

No. 26-

IN THE

Supreme Court of the United States

PATRICK WAYNE MCHENRY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When Petitioner Patrick McHenry robbed a motel guest, his shotgun stayed in a car parked outside. Mr. McHenry’s girlfriend later drove away from the motel in that car, while Mr. McHenry left in a different vehicle. Mr. McHenry was charged with carrying a firearm during a crime of violence under 18 U.S.C. § 924(c). At trial, the government argued only that he personally carried the firearm before and after the takings—when he drove it to the motel and after he had already left. Neither the government’s arguments nor the jury instructions suggested that flight from the scene can be part of a robbery for § 924(c) purposes, or that Mr. McHenry violated § 924(c) when he told his girlfriend to drive away in the car with the shotgun.

The Tenth Circuit nonetheless affirmed, holding that a robbery continues at least through any immediate post-taking flight—even though the offense-element conduct is already over—so Mr. McHenry constructively carried the shotgun “during” the robbery by having his girlfriend drive away with it after the takings. The court acknowledged that the government did not make this argument at trial, but it concluded (in the two-judge concurrence’s words) that the jury had enough “puzzle pieces” to convict on this theory.

The questions presented are:

1. Whether the decision below should be summarily reversed for affirming a conviction on a theory that “the Government[] fail[ed] to argue,” App. 23a, and the court never submitted to the jury.
2. Whether a defendant violates § 924(c) by carrying a firearm “during” a crime of violence if he does not carry the firearm while committing the offense’s conduct elements—only after the elements are complete.

PARTIES TO THE PROCEEDING

Petitioner is Patrick Wayne McHenry.

Respondent is the United States of America.

No corporate parties are involved in this case.

RELATED CASES

This case arises from the following proceedings in the District Court for the Eastern District of Oklahoma and the Court of Appeals for the Tenth Circuit:

United States v. McHenry
No. 24-7048 (10th Cir.); and

United States v. McHenry
No. 6:21-cr-326-RAW-2 (E.D. Okla.).

No other proceedings directly relate to this case.

TABLE OF CONTENTS

	Page
Questions presented	i
Parties to the proceeding.....	ii
Related cases.....	iii
Petition for a writ of certiorari.....	1
Opinions and orders below	1
Statement of jurisdiction.....	1
Constitutional and statutory provisions involved.....	1
Introduction	2
Statement.....	4
Reasons for granting the petition	7
I. The Tenth Circuit’s affirmance on grounds never presented to the jury warrants summary reversal.....	7
A. The decision below directly contravenes this Court’s trial-waiver precedents.....	7
B. Ordinary certiorari criteria favor intervention too.....	13
II. The Court should alternatively grant certiorari on the § 924(c) issue.....	17
A. The circuits are split.....	18
B. The decision below is wrong.....	22
C. This case is an ideal vehicle to resolve an important and recurring issue.....	25
Conclusion.....	28

TABLE OF AUTHORITIES

CASES	Page
<i>Abouammo v. United States</i> , 146 S. Ct. 1571 (2026).....	4, 23, 24, 26
<i>Barrett v. United States</i> , 607 U.S. 128 (2026)	25, 26
<i>Carter v. United States</i> , 530 U.S. 255 (2000)	4, 23, 24
<i>Chambers v. McCaughtry</i> , 264 F.3d 732 (7th Cir. 2001).....	25
<i>Chiarella v. United States</i> , 445 U.S. 222 (1980)	7, 8, 13
<i>Ciminelli v. United States</i> , 598 U.S. 306 (2023)	2, 8, 9, 10, 12, 13, 16, 17
<i>Delligatti v. United States</i> , 604 U.S. 423 (2025)	26
<i>Dunn v. United States</i> , 442 U.S. 100 (1979)	7, 16
<i>Erlinger v. United States</i> , 602 U.S. 821 (2024)	16
<i>Hewitt v. United States</i> , 606 U.S. 419 (2025)	26
<i>Lora v. United States</i> , 599 U.S. 453 (2023)	26
<i>McCormick v. United States</i> , 500 U.S. 257 (1991)	2, 8, 9, 13
<i>Muscarello v. United States</i> , 524 U.S. 125 (1998)	10
<i>Rutherford v. United States</i> , 608 U.S. ____ (2026).....	26
<i>Toussie v. United States</i> , 397 U.S. 112 (1970)	24
<i>United States v. Ashburn</i> , 20 F.3d 1336 (5th Cir. 1994).....	25

TABLE OF AUTHORITIES—continued

<i>United States v. Askia</i> , 893 F.3d 1110 (8th Cir. 2018)	24
<i>United States v. Andrews</i> , 442 F.3d 996 (7th Cir. 2006)	21
<i>United States v. Baker</i> , 155 F.4th 1188 (10th Cir. 2025)	13, 14
<i>United States v. Cecil</i> , 615 F.3d 678 (6th Cir. 2010)	20
<i>United States v. Clark</i> , 115 F.4th 895 (8th Cir. 2024)	19
<i>United States v. Davis</i> , 588 U.S. 445 (2019)	24, 25, 26
<i>United States v. Dinkane</i> , 17 F.3d 1192 (9th Cir. 1994)	25
<i>United States v. Edwards</i> , No. 23-5007, 2025 WL 789558 (6th Cir. Mar. 12, 2025)	20, 21, 23
<i>United States v. Haymond</i> , 588 U.S. 634 (2019)	7
<i>United States v. Irving</i> , 437 F.2d 649 (D.C. Cir. 1970)	24
<i>United States v. Johnson</i> , 19 F.4th 248 (3d Cir. 2021)	14, 15
<i>United States v. Long Pumpkin</i> , 56 F.4th 604 (8th Cir. 2022)	11, 18
<i>United States v. McCaskill</i> , 676 F.2d 995 (4th Cir. 1982)	25
<i>United States v. Smith</i> , 415 F.3d 682 (7th Cir. 2005)	21
<i>United States v. Taylor</i> , 596 U.S. 845 (2022)	26
<i>United States v. Williams</i> , 344 F.3d 365 (3d Cir. 2003)	19, 20

TABLE OF AUTHORITIES—continued

<i>United States v. Winfield</i> , 997 F.2d 1076 (4th Cir. 1993)	15, 16
---	--------

STATUTES

18 U.S.C. § 924(c)(1)	1
18 U.S.C. § 2111	2
18 U.S.C. § 2119	2
28 U.S.C. § 1254(1)	1

CONSTITUTION

Sixth Amendment	1
-----------------------	---

OTHER AUTHORITIES

<i>During</i> , Merriam-Webster Dictionary, https://www.merriam- webster.com/dictionary/during	23
U.S. Sent’g Comm’n, Section 924(c) Firearms, https://www.ussc.gov/research/quick- facts/section-924c-firearms	26

PETITION FOR A WRIT OF CERTIORARI

Petitioner Patrick Wayne McHenry respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Tenth Circuit.

OPINIONS AND ORDERS BELOW

The Tenth Circuit’s opinion is reported at 161 F.4th 1194 and reproduced at App. 1a–26a. The unreported order denying panel rehearing and rehearing *en banc* is reproduced at App. 27a–28a.

STATEMENT OF JURISDICTION

The Tenth Circuit issued its judgment on December 12, 2025 and denied a timely rehearing petition on April 2, 2026. On May 29, 2026, Justice Gorsuch extended the time to file this petition to July 31, 2026. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury

18 U.S.C. § 924(c)(1) provides:

[A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime . . . be sentenced to a term of imprisonment of not less than 5 years.

18 U.S.C. § 2111 provides:

Whoever, within the special maritime and territorial jurisdiction of the United States, by force and violence, or by intimidation, takes or attempts to take from the person or presence of another anything of value, shall be imprisoned not more than fifteen years.

18 U.S.C. § 2119 provides:

Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall . . . be fined under this title or imprisoned not more than 15 years, or both[.]

INTRODUCTION

This case raises two important issues of federal criminal law, one warranting summary reversal.

First: May a court of appeals affirm a criminal conviction on a theory that was never presented to the jury or articulated in the jury instructions, so long as the instructions do not foreclose that theory outright?

It cannot. Under this Court’s longstanding waiver precedents, a defendant’s jury-trial right is violated “when an appellate court retries a case on appeal under different instructions and on a different theory than was ever presented to the jury.” *McCormick v. United States*, 500 U.S. 257, 270 n.8 (1991). Thus, the government cannot “cherry-pick facts presented to a jury charged on” one theory and use them to sustain a conviction on a different theory. *Ciminelli v. United States*, 598 U.S. 306, 316–17 (2023). That is true even if the jury instructions do not foreclose the new theory.

Yet the Tenth Circuit did exactly that. It affirmed Mr. McHenry’s § 924(c)(1) conviction on the novel theory that he indirectly carried a shotgun “during” a robbery by telling his girlfriend to drive off in the car containing the shotgun *after* the takings were complete. As the two-judge concurrence conceded, “the Government[] fail[ed] to argue” this theory, and the jury instructions did not articulate it. App. 23a. But the court concluded that “this potential trial waiver” was not a problem because the evidence and instructions gave the jury the “puzzle pieces” it needed to convict on this unargued ground. *Id.* at 24a, 26a.

Thus, under the decision below, a conviction may be affirmed on any theory the facts support, so long as the jury instructions do not explicitly foreclose it. That is just the kind of trial-by-appeal that this Court’s precedents forbid. Summary reversal is proper.

Even under standard certiorari criteria, review is warranted. Just last year, under similar reasoning, a divided Tenth Circuit panel affirmed a conviction on a theory not articulated at trial. This outlier approach conflicts directly with other circuits’ decisions. Absent summary reversal, the Court should grant plenary review to resolve this conflict.

Second, the Tenth Circuit’s substantive holding independently warrants review. The court resolved an important, recurring question: For purposes of determining whether a firearm was carried “during” a § 924(c) predicate offense, does the predicate last only as long as it takes to complete the proscribed conduct, or does it continue however long “common sense” may dictate? App. 15a. In line with three other circuits, the Tenth Circuit adopted the latter approach, treating flight as part of a predicate robbery offense even

though the charged statutory predicates have no element of flight or asportation (carrying away). See App. 14a. The Eighth Circuit, by contrast, holds that a predicate offense ends—and the window for § 924(c) liability closes—once its elements are complete.

The Eighth Circuit is right. Section 924(c)’s reach must be defined by a predicate offense’s elements, not by the duration of post-element conduct. This Court made clear in *Carter v. United States*, 530 U.S. 255 (2000), that courts may not read an asportation element into a robbery statute that Congress chose not to include. Nor can the decision below be squared with *Abouammo v. United States*, 146 S. Ct. 1571 (2026), which recently confirmed that a crime is complete once its elements are satisfied. Under the correct approach, Mr. McHenry’s robberies were complete—and his § 924(c) exposure concluded—*before* he supposedly carried the shotgun by telling his girlfriend to drive away with it. His § 924(c) conviction should be set aside.

STATEMENT

1. In late summer 2021, Mr. McHenry drove to a Motel 6 in Muskogee, Oklahoma, in a silver Honda containing a sawed-off shotgun. App. 3a. He parked around back—leaving the shotgun in the car—and walked with his codefendant, Ashton Clark, to a room occupied by Charles Jarman. *Id.* Mr. McHenry then threatened Mr. Jarman, took his property, and obtained possession of his Subaru. *Id.* at 4a.

The robbery and carjacking took place inside and in the parking lot in front of Mr. Jarman’s motel room. App. 3a–4a. During the takings, the shotgun never left the Honda, which was parked in a different lot. *Id.* at 3a. No witness testified that Mr. McHenry had the

shotgun on his person, in the room, or anywhere within his reach, and Ms. Clark testified that it remained in the parked Honda throughout. *Id.* at 6a. The government told the jury the same thing in closing argument, acknowledging that the shotgun “was in [the Honda] the whole time.” D. Ct. Dkt. 133 at 632.

After the robbery, Mr. McHenry told Ms. Clark to follow him in the Honda, while he drove away in Mr. Jarman’s Subaru. App. 4a. At the time, the shotgun was still in the Honda. *Id.* A short distance from the motel, the two switched vehicles and Mr. McHenry drove away in the Honda with the shotgun inside. *Id.*

2. Mr. McHenry was indicted for conspiracy to commit kidnapping, kidnapping, carjacking, robbery in Indian country, and carrying a firearm during and in relation to a crime of violence under § 924(c)(1)(A). The § 924(c) count alleged that Mr. McHenry “carried” the shotgun during the robbery and carjacking. App. 6a. Indeed, the government initially charged Mr. McHenry under § 924(c) on the theory that he “brandished a firearm [at Mr. Jarman]” during the course of the robbery. D. Ct. Dkt. 96 at 3. When it became clear that this did not happen, the government pivoted to the theory that Mr. McHenry personally moved the firearm before and after the encounter. App. 80a–81a.

At the close of the government’s case, Mr. McHenry moved for a judgment of acquittal on the § 924(c) count, arguing that it failed to prove he carried a firearm during the robbery because the shotgun remained in the Honda the whole time. App. 6a. The government responded that Mr. McHenry transported the shotgun to the Motel 6 and then left it in the Honda while robbing Mr. Jarman. *Id.* The district court denied the motion. *Id.*

During closings, the government conceded that the shotgun was in the Honda “the whole time” that Mr. McHenry was taking Mr. Jarman’s belongings. D. Ct. Dkt. 133 at 632. But it argued that Mr. McHenry violated § 924(c) still because he drove the shotgun to the Motel 6, and because he personally moved it to other locations later on. App. 80a–81a.

Mr. McHenry was convicted on all counts. App. 6a. The jury found that he carried—but did not use—a firearm during the robbery and carjacking. *Id.* The district court imposed a thirty-five-year sentence, including the mandatory consecutive five-year sentence required by § 924(c). *Id.* at 6a–7a.

3. The court of appeals affirmed on a different theory. It agreed that Mr. McHenry did not personally transport the shotgun during the robbery. But, adopting its own new theory, it concluded that he indirectly carried the shotgun by directing Ms. Clark to drive the Honda after the takings were complete. App. 10a. Holding that the robbery continued during Mr. McHenry’s flight from the scene, the court found this constructive post-taking carrying sufficient to satisfy § 924(c)’s “during” requirement. *Id.* at 13a. The majority barely tried to show that this theory had been sufficiently presented to the jury.

Judge Federico, joined by Judge McHugh, concurred. The concurrence conceded that “the Government[] fail[ed] to argue to the jury at trial that McHenry constructively possessed the shotgun during his flight when he instructed his girlfriend to follow him in the car . . . contain[ing] the shotgun,” which thus presented “tricky waiver questions.” App. 22a–23a. Yet the concurrence still concluded that affirmance on that theory was proper. It reasoned that, even absent an express argument or specific jury instructions, the

court’s general “instruct[ion] . . . on constructive possession,” “[c]ombined with the testimony from [Mr.] McHenry’s girlfriend that [Mr.] McHenry . . . directed her to follow in a separate vehicle with the shotgun,” gave “the jury . . . the puzzle pieces needed to convict.” *Id.* at 26a.

The Tenth Circuit denied rehearing *en banc*. App. 29a.

REASONS FOR GRANTING THE PETITION

I. The Tenth Circuit’s affirmance on grounds never presented to the jury warrants summary reversal.

“Only a jury, acting on proof beyond a reasonable doubt, may take a person’s liberty.” *United States v. Haymond*, 588 U.S. 634, 637 (2019) (plurality opinion). Thus, an appellate court “cannot affirm a criminal conviction on the basis of a theory not presented to the jury.” *Chiarella v. United States*, 445 U.S. 222, 236 (1980). Even so, the Tenth Circuit affirmed Mr. McHenry’s conviction on a theory of indirect carriage during *post*-taking flight that “the Government[] fail[ed] to argue,” App. 23a, and the district court never submitted to the jury. That clear violation of this Court’s longstanding precedents warrants summary reversal. Even under ordinary certiorari criteria, this Court should grant review to correct the Tenth Circuit’s outlier approach, which undermines the Sixth Amendment’s protections.

A. The decision below directly contravenes this Court’s trial-waiver precedents.

1. “Few constitutional principles are more firmly established than a defendant’s right to be heard on the specific charges of which he is accused.” *Dunn v.*

United States, 442 U.S. 100, 106 (1979). Determining whether a defendant is guilty of those charges is quintessentially “[a] function of” the “jury”—not an appellate court. *Ciminelli*, 598 U.S. at 317. That “right to a jury trial” is thus violated “when an appellate court retries a case on appeal under different instructions and on a different theory than was ever presented to the jury.” *McCormick*, 500 U.S. at 270 n.8 (1991). This “trial waiver” rule is clear and longstanding. App. 24a.

Chiarella set forth the modern doctrine. The defendant was convicted for “fail[ing] to disclose [an] impending [corporate] takeover before trading in the target company’s securities,” in violation of the Exchange Act. *Id.* at 224. The theory “submitted to the jury” at trial was that the defendant violated his duty to disclose material, nonpublic information to sellers of the target company’s securities. *Id.* at 233, 236. That theory turned out to be legally improper. *Id.* at 234–35. On appeal, the government advanced the “alternative theory” that the defendant “breached a duty to the acquiring corporation when he acted upon” material, nonpublic information. *Id.* at 235–36.

This Court refused to consider that theory because it “was not submitted to the jury.” *Id.* at 236. The “jury instructions demonstrate[d] that [the defendant] was convicted merely because of his failure to disclose material, nonpublic information to sellers.” *Id.* The jury was “not instructed on the nature or elements of a duty owed by petitioner to anyone other than the sellers.” *Id.* Because appellate courts “cannot affirm a criminal conviction on the basis of a theory not presented to the jury,” the Court refused to consider the government’s new theory. *Id.* at 236–37.

McCormick built on this rule. There, the defendant was convicted of accepting illegal payments under color of official right, in violation of the Hobbs Act. *McCormick*, 500 U.S. at 259. At trial, the jury was instructed generally that “voluntary campaign contributions were not vulnerable under the Hobbs Act.” *Id.* at 269. But it was not instructed “that the difference between legitimate and illegitimate campaign contributions was to be determined by the intention of the parties after considering specified factors.” *Id.* In upholding the conviction, the Fourth Circuit applied its own multi-factor test and reviewed the record for evidence that would “support findings . . . that the parties never intended any of the payments to be campaign contributions.” *Id.* at 270.

This Court reversed the attempt to affirm a conviction “under different instructions and on a different theory than was ever presented to the jury.” *Id.* at 269–70 & n.8. A general instruction that voluntary campaign contributions are permissible under the Hobbs Act, without more, was insufficient to apprise the jury of the government’s theory on appeal. *Id.* at 269–70. Nor did it matter that the underlying factual record “support[ed]” the Fourth Circuit’s “findings.” *Id.* at 270. “Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury.” *Id.* at 270 n.8. Because the jury was never instructed on the specific “legal and factual theories” on which the Fourth Circuit affirmed, the conviction could not stand. *Id.* at 270 & n.8.

Most recently, *Ciminelli* refused to affirm a wire-fraud conviction on a theory that was not “articulated below.” 598 U.S. at 316. There, after abandoning its prior “right-to-control theory,” the government urged

the Court to affirm the defendant's convictions "on the alternative ground that the evidence was sufficient to establish wire fraud under a traditional property-fraud theory." *Id.* That theory was neither "presented" at trial nor "charged" to the jury in the instructions. *Id.* The government nonetheless offered "profuse citations" to the factual records below to support its alternative theory. *Id.*

The Court swiftly rejected that end-run. It would not "cherry-pick facts presented to a jury charged on the right-to-control theory and apply them to the elements of a different wire fraud theory in the first instance." *Id.* at 316–17 (emphasis omitted). That would mean assuming "the function of a . . . jury," which is "not [an appellate court's] role." *Id.* at 317.

2. The decision below violates these trial-waiver precedents. To convict Mr. McHenry of carrying a firearm during a crime of violence under § 924(c)(1), the government was required to prove—and the jury was required to find—that he "knowingly possesse[d] and convey[ed]" a firearm during the robbery offense. *Muscarello v. United States*, 524 U.S. 125, 127 (1998). The Tenth Circuit concluded that these elements were satisfied because Mr. McHenry "carr[ied]" the shotgun indirectly when he ordered Ms. Clark to drive the Honda "during" their flight from the Motel 6, after the taking was complete. App. 10a, 16a. But as the two-judge concurrence recognized, "the Government[] fail[ed] to argue to the jury at trial that [Mr.] McHenry constructively possessed the shotgun during his flight when he instructed his girlfriend to follow him in the car that contained the shotgun." *Id.* at 23a. That failure reflected two distinct omissions.

First, the government did not explain when, in its view, the robbery crimes began and ended. Most notably, it did not argue that the robbery “continued” during the period of immediate flight, App. 16a, *after* Mr. McHenry had “secured initial control over the property” and the violent taking had thus ended. See *United States v. Long Pumpkin*, 56 F.4th 604, 614 (8th Cir. 2022). As a result, it never articulated the theory that Mr. McHenry’s possession and conveyance of a firearm during immediate flight could constitute carrying a firearm “during” a crime of violence.

Second, the government did not put forward the concepts of indirect carrying: it never argued that Mr. McHenry violated § 924(c)(1) by “exercis[ing] dominion and control over [Ms. Clark] and the [Honda]’ during the time” of immediate flight. App. 10a (citation omitted). Rather, the government’s carrying theory focused only on Mr. McHenry’s *direct* carriage of the firearm. The government maintained that Mr. McHenry “transport[ed] or move[d] the firearm from one place to another” because he *personally* moved the firearm. *Id.* at 80a–81a. It never invoked the period when Ms. Clark drove the Honda away from the Motel 6, which happened after the taking and before Mr. McHenry reentered the Honda.

Nor was the jury instructed on the Tenth Circuit’s theory. For one thing, the instructions nowhere suggested that flight is part of robbery, such that a defendant can commit a § 924(c)(1) offense by carrying a firearm only “during” his post-taking flight. Rather, the jurors were told that the conduct elements of the robbery offenses involved only the taking of property by force and violence or by intimidation. App. 59a–62a. Absent any instruction on how to determine the predicate robbery’s duration, the jurors would naturally

look to what they were told about the robbery itself—that it constitutes the conduct captured by its elements, and thus lasts only as long as they do. See *id.* at 59a–65a.

The instructions likewise failed to cover indirect carriage. The jury was instructed only on constructive possession, the first element of the Tenth Circuit’s indirect-carriage theory. App. 69a. But it was not instructed that § 924(c)(1)’s conveyance element can be satisfied by indirect transportation through another person. As a result, the instructions never articulated one of the elements of the Tenth Circuit’s theory (indirect conveyance), and they certainly never connected it to the other element (constructive possession) as a cognizable theory of indirect carriage.

3. The majority opinion barely tried to justify its wholly new theory. It said only that the “government argued to the jury that Mr. McHenry . . . violated § 924(c)(1)(A)” by “transporting the shotgun away from the Motel 6 to the house in Braggs,” “retrieving [the gun] from the Honda,” and then driving “back up to Tulsa.” App. 20a (cleaned up). But each of those instances occurred well *after* Mr. McHenry and Ms. Clark’s immediate flight from the scene, when Mr. McHenry either drove the Honda himself or carried the firearm on his person. So this was not the theory the Tenth Circuit itself adopted. The majority also pointed to arguments made “on appeal,” *id.*, but appellate arguments are irrelevant to *trial* waiver. See *Ciminelli*, 598 U.S. at 316.

The two-judge concurrence’s reasoning was little better. The concurrence conceded that “the Government[] fail[ed] to argue to the jury at trial that [Mr.] McHenry constructively possessed the shotgun during

his flight when he instructed his girlfriend to follow him in the car that contained the shotgun.” App. 23a. That admission “should [have been] the end of the case,” *Ciminelli*, 598 U.S. at 316—especially since the government’s theory was also absent from the jury instructions. See *Chiarella*, 445 U.S. at 236.

The concurrence nonetheless tried to justify affirmance by narrowing this Court’s trial-waiver precedents to a vanishing point. In its view, a court of appeals may affirm based on a theory that the government never articulated at trial, so long as the jury has enough to “piece” together “the puzzle” and the theory is not outright foreclosed by the jury instructions. App. 26a. Applying that rule, the Tenth Circuit concluded that the instruction on constructive possession and the testimony from Mr. McHenry’s girlfriend, viewed in “[c]ombin[ation],” gave “the jury . . . the puzzle pieces needed to convict” on a theory never presented. *Id.*

That reasoning cannot be squared with *McCormick*’s holding that generalized and incomplete jury instructions do not suffice to raise a theory supporting affirmance, 500 U.S. at 269–70 & n.8, or with *Ciminelli*’s recent admonition against “cherry-pick[ing] facts presented to a jury charged on” a different theory, 598 U.S. at 316. Summary reversal is warranted.

B. Ordinary certiorari criteria favor intervention too.

1. In recent years, the Tenth Circuit has become an outlier in its failure to adhere to this Court’s trial-waiver precedents.

Just last year, the court similarly affirmed a conviction on a theory not presented to the jury. *United States v. Baker*, 155 F.4th 1188, 1206 (10th Cir. 2025).

The *Baker* defendant was convicted of wire fraud. *Id.* at 1190. On appeal, the majority and dissent split on whether the government ever articulated to the jury its appellate theory about the relevant property interest. The majority held that the government set forth its theory in its opening statement, but it went on to hold alternatively that “even if the prosecution had not presented this theory of the case,” no trial waiver occurred. *Id.* at 1194 n.3. In the majority’s view, “the jury instructions . . . simply required the jury to find that [the defendant] schemed to deprive his victims of money or property,” and did not “specif[y] or delimit[] what could be considered as the property targeted by the fraudulent scheme.” *Id.* From there, the majority concluded that the court’s “task on appeal” was “only to determine whether there was a factual basis for the jury to find that *some form* of property was targeted.” *Id.* (emphasis added).

As Judge Phillips explained in dissent, that approach violates controlling precedent. *Id.* at 1209. Indeed, *Baker*’s rationale resembles the concurrence’s erroneous reasoning here. Like the concurrence below, the *Baker* majority embraced the rule that an appellate court may affirm on any theory so long as the jury instructions do not foreclose the theory and there is an adequate “factual basis” to support it. *Id.* at 1194 n.3. That is not the law.

2. The Tenth Circuit’s extreme stance on trial waiver conflicts with other circuits’ approaches.

The Third Circuit’s decision in *United States v. Johnson* is illustrative. There, the defendant was charged with filing a fabricated court document in violation of 18 U.S.C. § 1001. 19 F.4th 248, 252 (3d Cir. 2021). To prove materiality, the government’s “trial

theory” focused entirely on the document’s capacity to influence the “Judge, and the Judge alone.” *Id.* at 257. The Third Circuit found the evidence insufficient to support that theory. *Id.* at 261. On appeal, the government advanced a new theory of materiality based on the document’s influence on the clerk of the court. *Id.*

The Third Circuit refused to consider that “new theory” because “the jury never heard” it. *Id.* Because the government had only and “repeatedly argu[ed] that materiality” was based on the document’s capacity to influence the judge, the jury never had the opportunity “to pass on” the government’s clerk-focused theory. *Id.* at 261–262 (quotation marks omitted). That failure to argue and charge the jury on the alternative theory alone sufficed to defeat the government’s case. The court could “not consider in the first instance arguments” that “were not presented to the jury.” *Id.* at 262 (quotation omitted). The Third Circuit did not pause to consider whether this unargued theory was nevertheless reconcilable with the evidence and the jury instructions.

The Fourth Circuit likewise holds that a conviction may not be affirmed on a theory never presented to the jury. *United States v. Winfield* reversed a conviction for conspiracy to defraud the United States under 18 U.S.C. § 371. 997 F.2d 1076, 1081 (4th Cir. 1993). At trial, the jury was instructed on the theory that the defendants conspired to obstruct currency transaction reporting requirements—a theory the Fourth Circuit rejected. *Id.* The government attempted to argue, in the alternative, that the defendants also conspired to defraud the United States by engaging in money laundering. *Id.*

That theory failed. Any instruction concerning a “conspiracy to violate the involved money laundering statutes” was “[a]bsent” from the jury charge. *Id.* Rather, “[t]he court’s only discussion of money laundering was a passing reference to the money laundering theory in its instruction on the burdens of proof and in its preface to the instructions on the substantive counts.” *Id.* “Even read as a whole, the instructions d[id] not inform the jury of the elements of conspiracy to violate the laundering statutes in sufficient detail for the jury to understand the requirement for convictions.” *Id.* Because the “theor[y] [was] not submitted to the jury,” it could “[n]ot stand.” *Id.*

Here, too, the Tenth Circuit’s theory was “not submitted to the jury.” *Id.* Indeed, any discussion of that specific § 924(c) theory was “[a]bsent [from the] jury instructions.” *Id.* Thus, the jury here was “not inform[ed]” of “the elements” of the theory “in sufficient detail for the jury to understand the requirements for conviction[.]” *Id.* Had the Tenth Circuit followed the Fourth Circuit’s approach, this failure to instruct would have been “the end of the case.” *Ciminelli*, 598 U.S. at 316. In short, the Third and Fourth Circuits do not accept the “puzzle pieces” approach that the Tenth Circuit has repeatedly endorsed.

3. Trial waiver is no mere formality. Again, “a defendant’s right to be heard on the specific charges of which he is accused” is a bedrock constitutional protection. *Dunn*, 442 U.S. at 106. “To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process.” *Id.* “These principles represent not procedural formalities but fundamental reservations of power to the American people.” *Erlinger*

v. *United States*, 602 U.S. 821, 832 (2024) (quotation marks and brackets omitted).

The Tenth Circuit has not heeded that instruction. This petition, in turn, presents an ideal vehicle to correct that increasingly wayward approach to trial waiver. The fundamental question here is a legal one: whether the Tenth Circuit’s trial waiver rule is proper. The facts are straightforward and undisputed, the issue was pressed and passed upon below, and the Tenth Circuit denied Mr. McHenry’s rehearing petition, making clear its outlier waiver position is here to stay.

This issue is also (unfortunately) recurring. Just recently, this Court reminded the government that it cannot advance new criminal theories on appeal. See *Ciminelli*, 598 U.S. at 316–17. But, at least in the Tenth Circuit, the government has not always obeyed that rule. And regrettably, the Tenth Circuit has enabled that defiance. This case presents an ideal opportunity to remind the government and the courts of appeals that the Sixth Amendment’s jury-trial commands must be followed.

The Court should summarily reverse on this ground, or alternatively grant plenary review to decide whether an appellate court can affirm a conviction on any factual basis that is not outright foreclosed by the jury instructions.

II. The Court should alternatively grant certiorari on the § 924(c) issue.

Barring summary reversal, the Court should grant plenary review to address the substantive question: Whether a defendant violates § 924(c) by carrying a firearm “during” a crime of violence if he does not carry the firearm while committing the offense’s conduct elements—only after the elements are complete.

A. The circuits are split.

The circuits are divided over how to define the duration of a § 924(c) predicate offense in determining whether a person used a firearm “during” that offense. The Eighth Circuit considers the predicate offense to last only as long as the conduct comprising its elements. The Third, Sixth, Seventh, and Tenth Circuits count post-element conduct—including flight—as occurring “during” the offense for § 924(c) purposes. That disagreement is dispositive here.

1. **The Eighth Circuit** refuses to consider post-element conduct as occurring “during” a § 924(c) predicate offense. In *United States v. Long Pumpkin*, the court vacated the defendants’ § 924(c) convictions for discharging firearms “during” a carjacking because it found that “the carjacking offense necessarily ended before firearms were discharged.” 56 F.4th 604, 614 (8th Cir. 2022). The court concluded that “a carjacking occurs at the precise moment when a vehicle is seized and is complete once the defendant has secured initial control over the property in question.” *Id.* (cleaned up). That being so, firearm use *after* control was secured did not happen “during” the offense.

In so holding, the Eighth Circuit rejected the government’s claim that the carjacking continued so long as the carjacker maintained control over the victim’s car, or until the victim and his car were permanently separated. *Id.* Instead, the court emphasized that the offense was complete once the conduct element comprising the offense—the “taking”—was complete. *Id.*; see *id.* at 610 (listing elements).

Following that same rule in another case, the Eighth Circuit upheld a § 924(c) conviction only because it found that a reasonable jury could have concluded that the taking element of the predicate carjacking offense

was still in progress when the defendant used the firearm. *United States v. Clark*, 115 F.4th 895, 900 (8th Cir. 2024); see *id.* at 898 (listing the elements of the offense).

2. The Third, Sixth, and Seventh Circuits, now joined by the court below, have expanded the duration of a § 924(c) predicate offense by applying a loose “common sense” standard in place of an elements-based rule—though not without some misgivings.

The Third Circuit held in *United States v. Williams* that Williams carried a firearm “during” a bank robbery even though he did not have the gun with him in the bank; it was merely sitting in the getaway car. 344 F.3d 365, 370–76 (3d Cir. 2003). The court explicitly rejected what it referred to as the “categorical approach”—the idea that the duration of a crime is established by its “statutory definition.” *Id.* at 373–374. The court admitted that, “because the elements of” the bank robbery statute “do not include the ‘taking away,’ it could be argued that the categorical approach would require us to conclude that the carrying of the gun did not occur ‘during’ the bank robbery.” *Id.* However, for § 924(c) purposes, the court preferred a “common sense, temporal approach to the specific facts.” *Id.* at 374.

Then, using legislative history, treatises, and case law, the court sought to identify an “ordinary meaning” for both the language of § 924(c) and the generic crime of robbery. *Id.* at 374–75. Concluding that § 924(c) was meant to be broad and that “‘carrying away’ is normally considered to be part of robbery,” the court held that “[e]ven though Williams had committed all elements necessary to constitute an indictable offense” *before* stepping into the getaway car, a reasonable jury could have found that his flight “was suffi-

ciently related to the robbery so that Williams was carrying the gun ‘during’ the robbery.” *Id.* at 375–76 (citation omitted).

The Sixth Circuit came to a similar conclusion in *United States v. Cecil*, 615 F.3d 678, 693–94 (6th Cir. 2010). Cecil and his nephew set up a fake drug bust to steal cocaine. *Id.* at 684. After the nephew received the cocaine from his supplier, but before he paid for it, Cecil (a police officer) turned on his sirens, capturing the supplier but allowing his nephew to escape with the cocaine. *Id.* at 685. In conducting his subsequent “search” of the supplier’s car, Cecil drew his service weapon. *Id.* On that basis, Cecil was convicted under § 924(c).

Even though Cecil’s nephew had already driven away with the cocaine when Cecil used his firearm, meaning the taking was complete, the Sixth Circuit upheld the § 924(c) conviction. It reasoned that a “robbery does not necessarily end at the point along the time line at which all of the elements of the offense have been established.” *Id.* at 693. Robbery, the court said, is “more naturally understood to include the act of fleeing and the immediate consequences of such flight.” *Id.* at 693 (cleaned up).

More recently, however, Judge Readler has questioned the Sixth Circuit’s approach to § 924(c)’s “during and in relation to” requirements. *United States v. Edwards*, No. 23-5007, 2025 WL 789558, at *5 (6th Cir. Mar. 12, 2025) (Readler, J., concurring). He explained that, while the phrase “in relation to” asks if the firearm “furthered the purpose or effect of the crime,” *id.* at *9 (cleaned up), the word “during” separately asks whether the firearm was used “throughout the duration of or at a point in the course of” the crime, *id.* at *7 (cleaned up). And to determine the crime’s duration, Judge Readler consulted “the elements.” *Id.*

He then observed that acts may be done in relation to a crime, but nevertheless after the offense conduct has ended—as when Edwards, whose predicate offense was drug possession, “no longer possessed heroin when he used his firearm.” *Id.* at *5, *7–9. Judge Readler ultimately voted to affirm because Edwards did not challenge the jury instruction on this point—but he was “doubtful” that “the instruction properly described the elements of” the § 924(c) charge. *Id.* at *10.

The Seventh Circuit held the defendant in *United States v. Andrews* liable under § 924(c) using a post-element aiding-and-abetting theory. 442 F.3d 996, 1002–03 (7th Cir. 2006). Andrews loaned his car to two armed men who robbed a credit union. *Id.* at 999–1000. The court held that, whether or not Andrews knew the robbers planned to use their weapons inside of the credit union, he was at least “aware [the] firearms would be present in the car during the getaway.” *Id.* at 1002. To satisfy § 924(c)’s “during” requirement, the court concluded that “[e]scape is considered part of a robbery and the use of a firearm during an escape is a violation of 924(c).” *Id.* For that proposition, the court merely cited another Seventh Circuit case approving a jury instruction to the same effect. See *United States v. Smith*, 415 F.3d 682, 689 (7th Cir. 2005), *vacated on other grounds*, 547 U.S. 1190 (2006).

The Tenth Circuit took the post-element-conduct side of the split below. Though neither of Mr. McHenry’s predicate offenses included an element of flight or “asportation” (carrying away stolen property), App. 11a, the court decided that it could “look[] beyond [a] predicate crime’s statutory text and elements” and “treat[] the defendant’s underlying statutory crime as a ‘continuing offense,’ even though the underlying statute itself [does] not indicate as much,” *id.* at 13a.

What mattered to the court was not the predicate offense’s text, but how robbery was “generally viewed.” *Id.* at 16a. Based on that “common sense” understanding, the court held that “a rational jury could conclude that McHenry’s ‘flight’ from the scene was ‘during’ his underlying robberies,” even though it occurred after the takings were complete. *Id.* at 15a, 19a (citation omitted).

The Tenth Circuit then denied Mr. McHenry’s petition for rehearing *en banc* identifying the conflict with the Eighth Circuit.

3. This case would turn out differently in the Eighth Circuit. No one disputes that the elements of Mr. McHenry’s predicate robberies were completed before the codefendants drove away from the motel, and thus before the period of “flight” that the Tenth Circuit treated as “during” those offenses. App. 15a. And the Tenth Circuit acknowledged that Mr. McHenry did not carry a firearm during conduct that comprised any of the robberies’ elements. *Id.* at 3a. To nevertheless affirm the conviction, the Tenth Circuit necessarily and explicitly relied on post-element conduct as part of the robbery for § 924(c) purposes. *Id.* at 2a.

By contrast, because the Eighth Circuit cabins the duration of a crime to its definitional elements, it would have considered the duration of each robbery to be complete as soon as each taking was complete—which was before the codefendants fled from the scene with a firearm. So, under the Eighth Circuit’s approach, the firearm was not carried “during” the robberies.

B. The decision below is wrong.

The Tenth Circuit held that, “when we assess whether the carriage of a firearm occurs ‘during’ an underlying crime within the meaning of § 924(c)(1),

the underlying crime does not necessarily end” as soon as the conduct comprising its offense elements is over. App. 14a. In so doing, the court ignored this Court’s precedent and clear statutory language in favor of an undertheorized, atextual approach.

1. The ordinary meaning of “during” is “at a point in the course of.” *During*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/during> (last visited July 29, 2026). Thus, a person “violates § 924(c)(1)(A) where he uses a firearm at some point in the course of, and with respect to,” a predicate offense. *Edwards*, 2025 WL 789558, at *6 (Readler, J., concurring). In turn, the key question is when the predicate offense begins and ends.

The answer is found in the predicate’s elements—precisely where the Tenth Circuit refused to look. App. 14a. Just last month, this Court emphasized that a “crime’s conduct elements” define the “conduct constituting the offense.” *Abouammo*, 146 S. Ct. at 1576–77 (cleaned up). Once a person has committed the “prohibited act in th[e] statute,” “the crime is complete.” *Id.* at 1577. Acts or events that are “not elements of [the] crime” “cannot figure in determining where [that] crime was committed.” *Id.* at 1578 (cleaned up).

Though *Abouammo* dealt specifically with venue, its analysis of what conduct comprises a crime applies equally here. Just as Mr. Abouammo’s post-element conduct did not cause his offense to continue into another jurisdiction, see *id.*, Mr. McHenry’s post-element flight did not prolong his predicate robbery offenses for § 924(c) purposes. The duration of a § 924(c) predicate crime “must be based on the conduct that” the predicate offense “itself proscribes.” *Id.* at 1579. Indeed, this Court has made clear that courts may not read an

asportation element into a robbery statute that Congress chose not to include. See *Carter*, 530 U.S. at 272. *Carter* clarified that determining the contours of a crime is an “inquiry focuse[d] on an analysis of the textual product of Congress’[s] efforts.” *Id.*

Congress chose not to include a “carrying away” element in either of the predicate crimes here. See App. 11a, 21a. To nevertheless construe those robberies as extending through any post-taking conduct—let alone post-element flight—is atextual and improper. As this Court has cautioned with respect to § 924(c), “expand[ing] a criminal statute’s scope would risk offending . . . due process and separation-of-powers principles.” *United States v. Davis*, 588 U.S. 445, 464 (2019). The Tenth Circuit’s treatment of § 924(c) has the same problems.

2. The Tenth Circuit’s holding rests on the premise that the predicate robberies are “continuing offenses.” See App. 10a–16a. But this Court generally treats an offense as continuing only while *the conduct comprising its elements* is ongoing. See *Abouammo*, 146 S. Ct. at 1576; *Toussie v. United States*, 397 U.S. 112, 120 (1970) (offense continues for limitations purposes only if the statute “clearly contemplates a prolonged course of conduct”). Indeed, larceny is an “easy example” of a crime that is *not* continuing because it “is committed and complete once the last of [its] elements has occurred.” *United States v. Askia*, 893 F.3d 1110, 1116 (8th Cir. 2018); cf. *United States v. Irving*, 437 F.2d 649, 650 (D.C. Cir. 1970) (aiding a robber in immediate flight from a bank robbery would be providing “after the fact” aid, not abetting an ongoing offense).

Instead of grappling with these points, the Tenth Circuit emphasized a circuit precedent treating an “on-going” drug-manufacturing operation as “continuing” under § 924(c) “even though the . . . statute itself did

not indicate as much.” App. 11a–15a (discussing *United States v. Brown*, 400 F.3d 1242 (10th Cir. 2005)). But even if *Brown*’s approach is otherwise sound, the Tenth Circuit never explained why Mr. McHenry’s predicate robberies should be treated the same way. The offense conduct in *Brown*—the conduct that actually satisfied the offense elements—appeared to continue “for over two weeks,” during which the defendant carried a gun. App. 13a. Not so here.

The truth is that the Tenth Circuit below merely joined a chorus of cases—arising in various contexts, including § 924, aiding-and-abetting, and felony murder—that reflexively cite each other for the largely unexamined assertion that “robbery” continues through flight. See, e.g., *United States v. McCaskill*, 676 F.2d 995, 1000 (4th Cir. 1982) (stating as much in the aiding-and-abetting context); *United States v. Ashburn*, 20 F.3d 1336, 1341 (5th Cir. 1994) (sentencing enhancement); *Chambers v. McCaughtry*, 264 F.3d 732, 743 n.6 (7th Cir. 2001) (felony murder); *United States v. Dinkane*, 17 F.3d 1192, 1200 (9th Cir. 1994) (aiding and abetting). Like the court below, most of these cases content themselves with generic descriptions of “robbery” as a concept, unmoored from specific doctrinal context or statutory text. None of them meaningfully illuminates what “during” means in § 924(c), or how to identify the duration of a specific robbery predicate with clear statutory text.

C. This case is an ideal vehicle to resolve an important and recurring issue.

Section 924(c) is serious. It “threatens long prison sentences,” *Davis*, 588 U.S. at 448, and can even lead to “two consecutive mandatory minimum sentences for the single use of a single firearm,” *Barrett v. United States*, 607 U.S. 128, 136 (2026). Section 924(c) is also charged thousands of times a year, and the average

sentence for people convicted under § 924(c) is 149 months. See U.S. Sent’g Comm’n, *Section 924(c) Firearms*, <https://www.ussc.gov/research/quick-facts/section-924c-firearms> (last visited July 29, 2026).

The expansion of liability here is significant. While the Tenth Circuit held that the duration of the predicate robberies extended “[a]t least for the first few moments” after Mr. McHenry drove away from the motel, App. 17a–18a, it offered no limiting principle—beyond “common sense”—to determine when a robbery ends. *Id.* at 15a.

And the atextual nature of the § 924(c) expansion upsets the balance of power within the criminal justice system. When prosecutors charge crimes defined by limited elements—for example, robberies that do not require asportation—they receive the benefit of having to prove *only* those limited elements to secure a conviction. But under the majority approach, those same crimes are then expanded for § 924(c) purposes to include features the government never had to prove. The government should not be permitted to have it both ways. See, e.g., *Abouammo*, 146 S. Ct. at 1579 (acknowledging that the relative ease of proving an offense with limited conduct elements “comes [at a] cost”).

For similar reasons, the Court has granted certiorari almost annually to clarify § 924(c)’s meaning. See, e.g., *Rutherford v. United States*, 608 U.S. ____ (2026); *Barrett*, 607 U.S. 128; *Hewitt v. United States*, 606 U.S. 419 (2025); *Delligatti v. United States*, 604 U.S. 423 (2025); *Lora v. United States*, 599 U.S. 453 (2023); *United States v. Taylor*, 596 U.S. 845 (2022); *Davis*, 588 U.S. 445. It should do the same here.

This case is the perfect vehicle to resolve the split. There are no jurisdictional problems, and this issue

was vigorously pressed and passed upon below. See App. 1a–19a. Additionally, a favorable ruling for Mr. McHenry would be dispositive. Even if the Tenth Circuit’s trial-waiver ruling were correct, Mr. McHenry did not violate § 924(c) if he did not constructively carry a firearm “during” the predicate robberies. And—as the panel acknowledged—he can only be deemed to have carried a firearm “during” the predicate robberies if the Tenth Circuit is right that post-element flight is included within the duration of those statutory offenses.

CONCLUSION

For these reasons, the petition should be granted and the decision below should be summarily reversed. Alternatively, the Court should grant plenary review of both questions presented.

Respectfully submitted,

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