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Tenth Circuit

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. AARON BOWEN, Defendant - Appellant.	No. 17-1011

Appeal from the United States District Court
for the District of Colorado
(D.C. Nos. 16-CV-01119-REB & 05-CR-00425-REB-4)

Meredith B. Esser, Assistant Federal Public Defender (Virginia L. Grady, Federal Public Defender, and Josh Lee, Assistant Federal Public Defender, with her on the briefs), Office of the Federal Public Defender for the District of Colorado, Denver, Colorado, appearing for Appellant.

J. Bishop Grewell, Assistant United States Attorney (Robert C. Troyer, Acting United States Attorney, with him on the brief), Office of the United States Attorney for the District of Colorado, Denver, Colorado, appearing for Appellee.

Before **BRISCOE**, **KELLY**, and **McHUGH**, Circuit Judges.

BRISCOE, Circuit Judge.

Aaron Bowen appeals the district court's dismissal of his motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. Bowen challenges his

conviction for brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii), which rested on the trial court's instruction that witness retaliation was a crime of violence under 18 U.S.C. § 924(c)(3). Given the narrowing of issues by the parties and developments in the law while this appeal was pending, resolution of this case requires us to answer certain questions and leave others for another day. In short, we hold that United States v. Davis, 139 S. Ct. 2319 (2019), in which the Supreme Court held that 18 U.S.C. § 924(c)(3)(B) is void for vagueness, created a new substantive rule that is retroactively applicable on collateral review, and we conclude that Bowen's convictions for witness retaliation do not qualify as crimes of violence under 18 U.S.C. § 924(c)(3)(A). Therefore, Bowen is actually innocent of 18 U.S.C. § 924(c)(1). The parties have agreed in this case that, if Bowen is actually innocent, his § 2255 motion is timely. Because Bowen is entitled to relief under § 2255, we REVERSE the district court's dismissal of Bowen's § 2255 motion and REMAND with instructions to VACATE his § 924(c)(1) conviction.[1]

I

In 2007, a jury convicted Bowen of: (1) aiding and abetting the retaliation against a witness, in violation of 18 U.S.C. § 1513(b)(2); (2) conspiracy to retaliate against a witness, in violation of 18 U.S.C. §§ 371 and 1513(e) (collectively, the

[1] The docket indicates that Bowen is "on parole or other conditional release as a result of . . . the conviction which is the subject of this appeal." Dkt. No. 10570331 (capitalization omitted).

"witness retaliation convictions"); and (3) possession and brandishing of a firearm in furtherance of a federal crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii) (the "brandishing conviction"). The district court sentenced Bowen to 161 months in prison and a five-year term of supervised release. This sentence included an 84-month sentence for Bowen's brandishing conviction, to be served consecutively to his witness retaliation conviction sentences.

Bowen's brandishing conviction was imposed pursuant to 18 U.S.C. § 924(c)(1)(A)(ii), which provides, in relevant part, that "any person who, during and in relation to any crime of violence . . . , uses or carries a firearm," or who possesses a firearm in furtherance of the crime of violence, shall, "if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years" to run consecutively to the term of imprisonment for the underlying crime of violence. 18 U.S.C. § 924(c)(1)(A)(ii) (emphasis added). Section 924(c)(3) defines "crime of violence" as:

> [A]n offense that is a felony and—
>
> > (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> >
> > (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3). Subsection (A) is referred to as the "elements clause," and subsection (B) is referred to as the "residual clause." The jury was instructed that both of Bowen's witness retaliation convictions were crimes of violence.

On June 26, 2015, the United States Supreme Court held in Johnson v. United States that 18 U.S.C. § 924(e)(2)(B)(ii), the Armed Career Criminal Act's (the "ACCA") residual clause, is void for vagueness. 135 S. Ct. 2551, 2563 (2015). That clause defined a "violent felony" as a felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another." Id. at 2555–56 (emphasis omitted). The Court later made its Johnson ruling retroactive to cases on collateral review. Welch v. United States, 136 S. Ct. 1257, 1265 (2016).

Within one year of the Court's decision in Johnson, Bowen filed this § 2255 motion challenging his brandishing conviction. Bowen argued that although Johnson expressly applied to the ACCA's residual clause, it also invalidated § 924(c)(3)'s residual clause. And, according to Bowen, his witness retaliation convictions could only qualify as crimes of violence under the residual clause, § 924(c)(3)(B), because they do not constitute crimes of violence under the elements clause, § 924(c)(3)(A). Therefore, Bowen argued, Johnson mandates that his brandishing conviction be vacated.

The district court dismissed Bowen's § 2255 motion. As to Bowen's conviction for aiding and abetting witness retaliation, the district court concluded that "witness retaliation constitutes a crime of violence under" the elements clause. ROA at 122. The district court "assume[d] without deciding" that Bowen's conviction for conspiracy to retaliate against a witness did not qualify as a crime of violence under the elements clause, id., but concluded that Bowen's § 2255 motion was untimely because he was not "assert[ing] a right newly recognized by the Supreme Court in

Johnson," id. at 124. On January 13, 2017, the district court entered final judgment, dismissing Bowen's motion. Id. at 128.

Bowen filed a timely notice of appeal, and we granted a certificate of appealability on the following two issues:

> In Johnson v. United States, 135 S. Ct. 2551 (2015), the Court invalidated part of the Armed Career Criminal Act. Bowen filed a post-conviction motion challenging a similar (but not identical) statute, 18 U.S.C. § 924(c)(3)(B), as unconstitutional under Johnson. Does such a motion "assert[]" a violation of "the right . . . newly recognized" in Johnson so as to authorize an otherwise barred post-conviction motion under 28 U.S.C § 2255(f)(3)?
>
> Bowen was convicted under 18 U.S.C. § 924(c) for brandishing a firearm during a crime of violence, predicated on the offense of retaliating against a witness, 18 U.S.C. § 1513. Does Bowen's § 924(c) conviction violate Johnson in that retaliating against a witness qualifies as a crime of violence only under § 924(c)(3)(B), which is unconstitutional under Johnson?

Dkt. No. 10477354, at 3–4.

After briefing and oral argument, we abated this case pending the Supreme Court's decision in United States v. Davis. On June 24, 2019, the Supreme Court ruled in Davis that § 924(c)(3)(B), the residual clause, is void for vagueness. 139 S. Ct. at 2336. We thereafter lifted the abatement and ordered supplemental briefing.

II

"On appeal from the denial of a § 2255 motion, ordinarily we review the district court's findings of fact for clear error and its conclusions of law de novo." United States v. Snyder, 871 F.3d 1122, 1125 (10th Cir. 2017) (quoting United States v. Barrett, 797 F.3d 1207, 1213 (10th Cir. 2015)). When, as here, "the district court

does not hold an evidentiary hearing, but rather denies the motion as a matter of law upon an uncontested trial record, our review is strictly de novo." Barrett, 797 F.3d at 1213 (quoting United States v. Rushin, 642 F.3d 1299, 1302 (10th Cir. 2011)).

Although the district court concluded that Bowen's § 2255 motion was untimely, the United States now asserts that if "Bowen [is] actually innocent of his § 924(c) offense[,] . . . . he would overcome the procedural bar of timeliness." Aplee. 28(j) Letter (filed Aug. 27, 2018). Bowen agrees. See Aplt. Supp. Reply Br. at 5 (filed July 26, 2019) ("[I]t appears that the parties agree that, unless the offense of witness retaliation necessarily requires violent physical force, Mr. Bowen is actually innocent, and any time bar is excused.").

Based on the parties' agreement, we assume without deciding that Bowen's § 2255 motion is timely if he is actually innocent of § 924(c)(1).[2] Cf. Day v.

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[2] We recognize that neither our circuit nor the Supreme Court has definitively resolved whether a claim of actual innocence based on a new statutory interpretation—rather than such a claim based on new evidence—can overcome § 2255's statute of limitations. Cf. Bousley v. United States, 523 U.S. 614, 623 (1998) (holding that a § 2255 movant could be actually innocent based on a new statutory interpretation, but remanding "to permit [the defendant] to attempt to make a showing of actual innocence"); Batrez Gradiz v. Gonzales, 490 F.3d 1206, 1209 (10th Cir. 2007) (recognizing that a statutory-interpretation-based claim of actual innocence could excuse lack of exhaustion in an appeal of an order of removal). Nonetheless, "we rely on the parties to frame the issues for decision." Greenlaw v. United States, 554 U.S. 237, 243 (2008). And in this case, the parties agree that if Bowen's witness retaliation convictions do not qualify as crimes of violence under § 924(c)(3)'s elements clause, his motion is timely. And because we conclude that they do not, we do not address Bowen's other arguments about why his § 2255 motion is timely.

In supplemental briefing, the United States offers another timeliness argument—that Bowen's motion is "untimely" because it was filed "too early," i.e., before the Supreme Court's decision in Davis was "issued on June 24, 2019." Aplee.

McDonough, 547 U.S. 198, 202 (2006) ("[W]e would count it an abuse of discretion to override [the government's] deliberate waiver of a limitations defense."). We therefore turn to the question of whether retaliating against a witness qualifies as a crime of violence under § 924(c)(3). As discussed below, we conclude that it does not.

III

We first conclude that the Supreme Court's ruling in Davis that § 924(c)(3)'s residual clause is void for vagueness is a new constitutional rule that is retroactive on collateral review. Therefore, Bowen cannot be guilty of violating § 924(c)(1) if his witness retaliation convictions qualify as crimes of violence only under § 924(c)(3)'s residual clause.

A brief discussion of the relevant cases will help frame our analysis. As noted, Johnson held that the ACCA's residual clause was unconstitutionally vague. 135 S. Ct. at 2563. And in Welch, the Court ruled that Johnson created a new, substantive rule and was therefore retroactively applicable to cases on collateral review. 136 S.

Supp. Br. at 5 (filed July 25, 2019). But the United States does not explain how Davis undermines the United States' prior representation that Bowen "would overcome the procedural bar of timeliness" if "actually innocent of his § 924(c) offense." Aplee. 28(j) Letter (filed Aug. 27, 2018). In its prior representation, the United States explained that, unless the Supreme Court upheld the validity of § 924(c)'s residual clause, "Bowen would be able to satisfy § 2255's statute of limitations to the extent his conviction was based on § 924(c)(3)(B)'s residual clause." *Id.* As contemplated by the United States' 28(j) Letter, the Supreme Court took up the issue of § 924(c)(3)(B), but concluded that the clause is unconstitutionally vague. Davis, 139 S. Ct. at 2336. Therefore, we proceed according to the parties' prior agreement concerning actual innocence.

Ct. at 1265 ("By striking down the residual clause as void for vagueness, Johnson changed the substantive reach of the Armed Career Criminal Act, altering 'the range of conduct or the class of persons that the [Act] punishes.'" (quoting Schriro v. Summerlin, 542 U.S. 348, 353 (2004))). In Sessions v. Dimaya, the Court held that 18 U.S.C. § 16(b), which has language similar to that of § 924(c)(3)(B), was also void for vagueness. 138 S. Ct. 1204, 1213–16 (2018). The Dimaya plurality relied on Johnson for its holding, stating that "Johnson effectively resolved the case now before [it]," id. at 1213, and that "Section 16's residual clause violates [due process] in just the same way" as did the ACCA's residual clause, id. at 1215. Finally, in Davis, the Court struck down § 924(c)(3)(B) as void for vagueness. 139 S. Ct. at 2336. Davis resolved a circuit split, rejecting the United States' argument and the holding of three circuits that reading § 924(c)(3)(B) to require a conduct-specific—rather than categorical—approach could save that clause from unconstitutionality. Id. at 2325 & n.2, 2332–33. The Court held that the categorical approach applied, and that § 924(c)(3)(B) was unconstitutionally vague. Id. at 2336.

We now conclude that, in striking down § 924(c)(3)(B) as void for vagueness, Davis created a new constitutional rule.

"[A]s a general matter, 'new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.'" Welch, 136 S. Ct. at 1264 (quoting Teague v. Lane, 489 U.S. 288, 310 (1989)). For purposes of determining retroactivity, "a case announces a new rule when it breaks new ground or imposes a new obligation" on the government.

Teague, 489 U.S. at 301. A rule is new "if the result was not dictated by precedent existing at the time the defendant's conviction became final." Id. And a result was not dictated by precedent unless it would have been "apparent to all reasonable jurists." Lambrix, 520 U.S. at 527–528. Even when the Court applies an already existing rule, its decision may create a new rule if it applies the existing rule in a new setting, thereby extending the rule "in a manner that was not dictated by precedent." Stringer v. Black, 503 U.S. 222, 228 (1992).

Davis created a new rule.

Davis's legal analysis makes clear that it created a new rule.[3] Importantly, Davis begins the vagueness inquiry for § 924(c)(3)(B) by addressing the threshold determination of whether the categorical approach applies to § 924(c)(3)(B) at all.[4]

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[3] Davis's language also indicates that it created a new rule. The Davis Court never says that its result is "dictated by" any other case. Cf. United States v. Pullen, 913 F.3d 1270, 1279 n.6 (10th Cir. 2019) (finding it "[n]otabl[e]" that "Dimaya could have, but did not, state that any 'rule' from Johnson 'dictated' a result in Dimaya"). Further Davis's discussion of the relevance of Johnson and Dimaya is notably reserved. See Davis, 139 S. Ct. at 2325–27 (describing statutes at issue in Johnson and Dimaya as "bear[ing] more than a passing resemblance to § 924(c)(3)(B)'s residual clause," and stating that "there's no material difference in the language or scope of" the residual clause at issue in Dimaya and § 924(c)(3)(B)'s residual clause); cf. Dimaya, 138 S. Ct. at 1213 (stating that "Johnson effectively resolved" the case); id. at 1215 (stating that "Section 16's residual clause violates [due process] in just the same way" as did the ACCA's). Davis also points to differences between § 924(c)(3)(B) and the residual clauses at issue in Johnson and Dimaya, further indicating that the result in Davis was not dictated by Johnson or Dimaya. See Davis, 139 S. Ct. at 2327 ("[A] case-specific approach wouldn't yield the same practical and Sixth Amendment complications under § 924(c) that it would have under the ACCA or § 16.").

[4] The dissent notes that Davis "state[s] that the application of the categorical approach to § 924(c) is not even a close question after the Court's unanimous

See Davis, 139 S. Ct. at 2326 ("[Johnson and Dimaya] teach that the imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of

decision in Leocal v. Ashcroft, 543 U.S. 1, 7 (2004) . . . ." and "view[s] . . . the issue of whether Davis announced a new rule [to be] not clear." Dissent at 4 n.3 (citing Davis, 139 S. Ct. at 2328). Of course, Davis itself did not rely solely on Leocal to conclude that § 924(c) required application of the categorical approach. See Davis, 139 S. Ct. at 2327 ("To answer [the question of whether § 924(c)(3) requires the categorical approach,] we need to examine the statute's text, context, and history"). And just the year before, the Supreme Court had declined to affirm its holding that § 16(b) required application of the categorical approach. See Dimaya, 138 S. Ct. at 1233 (Gorsuch, J., concurring) (declining to join the plurality's conclusion that the categorical approach applied to § 16(b), noting that he "remain[s] open to different arguments about [Supreme Court] precedent and the proper reading of language like [that in § 16(b)]"); see also id. at 1254 (Thomas, J., dissenting) ("The text of § 16(b) does not require a categorical approach."). Further, three circuit courts had interpreted § 924(c) as not requiring application of the categorical approach. See United States v. Douglas, 907 F.3d 1, 11–16 (1st Cir. 2018); Ovalles v. United States, 905 F.3d 1231, 1240–52 (11th Cir. 2018) (en banc); United States v. Barrett, 903 F.3d 166, 178–84 (2d Cir. 2018). We respectfully suggest that it therefore appears numerous jurists did view "the application of the categorical approach to § 924(c) [to be] a close question." Dissent at 4 n.3.

Of course, we use an objective standard, Stringer, 503 U.S. at 237, to determine whether "reasonable jurists could have differed as to whether" Davis was compelled by precedent, Beard v. Banks, 542 U.S. 406, 414 (2004), and the mere existence of disagreement among jurists is not dispositive, Chaidez v. United States, 568 U.S. 342, 353 n.11 (2013) ("[T]he mere existence of . . . conflicting authority in state or lower federal courts, does not establish that a rule is new." (quotations omitted)). But this disagreement reinforces our conclusion that Davis created a new rule. See Butler v. McKellar, 494 U.S. 407, 415 (1990) ("That the outcome . . . was susceptible to debate among reasonable minds is evidenced further by the differing positions taken by the judges of the Courts of Appeals for the Fourth and Seventh Circuits . . . ."); United States v. Chang Hong, 671 F.3d 1147, 1154 (10th Cir. 2011) ("It goes without saying [other state and federal courts] are some of the 'reasonable jurists' we must survey to determine if" a rule is new.). And we find it informative that the Supreme Court did not seem to think that Leocal alone resolved the question of whether § 924(c) required application of the categorical approach. See Davis, 139 S. Ct. at 2327–37 (examining "the statute's text, context, and history" to determine whether "Congress actually wrote" § 924(c) to "us[e] a case-specific [rather than categorical] approach").

risk posed by a crime's imagined 'ordinary case.' But does § 924(c)(3)(B) require that sort of inquiry?" (emphasis added)). Much of Davis is devoted to answering that question by carefully examining the text of the statute, as well as its context and history. See id. at 2327–37.

First, because "the word 'offense' appears just once in § 942(c)(3)," the Court noted that it should have the same meaning in both the elements and residual clauses. Id. at 2328. "And everyone agree[d] that, in connection with the elements clause, the term 'offense' carries [its] . . . 'generic' meaning." Id. Therefore, the same was true for § 924(c)(3)(B). The Court then explained that, while "dozens of federal statutes . . . use the phrase 'crime of violence' to refer to presently charged conduct," [s]ome of those statutes cross-reference the definition of 'crime of violence' in § 924(c)(3), while others are governed by the virtually identical definition in § 16." Id. at 2329. "[H]old[ing] . . . that § 16(b) requires the categorical approach while § 924(c)(3)(B) requires the case-specific approach would [have] ma[d]e a hash of the federal criminal code." Id. at 2330. Finally, the Court reasoned that "[§] 924(c)(3)(B)'s history provides still further evidence that it carries the same categorical approach command as § 16(b)" because, when § 924(c) was enacted, "Congress didn't provide a separate definition of 'crime of violence" in § 942(c) but relied on § 16's general definition." Id. Because Davis required that the Court resolve the threshold inquiry of whether the categorical approach applied, its resulting constitutional holding was not dictated by Johnson. Cf. Chaidez, 568 U.S. at 348–49 (noting that the "preliminary question" came to the "Court unsettled—so . . . the Court's answer . . .

required a new rule").

In Chaidez, the Supreme Court decided whether Padilla v. Kentucky, 559 U.S. 356 (2010), created a new rule. 568 U.S. at 344. In Padilla, the Court held that the Sixth Amendment "requires an attorney for a criminal defendant to provide advice about the risk of deportation arising from a guilty plea." Id. The Chaidez Court acknowledged that

> Padilla would not have created a new rule had it only applied Strickland's general standard to yet another factual situation—that is, had Padilla merely made clear that a lawyer who neglects to inform a client about the risk of deportation is professionally incompetent.
>
> But Padilla did something more. Before deciding if failing to provide such advice "fell below an objective standard of reasonableness," Padilla considered a threshold question: Was advice about deportation "categorically removed" from the scope of the Sixth Amendment right to counsel because it involved only a "collateral consequence" of a conviction, rather than a component of the criminal sentence? 559 U.S. at 366. In other words, prior to asking how the Strickland test applied ("Did this attorney act unreasonably?"), Padilla asked whether the Strickland test applied ("Should we even evaluate if this attorney acted unreasonably?"). And . . . that preliminary question about Strickland's ambit came to the Padilla Court unsettled—so that the Court's answer ("Yes, Strickland governs here") required a new rule.

Id. at 348–49.

As did Padilla, Davis required the Court to answer a threshold question: Does § 924(c)(3)(B) require "a judge's estimation of the degree of risk posed by a crime's imagined 'ordinary case'"? Davis, 139 S. Ct. at 2326. Because that question "came to the [Davis] Court unsettled," "the Court's answer ("Yes, [the categorical approach applies] here") required a new rule." Chaidez, 568 U.S. at 349; see also In re

Hammoud, --- F.3d ---, 2019 WL 3296800, at *3 (11th Cir. July 23, 2019) ("[T]he rule announced in Davis is also 'new' because it extended Johnson and Dimaya to a new statute and context.").

We also conclude that Davis's new rule is substantive and therefore retroactively applicable to cases on collateral review.

Two categories of decisions fall outside Teague's general bar on retroactivity: "[n]ew substantive rules," Schriro, 542 U.S. at 351, and new "watershed rules of criminal procedure," Saffle v. Parks, 494 U.S. 484, 495 (1990) (quotations omitted). A new rule is substantive "if it alters the range of conduct or the class of persons that the law punishes." Schriro, 542 U.S. at 353. "This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." Id. at 351–52 (citation omitted). In other words, substantive rules "produce a class of persons convicted of conduct the law does not make criminal." Id. at 352.

Under this framework, the rule announced in Davis is clearly substantive. Davis struck down § 924(c)(3)'s residual clause as void for vagueness, "chang[ing] the substantive reach of [§ 924(c)(3) and] altering 'the range of conduct or the class of persons that [§ 924(c)(3)] punishes.'" Welch, 136 S. Ct. at 1265 (quoting Schriro, 542 U.S. at 353). Before Davis, a person could be convicted for the crime of using a firearm in connection with a crime of violence, even if the predicate crime qualified as a crime of violence only under § 924(c)(3)'s residual clause. After Davis, "the

same person engaging in the same conduct is no longer subject to" this conviction. Id. "It follows that [Davis] announced a substantive rule that has retroactive effect in cases on collateral review." Id. at 1268.

Because § 924(c)(3)'s residual clause is void for vagueness—and because that ruling applies to Bowen's case on collateral review—Bowen cannot be guilty of violating § 924(c)(1) if his witness retaliation convictions qualify as crimes of violence only under § 924(c)(3)(B).

IV

We also conclude that Bowen's witness retaliation convictions are not crimes of violence under § 924(c)(3)'s elements clause—§ 924(c)(3)(A).

A

As noted, 18 U.S.C. § 924(c)(3) defines the term "crime of violence" as:

> an offense that is a felony and—
>
> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3)(A)–(B) (emphasis added).

The Supreme Court has held that the term "physical force" requires more than offensive touching; it means "violent force—that is, force capable of causing physical pain or injury to another person." Curtis Johnson v. United States, 559 U.S. 133, 140 (2010); cf. United States v. Melgar-Cabrera, 892 F.3d 1053, 1064 (10th Cir.

2018) (applying Curtis Johnson's definition of "physical force" to § 924(c)(3)'s definition of "crime of violence"). This violent force need not be particularly strong or likely to cause pain or injury. See Stokeling v. United States, 139 S. Ct. 544, 554 (2019) ("[Curtis]Johnson . . . does not require any particular degree of likelihood or probability that the force used will cause physical pain or injury; only potentiality."). And "violent force" can be applied indirectly, such as through poison or even through physically harmful neglect. See United States v. Ontiveros, 875 F.3d 533, 537–38 (10th Cir. 2017). Nonetheless, "the term 'physical force' itself normally connotes force strong enough to constitute 'power'—and all the more so when it is contained in a definition of '[crime of violence].'" Curtis Johnson, 559 U.S. at 142; Melgar-Cabrera, 892 F.3d at 1064.

To determine whether Bowen's witness retaliation convictions have "as an element the use, attempted use, or threatened use of [violent] force against the person or property of another," 18 U.S.C. § 924(c)(3)(A); Curtis Johnson, 559 U.S. at 140; Melgar-Cabrera, 892 F.3d at 1064, we apply the categorical approach, see Ontiveros, 875 F.3d at 535. Under the categorical approach, we look "only to the fact of conviction and the statutory definition of the prior offense, and do not generally consider the particular facts disclosed by the record of conviction." United States v. Serafin, 562 F.3d 1105, 1107–08 (10th Cir. 2009) (quotations omitted). "We must compare the scope of conduct covered by the elements of the crime . . . with" § 924(c)(3)(A)'s "definition of 'crime of violence.'" United States v. O'Connor, 874 F.3d at 1147, 1151 (10th Cir. 2017).

In making this comparison, we "presume that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by [§ 924(c)(3)'s elements clause]." Moncrieffe v. Holder, 569 U.S. 184, 190–91 (2013) (brackets and quotations omitted). But we also "follow the Supreme Court's instruction that there must be 'a realistic probability, not a theoretical possibility,' that the statute at issue could be applied to conduct that does not constitute a crime of violence." Melgar-Cabrera, 892 F.3d at 1061 (quoting Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)). Finally,

> [i]n construing [§ 924(c)(3)], we cannot forget that we ultimately are determining the meaning of the term "crime of violence." The ordinary meaning of this term, combined with [§ 924(c)(3)(A)'s] emphasis on the use of physical force . . . , suggests a category of violent, active crimes . . . .

Leocal v. Ashcroft, 543 U.S. 1, 11 (2004).

B

As regards Bowen's witness retaliation convictions, he was convicted of violating 18 U.S.C. § 1513(b)(2):

> (b) Whoever knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person for—
>
> (2) any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation[,] supervised release, parole, or release pending judicial proceedings given by a person to a law enforcement officer;
>
> or attempts to do so, shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 1513(b)(2) (eff. Nov. 2, 2002–Jan. 6, 2008). The parties agree that "[a]

defendant may be convicted of witness retaliation if, with intent to retaliate, he knowingly causes or threatens to cause [(1)] bodily injury to a witness or knowingly causes or threatens to cause [(2)] damage to a witness's property." Aplt. Op. Br., at 9 (citing 18 U.S.C. § 1513(b)(2)) (emphases added); accord Aplee. Br. at 16.[5] We conclude that witness retaliation through bodily injury qualifies as a crime of violence under § 924(c)(3)'s elements clause, but witness retaliation through property damage does not. And because we must presume that Bowen's witness retaliation convictions rested upon the least of the acts criminalized, Moncrieffe, 569 U.S. at 190–91, we conclude that Bowen's witness retaliation convictions do not qualify as crimes of violence and Bowen is actually innocent of § 924(c)(1).

1

We easily conclude that witness retaliation through bodily injury qualifies as a crime of violence under § 924(c)(3)'s elements clause. As discussed, "physical force" in § 924(c)(3)(A) means "force capable of causing physical pain or injury to another person." Curtis Johnson, 559 U.S. at 140; Melgar-Cabrera, 892 F.3d at 1064.

[5] That is, neither party argues that § 1513(b)(2) is "divisible in that it contains more than one crime," (for example, one crime for witness retaliation through bodily injury and another crime for witness retaliation through property damage) such that the modified categorical approach applies. United States v. Titties, 852 F.3d 1257, 1265 (10th Cir. 2017). If the modified categorical approach applied, we would "peer around the statute of conviction" and "consult record documents" in order to identify "which of the statute's alternative elements formed the basis of [Bowen's witness retaliation] conviction[s]." Id. at 1366. Because neither party raises this issue, we assume without deciding that § 1513(b)(2) is indivisible, and we apply the pure categorical approach to our analysis.

Therefore, a crime that requires knowingly causing or threatening to cause bodily injury to another necessarily has as an element the use or threatened use or physical force.[6]

But in conducting the categorical analysis, we must "identify the minimum 'force'" required for a witness retaliation conviction, and "determine if that force" qualifies as violent force. United States v. Harris, 844 F.3d 1260, 1264 (10th Cir. 2017) (first emphasis added). Therefore, Bowen can still be actually innocent of § 924(c)(1) if witness retaliation through property damage does not "ha[ve] as an element the use, attempted use, or threatened use of [violent] force against the person or property of another." 18 U.S.C. § 924(c)(3)(A); Curtis Johnson, 559 U.S. at 140; Melgar-Cabrera, 892 F.3d at 1064. We conclude that it does not.

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Bowen argues that witness retaliation through property damage does not qualify as a crime of violence under § 924(c)(3)'s elements clause because "[a] defendant can damage another's property without engaging in conduct that could

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[6] The bulk of Bowen's argument on this issue relies on United States v. Perez-Vargas, in which we distinguished between the "means by which an injury occurs"—that is, "the use of physical force"—and "the result of a defendant's conduct"—that is, "bodily injury." 414 F.3d 1282, 1285 (10th Cir. 2005). Because the offense at issue in Perez-Vargas, Colorado third-degree assault, could be committed by, for example, "intentionally exposing someone to hazardous chemicals," we concluded that it was not a "crime of violence." Id. at 1285–87.

After briefing in this case concluded, we overruled that aspect of Perez-Vargas. Ontiveros, 875 F.3d at 536 ("[W]e now hold that Perez-Vargas's logic on this point is no longer good law in light of [United States v. Castleman, 572 U.S. 157 (2014)]."). Bowen has since disclaimed any reliance on Perez-Vargas. See Aplt. Supp. Reply Br. at 5 (filed July 26, 2019).

fairly be characterized as" violent force. Aplt. Op. Br. at 27. The United States argues that the appropriate physical-force standard for § 924(c)(3)(A) is not whether the force applied is "violent," but whether the force applied is "force capable of damaging property." Aplee. Resp. at 24. We agree with Bowen and conclude that property crimes of violence under § 924(c)(3) are those that require violent force, not merely the force required to damage property. And because Bowen has demonstrated that a defendant can be convicted of violating § 1513(b)(2) for conduct that does not have as an element the use of violent force, § 1513(b)(2) does not qualify as a crime of violence under § 924(c)(3)(A).

Bowen argues that property can be damaged without the use of physical force, including by: (1) "transmitting a computer virus," (2) "spray-painting a car," or (3) "placing electronic equipment in water." Aplt. Op. Br. at 9. Bowen cites United States v. Edwards, 321 F. App'x 481 (6th Cir. 2009), to demonstrate "a realistic probability, not a theoretical possibility," Duenas-Alvarez, 549 U.S. at 193, that a defendant can be convicted of witness retaliation under § 1513(b)(2) for such non-violent actions. In Edwards, the Sixth Circuit affirmed a conviction under § 1513(b)(2) when the defendant had asked another person to spray-paint a witness's car. 321 F. App'x at 483. The Sixth Circuit concluded that asking someone to spray-paint a witness's car amounted to "conduct threatening to cause property damage to" the witness's property "with the requisite intent to retaliate against her for providing information relating to the commission of a federal offense." Id. at 485. Edwards thus demonstrates that a defendant can, in fact, be convicted under § 1513(b)(2) for

spray-painting a witness's car. The United States does not argue otherwise. We must therefore determine whether spray-painting a witness's car qualifies as a crime of violence under § 924(c)(3)'s elements clause. Moncrieffe, 569 U.S. at 190–91 ("[W]e must presume that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by [§ 924(c)(3)'s elements clause]." (brackets and quotations omitted)).

We agree with Bowen that property "crimes of violence" under § 924(c)(3)(A) are those that include "violent force," Curtis Johnson, 559 U.S. at 140,[7] not merely those that "injur[e] . . . property," United States v. Hill (Hill II), 890 F.3d 51, 58 (2d Cir. 2018).[8] And we easily conclude that the act of spray-painting another's car does

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[7] The United States argues that Bowen's "application of Curtis Johnson['s definition of force] to property" is incorrect. Aplee. Resp. at 24. This argument fails after Melgar-Cabrera, in which we did exactly that. 892 F.3d at 1064 ("[T]he word 'force' as used in § 924(c)(3)(A) means 'violent force,' just as the Court held in [Curtis Johnson] in regard to § 924(e)(2)(B)(i).").

[8] The United States relies on United States v. Hill (Hill I), 832 F.3d 135 (2d Cir. 2016), amended and superseded by Hill II, 890 F.3d 51 (2d Cir. 2018), for its characterization of the level of force necessary to commit a property crime of violence. In Hill II, construing Hobbs Act robbery, the Second Circuit assumed without deciding that Curtis Johnson's "physical force" definition applies to § 924(c)(3)(A). Id. at 58. Applying that definition of force to property damage (not physical harm, as Curtis Johnson did), the Second Circuit concluded that "violent force" is "no more nor less than force capable of causing . . . injury to property." Id. In light of this definition of "physical force," the Second Circuit concluded that the defendant's hypotheticals of non-forceful means of satisfying Hobbs Act robbery—such as "threatening to throw paint on the victim's house, to spray paint his car, or . . . to pour[] chocolate syrup on his passport"—still "involve the use or threatened use of physical force" because they threaten to damage property. Id. at 57–58.

We disagree with the Second Circuit. Hill II's definition would sweep into § 924(c)(3)(A) crimes—such as spray-painting another's car—that do not require the

not entail the use of violent force. Cf. United States v. Mann, 899 F.3d 901, 902 (10th Cir. 2018) (concluding that assault resulting in serious bodily injury is a crime of violence under § 924(c)(3)'s elements clause); Melgar-Cabrera, 892 F.3d at 1064 (same, as to Hobbs Act robbery); Ontiveros, 875 F.3d at 538 ("Colorado second-degree assault requires intentional causation of serious bodily harm, easily meeting the standard for 'violent force.'" (emphasis omitted)); see also United States v. Landeros-Gonzales, 262 F.3d 424, 426–27 (5th Cir. 2001) (concluding that "the intentional marking of another's property" does not qualify as a crime of violence for purposes of a sentencing enhancement). We remain mindful "that we ultimately are determining the meaning of the term 'crime of violence,'" and the "ordinary meaning of this term . . . suggests a category of violent, active crimes." Leocal, 543 U.S. at 11. And nothing about spray-painting someone else's car "suggests . . . a violent, active crime[]." Id. We therefore conclude that witness retaliation under 18 U.S.C. § 1513(b)(2) does not "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. § 924(c)(3)(A), and does not satisfy § 924(c)(3)'s elements clause.[9]

The dissent disagrees. Adopting the reasoning in cases from the Second Circuit and the United States District Court for the District of Columbia, the dissent

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sort of "violent force" necessary for a crime to qualify as a crime of violence under § 924(c)(3)(A). Curtis Johnson, 559 U.S. at 140; Melgar-Cabrera, 892 F.3d at 1064.

[9] For the same reasons, conspiring to retaliate against a witness does not qualify as a crime of violence under § 924(c)(3)(A).

defines "physical force against the property of another [a]s force capable of causing physical harm, such as damage, destruction, or substantial impairment to the property's use." Dissent at 15. We find the dissent's reasoning unpersuasive.

As is true of Hill II's definition of the level of force necessary to constitute "physical force" under § 924(c)(3)(A), the dissent's definition is initially attractive. Defining "physical force against the . . . property of another" as entailing merely the amount of force necessary to damage the property is straightforward. 18 U.S.C. § 924(c)(3)(A). And an argument can be made—indeed, the dissent and the Second Circuit make the argument—that such a reading follows from Curtis Johnson's definition of "physical force." The argument goes like this: Curtis Johnson defined "physical force" in the context of a statute that addressed only injury to another person, not injury to property. See Curtis Johnson, 559 U.S. at 140 (interpreting § 924(e)(2)(B)(i), which defines a "violent felony" as one that "has as an element the use, attempted use, or threatened use of physical force against the person of another"). And because Curtis Johnson, in that context, defined "physical force" as "force capable of causing physical pain or injury to another person," id., it follows that the physical force necessary to cause injury to property is merely the "force capable of causing physical . . . injury to" property. Id. But this reasoning is inconsistent with how the Supreme Court has interpreted the phrase "physical force."

The Supreme Court has never defined the contours of the phrase "physical force" in the context of a statute, like § 924(c)(3)(A), that applies to crimes involving property damage. Rather, the Supreme Court has defined the term "physical force"

as that term was used in § 924(e)(2)(B), which defines a "violent felony" as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B) (emphasis added);[10] accord Stokeling, 139 S. Ct. at 548; Curtis Johnson, 559 U.S. at 137–38.[11] We must therefore apply the Supreme Court's principles and reasoning from these cases to a statute, unlike the one the Supreme Court was faced with, that defines a crime of violence as one that "has as an element the use, attempted use, or threatened use of physical force against the . . . property of another." § 924(c)(3)(A).

The Court first addressed the definition of "physical force" in Curtis Johnson. 559 U.S. at 138. There, the Court held that "actual[] and intentional[] touching"—the level of force required to commit common-law battery—did not require the sort of "strong physical force" necessary to qualify as a "violent felony" under the ACCA's elements clause. Id. at 138, 140. The Court recognized that it was "interpreting the phrase 'physical force' as used in defining . . . the statutory category of 'violent felonies.'" Id. at 140 (alterations omitted). And, in that context, the

[10] In Castleman, the Court defined "physical force" in the context of a statute defining "misdemeanor crime of domestic violence." 18 U.S.C. § 921(33)(A); Castleman, 572 U.S. at 162–63. But Castleman does not direct our analysis because Castleman held that Curtis Johnson's definition of "physical force" did not apply in the context of § 921(33)(A). See Castleman, 572 U.S. at 163.

[11] Leocal addressed the definition of "physical force" in 18 U.S.C. § 16, but Leocal was concerned with the mens rea necessary to establish that a defendant had used physical force; not the type of force necessary to constitute physical force. 543 U.S. at 9–11. Leocal, therefore, does not inform our analysis of whether spray-painting someone's car involves physical force.

Court "th[ought] it clear that . . . the phrase 'physical force' means violent force—that is, force capable of causing physical pain or injury to another person." Id. The Court reasoned that the word "violent" alone "connotes a substantial degree of force," and this "connotation of strong physical force is even clearer" when "the adjective 'violent' is attached to the noun 'felony.'" Id.

Nine years later, the Court held that a robbery offense that has as an element the use of force "sufficient to overcome a victim's resistance necessitates the use of 'physical force'" as Curtis Johnson had defined that term. Stokeling, 139 S. Ct. at 548, 552–53. In Stokeling, the Court rejected the defendant's argument that Curtis Johnson required a degree of force that was substantial, stating:

> The nominal contact [Curtis]Johnson addressed involved physical force that is different in kind from the violent force necessary to overcome resistance by a victim. The force necessary for misdemeanor battery does not require resistance or even physical aversion on the part of the victim; the "unwanted" nature of the physical contact itself suffices to render it unlawful.

Id. at 553 (emphases added). The Court reasoned that "the force necessary to overcome a victim's physical resistance," in contrast, "is inherently 'violent' in the sense contemplated by [Curtis]Johnson." Id. "[R]obbery that must overpower a victim's will necessarily involves a physical confrontation and struggle. The altercation need not cause pain or injury or even be prolonged; it is the physical contest between the criminal and the victim that is itself 'capable of causing physical pain or injury.'" Id. (emphases added) (quoting Curtis Johnson, 559 U.S. at 140).

In light of the "inherently violent" nature of overcoming a victim's will, id.

(quotations omitted), Stokeling held that "force is 'capable of causing physical injury' within the meaning of [Curtis]Johnson when it is sufficient to overcome a victim's resistance." Id. at 554. And the Court stated that its holding was "consistent with" Justice Scalia's understanding that force as minor as "hitting, slapping, shoving, grabbing, pinching, biting, and hair pulling" qualified as "physical force" under Curtis Johnson's definition of that term. Id. (referring to Castleman, 572 U.S. at 182 (Scalia, J., concurring)). Thus, after Stokeling, we know that Curtis Johnson "does not require any particular degree of likelihood or probability that the force used will cause physical pain or injury; only potentiality." Id.

The dissent opines that "the proper focus" of the crime-of-violence inquiry "is on whether the force did or could cause physical pain or injury?" Dissent at 14. This is, of course, the inquiry when determining whether physical force used against another person is a crime of violence. See Stokeling, 139 S. Ct. at 553–54; Curtis Johnson, 559 U.S. at 140. The difficult question we face here, though, is what that inquiry means when determining whether physical force used against property is a crime of violence. We respectfully disagree with the dissent about how to apply the inquiry to the use of physical force against property.

As with force applied against or towards people, not all force applied against property is "inherently violent." Stokeling, 139 S. Ct. at 553 (quotations omitted). Some is the equivalent of offensive touching. See Curtis Johnson, 559 U.S. at 139–40. It is, of course, easy to imagine any number of actions (such as spray-painting another's car) that damage property but do not have the same inherent violence as

overcoming the will of a robbery victim. The question, therefore, is: What amount of force against property qualifies as "violent force"? Id. at 140.

Although Stokeling held that a minimal amount of force—when directed against the person of another—satisfies Curtis Johnson's definition of "violent force," Stokeling so held because force applied against or towards a person "need not cause pain or injury or even be prolonged" to be violent. 139 S. Ct. at 553. It was enough that the robbery statute at issue required the perpetrator to overcome the will of his victim. *Id.* This is not so of crimes against property; there is not inherent violence in, for example, spray-painting another's car, see Edwards, 321 F. App'x at 483, or "threatening to throw paint on [another's] house, . . . or . . . to pour chocolate syrup on his passport," Hill II, 890 F.3d at 57 (alterations omitted). Nothing about those actions is inherently violent, so the mere fact that they damage property cannot make them crimes of violence under § 924(c)(3).

For these reasons, we conclude that the Supreme Court's ruling in Curtis Johnson cannot be applied to § 924(c)(3) in the same way the dissent and Hill II interpret it. That is, in the context of § 924(c)(3)'s definition of crime of violence, "physical force against the . . . property of another," § 924(c)(3)(A), does not just mean force that "did or could cause physical pain or injury," Dissent at 14.

We are left, then, with the Supreme Court's guidance about when a crime is a crime of violence. In Curtis Johnson, the Court defined physical force as "violent force." 559 U.S. at 140. In Leocal the Court exhorted that "we []not forget that we ultimately are determining the meaning of the term 'crime of violence,'" and the

"ordinary meaning of this term . . . suggests a category of violent, active crimes." 543 U.S. at 11. Finally, in Stokeling, the Court acknowledged that force applied against or towards a person, "need not cause pain or injury or even be prolonged" to be violent. 159 S. Ct. at 553. Although spray-painting another's car damages that person's property, we cannot conclude that the mere fact that it damages property means that it requires "violent force," Curtis Johnson, 559 U.S. at 140, or makes it a crime of violence under § 924(c)(3).[12]

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[12] The dissent invokes Castleman's rejection of the "logic . . . that pulling the trigger on a gun is not a 'use of force' because it is the bullet, not the trigger, that actually strikes the victim," Castleman, 572 U.S. at 171, and then analogizes the force used to pull the trigger on a gun to the "force used to depress the trigger on a can of spray paint," Dissent at 10–11. The dissent maintains that, if Castleman reasoned that the amount of force needed to pull the trigger of a gun qualified as "physical force," then certainly the amount of force needed to "depress the trigger on a can of spray paint" must be enough force to also qualify as physical force. This comparison, however, ignores the context of that statement in Castleman.

First, Castleman made that distinction when rejecting the argument that force indirectly applied did not qualify as the "use of force." 572 U.S. at 171 ("That the harm occurs indirectly, rather than directly (as with a kick or punch), does not matter."). Its rejection, therefore, of the "logic . . . that pulling the trigger on a gun is not a 'use of force' because it is the bullet, not the trigger, that actually strikes the victim," id., addresses the indirect-force aspect of the action of shooting a gun. That is, Castleman was explaining that shooting someone requires the use of force even though it only requires the amount of force necessary to pull a trigger; there was no question that the shooting itself involved the use of force.

But that is not the issue in this case. The question here is whether spray-painting someone's car itself involves "physical force"—not whether spray-painting someone's car involves physical force even though it requires only the amount of force necessary to "depress the trigger on a can of spray paint." Dissent at 10. Castleman's gun-trigger statement does not help us answer that question.

Further, as noted, Castleman was interpreting "physical force" in a statute in which Curtis Johnson's definition of "force" did not govern. Castleman, 572 U.S. at 163 ("But here, [unlike in Curtis Johnson,] the common-law meaning of 'force' fits perfectly: The very reasons we gave for rejecting that meaning in [Curtis Johnson when] defining a 'violent felony' are reasons to embrace it in defining a

We conclude that Bowen's witness retaliation convictions do not qualify as crimes of violence under 18 U.S.C. § 924(c)(3)(A), and § 924(c)(3)(B) is void for vagueness, so Bowen is actually innocent of § 924(c)(1). The parties agree that Bowen's actual innocence makes his § 2255 motion timely. Cf. Day, 547 U.S. at 202 ("[W]e would count it an abuse of discretion to override [the government's] deliberate waiver of a limitations defense.").

V

Finally, we turn to the merits of Bowen's claim. Bowen alleges in his § 2255 motion that he was "convicted under § 924(c)(3)(B), the so-called residual clause," and his conviction is therefore "in violation of Johnson v. United States and must be vacated." ROA at 84. This "necessarily implies that [Bowen's conviction] was imposed under an invalid—indeed, unconstitutional—legal theory, and that [Bowen] was, therefore, [convicted] in violation of the Constitution." Snyder, 871 F.3d at 1128.

We conclude that Bowen's brandishing conviction must have rested on § 924(c)(3)'s residual clause, and the trial court therefore erred. See Driscoll, 892 F.3d at 1132. Bowen correctly states that "[t]he record is silent about whether" his § 924(c)(1) conviction rests on § 924(c)(3)'s elements clause or residual clause.

'misdemeanor crime of domestic violence.'"); accord id. at 163–68 (discussing why Curtis Johnson's definition of "physical force" did not apply). Therefore, even if Castleman's gun-trigger statement was concerned with the amount of force (rather than the nature in which the force was applied, i.e., directly or indirectly), Castleman's definition of force does not govern in this case.

Aplt. Op. Br. at 5. Because the record is ambiguous, "we turn to the relevant background legal environment at the time of [Bowen's conviction]" to determine whether witness retaliation meets the "crime of violence" definition under § 924(c)(3)(A). Driscoll, 892 F.3d at 1133. Under controlling law within our circuit in 2007, Bowen's brandishing conviction must have rested on § 924(c)(3)'s residual clause.

Bowen's trial "occurred against the backdrop of the Supreme Court's decision in Taylor[v. United States, 495 U.S. 575 (1990)]," under which district courts could "examine the underlying charging documents and/or jury instructions to determine" which crime the defendant had been charged with. Snyder, 871 F.3d at 1129. Within our circuit, however, this so-called "Taylor exception" was "restricted to cases in which a court looks beyond the simple fact of a conviction to determine whether the offense meets the elements of certain specific offenses enumerated in [the ACCA residual clause]." McCann v. Bryon L. Rosquist, D.C., P.C., 185 F.3d 1113, 1117 (10th Cir. 1999) (emphasis added) (citing United States v. Permenter, 969 F.2d 911, 913 (10th Cir. 1992)), judgment vacated on other grounds by Bryon L. Rosquist, D.C., P.C. v. McCann, 529 U.S. 1126 (2000). Our circuit did not employ the Taylor exception to determine whether an offense qualified as a crime of violence under the elements clause, such as § 924(c)(3)(A). See, e.g., United States v. Torres-Ruiz, 387 F.3d 1179, 1182 (10th Cir. 2004) ("[T]he express focus of [the crime of violence] inquiry is on the elements of the [underlying] crime at issue rather than the unique underlying circumstances of the crime . . . ."). Section 924(c)(3) does not have an

enumerated clause—it has only a residual clause and an elements clause—so the trial court could not have employed the Taylor exception to determine if Bowen's witness retaliation crimes were crimes of violence under § 924(c)(3)'s elements clause.

Therefore, at the time of Bowen's conviction, controlling law in our circuit would have required the district court to apply the pure categorical approach to determine if Bowen's witness retaliation convictions qualified as crimes of violence under § 924(c)(3)'s elements clause. And, as we have discussed, witness retaliation under § 1513(b)(2) does not categorically qualify as a crime of violence under § 924(c)(3)'s elements clause. Because the trial court could not have concluded that Bowen's witness retaliation convictions were crimes of violence under the elements clause, it must have relied on the residual clause to find that witness retaliation was a crime of violence. Under Davis, this was error.

Further, the trial court's error "had a substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 637. As discussed, Bowen's brandishing conviction relied on § 924(c)(3)'s residual clause. Had the trial court correctly concluded that witness retaliation was not a crime of violence, the jury could not have convicted Bowen of violating 18 U.S.C. § 924(c)(1)(A)(ii). Therefore, in Bowen's case, the error resulted in his conviction and was not harmless.

We REVERSE the district court's dismissal of Bowen's § 2255 motion and REMAND with instructions to VACATE Bowen's § 924(c)(1) conviction.

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McHugh, Circuit Judge, dissenting.

Because I agree with the district court that Retaliation Against a Witness under 18 U.S.C. § 1513(b)(2) qualifies as a crime of violence under 18 U.S.C. § 924(c)(3)(A), I respectfully dissent from the majority opinion.

I. BACKGROUND

This case arises from an incident in which Mr. Bowen and several accomplices became aware of Alcohol, Tobacco, Firearms, and Explosives (ATF) agents' interrogation of one of their associates, Clifford Cline. *See United States v. Bowen* ("*Bowen I*"), 527 F.3d 1065, 1069–72 (10th Cir. 2008). Concerned about Mr. Cline's potential cooperation with the ATF agents, Mr. Bowen and his accomplices physically assaulted Mr. Cline while repeatedly questioning him about his connection to ATF. *Id.* at 1071. During the assault, one of the attackers threatened Mr. Cline with a gun. *Id.* at 1071–72.[1]

For his part in the assault, Mr. Bowen was indicted for retaliating against a witness, in violation of 18 U.S.C. §§ 2, 1513(b)(2); conspiracy to retaliate against a witness, in violation of 18 U.S.C. §§ 371, 1513(b)(2); and possession and brandishing of

[1] I provide a brief recitation of the facts merely to place the charges and the trial court's instructions to the jury in context. Below, I perform my "crime-of-violence" analysis under the categorical approach, looking to the least of the acts criminalized by the statute.

a firearm in furtherance of a federal crime of violence, in violation of 18 U.S.C. §§ 2, 924(c)(1)(A)(ii).[2] Under § 924(c), a "crime of violence" is:

> An offense that is a felony and—
>
> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another [the "elements clause"], or
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense [the "residual clause"].

18 U.S.C. § 924(c)(3).

Although the record does not specify which clause of § 924(c) the court relied upon, the jury was instructed that retaliation against a witness and conspiracy to retaliate against a witness both qualified as crimes of violence. The jury convicted Mr. Bowen on all three counts and found, by special verdict, that the § 924(c) count was supported under both predicate offenses. Mr. Bowen appealed his § 924(c) conviction on sufficiency of the evidence grounds but did not claim that retaliating against a witness was not a crime of violence. *Bowen*, 527 F.3d at 1075. We affirmed Mr. Bowen's conviction, *id.* at 1080, and the Supreme Court denied his petition for a writ of certiorari, *Bowen v. United States*, 555 U.S. 930 (2008).

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[2] Our decision on direct appeal states that Mr. Bowen was convicted of aiding and abetting the retaliation of a witness, conspiracy to retaliate against a witness, and aiding and abetting the possession and brandishing of a firearm in furtherance of a federal crime of violence. *United States v. Bowen*, 527 F.3d 1065, 1069 (10th Cir. 2008). But following our decision, the district court entered an amended judgment identifying the offenses of conviction as retaliation against a witness, conspiracy to retaliate against a witness, and possession and brandishing of a firearm in furtherance of a federal crime of violence.

Mr. Bowen filed his first 28 U.S.C. § 2255 motion for post-conviction relief nearly eight years after his conviction became final, relying on the Supreme Court's decision in *Johnson v. United States* ("*Samuel Johnson*"), 135 S. Ct. 2551 (2015). There, the Court held the residual clause of the Armed Career Criminal Act ("ACCA"), which required increased prison sentences for any defendant convicted of a violent felony that "otherwise involve[d] conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutionally void for vagueness. *Samuel Johnson*, 135 S. Ct. at 2555–56, 2563. Although Mr. Bowen was convicted and sentenced under 18 U.S.C. § 924(c), he contended the Supreme Court's decision in *Samuel Johnson* extended beyond the ACCA and rendered the residual clause of § 924(c)(3)(B) unconstitutionally vague. And because, according to Mr. Bowen, neither of the predicate offenses qualified as "crimes of violence" under the elements clause of § 924(c)(3)(A), he contended his sentence must be overturned. After concluding that witness retaliation is a crime of violence under the elements clause, § 924(c)(3)(A), the district court dismissed the motion as untimely, holding that *Samuel Johnson* does not apply to § 924(c).

II. DISCUSSION

Mr. Bowen's argument on appeal rests on two grounds, one procedural and one substantive. Unlike the majority, I begin by addressing the merits of Mr. Bowen's motion, rather than the timeliness procedural bar. I do so for two reasons. First, I believe the issue of timeliness, and the corresponding "new rule" analysis, present a more

complicated question than the merits.[3] Second, although the district court dismissed Mr. Bowen's motion as untimely, we may "affirm the district court on any ground adequately supported by the record." *Elkins v. Comfort*, 392 F.3d 1159, 1162 (10th Cir. 2004). Therefore, if either of Mr. Bowen's convictions—retaliation against a witness or conspiracy to retaliate against a witness—qualifies as a crime of violence under § 924(c)(3)(A), we may affirm the district court on the merits without deciding the timeliness issue.

Here, only one predicate offense is needed to support Mr. Bowen's § 924(c) conviction, and conspiracy to retaliate against a witness cannot be a crime of violence if retaliation against a witness is not a crime of violence. Therefore, I address only whether retaliation against a witness qualifies as a crime of violence under § 924(c)'s elements clause. In my opinion, it does.

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[3] Although the Court in *Davis* does not state that the result is "dictated by" prior opinions, it does state that the application of the categorical approach to § 924(c) is not even a close question after the Court's unanimous decision in *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004) (holding the residual clause in 18 U.S.C. § 16(b) required the categorical approach). *Davis*, 139 S. Ct. at 2328 ("And what was true of § 16(b) seems to us at least as true of § 924(c)(3)(B): It's not even close; the statutory text commands the categorical approach."). And the government agreed that if the categorical approach applied, "then § 924(c)(3)(B) must be held unconstitutional too"—like in *Johnson* and *Dimaya. Id.* at 2327. So, in my view, the issue of whether *Davis* announced a new rule is not clear. It is true, as the majority notes, that the Court in *Davis* undertook a careful review of the statute at issue, 18 U.S.C. § 924(c). The same is true, however, with respect to the Court's consideration of 18 U.S.C. § 16(b) in *Dimaya. See, Sessions v. Dimaya*, 138 S. Ct. 1204, 1215-16 (2019). But, because I think 18 U.S.C. § 1513(b)(2)(A) is a crime of violence under the categorical approach, I need not and do not decide whether *Davis* announced a new rule.

To succeed on the merits of his claim, Mr. Bowen must prove that § 924(c)'s residual clause is unconstitutionally void for vagueness *and* that retaliation against a witness does not qualify as a crime of violence under § 924(c)'s elements clause. Because I do not believe Mr. Bowen can succeed on the latter question and because answering the former would require determining whether *United States v. Davis*, 139 S. Ct. 2319 (2019), is a new rule and, if so, whether that rule applies retroactively to Mr. Bowen's case on collateral review, I address only whether retaliation against a witness "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." *See* § 924(c)(3)(A).

A. Standard of Review

Whether a particular offense qualifies as a crime of violence under 18 U.S.C. § 924(c) is a legal question, which we review de novo. *United States v. Serafin*, 562 F.3d 1105, 1107 (10th Cir. 2009).

B. Analysis

"To determine whether a predicate crime constitutes a crime of violence under § 924(c), we employ the categorical approach." *United States v. Melgar-Cabrera*, 892 F.3d 1053, 1060–61 (10th Cir. 2018); *see also Davis*, 139 S. Ct. at 2327. The categorical approach is concerned only with whether the statutory elements of the offense—"the things the prosecution must prove to sustain a conviction," *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016) (quoting Black's Law Dictionary 634 (10th ed. 2014)—"necessarily satisfy [§ 924(c)'s] definition," *United States v. Titties*, 852 F.3d 1257, 1266 (10th Cir. 2017); *accord Melgar-Cabrera*, 892 F.3d at 1061. Under this approach, we

identify the elements of the underlying "crime of violence"—including the minimum level of force required by law to violate that statute—and "then determine if *that* force categorically fits the definition of physical force." *United States v. Harris*, 844 F.3d 1260, 1264 (10th Cir. 2017); *see Moncrieffe v. Holder*, 569 U.S. 184, 190–91 (2013) ("[W]e must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by" § 924(c)(3)(A) (quoting *Johnson v. United States* ("*Curtis Johnson*"), 559 U.S. 133, 137 (2010)). "'[I]f the statute sweeps more broadly than' [§ 924(c)'s] definition—that is, if some conduct would garner a conviction but would not satisfy the definition—then any 'conviction under that law cannot count'" as a crime of violence. *Titties*, 852 F.3d at 1266 (quoting *Descamps v. United States*, 570 U.S. 254, 261 (2013)). This is true "even if the defendant's actual conduct (i.e., the facts of the crime) fits within the generic offense's boundaries." *Mathis*, 136 S. Ct. at 2248.

Our first step, then, is to identify the elements of retaliation against a witness in violation of 18 U.S.C. § 1513(b)(2)—the crime of violence underlying Mr. Bowen's § 924(c) conviction. The statute punishes anyone who "knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person for" providing information to law enforcement regarding violations of federal law. 18 U.S.C. § 1513(b)(2).[4] Thus, to sustain a conviction under § 1513(b)(2), the

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[4] 18 U.S.C. § 1513(b) states in its entirety:

government must prove three elements: "1) knowing engagement in conduct; 2) either causing, or threatening to cause, bodily injury or property damage to another person; and 3) with intent to retaliate against any person for, *inter alia,* providing information relating to the commission of a federal offense." *United States v. Edwards*, 321 F. App'x 481, 484 (6th Cir. 2009) (unpublished). Only the second element is at issue here, which can be satisfied by either (1) causing or threatening to cause bodily injury to another person or (2) causing or threatening to cause damage to another person's tangible property.[5]

> Whoever knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person for—
>
> > (1) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or
> >
> > (2) any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings given by a person to a law enforcement officer;
> > or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

[5] Both parties agree that 18 U.S.C. § 1513(b)(2) is an indivisible statute, with causing or threatening bodily injury or property damage as alternate means of violating the same element. *See* Aplt. Br. at 24 (identifying § 1513(b)(2)'s elements as "(a) knowingly causing bodily injury *or* property damage[with the] (b) specific intent to retaliate against (c) a protected person" (emphasis added)); Aplee. Br. at 16 ("Every conviction for witness retaliation under § 1513(b) requires that a defendant attempt, threaten, *or* knowingly engage in conduct causing bodily injury to another *or* damaging another's tangible property." (emphasis added)).

Before turning to whether § 1513(b)(2) is a crime of violence, it is necessary to discuss the definition and requirements of § 924(c)'s elements clause. As discussed above, § 924(c) criminalizes the carrying, use, brandishing, or discharging of a firearm during the commission of an offense which "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(1)(A), (c)(3)(A). And while the Supreme Court has never provided an exhaustive list of conduct that constitutes "physical force" under § 924(c), it has defined the same phrase as meaning "violent force—that is, force capable of causing physical pain or injury to another person" under § 924(e)(2)(B)—a different subsection of the same statute. *See Curtis Johnson*, 559 U.S. at 140.

We, along with many of our sibling circuits,[6] have applied *Curtis Johnson*'s "violent force" definition when interpreting § 924(c). *See Melgar-Cabrera*, 892 F.3d at 1064 ("We conclude that the word 'force' as used in § 924(c)(3)(A) means 'violent force,' just as the Court held in [*Curtis Johnson*] in regard to § 924(e)(2)(B)(i)."). Therefore, for an offense to qualify as a crime of violence under § 924(c)(3)(A), it must have as an element the use, attempted use, or threatened use of "force capable of causing

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[6] *United States v. Evans*, 848 F.3d 242, 245 (4th Cir. 2017) (applying *Curtis Johnson*'s definition of physical force as violent force to crimes of violence under § 924(c)); *United States v. Gutierrez*, 876 F.3d 1254, 1256 (9th Cir. 2017) (same); *In re Hernandez*, 857 F.3d 1162, 1166 (11th Cir. 2017); *United States v. Taylor*, 848 F.3d 476, 491 (1st Cir. 2017) (same); *United States v. Armour*, 840 F.3d 904, 909 (7th Cir. 2016) (same); *United States v. Rafidi*, 829 F.3d 437, 445 (6th Cir. 2016); *see also United States v. Hill*, 890 F.3d 51, 57 (2d Cir. 2018) (assuming arguendo that *Curtis Johnson*'s definition of physical force applies to § 924(c)(3)(A)).

physical pain or injury" to another's person or property. *Melgar-Cabrera*, 892 F.3d at 1064 (quoting *Curtis Johnson*, 559 U.S. at 140).

I turn now to whether retaliating against a witness is a crime of violence under § 924(c)(3)(A). Recall that § 1513(b)(2) is violated when a defendant causes or threatens bodily injury *or* causes or threatens damage to another's property. Because "'[nothing] more than the least of th[e] acts' criminalized" by the statute must satisfy the requirements of § 924(c)(3)(A), *see Moncrieffe*, 569 U.S. at 191 (quoting *Curtis Johnson*, 559 U.S. at 137), § 1513(b)(2) cannot be a crime of violence unless threatening to damage another's property—the minimum conduct criminalized by the statute—necessarily involves violent physical force. I accordingly limit my analysis to that least of criminal acts.

To determine whether § 1513(b)(2)'s prohibition on causing or threatening to cause property damage is a crime of violence, we must determine (1) whether damaging property necessarily involves the use of physical force and (2) what use of physical force against another's property entails under § 924(c)(3)(A). Like the use of force against a person, the first question focuses on *how* the use of force occurs (direct or indirect) while the second focuses on the *amount* of force that must be used.

Mr. Bowen argues that § 1513(b)(2) does not involve the use of physical force against another's property because there are "[i]nnumerable . . . ways to damage property without using violence." Aplt. Br. at 27. In support, he cites a conviction under the statute for threatening to spray-paint a witness's car, *see Edwards*, 321 F. App'x at 485, and provides an array of hypotheticals, such as "remotely transmitting malware," "placing

another's smartphone or computer in a tub of water, sprinkling bleach on another's clothing or furniture, or leaving another's refrigerator or freezer open (spoiling the food inside)." Aplt. Br. at 26, 27. For the reasons I now explain, I disagree.

1. Indirect Force

Under § 924(c), it is irrelevant whether the statute criminalizes the direct application of force or the resulting bodily injury because "[i]t is impossible to cause bodily injury without using force 'capable of' producing that result." *Melgar-Cabrera*, 892 F.3d at 1066 (citations omitted). The question, then, is whether § 924(c) encompasses both direct and indirect use of force against the property of another. I conclude that it does.

Like statutes criminalizing offenses against the person of another, property offense statutes criminalize either a defendant's conduct in relation to the property, *see United States v. Estrada*, 777 F.3d 1318, 1321 (11th Cir. 2015) (citing Fla. Stat. § 790.19, which punishes anyone who "shoots at, within, or into, or throws any missile or hurls or projects a stone or other hard substance" at particular types of property), or the outcome of a defendant's conduct, *see United States v. Abu Khatallah*, 316 F. Supp. 3d 207, 213 (D.D.C. 2018) (citing 18 U.S.C. § 1363, which prohibits "willfully and maliciously destroy[ing] or injur[ing] any structure, conveyance, or other real or personal property").

The plain language of § 924(c)(3)(A) (prohibiting the use of "physical force against the person or property of another"), provides no basis for concluding that the use of physical force against another's person requires a different standard than the use of physical force against another's property. In fact, the structure of the statute reads as

prohibiting the use of physical force against either the body or the property of another person, such that the force sufficient under one is enough under the other. Thus, for example, the force used to depress the trigger on a can of spray paint, like pulling the trigger of a gun, *see United States v. Castleman*, 572 U.S. 157, 170–71 (2014), can be considered in assessing whether the paint expelled onto an automobile is physical force capable of causing injury to that car. That is, the fact that the force is indirect is irrelevant.

2. Amount of Force

Having concluded that § 924(c) can encompass the indirect use of force resulting in damage or injury to property, we face the interrelated question of how much force is required when causing such damage or injury. While I agree that the force must be "violent force," I would interpret that term differently than the majority.

I have found only three cases directly addressing this question—the amount of force required to injure property—in the context of § 924(c). Two of the three cases, *United States v. Hill*, 890 F.3d 51, 57–58 (2d Cir. 2018), and *Abu Khatallah*, 316 F. Supp. 3d 207, address the issue in relation to *Curtis Johnson*'s definition of physical force. The third, *United States v. McGuire*, 706 F.3d 1333 (11th Cir. 2013), does not rely on any specific definition and involves damage to a loaded plane—necessarily involving risk to persons. Accordingly, I limit my discussion to the first two decisions, which I explain in some detail.

In *Hill*, the defendant was convicted under 18 U.S.C. § 924(j)(1) of committing a firearms-related murder in the course of a § 924(c) crime of violence. 890 F.3d at 54. The

underlying crime of violence for Mr. Hill's § 924(j)(1) conviction was Hobbs Act robbery, 18 U.S.C. § 1951(b)(1). *Id.* On appeal, Mr. Hill challenged his conviction by arguing that Hobbs Act robbery was not a crime of violence under § 924(c) because it could be committed by placing the victim in fear of injury to his property or person through non-forceful means. *Id.* at 57. In support of his argument, Mr. Hill claimed that a person could commit Hobbs Act robbery by "threatening to throw paint on the victim's house, to spray paint his car, or, most colorfully, to pour chocolate syrup on his passport" and that such acts "would be insufficient to satisfy the [physical force] standard in [*Curtis Johnson*]." *Id.* (internal quotation marks and alterations omitted).

The court rejected this argument, noting that *Curtis Johnson* required force "capable of causing physical pain or injury to another person" but "did *not* construe § 924(e)(2)(B)(i) to require that a particular quantum of force be employed or threatened to satisfy its physical force requirement." *Id.* at 58. The Second Circuit noted that *Curtis Johnson* was concerned with distinguishing force that is merely offensive from force that is capable of causing pain or injury—not with determining how much pain or injury is necessary to constitute a use of violent force. Thus, it concluded that the use of physical force required by § 924(c) "means no more or less than force capable of causing physical pain or injury to a person *or* injury to property" and, under that definition, Mr. Hill's hypotheticals involved the use of physical force. *Id.* Unlike the majority, I find this reasoning persuasive.

The district court for the District of Columbia reached a similar result in *Abu Khatallah*, 316 F. Supp. 3d 207. Mr. Abu Khatallah was convicted under § 924(c) based

on the predicate crime of intentionally injuring a building within the special and maritime jurisdiction of the United States, in violation of 18 U.S.C. § 1363.[7] *Id.* at 210. "[A]t a minimum, to be convicted under § 1363 a defendant must have intentionally injured federal property, or have attempted or conspired to do so." *Id.* at 213. Mr. Abu Khatallah argued that § 1363 could not be a crime of violence because it could be violated without the "violent physical force" required by *Curtis Johnson*, citing upheld convictions under the statute for flooding an inmate's cell by breaking a sprinkler head and pouring tar on the steps of a courthouse. *Id.* at 214–15. The court disagreed:

> [T]hese cases do not show that § 1363 can be violated using less force than that contemplated in [*Curtis*] *Johnson*. The relevant question under [*Curtis*] *Johnson* is not whether the Court would describe all § 1363 convictions as "violent" in an intuitive sense. Rather, [*Curtis*] *Johnson*'s definition of physical force simply requires that all of the prohibited acts involve "force capable of causing physical injury." Tarring a courthouse or breaking a sprinkler, while not particularly brutal, each require that level of force against property. Neither act is the sort of *de minimis* intrusion—like a trespassory but otherwise harmless touch—that the Supreme Court in [*Curtis*] *Johnson* viewed as outside the scope of ACCA's elements clause.

Id. (internal citations omitted).

To illustrate the distinction between the two levels of force, the court considered a hypothetical scenario in which a defendant "entered a secured federal building at night

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[7] The jury convicted Mr. Abu Khatallah of three offenses identified in the jury instructions as crimes of violence (providing material support to terrorists, in violation of 18 U.S.C. § 2339A; conspiring to provide material support to terrorists, in violation of 18 U.S.C. § 2339A; and the § 1363 offense), but did not identify which offense it relied on. *United States v. Abu Khatallah*, 316 F. Supp. 3d 207, 210–11 (D.D.C. 2018). The district court concluded that the § 924(c) conviction was valid so long as one of the above three offenses qualified as a crime of violence, and it chose to analyze the § 1363 conviction.

and placed his hand on the wall." *Id.* at 215 n.7. Although the defendant would have used sufficient force at common law to commit the offensive trespass in that scenario, he would "not have used 'violent force' against property" in violation of § 1363. *See id.* The court ultimately held that "[i]njuring federal property categorically requires a use of force against the property of another." *Id.* at 213. Again, I find this reasoning persuasive.

Section 924(c)'s elements clause defines a crime of violence as an offense that is a felony and "has an element the use, attempted use, or threated use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). And the Supreme Court has clarified that "physical force" means simply "force exerted through concrete bodies—distinguishing physical force from, for example, intellectual force or emotional force." *Stokeling v. United States,* 139 S. Ct. 544, 552 (2019) (quoting *Curtis Johnson*, 559 U.S. at 138)). To illustrate, spray painting a car involves physical, as opposed to intellectual or emotional, force. The Court has also reiterated since *Curtis Johnson* that physical force requires only force that is capable of causing pain or injury. *See id.* at 553 ("In the wake of [*Curtis*] *Johnson*, the Court has repeated its holding that 'physical force' means 'force capable of causing physical pain or injury.'" (quoting *Sessions v. Dimaya,* 138 S. Ct. 1204, 1220 (2018)); *id.* (rejecting the defendants' reliance on *Curtis Johnson*'s use of adjectives such as "severe," "extreme," "furious," or "vehement," and explaining that these words "merely supported [*Curtis*] *Johnson*'s actual holding: that common-law battery does not require 'force capable of causing physical pain or injury'"). Thus, the proper focus is on whether the force did or could cause physical pain or injury.

To answer this question, I begin with the meaning of the words. Black's Law Dictionary defines injury as "[a]ny harm or damage." *Injury*, Black's Law Dictionary (10th ed. 2014). In turn, it defines damage as "physical harm that is done to something," *Damage*, Black's Law Dictionary (10th ed. 2014), and criminal damage to property as "[i]njury, destruction, or substantial impairment to the use of property," *Criminal Damage to Property*, Black's Law Dictionary (10th ed. 2014). Thus, physical force against the property of another is force capable of causing physical harm, such as damage, destruction, or substantial impairment to the property's use. Much like the broken sprinkler or tarred courthouse, the force necessary to spray paint a car, while not "violent in an intuitive sense[,] . . . . require[s] [*Curtis Johnson*'s] level of force against property." *Abu Khatallah*, 316 F. Supp. 3d at 214–15 (internal quotation marks omitted).[8] That is, any force that expels paint onto a car is force capable of causing damage to that personal property. In contrast, the force required to spit on a car—an action not capable of causing damage—is not.

In my view, then, a threat to "damage[] the tangible property of another person," 18 U.S.C. § 1513(b), is a crime of violence because it is a threat to use physical force capable of causing injury against the property of another. 18 U.S.C. § 924(c)(3)(A). As a result, I would hold that a threat to spray paint someone's car, to place their electronic devices in water, or to otherwise damage their property are crimes of violence. And

[8] In rebuttal, Mr. Bowen cites to a Fifth Circuit case holding that spray painting a car is not a crime of violence. *See United States v. Landeros-Gonzales*, 262 F.3d 424, 427 (5th Cir. 2001). But this decision is unpersuasive because it was issued before the Supreme Court's holdings in *Curtis Johnson* and *Castleman*.

whether the actor gently places the electronic device in a full bathtub or violently slams it into the water from atop the toilet is irrelevant. In either case, the "violence" is the damage to the property. Consequently, I would also conclude that retaliation against a witness is a crime of violence under § 924(c) and would deny Mr. Bowen relief.[9]

[9] Because I would hold that Mr. Bowen is guilty of Retaliation Against a Witness under 18 U.S.C. § 924(c)(3)(A), I would also hold that he is not actually innocent.