreme Court for certiorari. Following its decision in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), the Court remanded this case to our court "for further consideration in light of" *Dimaya*. *Davis v. United States*, 138 S. Ct. 1979, 1979–80 (2018) (mem.).

On remand, we affirmed the Appellants' convictions and sentences on all counts save Count Two. *United States v. Davis*, 903 F.3d 483, 486 (5th Cir. 2018). Finding the residual clause of 18 U.S.C. § 924(c) unconstitutionally vague in light of *Dimaya*, we vacated the Appellants' convictions and sentences on Count Two and remanded for entry of a revised judgment. *Id.* While the Appellants' petitions for rehearing were pending, the United States petitioned for certiorari on the issue of the residual clause in this context, which the Supreme Court granted. We stayed proceedings on the petitions for rehearing pending the Court's decision. The Court agreed that § 924(c)'s residual clause was unconstitutionally vague, so it affirmed our decision on the Count Two convictions. Because we had stayed the petition for rehearing pending the Court's decision, it vacated in part and remanded the case to our court to

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[1] Glover was convicted under the Hobbs Act on Counts One, Three, Four, Five, and Six; Davis was convicted on Counts One, Five, and Six.

[2] These were Counts Two and Seven, which charged the Appellants with using, carrying, and brandishing firearms during and in relation to, and possessing and brandishing firearms in furtherance of, a crime of violence. Glover's conviction on Count Seven also included aiding and abetting the brandishing of firearms. Our original ruling that the conviction on Count Seven remains valid following *Dimaya* because it involved a crime of violence under the elements clause which was not altered. *See* 903 F.3d at 484-85

address in the first instance the petition for rehearing which included the issue of whether we should order a resentencing. *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019).

To summarize, we continue to affirm all convictions save Count Two which we vacate. We therefore remand for entry of a revised judgment of conviction consistent with this opinion. We deny the petition for rehearing as to the convictions. Turning to the question of resentencing, we grant the petition for rehearing in part and vacate the Appellants' sentences in full, remanding their sentences to the district court for resentencing in full.[3] *See Pepper v. United States*, 562 U.S. 476, 507 (2011) ("Because a district court's original sentencing intent may be undermined by altering one portion of the calculus, an appellate court when reversing one part of a defendant's sentence may vacate the entire sentence . . . ." (citation and internal quotation marks omitted)). We do not opine on how the district court should resentence the Appellants.

The judgment of the district court is AFFIRMED in part, VACATED in part, and REMANDED for entry of a revised judgment and for resentencing.

[3] While not dispositive, the Government concedes that a full resentencing is appropriate here.