APPENDIX A

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Case No. 22-3958

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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KELLY L. STEPHENS, Clerk

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KENNETH JACKSON JR., Defendant-Appellant.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO O P I N I O N

Before: BATCHELDER, MOORE, and BUSH, Circuit Judges.

BUSH, J., delivered the opinion of the court in which BATCHELDER, J., joined in full, and MOORE, J., joined in part. MOORE, J. (pp. 12–20), delivered a separate opinion dissenting from Part II.A. of the majority opinion.

JOHN K. BUSH, Circuit Judge. Kenneth Jackson Jr. has appealed his sentence to this court for the third time. In his first appeal, we held that Jackson's convictions for completed carjacking were crimes of violence under 18 U.S.C. § 924(c). However, we remanded his case to the district court after vacating one of his firearms convictions. In his second appeal, we held that the district court erred in applying revised penalties under the First Step Act of 2018 to his § 924(c) convictions because the relevant provision of the Act did not apply retroactively to a defendant who had already been sentenced. Now, Jackson asks us to reconsider the same two questions that we previously addressed: namely, whether carjacking is a crime of violence under § 924(c) and whether the district court should have applied the First Step Act's revised penalties at his second

resentencing hearing. Because we see no reason to disturb our prior holdings, we deny Jackson's claims and affirm the judgment of the district court.

I.

In 2017, a jury convicted Jackson of three counts of carjacking under 18 U.S.C. § 2119(2) and three counts of brandishing a firearm during a crime of violence under 18 U.S.C. § 924(c)(1)(A)(ii). *United States v. Jackson*, 918 F.3d 467, 471 (6th Cir. 2019) (*Jackson I*). At the time Jackson was initially sentenced, § 924(c) required a mandatory sentence of twenty-five years for any subsequent violations of the statute, even if those violations occurred in the same case. *See* § 924(c)(1)(A)(iii); *see also United States v. Davis*, 139 S. Ct. 2319, 2324 n.1 (2019). Accordingly, the district court imposed a sentence of eighty-seven months' imprisonment for Jackson's three carjacking counts and consecutive sentences of seven, twenty-five, and twenty-five years for the firearms counts. *Jackson I*, 918 F.3d at 477.

The First Step Act was enacted in December 2018. Section 403(a) of the First Step Act amended § 924(c) so that the twenty-five-year mandatory minimum would not apply unless the defendant had a prior, final conviction under the statute. First Step Act of 2018, § 403(a), Pub. L. No. 115-391, 132 Stat. 5194, 5221–5222 (Dec. 21, 2018). The statute provides that § 403(a) applies 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." *Id.* § 403(b). Three months later, this court vacated one of Jackson's § 924(c) convictions and remanded his case to the district court for resentencing. *Jackson I*, 918 F.3d at 471.

On remand, the district court applied § 403(a) and reduced Jackson's sentence to fourteen years for the two § 924(c) offenses. *United States v. Jackson*, 995 F.3d 522, 524 (6th Cir. 2021) (*Jackson II*). However, because Jackson was no longer subject to the original 57-year mandatory

minimum sentence under § 924(c), the court imposed an enhanced guidelines sentence of 108 months for his carjacking convictions. *Id.* Jackson challenged his enhanced guidelines sentence, and the government challenged the court's application of the First Step Act to Jackson's § 924(c) offenses. We held that the district court erred in applying the First Step Act at Jackson's resentencing because the plain meaning of § 403(b) provides that the statute's revised penalties do not apply to a defendant who has already been sentenced on the date the statute was enacted. More specifically, Jackson could not benefit from § 924(c)'s revised penalties because he was sentenced in August 2017—over one year before the First Step Act went into effect. The fact that Jackson's sentence was subsequently vacated did not affect our conclusion. We explained that although the vacatur provided the "prospective legal effect" of invalidating Jackson's prior sentence "looking forward," it did not "erase Jackson's prior sentence from history" such that a sentence had never been imposed. *Jackson II*, 995 F.3d at 525.

Prior to his second resentencing hearing, Jackson filed a sentencing memorandum asking the district court to vacate his remaining § 924(c) convictions because they did not qualify as crimes of violence under the Supreme Court's decision in *United States v. Taylor*, 142 S. Ct. 2015 (2022). The district court rejected his argument and, applying penalties under the version of § 924(c) that pre-dates the First Step Act, imposed a sentence of twelve months on the carjacking counts and consecutive seven and twenty-five-year sentences on his remaining § 924(c) offenses. Jackson then filed this appeal.

Jackson now raises two arguments on appeal that he previously raised in his prior appeals. First, Jackson claims that the district court erred in failing to apply the First Step Act at his resentencing hearing. Second, Jackson asserts that his completed carjacking convictions do not

qualify as crimes of violence following the Supreme Court's decisions in *Taylor*, 142 S. Ct. 2015, and *Borden v. United States*, 141 S. Ct. 1817 (2021).

We addressed both of Jackson's arguments in his prior appeals, and he has not presented any legal or factual change that would disturb our prior conclusions. Accordingly, we adhere to our previous rulings and affirm the judgment of the district court.

II.

A. WHETHER THE DISTRICT COURT ERRED IN NOT APPLYING THE FIRST STEP ACT AT RESENTENCING

Jackson first argues that the district court erred by failing to apply the First Step Act at resentencing, explaining that he should have benefitted from the Act's revised penalties under § 403(b) because his sentence had been vacated after the statute's date of enactment. Jackson claims that the effect of the vacatur made his sentence a legal nullity, such that "a sentence had not been imposed" in his case at the time of his resentencing. First Step Act of 2018, § 403(b). In addition, Jackson argues that the district court could have applied the First Step Act at resentencing because of the Supreme Court's holding in *Concepcion v. United States*, 142 S. Ct. 2389 (2022). There, the Court held that district courts may consider intervening changes in the law when resentencing a defendant under § 404 of the First Step Act. We review de novo whether Jackson is entitled to relief under the First Step Act.

The United States contends that Jackson's argument is precluded by the law-of-the-case-doctrine, which "promotes judicial efficiency by prohibiting parties from indefinitely relitigating the same issue that a court resolved in an earlier part of the case." *Samons v. Nat'l Mines Corp.*, 25 F.4th 455, 463 (6th Cir. 2022); *United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir. 1994) ("Under the doctrine of law of the case, findings made at one point in the litigation become the law of the case for subsequent stages of that same litigation."); *see also United States v. Clark*, 225

F. App'x 376, 378–79 (6th Cir. 2007) ("Because [a prior panel of this Court has already decided this exact issue, it has become law-of-the-case and is binding upon the district court after remand and upon us in this appeal."). But we may reconsider a prior panel's ruling in three contexts: where "(1) substantially different evidence is raised on subsequent trial; (2) where a subsequent contrary view of the law is decided by the controlling authority; or (3) where a decision is clearly erroneous and would work a manifest injustice." *United States v. Haynes*, 468 F.3d 422, 426 (6th Cir. 2006) (quoting *McKenzie v. BellSouth Telecomms, Inc.*, 219 F.3d 508, 513 n.3 (6th Cir. 2000)).

Jackson has not presented any change in law or facts that would warrant reconsidering our decision in *Jackson II*. Stated differently, under any of the *Haynes* prongs, Jackson fails to establish a valid basis for us to reconsider our decision in *Jackson II*. We take each prong in turn.

As an initial matter, in considering the first prong of *Haynes*, Jackson did not present any additional evidence indicating that he was entitled to benefit from § 403 of the First Step Act at his resentencing.

As to the second prong, Jackson did not present any controlling authority that would require us to rethink our prior decision. He points to the Supreme Court's decision in *Concepcion* to support his claim, but that case involves a separate section of the First Step Act and so does not affect our holding in *Jackson II*. In *Concepcion*, the defendant was resentenced under § 404(b) of the First Step Act, which authorizes courts to apply reduced penalties under the Fair Sentencing Act of 2010 to defendants sentenced before that Act was enacted. 142 S. Ct. at 2397. However, as this court has recognized, "*Concepcion* concerned a different and unrelated provision of the First Step Act that explicitly applied retroactively." *United States v. McCall*, 56 F.4th 1048, 1061 (6th Cir. 2022). The decision did not address whether § 403—the provision at issue in this case—

applies to a defendant who has already been sentenced. As such, *Concepcion* has no bearing on the outcome of Jackson's appeal.

Additionally, Jackson has not presented any decisions from our circuit that would require us to reconsider our holding in *Jackson II*. The United States cites *United States v. Carpenter*, in which another panel of this court followed *Jackson II* in declining to apply § 403 of the First Step Act to a defendant who was "under sentence pending appeal" at the time the Act went into effect. No. 22-1198, 2023 WL 3200321, at *2 (6th Cir. May 2, 2023) (citing *Jackson II*, 995 F.3d at 525). Like in *Jackson II*, the court in *Carpenter* held that the First Step Act's amendments did not apply at resentencing because the defendant's initial sentence was imposed before enactment of the First Step Act and vacated "after the Act became law." *Id.* at *2.

Moreover, the *Carpenter* court explained that its decision did not conflict with our prior holding in *United States v. Henry*, 983 F.3d 214 (6th Cir. 2020). In *Henry*, we held that § 403 applied to a defendant at resentencing when the defendant's sentence had been vacated *before* the date of the First Step Act's enactment. *Id.* at 217. By contrast, Carpenter's sentence was vacated *after* the statute was enacted. *Carpenter*, 2023 WL 3200321, at *2. Accordingly, Carpenter was not entitled to relief at resentencing under the plain meaning of § 403(b), because a sentence "had been imposed" in his case—albeit not a final sentence.

Because Jackson has not cited any controlling authority that contradicts our panel's prior decision, we are bound by that decision in the instant appeal. *See, e.g.*, *Rutherford v. Columbia Gas*, 575 F.3d 616, 619 (6th Cir. 2009) ("A published prior panel decision 'remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification

of the decision or this Court sitting en banc overrules the prior decision.'") (quoting *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)).

Finally, under the third *Haynes* prong, Jackson has not demonstrated that our prior decision was "clearly erroneous and would work a manifest injustice." *Haynes*, 468 F.3d at 426. We note that an inter-circuit split exists over the proper interpretation of § 403(b)'s retroactivity provision. *See, e.g.*, *Jackson II*, 995 F.3d at 525-26. Also, there is disagreement among jurists in some circuits that have addressed the issue. *Compare, e.g.*, *United States v. Carpenter*, 2023 WL 6053553, at *1–3 (6th Cir. Sept. 18, 2023) (Kethledge, J., concurring in denial of rehearing en banc) (concluding that § 403 of the First Step Act did not apply to a defendant who was "under sentence pending appeal" at the time the Act went into effect) (citation omitted) *and United States v. Uriate*, 975 F.3d 596, 606–09 (7th Cir. 2020) (Barrett, J., dissenting) (same) *with, e.g.*, *Carpenter*, 2023 WL 6053553, at *3–5 (Griffin, J., dissenting from denial of rehearing en banc) (concluding that § 403 of the First Step Act did apply in those circumstances) *and Uriate*, 975 F.3d at 596 (en banc) (same). But the mere lack of consensus between judges on an issue is not enough to show clear error or manifest injustice. To the contrary, a circuit split is "good evidence that the issue is subject to reasonable dispute." *United States v. Al-Maliki*, 787 F.3d 784, 794 (6th Cir. 2015) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)).

Jackson has failed to demonstrate that reconsideration of *Jackson II* would be justified under any of the *Haynes* factors. Accordingly, the district court did not err in declining to apply § 403 of the First Step Act at Jackson's resentencing.

B. WHETHER COMPLETED CARJACKING CONSTITUTES A CRIME OF VIOLENCE

Next, Jackson claims that the district court erred when it found that his completed carjacking convictions qualify as crimes of violence under 18 U.S.C. § 924(c). "[W]e review de

novo a district court's determination that a prior conviction is a crime of violence." *United States v. Denson*, 728 F.3d 603, 607 (6th Cir. 2013).

Jackson was sentenced under 18 U.S.C. § 924(c)(1)(A), which provides for enhanced mandatory minimums for any person who "during and in relation to any crime of violence or drug trafficking crime . . . 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 . . . ." The statute defines a "crime of violence" as a felony that, under the elements clause, "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or that, under the residual clause, "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)(A), (B). The Supreme Court held in *Davis*, 139 S. Ct. at 2336, that the residual clause is unconstitutionally vague. Accordingly, we analyze Jackson's carjacking convictions under the elements clause to determine whether the offenses contain the use of force as an element. And using a categorical approach, we look not to whether Jackson used force in committing the crimes, but whether the statute always requires the government to prove that he used, or threatened to use, force. *Taylor*, 142 S. Ct. at 2020 (noting that categorical approach "does not require—in fact, it precludes—an inquiry into how any particular defendant may commit the crime").

Based on this standard carjacking is a crime of violence under the elements clause. *Jackson I*, 918 F.3d at 486. A person is guilty of carjacking under 18 U.S.C. § 2119 when, "with the intent to cause death or serious bodily harm," he "takes a motor vehicle . . . from the person or presence of another by force and violence or by intimidation." More specifically, the requirement that a vehicle be taken "by force and violence" or by "intimidation" requires proof that the person used,

or threatened to use, force. *See Jackson I*, 918 F.3d at 486 ("[T]he commission of carjacking by 'intimidation' necessarily involves the threatened use of violent physical force."); *see also Wingate v. United States*, 969 F.3d 251, 263–64 (6th Cir. 2020) (holding that bank robbery under 18 U.S.C. § 2113(a), which may be committed "by force and violence, or by intimidation" qualifies as a crime of violence under the elements clause). And as we noted in *Jackson I*, the statutory requirement that the defendant commit the offense "with the intent to cause death or serious bodily injury," 918 F.3d at 486, further confirms that carjacking is a crime of violence under § 924(c)(3)(A).

Taylor does not change our analysis. There, the Supreme Court considered whether attempted Hobbs Act robbery satisfies the elements clause. To convict a defendant for attempted Hobbs Act robbery, the government must prove that "(1) [t]he defendant intended to unlawfully take or obtain personal property by means of actual or threatened force, and (2) he completed a 'substantial step' toward that end." *Taylor*, 142 S. Ct. at 2020. The Court held that the attempt crime could not serve as a predicate offense under § 924(c)(3) because the statute does not require proof that the defendant "actually harm[ed] anyone or even threaten[ed] harm." *Id.* (citing ALI, Model Penal Code § 222.1). Instead, because the statute prohibits the intent to take property by use or threat, "along with a substantial step toward achieving that object," the Court determined that a defendant could be convicted of the crime without using or threatening to use force. *Id.* at 2020.

By contrast, Jackson was charged with completed carjacking, which requires that he actually used force or intimidation to accomplish his goal. The *Taylor* Court's concern that a defendant may be convicted of attempted robbery for conduct occurring "before he reaches his

robbery victim and before he has actually engaged in threatening conduct" therefore does not apply here. *Id.* at 2020–21 (citing ALI, Model Penal Code § 222.1, p. 114 (1980)).

But Jackson raises another argument. For the first time on appeal, he argues that his carjacking convictions do not qualify as crimes of violence under § 924(c) following *Borden*, 141 S. Ct. 1817. In *Borden*, the Supreme Court held that for an offense to qualify as a "violent felony" under the elements clause of the Armed Career Criminal Act (ACCA), the statute of conviction must require that the defendant acted with a mens rea greater than recklessness. 141 S. Ct. at 1825. Jackson claims that his carjacking convictions do not have a sufficiently culpable mens rea to qualify as crimes of violence because a defendant may be convicted for reckless carjacking under § 2119. Jackson waived his *Borden* claim by failing to raise it during a prior appeal, *see United States v. Adesida*, 129 F.3d 846, 850 (6th Cir. 1997). In any event, it would fail on the merits.

In *United States v. Brown*, the Seventh Circuit determined whether a defendant's conviction for "[taking] a motor vehicle from [a] person . . . by the use of force or by threatening the imminent use of force" qualified as a predicate offense under the elements clause of the ACCA. 74 F.4th 527, 529 (7th Cir. 2023). The court found that the statute of conviction survived under *Borden* because it prohibited a "taking *by* the use or threat of force," which "strongly suggests that force or intimidation must be aimed or directed at the taking of the motor vehicle." *Id.* at 531. Because the statute proscribed using force for a specific purpose—"in order to facilitate the taking of a vehicle"—it was "not the sort of reckless use of force that *Borden* found to be beyond the scope of the elements clause." *Id.*

Like in *Brown*, Jackson's statute of conviction proscribes using force to facilitate the taking of a motor vehicle, which "is, by its nature, a conscious and deliberate action." *Id.*; *see* 18 U.S.C. § 2119. Moreover, the federal carjacking statute expressly provides that to be convicted of

carjacking, a defendant must act "with the intent to cause death or serious bodily injury." 18 U.S.C. § 2119. That specific intent provision requires that the perpetrator "direct his action at, or target, another individual," and satisfies *Borden*'s requirement of a purposeful or knowing mens rea. 141 S. Ct. at 1825. The district court therefore properly found that Jackson's convictions for completed carjacking qualify as predicate offenses under § 924(c)(3)(A).

III.

For the above reasons, we affirm the judgment of the district court.

KAREN NELSON MOORE, Circuit Judge, concurring in part and dissenting in part. The majority concludes that there is no basis to reconsider our prior decisions in *United States v. Jackson*, 918 F.3d 467 (6th Cir. 2019) (*Jackson I*), and *United States v. Jackson*, 995 F.3d 522 (6th Cir. 2021) (*Jackson II*). Although I agree with the majority that there is no reason to disturb *Jackson I*, I would hold that *Jackson II* was clearly erroneous and would work a manifest injustice because it disregards basic rules of grammar and statutory interpretation, conflicts with every other circuit to address the issue, and imposes draconian punishment on defendants, such as Jackson, despite Congress's clear directive to end such practices. I therefore respectfully dissent from Part II.A of the majority opinion.

"Under the law-of-the-case doctrine, a prior ruling may only be reconsidered where: '(1) substantially different evidence is raised on subsequent trial; (2) where a subsequent contrary view of the law is decided by the controlling authority; or (3) where a decision is clearly erroneous and would work a manifest injustice.'" *United States v. Haynes*, 468 F.3d 422, 426 (6th Cir. 2006) (quoting *McKenzie v. BellSouth Telecomms., Inc.*, 219 F.3d 508, 513 n.3 (6th Cir. 2000)). Because I would hold that *Jackson II* is clearly erroneous and would work a manifest injustice, I will not address the first or second *Haynes* factors.

Jackson II concluded that First Step Act § 403 did not apply at Jackson's plenary resentencing because his pre-Act sentence was vacated after the First Step Act was enacted. 995 F.3d at 523–24. For the reasons explained below, *Jackson II* cannot be squared with the plain language of the First Step Act.

First, and foundationally, to support its conclusion in *Jackson II*, the majority rewrote the plain language of the statute. First Step Act § 403 "shall apply to any offense that was committed before the date of enactment [of the First Step Act], if a sentence for the offense has not been

imposed as of such date of enactment." First Step Act of 2018, § 403(b), Pub. L. No. 115-391, 132 Stat. 5194, 5221–5222 (Dec. 21, 2018). I will focus first on the phrase "has . . . been imposed,"[1] which *Jackson II* correctly identified as a phrase that is written in the present-perfect tense. 995 F.3d at 524. "The present-perfect tense is formed by using *have* or *has* with the principal verb's past participle" and "denotes an act, state, or condition that is now completed or continues up to the present." THE CHICAGO MANUAL OF STYLE ¶ 5.132 (17th ed. 2017). "The present perfect is distinguished from the past tense because it refers to (1) a time in the indefinite past . . . or (2) a past action that comes up to and touches the present." *Id.*

A sentence that has been vacated cannot be considered a sentence that "has been imposed." Specifically, a sentence that has since been vacated cannot fall within the first category from *The Chicago Manual* because that sentence was imposed for a definite period of time, as opposed to "a time in the indefinite past." THE CHICAGO MANUAL OF STYLE ¶ 5.132. Stated another way, Jackson had a sentence imposed from the date of his sentencing until the date of its vacatur. This is a definitive time period because there are specifics dates associated with the date of sentencing and the date of vacatur. Likewise, a sentence that has been vacated does not fit within the second category because the sentence does not "come[] up to and touch[] the present." *Id.* Even *Jackson II* recognized this reality: when a sentence is vacated "it is of no legal effect anymore" because "eliminating a sentence's prospective legal effect . . . wipe[s] the slate clean looking forward." 995 F.3d at 525 (citations and quotation marks omitted).[2] A sentence that has been vacated cannot

[1]The statute uses the phrase in the negative—has not been imposed—but courts tend to consider whether a particular defendant does not qualify for relief under the Act because a sentence "ha[s] been imposed." *See, e.g.*, *Jackson II*, 995 F.3d at 523. For ease of reference, I will use the phrase "has been imposed."

[2]To be clear, as I previously explained, the *Jackson II* majority's conclusion that vacatur is forward looking is incorrect. *See Jackson II*, 995 F.3d at 527 (Moore, J., dissenting). But, even under *Jackson II*'s incorrect view of vacatur, its analysis fails.

be captured by the phrase "has . . . been imposed" because, once vacated, the slate is wiped clean looking forward. *See Citizens State Bank v. U.S. ex rel. I.R.S.*, 932 F.2d 490, 493 (6th Cir. 1991) (per curiam) (explaining that Congress's decision to use the present-perfect tense, as opposed to past-perfect, "suggests that Congress intended to cover only those security interests which exist presently").

Rather than analyze the statute as written, *Jackson II*, under the guise of simply looking to the statutory text, rewrote § 403(b) from "has . . . been imposed" to "had been imposed."[3] *See Jackson II*, 995 F.3d at 524 ("Our task begins with the statutory text. When, as here, the text is clear, it ends there as well." (citations omitted)). Indeed, *Jackson II* all but says so itself. Although it correctly quoted the statute and defined the phrase "has . . . been imposed" as the present-perfect tense, *Jackson II* repeatedly and exclusively used the phrase "had been imposed" to describe the purportedly relevant inquiry under § 403(b). *See* 995 F.3d at 523 ("As of that day, a sentence *had been imposed* on Kenneth Jackson, Jr." (emphasis added)); *id.* 524–25 ("We must look at Jackson's status as of December 21, 2018 and ask whether—at that point—a sentence *had been imposed* on him." (emphasis added)); *id.* at 525 ("That Jackson was without a sentence for three months in 2019 does not change the fact that as of December 21, 2018, a sentence *had been imposed* on him." (emphasis added)); *id.* at 526 ("Here, the First Step Act did so expressly provide—but only for defendants on whom a sentence *had not been imposed* as of December 21, 2018." (emphasis added)). At bottom, *Jackson II* amounts to a bait-and-switch in which the majority invoked the applicable grammatical rule but then conducted an analysis based on a phrase that is not in the statute and does not fall within that grammatical rule. Rather than interpret the statute as written,

[3]"Had been imposed" is in the past-perfect tense, which "is formed by using *had* with the principal verb's past participle" and "refers to an act, state, or condition that was completed before another specified or implicit past time or past action." THE CHICAGO MANUAL OF STYLE ¶ 5.133.

Jackson II rewrote the provision to support the outcome that it desired. The reasoning in *Jackson II* rests entirely on this rewrite and, for that reason, it cannot stand.

Once the phrase "has . . . been imposed" is properly understood, the interpretation of "a sentence" becomes clear. Although *Jackson II* concludes that "a sentence" must refer to *any* sentence, even a vacated one, 995 F.3d at 524, Congress's use of the present-perfect tense instructs otherwise. "[A] sentence" is the object of the present-perfect verb "has . . . been imposed." First Step Act § 403(b). If the sentence is of no legal effect as of the date it was vacated, *see Jackson II*, 995 F.3d at 525, it can no longer be considered "a sentence" that "has . . . been imposed," First Step Act § 403(b); instead, once vacated, it is a sentence that had been imposed. Put another way, as the government explained in *United States v. Carpenter*, "it would not be coherent to say 'a sentence has been imposed as of 20[18], but it has since been vacated.' Instead, an ordinary speaker of English would say 'a sentence *had* been imposed as of 20[18], but it has since been vacated.'" Gov. Resp. to Pet. for Rehr'g at 9, *United States v. Carpenter*, No. 22-1198 (6th Cir. Aug. 7, 2023), D. 34 (emphasis added).

Moreover, we must "assume[] [that] Congress is well aware of the background principle[s] when it enacts new criminal statutes." *Dorsey v. United States*, 567 U.S. 260, 274 (2012). "A general remand [for resentencing] effectively wipes the slate clean," and "gives the district court authority to redo the entire sentencing process." *United States v. McFalls*, 675 F.3d 599, 606 (6th Cir. 2012); *see also Pepper v. United States*, 562 U.S. 476, 507 (2011) (stating that vacatur "wipe[s] the slate clean"); *Jordon v. Gilligan*, 500 F.2d 701, 710 (6th Cir. 1974) ("[A] void judgment is no judgment at all and is without legal effect."). We should not lightly put courts "in the unusual position of giving effect to legal judgments [that have been] vacated." *Jackson II*, 995

F.3d at 527 (Moore, J., dissenting) (quoting *United States v. Henry*, 983 F.3d 213, 223 (6th Cir. 2020)).

By changing the language of the statute in its analysis, *Jackson II* attempted to bypass the fact that the plain text of the statute—specifically the use of the present-perfect tense, as described above—is consistent with the background principles of vacatur and resentencing and, thus, supports their application. *See* 995 F.3d at 525 (reasoning that vacatur law is irrelevant because it is forward looking and, therefore, "does not change the fact that as of December 21, 2018, a sentence had been imposed on [Jackson]"). A post-Act resentencing court should not be in the position of giving effect to a vacated sentence unless Congress makes clear that the typical background principles do not apply. There is no such instruction in § 403. If Congress intended for the typical principles of vacatur and resentencing not to apply, it could have easily said so by changing "has" to "had," or, as other courts have suggested, by using "initial sentence" as opposed to "a sentence." *See United States v. Bethea*, 841 F. App'x 544, 549 (4th Cir. 2021); *see also Advocate Health Care Network v. Stapleton*, 581 U.S. 468, 477 (2017) ("When legislators did not adopt 'obvious alternative' language, 'the natural implication is that they did not intend' the alternative" (quoting *Lozano v. Montoya Alvarez*, 572 U.S. 1, 16 (2014))). Congress did not displace the well-settled principles of vacatur and resentencing, and this court is therefore not free to ignore them.

With a corrected understanding of the phrases "has . . . been imposed" and "a sentence," the remainder of *Jackson II*'s reasoning collapses on itself. First, *United States v. Henry* is directly applicable, and *United States v. Richardson* is distinguishable. Not only does *Jackson II* "adopt[] a reading of the text that we rejected in *Henry*," *Jackson II*, 995 F.3d at 527 (Moore, J., dissenting), but Henry and Jackson are in the same position: at the time of resentencing, neither had a sentence

that could be described using the present-perfect tense because their initial sentences were vacated. In other words, although Henry and Jackson both had a sentence imposed previously, neither could be said to have a sentence imposed presently. This, too, is why *Richardson*, wherein we determined that § 403 did not apply to a defendant who had a valid sentence and a pending direct appeal, is inapplicable. 948 F.3d 733, 748–53 (6th Cir. 2020). "When our court reviews a sentence on direct appeal, that sentence remains 'imposed' *unless we vacate and remand for resentencing*." *Henry*, 983 F.3d at 223 (emphasis added). Despite his pending direct appeal, Richardson was appropriately considered a defendant with a sentence that "has . . . been imposed." First Step Act § 403(b). Accordingly, *Jackson II* directly conflicts with *Henry*, despite identical factual circumstances.

Next, *Jackson II* explained that "Congress's amendments to 'an older criminal statute shall not change the penalties "incurred" under that older statute "unless the repealing Act shall so expressly provide,"'" and, therefore, *Jackson II* concluded that "the First Step Act did so expressly provide—but only for defendants on whom a sentence *had not been imposed* as of December 21, 2018." *Jackson II*, 995 F.3d at 526 (emphasis added) (quoting *Dorsey*, 567 U.S. at 272). No one contests that First Step Act § 403 expressly provides for a change in penalties; however, *Jackson II* concluded that Jackson does not benefit from this change by substituting the statute's phrase, "has . . . been imposed," with the majority's preferred phrase, "had been imposed." *See id.* As should be clear at this point, this cannot be squared with the statute's text.

Finally, there is no basis to disagree with the other circuits that have addressed this issue. *Jackson II* concluded that *Bethea*, the only other circuit-level case that had been decided at that point, was not persuasive because it relied on a purported misreading of *Uriarte* and *Henry*. *Jackson II*, 995 F.3d at 525–26. As explained above, however, *Henry*—and *Uriarte*, which

addressed the same factual circumstance as *Henry*, and upon which *Henry* was based—is indistinguishable from *Jackson II*. Now, the majority, in an effort to deflect attention from the true circuit split, contends that "a circuit split is 'good evidence that [this] issue is subject to reasonable dispute.'" Maj. Op. at 7 (quoting *United States v. Al-Maliki*, 787 F.3d 784, 794 (6th Cir. 2015)). But the majority does not attempt to cite—never mind to address—the actual composition of the circuit split, instead pointing to the "disagreement between jurists in some circuits," and citing to separate writings from this court's denial of the defendant's petition for rehearing en banc in *Carpenter* and the competing opinions in *Uriarte*. Maj. Op. at 7. Rather than provide "good evidence that [this] issue is 'subject to reasonable dispute,'" *id.* (citations omitted), the circuit split is further evidence that *Jackson II* is clearly erroneous.

In addition to the Fourth Circuit, two circuit courts have addressed this question. The Ninth and Third Circuits both concluded that § 403 applies to defendants who were sentenced before December 21, 2018, but whose sentences were later vacated. *See United States v. Merrell*, 37 F.4th 571, 574–78 (9th Cir. 2022); *United States v. Mitchell*, 38 F.4th 382, 386–89 (3d Cir. 2022). The Second Circuit appears likely to join this side of the circuit split, if given the opportunity to decide the issue directly. *See United States v. Brown*, 935 F.3d 43, 49 (2d Cir. 2019) (vacating the defendant's sentence, remanding for plenary resentencing, and stating that "[r]esentencing will also afford [the defendant] the opportunity to argue that he should benefit from section 403(b) of the First Step Act of 2018"); *United States v. Walker*, 830 F. App'x 12, 17 n.2 (2d Cir. 2020) (noting that the "government agreed that at a resentencing that would occur as a result of our remand, [defendant] would benefit from the [FSA's] reforms").

If that were not enough, the government has also changed its position since *Jackson II*. At Jackson's first resentencing and before this court in *Jackson II*, the government argued that

§ 403(b) does not apply at resentencing. *See* Appellee Br. at 9–10. Now, the government has taken the opposite position. Appellee Br. at 21 n.3; *see also* Gov. Resp. to Pet. for Rehr'g at 5, *United States v. Carpenter*, No. 22-1198 (6th Cir. Aug. 7, 2023), D. 34. The government explained that it changed its position on this issue because it determined that its prior position—and *Jackson II*—was incorrect. Appellee Br. at 21 n.3; *see also* Gov. Resp. to Pet. for Rehr'g at 5, *United States v. Carpenter*, No. 22-1198 (6th Cir. Aug. 7, 2023), D. 34 (stating that "the government has reconsidered its position and now concludes that the best reading of Section 403 is that the section's amended statutory penalties apply at any sentencing that takes place after the Act's effective date" and then arguing that "*Jackson* [*II*] was wrongly decided"). In light of the growing circuit split, the government's changed position, and the grammatical errors underlying *Jackson II*'s statutory interpretation, I would hold that *Jackson II* was clearly erroneous.

In terms of whether *Jackson II* would work a manifest injustice, the import of this decision is clear. As Judge Griffin stated in *Carpenter*, *Jackson II* not only affects defendants arguing that § 403 should apply to them at resentencing, but it will likely impact how this circuit interprets § 401(c) of the First Step Act, which uses identical language. *See Carpenter*, 80 F.4th at 795 (Griffin, J., dissenting from denial of rehearing en banc) ("[O]ur interpretation of the statutory language at issue matters to more than just cases involving firearms . . . . The Act uses identical language in § 401(c), which applies the Act's benefits to offenders sentenced for certain drug offenses . . . . How we interpret this language will continue to matter for years to come, as defendants' pre-Act sentences or convictions are considered (and potentially vacated) on post-conviction review . . . ." (citations omitted)). And, as Judge Bloomekatz explained, "[t]he real human costs that this esoteric legal issue presents . . . should not be overlooked." *Id.* at 796 (Bloomekatz, J., dissenting from denial of rehearing en banc). For example, Jackson's sentence is

five years longer and Carpenter's "sentence is *eighty* years longer than [they] would be if [these defendants] had been resentenced in the seventeen states that comprise the Third, Fourth, and Ninth Circuits. The resulting sentencing disparity . . . should give us pause . . . ." *Id.* at 797. I would therefore hold that *Jackson II* would work a manifest injustice.

Accordingly, I would hold that *Jackson II* was clearly erroneous and would work a manifest injustice such that it should be reconsidered. I respectfully dissent.

APPENDIX - B

No. 22-3958

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Apr 2, 2024
KELLY L. STEPHENS, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KENNETH JACKSON JR.,

Defendant-Appellant.

AMENDED

O R D E R

BEFORE: BATCHELDER, MOORE, and BUSH, 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. Judge Moore adheres to her dissent and would grant rehearing.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

APPENDIX - C

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CASE NO. 22-3958

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KENNETH JACKSON, JR.
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Ohio

BRIEF OF PLAINTIFF-APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellee, the United States of America, believes that the briefs and record adequately present the facts and legal argument and that oral argument would not aid in the decisional basis. In previous appeals, this Court has already considered and rejected both arguments that Jackson raises here. Oral argument is unnecessary because the law-of-the-case doctrine prohibits reconsideration of these issues. The undisputed facts show that the district court followed this Court's instructions. Therefore, the government recommends that this Court decide the case on the briefs under Federal Rule of Appellate Procedure 34(a)(2)(C).

JURISDICTIONAL STATEMENT

The district court had jurisdiction in this criminal case under 18 U.S.C. § 3231. (R. 11: Indictment, PageID 117-30). The court originally sentenced Jackson to a total term of 771 months' imprisonment on August 23, 2017. (R. 170: First Judgment, PageID 1475-81). In Jackson's first appeal, this Court vacated one of his convictions under 18 U.S.C. § 924(c), affirmed his other two convictions for violating that same statute, and remanded for resentencing. United States v. Jackson, 918 F.3d 467, 494 (6th Cir. 2019).

The district court resentenced Jackson to a total term of 276 months' imprisonment on June 18, 2019. (R. 227: Second Judgment, PageID 2957-63). The parties cross-appealed, and this Court reversed, holding that the district court should not have applied the First Step Act at the resentencing, and remanded once again. United States v. Jackson, 995 F.3d 522, 526 (6th Cir. 2021), cert. denied, 142 S. Ct. 1234 (2022).

The district court resentenced Jackson to a total of 396 months' imprisonment. (R. 247: Third Judgment, PageID 3021-27). It imposed a 12-month sentence for Jackson's carjacking convictions, consecutive to mandatory 84-month and 300-month sentences on Jackson's two Section 924(c) convictions. (Id.). Jackson filed a timely appeal. (R. 249: Notice of Appeal, PageID 3032).

This Court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

STATEMENT OF THE ISSUES

I. Did the district court properly follow this Court's instructions in Jackson II and resentence Jackson using the pre-First Step Act penalties?

II. Did the district court properly follow this Court's holding in Jackson I and find that carjacking is a crime of violence under the elements clause?

STATEMENT OF THE CASE

I. Introduction

In Kenneth Jackson's first appeal, this Court held that carjacking was a crime of violence. United States v. Jackson, 918 F.3d 467, 486 (6th Cir. 2019) ("Jackson I"). It remanded for resentencing, however, after vacating one of his three convictions for using a firearm during a crime of violence, finding that Jackson made only a single choice to "use, carry, or possess" a firearm during two simultaneous carjackings. Id. at 492.

In Jackson's second appeal, this Court held that the district court improperly applied at resentencing the statutory penalties as amended by the First Step Act. United States v. Jackson, 995 F.3d 522, 525-26 (6th Cir. 2021) ("Jackson II"). Because Jackson had been sentenced as of December 21, 2018—the effective date of the First Step Act—this Court held that the district court should have used the pre-First Step Act penalties at the resentencing. It remanded and instructed the district court to sentence Jackson "under the version of § 924(c) that pre-dates the First Step Act of 2018." Jackson II, 995 F.3d at 526.

The district court followed this instruction. It sentenced Jackson to 1 year of prison for his multiple carjacking counts, consecutive to 7-year and 25-year prison terms for his two Section 924(c) convictions. (R. 247: Third Judgment, PageID 3021-27).

In this third appeal, Jackson raises these same issues once again. Despite this Court's holding in Jackson I, he claims that carjacking is not a crime of violence. Despite this Court's holding in Jackson II, he claims that the district court should have applied the First Step Act's revised penalties at his second resentencing hearing. Under the law-of the-case doctrine, this Court must follow its previous holdings. Jackson's reliance on United States v. Taylor, 142 S. Ct. 2015, 2020 (2022)—which held that attempted Hobbs Act robbery is not a crime of violence—fails because he was charged and convicted with completed carjacking. And his reliance on Concepcion v. United States, 142 S. Ct. 2389, 2401 (2022), also fails because it interpreted a different subsection of the Act, with different statutory language.

The district court followed this Court's instructions. Consistent with the holding in Jackson I, it held that carjacking was a crime of violence. Consistent with the holding in Jackson II, it sentenced Jackson using pre-First Step Act's penalties. No error occurred. Therefore, this Court should affirm.

II. Jackson committed one carjacking on July 25, 2015, and two simultaneous carjackings on July 26th.

On July 25, 2015, Jackson, along with codefendants Antowine Palmer, Calvin Rembert, and Ter'vontae Taylor, decided to steal a car so they could drive surreptitiously through neighborhoods controlled by rival gang members. (R. 205:

Rembert Trans., PageID 2395-401). After Jackson identified a potential robbery target, he and Taylor committed an armed carjacking. (Id., 2401-05; R. 206: Taylor Trans., PageID 2575-78).

One stuck a gun in the victim's face and ordered him to surrender his keys and wallet. (R. 203: D.G. Trans., PageID 1915-18). The other said, "You know what this is. Give, give up everything you've got." (Id.). When the victim tried to resist, one robber pistol-whipped him and threatened to kill him. (Id., PageID 1922-27). Jackson and Taylor went through the victim's pockets, took his wallet, and demanded his keys. After receiving the keys, Jackson and Taylor fled in the victim's GMC Denali. (Id., PageID 1952-53).

Approximately twelve hours after the carjacking, the Cleveland police discovered the stolen Denali on the street near Jackson's residence. (R. 203: Goines Trans., PageID 1971-74; R. 203: Landrau Trans., PageID 2007-12). Forensic analysis showed that Jackson's DNA was located on a tobacco wrapper found in the stolen Denali. (R. 204: Dennis Trans., PageID 2182-83). After reviewing a photo array, the victim identified Jackson as one of the carjackers. (R. 203: D.G. Trans., PageID 1942-44; R. 203: Landrau Trans., PageID 2030-31).

The next night, July 26th, Jackson and Taylor carjacked two other people at gunpoint in Tremont. (R. 203: Z.N. Trans., PageID 1863-68; R. 206: G.B. Trans., PageID 2540-51). The victims each parked a car on the street in Cleveland's

Tremont neighborhood and had begun walking together towards a house when Jackson and Taylor attacked them. (Id.). Jackson and Taylor, brandishing firearms, ordered the victims to the ground, then took their wallets, cellphones, and car keys. Jackson and Taylor ran towards the two victims' cars, each selected one, and they drove both cars away. (R. 203: Z.N. Trans., PageID 1868-78; R. 206: G.B. Trans., PageID 2540-51).

Officers recovered the victims' two stolen Corollas separately, in mid-August. They found one car on August 11th, driving near Jackson's house. (R. 203: Schwebs Trans., PageID 1995-2000; Goines Trans., PageID 1980-82). Several days later, on August 17th, officers began following the second car while Jackson was driving it. He led them on a high-speed chase, abandoned the car, and was arrested in a house near his home. (R. 205: Middaugh Trans., PageID 2266-80; Robinson Trans., PageID 2311-16; McCort Trans., PageID 2323). Two of Jackson's prints were found in the car. (R. 204: M. Johnson Trans., PageID 2149-55). After viewing a photo array, one victim identified Jackson as one of the carjackers. (R. 203: Z.N. Trans., PageID 1885-89; R. 203: Landrau Trans., PageID 2030-31).

III. After a jury convicted Jackson of three carjacking counts and three counts of brandishing a firearm during a carjacking, the district court sentenced him to 771 months in prison.

Jackson was originally charged with five counts of carjacking, in violation of 18 U.S.C. §§ 2119 and 2, and five counts of brandishing a firearm during and in relation to each carjacking, in violation of 18 U.S.C. § 924(c). (R. 11: Indictment, PageID 117-30). In addition to the three carjackings described above, the indictment alleged that Jackson was involved with two other carjackings on August 12, 2015. During trial, however, Taylor recanted previous statements that he had given to law enforcement, (see R. 206: Taylor Trans., PageID 2568-611), so the government moved to dismiss the counts associated with those two additional carjackings, including two of the five Section 924(c) counts. (R. 207: Trial Trans., PageID 2652-53).

The jury found Jackson guilty of the July 25th carjacking (Count 1), and brandishing a firearm during and in relation to it (Count 2). The jury also found Jackson guilty of both July 26th carjackings (Counts 6 and 10), and brandishing a firearm during and in relation to each of them, separately (Counts 7 and 11). (R. 125: Jackson Verdict Form, PageID 823-28).

The district court imposed a 771-month sentence on Jackson. (R. 197: Jackson First Sentencing Trans., PageID 1670-98). This included an 87-month sentence for the three carjacking counts, and consecutive 7, 25, and 25-year terms

for the three Section 924(c) counts. (Id., PageID 1691). The court found that this sentence was sufficient, but not greater than necessary, to satisfy the statutory factors. (Id., PageID 1692-93). The court considered, but rejected, Jackson's request to impose a one-day sentence for the carjacking counts because that sentence would be an "absolute insult" to his victims. (Id., PageID 1693-94). The court recognized its sentence was "severe," but found it necessary to provide general deterrence to other community gang members. (Id., PageID 1694). While the court was sentencing him, Jackson laughed. (Id.).

IV. This Court affirmed Jackson's carjacking convictions and held that carjacking is a crime of violence, but reversed one brandishing count.

In Jackson's first appeal, this Court affirmed his three carjacking convictions, but vacated one of the three Section 924(c) convictions. Jackson I, 918 F.3d at 494. Since Jackson had only made a single decision to use a firearm during the two simultaneous July 26th carjackings, this Court held that he had committed only one Section 924(c) violation that day. Id. It therefore vacated one Section 924(c) conviction and vacated his sentence, remanding for resentencing.

In his first appeal, Jackson also argued—as he does here—that carjacking is not a crime of violence, and therefore, that all three of his Section 924(c) convictions were invalid. This Court rejected that argument in Jackson I. It held, instead, that "the commission of carjacking by 'intimidation' necessarily involves

the threatened use of violent physical force and, therefore, [] carjacking constitutes a crime of violence under § 924(c)'s elements clause." 918 F.3d at 486.

V. The district court erroneously resentenced Jackson using the First Step Act's revised penalties.

After this Court heard oral argument in Jackson's first appeal, but before it issued its opinion, Congress passed the First Step Act, which went into effect on December 21, 2018. Before that date, an enhanced 25-year sentence applied when a defendant committed a second or subsequent Section 924(c) violation, even though charged in the same case. 18 U.S.C. § 924(c) (2017). In the First Step Act, Congress changed that rule to make Section 924(c)'s enhancement apply only if the defendant had a prior Section 924(c) conviction that had become final. The Act provided that this amendment applied to any offense committed before it was enacted, "if a sentence for the offense has not been imposed as of [December 21, 2018]." First Step Act, Section 403(b). The parties disputed whether these amendments should apply at Jackson's resentencing. (R. 217: Government Sentencing Mem., PageID 2865-75; R. 220: Jackson Sentencing Mem., PageID 2914-24).

After considering the parties' arguments, the district court agreed with Jackson, stated that it believed the First Step Act applied at the resentencing, and refused to impose the 25-year mandatory consecutive sentence for Jackson's

second Section 924(c) conviction. (R. 221: Order, PageID 2925-29; R. 224: Resentencing Trans., PageID 2939-40). Instead, the district court imposed a total sentence of 276 months, consisting of a 108-month sentence for the carjacking counts, followed by two consecutive 84-month terms for each of the two remaining Section 924(c) counts. (Id., PageID 2948; R. 227: Judgment, PageID 2964-68).

The government appealed, and this Court reversed. Jackson II, 995 F.3d at 525-26. Because Jackson had been sentenced "as of" December 21, 2018—the effective date of the First Step Act—this Court held that the plain language of the statute required the district court to use the pre-First Step Act penalties. It remanded and ordered the district court to sentence Jackson "under the version of § 924(c) that pre-dates the First Step Act of 2018." Jackson II, 995 F.3d at 526.

VI. The district court followed this Court's instructions, and resentenced Jackson using the pre-First Step Act penalties.

After this Court remanded for a second resentencing, Jackson filed a sentencing memorandum asking the district court to vacate his remaining Section 924(c) convictions. (R. 243: Memorandum, PageID 3002-06). He claimed that his completed carjacking convictions no longer constituted crimes of violence after the Supreme Court's decision in United States v. Taylor, 142 S. Ct. 2015 (2022), which held that attempted Hobbs Act robbery was not a violent crime. (Id.). The government argued that Taylor had no effect on Jackson's case because he was

convicted of completed carjacking, which this Court repeatedly had held—even in Jackson's direct appeal—was a crime of violence. (R. 244: Response, PageID 3007-13).

The district court rejected Jackson's attempt to vacate his Section 924(c) convictions. (R. 251: Third Sentencing Trans., PageID 3039-41). It found that carjacking requires the use, attempted use, or threatened use of force, following this Court's decision in Jackson I. (Id., PageID 3040). It found that Taylor had no bearing on the question because it examined attempted Hobbs Act robbery, not completed carjacking. (Id.).

Without objection, the court found that Jackson's offense level was 27, and his criminal history category was III, leading to an 87-to-108-month Guideline range for his carjacking convictions. (Id., PageID 3037-38, 3042). The court also noted that this Court's remand order required consecutive 7-year and 25-year sentences for the two Section 924(c) counts. (Id.).

Defense counsel asked the court for mercy, arguing that Jackson had matured during the seven years since he was first charged in this case. (Id., PageID 3042-44). He requested that the court impose the minimum possible sentence, to allow Jackson to return to his family and become a productive community member. (Id., PageID 3044-45). During allocution, Jackson apologized to the court and promised to "continue to grow." (Id., PageID 3045).

The government asked the court to consider the impact that Jackson's carjacking spree had on the victims. (Id., PageID 3045-46). It recommended that the Court impose a within-Guidelines sentence on the carjacking counts, consecutive to the mandatory sentences for the Section 924(c) counts. (Id., PageID 3046-47). Further, as the parties previously discussed off the record, the government formally noted that the Department of Justice had re-examined its litigating position on the retroactivity of the First Step Act in cases like Jackson's, after this Court's decision in Jackson II. (Id., PageID 3048-49). Although the government now believed that the First Step Act should apply to defendants like Jackson, the government noted that the Sixth Circuit's decision in Jackson II was binding, and the district court must follow the order in that opinion.[1] (Id.).

After hearing argument and allocution, the district court varied downward substantially from the advisory Guidelines range on the carjacking counts. (Id., PageID 3051-52). It cited the government's changed position on First Step Act retroactivity, and the fact that every other Circuit had reached a contrary position. (Id.). Accordingly, it imposed a 12-month sentence on the carjacking counts,

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[1] The government also noted that, due to the change in its litigating position, it had attempted to reach a joint sentencing recommendation with Jackson that would have resulted in the dismissal of a Section 924(c) count, in return for a sentence lower than the mandatory 32-year sentence that applied. (Id., PageID 3046-48). The parties were unable to reach an agreement. (Id., PageID 3050).

consecutive to 7-year and 25-year sentences on the Section 924(c) counts, for a total of 396 months' imprisonment. (Id.). The court incorporated the reasons it had given when previously sentencing Jackson. (Id., PageID 3054). It also stated that it would have preferred to give the longer sentence for the carjacking counts, and a shorter sentence on the firearms counts, but it did not have such discretion. (Id.). It recognized that it had the authority to impose an even shorter sentence on the carjacking counts, but it believed that a shorter sentence would send the wrong message to the carjacking victims. (Id., PageID 3058-59).

After the court entered its amended judgment, (R. 247: Third Judgment, PageID 3021-27), Jackson filed this timely appeal. (R. 249: Notice, PageID 3032). Because the district court properly applied this Court's holdings in Jackson's previous appeals, and subsequent Supreme Court decisions did not undermine the validity of those holdings, this Court should affirm the sentence.

SUMMARY OF THE ARGUMENT

In Jackson's two previous direct appeals, this Court decided both issues that he now raises in the present appeal. In Jackson I, this Court held that carjacking is a crime of violence because it has as an element the use, attempted use, or threatened use of physical force against another person. In Jackson II, this Court held that the First Step Act did not apply at Jackson's resentencing because he had been sentenced as of the effective date of the Act. Under the law-of-the-case doctrine, these two previous decisions bound the district court, and bind this Court on appeal, unless there has been an intervening change in the law. There has not been.

The Supreme Court's decision in Concepcion v. United States, 142 S. Ct. 2389, 2401 (2022), did not undermine this Court's decision in Jackson II that the First Step Act amendments did not apply. Concepcion involved a different section of the First Step Act, containing different statutory language, applicable to a different class of offenders. And the retroactivity of that provision was undisputed. It has little relevance, if any, to the present case. The Supreme Court recognized in Concepcion that Congress had the authority to limit district courts' discretion at sentencing. And this Court held, in Jackson II, that Congress did limit the district court's discretion, and could not apply the revised penalties to offenders, like Jackson, who had been sentenced "as of" the First Step Act's effective date. Thus,

this Court must follow its decision in Jackson II and affirm the district court's sentence, which followed this Court's explicit instructions.

This Court must also follow its decision in Jackson I, which held that carjacking is a crime of violence under Section 924(c)(3)(A)'s elements clause. The Supreme Court's decision in United States v. Taylor, 142 S. Ct. 2015 (2022), does not undermine the validity of Jackson I. In Taylor, the Supreme Court held that attempted Hobbs Act Robbery was not a crime of violence because it did not require the actual use or threatened use of physical force. Competed carjacking, however, does require the actual or threatened use of violent physical force and, therefore, is a crime of violence. Thus, Taylor does not affect the validity of Jackson's Section 924(c) convictions. And because carjacking requires a defendant to act with specific intent to cause seriously bodily harm or death, it cannot be committed recklessly. Thus, even if Jackson had preserved this argument—which he did not—the Supreme Court's decision in United States v. Borden, 141 S. Ct. 1817 (2021), would not apply. This Court's decision in Jackson I remains binding.

The district court followed this Court's instructions. Consistent with the holding in Jackson I, it held that carjacking was a crime of violence. Consistent with the holding in Jackson II, it did not apply the First Step Act's amended penalties. No error occurred. Therefore, this Court should affirm.

ARGUMENT

I. Following this Court's instructions, the district court properly declined to apply Section 403 of the First Step Act at Jackson's resentencing.

A. Standard of Review

This Court reviews questions of statutory interpretation de novo. Jackson II, 995 F.3d at 524.

B. This Court's decision in Jackson II controls the scope of Section 403 and requires this Court to hold that it does not apply to Jackson.

The law-of-the-case doctrine forecloses Jackson's first claim. According to that doctrine, a Court of Appeals' determinations are binding on both the district court on remand and the Court of Appeals upon subsequent appeal. United States v. Moored, 38 F.3d 1419, 1421-22 (6th Cir. 1994). A prior ruling may only be reconsidered where: "(1) substantially different evidence is raised on subsequent trial; (2) where a subsequent contrary view of the law is decided by the controlling authority; or (3) where a decision is clearly erroneous and would work a manifest injustice." McKenzie v. BellSouth Telecomm., Inc., 219 F.3d 508, 513 n.3 (6th Cir. 2000) (citing Hanover Ins. Co. v. American Eng'g Co., 105 F.3d 306, 312 (6th Cir. 1997)). None of those factors is present here.

This Court held in Jackson II that the district court wrongly applied the First Step Act's amended penalties at Jackson's second sentencing hearing because he

had been sentenced "as of" December 21, 2018. 995 F.3d at 525-26. Thus, it ordered the district court to sentence Jackson "under the version of § 924(c) that pre-dates the First Step Act of 2018." Jackson II, 995 F.3d at 526. Under the law-of-the-case doctrine, that decision bound the district court, and it binds this Court here.

This Court recently followed Jackson II in another case, decided last month. See United States v. Carpenter, No. 22-1198, 2023 WL 3200321, at *2 (6th Cir. May 2, 2023).[2] Like Jackson's case, Carpenter has a lengthy procedural history before and after the First Step Act's enactment. In 2013, Carpenter was convicted of five counts of using or carrying a firearm during a crime of violence. This Court affirmed his conviction and sentence. United States v. Carpenter, 819 F.3d 880 (6th Cir. 2016). In June 2018, the Supreme Court reversed this Court's ruling on Carpenter's unrelated Fourth Amendment claims, remanding to this Court. Carpenter v. United States, 138 S. Ct. 2206 (2018). While the case was pending in this Court, Congress passed the First Step Act. In 2019, this Court again affirmed Carpenter's convictions, United States v. Carpenter, 926 F.3d 313 (6th Cir. 2019), but later remanded for resentencing. United States v. Carpenter, 788 F. App'x 364, 364-65 (6th Cir. 2019). Following Jackson II, the district court applied the pre-

[2] On June 5, 2023, Carpenter filed a petition for rehearing en banc. Sixth Cir. Case No. 22-1198, Doc. 30.

First Step Act penalties in Section 924(c). This Court affirmed, holding that Jackson II dictated that the First Step Act's amendments did not apply at resentencing. United States v. Carpenter, No. 22-1198, 2023 WL 3200321, at *2.

Thus, this Court's holding in Jackson II remains binding precedent in this Circuit, as this Court noted last month in Carpenter. The district court properly followed this Court's instructions and used pre-First Step Act penalties at resentencing.

C. The Supreme Court's Concepcion decision does not require a different result.

The Supreme Court's recent decision in Concepcion v. United States, 142 S. Ct. 2389 (2022), did not abrogate this Court's holding in Jackson II. It analyzed a different question, involving a different subsection of the First Step Act, that contained different statutory language. Thus, it has no bearing on this case.

In Concepcion, the defendant was convicted of drug trafficking and sentenced as a career offender in 2007 to 228 months in prison. His sentence was imposed under the sentencing scheme that included a 100-to-1 disparity between crack-cocaine and powder-cocaine. Id. at 2396. Congress amended those penalties in the 2010 Fair Sentencing Act. Congress and the Sentencing Commission, however, did not make those changes retroactively applicable to career offenders like Concepcion. Id. But in 2018, Congress gave district courts

discretion to impose a reduced sentence on any offender who was convicted of an offense whose statutory penalties were reduced in the Fair Sentencing Act. First Step Act § 404(b).

There was no question in Concepcion that Section 404 of the First Step Act applied to the defendant and that the district court had discretion to resentence him using the revised Fair Sentencing Act penalties. Indeed, the retroactivity provision expressly stated that the amendments applied to defendants in Concepcion's shoes. Id. Instead, the question in Concepcion was whether the district court could consider new facts about the defendant and changes in the Sentencing Guidelines when deciding whether and how much to reduce his sentence. 142 S. Ct. at 2397. The Supreme Court held that the district court could consider such facts and changes. Id. at 2404. Because the statute's applicability was undisputed, Concepcion has no bearing the threshold question here: whether Congress made a different section of the First Step Act—Section 403—which employs different statutory language than Section 404, retroactive to offenders like Jackson.

The Concepcion Court cautioned that Congress had the authority to limit a district court's sentencing discretion. "The only limitations on a court's discretion to consider any relevant materials at an initial sentencing or in modifying that sentence are those set forth by Congress in a statute or by the Constitution." Id. at 2400 (emphasis added). The Court held that Section 404's only limitation was to

deny eligibility if offenders' sentence had previously been imposed or reduced using the amended Fair Sentencing Act penalties. Id. at 2402; see First Step Act § 404(c). Since Concepcion had never received a sentence or reduction under the Fair Sentencing Act, he was eligible for resentencing, and there was no limitation to the information that the district court could consider. 142 S. Ct. at 2400-02.

Jackson, however, is not covered by Section 404 of the First Step Act. His case involves Section 403. And this Court held, in Jackson II, that Congress did limit district court's discretion when applying the amended First Step Act penalties in Section 403 for offenders convicted under Section 924(c). Specifically, this Court held that that the statutory text "creates a straightforward test for retroactivity": a court must consider the defendant's "status as of December 21, 2018 and ask whether—at that point—a sentence had been imposed on him." Jackson II, 995 F.3d at 524-25. If a sentence was imposed as of that date, this Court held that Section 403 does not apply—even if that sentence were subsequently vacated. Id. at 525-26.

Since this Court held that Section 403 did not apply to Jackson, it instructed the district court to resentence him using the pre-First Step Act penalties. Jackson II, 995 F.3d at 526. The district court followed this Court's instructions. Concepcion does not change the analysis, because it analyzed a different issue regarding a different, inapplicable, section of the First Step Act. This Court must

follow its previous holdings in Jackson II and Carpenter and affirm the district court's sentence.[3]

II. Following this Court's previous decision in Jackson I, the district court properly found that carjacking is a crime of violence.

A. Standard of Review

Whether a crime constitutes a "crime of violence" for purposes of 18 U.S.C. § 924(c) is a legal question that this Court reviews de novo. United States v. Rafidi, 829 F.3d 437, 443 (6th Cir. 2016).

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[3] The government notes that after this Court issued its decision in Jackson II, the Department of Justice reexamined its position on this issue. It now concludes that the best reading of Section 403, considered in light of the statutory text, context, and purpose, is that the amended statutory penalties set forth in Section 403 should apply at any sentencing that takes place after the Act's effective date. The Department changed its position after several other courts considering the same question reached a result different from this Court's. See United States v. Mitchell, 38 F.4th 382, 386-89 (3d Cir. 2022); United States v. Merrell, 37 F.4th 571, 575-78 (9th Cir. 2022); see also United States v. Bethea, 841 F. App'x 544, 548-53 (4th Cir. 2021) (unpublished).

The government recently explained its change of position fully in its memorandum of law in United States v. Pettway, No. 12-cr-103 (W.D.N.Y.), ECF No. 1301, and is prepared to submit a similar supplemental brief to this Court if the panel would find that helpful. Regardless of the government's change of position, however, it believes that this Court's holding in Jackson II bound the district court and binds the panel in this appeal.

B. This Court's decision in Jackson I controls this appeal.

Jackson, once again, attempts to attack his Section 924(c) convictions by claiming that carjacking is not a crime of violence. But under this Court's binding precedent—most importantly, in Jackson's own direct appeal—completed carjacking is categorically a crime of violence under the elements clause.

To obtain a conviction for carjacking, the government must prove that the defendant, "(1) with intent to cause death or serious bodily harm, (2) took a motor vehicle, (3) that had been transported, shipped, or received in interstate or foreign commerce, (4) from the person or presence of another (5) by force and violence or intimidation." United States v. Fekete, 535 F.3d 471, 476 (6th Cir. 2008) (emphasis added); see also 18 U.S.C. § 2119.

This Court has, for years, repeatedly held that a completed carjacking categorically qualifies as a crime of violence under 18 U.S.C. § 924(c)(3). See, e.g., United States v. Taylor, 814 F.3d 340, 376-78 (6th Cir. 2016); United States v. Dial, 694 F. App'x 368, 373 (6th Cir. 2017); United States v. Johnson, 22 F.3d 106 (6th Cir. 1994); United States v. Hudson, 53 F.3d 744, 746 (6th Cir. 1995); United States v. Harwood, 25 F.3d 1051, 1994 WL 228297, *1 (6th Cir. May 25, 1994).

While many of those cases analyzed carjacking under the now-invalidated residual clause, 18 U.S.C. § 924(c)(3)(B), this Court also has held that carjacking

qualifies under the elements clause, 18 U.S.C. § 924(c)(3)(A). In fact, this Court specifically held in Jackson's first appeal that carjacking was a crime of violence under the elements clause. Jackson I, 918 F.3d at 486. Under the law-of-the-case doctrine, that decision bound the district court and binds this Court in this appeal. United States v. Moored, 38 F.3d at 1421-22 (a Court of Appeals' determinations are binding on both the district court on remand and the Court of Appeals upon subsequent appeal).

In Jackson I, this Court directly addressed and rejected the very argument that Jackson now raises again. He claims that carjacking is not categorically a violent crime because it can be committed "by intimidation." (Doc. 21: Jackson Br., Page 39-40). That argument ignores the plain text of § 924(c)(3)(A), which defines a "crime of violence" as a felony 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) (emphasis added). This Court flatly rejected this argument in Jackson I: "the commission of carjacking by 'intimidation' necessarily involves the threatened use of violent physical force and, therefore, . . . carjacking constitutes a crime of violence under § 924(c)'s elements clause." 918 F.3d at 486.

Jackson cites no cases from this Court, or any other Circuit, holding otherwise. He relies on the Fourth Circuit's decision in United States v. Torres-

Miguel, 701 F.3d 165 (4th Cir. 2012), which found that threatening to commit a crime which will result in death or great bodily injury under California law did not necessarily include the threatened use of physical force. His reliance is misplaced for three reasons. First, the Torres-Miguel panel was determining whether that California statute qualified for a Guidelines sentencing enhancement in illegal-reentry cases. Thus, the case has little relevance to the statutory-interpretation issue before this Court. Second, the holding in Torres-Miguel was later abrogated. The Fourth Circuit later said, "this Court has confirmed and reaffirmed in several decisions that the direct versus indirect use of force distinction articulated in Torres–Miguel has been abrogated by United States v. Castleman, 134 S. Ct. 1405 (2014)." United States v. Covington, 880 F.3d 129, 134 (4th Cir. 2018) (cleaned up). Third, the Fourth Circuit actually holds—as this Court does—that carjacking is a crime of violence under the elements clause. United States v. Evans, 848 F.3d 242, 247 (4th Cir. 2017) ("The act of taking a motor vehicle 'by force and violence' requires the use of violent physical force, and the act of taking a motor vehicle 'by intimidation' requires the threatened use of such force.") For these reasons, the holding in Torres-Miguel has no bearing on the outcome here.

Bank robbery, like carjacking, can also be committed "by force and violence, or by intimidation." 18 U.S.C. § 2113(a) (emphasis added). As in carjacking cases, this Court holds that a completed bank robbery is also a crime of

violence under 18 U.S.C. § 924(c)(3)(A). Wingate v. United States, 969 F.3d 251, 263-64 (6th Cir. 2020); United States v. Henry, 722 F. App'x 496, 500 (6th Cir. 2018); United States v. McBride, 826 F.3d 293, 296 (6th Cir. 2016) ("A taking by intimidation under § 2113(a) therefore involves the threat to use physical force.").

In sum, the law-of-the-case doctrine and this Court's binding precedents in other cases foreclose Jackson's current argument. Carjacking requires a defendant to use either (a) force and violence—which Jackson does not dispute qualifies under the elements clause—or (b) intimidation. This Court held in Jackson I that intimidation constitutes a threat of force. Therefore, carjacking qualifies as a crime of violence under the elements clause, even though it can be committed through intimidation.

C. Recent Supreme Court decisions do not require a different result.

1. Completed carjacking remains a crime of violence after the Supreme Court's decision in Taylor.

The Supreme Court's decision in United States v. Taylor, 142 S. Ct. 2015 (2022), does not abrogate this Court's decision in Jackson I, or its other cases holding that completed carjacking is a crime of violence. There, the Supreme Court concluded that attempted Hobbs Act robbery does not categorically qualify as a "crime of violence" under 18 U.S.C. § 924(c), because a defendant may commit an attempt offense without actually using or threatening force. Attempted

Hobbs Act robbery has two elements: "(1) The defendant intended to unlawfully take or obtain personal property by means of actual or threatened force, and (2) he completed a 'substantial step' toward that end." Id. at 2020. A "substantial step," however, "does not require the government to prove that the defendant used, attempted to use, or even threatened to use force against another person or his property." Id.

To illustrate this, the Court described a hypothetical defendant who only intended to threaten (but not use actual) force and was caught before he could convey that threat. In the Court's hypothetical, the defendant planned to rob a business, researched its security measures and business practices, drafted a demand note, and bought supplies and planned his escape, but was arrested as he crossed the threshold into the store. Taylor, 142 S. Ct. at 2021. Because this attempted Hobbs Act robbery was accomplished through an unrealized, yet-to-be conveyed threat to use force—and did not require any intent to actually use force—it did not categorically require either an "attempted use" of physical force or a "threatened use" of physical force. Id. at 2021. It is this "attempt to threaten" theory of Hobbs Act robbery that is categorically problematic vis-à-vis the "crime of violence" definition.

Taylor dealt with attempted Hobbs Act Robbery, and not carjacking, either attempted or completed. Thus, it did not analyze the carjacking statute in its

decision. Nor did it address the issue that Jackson raises regarding "intimidation," a word that does not appear anywhere in the Supreme Court's Taylor opinion. Nevertheless, Taylor affirmatively supports this Court's earlier rejection of Jackson's claims because Taylor did not in any way upset the completed Hobbs Act robbery crime as continuing to constitute a "crime of violence."

Indeed, Taylor made clear that actually threatening force or violence as part of a completed Hobbs Act robbery requires "the use, attempted use, or threatened use" of force and thus continues to satisfy the Section 924(c) elements clause definition. Id. at 2020. Likewise, actually intimidating carjacking victims through threats of force or violence as part of a completed carjacking crime also still satisfies the Section 924(c) elements clause, as this Court held in Jackson I and several other cases.

Jackson was not charged with attempted carjackings;[4] he was charged with completed carjackings. (R. 11: Indictment, PageID 117-30). Neither the

[4] Moreover, even an attempted carjacking is distinguishable from attempted Hobbs Act robbery, such that Taylor would not affect it. That is because, unlike Hobbs Act robbery, the carjacking statute requires that a defendant act "with the intent to cause death or serious bodily harm." 18 U.S.C. § 2119. Thus, any defendant who intends every element of the completed offense and takes a substantial step toward its completion must necessarily have taken a substantial step toward effecting the death or serious bodily injury of his victim—both of which would categorically require the use of force. But because Jackson's case involved completed carjackings, this Court need not examine that question at this time.

indictment, (id.), nor the court's jury instructions, (R. 210: Instructions, PageID 2728-69), referred to an "attempted" carjacking. Thus, Taylor does not affect the outcome.

2. Even if Jackson had preserved his mens rea argument under Borden, it would fail because offenders cannot commit carjacking recklessly.

Similarly, Jackson's arguments regarding the Supreme Court's decision in United States v. Borden, 141 S. Ct. 1817 (2021), are procedurally barred and substantively meritless. His arguments are procedurally barred because Jackson never raised them in either of his two previous appeals, or in the district court. A party who could have sought review of an issue or a ruling during a prior appeal, but did not, "is deemed to have waived the right to challenge that decision thereafter, for it would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost." United States v. Adesida, 129 F.3d 846, 850 (6th Cir. 1997) (cleaned up). Jackson never previously argued that carjacking's mens rea was insufficient to qualify as a crime of violence.

Even if Jackson had preserved this argument, it would not require this Court to reexamine its holding in Jackson I. In Borden, the Supreme Court held that a criminal offense that requires only a recklessness mens rea could not qualify as a

"violent felony" under the ACCA's elements clause, 18 U.S.C. § 924(e)(2)(B).[5] 141 S. Ct. at 1834. But to convict a defendant of carjacking, the government must prove that the defendant acted with the specific intent to inflict seriously bodily harm or death if necessary to steal the car. Holloway v. United States, 526 U.S. 1, 12 (1999). A defendant cannot act both recklessly and with this degree of specific intent. Jackson has cited no case where a defendant was convicted of committing a carjacking recklessly. Thus, even if he had not procedurally defaulted this argument, it still would not affect the outcome here.

Based on the binding precedents cited above, including in Jackson I, this Court should follow its previous ruling that Jackson's completed carjackings were crimes of violence.

[5] The only difference between the ACCA's elements clause and Section 924(c)(e)(A)'s elements clause is that the latter also includes crimes involving the use, attempted use, or threatened use of force against property, in addition to persons.

CONCLUSION

The district court properly followed this Court's holdings in Jackson's two previous appeals. Those decisions are still binding because no Supreme Court case, or this Court acting en banc, has abrogated them. Therefore, this Court should affirm Jackson's sentence.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH WORD LIMITATION

I hereby certify that the foregoing contains 6,540 words according to the word-counting feature of Microsoft Word for Office 365 and complies with this Court's 13,000-word limitation for briefs.

/s/ Matthew B. Kall
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UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to Sixth Circuit Rule 30(b), the government designates the following district court filings as relevant to this appeal:

DESCRIPTION OF ENTRY	RECORD ENTRY NO.	PAGE ID RANGE
Docket Sheet, Northern District of Ohio, Case No. 1:15-CR-00453	N/A	N/A
Indictment	11	117-30
Verdict Form	125	823-28
Jackson PSR (first sentencing)	160	1331-66
Judgment	170	1475-81
Transcript of first sentencing	197	1670-98
Trial Transcript, April 26, 2017	203	1812-2055
Trial Transcript, April 27, 2017	204	2056-252
Trial Transcript, April 28, 2017	205	2253-466
Trial Transcript, May 1, 2017	206	2467-625
Trial Transcript, May 2, 2017	207	2626-719
Jury Instructions	210	2728-69
Revised Presentence Report	215	2828-57
Government's Second Sentencing Memorandum	217	2865-75
Jackson's Second Sentencing Memorandum	220	2914-24
Order regarding First Step Act	221	2925-29

Transcript of second sentencing	224	2932-52
Second Judgment	227	2957-63
Jackson's Third Sentencing Memorandum	243	3002-06
Government Response to Third Sentencing Memorandum	244	3007-13
Third Judgment	247	3021-27
Notice of Appeal	249	3032
Transcript of third sentencing	251	3034-60