

No. 22-3699

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**FILED**

Aug 29, 2023

DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA, )  
                                  )  
Plaintiff-Appellee,       )  
                                  )  
v.                            )  
                                  )  
JARMAINE CARTER,         )  
                                  )  
Defendant-Appellant.     )  
                                  )  
                                  )  
                                  )

**O R D E R****BEFORE:** GRIFFIN, KETHLEDGE, and THAPAR, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

**ENTERED BY ORDER OF THE COURT**

Deborah S. Hunt, Clerk

RECOMMENDED FOR PUBLICATION  
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 23a0118p.06

**UNITED STATES COURT OF APPEALS**  
FOR THE SIXTH CIRCUIT

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UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*v.*

JARMAINE CARTER,

*Defendant-Appellant.*

No. 22-3699

Appeal from the United States District Court for the Northern District of Ohio at Toledo.

No. 3:21-cr-00420-1—James R. Knepp II, District Judge.

Decided and Filed: June 2, 2023

Before: GRIFFIN, KETHLEDGE, and THAPAR, Circuit Judges.

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**COUNSEL**

**ON BRIEF:** Krysten E. Beech, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Toledo, Ohio, for Appellant. Jason Manion, UNITED STATES ATTORNEY'S OFFICE, Cleveland, Ohio, for Appellee.

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**OPINION**

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THAPAR, Circuit Judge. Jarmaine Carter pled guilty to illegally possessing a firearm. Because Carter had been convicted of robbery, the district court enhanced Carter's sentencing range. On appeal, Carter argues the enhancement was improper because robbery isn't a crime of violence. We disagree and affirm.

## I.

After drunkenly beating his wife and threatening to shoot her with a handgun, Carter pled guilty to possessing a firearm as a felon. *See* 18 U.S.C. §§ 922(g)(1), 924(a)(2). This wasn't Carter's first time in court. He'd already been convicted of felony robbery under Ohio law. *See* Ohio Rev. Code § 2911.02(A)(2) ("Ohio robbery"). And at sentencing for the felon-in-possession offense, the district court held that Ohio robbery is a crime of violence. On that basis, it calculated an enhanced Guidelines range of 37–46 months' imprisonment. *See* U.S.S.G. § 2K2.1(a)(4)(A); *id.* § 4B1.2. Considering the harm Carter caused his wife, the district court suggested the sentence would've been the same even without the enhancement.<sup>1</sup> Ultimately, the court sentenced Carter to 38 months' imprisonment.

## II.

On appeal, Carter argues that Ohio robbery is not a crime of violence. We disagree.

The United States Sentencing Guidelines provide for an enhanced sentencing range if a defendant has been convicted of "a crime of violence." *Id.* § 2K2.1(a)(4)(A). The Guidelines list certain crimes that qualify. *Id.* § 4B1.2(a)(2). That list includes robbery and extortion. *Id.*

At first blush, then, our task seems simple: we merely ask whether Carter's conduct satisfies the elements of any enumerated crime of violence. But we're bound to use the "categorical approach." *United States v. Camp*, 903 F.3d 594, 599 (6th Cir. 2018). That means we must ignore the actual facts of Carter's robbery offense and instead decide whether the elements of Ohio robbery are "the same as, or narrower than" the elements of a Guidelines offense. *See Descamps v. United States*, 570 U.S. 254, 257 (2013). If some hypothetical defendant can violate the Ohio robbery law without meeting the elements of a Guidelines-enumerated offense, Carter's robbery offense isn't a crime of violence. *See United States v.*

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<sup>1</sup>We've invoked the harmless-error doctrine when a district court says it would impose the same sentence with or without an enhancement. *E.g.*, *United States v. Morrison*, 852 F.3d 488, 491 (6th Cir. 2017). Here, at times, the district court suggested Carter's sentence might've been the same even if robbery weren't a crime of violence. But the district court also made other, more equivocal statements. *See, e.g.*, R. 35, Pg. ID 280 (stating the sentence would not be "significantly different"); *id.* at 271 ("I would have *almost* certainly varied upward." (emphasis added)). Thus, we can't say "*with certainty*" that the sentence would've been the same without the enhancement. *United States v. Gillis*, 592 F.3d 696, 699 (6th Cir. 2009) (citation omitted).

*Yates*, 866 F.3d 723, 734 (6th Cir. 2017). That’s true even if Carter’s conduct did meet those elements. *See id.* at 728.

Making matters more difficult, the Guidelines don’t define “robbery.” So, to apply the categorical approach to robbery, we would have to construct the elements of “generic” robbery and compare Ohio’s statute to that made-up offense. *Id.* at 732–33. That would require us to mull through a host of robbery laws, decide which of their various elements should be included in a “generic” definition of robbery, and then analyze all the hypothetical ways a defendant could violate that generic offense. *See United States v. Burris*, 912 F.3d 386, 409 (6th Cir. 2019) (en banc) (Thapar, J., concurring).

Luckily, there’s a simpler way to resolve this case. We’ve previously considered whether a robbery offense is a categorical match for Guidelines extortion. *Camp*, 903 F.3d at 600. And because the Guidelines define “extortion,” we apply that definition rather than constructing our own. *Id.* at 602. Under the Guidelines, extortion is “obtaining something of value from another” by wrongfully using “force, fear of physical injury, or threat of physical injury.” U.S.S.G. § 4B1.2 cmt. n.1 (cleaned up). Ohio robbery categorically matches that definition.

#### A.

The Ohio robbery statute contains three divisible subsections. Ohio Rev. Code § 2911.02(A); *see United States v. Butts*, 40 F.4th 766, 770 (6th Cir. 2022). Carter was convicted under Section (A)(2), which provides that “[n]o person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall . . . [i]nflict, attempt to inflict, or threaten to inflict physical harm on another.” Ohio Rev. Code § 2911.02(A)(2). We count four elements: (1) theft or attempted theft and (2) physically harming, attempting to harm, or threatening to harm (3) another person (4) during the theft or attempted theft. These elements are the same as, or narrower than, the elements of Guidelines extortion. We address each in turn.

*Theft.* The first element of Ohio robbery—theft or attempted theft—is narrower than the corresponding requirement in the Guidelines. The Guidelines require that an extortionist “obtain[] something of value from another,” which is satisfied when an offender gains control over the object. U.S.S.G. § 4B1.2 cmt. n.1; *Scheidler v. Nat’l Org. for Women, Inc.*, 537 U.S.

393, 405 (2003). Ohio's theft statute has the same requirement: an individual must "obtain or exert control over . . . property or services." Ohio Rev. Code § 2913.02(A) (defining theft). Of course, an individual can commit Ohio robbery by merely "attempting" a theft offense. Ohio Rev. Code § 2911.02(A)(2). But the same is true under the Guidelines: crimes of violence "include the offenses of aiding and abetting, conspiring, and *attempting* to commit such offenses." U.S.S.G. § 4B1.2 cmt. n.1 (emphasis added).

Ohio's first element has additional requirements that the Guidelines lack. Unlike the Guidelines, Ohio theft requires an individual to have "knowingly" obtained property "with [the] purpose to deprive the owner of property." Ohio Rev. Code § 2913.02(A). And Ohio theft is complete only if an individual acts without consent or by deception, threat, or intimidation. *Id.* Because it circumscribes less conduct, the first element of Ohio robbery is narrower than the Guidelines' extortion elements. It's not possible for a defendant to commit the first element of Ohio robbery without meeting the corresponding element of Guidelines extortion.

*Physical Harm.* The second element of Ohio robbery is the same as the corresponding element in the Guidelines. Ohio law requires an individual to "[i]nflict, attempt to inflict, or threaten to inflict physical harm." Ohio Rev. Code § 2911.02(A)(2). So do the Guidelines. They require "force, fear of physical injury, or threat of physical injury." U.S.S.G. § 4B1.2 cmt. n.1 (cleaned up). The only difference is that Ohio robbery expressly lists "attempt" to inflict physical harm. But again, the Guidelines cover attempts. *Id.*

*On Another.* The third element of Ohio robbery is that the "person" must inflict harm "on another." See Ohio Rev. Code § 2911.02(A)(2). The Guidelines don't specify whether the physical-injury requirement is satisfied by injury to property. U.S.S.G. § 4B1.2 cmt. n.1. Several circuits have interpreted "physical injury" to mean injury "against the person of another." *United States v. Chappelle*, 41 F.4th 102, 111 (2d Cir. 2022); *United States v. Scott*, 14 F.4th 190, 197 (3d Cir. 2022); *United States v. Edling*, 895 F.3d 1153, 1157 (9th Cir. 2018); *United States v. O'Connor*, 874 F.3d 1147, 1157–58 (10th Cir. 2017). But whether or not we accept these circuits' gloss, Ohio's version of this element is still the same or narrower. If the Guidelines require harm to another individual, the elements are the same. And if not, the

Guidelines extend beyond Ohio robbery. Either way, Ohio robbery isn’t broader than Guidelines extortion.

*During or Immediately After.* The final element of Ohio robbery requires the physical harm to occur during theft or while “fleeing immediately after.” Ohio Rev. Code § 2911.02(A)(2). Here, “immediately after” means without “any delay or lapse of time” between theft and flight. *State v. Thomas*, 832 N.E.2d 1190, 1192 (Ohio 2005). The Guidelines’ definition doesn’t list any concurrence requirement. *See* U.S.S.G. § 4B1.2 cmt. n.1. Thus, if the Guidelines differ from Ohio robbery on this element, the Guidelines are broader than Ohio robbery.

In sum, the elements of Ohio robbery are “the same as, or narrower than,” the Guidelines’ elements of extortion. *See Camp*, 903 F.3d at 600 (citation omitted).

## B.

Carter doesn’t dispute that his Ohio robbery offense is a categorical match for extortion. Instead, he argues we can’t compare his robbery charge to Guidelines extortion. Because the crime he was convicted of is called robbery, he says, we can compare it only to Guidelines robbery. We disagree.

For one, Carter’s argument conflicts with circuit precedent. We’ve elsewhere analyzed whether Hobbs Act robbery—which is also called robbery—matches extortion. *Id.* at 602 (“[W]e must next determine whether Hobbs Act robbery is a categorical match with the enumerated offense of extortion.”). For another, Carter’s argument conflicts with the Guidelines’ text, which says “any” offense matching an enumerated offense is a crime of violence. U.S.S.G. § 4B1.2(a). The Guidelines thus don’t require that the state crime share the same name as the enumerated offense. *See id.* Several of our sister circuits have come to the same conclusion, stating it’s possible for a robbery law to categorically match Guidelines extortion. *Chappelle*, 41 F.4th at 110–11; *Scott*, 14 F.4th at 196–97; *Edling*, 895 F.3d at 1157; *O’Connor*, 874 F.3d at 1155–58.

No. 22-3699

*United States v. Carter*

Page 6

In response, Carter points to our decision in *United States v. Rede-Mendez*, 680 F.3d 552, 556 (6th Cir. 2012), in which we said the offense of conviction must fall within the generic definition of “that” crime. But that statement is dicta—*Rede-Mendez* didn’t consider whether a crime could be a categorical match for an enumerated offense of a different name, so nothing turned on the statement Carter cites. *See id.* Thus, we’re not bound by it. *Wright v. Spaulding*, 939 F.3d 695, 701 (6th Cir. 2019). And even if we were, *Rede-Mendez* cuts against Carter’s argument. Just one line before the statement cited by Carter, we cautioned against overemphasizing the label of the crime: a crime doesn’t qualify as a crime of violence “just because it has the same name as one of the enumerated offenses.” 680 F.3d at 556. Carter’s out-of-context dicta isn’t enough to overcome the text of the Guidelines and binding circuit precedent.

\* \* \*

We affirm.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA

v.

JARMAINE CARTER

**JUDGMENT IN A CRIMINAL CASE**

§

§

§

§ Case Number: 3:21-CR-00420-JRK(1)

§ USM Number: 65397-509

§ **Donna M. Grill**

§ Defendant's Attorney

The Defendant pleaded guilty to Count One (1) of the Indictment on 12/14/2021.

Accordingly, the Defendant is adjudicated guilty of the following offense:

<u>Title &amp; Section / Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18:922(g)(1) and 924(a)(2) Felon In Possession of a Firearm	04/21/2021	1

The Defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the Defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the Defendant must notify the court and United States attorney of material changes in economic circumstances.

August 11, 2022

\_\_\_\_\_  
Date of Imposition of Judgment

s/ James R. Knepp II

\_\_\_\_\_  
Signature of Judge

James R. Knepp II, U.S. District Judge

\_\_\_\_\_  
Name and Title of Judge

August 11, 2022

\_\_\_\_\_  
Date

DEFENDANT: JARMAINE CARTER  
CASE NUMBER: 3:21-CR-00420-JRK(1)

## IMPRISONMENT

The Defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **THIRTY-EIGHT (38) MONTHS as to Count One (1) of the Indictment.**

The Court makes the following recommendations to the Bureau of Prisons:

1. The Defendant be considered for enrollment in the Residential Drug Abuse Program (RDAP), or in the alternative, any program for alcohol and/or substance abuse treatment.
2. The Defendant be designated to a facility as close to Northwest Ohio as possible.

The Defendant is remanded to the custody of the United States Marshal.

## RETURN

I have executed this judgment as follows:

Defendant delivered on \_\_\_\_\_ to

at \_\_\_\_\_, with a certified copy of this judgment.

United States Marshal

By  
Deputy United States Marshal

DEFENDANT: JARMAINE CARTER  
CASE NUMBER: 3:21-CR-00420-JRK(1)

## **SUPERVISED RELEASE**

Upon release from imprisonment, the Defendant shall be placed on supervised release for a term of THREE (3) YEARS.

While on supervision, the Defendant must comply with the Mandatory and Standard Conditions that have been adopted by this Court, as well as with any other conditions on the attached pages.

### **MANDATORY CONDITIONS**

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance.
  - You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the Court. *(applicable if checked)*
  - Based on the Court's determination that you pose a low risk of future substance abuse, the above drug testing condition is suspended. *(applicable if checked)*
4.  You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(applicable if checked)*
5.  You must cooperate in the collection of DNA as directed by the probation officer. *(applicable if checked)*
6.  You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(applicable if checked)*
7.  You must participate in an approved program for domestic violence. *(applicable if checked)*

### **STANDARD CONDITIONS**

These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the Court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.

DEFENDANT: JARMAINE CARTER  
CASE NUMBER: 3:21-CR-00420-JRK(1)

2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

DEFENDANT: JARMAINE CARTER  
CASE NUMBER: 3:21-CR-00420-JRK(1)

## SPECIAL CONDITIONS OF SUPERVISION

### Substance Abuse Treatment and Testing

You shall participate in an approved program of substance abuse testing and/or outpatient or inpatient substance abuse treatment as directed by their supervising officer; and abide by the rules of the treatment program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.). You shall not obstruct or attempt to obstruct or tamper, in any fashion, with the efficiency and accuracy of any prohibited substance testing.

### Mental Health Treatment

You must undergo a mental health evaluation and/or participate in a mental health treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program (provider, location, modality, duration, intensity, etc.).

### Mental Health Medications

You must take all mental health medications that are prescribed by your treating physician.

### Alcohol Restriction

You must not use or possess alcohol.

### Cognitive Behavioral Treatment / Reentry Court

You will be evaluated for participation in a cognitive-behavioral treatment / reentry court program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.).

### Search / Seizure

You must submit your person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. The probation officer may conduct a search under this condition only when reasonable suspicion exists that you have violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

### U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: [www.uscourts.gov](http://www.uscourts.gov).

Defendant's Signature \_\_\_\_\_

Date \_\_\_\_\_

DEFENDANT: JARMAINE CARTER  
 CASE NUMBER: 3:21-CR-00420-JRK(1)

## CRIMINAL MONETARY PENALTIES

The Defendant must pay the total criminal monetary penalties:

	<u>Assessment</u> <i>\$100 per each Count of conviction</i>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
<b>TOTALS</b>	\$100.00	\$.00	\$.00	<i>Not Applicable</i>	<i>Not Applicable</i>

## SCHEDULE OF PAYMENTS

The Defendant shall pay to the United States a special assessment of \$100.00 (one hundred dollars) as to Count One (1) of the Indictment, which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court, 1716 Spielbusch Avenue, Room 114, Toledo, Ohio 43604.

The Court determines that the Defendant does not have the ability to pay a fine and the Court waives the imposition of a fine in this case.

The Defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA Assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

## FORFEITURE

The Defendant shall forfeit the Defendant's interest in the following property to the United States:

**FN Sasilmax, model SAR-9x 9mm handgun, bearing serial number T1102-19BV03857, with ammunition**