

FILED
United States Court of Appeals
Tenth Circuit

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

October 27, 2026

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

No. 23-7086

KENNETH EUGENE BARRETT,

Defendant - Appellant.

Appeal from the United States District Court
for the Eastern District of Oklahoma
(D.C. No. 6:04-CR-00115-RAW-1)

Howard A. Pincus, Assistant Federal Public Defender (Virginia L. Grady, Federal Public Defender, with him on the briefs), Office of the Colorado Federal Public Defender, Denver, Colorado, for Defendant-Appellant.

Scott A.C. Meisler, Deputy Chief, Appellate Section, Criminal Division, United States Department of Justice, Washington, District of Columbia (Nicole M. Argentieri, Principal Deputy Assistant Attorney General; David Rody, Acting Deputy Assistant Attorney General; and Jeffrey B. Kahan, Deputy Chief, Capital Case Section, United States Department of Justice, Washington, District of Columbia; Christopher J. Wilson, United States Attorney, and Linda Epperley, Assistant United States Attorney, Office of the United States Attorney for the Eastern District of Oklahoma, Muskogee, Oklahoma, on the brief), for Plaintiff-Appellee.

Before **HOLMES**, Chief Judge, **EBEL**, and **CARSON**, Circuit Judges.

HOLMES, Chief Judge.

Kenneth Barrett seeks to have his conviction for using a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A) and (j), vacated. He contends that the predicate offense—21 U.S.C. § 848(e)(1)(B), causing the intentional killing of a state law enforcement officer in furtherance of a drug-trafficking crime—does not categorically constitute a crime of violence under the plain text of the statute.

We disagree. Exercising jurisdiction under 28 U.S.C. §§ 1291 and 2253, we conclude that a § 848(e)(1)(B) offense constitutes a crime of violence under § 924(c)(3)’s elements clause. More specifically, we hold that a § 848(e)(1)(B) offense can only be committed with an intentional *mens rea*.¹ We therefore **affirm** the district court’s denial of Mr. Barrett’s 28 U.S.C. § 2255 motion and his related motion to alter or amend the district court’s order and judgment.

I

In January 1999, an Oklahoma court issued a warrant for Mr. Barrett’s arrest. *United States v. Barrett (Barrett I)*, 496 F.3d 1079, 1082

¹ See, e.g., *Mens Rea*, BLACK’S LAW DICTIONARY (12th ed. 2024) (defining term to mean, *inter alia*, the “state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime”).

(10th Cir. 2007). The Oklahoma court issued the warrant because Mr. Barrett, a methamphetamine dealer, failed to appear at his trial on charges of unlawful delivery of a controlled drug. Although Mr. Barrett eluded arrest for the next eight months, state law enforcement officials continued to investigate his role in the eastern Oklahoma meth trade. In September 1999, local law enforcement learned from a confidential informant that Mr. Barrett was manufacturing meth at his residence. State police used that tip to obtain a search warrant for Mr. Barrett's home. In light of Mr. Barrett's "violent and unstable nature," the warrant dispensed with any knock-and-announce requirement. *Id.*

State police served the no-knock warrant on Mr. Barrett's residence in the early hours of September 24, 1999. Mr. Barrett met the officers with a hail of rifle fire, killing Trooper David Eales and wounding Trooper John Hamilton. The remaining officers' search of Mr. Barrett's residence yielded "a variety of other firearms" and "materials related to the production and use of methamphetamine." *Id.* at 1085. On Mr. Barrett's person, the officers found "a plastic baggie containing red phosphorous, a lighter, and approximately \$2100 in cash." *Id.*

II

The litigation history following these tragic events is lengthy and tortuous. We have detailed this history in a previous decision. *See United*

States v. Barrett (Barrett III), 985 F.3d 1203, 1209–21 (10th Cir. 2021).

We provide only a summary of that history here, to set the stage for our consideration of the district court’s disposition of the second or successive § 2255 motion at issue.

A

Mr. Barrett was first tried in Oklahoma state court. In 2002, his first trial ended with a hung jury. In 2004, a second Oklahoma jury acquitted Mr. Barrett of first-degree murder and other charges, but it convicted him of the lesser-included offenses of first-degree manslaughter and assault and battery with a dangerous weapon. For these offenses, an Oklahoma court sentenced Mr. Barrett to a combined prison term of 30 years.

Less than six months after the Oklahoma court sentenced Mr. Barrett for his 2004 convictions, the United States filed a criminal complaint against Mr. Barrett in the Eastern District of Oklahoma. The federal government subsequently indicted Mr. Barrett on three counts: Count 1 – using and carrying a firearm during and in relation to drug trafficking crimes and possessing a firearm in furtherance of such drug trafficking offenses, resulting in death, in violation of 18 U.S.C. § 924(c)(1)(A) and (j); Count 2 – using and carrying a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A) and

(j); and Count 3 – intentionally killing a state law enforcement officer during the commission of a drug trafficking crime, in violation of 21 U.S.C. § 848(e)(1)(B). The grand jury charged the offense listed at Count 3 as the predicate “crime of violence” for Count 2.

The federal jury convicted Mr. Barrett of all three counts. At the second stage (i.e., penalty phase) proceedings, the jury recommended that the district court impose sentences of life imprisonment on the two § 924(c) counts and a sentence of death on the § 848(e)(1)(B) count. The district court imposed the sentences that the jury recommended and entered judgment. We affirmed Mr. Barrett’s convictions and death sentence on direct appeal.

B

Mr. Barrett subsequently launched a collateral attack on his convictions and sentence, seeking relief under 28 U.S.C. § 2255. *United States v. Barrett (Barrett II)*, 797 F.3d 1207, 1211 (10th Cir. 2015). After the district court denied Mr. Barrett’s § 2255 motion, we granted a certificate of appealability (“COA”) permitting Mr. Barrett to appeal from the denial of several ineffective assistance of counsel (“IAC”) claims. We affirmed the district court’s denial of § 2255 relief “on all but one” of Mr. Barrett’s IAC claims. *Id.* Holding that Mr. Barrett’s trial attorneys may have been “ineffective by failing to investigate and present evidence of his

background and mental health for the trial’s penalty phase,” we reversed and remanded for the district court to conduct an evidentiary hearing. *Id.*

The district court referred the evidentiary hearing to a magistrate judge. After hearing the testimony of fourteen witnesses over seven days, the magistrate judge “recommended the district court find that Mr. Barrett’s counsel performed deficiently under the Sixth Amendment and that such performance prejudiced Mr. Barrett at sentencing.” *Barrett III*, 985 F.3d at 1207. Unconvinced, the district court rejected the recommendation, finding that Mr. Barrett could not establish the prejudice element of his Sixth Amendment IAC claim. The district court nonetheless issued a COA, and Mr. Barrett appealed.

We reversed, adopting the magistrate judge’s finding that certain evidence—specifically, evidence available to Mr. Barrett’s penalty phase counsel but not presented by counsel to the jury at that phase—“would likely have softened the edge of the aggravating evidence the jury heard at trial and sentencing.” *Id.* at 1232. Thus, we determined there was a reasonable probability that at least one juror would have recommended a life sentence—rather than the death penalty—at sentencing.

Consequently, we vacated Mr. Barrett’s death sentence and remanded for resentencing on his § 848(e)(1)(B) count (i.e., Count 3). The

government subsequently withdrew its notice of intent to seek the death penalty on Mr. Barrett's § 848(e)(1)(B) conviction.

C

Meanwhile, as most relevant here, while post-conviction litigation was playing out at the trial and appellate levels concerning Mr. Barrett's first § 2255 challenge to his Count 3 conviction for violating 21 U.S.C. § 848(e)(1)(B), Mr. Barrett sought permission from our court to file a successive § 2255 motion in the district court in light of the Supreme Court's decisions in *Johnson v. United States*, 576 U.S. 591 (2015), and *Welch v. United States*, 578 U.S. 120 (2016). *See* 28 U.S.C. § 2255(h) (noting that a "second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals"); *id.* § 2244(b)(3)(A) ("Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."). Mr. Barrett sought to challenge his Count 2 conviction for violating 18 U.S.C. § 924(c)(1)(A) and (j). While Mr. Barrett's application remained pending (that is, abated), the Supreme Court decided *Sessions v. Dimaya*, 584 U.S. 148 (2018), and, of greater

importance to Mr. Barrett’s § 2255 motion, *United States v. Davis*, 588 U.S. 445 (2019).²

In *Davis*, the Supreme Court held that the residual clause of the crime-of-violence definition for § 924(c) offenses—contained in 18 U.S.C. § 924(c)(3)(B)—was unconstitutionally vague. 588 U.S. at 470. Thus, after *Davis*, an individual can only commit a § 924(c) offense predicated on a crime of violence if that predicate offense satisfies the statute’s elements clause, contained in 18 U.S.C. § 924(c)(3)(A). *See id.* at 449–50, 452, 456, 467.

We subsequently determined that “*Davis* announced a new rule of constitutional law and that the Supreme Court has made *Davis* retroactively applicable to cases on collateral review.” *In re Mullins*, 942 F.3d 975, 979 (10th Cir. 2019). Accordingly, we granted Mr. Barrett “authorization to file a second or successive § 2255 motion in district court challenging his § 924(c) conviction and sentence under *Davis*,” finding that his motion satisfied the gatekeeping requirements of § 2255(h). Aplt.’s App., Vol. II, at 3049–50 (Order, *In re Barrett*, No. 16-7039, at *1–2 (10th Cir., filed Nov. 29, 2019)).

² Mr. Barrett moved to supplement his *Johnson* and *Welch* application with the Supreme Court’s subsequent decisions in *Dimaya* and *Davis*, and we approved his request.

D

Mr. Barrett returned to the district court, where he filed his § 2255 motion to vacate, set aside, and correct conviction and sentence pursuant to *United States v. Davis*. Aplt.'s App., Vol. II, at 3052–79 (28 U.S.C. § 2255 Mot., filed Dec. 13, 2019). Mr. Barrett argued not only that his Count 2 conviction under § 924(c) should be vacated and the charge dismissed with prejudice, but also that he should “be resentenced by a jury on Counts 1 and 3” in view of “the likelihood that the invalid Count 2 § 924(c) conviction influenced the jury’s sentencing verdict on the remaining counts.” *Id.* at 3057, 3071–72 (citing *United States v. Smith*, 756 F.3d 1179, 1189 (10th Cir. 2014)).

The district court denied Mr. Barrett’s successive § 2255 motion. Identifying the “core question presented” as whether a § 848(e)(1)(B) offense constitutes a crime of violence under § 924(c)(3)’s elements clause, the district court assigned Mr. Barrett the burden of “showing that his conviction or sentence as to Count Two rested on the residual clause invalidated by *Davis*.” Aplt.’s App., Vol. II, at 3244–45 (Dist. Ct. Order, filed Dec. 6, 2021). Finding no mention of the residual clause in Mr. Barrett’s presentence report, the district court proceeded to consider “whether it would have been necessary to rely on the residual clause to sustain [Mr. Barrett’s] §[]924(c) conviction as to Count Two.” *Id.* at 3245.

In answering that question in the negative, the district court first observed that the jury was instructed that one element of Count 2 was that Mr. Barrett “intentionally killed” or “caused the intentional killing” of Trooper Eales. *Id.* at 3246 (emphasis removed).

The district court then concluded that “an ‘intentional killing’ under [§ 848(e)(1)(B)] is a crime of violence” under § 924(c)(3)’s elements clause, stating that “it is impossible to cause death without applying physical force.” *Id.* (citations omitted). Consequently, the district court held that a § 848(e)(1)(B) homicide requires “a *mens rea* beyond recklessness.” *Id.* at 3247.³ And the district court rejected Mr. Barrett’s “broader argument,” that vacatur and/or resentencing was warranted with respect to Counts 1 and 3, as “beyond what the Tenth Circuit authorized in a second or successive §[]2255 motion.” *Id.* at 3248.

³ On appeal, Mr. Barrett deems this line “an obvious reference to the holding of *Borden v. United States*, 59[3] U.S. 420 (20[21]) [(plurality opinion)].” Aplt.’s Opening Br. at 9. In *Borden*, a four-Justice plurality concluded that an offense that can be committed with a *mens rea* of recklessness does not satisfy 18 U.S.C. § 924(e)’s elements clause, which, like § 924(c)(3)’s elements clause, requires as an element the use, attempted use, or threatened use of physical force against the person of another. 593 U.S. at 423–24, 445 (plurality opinion). Justice Thomas concurred in the judgment, agreeing that recklessness is insufficient but relying instead on the phrase “use of physical force,” rather than “against the person of another.” *See id.* at 446 (Thomas, J., concurring in the judgment) (“The plurality focuses on the latter part of the operative language: ‘against the person of another.’ I rest my analysis instead on a separate phrase: ‘use of physical force.’”).

The district court “decline[d] to issue a certificate of appealability as to any issue raised” in Mr. Barrett’s successive § 2255 motion, *id.*, and entered a judgment of dismissal. Less than one month after the district court’s dismissal of his successive § 2255 motion, Mr. Barrett moved under Federal Rule of Civil Procedure 59(e) to alter or amend the judgment, and requested, *inter alia*, that the district court issue a COA.

In resolving Mr. Barrett’s Rule 59(e) motion, the district court upheld its denial of his successive § 2255 motion, but it agreed that Mr. Barrett had done enough to justify a COA. The district court ultimately granted Mr. Barrett a limited COA permitting him to challenge his conviction on Count 2, but excluding from the scope of the COA his contentions that vacatur of his Count 2 conviction also required vacatur and/or resentencing on Counts 1 and 3.

Mr. Barrett timely appealed from the district court’s denial of both his successive § 2255 motion and his Rule 59(e) motion.⁴

⁴ Mr. Barrett timely filed his motion to alter or amend the district court’s judgment within the twenty-eight days allowed by Rule 59(e). Because his Rule 59 motion was timely filed, Mr. Barrett’s time to appeal did not begin to run until the district court disposed of his Rule 59 motion. *See* Fed. R. App. P. 4(a)(4)(A)(iv). And Mr. Barrett properly filed his notice of appeal within sixty days of the district court’s order disposing of his Rule 59 motion. So, Mr. Barrett’s appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B). *See United States v. Cruz*, 774 F.3d 1278, 1284 (10th Cir. 2014).

III

“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 *Barrett II*, 797 F.3d at 1213). More specifically, we “review de novo the district court’s interpretation of § 924(c) and its legal conclusion that a particular offense constitutes a crime of violence.” *United States v. Melgar-Cabrera*, 892 F.3d 1053, 1060 (10th Cir. 2018). “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.’” *United States v. Bowen*, 936 F.3d 1091, 1097 (10th Cir. 2019) (quoting *Barrett II*, 797 F.3d at 1213).

A

Mr. Barrett contends that the district court’s crime-of-violence judgment rested on § 924(c)(3)’s unconstitutional residual clause. Thus, he contends, “the question becomes whether the constitutional error was harmless.” Aplt.’s Opening Br. at 21. And Mr. Barrett argues that “the government will not be able to meet[] its burden of showing harmlessness, as the killing of a law-enforcement officer criminalized in 21 U.S.C. § 848(e)(1)(B) does not categorically satisfy the elements clause.” *Id.* at 22.

Mr. Barrett points to the plain text of § 848(e)(1)(B) and argues it “shows that ‘causes’ does not mean ‘intentionally causes,’ and one can cause another to intentionally kill with a mental state that does not satisfy *Borden*.” *Id.* at 23; *see Borden v. United States*, 593 U.S. 420, 424–25, 445 (2021) (plurality opinion) (holding that recklessness is an insufficient *mens rea* to satisfy an offense—like a crime of violence as defined by § 924(c)(3)’s elements clause—that “has as an element the use, attempted use, or threatened use of physical force against the person of another”). Mr. Barrett argues that the language of the federal accomplice liability statute, 18 U.S.C. § 2, further supports his reading of § 848(e)(1)(B).

Notably, Mr. Barrett does not make a distinct argument for reversal concerning the district court’s “related order on his motion to alter or amend judgment.” *Aplt.’s Opening Br.* at 44; *see Aplt.’s Reply Br.* at 28. Putting aside the question of whether Mr. Barrett, by his briefing omission, has waived any arguments for reversal regarding this order, *see, e.g., United States v. Egli*, 13 F.4th 1139, 1149 (10th Cir. 2021), the success of his appeal as to this order must necessarily depend solely on the arguments that he has advanced regarding the court’s denial of his § 2255 motion. And Mr. Barrett does not dispute this.

As to Mr. Barrett's arguments regarding the court's denial of his § 2255 motion, not surprisingly, the government stands in opposition. It states that "[n]either the record of [Mr.] Barrett's trial nor the background legal environment at the time establishes, as a matter of historical fact, that the district court classified [Mr.] Barrett's offense as a crime of violence under the residual clause and not the elements clause." Aplee.'s Resp. Br. at 26.

Furthermore, in the alternative, the government contends that § 848(e)(1)(B) is a crime of violence under § 924(c)(3)'s elements clause, and therefore, any error by the district court in relying on § 924(c)(3)'s unconstitutional residual clause is harmless. More specifically, the government asserts that "the intentional killing of [a] police officer during a drug crime constitutes a crime of violence" because "[t]he text and context of § 848(e)(1)(B) make clear that the statute's intent requirement applies to *all* of the various means of committing the offense." *Id.* at 27 (emphasis added).

B

When reviewing the merits of a § 2255 motion, "we apply harmless-error review." *United States v. Driscoll*, 892 F.3d 1127, 1132 (10th Cir. 2018). Under harmless error review, we first "determine whether the sentencing court erred." *Id.* Then, "if the sentencing court erred, we

determine whether that error ‘had substantial and injurious effect or influence in determining’ [the defendant’s] sentence.” *Id.* (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993)). “We apply current law at this second stage because . . . harmless error review goes to the question of remedies and resentencing. . . .” *United States v. Lewis*, 904 F.3d 867, 873 (10th Cir. 2018). In other words, we consider whether the movant is “entitled to a reduced sentence” due to the error or whether “a sentencing judge, applying current law,” would “re-sentence him to the same length of imprisonment.” *Id.*

In this case, we assume *arguendo* that the first step of the harmless error inquiry has been satisfied. More specifically, we assume that Mr. Barrett’s conviction under Count 2 was erroneously based on 18 U.S.C. § 924(c)(3)(B) (i.e., the residual clause), which the Supreme Court deemed unconstitutionally vague in *Davis*, 588 U.S. at 470. Based on this assumption, we analyze whether, under current law, that error had a substantial and injurious effect or influence in determining Mr. Barrett’s sentence.

We conclude that it did not. That is because under § 924(c)(3)(A) (i.e., the elements clause), a § 848(e)(1)(B) homicide is a crime of violence. Therefore, Mr. Barrett is not entitled to resentencing because any error by

the district court stemming from its assumed reliance on the residual clause is harmless; Mr. Barrett’s conviction on Count 2 stands intact.

1

Count 2 of Mr. Barrett’s federal indictment—the count at issue here—charged a violation of § 924(c)(1)(A) based on Mr. Barrett’s use of a firearm with respect to the § 848(e)(1)(B) offense charged in Count 3. Under § 924(c)(1)(A), “any person who, during and in relation to **any crime of violence** . . . uses 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” be sentenced to an additional term of imprisonment as specified by the statute. *Id.* (emphasis added). Section 848(e)(1)(B) criminalizes homicide against law enforcement officers engaged in their official duties in the following terms:

[A]ny person, during the commission of, in furtherance of, or while attempting to avoid apprehension, prosecution or service of a prison sentence for, a felony violation of this subchapter or subchapter II who **intentionally kills or counsels, commands, induces, procures, or causes the intentional killing** of any Federal, State, or local law enforcement officer engaged in, or on account of, the performance of such officer’s official duties and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death.

Id. (emphasis added).

Section 924(c)(3) dictates that to qualify as a predicate “crime of violence,” an offense must be a felony that either:

(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.

Id. Subsection (A) is known as the “elements clause,” and subsection (B) is known as the “residual clause.” *United States v. Taylor*, 596 U.S. 845, 856 (2022) (“Next door to the elements clause Congress included the residual clause.”). But in 2019, in *Davis*, the Supreme Court deemed unconstitutionally vague the residual clause of subsection (B). *See* 588 U.S. at 470.

We subsequently recognized in *Bowen* that the Supreme Court’s decision in *Davis* “created a new substantive rule [of constitutional law] that is retroactively applicable on collateral review,” such that defendants convicted of § 924(c) offenses based on ostensibly predicate “crimes of violence” under § 924(c)(3)(B)’s unconstitutional residual clause can pursue actual-innocence claims under 28 U.S.C. § 2255. 936 F.3d at 1095.

Accordingly, an offense does not qualify as a crime of violence under § 924(c)(3) unless it satisfies the elements clause in subsection (A). “To determine whether a federal felony may serve as a predicate for a

conviction and sentence under the elements clause, . . . we must apply a ‘categorical approach.’” *Taylor*, 596 U.S. at 850. This analysis precludes “an inquiry into how any particular defendant may commit the crime. The only relevant question is whether the federal felony at issue *always* requires the government to prove—beyond a reasonable doubt, as an element of its case—the use, attempted use, or threatened use of force.” *Id.* (emphasis added).

If it is possible for a defendant to commit an offense with a *mens rea* of recklessness or a lesser level of culpability, then that offense does not always require the government to prove the use, attempted use, or threatened use of force against the person of another. *Borden*, 593 U.S. at 423–24, 445. In other words, an offense categorically qualifies as a crime of violence under the elements clause only if that crime requires a *mens rea* of a higher level of culpability than recklessness. *See id.* So, Mr. Barrett’s argument that the trial court’s *Davis* error was harmful relies on his contention that § 848(e)(1)(B) can be violated with a *mens rea* of recklessness or less.

2

Determining which *mens rea* applies to a statute is a matter of statutory construction. *United States v. Serawop*, 410 F.3d 656, 660 (10th Cir. 2005) (citing *Staples v. United States*, 511 U.S. 600, 605 (1994)).

However, importantly, “as a general matter, our criminal law seeks to punish the ‘vicious will.’” *Ruan v. United States*, 597 U.S. 450, 457 (2022) (quoting *Morissette v. United States*, 342 U.S. 246, 251 (1952)). Thus, “we must construe the statute in light of the background rules of the common law, in which the requirement of some *mens rea* for a crime is firmly embedded.” *Staples*, 511 U.S. at 605 (citation omitted).

The “four states of mind, as described in modern statutes and cases, that may give rise to criminal liability” are—in descending order of culpability—“purpose, knowledge, recklessness, and negligence.” *Borden*, 593 U.S. at 425–26. The parties do not dispute that, “when Congress uses the word ‘intentional’ as a *mens rea* in a criminal statute, that equates at least with purpose, and may also cover both purposeful and knowing actions.” *United States v. Smith*, 104 F.4th 314, 327 (D.C. Cir. 2024), *cert. denied*, 145 S. Ct. 1478 (2025).

With this backdrop in mind, we conclude, for three salient reasons, that 21 U.S.C. § 848(e)(1)(B) requires an intentional *mens rea* for all its inculpatory actions. *See Smith*, 104 F.4th at 328–30.

First, § 848(e)(1)(B) is not silent as to what state of mind is required under the statute. It contains purposeful *mens rea* language. Twice § 848(e)(1)(B) explicitly uses variants of the word “intentional.” The statute applies to someone “who *intentionally* kills” a law enforcement

officer. 21 U.S.C. § 848(e)(1)(B) (emphasis added). It also applies to someone who “counsels, commands, induces, procures, or causes the *intentional* killing” of a law enforcement officer. *Id.* (emphasis added). Implicitly, the statute refers to intentionality a third time in the phrase “and *such* killing results,” which is an incorporation of (and implicit cross-reference to) the prior explicit references to an intentional killing. *Id.* (emphasis added).

“Absent indication of contrary purpose in the language . . . of the statute,” *Liparota v. United States*, 471 U.S. 419, 425 (1985), we are inclined to apply Congress’s use of “intentional” in § 848(e)(1)(B) to all material elements of the offense. *See Rehaif v. United States*, 588 U.S. 225, 229 (2019) (“[W]hen a statute ‘prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such [a culpability] provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.’” (quoting MODEL PENAL CODE § 2.02(4) (A.L.I. 1985))).

“In other words, when Congress explicitly provides a *mens rea* in a criminal statute, the most faithful reading of statutory text, absent contrary indicia, is to apply that *mens rea* to all relevant culpable acts, rather than to divine a lesser *mens rea* that lacks any textual basis.”

Smith, 104 F.4th at 329. Here, that means applying an intentional *mens rea* to each inculpatory action: “intentionally **kills** or **counsels**, **commands**, **induces**, **procures**, or **causes** the intentional killing.” 21 U.S.C. § 848(e)(1)(B) (emphasis added). Mr. Barrett’s argument that § 848(e)(1)(B) only requires a *mens rea* of recklessness or a lesser level of culpability lacks any textual basis in the statute.

Second, § 848(e)(1)(B)’s terms “themselves connote intentionality.” *See Smith*, 104 F.4th at 329. We examine the dictionary definition of each inculpatory action in § 848(e)(1)(B), as the D.C. Circuit did in *Smith* for the identical passage of § 848(e)(1)(A). *See id.* The parties do not dispute that, as to the five-verb string following the phrase “intentionally kills or,” the first four verbs imply intentional conduct. To “counsel” means “to recommend esp[ecially] as the best or most expedient act, course, or policy.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 518 (1993) (def. 2) [hereinafter WEBSTER’S THIRD]. To “command” means “to direct authoritatively” or to “order.” *Id.* at 455 (def. 1). To “induce” means “to prevail upon” or to “inspire, call forth, or bring about by influence or stimulation.” *Id.* at 1154 (def. 1). And to “procure” means “to bring about by particular care or effort.” *Id.* at 1809 (def. 2).⁵

⁵ In its analysis of statutory-term definitions, *Smith* cited to WEBSTER’S THIRD. *See Smith*, 104 F.4th at 329. It is worth noting that

Where the parties disagree is on the interpretation of the word “causes” in the statute. To “cause” means “to effect by command, authority, or force.” *Id.* at 356 (def. 2).

Of course, viewed in isolation, we could interpret “cause” in a broader sense—devoid of intentionality—especially given its numerous meanings. *See, e.g., id.* (def. 1) (defining to “cause” as, for example, “MAKE: . . . careless driving ~s accidents”). But “the canon of *noscitur a sociis* teaches that a word is ‘given more precise content by the neighboring words with which it is associated.’” *Fischer v. United States*, 603 U.S. 480, 487 (2024) (quoting *United States v. Williams*, 553 U.S. 285, 294 (2008)); *see also Smith*, 104 F.4th at 329 (“Settled statutory construction principles require that ‘cause’ be read consonantly with the verbs that surround it, each of which speaks to intentional actions.”).

“That ‘avoid[s] ascribing to one word a meaning so broad that it is inconsistent with’ ‘the company it keeps.’” *Fischer*, 603 U.S. at 487 (alteration in original) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995)); *see also Abramski v. United States*, 573 U.S. 169, 179 (2014) (noting that, when interpreting a statute, courts “must (as usual)

this dictionary is not alone—among contemporary dictionaries—in its understanding of those terms. *See, e.g.,* MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 230, 264, 594, 930 (10th ed. 1993) (defining in a similar fashion “command,” “counsel,” “induce,” and “procure”).

interpret the relevant words not in a vacuum, but with reference to the statutory context”). We thus should use the surrounding verbs to help narrow which meaning of “cause” Congress most probably intended. And here, the intentionality connoted by the surrounding verbs Congress used in § 848(e)(1)(B) indicates that the statute’s term “cause” also implies intentional conduct—that is, conduct with a *mens rea* higher than recklessness.

Third, the punishment for violating the statute further supports a determination that § 848(e)(1)(B) requires an intentional *mens rea* for all its inculpatory actions. “[S]evere penalties counsel in favor of a strong scienter requirement.” *Ruan*, 597 U.S. at 460. And here, Congress prescribed that violators “shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death”—importantly, levying the *same* range of punishment for those who intentionally kill and those who cause an intentional killing of a law enforcement officer. 21 U.S.C. § 848(e)(1)(B). The presence of such severe penalties “militates against interpreting” § 848(e)(1)(B) “to cover reckless conduct—especially given Congress’s repeated textual requirement of intentional action.” *Smith*, 104 F.4th at 330; *see also Borden*, 593 U.S. at 439 (cautioning against

interpreting a statute to cover reckless offenses where a conviction would trigger “15-year minimums”).

One hypothetical Mr. Barrett presents in support of his argument that § 848(e)(1)(B) does not require intentionality for all its inculpatory actions is a situation in which a leader of a drug enterprise, upon seeing police officers approaching, tells his underlings to “do something.” Aplt.’s Opening Br. at 33. This instruction could be construed as an order to do anything from destroying evidence of drugs to killing the officers. Thus, Mr. Barrett contends if the underling killed one of the officers, the leader would have caused an intentional killing under the meaning of the statute even if he did not intend to do so. But (in addition to the reasons we have already discussed) the possibility of receiving a death sentence if convicted under § 848(e)(1)(B) counsels that, in Mr. Barrett’s hypothetical scenario, the government would need to prove that the leader—through his instruction—actually intended his underlings to kill one of the officers. “Such severe penalties counsel in favor of a strong scienter requirement.” *Ruan*, 597 U.S. at 460.

3

Lastly, Mr. Barrett contends that the language of the federal accomplice liability statute, 18 U.S.C. § 2, provides support for his argument that § 848(e)(1)(B) can be violated with a reckless state of mind.

In subsection (a), that statute says, “Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.” 18 U.S.C. § 2(a). In subsection (b), it says, “Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.” *Id.* § 2(b).

Mr. Barrett draws a connection between the two statutes—§ 848(e)(1)(B) and § 2—succinctly:

Congress could hardly have been unaware that it was using in § 848(e)(1)(B) the same verbs in § 2, and putting them in the same order. And that being so, the use of the unadorned “causes” in § 848(e)(1)(B), rather than the “willfully causes” of § 2(b), cannot be chalked up to accident. Rather, it bespeaks a congressional decision not to limit “causes” in § 848(e)(1)(B), as it had in § 2. This confirms, and adds to, the plain-text reading of § 848(e)(1)(B).

Aplt.’s Opening Br. at 28 (citation omitted). He elaborates on why the similarities and differences of the two statutes ostensibly further his plain-text reading:

“[C]auses” does not naturally bespeak a particular *mens rea*. This is reflected in the use of the adverb “willfully” in § 2(b) to confine the reach of “causes” to what was, in that context, considered to be appropriate for principal liability. The absence of any such modifier of “causes” in § 848(e)(1)(B) shows an intent not to confine the reach of the word, but instead to give “causes” its ordinary breadth.

Id. at 29. Yet Mr. Barrett’s argument—predicated on the presence of “willfully” in § 2(b)—does not persuade us.

At the outset, Mr. Barrett’s suggestion that the term “causes” in criminal statutes is typically untethered to a particular *mens rea* is at odds with the “longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state.” *Ruan*, 597 U.S. at 457–58 (quoting *Rehaif*, 588 U.S. at 229). In § 2(b), “causes” is not surrounded by other verbs or explicit language that connotes a specific *mens rea*. Accordingly, in keeping with the presumption, it seems reasonable to infer that Congress modified “causes” with “willfully” so that the required *mens rea* was clear. By contrast, in § 848(e)(1)(B), Congress was able to achieve this clarifying effect through the language it surrounded “causes” with; it surrounded “causes” with explicit “intentional” language and verbs that connote intentionality. Accordingly, we are not persuaded by Mr. Barrett’s argument that § 2(b) implicitly signals—as to “causes”—Congress’s “intent not to confine the reach of the word” in § 848(e)(1)(B) to a particular *mens rea*.

All of § 848(e)(1)(B) is infused with intentionality. Assessed against the backdrop of the common law presumption that Congress intends for criminal statutes charging an accused to require proof of a culpable state

of mind, § 848(e)(1)(B)’s explicit use of “intentional” variants, coupled with verbs that connote intentionality, and its imposition of severe penalties, all demonstrate to us that the statute requires an intentional *mens rea*—that is, a *mens rea* higher than recklessness. We conclude that § 848(e)(1)(B) categorically qualifies as a crime of violence under § 924(c)(3)’s elements clause.

IV

Assuming, as we do, that the district court committed *Davis* error by finding that Mr. Barrett’s § 848(e)(1)(B) offense was a crime of violence under § 924(c)(3)’s residual clause, we nonetheless conclude that such error was harmless because Mr. Barrett’s § 848(e)(1)(B) offense qualifies as a crime of violence under § 924(c)(3)’s elements clause. Thus, we **AFFIRM** the district court’s order denying Mr. Barrett’s § 2255 motion and its related order denying his motion to alter or amend the district court’s order and judgment.⁶

⁶ Mr. Barrett’s counsel has filed a motion to withdraw from his representation of Mr. Barrett. We **grant** that motion.