

APPENDIX

TABLE OF CONTENTS

	<u>Page</u>
APPENDIX A—Fifth Circuit Opinion (Feb. 2, 2024)	1a
APPENDIX B—Excerpts of Duffey Resentencing Hearing Transcript (Mar. 2, 2022)	19a
APPENDIX C—Duffey Judgment On Resentencing (Mar. 14, 2022)	33a
APPENDIX D—Excerpts of Ross Resentencing Hearing Transcript (Mar. 24, 2022)	55a
APPENDIX E—Ross Judgment On Resentencing (Mar. 29, 2022)	66a

1a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22-10265

FILED: February 2, 2024

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

COREY DEYON DUFFEY; JARVIS DUPREE ROSS; TONY R.
HEWITT,

Defendants–Appellants.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:08-CR-167-1

Before SOUTHWICK, ENGELHARDT, and WILSON,
Circuit Judges.

CORY T. WILSON, *Circuit Judge:*

The primary issue in this appeal is whether § 403 of the First Step Act applies to post-enactment resentencings of defendants whose pre-enactment

sentences were vacated after the law was enacted. It does not, so Appellants' § 403 claims lack merit. Further, Appellant Duffey's challenge to the application of a sentencing enhancement at his resentencing and Appellant Hewitt's challenge to his remaining § 924(c) convictions both fail. Accordingly, we affirm as to all issues.

I.

Appellants Corey Deyon Duffey, Jarvis Dupree Ross, and Tony R. Hewitt were convicted in 2009 on numerous counts of conspiracy, attempted bank robbery, and bank robbery, as well as using a firearm in furtherance thereof, in violation of 18 U.S.C. § 924(c). *See United States v. Duffey*, 456 F. App'x 434, 438 & nn.1–4 (5th Cir. 2012). On direct appeal, this court reversed the convictions for the attempted robberies and the corresponding firearms charges, affirmed the other convictions, and remanded to the district court for resentencing. *Id.* at 444–45. Appellants were each resentenced in 2012. We affirmed these new sentences. *See United States v. Ross*, 582 F. App'x 528, 529–30 (5th Cir. 2014).

At the time we affirmed Appellants' new sentences, an initial violation of § 924(c) required a mandatory minimum sentence of five years. 18 U.S.C. § 924(c)(1)(A)(i) (effective 2012–2018). If a “second or subsequent” violation was committed, each such conviction was to result in a mandatory sentence of “not less than 25 years[.]” § 924(c)(1)(C)(i). Also at that time, the initial and subsequent convictions could be “stacked,” such that a first, second, and any subsequent convictions could arise out of the same incident or conduct. *See Deal v. United States*, 508 U.S. 129, 132–33 (1993). Thus, when Appellants were

convicted under § 924(c)(1)(A)(i) for using a firearm in connection with a conspiracy to commit bank robbery, they received five-year minimum sentences. Because they were also convicted for subsequent § 924(c) violations arising out of the same conduct—convictions that were stackable—Appellants each received 25-year mandatory minimum sentences for every additional § 924(c) conviction.

Appellants filed unsuccessful motions to vacate, set aside, or correct their sentences under 28 U.S.C. § 2255. See *United States v. Ross*, No. 3:15-CV-3233-B-BH, No. 3:08-CR-167-B-BH(3), 2017 WL 3328120, at *1 (N.D. Tex. June 22, 2017), *adopting report and recommendation*, 2017 WL 3314195, at *1 (N.D. Tex. Aug. 3, 2017); *United States v. Duffey*, No. 3:15-CV-0500-B-BH, No. 3:08-CR-0167-B(1), 2017 WL 6989111, at *1 (N.D. Tex. Dec. 29, 2017), *adopting report and recommendation*, 2018 WL 461126, at *1 (N.D. Tex. Jan. 17, 2018); *United States v. Hewitt*, No. 3:16-CV-603-B-BH, No. 3:08-CR-167-B(2), 2018 WL 3853708, at *1 (N.D. Tex. July 15, 2018), *adopting report and recommendation*, 2018 WL 3845232, at *1 (N.D. Tex. Aug. 13, 2018).

In 2020, Appellants filed motions for authorization to file successive § 2255 motions in light of the Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019), which held that conspiracy-predicated § 924(c) convictions do not qualify as “crimes of violence.” Appellants argued that several of their convictions—and resulting 25-year mandatory minimum sentences—were unconstitutional because the predicate offense for the enhancement, *i.e.*, conspiracy to commit bank robbery,

no longer qualified as a crime of violence under § 924(c)(3). We granted Appellants' motions.

Appellants then filed their successive habeas applications in the district court, which granted relief. The district court vacated Appellants' § 924(c) conspiracy convictions and accompanying sentences, vacated the sentences on all remaining convictions, and ordered resentencing.

Prior to Appellants' resentencing hearings, they each filed objections to their respective presentence reports (PSR), arguing, *inter alia*, that § 403 of the First Step Act of 2018 applied to their resentencing. Specifically, they argued they were subject only to the five-year mandatory minimum sentence set by § 924(c) under § 403, which eliminated sentence stacking.¹ The Government and the probation officer responded that § 403 did not apply because Appellants were serving valid sentences at the time that the First Step Act was enacted on December 21, 2018. The Government maintained this view during Duffey's and Ross's resentencings. However, the Government changed its position by the time of Hewitt's resentencing. Similarly, on appeal, the Government

¹ Section 403(a) of the First Step Act subjects defendants to only the five-year minimum sentence for multiple convictions arising out of the same conduct, when no other § 924(c) conviction has become "final." First Step Act of 2018, Pub. L. No. 115-391, § 403(a), 132 Stat. 5194, 5221. Section 403(b) provides that the Act "shall apply to any offense that was committed before the date of enactment of th[e] Act, if a sentence for the offense has not been imposed as of such date of enactment." *Id.* § 403(b), 132 Stat. 5194, 5222.

asserts that § 403 should apply across the board to Appellants' resentencings.

In addition to Appellants' § 403 arguments, Duffey and Hewitt each raised additional arguments at their 2022 resentencings that are at issue in this appeal. Duffey objected to the application of a two-level adjustment under U.S.S.G. § 2B3.1(b)(4)(B) for physical restraint of the victim, arguing that even though the bank manager was held at gunpoint, moved to the vault, and ordered to open it during one of the bank robberies, he was not physically restrained as defined in the Guidelines. Hewitt moved to dismiss his remaining § 924(c) convictions, arguing that the district court's vacatur of his § 924(c)(1)(A)(i) conviction required vacatur of *all* his § 924(c) convictions.

The district court overruled Appellants' objections—including Duffey's physical-restraint enhancement objection—and denied Hewitt's motion to dismiss. Appellants were then resentenced as follows: Duffey received 1,560 months imprisonment; Ross received 1,625 months imprisonment; and Hewitt received 1,625 months imprisonment. Appellants now challenge those sentences.

II.

We review questions of statutory interpretation *de novo*. *United States v. Tilford*, 810 F.3d 370, 371 (5th Cir. 2016). We review the district court's interpretation and application of the Sentencing Guidelines *de novo* and its factual findings for clear error. *United States v. Garcia*, 857 F.3d 708, 711–12 (5th Cir. 2017). On matters of jurisdiction, our review is *de novo*, using the same standard as the district court. *Gulf Petro Trading Co. v. Nigerian Nat'l*

Petroleum Corp., 512 F.3d 742, 746 (5th Cir. 2008). Questions of law relating to a § 2255 application are also reviewed *de novo*, while factual findings are reviewed for clear error. *United States v. Wiese*, 896 F.3d 720, 723 n.3 (5th Cir. 2018).

III.

We must first determine whether § 403(a) of the First Step Act applies to Appellants' latest resentencings. We conclude it does not.

“[W]e start where we always do: with the text of the statute.” *Van Buren v. United States*, 141 S. Ct. 1648, 1654 (2021). Section 403(b) of the First Step Act states that § 403(a) “shall apply to any offense that was committed before the date of enactment of th[e] Act, if a sentence for the offense has not been imposed as of such date of enactment.” In the mine run of pending cases, application of this language is straightforward. But does the First Step Act’s reach encompass prior offenses for which a pre-Act sentence is later vacated? Can it be said that such a sentence “has not been imposed”?

These questions have “vexed[] and split[] our sister circuits.” *United States v. Mitchell*, 38 F.4th 382, 386 (3d Cir. 2022). On one side of the split, the Third, Fourth, and Ninth Circuits have held that the First Step Act “requires [courts] to treat the vacated sentence as if it were never imposed[]” so that § 403(b) encompasses offenses involving the post-enactment vacatur of pre-enactment sentences. *United States v. Merrell*, 37 F.4th 571, 577–78 (9th Cir. 2022); *see also Mitchell*, 38 F.4th at 389; *United States v. Bethea*, 841

Fed. App'x 544, 550–51 (4th Cir. 2021).² On the other side, the Sixth Circuit has held that § 403(b) does not apply when, notwithstanding post-enactment vacatur, “a sentence had been imposed” prior to the date of enactment. *United States v. Jackson*, 995 F.3d 522, 525 (6th Cir. 2021); see also *United States v. Carpenter*, 80 F.4th 790, 791 (6th Cir. 2023) (Kethledge, J., joined by Sutton, C.J., Thapar, and Bush, JJ., concurring in the denial of rehearing en banc) (“[F]or purposes of precluding the Act’s retroactivity as to the sentence for a particular conviction—the imposition of any sentence will do. For § 403(b) simply asks whether, as of the Act’s date of enactment (December 21, 2018), ‘a’ sentence has or ‘has not been imposed[.]’”) (citation omitted). As explained below, we agree with the Sixth Circuit’s interpretation of § 403(b) because it is the reading more faithful to the statute’s text.

“When faced with questions of statutory construction, ‘we must first determine whether the statutory text is plain and unambiguous’ and, ‘[i]f it is, we must apply the statute according to its terms.’” *Asadi v. G.E. Energy (USA) L.L.C.*, 720 F.3d 620, 622 (5th Cir. 2013) (quoting *Carcieri v. Salazar*, 555 U.S.

² Additionally, the Seventh Circuit has held that § 403(b) applies to a convicted defendant whose sentence had been vacated prior to the enactment date but remained *unsentenced* on the enactment date. See *United States v. Uriarte*, 975 F.3d 596, 601 (7th Cir. 2020) (en banc). Notably, the Seventh Circuit appears to have left open the question of whether § 403(b) would apply to post-enactment vacatures. See *id.* at 605 (discussing “Congress’s intent not to reopen *finished* proceedings because of the change in the law effected by the First Step Act”) (emphasis in original).

379, 387 (2009)). “The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). “If the statutory text is unambiguous, our inquiry begins and ends with the text.” *Id.* (quoting *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004)).

Appellant Hewitt and the Government both argue that § 403(b)’s reference to “a sentence” is “ambiguous as to whether it refers to the historical fact of the imposition of a sentence, regardless of its validity, or whether it refers to the imposition of a sentence with continuing validity.” The thrust of their ambiguity argument stems from § 403(b)’s use of the present-perfect tense in the phrase “has not been imposed[.]” The Government maintains that this language “indicates that Congress was not focused on the single point in time of the pronouncement of the judgment, but rather on the sentence’s continuing validity.” We disagree.

As an initial matter, we have previously said that a sentence is “imposed” “when the district court pronounces it[.]” *United States v. Gomez*, 960 F.3d 173, 178 (5th Cir. 2020). Thus, the phrase “has not been imposed” suggests an act yet to be completed by the district court. *See Uriarte*, 975 F.3d at 606–07 (Barrett, J., dissenting). Put differently, whether a sentence has been “imposed” appears to hinge on a district court’s action or inaction—not on a defendant’s status. *See id.* at 607. Because of this, § 403(b)’s use of “imposed” puts the “focus on the historical fact” of a sentence’s imposition. *Id.*

Couple this with § 403(b)'s delineation that the First Step Act applies to defendants for whom “a sentence . . . ha[d] not been imposed” as of the enactment date. Again, in the mine run of cases, the statute's application is easy: Criminal defendants who had not yet had a sentence imposed as of December 21, 2018, fall within the First Step Act's ambit. Defendants who already had a sentence imposed by then do not. Congress unambiguously drew the line for the First Step Act's application based on the date a sentence was imposed.

But in today's case, a question remains: Does § 403(b)'s use of “a sentence” mean *any* sentence—including subsequently vacated ones—or, as the parties argue, does it mean only a sentence with continuing validity? The answer is the former.

Section 403(b)'s text does not indicate that Congress intended for the First Step Act to apply only to a sentence with continuing validity. The Government's argument to the contrary tracks with the Fourth and Seventh Circuits' reasoning: “Had Congress intended the phrase ‘a sentence’ to convey a very broad meaning, it could have used the word ‘any’ as it did earlier in the same sentence[.]” *Bethea*, 841 F. App'x at 549 (quoting *Uriarte*, 975 F.3d at 604 (majority opinion)). But that gun kicks as hard as it shoots. If Congress meant for the First Step Act's retroactivity bar to apply only to valid sentences, it could easily have said so. Instead, § 403(b)'s use of “the indefinite article ‘a’ is broad enough to refer to any sentence that that has been imposed for the offense, even one that was subsequently vacated.” *Uriarte*, 975 F.3d at 608 (Barrett, J., dissenting).

True enough, Congress’s use of “a sentence”—as opposed to “any sentence” or “a *valid* sentence”—could perhaps have been clearer. But “[t]he mere observation that the statutory language could be made clearer does not make it unclear in the first place.” *Jackson*, 995 F.3d at 526. Nor does it make it ambiguous. Indeed, “[u]nambiguity does not require perfection [W]e should not reject [§ 403(b)] just because it could be made even more clear.” *Bethea*, 841 F. App’x at 557 (Quattlebaum, J, dissenting).

The parties urge us—admittedly with support from our sister circuits—to focus on the impact of sentence vacatur when interpreting § 403(b). But vacatur has no effect on our interpretation. As the Sixth Circuit made clear in *Jackson*, “vacatur does not erase [Appellants’] prior sentence[s] from history.” 995 F.3d at 525 (quoting *Vacate*, BLACK’S LAW DICTIONARY (11th ed. 2019)). “[E]liminating a sentence’s prospective legal effect only ‘wipe[s] the slate clean’ looking forward.” *Id.* (quoting *Pepper v. United States*, 562 U.S. 476 (2011)). Indeed, “vacatur wipes the slate clean insofar as the defendant will be sentenced anew,” but it “does not require the district court to proceed as if the initial sentencing never happened.” *Uriarte*, 975 F.3d at 608 (Barrett, J., dissenting) (citing *Pepper*, 562 U.S. at 507–08).³ This makes good sense; otherwise, one who, as here, has been in prison for over a decade serving later-vacated sentences would nonetheless qualify as “a defendant on whom a sentence has not been imposed” as of the First Step

³ In any event, even if this “‘clean slate’ principle were sound, a background principle cannot overcome statutory text.” *Id.* at 609.

Act's enactment date. *Carpenter*, 80 F.4th at 792 (Kethledge, J., concurring) (quoting *Merrell*, 37 F.4th at 578 (Boggs, J., dissenting)).

We find a helpful analogue in 18 U.S.C. § 3742(g) for how “a defendant’s earlier sentencing” serves “as a temporal marker that identifies the substantive rules . . . that the district court must apply when [re-]sentencing a particular defendant.” *Id.* That statute, which addresses “[s]entencing upon remand[,]” provides that a “district court to which a case is remanded . . . shall apply the guidelines . . . that were in effect *on the date of the previous sentencing* of the defendant prior to the appeal.” § 3742(g) (emphasis added). As with § 403(b), § 3742(g)’s reference to the reality of a defendant’s prior sentencing does not give the vacated sentence legal effect. *Carpenter*, 80 F.4th at 792 (Kethledge, J., concurring). But it pegs the rules that apply to a resentencing on remand to the historical fact of the prior sentence. Section 403(b) does the same thing. To construe it differently, a district court would be forced paradoxically to “recognize the fact of the defendant’s prior sentence for purposes of determining his guidelines range . . . but at the same time pretend that sentence never happened for purposes of determining the defendant’s mandatory minimum.” *Id.* We do not read § 403(b)’s text to create such incongruity.

To summarize, we read § 403(b) as drawing the line for § 403(a)’s application at the date on which a sentence—whether later-vacated or with ongoing validity—was imposed. We do not discern ambiguity

in § 403(b)'s language.⁴ *Cf. Gomez*, 960 F.3d at 177 (“The Act itself plainly states that § 403 is not retroactive: It applies to an offense committed before its December 21, 2018 effective date only ‘if a sentence for the offense ha[d] not been imposed as of such date.’”); *see also United States v. Smith*, 967 F.3d 1196, 1212 (11th Cir. 2020) (“There is no ambiguity in § 403(b). It plainly draws a line based on the Act’s enactment date and provides that whether the amendments in § 403(a) apply to a case depends on which side of that line the imposition of the sentence falls.”).⁵ Our analysis thus “begins and ends with the text.” *Asadi*, 720 F.3d at 622 (citation omitted). Applying that text, because sentences for Appellants’ offenses had been imposed upon them prior to the First Step’s Act’s December 21, 2018 enactment date—even though those sentences were later vacated in 2020—§ 403(a) of the First Step Act does not apply, as the district court correctly held.

⁴ Because we hold that § 403(b) is unambiguous, we reject Duffey and Ross’s arguments that the rule of lenity requires us to read § 403(b) in the light most favorable to them. *See Shular v. United States*, 140 S.Ct. 779, 787 (2020) (“The rule [of lenity] ‘applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute.’”) (quoting *United States v. Shabani*, 513 U.S. 10, 17 (1994)).

⁵ *Gomez* and *Smith* both interpreted § 403(b) in the context of sentences that had been imposed by the district court prior to the First Step Act’s enactment date but remained pending on direct appeal as of that date. However, the point remains: Those cases agreed that § 403(b)’s language is clear and unambiguous.

IV.

Duffey also challenges his latest resentencing, in which the district court applied a two-level enhancement under U.S.S.G. § 2B3.1(b)(4)(B) for the physical restraint of a victim during a robbery. In 2008, Duffey and his cohorts robbed a series of banks throughout the Dallas-Fort Worth Metroplex. During these robberies, each bank’s manager “was held at gunpoint and moved to the vault and told to open the vault.” Because of this, the district court applied the enhancement to Duffey’s sentence for the physical restraint of the branch managers.

A.

Before we address the merits of Duffey’s argument, we must first ensure that we have appellate jurisdiction over this issue. *United States v. Hanner*, 32 F.4th 430, 434 (5th Cir. 2022) (quoting *Castaneda v. Falcon*, 166 F.3d 799, 801 (5th Cir. 1999) (“We must always be sure of our appellate jurisdiction and, if there is doubt, we must address it, sua sponte if necessary.”)). Citing *Hanner*, the Government suggests we lack jurisdiction because “Duffey’s successive Section 2255 motion . . . w[as] limited to . . . Duffey’s Section 924(c) convictions premised on conspiracy to commit bank robbery[.]” This is so, the Government proposes, because Duffey’s physical-restraint enhancement argument falls outside the scope of our underlying 2021 grant of leave to file the § 2255 motion at issue here.

In *Hanner*, the defendant challenged whether his manslaughter conviction—entirely separate from those encompassed in the grant of his application to file a successive habeas application—qualified as an

Armed Career Criminal Act predicate after a change in the law. *Id.* Because “Hanner neither sought nor obtained permission to file a successive § 2255 motion raising [that] claim[,]” the district court lacked jurisdiction to consider the issue, and Hanner’s appeal was dismissed to the extent that issue was raised. *Id.*

Duffey’s challenge to the two-level Guidelines enhancement diverges substantially from *Hanner*. His motion to file a successive habeas application was cabined to whether “he was convicted and sentenced under § 924(c)(1) based on a predicate offense that is not a ‘crime of violence.’” But the district court eventually vacated Duffey’s conspiracy-based § 924(c) convictions and sentences, leading to vacatur of his other sentences as well. Therefore, Duffey does not raise a separate conviction, as in *Hanner*. Instead, he questions imposition of the physical-restraint enhancement to his new sentences growing out of his latest habeas petition. We have previously rejected, albeit in a different procedural posture, a jurisdictional challenge to a district court’s consideration of sentencing enhancements on resentencing after a successful § 2255 challenge to a § 924(c) conviction. *See United States v. Benbrook*, 119 F.3d 338, 339–40 (5th Cir. 1997); *see also United States v. Robinson*, 769 F. App’x 140, 141 (5th Cir. 2019) (reviewing a challenge to sentencing enhancement applied at resentencing following a successful successive § 2255 motion). The same result obtains here, and we have jurisdiction to consider Duffey’s claim.

B.

Turning to the merits, we agree with the Government that the district court properly applied

the physical-restraint enhancement. Section 2B3.1(b)(4)(B) imposes a two-level enhancement “if any person was physically restrained to facilitate commission of the offense or to facilitate escape.” The Guideline commentary defines “physically restrained” as “the forcible restraint of the victim such as by being tied, bound, or locked up.” *Garcia*, 857 F.3d at 712 (quoting U.S.S.G. §§ 1B1.1 cmt. n.1(K), 2B3.1 cmt. n.1). “By the use of the words ‘such as,’ it is apparent that ‘being tied, bound, [and] locked up’ are listed by way of example rather than limitation.” *Id.* (citation omitted). Thus, “it is possible for a district court to conclude that a defendant physically restrained his victims without evidence that he actually tied, bound, or locked them up.” *Id.* (citation omitted).

Duffey relies primarily on *Garcia* to support his position. There, during an armed robbery, a defendant held a gun to an employee’s head and demanded that he get down on the floor. *Id.* at 710. Based on this conduct, the district court approved the two-level physical-restraint enhancement. On appeal, however, we held that though there was “little doubt that at least one of the employees felt restrained[,]” the robbery victims “were not subjected to the type of *physical* restraint that victims experience when they are tied, bound, or locked up.” *Id.* at 713; *see also* U.S.S.G. §§ 1B1.1 cmt. N.1(K), 2B3.1 cmt. N.1. We reasoned that because the situation in *Garcia* was no different than “what would normally occur during an armed robbery[,]” the physical-restraint enhancement did not apply. *Id.* at 713–14.

Duffey contends that *Garcia* encapsulates his situation, so the enhancement should not apply in his case, either. But *Garcia* is distinguishable. In *Garcia*,

we noted that courts had previously found the physical-restraint enhancement appropriate “where defendants force their victims to move into confined spaces at gunpoint and instruct the victims not to leave.” *Id.* at 712 (collecting cases). The panel stressed that *Garcia* was not such a case because “the defendants allowed the employees to remain where they were and never forced them to move to a confined space.” *Id.* Duffey’s case is more akin to *United States v. Frank*, 223 F. App’x 412 (5th Cir. 2007). There, we found the physical-restraint enhancement applicable because the defendants “escorted a security guard and several casino employees to the casino manager’s office at gunpoint and instructed them not to leave.” *Frank*, 223 F. App’x at 413.

As in *Frank*, in the string of bank robberies in which Duffey was involved, Duffey and his partners in crime did more than “simply stand[] near a door, hold[] a firearm, and instruct[] a victim to get on the ground[.]” *Garcia*, 857 F.3d at 713. The district court’s findings, adopted from Duffey’s PSR, show that in each robbery, the banks’ managers “w[ere] held at gunpoint and moved to the vault and told to open the vault.” At Duffey’s March 2022 resentencing hearing, the district court noted that Duffey and his cohorts “robbed . . . bank[s] in a takeover fashion[.]” and, in at least one of these robberies, pointed a gun at a bank manager’s head and forced the manager to the vault area to open it, such that there were “more than enough facts to support restraint.” The district court’s findings are plausible in light of the record as a whole. *United States v. Rodriguez*, 630 F.3d 377, 380 (5th Cir. 2011) (citations omitted). The district court therefore did not clearly err, and it follows that the court did not

abuse its discretion in applying the § 2B3.1(b)(4)(B) enhancement in Duffey's 2022 resentencing.

V.

We turn finally to whether the district court erred in determining that it did not have jurisdiction to vacate Hewitt's remaining § 924(c) convictions. We affirm the district court on this point as well.

Before his 2022 resentencing, Hewitt moved to dismiss his convictions predicated on substantive bank robbery. Hewitt argued that because his initial convictions based on § 924(c) were vacated as part of his successful § 2255 application, his subsequent convictions must also be dismissed given that they were premised on previously vacated counts. The district court denied Hewitt's motion for lack of jurisdiction, reasoning that Hewitt was required to seek leave in this court to file a new § 2255 application raising this claim. On appeal, Hewitt argues that another § 2255 application is unnecessary. We disagree.

When determining whether the district court has jurisdiction to decide the merits of a successive § 2255 application, we require that the defendant pass two "gates." *Wiese*, 896 F.3d at 723. At the first gate, the defendant must make a "prima facie showing" in this court that his claims result from either "(1) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable, or (2) newly discovered, clear and convincing evidence that but for the error no reasonable fact finder would have found the defendant guilty." *Id.* (quotation marks and citation omitted). At the second gate, the defendant must "actually prove at the district court level that the

relief he seeks relies either on a new, retroactive rule of constitutional law or on new evidence.” *Id.* Hewitt passed through neither gate on the point he now seeks to raise.

We granted Hewitt’s motion to file a successive § 2255 application regarding whether “his 18 U.S.C. § 924(c) convictions that were predicated on his convictions for *conspiracy to commit bank robbery* should be vacated.” Several of Hewitt’s convictions were predicated on conspiracy and were in fact vacated. But his remaining five § 924(c) convictions were based on the *substantive* crime of bank robbery. These remaining § 924(c) convictions fall outside of our authorization for Hewitt’s instant § 2255 motion. Thus, the district court held—correctly—that it lacked jurisdiction to reach those convictions. *See Hanner*, 32 F.4th at 434–35.

* * *

Based on the foregoing, as to all issues presented, the district court is

AFFIRMED.

19a

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

COREY DEYON DUFFEY,

Defendant.

3:08-CR-00167-B-1

RESENTENCING HEARING
BEFORE THE HONORABLE JANE J. BOYLE
UNITED STATES DISTRICT JUDGE
MARCH 2, 2022

A P P E A R A N C E S

For the Government:

UNITED STATES ATTORNEY'S OFFICE
1100 Commerce Street - 3rd Floor
Dallas, TX 75242
214/659-8600

20a

BY: AMY J. MITCHELL
GARY TROMBLAY

For the Defendant:

HUNTER, LANE & JAMPALA
310 S St Mary's St - Suite 1740
San Antonio, TX 78205
210/202-1076
BY: JOHN TORREY HUNTER
VIVEK JAMPALA

and

FLANARY LAW FIRM, PLLC
One International Center
100 NE Loop 410 - Suite 650
San Antonio, TX 78216
210/738-8383
BY: DONALD HERBERT FLANARY, III

COURT REPORTER: SHAWNIE ARCHULETA,
TX CCR No. 7533
1100 Commerce Street
Dallas, Texas 75242

Proceedings reported by mechanical stenography,
transcript produced by computer.

(In open court at 10:00 a.m.)

THE COURT: Good morning. This is Case Number
3:08-CR-167. Seen you many times before. We've got
a sentencing in United States v. Corey Deyon Duffey.
We're going do a re-sentencing today.

Who is here for the Government?

MS. MITCHELL: Amy Mitchell.

THE COURT: Take your mask off, please.

MS. MITCHELL: Amy Mitchell and Gary Tromblay for the Government.

THE COURT: Mr. Tromblay, you are back.

MR. TROMBLAY: I am back.

THE COURT: Ms. Mitchell, nice to see you. Haven't seen you for a while.

And for the defense?

MR. JAMPALA: Your Honor --

THE COURT: Stand up, please.

MR. JAMPALA: Your Honor, my name is Vivek Jampala. And this is --

THE COURT: No, no. Last name?

MR. JAMPALA: Jampala.

THE COURT: Spell it for me.

MR. JAMPALA: J-A-M-P-A-L-A.

THE COURT: I've got to get that right. Jampala. Okay.

MR. JAMPALA: And this is Mr. John Hunter.

MR. HUNTER: Good morning, Your Honor. John Hunter for Mr. Duffey.

THE COURT: Speak into the microphone, and take your mask off, please.

MR. HUNTER: Good morning, Your Honor. John Hunter for Mr. Duffey.

THE COURT: Mr. Jampala and Mr. Hunter, and Mr. Duffey is here.

THE DEFENDANT: Yes, ma'am.

MR. FLANARY: And Don Flanary, Your Honor.

THE COURT: Don what?

MR. FLANARY: Flanary.

THE COURT: Flanary. Okay. We have -- this is a big team of a defense.

[End of relevant section of transcript.]

MR. JAMPALA: Regarding the First Step Act, it's our contention that this is an issue of what constitutes a valid sentence, and when Congress passed the First Step Act, what they intended as far as its retroactivity was regarding valid sentences and not merely any sentence.

The Government does cite to *United States v. Gomez* from the 5th Circuit 2020. And we think that that is not completely on point, because it does very much hinge upon the idea of when a sentence is imposed.

It's not our contention that there's some temporal aspect of the sentencing that makes it --

THE COURT: What -- what do you mean by that?

MR. JAMPALA: That there is something wrong with the dates or that his original sentences happened prior. Our contention is that those are not valid sentences at all, and therefore should not be considered.

THE COURT: Now, do you have any cases right on point?

MR. JAMPALA: Not from the 5th Circuit, Your Honor. But the case cited by the Government, *United States v. Jackson*, does compare and contrast their reasoning with the 4th Circuit's reasoning. Both of these are from the 6th and 4th --

THE COURT: Tell me about those cases.

MR. JAMPALA: Sure.

Jackson, the -- it is from the 6th Circuit Court of Appeals, and it was just decided in April of this year - - sorry, of last year, excuse me.

And the Court decided that the exact language -- excuse me, let me pull it up -- of the First Step Act, I believe it's 403(b), Applicability to Pending Cases.

And it states: "This section and the amendments made by this section shall apply to any offenses 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."

And it was enacted December 21st of 2018.

And, essentially, we are basically fighting over a term. If a sentence for the offense has not been imposed. And like I said, the word "imposed" is not really in question, it's really a question of what does "a sentence" mean?

And regarding this, *Jackson* basically says that "a sentence" means at the date of December 21st, the date of enactment, does the defendant have a sentence?

And they go through and they do cite *Black's Law Dictionary* and *The Chicago Manual of Style* to -- or to reiterate that the tense of the verb should apply. And this is them quoting from *Chicago Manual of Style*.

THE COURT: Slow down. Slow down, because you read faster than you talk.

MR. JAMPALA: I'm a nervous reader, Your Honor.

THE COURT: I am, too. I talk fast.

MR. JAMPALA: This is from *Jackson*. And I think this is roughly the holding in their --

THE COURT: What circuit was that? Fourth?

MR. JAMPALA: Sixth.

“In arguing to the contrary, *Jackson* contends that there was -- that when his sentence was vacated ‘his sentence was rescinded, and there was no longer a sentence imposed upon him until he was resentenced.’ That argument misconstrues the First Step Act’s retroactivity inquiry. 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 upon him. After all, vacatur does not erase *Jackson*’s prior sentence from history. Vacatur merely ‘makes void’ the thing vacated.”

And they cite the definition of “Vacate” from *Black’s Law Dictionary*.

“When that thing becomes void, it is ‘of no legal effect’ anymore.”

And they cite the definition of “Void” from *Black’s Law Dictionary*.

“But eliminating a sentence’s prospective legal effect only ‘wipes the slate clean’ looking forward.” Citing to *Pepper v. United States* from United States Supreme Court --

THE COURT: Slow down. *Pepper v. United States*.

MR. JAMPALA: Yes, and I will give the full citation, I apologize.

THE COURT: That’s okay.

MR. JAMPALA: 562 U.S. 476 at page 507, and that’s from 2011.

THE COURT: In that case, did they apply the First Step Act in the manner that you are requesting?

MR. JAMPALA: In *Pepper* or --

THE COURT: In either one.

MR. JAMPALA: In *Jackson*, no. But right below that they discuss -- they -- which is their sister court's -- 4th Circuit -- decision that goes the other way.

THE COURT: Tell me about that.

Tell me about the only decision you have that goes this way.

MR. JAMPALA: Well, let me -- I apologize.

THE COURT: That's okay. Take your time.

I appreciate -- you know, I appreciate the time.

MR. JAMPALA: Regarding the "they," I am -- I don't think I have a report citation, but it's *United States v. Bethea*, Number 19-4618 at page 11. This is from the Fourth --

THE COURT: What circuit was that?

MR. JAMPALA: Fourth Circuit 2021.

THE COURT: And did they apply the First Step Act in the manner you're suggesting?

MR. JAMPALA: Yes, they did.

THE COURT: So tell me about that case. Tell me what the facts were.

MR. JAMPALA: Let me . . . this was not necessarily a 924(c) issue. It was regarding the First Step Act's Amendment to 841. But they do discuss vacatur, specifically in the context of having a 2255, I believe.

And I'll just quote what I believe is the proper section here.

“In this case, the district court’s vacatur and reentry of judgment nullified Bethea’s original sentence such that a sentence cannot legally -- cannot legally be said to have been imposed until 2019. As this Court explained in *United States v. Hadden*, 2255 contemplates specific types of remedies in a criminal judgment -- if a criminal judgment is infirm.”

And the citation is 475 F.3d 652 at 667 to 668 in 2007.

Quoting from that: “The end result --”

THE COURT: Slow down.

MR. JAMPALA: Sorry.

“‘The end result of a successful 2255 proceeding must be the vacatur’ of a sentence followed by a remedy (1) granting release; (2) granting a new trial, or (3) granting a ‘new sentence, be it imposed by (a) a resentencing or (b) a corrected sentence.’”

“A corrected sentence ‘is an entirely new sentence,’ which permits a direct appeal from its imposition as part of the individual’s original, criminal case.”

And they cite back to the same case at 664.

“And a ‘new’ sentence is imposed by correction even if that correction merely changes the date to permit appeal.”

And they go on to explain their reasoning a little bit more.

THE COURT: No, that’s okay. That’s okay. All right. Just tell me else you have besides those cases.

MR. JAMPALA: Those are the, I -- I think the two most developed cases on the issue that directly talk about the types of, I guess, interpretation as regarding retroactivity and the question of what constitutes a

sentence, whether it is merely a valid sentence or any sentence that is a historical fact.

I think that the 4th Circuit is correct on this, because it is often the case in a courtroom, especially in a criminal context, that we do not deal necessarily with historical facts. We deal with legal facts.

I think the 4th Amendment jurisprudence is the exclusionary rules are completely based on this. We do not use facts that, even though they may be true and historically true, but they maybe run afoul of the law and we toss those facts out. And we have a legal fact that this individual did not find -- the officer did not find any contraband or a confession was not found to be lawfully received from the defendant, and, therefore, there was no confession at all.

And this also happens in the context of being able to deny an arrest happened. It happens after expunction. It happens -- I'm unsure about this, but I believe a presidential pardon has certain effects of altering historical facts and having the legal fact be different.

THE COURT: Okay. Anything else?

MR. JAMPALA: I will say the use of the words of the First Step Act, I do believe, are important.

Convictions and sentences are overturned all the time, and they can be overturned on direct appeal or by writ.

And Congress, if they did want to have a firm date anchored to historical facts, could have used the factual basis as the anchoring date, which they chose not to do. They could have used the date of the indictment, which was served as a basis of conviction to also serve as a date, the date that the indictment

came down, which is also fixed. And barring a motion to quash at the (inaudible) level, stays in place.

As opposed to doing that, they chose the word, “a sentence.” And sentences -- the date of that sentence and resentencing, as you know, we are here for the third time historically, first time legally.

THE COURT: Well, the first time wasn’t my fault. The second time I don’t think was my fault. I don’t know. I just think the law has changed.

Okay. Anything else?

MR. JAMPALA: Regarding this issue, I will say, Your Honor, I believe *Jackson* is actually pending cert in the Supreme Court. I think by this Friday, they should have a decision as to whether or not they want to pick that up. But either way, I do think there is a circuit split, if not a developing circuit split.

I do want to make the Court aware that I believe the “they” is unpublished, but it is treated with -- well, the opinion, itself, has a great deal of analysis. And the 6th Circuit seems to treat it with the intellectual rigor, which I believe it deserves.

THE COURT: Thank you, Mr. Jampala.

I would like to hear from Ms. Mitchell.

Be sure to talk into the mic.

MS. MITCHELL: The first thing I would like to say is, I would confirm that *Bethea* is an unpublished decision. It was a --

THE COURT: What decision was that?

MS. MITCHELL: *Bethea*.

THE COURT: Okay. And where was that out of?

MS. MITCHELL: That is the 4th Circuit.

It is unpublished, and it is a two-one decision. And the dissent on that case actually falls on the side of the *Jackson* case.

And also *Jackson*, last time I checked, it was also -- I believe it is also pending cert. Perhaps it is a developing circuit split, but it is not one yet, because there's no published decision out of the 4th Circuit that goes the other way.

It -- because it's unpublished. As to the underlying argument, the 5th Circuit has drawn the same line as the 11th Circuit and the 6th Circuit, and that line is the date of enactment.

THE COURT: What do you mean the date of enactment?

MS. MITCHELL: The date of enactment for the amendment. I'm sorry.

THE COURT: Okay.

MS. MITCHELL: So the First Step Act Amendment went into effect December 21st, 2018. And as of that date, Mr. Duffey was serving a valid sentence. This Court's sentence was imposed first in 2010, and the second resentencing was in 2012.

He was serving that sentence on the day of enactment. And that is the date that the 5th Circuit looked at in *Gomez*. That's the date that the 6th Circuit looked at in *Jackson*. It's the date that the 11th Circuit looked at in *Smith*. Which the *Smith* case is the one I referenced in my response to the defendant's objections.

So it's the Government's position that the best reading of the statutory -- or the amendment's language, itself, is that, was there a valid sentence on

the date of enactment, and if there was, the amendment does not apply. So it's our position that the subsequent 924(c)'s should continue to be 25 years.

THE COURT: Okay. Thank you very much, Ms. Mitchell.

MS. MITCHELL: Thank you.

THE COURT: Okay. I think I have heard enough about this, unless you have something else, Mr. Jampala, but I would like to rule. Mr. Jampala, are you ready?

MR. JAMPALA: Ready, Your Honor.

THE COURT: You know, I think you make an interesting argument. And if this becomes a circuit split, we will deal with it at that time. But I don't think it is a circuit split, and I am very convinced that the date of enactment out of the 5th Circuit and the 11th Circuit are the correct dates.

I don't see how someone can't be serving a sentence when they are serving a sentence. And I think that Probation dealt with this very well in the fourth addendum. And, you know, you can read into it what you like, but I -- on page 2 of the presentence report, they give a nice analysis.

The First Step Act was enacted on December 21st, 2018, as Ms. Mitchell has pointed out, at which time the defendant was serving a sentence of imprisonment imposed by the Court. Therefore, the amendment to 924(c) is not retroactive to this case. And as such, the mandatory minimum sentences for 27, 31, 35 and 39 is 25 years or 300 months.

So I also think the Government's response has some good language in there, and I adopt it, and I'm going to overrule the objection.

[End of relevant section of transcript.]

THE COURT: Thank you very much.

Mr. Duffey, do you want to come up with one of your lawyers? Both of your lawyers? Yeah.

Mr. Duffey, I can see that your demeanor, even if I'm not looking at your words, your demeanor is much better. You've grown substantially in prison. And all these letters that I got, my gosh, I just -- you know, I can't overlook them.

And so I know you are a better person. I know you affected two prisoners' lives, if not more. I know that you had tons of support.

Do you have any family out here today?

THE DEFENDANT: Yes, Your Honor, I do.

THE COURT: Who is it?

Just stand.

Thank you-all very much for coming. Wow. Thank you-all very, very much for coming. I really appreciate it. You can be seated.

Okay. But, I mean, it doesn't get past the facts of the case. I mean, these were several violent bank robberies, takeover bank robberies with body armor, tasers, guns, all sorts of guns, leaping over the counters, hitting and tasing bank tellers who will never be the same because of it.

I mean, I think all the facts that I have already cited to in my previous sentencings and those facts, all combined to -- you know, the 3553 factors, number

one, here is deterrence. And I just -- I can't have them. I just can't allow someone who committed that many bank robberies to get out early. I will -- I will -- I will seriously -- it's going to be a shorter sentence, but it's not going to be what you want.

There's the -- there's the nature and characteristics of the defendant. I know you're great now, but you weren't then. And -- and just the safety of the community.

So all of those reasons, I think, and all of the 3553 factors combined to call for the following sentence:

On Counts 1, 14, 15, 16, 20, 24, 28, 32 and 36, 60 months in custody -- a total of 60 months in custody.

For Count 5, 120 months in custody to run concurrently with the 60 months.

And then we're going to Counts 22, 26, 30, 34 and 38. That's 300 months to run concurrently with all the previous counts.

Then on Count 23, 60 months. But this one is going to run consecutively to the other sentences imposed.

And Count 27, 31, 35 and 39, 300 months to run consecutively, for a total of 1,200 months in custody. It's not the 3,200 months. It's not the 4,800 months. It's 1,200 months in custody.

And I would give this sentence regardless of the five-level, two-level enhancements, any of the enhancements that applied in this case, I would give this sentence regardless of it.

In addition, on all of the counts, you have five-year term of supervised release to run concurrently. That's on all the counts.

[End of relevant section of transcript.]

33a

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA

v.

COREY DEYON DUFFEY

**JUDGMENT ON RESENTENCING IN A
CRIMINAL CASE**

Case Number: **3:08-CR-00167-B(1)**

USM Number: 37465-177

John Torrey Hunter

Defendant's Attorney

THE DEFENDANT:

<input type="checkbox"/> pleaded guilty to count(s)	
<input type="checkbox"/> pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court(s).	

<input type="checkbox"/> pleaded nolo contendere to count(s) which was accepted by the court	
<input checked="" type="checkbox"/> was found guilty on count(s) after a plea of not guilty	<u>Counts 1, 5, 14, 15, 16, 20, 22, 23, 24, 26, 27, 28, 30, 31, 32, 34, 38, 39 of the _____ superseding Indictment filed November 19, 2008</u>

The defendant is adjudicated guilty of these offenses:

<u>Title & Section/ Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 371(18) U.S.C. § 2113(a) & (d) Conspiracy to Commit Bank Robbery	June 2, 2008	1
18 U.S.C. §§ 922(g)(1) & 924(a)(2) Felon in Possession of a Firearm	June 2, 2008	5
18 U.S.C. § 371(18) U.S.C. § 2113(a) & (d) Conspiracy to Commit Bank Robbery	May 2008	14
18 U.S.C. § 371(18) U.S.C. § 2113(a) & (d) Conspiracy to Commit Bank Robbery	May 2008	15

18 U.S.C. § 371(18) May 16, 2008 16
U.S.C. § 2113(a) & (d))
Conspiracy to Commit
Bank Robbery

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s)_____

Counts 3, 4, 18, and 19 vacated by the Fifth Circuit on January 3, 2012, and Counts 2, 17, 21, 25, 29, 33, and 37 vacated by the June 14, 2021 Agreed Order granting Defendant's motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255.

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.

March 2, 2022

Date of Imposition of Judgment

Jane J. Boyle

Signature of Judge

36a

JANE J. BOYLE, UNITED STATES
DISTRICT JUDGE

Name and Title of Judge

March 14, 2022

Date

ADDITIONAL COUNTS OF CONVICTION

<u>Title & Section/ Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 371(18 U.S.C. § 2113(a) & (d)) Conspiracy to Commit Bank Robbery	April 24, 2008	20
18 U.S.C. §§ 2113(a) & (d) & 2 Bank Robbery and Aiding and Abetting	April 24, 2008	22
18 U.S.C. § 924(c)(1)(C)(i) Using and Carrying a Firearm During and in Relation to, and Possessing a Firearm in Furtherance of a Crime of Violence	April 24, 2008	23
18 U.S.C. § 371(18 U.S.C. § 2113(a) & (d)) Conspiracy to Commit Bank Robbery	March 28, 2008	24
18 U.S.C. §§ 2113(a) & (d) & 2 Bank Robbery and Aiding and Abetting	March 28, 2008	26
18 U.S.C. § 924(c)(1)(C)(i) Using and Carrying a Firearm During and in Relation to, and Possessing a	March 28, 2008	27

Firearm in Furtherance of a Crime of Violence		
18 U.S.C. § 371(18) U.S.C. § 2113(a) & (d)) Conspiracy to Commit Bank Robbery	March 28, 2008	28
18 U.S.C. §§ 2113(a) & (d) & 2 Bank Robbery and Aiding and Abetting	March 28, 2008	30
18 U.S.C. § 924(c)(1)(C)(i) Using and Carrying a Firearm During and in Relation to, and Possessing a Firearm in Furtherance of a Crime of Violence	March 28, 2008	31
18 U.S.C. § 371(18) U.S.C. § 2113(a) & (d)) Conspiracy to Commit Bank Robbery	February 1, 2008	32
18 U.S.C. §§ 2113(a) & (d) & 2 Bank Robbery and Aiding and Abetting	February 1, 2008	34
18 U.S.C. § 924(c)(1)(C)(i) Using and Carrying a Firearm During and in Relation to, and Possessing a Firearm in Furtherance of a Crime of Violence	February 1, 2008	35

39a

18 U.S.C. § 371(18 U.S.C. § 2113(a) & (d)) Conspiracy to Commit Bank Robbery	January 28, 2008	36
18 U.S.C. §§ 2113(a) & (d) & 2 Bank Robbery and Aiding and Abetting	January 28, 2008	38
18 U.S.C. § 924(c)(1)(C)(i) Using and Carrying a Firearm During and in Relation to, and Possessing a Firearm in Furtherance of a Crime of Violence	January 28, 2008	39

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **1,560 MONTHS**. This term consists of 60 months on each of Counts 1, 14, 15, 16, 20, 24, 28, 32, and 36; 120 months on Count 5; and 300 months on each of Counts 22, 26, 30, 34, and 38. All counts listed above are to run concurrently with one another. Furthermore, the defendant is hereby committed to the custody of the Federal Bureau of Prisons for a period 60 months on Count 23; and 300 months on each of Counts 27, 31, 35, and 39, to run consecutive to each other, and to any other sentence imposed, for a total aggregate term of imprisonment of 1,560 months.

The court makes the following recommendations to the Bureau of Prisons: _____

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

The defendant shall surrender to the United States Marshal for this district: _____

at _____ a.m. p.m. on _____

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons: _____

before 2 p.m. on _____

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

41a

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

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **FIVE (5) YEARS. This term consists of 3 years on each of Counts 1, 5, 14, 15, 16, 20, 24, 28, 32, and 36; and 5 years on each of Counts 22, 23, 26, 27, 30, 31, 34, 35, 38, and 39, to run concurrently with one another.**

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.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. (*check if applicable*)
5. You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
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

43a

officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*

7. You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. 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.

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.

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. I understand additional information regarding these conditions is available at www.txnp.uscourts.gov.

Defendant's Signature _____

Date _____

SPECIAL CONDITIONS OF SUPERVISION

Pursuant to the Mandatory Victims Restitution Act of 1996, the defendant is ordered to pay restitution in the amount of \$355,976 (joint and several with his co-defendants as set forth on page 7), payable to the U.S. District Clerk, 1100 Commerce Street, Room 1452, Dallas, Texas 75242. Restitution shall be payable immediately and any unpaid balance shall be payable during incarceration. Restitution shall be disbursed to:

Bank of America
Attention: Security Director
Acct Ref: Bank robbery on April 24, 2008
\$85,000.00

State Bank of Texas
Attention: Security Director
Acct Ref: Bank robbery on March 28, 2008
\$14,000

Comerica Bank
Attention: Security Director
Acct Ref: Bank robbery on February 1, 2008
\$246,000

Citi Bank
Attention: Security Director
Acct Ref: Bank robbery on January 28, 2008
\$5,000

Century Bank
Attention: Security Director
Acct Ref: Bank robbery on March 28, 2008
\$5,976

If upon commencement of the term of supervised release any part of the restitution remains unpaid, the defendant shall make payments on such unpaid

balance in monthly installments of not less than 10 percent of the defendant's gross monthly income, or at a rate of not less than \$50 per month, whichever is greater. Payment shall begin no later than 60 days after the defendant's release from confinement and shall continue each month thereafter until the balance is paid in full. In addition, at least 50 percent of the receipts received from gifts, tax returns, inheritances, bonuses, lawsuit awards, and any other receipt of money shall be paid toward the unpaid balance within 15 days of receipt. This payment plan shall not affect the ability of the United States to immediately collect payment in full through garnishment, the Treasury Offset Program, the Inmate Financial Responsibility Program, the Federal Debt Collection Procedures Act of 1990 or any other means available under federal or state law. Furthermore, it is ordered that interest on the unpaid balance is waived pursuant to 18 U.S.C. § 3612(f)(3).

You must provide the probation officer with access to any requested financial information and authorize the release of any financial information. The probation office may share financial information with the U.S. Attorney's Office.

The defendant shall pay any remaining balance of restitution in the amount of \$355,976, as set out in this Judgment.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments page.

	<u>Assessment</u>	<u>Restitution</u>
TOTALS	\$2,000.00	\$355,976.00
	<u>AVAA</u>	<u>JVTA</u>
	Fine <u>Assessment*</u>	<u>Assessment**</u>
TOTALS	\$0.00 \$0.00	\$0.00

The determination of restitution is deferred until _____ *An Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However,

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

\$85,000.00, joint and several with co-defendants Tony Hewitt(2), Jarvis Ross (3), Darobie Stenline (4), Charles Runnels (5), Antonyo Reece (6), and Yolanda McDow (7), to:

Bank of America

Acct Ref: Bank robbery on April 24, 2008

\$14,000, joint and several with co-defendants Tony Hewitt(2), Jarvis Ross (3), Darobie Stenline (4), and Charles Runnels (5), to:

State Bank of Texas

Acct Ref: Bank robbery on March 28, 2008

\$246,000, joint and several with co-defendants Tony Hewitt(2), Jarvis Ross (3), Darobie Stenline (4), Charles Runnels (5), and Yolanda McDow (7), to:

Comerica Bank

Acct Ref: Bank robbery on February 1, 2008

\$5,000, joint and several with co-defendants Tony Hewitt(2), Jarvis Ross (3), Darobie Stenline (4), and Charles Runnels (5), to:

Citi Bank

Acct Ref: Bank robbery on January 28, 2008

\$5,976, joint and several with co-defendants Tony Hewitt(2), Jarvis Ross (3), Charles Runnels (5), and Yolanda McDow (7), to:

Century Bank

Acct Ref: Bank robbery on March 28, 2008

Restitution amount ordered pursuant to plea agreement \$_____

51a

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

the interest requirement is waived for fine restitution

the interest requirement for the fine restitution is modified as follows:_____

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A Lump sum payment of \$ 355,976 due immediately, balance due

not later than _____, or

in accordance with C, D, E, or F below;
or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after the date of this judgment; or

D Payment in equal monthly (*e.g., weekly, monthly, quarterly*) installments not less than 10 percent of the defendant's gross monthly income, or at a rate of not less than \$50 per month, whichever is greater, until the balance is paid in full, to commence 60 days (*e.g., 30 or 60 days*) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (*e.g., 30 or 60 days*) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

It is ordered that the Defendant shall pay to the United States a special assessment of

\$2,000.00 for Counts 1, 5, 14, 15, 16, 20, 22, 23, 24, 26, 27, 28, 30, 31, 32, 34, 35, 36, 38, and 39, which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of 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.

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

Joint and Several

See above for Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

As set forth on page 7.

The defendant shall pay the cost of prosecution.
 The defendant shall pay the following court cost(s): _____

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

54a

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTAs assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

55a

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JARVIS DUPREE ROSS,

Defendant.

3:08-CR-00167-B-3

RESENTENCING HEARING
BEFORE THE HONORABLE JANE J. BOYLE
UNITED STATES DISTRICT JUDGE
MARCH 24, 2022

A P P E A R A N C E S

For the Government:

UNITED STATES ATTORNEY'S OFFICE
1100 Commerce Street - 3rd Floor
Dallas, TX 75242

56a

214/659-8600

BY: AMY J. MITCHELL

For the Defendant:

LAW OFFICE OF KEVIN B. ROSS, P.C.

8150 North Central Expressway - Suite M2070

Dallas, TX 75206

214/731-3151

BY: KEVIN B. ROSS

COURT REPORTER: SHAWNIE ARCHULETA,

TX CCR No. 7533

1100 Commerce Street

Dallas, Texas 75242

proceedings reported by mechanical stenography,
transcript produced by computer.

(In open court at 10:00 a.m.)

THE COURT: This is Case 3:08-CR-167, United States v. Jarvis Dupree Ross.

Who is here for the Government?

MS. MITCHELL: Amy Mitchell for the Government.

THE COURT: And who is here for the defense?

MR. ROSS: Kevin Ross, Your Honor.

[End of relevant section of transcript.]

MR. ROSS: What we tried to do, Your Honor, in the objections, is focused on the fact that we believe the First Step Act of 2018 that modified 924(c)'s is applicable in this case.

Your Honor, in the response to the objections, they cited U.S. v. Gomez and the Fifth Circuit that talked

about when a sentence is imposed, and ultimately concluded that the First Step Act of 2018 does not apply for cases that are on direct appeal.

This case is different and, I think, distinguishable from Gomez in this sense.

Mr. Gomez, which happened to be my case before the 5th Circuit --

THE COURT: That's funny.

MR. ROSS: -- had a sentence that already had been imposed just right before the First Step Act went into effect. The case went all the way up in oral argument.

The difference in that was that there was a sentence imposed at the time. And the argument more so was that it wasn't a final sentence, it was pending on appeal and things of that nature.

The difference in this case is that this is a 2255 -- which was granted -- in which the Court has vacated, set aside his sentence. So as he stands here today, he is not under a sentence.

And so, in effect, as some of the cases that we cited, that when there is a vacatur or setting aside of a sentence, then that sentence becomes a nullity, a legal nullity. And so to go back and to say that though a sentence was imposed prior to, but, yet, now looking at it, there's not a sentence, because that sentence has been vacated, wherein he gets a clean slate. And the Court now in resentencing him is starting afresh.

It's more so -- what adds to this, Your Honor, is the fact that this is not a limited type of sentencing. This is a general resentencing in which the Court has complete discretion in resentencing on all counts on the whole case.

So the argument, Your Honor, is the fact that, as he stands here today, if a person were to stand before the Court in the same situation with a 924(c) conviction, the Court would have to follow the First Step Act and could not apply in that case.

And so here, Mr. Ross stands in the same situation as far as a resentencing goes in which he's not under a sentence.

Your Honor, this is a huge swing. There's 1,200 months if he gets sentenced without the First Step Act. 240 months if he gets sentenced and the First Step Act does apply. That's a 960-month swing. That's a 80-year swing.

And I think it's clear from the -- what Congress was seeking to do in implementing the First Step Act and passing the First Step Act is for defendants who were in this situation would not be under the overbearing lengthy sentences that were being imposed.

THE COURT: Do you have any cases that are on point?

MR. ROSS: Your Honor, I think right now, as far as cases, *Bethea* is a case in which the 4th Circuit discussed the fact that on a 2255 for a remand for resentencing that they would apply the First Step Act. I think right now there is a circuit split.

THE COURT: Yes, there is.

MR. ROSS: It's really kind of undecided and really based upon when a sentence is deemed to be imposed in a case.

Exhibit A that I had filed with my PSR objections was an amicus brief on behalf of three of the sentencers who helped draft the First Step Act,

Senator Grassley, Senator Durbin, and Senator Booker.

Your Honor, I think that this amicus brief, which was in another case, it didn't reach the merits because the defendant was released on passion or never really got to the point of making this decision.

But clearly in this brief filed on behalf of the senators, who drafted it, discusses Section 401(c), but the language is exactly the same in the 924(c) section in the case.

Your Honor, I think -- and 403(b) -- it clearly shows Congress's intent.

THE COURT: I mean, it says, "The text of Section 401 reflects the settled principle that vacatur nullifies the sentence in its entirety," on Page 10.

MR. ROSS: That's correct, Your Honor.

And in Footnote 3, where it talks about Section 403 of this act, which is not an issue in this appeal, but it is in our case, contains the identical applicability provision. And that the Court's interpretation of Section 401(c) most likely --

THE COURT: Slow down.

MR. ROSS: And that the Court's interpretation of 401(c) will most likely inform any future interpretation of 403(b), and that's why we are here today.

THE COURT: Okay.

MR. ROSS: Your Honor, I think that it is not a far legal stretch. Actually, I think it's -- it's on point, that just from -- from a legal perspective under the law, that if a sentence has been vacated and becomes a legal nullity, it is as if that sentence is no -- it is. That

sentence is no longer in effect. So then, to go back and say a sentence that was imposed that is void and try to give legal effect to it based on the statute, I don't think that's how anyone looks -- should look at the law or what -- what the intent of Congress was when it passed this law.

So, Your Honor, in a nutshell, getting to the point, because there is -- because the sentence -- earlier sentence was nullified, it was vacated, set aside, therefore there is not a sentence that was imposed legally.

And as Mr. Ross stands here today to be re -- to be sentenced, it is as if he is being sentenced for the first time.

THE COURT: Is the case in the 4th Circuit also a 403 case?

MR. ROSS: I believe it is, Your Honor.

THE COURT: All right. Okay. I would like to hear from Ms. -- I'm sorry, Ms. Mitchell.

MS. MITCHELL: They don't let me out of my office very often these days.

THE COURT: They don't, but we're seeing you more and more and that's good.

MS. MITCHELL: I think the important thing here -- and it's this one that's working better.

THE COURT: Yeah, I think so.

MS. MITCHELL: -- Congress could have made the amendments to 924(c) fully retroactive. They could have said, "This applies to everyone," or "This applies to sentences that aren't final or sentences that are vacated in the future," but they didn't do that. What they did was limit it very specifically to whether a

sentence for the offense has been imposed as of the date of enactment, which is December 20th of 2018.

And so in this case, Mr. Ross was serving this Court's valid sentence on December 20th, 2018. It was the sentence the Court imposed in 2012. And based on the plain language of the amendment, itself, taken together with the cases that have begun to interpret it. Gomez is the only 5th Circuit case.

THE COURT: I have Jackson out of the 6th Circuit.

MS. MITCHELL: Yes, Jackson out of the 5th Circuit and Smith out of the 11th. There are actually several cases out of the 6th Circuit. And all of those really focus on was there a valid sentence on the date of enactment.

And in some of those cases, a sentence was vacated just before, but they hadn't been resentenced yet. And so on December 20th, 2018, they did have a sentence. And in those cases, the 6th Circuit applied the amendments.

But in the cases where there was a sentence on that particular date, the amendments did not apply. And it's the Government's position that that is the better reading of the language of the amendment and that Mr. Ross should be subject to 25 years on those subsequents.

THE COURT: So how would Mr. Ross not be subject to what you are talking about here?

MS. MITCHELL: If the Court had vacated his sentence on December 19th of 2018 and potentially he would not have been subject -- he would have been eligible for the First Step Act.

THE COURT: And how could I have done that?

MS. MITCHELL: You couldn't have in this case, because there was no --

THE COURT: Right.

MS. MITCHELL: I don't remember exactly what day this came out.

THE COURT: Yeah, it came out in 2019 or something, right?

MS. MITCHELL: Correct.

THE COURT: Yeah, 2020.

MS. MITCHELL: Yeah. The decision that actually, you know, caused the vacatur of his, you know, unconstitutional 924(c)'s that were tied to conspiracy, bank robbery, that occurred later on.

THE COURT: Yes. Okay. Thank you.

MS. MITCHELL: Thank you.

THE COURT: Mr. Ross, I like this argument. I appreciate this. And this is probably the third or fourth time I've heard it, but I -- I think I'm going to go with the Government.

We will see what the 5th Circuit says, because I'm sure you will appeal this, and see if they can tell us whether 403 is subject to the First Step Act or not. I don't think it is based on what I've seen out of the 6th Circuit, but we'll see. All right? So I'm going to overrule your objection.

[End of relevant section of transcript.]

THE COURT: All right. Mr. Ross, you know, the case is horrible, you know. I don't have to repeat all the facts, but it was an armed robbery, several armed robberies, takeover robberies, where people were terrorized. You had body armor. You had stun guns.

63a

You had weapons. You had all sorts of stuff, you know, maps and stuff. And it was jumping over the counters and hitting people with a gun and stunning people with a gun. And some of those people will never get over that.

And it was -- it was kind of a fun case, actually, because I couldn't believe what I was hearing. But at the same time, it -- it really did happen, and it was scary. And I think that we thought that the next thing you were going to do was hijack someone, because that seemed to be in the plans, but I'm not considering that now.

So I'm thinking about all the facts of the case, and they are overwhelmingly bad. And I also recall, if you will -- just a minute. Just a minute. I'm looking for his presentence report.

Oh, here it is.

Yeah, I'm looking at your adult convictions, and they were possession of marijuana; tampering with identification numbers; evading arrest; possession of marijuana; assault on a public servant, and -- you know, they -- they are sort of violent, there's some in there of the violent type.

So, you know, I just don't have much sympathy for you. I am going to give you a sentence in line with what I am supposed to under the law. But the 3553 factors, I think, just beg me to sentence you to a lot of time, and I'm going to.

So on Counts 1, 14, 15, 16, 20, 24, 28, 36, I'm going to give you 60 months per count.

On Count 7 and 42, 120 months per count.

On Counts 22, 26, 30, 38, 300 months per count.

And on Count 12, 365 months to run currently to all previous counts.

And Count 13, 60 months to run consecutively to any other sentence imposed.

And Counts 23 and 27, 300 months per count to run consecutively to each other and to any other sentence imposed for an aggregate sentence of 1,200 months. And the total sentence imposed is 1,625 months.

Did I announce that correctly?

MR. ROSS: I think there's just two counts that were left off at the end. It should be Counts 23, 27, 31 and 39.

THE COURT: Okay. 23, 27, 31 and 39 at 300 months per count to run consecutively with each other.

Okay. Supervised release is:

On Counts 1, 7, 14, 15, 16, 20, 24, 28, 36 and 42, three years' supervised release.

On Counts 12, 13, 22, 23, 26, 27, 30, 31, 38 and 39, five years to run concurrently with the other sentence -- with the other supervised release term.

There is a 100-dollar per count special assessment for a total of \$2,000. There's no fine, and restitution in the amount of \$109,976.

So pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Jarvis Dupree Ross, is hereby committed to the custody of the Federal Bureau of Prisons for a period of 60 months on each of Counts 1, 14, 15, 16, 20, 28 and 36; 120 months on Counts 7, 40 and 42; 300 months on Counts 22, 26, 30, 38; and 365 months on Count 12. All counts listed above are to run concurrently with one another.

65a

Furthermore, the defendant is hereby committed to the custody of the Federal Bureau of Prisons for a period of 60 months on Count 13 and 300 months on each of Counts 23, 27, 31 and 39 to run consecutive to each other and to any other sentence imposed, the sentence being 1,625 months.

[End of relevant section of transcript.]

66a

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA

v.

JARVIS DUPREE ROSS

**JUDGMENT ON RESENTENCING IN A
CRIMINAL CASE**

Case Number: **3:08-CR-00167-B(3)**

USM Number: 37467-177

Kevin B Ross

Defendant's Attorney

THE DEFENDANT:

<input type="checkbox"/> pleaded guilty to count(s)	
<input type="checkbox"/> pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	

<input type="checkbox"/> pleaded nolo contendere to count(s) which was accepted by the court	
<input checked="" type="checkbox"/> was found guilty on count(s) after a plea of not guilty	<u>Counts 1, 7, 12, 13, 14, 15, 16, 20, 22, 23, 24, 26, 27, 28, 30, 31, 36, 38, 39, and 42 of the superseding Indictment filed November 19, 2008</u>

The defendant is adjudicated guilty of these offenses:

<u>Title & Section/ Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 371(18) U.S.C. § 2113(a) & (d) Conspiracy to Commit Bank Robbery	June 2, 2008	1
18 U.S.C. §§ 922(g)(1) & 924(a)(2) Felon in Possession of a Firearm	June 2, 2008	7
18 U.S.C. § 1201(a)(1) Kidnapping	June 2, 2008	12
18 U.S.C. § 924(c)(1)(C)(i) Using and Carrying a Firearm During and in Relation to, and Possessing a	June 2, 2008	13

Firearm in Furtherance
of a Crime of Violence

18 U.S.C. § 371(18) May 2008 14
U.S.C. § 2113(a) & (d))
Conspiracy to Commit
Bank Robbery

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s)_____

Counts 3, 4, 18, and 19 vacated by the Fifth Circuit on January 3, 2012, and Counts 2, 17, 21, 25, 29, and 37 vacated by the November 2, 2021, Agreed Order Granting § 2255 Motion (doc. 700.)

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.

March 24, 2022

Date of Imposition of Judgment

Jane J. Boyle

Signature of Judge

69a

JANE J. BOYLE, UNITED STATES
DISTRICT JUDGE

Name and Title of Judge

March 29, 2022

Date

ADDITIONAL COUNTS OF CONVICTION

<u>Title & Section/ Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 371(18) U.S.C. § 2113(a) & (d) Conspiracy to Commit Bank Robbery	May 2008	15
18 U.S.C. § 371(18) U.S.C. § 2113(a) & (d) Conspiracy to Commit Bank Robbery	May 16, 2008	16
18 U.S.C. § 371(18) U.S.C. § 2113(a) & (d) Conspiracy to Commit Bank Robbery	April 24, 2008	20
18 U.S.C. §§ 2113(a) & (d) & 2 Bank Robbery and Aiding and Abetting	April 24, 2008	22
18 U.S.C. § 924(c)(1)(C)(i) Using and Carrying a Firearm During and in Relation to, and Possessing a Firearm in Furtherance of a Crime of Violence	April 24, 2008	23
18 U.S.C. § 371(18) U.S.C. § 2113(a) & (d) Conspiracy to Commit Bank Robbery	March 28, 2008	24

71a

18 U.S.C. §§ 2113(a) & (d) & 2 Bank Robbery and Aiding and Abetting	March 28, 2008	26
18 U.S.C. § 924(c)(1)(C)(i) Using and Carrying a Firearm During and in Relation to, and Possessing a Firearm in Furtherance of a Crime of Violence	March 28, 2008	27
18 U.S.C. § 371(18 U.S.C. § 2113(a) & (d)) Conspiracy to Commit Bank Robbery	March 28, 2008	28
18 U.S.C. §§ 2113(a) & (d) & 2 Bank Robbery and Aiding and Abetting	March 28, 2008	30
18 U.S.C. § 924(c)(1)(C)(i) Using and Carrying a Firearm During and in Relation to, and Possessing a Firearm in Furtherance of a Crime of Violence	March 28, 2008	31
18 U.S.C. § 371(18 U.S.C. § 2113(a) & (d)) Conspiracy to Commit Bank Robbery	January 28, 2008	36
18 U.S.C. §§ 2113(a) & (d) & 2 Bank Robbery and Aiding and Abetting	January 28, 2008	38

72a

18 U.S.C. § 924(c)(1)(C)(i) Using and Carrying a Firearm During and in Relation to, and Possessing a Firearm in Furtherance of a Crime of Violence	January 28, 2008	39
18 U.S.C. §§ 922(g)(1) & 924(a)(2) Felon in Possession of a Firearm	April 25, 2008	42

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **1,625 MONTHS**. This term consists of 60 months on each of Counts 1, 14, 15, 16, 20, 24, 28, and 36; 120 months on Counts 7 and 42; 300 months on each of Counts 22, 26, 30, and 38; and 365 months on Count 12. All counts listed above are to run concurrently with one another. Furthermore, the defendant is hereby committed to the custody of the Federal Bureau of Prisons for a period 60 months on Count 13; and 300 months on each of Counts 23, 27, 31, and 39, to run consecutive to each other, and to any other sentence imposed for a total aggregate term of imprisonment of 1,625 months.

The court makes the following recommendations to the Bureau of Prisons: _____

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

The defendant shall surrender to the United States Marshal for this district: _____

at _____ a.m. p.m. on ___

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons: _____

before 2 p.m. on _____

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

74a

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

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **FIVE (5) YEARS. This term consists of 3 years as to Counts 1, 7, 14, 15, 16, 20, 24, 28, 36, and 42; and 5 years as to Counts 12, 13, 22, 23, 26, 27, 30, 31, 38, and 39, with all terms to run concurrently.**

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.

The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)

4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. (*check if applicable*)

5. You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)

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

76a

offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*

7. You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. 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.

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.

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. I understand additional information regarding these conditions is available at www.txnp.uscourts.gov.

Defendant's Signature _____

Date _____

SPECIAL CONDITIONS OF SUPERVISION

Pursuant to the Mandatory Victims Restitution Act of 1996, the defendant is ordered to pay restitution in the amount of \$109,976, payable to the U.S. District Clerk, 1100 Commerce Street, Room 1452, Dallas, Texas 75242. Restitution shall be payable immediately and any unpaid balance shall be payable during incarceration. Restitution shall be disbursed to:

Bank of America
Attention: Security Director
Acct Ref: Bank robbery on 4/24/2008,
\$85,000.00

State Bank of Texas
Attention: Security Director
Acct Ref: Bank robbery on March 28, 2008
\$14,000

Citi Bank
Attention: Security Director
Acct Ref: Bank robbery on January 28, 2008
\$5,000

Century Bank
Attention: Security Director
Acct Ref: Bank robbery on March 28, 2008
\$5,976

If upon commencement of the term of supervised release any part of the restitution remains unpaid, the defendant shall make payments on such unpaid balance in monthly installments of not less than 10 percent of the defendant's gross monthly income, or at a rate of not less than \$50 per month, whichever is greater. Payment shall begin no later than 60 days after the defendant's release from confinement and

81a

shall continue each month thereafter until the balance is paid in full. In addition, at least 50 percent of the receipts received from gifts, tax returns, inheritances, bonuses, lawsuit awards, and any other receipt of money shall be paid toward the unpaid balance within 15 days of receipt. This payment plan shall not affect the ability of the United States to immediately collect payment in full through garnishment, the Treasury Offset Program, the Inmate Financial Responsibility Program, the Federal Debt Collection Procedures Act of 1990 or any other means available under federal or state law. Furthermore, it is ordered that interest on the unpaid balance is waived pursuant to 18 U.S.C. § 3612(f)(3).

You must provide the probation officer with access to any requested financial information and authorize the release of any financial information. The probation office may share financial information with the U.S. Attorney's Office.

The defendant shall pay any remaining balance of restitution in the amount of \$109,976, as set out in this Judgment.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments page.

	<u>Assessment</u>	<u>Restitution</u>
TOTALS	\$2,000.00	\$109,976.00
	<u>AVAA</u>	<u>JVTA</u>
	Fine <u>Assessment*</u>	<u>Assessment**</u>
TOTALS	\$0.00 \$0.00	\$0.00

The determination of restitution is deferred until _____ *An Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i),

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

all nonfederal victims must be paid before the United States is paid.

Restitution of \$109,976.00 to:

\$85,000.00, joint and several with co-defendants Corey Duffey (01), Tony Hewitt (02), Darobie Stenline (04), Charles Runnels (05), Antonyo Reece (06), and Yolanda McDow (07), to:

Bank of America

Acct Ref: Bank robbery on April 24, 2008

\$5,976, joint and several with co-defendants Corey Duffey (01), Tony Hewitt (02), Charles Runnels (05), and Yolanda McDow (07), to:

Century Bank

Acct Ref: Bank robbery on March 28, 2008

\$5,000, joint and several with co-defendants Corey Duffey (01), Tony Hewitt (02), Darobie Stenline (04), and Charles Runnels (05), to:

Citi Bank

Acct Ref: Bank robbery on January 28, 2008

\$14,000, joint and several with co-defendants Corey Duffey (01), Tony Hewitt (02), Darobie Stenline (04), and Charles Runnels (05), to:

State Bank of Texas

Acct Ref: Bank robbery on March 28, 2008

Restitution amount ordered pursuant to plea agreement \$_____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject

84a

to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

the interest requirement is waived for fine restitution

the interest requirement for the fine restitution is modified as follows:_____

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A Lump sum payment of \$ 109,976 due immediately, balance due

not later than _____, or

in accordance with C, D, E, or F below;
or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after the date of this judgment; or

D Payment in equal monthly (*e.g., weekly, monthly, quarterly*) installments not less than 10 percent of the defendant's gross monthly income, or at a rate of not less than \$50 per month, whichever is greater, until the balance is paid in full, to commence 60 days (*e.g., 30 or 60 days*) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (*e.g., 30 or 60 days*) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

It is ordered that the Defendant shall pay to the United States a special assessment of

\$2,000.00 for Counts 1, 7, 12, 13, 14, 15, 16, 20, 22, 23, 24, 26, 27, 28, 30, 31, 36, 38, 39 and 42, which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of 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.

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

Joint and Several

See above for Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

As set forth on page 7.

The defendant shall pay the cost of prosecution.
 The defendant shall pay the following court cost(s): _____

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

87a

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTAs assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.