No. 20-8016

IN THE SUPREME COURT OF THE UNITED STATES

RICO BLACKWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in denying a certificate of appealability on petitioner's unpreserved claim, which he asserted on collateral review, that his conviction and sentence for using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c), should be vacated based on United States v. Davis, 139 S. Ct. 2319 (2019).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Ga.):

United States v. Blackwell, No. 13-cr-72 (Aug. 20, 2013)

United States v. Marable, No. 12-cr-338 (Sept. 19, 2013)

Blackwell v. United States, No. 18-cv-3027 (June 30, 2020)

United States Court of Appeals (11th Cir.):

Blackwell v. United States, No. 20-12706 (Dec. 9, 2020)

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1) is unreported. The orders of the district court (Pet. App. 4-9, 2-3) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 2020. On March 19, 2020, this Court issued a blanket extension of the deadline to file a petition for a writ of certiorari to 150 days from the date of the judgment of a federal court of appeals. The petition for a writ of certiorari was filed on May 10, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Georgia, petitioner was convicted on one count of conspiring to commit bank robbery, in violation of 18 U.S.C. 371, and one count of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii). Judgment 1. The district court sentenced petitioner to 138 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. Petitioner did not appeal. Petitioner subsequently filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. 13-cr-72 D. Ct. Doc. 11 (June 21, 2018) (2255 Motion). The district court denied the motion, Pet. App. 4-9, and denied a certificate of appealability (COA), id. at 2-3. The court of appeals similarly denied a COA. Id. at 1.

1. On August 20, 2012, petitioner and two other men entered a PNC Bank in Dunwoody, Georgia. Presentence Investigation Report (PSR) ¶ 9. Petitioner and his confederates brandished firearms and then proceeded to the vault at the back of the bank, where they forced an employee at gunpoint to open the safe inside the vault. Ibid. The robbers stole more than $71,000. Ibid.

A federal grand jury in the Northern District of Georgia indicted petitioner and three co-conspirators on several offenses related to the August 20, 2012 PNC Bank robbery and other bank robberies. See 12-cr-338 D. Ct. Doc. 34, at 1-4 (Oct. 2, 2012)

(Indictment). The grand jury charged petitioner with one count of conspiring to commit bank robbery, in violation of 18 U.S.C. 371; one count of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), relating to the August 20, 2012 PNC Bank robbery; and one count of using a firearm during and in relation to a crime of violence (the PNC bank armed robbery), in violation of 18 U.S.C. 924(c). Indictment 3-4.

Petitioner entered into a plea agreement. As part of that agreement, the government filed a separate information in a new criminal docket charging petitioner with one count of conspiring to commit bank robbery, in violation of 18 U.S.C. 371, and one count of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). 12-cr-72 D. Ct. Doc. 1, at 1-2 (Mar. 13, 2013) (Information). The information identified the bank-robbery conspiracy as the crime of violence supporting the Section 924(c) charge. Information 2. In exchange for petitioner's guilty plea, the government agreed to dismiss the charges against petitioner in the earlier indictment -- including the armed bank-robbery charge and the associated firearm charge under Section 924(c). Plea Agreement 4.

In his plea agreement, petitioner acknowledged that he had committed the acts as alleged in the information, which stated that petitioner had entered the PNC Bank on August 20, 2012, had brandished a firearm, and had forced an employee to open the bank vault so that the robbers could steal more than $71,000. Plea

Agreement 1; see Information 2-3. During petitioner's plea colloquy, he specifically admitted to taking part in the August 20 PNC Bank robbery, brandishing a firearm during the robbery, and stealing money from the bank. Sentencing Tr. 14-16.

The district court accepted petitioner's guilty plea and sentenced him to 138 months of imprisonment, consisting of 54 months of imprisonment for the conspiracy offense and a consecutive 84 months of imprisonment for the Section 924(c) offense, to be followed by five years of supervised release. Judgment 2-3.

Petitioner's plea agreement included a provision waiving his right to appeal or collaterally attack his conviction and sentence. Plea Agreement 8. The agreement provided that petitioner "voluntarily and expressly waives the right to appeal his conviction and sentence and the right to collaterally attack his conviction and sentence in any post-conviction proceeding (including, but not limited to, motions filed pursuant to 28 U.S.C. § 2255) on any ground, except that [petitioner] may file a direct appeal of an upward departure or a variance [above] the sentencing guideline range as calculated by the district court or an appeal of any sentence over 84 months with respect to" the Section 924(c) count. Ibid. Petitioner did not appeal.

2. In 2018, petitioner filed a motion for postconviction relief under 28 U.S.C. 2255 in which he argued that his Section 924(c) conviction should be vacated on the theory that conspiracy to commit bank robbery is not a crime of violence. 2255 Motion

13. Section 924(c)(3) defines a "crime of violence" as a felony offense that either "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A), or "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)(B). Petitioner asserted that the latter alternative in Section 924(c)(3)(B) is unconstitutionally vague in light of this Court's decisions in Johnson v. United States, 576 U.S. 591 (2015), which held that the "residual clause" of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), is void for vagueness, 576 U.S. at 596; and Sessions v. Dimaya, 138 S. Ct. 1204 (2018), which invalidated the definition of a "crime of violence" in 18 U.S.C. 16(b). 2255 Motion 13. While petitioner's motion was pending, this Court held in United States v. Davis, 139 S. Ct. 2319 (2019), that the "crime[ ] of violence" definition in Section 924(c)(3)(B) is unconstitutionally vague. Id. at 2336.

The district court denied petitioner's Section 2255 motion. Pet. App. 4-9. The court explained that the collateral attack waiver in petitioner's plea agreement, as well as his "failure to appeal his sentence," both imposed "procedural bar[s] to his § 2255 motion." Id. at 9. The court additionally found that petitioner's plea colloquy "establishes without doubt that he participated in the armed bank robbery with others, and that he brandished his

gun," and thus petitioner "cannot establish that he is 'actually innocent'" of using a firearm during a crime of violence -- namely, armed bank robbery. Ibid. The court subsequently denied a COA. Id. at 2-3.

3. The court of appeals likewise denied a COA, finding that petitioner had "failed to make the requisite showing" that reasonable jurists would find debatable both the merits of petitioner's claim and his arguments attempting to overcome his procedural default of that claim. Pet. App. 1.

ARGUMENT

Petitioner contends (Pet. 9-23) that the court of appeals erred in denying a COA on his claim, which he brought in a motion under 28 U.S.C. 2255, that his conviction and sentence for using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c), should be vacated in light of this Court's decision in United States v. Davis, 139 S. Ct. 2319 (2019). The district court correctly rejected petitioner's claim, and the lower courts appropriately declined to issue a COA. The decision below does not directly conflict with any decision of another federal court of appeals. No further review is warranted.

1. Once a federal prisoner's conviction becomes final on appeal, he may file a motion under Section 2255 to "move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. 2255(a). If the district court denies relief, the prisoner must obtain a COA from "a circuit justice or

judge" before he may appeal that decision. 28 U.S.C. 2253(c)(1); accord Fed. R. App. P. 22(b)(1) ("[T]he applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability."). A COA may issue only if the prisoner has made "a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2), and must "indicate which specific issue or issues satisfy the showing required by paragraph (2)," 28 U.S.C. 2253(c)(3). The "substantial showing" requirement is satisfied only when the prisoner demonstrates "that reasonable jurists could debate" entitlement to relief on the merits and the resolution of any relevant procedural issues. Slack v. McDaniel, 529 U.S. 473, 484 (2000).

2. Petitioner contends (Pet. 9-15) that the district court erred in determining that he had procedurally defaulted his claim based on Davis by failing to raise that claim on direct appeal. When a federal prisoner failed to raise a claim on direct appeal, the prisoner generally cannot obtain relief on that claim under Section 2255, unless the prisoner establishes both "cause" for the procedural default and "prejudice" from the asserted error. United States v. Frady, 456 U.S. 152, 167-168 (1982). This Court has also suggested a narrow alternative option authorizing a court to excuse a procedural default if the prisoner can show that he is "actually innocent" of the underlying offense. Bousley v. United States, 523 U.S. 614, 622 (1998) (citation omitted). Petitioner cannot overcome his procedural default here.

a. Petitioner cannot demonstrate "cause" for his failure to appeal his Section 924(c) conviction. Davis applied well-established constitutional vagueness principles, 139 S. Ct. at 2325, and petitioner cannot show that a vagueness challenge to the residual clause in Section 924(c)(3)(B) would have been "so novel" at the time of his direct appeal "that its legal basis wa[s] not reasonably available to [his] counsel." Bousley, 523 U.S. at 622 (citation omitted). Even if it was unlikely that petitioner's challenge would have succeeded, this Court has long held that "futility cannot constitute cause." Id. at 623 (citation omitted).

As petitioner acknowledges (Pet. 10), the Eleventh Circuit recently recognized that a claim challenging Section 924(c) as unconstitutionally vague was not sufficiently novel before Davis to excuse the procedural default of such a claim. See Granda v. United States, 990 F.3d 1272, 1286-1288 (2021). As that court explained, unlike challenges to the ACCA's residual clause -- which this Court had expressly upheld before finding the provision unconstitutionally vague in Johnson -- "Davis did not overrule any prior Supreme Court precedents holding that the § 924(c) residual clause was not unconstitutionally vague." Id. at 1287; cf. Reed v. Ross, 468 U.S. 1, 17 (1984) (cause may be established where "a decision of this Court * * * explicitly overrule[s] one of our precedents").

Petitioner maintains (Pet. 4, 11-15) that four circuits have found a Davis claim sufficiently novel to demonstrate cause to

excuse a procedural default. But three of those cases pre-date Davis and address distinct challenges to the ACCA's residual clause under Johnson, or else to sentences under the federal Sentencing Guidelines before United States v. Booker, 543 U.S. 220 (2005). See Lassend v. United States, 898 F.3d 115, 122-123 (1st Cir. 2018), cert. denied, 139 S. Ct. 1300 (2019); Cross v. United States, 892 F.3d 288, 295-296 (7th Cir. 2018); United States v. Snyder, 871 F.3d 1122, 1127 (10th Cir. 2017), cert. denied, 138 S. Ct. 1696 (2018). Those cases therefore do not address whether the reasoning in Davis was sufficiently novel to excuse a procedural default. And the Fifth Circuit decision that petitioner invokes (Pet. 13-14), United States v. Reece, 938 F.3d 630 (2019), did not address the cause-and-prejudice standard because it found that the defendant was actually innocent of the Section 924(c) offense at issue. See id. at 634 n.3.

b. Petitioner, by contrast, cannot establish "actual innocence" to excuse his procedural default. Bousley, 523 U.S. at 622-623 (citation omitted). Even assuming that a federal prisoner could in some circumstances be "actually innocent" of a noncapital sentence, cf. Dretke v. Haley, 541 U.S. 386, 391-392 (2004) (declining to resolve that question), "where the Government has forgone more serious charges in the course of plea bargaining, petitioner's showing of actual innocence must also extend to those charges," Bousley, 523 U.S. at 624. Here, the record shows that the government forwent charging petitioner with substantive armed

bank robbery -- which carries a much higher statutory maximum sentence than conspiracy, compare 18 U.S.C. 2113(d) (25 year maximum for armed bank robbery), with 18 U.S.C. 371 (five year maximum for conspiracy) -- and with a Section 924(c) count predicated on substantive armed bank robbery, as part of a plea agreement. Petitioner cannot show that he is actually innocent of armed bank robbery; as the district court recognized, petitioner's plea agreement and plea colloquy both "establish[ ] without doubt that he participated in the armed bank robbery with others." Pet. App. 9.

Petitioner also cannot show actual innocence of a Section 924(c) offense. His plea agreement and colloquy confirm "that he brandished his gun during the robbery." Pet. App. 9. And armed bank robbery qualifies as a crime of violence under Section 924(c)(3)(A) irrespective of the residual clause in Section 924(c)(3)(B) that was found unconstitutionally vague in Davis. A conviction for armed bank robbery requires proof that the defendant (1) took or attempted to take money from the custody or control of a bank "by force and violence, or by intimidation," 18 U.S.C. 2113(a); and (2) either committed an "assault[ ]" or endangered "the life of any person" through "the use of a dangerous weapon or device" in committing the robbery, 18 U.S.C. 2113(d). For the reasons explained in the government's brief in opposition to the petition for a writ of certiorari in Johnson v. United States, No. 19-7079 (Apr. 24, 2020), cert. denied (June 21, 2021), armed

bank robbery qualifies as a crime of violence under Section 924(c) because it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A). See Br. in Opp. at 7-25, Johnson, supra (No. 19-7079). Every court of appeals with criminal jurisdiction, including the court below, has recognized that Section 924(c)(3)(A) and similarly worded provisions encompass federal bank robbery and armed bank robbery, see id. at 7-8, and this Court has recently and repeatedly denied petitions for writs of certiorari challenging the circuits' consensus on that issue, see id. at 8-9 & n.1.[1] Thus, neither Reece nor any other circuit decision cited by petitioner supports collateral relief in these circumstances.

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[1] See also, e.g., Johnson, supra No. 19-7079 (June 21, 2021); Jordan v. United States, No. 19-7067 (June 21, 2021); Rogers v. United States, No. 19-7320 (June 21, 2021); Cullett v. United States, No. 19-8190 (June 21, 2021); Vidrine v. United States, No. 19-8044 (June 21, 2021); Velasquez v. United States, No. 19-8191 (June 21, 2021); Simpson v. United States, No. 19-7764 (June 21, 2021); Gray v. United States, No. 19-7113 (June 21, 2021); Harvey v. United States, No. 19-8004 (June 21, 2021); Blanche v. United States, 19-8899 (June 21, 2021); Peterson v. United States, No. 20-5396 (June 21, 2021); Northcutt v. United States, No. 20-5640 (June 21, 2021); Davis v. United States, No. 20-6284 (June 21, 2021); Cernak v. United States, No. 20-6447 (June 21, 2021); Ward v. United States, No. 20-6582 (June 21, 2021); Davis v. United States, No. 20-6742 (June 21, 2021); Alexander v. United States, No. 20-7081 (June 21, 2021); Godwin v. United States, No. 20-7137 (June 21, 2021); Davis v. United States, No. 20-7126 (June 21, 2021); Douglas v. United States, No. 20-7223 (June 21, 2021); Alvarez v. United States, No. 20-7235 (June 21, 2021); Thomas v. United States, No. 20-7382 (June 21, 2021); Fields v. United States, No. 20-7413 (June 21, 2021); Chapnick v. United States, No. 20-7386 (June 14, 2021); Mitchell v. United States, No. 20-6622 (Mar. 22, 2021); Meece v. United States, No. 20-6425 (Mar. 1, 2021).

3. Petitioner additionally contends (Pet. 15-19) that the district court erred in enforcing the collateral attack waiver in his plea agreement. But this case would be a poor vehicle to address the effect of petitioner's collateral attack waiver, because that issue alone is not outcome determinative here -- as petitioner acknowledges (Pet. 17) -- and petitioner cannot overcome the procedural default of his Davis claim for the reasons stated above.

In any event, the district court correctly determined that the collateral attack waiver in petitioner's plea agreement also precludes his claim. This Court has recognized that a defendant may knowingly and voluntarily waive statutory or constitutional rights as part of a plea agreement. See, e.g., Ricketts v. Adamson, 483 U.S. 1, 8-10 (1987) (upholding plea agreement's waiver of right to raise a double-jeopardy defense); Town of Newton v. Rumery, 480 U.S. 386, 389 (1987) (affirming enforcement of plea agreement's waiver of right to file an action under 42 U.S.C. 1983). As a general matter, statutory rights are subject to waiver in the absence of some "affirmative indication" to the contrary from Congress. United States v. Mezzanatto, 513 U.S. 196, 201 (1995). Likewise, even the "most fundamental protections afforded by the Constitution" may be waived. Ibid.

Petitioner acknowledges (Pet. 16) that he knowingly and voluntarily agreed to the collateral attack waiver in his plea agreement. He nevertheless contends (Pet. 15-19) that a Davis

claim is "unwaiveable," and that the courts of appeals are divided concerning the enforcement of collateral attack waivers when a defendant raises a Davis claim. Petitioner is incorrect. As petitioner recognizes (Pet. 18), the Seventh Circuit has rejected a Davis-based challenge to a collateral attack waiver. See Oliver v. United States, 951 F.3d 841, 844-848 (2020). Petitioner asserts that the Ninth Circuit has held otherwise, but he quotes a decision that pre-dates Davis and considered a direct-appeal waiver in the context of a challenge to the application of the Sentencing Guidelines based on Johnson. See United States v. Torres, 828 F.3d 1113, 1124-1125 (2016).[2] Torres therefore did not address the validity of a collateral attack waiver when a defendant attempts to challenge his Section 924(c) conviction based on Davis. Petitioner also cites an unpublished Fifth Circuit decision in which the court considered the merits of a Davis claim. See United States v. Picazo-Lucas, 821 Fed. Appx. 335, 338 (2020). But the Fifth Circuit offered little reasoning for declining to enforce the defendant's appeal waiver in that case, finding only that "[t]he language of [the defendant's] plea agreement wa[s] insufficient" to preclude his claim. Ibid. Petitioner's collateral attack waiver here, however, is unambiguous and sweeping. See p. 4, supra (providing that petitioner "voluntarily

[2] The quotation that petitioner provides (Pet. 17) does not appear in Torres and is instead from a district court decision. See United States v. McMillen, No. 09-cr-0710, 2019 WL 4602237, at *3 (S.D. Cal. Sept. 23, 2019).

and expressly" waived his right "to collaterally attack his conviction and sentence * * * on any ground" not specifically enumerated) (emphasis added).

Petitioner next asserts (Pet. 16-17) a division of authority within the Eleventh Circuit concerning the enforceability of waivers foreclosing challenges to sentences imposed in excess of the maximum penalty authorized by law. Even to the extent that petitioner's collateral attack on his Section 924(c) conviction could be deemed an attack on a sentence above the applicable statutory maximum, his assertion of an intra-circuit disagreement does not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam). And finally, petitioner cannot show any manifest injustice that might excuse enforcement of his collateral attack waiver. As explained above, the government expressly forwent charging petitioner with a Section 924(c) violation based on an armed bank robbery that petitioner admitted and that remains a crime of violence after Davis. See pp. 2-3, 10-11, supra. "It is not a miscarriage of justice to refuse to put [petitioner] in a better position than [he] would have been in if all relevant actors had foreseen Davis." Oliver, 951 F.3d at 847.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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