

No.

In The Supreme Court Of The United States

Anthony Schneider,

Petitioner,

v.

United States of America,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Appendix

Appendix A	1a
<i>United States v. Anthony Schneider</i> , No. 21-15144, Dkt. No. 40-1 (9th Cir. July 18, 2023) (unpublished), Memorandum affirming denial of motion to vacate	
Appendix B	4a
<i>United States v. Anthony Schneider</i> , No. 21-15144, Dkt. No. 6 (9th Cir. June 24, 2022) (unpublished), Order granting COA	
Appendix C	6a
<i>United States v. Anthony Schneider</i> No. 3:19-CV-00656-LPH, ECF No. 3 (D. Nev. Jan. 8, 2021) (unpublished), Order denying to vacate and denying COA	

Appendix D 13a
United States v. Anthony Schneider, No. 3:16-CR-00005-LRH-CLB-1, ECF No. 88
(D. Nev. May 20, 2017) (unpublished), Plea Agreement

Appendix E.....28a
United States v. Lamar Jackson, No. 3:16-CR-00005-LRH-CLB, ECF No. 113 (D.
Nev. Aug. 12, 2019) (unpublished), Joint Motion to vacate Co-Defendant Lamar
Jackson’s 924(c) conviction

Appendix A

United States v. Anthony Schneider

No. 21-15144, Dkt. No. 40-1 (9th Cir. July 18, 2023) (unpublished)
Memorandum affirming denial of motion to vacate

FILED

JUL 18 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>UNITED STATES OF AMERICA,</p> <p style="text-align: center;">Plaintiff-Appellee,</p> <p>v.</p> <p>ANTHONY SCHNEIDER,</p> <p style="text-align: center;">Defendant-Appellant.</p>

No. 21-15144

D.C. Nos. 3:19-cv-00656-LRH
3:16-cr-00005-LRH-

CLB-1

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Larry R. Hicks, District Judge, Presiding

Submitted July 14, 2023**
San Francisco, California

Before: S.R. THOMAS, BEA, and BENNETT, Circuit Judges.

Anthony Schneider appeals the district court’s order and judgment denying his 28 U.S.C. § 2255 motion to vacate his conviction and sentence for using a firearm during and in relation to a crime of violence in violation of 18 U.S.C.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

§ 924(c). We have jurisdiction pursuant to 28 U.S.C. §§ 1291, 2253, and we review a district court’s denial of habeas relief de novo. *United States v. Ratigan*, 351 F.3d 957, 961 (9th Cir. 2003). We also review whether a defendant has waived the right to appeal or to bring a collateral attack de novo. *See United States v. Torres*, 828 F.3d 1113, 1118 (9th Cir. 2016). We may affirm on any ground supported by the record. *Holley v. Yarborough*, 568 F.3d 1091, 1098 (9th Cir. 2009). We affirm on the ground that Schneider’s § 2255 motion is barred by the collateral attack waiver in his plea agreement.

Schneider claims his § 924(c) conviction rests on an invalid predicate offense because attempted Hobbs Act robbery is not a crime of violence as that term is defined by § 924(c)(3)(A). *See United States v. Davis*, 139 S. Ct. 2319, 2336 (2019) (holding the alternative “residual” definition of crime of violence, found in § 924(c)(3)(B), is unconstitutionally vague). However, as part of his plea agreement, Schneider waived his right to bring a collateral attack under 28 U.S.C. § 2255.

We ordinarily do not reach the merits of direct appeals and collateral habeas motions brought by defendants who have knowingly and validly waived the right to bring such claims. *See Torres*, 828 F.3d at 1124. Schneider does not dispute that he voluntarily and knowingly waived collateral attack in his plea agreement.

Rather, he argues that his claim is beyond the scope of the waiver under our “illegal sentence exception.” He also argues that enforcing the plea waiver would result in a miscarriage of justice.

The illegal sentence exception does not apply here. While we do not enforce otherwise valid plea waivers against claims that a sentence is illegal, *id.* at 1125, we have limited that exception to genuine challenges to the legality of a *sentence*, and do not apply it to claims of an illegal *conviction*. *United States v. Goodall*, 21 F.4th 555, 562–63 (9th Cir. 2021). Here, the exception does not apply because Schneider challenges the legality of his conviction, not his sentence.

If a miscarriage of justice exception to the waiver rule exists, it does not apply here. Schneider pleaded guilty to three counts of completed Hobbs Act robbery, one count of attempted Hobbs Act robbery, and a § 924(c) firearm charge predicated on the attempted robbery. As part of the written plea agreement, Schneider admitted the factual bases of each robbery and admitted pointing a gun at victims in each robbery, except the robbery where Schneider wielded a machete. The government dismissed two § 924(c) charges predicated on the completed robberies as part of the plea agreement. In the context of this case, there is no miscarriage of justice that would void the valid plea waiver.

AFFIRMED.

Appendix B

United States v. Anthony Schneider

No. 21-15144, Dkt. No. 6 (9th Cir. June 24, 2022) (unpublished)
Order granting COA

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JUN 24 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTHONY SCHNEIDER,

Defendant-Appellant.

No. 21-15144

D.C. Nos. 3:19-cv-00656-LRH

3:16-cr-00005-LRH-CLB-1

District of Nevada,

Reno

ORDER

Before: BENNETT and FORREST, Circuit Judges.

The stay entered on August 11, 2021 (Docket Entry No. 6), is lifted.

The request for a certificate of appealability (Docket Entry No. 3) is granted with respect to the following issue: whether appellant's conviction for violating 18 U.S.C. § 924(c) must be vacated because attempted Hobbs Act robbery is not a qualifying predicate crime of violence, including whether relief is barred by appellant's plea waiver or his failure to raise the claim on direct appeal. *See* 28 U.S.C. § 2253(c)(3); *United States v. Taylor*, No. 20-1459, 2022 WL 2203334 (U.S. June 21, 2022); *see also* 9th Cir. R. 22-1(e).

Appellant's motion for substitute counsel (Docket Entry No. 4) is granted. *See* 18 U.S.C. § 3006A(a)(2)(B); *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983). Counsel will be appointed by separate order.

The Clerk will electronically serve this order on the appointing authority for the District of Nevada, who will locate appointed counsel. The appointing authority must send notification of the name, address, and telephone number of appointed counsel to the Clerk of this court at counselappointments@ca9.uscourts.gov within 14 days of locating counsel.

The opening brief is due September 21, 2022; the answering brief is due October 21, 2022; the optional reply brief is due within 21 days after service of the answering brief.

This order authorizes production of transcripts at government expense. *See* 28 U.S.C. § 753(f). Appellant must provide a copy of this order to the reporter(s) along with the designation.

The Clerk will serve on appellant a copy of the “After Opening a Case Couseled Cases” document.

Appendix C

United States v. Anthony Schneider

No. 3:19-CV-00656-LPH, ECF No. 3 (D. Nev. Jan. 8, 2021) (unpublished)
Order denying to vacate and denying COA

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

UNITED STATES OF AMERICA,

Respondent/Plaintiff,

v.

ANTHONY SCHNEIDER,

Petitioner/Defendant.

Case No. 3:16-cr-00005-LRH-CLB-1

ORDER

Defendant Anthony Schneider moves this Court to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, arguing that attempted Hobbs Act robbery is not a crime of violence in light of *United States v. Davis*, 139 S. Ct. 2319 (2019) (“*Davis*”). ECF No. 123, corrected ECF No. 124. The Government opposed, arguing that his motion is foreclosed by Ninth Circuit precedent and because his motion is procedurally defaulted and barred by the explicit terms of his plea agreement. ECF No. 127. Accordingly, Schneider replied. ECF No. 147. For the reasons contained within this Order, the Court denies Schneider’s motion and denies him a certificate of appealability.

I. BACKGROUND

On January 27, 2016, Schneider was indicted in an eight count indictment on three counts of interference with commerce by robbery (“Hobbs Act robbery”), in violation of 18 U.S.C. § 1951; three counts of use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c); one count of conspiracy to interfere with commerce by robbery, in violation of 18 U.S.C. § 1951; and one count of attempted interference with commerce by robbery, in

1 violation of 18 U.S.C. § 1951. ECF No. 1. On May 30, 2017, Schneider pled guilty to Counts 1,
2 3, 4, 7, and 8,¹ pursuant to a written plea agreement, in which he admitted the following facts: (1)
3 using what appeared to be an assault rifle, the Defendant robbed the El Rancho Market in Reno on
4 November 1, 2015, absconding with approximately \$550; (2) carrying a machete, Defendant
5 robbed the Little Caesars Pizza on West Moana Lane in Reno on November 6, 2015, and
6 absconded with approximately \$80; (3) Defendant robbed the Valley Liquor Market in Reno on
7 November 10, 2015; (4) during this robbery, he pointed a gun at employees and demanded they
8 give him money, ultimately absconding with approximately \$400 to \$500; (5) on November 17,
9 2015, Defendant attempted to rob the Taco Bell on North Hills Boulevard in Reno; (6) during this
10 robbery, Defendant carried a black pistol which he pointed at employees, and one suspect was
11 wearing an inside-out hooded sweatshirt; (7) when Defendant saw an employee on the phone, he
12 and his accomplice fled; (8) on November 17, 2015, Defendant was arrested by Washoe County
13 Sheriff's deputies on an outstanding warrant; (9) during an inventory search of the vehicle he was
14 driving, the deputies saw a silver mask, black pistol, and a black inside-out sweatshirt; and (10) all
15 of the stores Defendant admitted to robbing are businesses involved in interstate commerce. *See*
16 ECF No. 88 at 5-7.

17 On September 28, 2017, the Court sentenced Schneider to a total of 162-months
18 imprisonment—78-months imprisonment as to Counts 1, 3, 4, and 7, and 84-months as to Count
19 8, to run consecutively—to be followed by three years of supervised release as to Counts 1, 3, 4,
20 and 7 and five years of supervised release as to Count 8, to run concurrently. ECF Nos. 106 &
21 109. Schneider filed no direct appeal. On October 30, 2019, Schneider filed the pending section
22 2255 motion to vacate, set aside, or correct his sentence, in light of *Davis*. ECF No. 123, corrected
23 ECF No. 124. The Government opposed (ECF No. 127); accordingly, Schneider replied (ECF No.
24 147).² The Court now rules on the pending motion.

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26 _____
27 ¹ Counts 1, 3, and 4: interference with commerce by robbery; Count 7: attempted interference with
commerce by robbery; and Count 8: use of a firearm during and in relation to a crime of violence.

28 ² Due to change in counsel, the Court granted Defendant an extension on his time to file a reply. Therefore,
this motion was not ripe until June 11, 2020. *See* ECF Nos. 130; 145; & 147.

1 **II. LEGAL STANDARD**

2 Pursuant to 28 U.S.C. § 2255, a petitioner may file a motion requesting the court which
3 imposed sentence to vacate, set aside, or correct the sentence. 28 U.S.C. § 2255(a). Such a motion
4 may be brought on the following grounds: (1) “the sentence was imposed in violation of the
5 Constitution or laws of the United States;” (2) “the court was without jurisdiction to impose such
6 sentence;” (3) “the sentence was in excess of the maximum authorized by law;” or (4) the sentence
7 “is otherwise subject to collateral attack.” *Id.*; see *United States v. Berry*, 624 F.3d 1031, 1038 (9th
8 Cir. 2010) (citation omitted). When a petitioner seeks relief pursuant to a right newly recognized
9 by a decision of the United States Supreme Court, a one-year statute of limitations applies. 28
10 U.S.C. § 2255(f). That one-year limitation period begins to run from “the date on which the right
11 asserted was initially recognized by the Supreme Court.” *Id.* § 2255(f)(3).

12 **III. DISCUSSION**

13 **A. Schneider’s motion is not procedurally barred, and he has not waived his right to**
14 **collaterally attack his conviction and sentence.**

15 The Government argues that Schneider’s motion must be denied because (1) his plea
16 agreement contains a collateral-attack waiver; and (2) he failed to raise the issue on direct appeal.
17 ECF No. 127. These arguments are unavailing. First, the Ninth Circuit has held that an appeal
18 waiver in the plea agreement does not bar a defendant's challenge to his sentence based on an
19 unconstitutionally vague statute. *United States v. Torres*, 828 F.3d 1113, 1125 (9th Cir. 2016) (“A
20 waiver of appellate rights will also not apply if a defendant’s sentence is ‘illegal,’ which includes
21 a sentence that ‘violates the constitution.’”). As Schneider argues that his sentence should be
22 vacated because it was based on the now unconstitutionally vague residual clause of § 924(c), his
23 motion is not barred by the plea agreement.

24 Second, Schneider is not barred from collaterally attacking his sentence because he failed
25 to do so on direct appeal. Under § 2255(f)(3), he is entitled to challenge his sentence within one
26 year of “the date on which the right [he] assert[s] was *initially* recognized by the Supreme Court.”
27 (emphasis added). Courts in this District have previously held that a motion challenging the
28 constitutionality of § 924(c)’s residual clause is not procedurally barred, even when the defendant

1 did not raise the issue on appeal. *See United States v. Bonaparte*, Case No. 2:12-cr-132-JAD-
 2 CWH-2, 2017 WL 3159984, at *2 (D. Nev. July 25, 2017) (finding that the defendant’s section
 3 2255 motion was not “barred by his collateral-attack waiver or based on its timing.”); *United States*
 4 *v. Harrison Johnson*, No. 2:12-cr-00336-JAD-CWH, 2018 WL 3518448, at *2 (D. Nev. July 19,
 5 2018) (same). As Schneider’s motion was brought within one year of *Davis*,³ which held that the
 6 residual clause of § 924(c) is unconstitutionally vague, the Court finds his motion is timely.⁴

7 **B. While the residual clause of § 924(c) is unconstitutionally vague, Schneider’s**
 8 **sentence is upheld under the “elements” clause of the statute.**

9 Schneider pled guilty to Count 8 of the indictment, which charged him with using a firearm
 10 during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A). ECF Nos. 1; & 87. 18 U.S.C.
 11 § 924(c)(1)(A) provides that “any person, who, during and in relation to any crime of violence . . .
 12 for which the person may be prosecuted in a court of the United States, uses or carries a firearm,
 13 or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment
 14 provided for such crime of violence . . . be sentenced to a term of imprisonment” of not less than
 15 7 years if the firearm is brandished. The statute further defines “crime of violence” in two ways.
 16 The first, by what is known as the “elements” or “force” clause: an offense that is a felony and
 17 “has as an element the use, attempted use, or threatened use of physical force against the person
 18 or property of another.” *Id.* § 924(c)(3)(A). The second, by what is known as the residual clause:
 19 an offense that is a felony and “that by its nature, involves substantial risk that physical force
 20 against the person or property of another may be used in the course of committing the offense.”
 21 *Id.* § 924(c)(3)(B). Schneider argues that attempted Hobbs Act robbery is not a crime of violence
 22 by its elements, and thus, his sentence under section 924(c) could only have arisen under the
 23 unconstitutionally vague residual clause. Therefore, he argues it must be vacated.

24 The Court disagrees; it is bound by Ninth Circuit’s precedent, *United States v. Dominguez*,
 25 954 F.3d 1251 (9th Cir. 2020), which held that attempted Hobbs Act robbery is categorically a

26 ³ *Davis* was decided on June 24, 2019 and Schneider’s motion was filed on October 30, 2019.

27 ⁴ The Court further notes that in *United States v. Gutierrez*, 876 F.3d 1254, 1255-56 (9th Cir. 2017), the
 28 defendant did not directly appeal his sentence, but still brought a motion challenging his conviction for
 brandishing a firearm during a crime of violence. In that case, the Government “did not raise any procedural
 barriers” for the Court to consider and the Ninth Circuit proceeded directly to the merits of the case.

1 crime of violence under the elements clause. “An offense is categorically a crime of violence only
2 if the least violent form of the offense qualifies as a crime of violence.” *Dominguez*, 954 F.3d at
3 1259. Considering the “fear of injury” provision the least serious way to violate of the Hobbs Act
4 robbery statute, the Ninth Circuit determined that “placing a victim in fear of bodily injury is
5 categorically a crime of violence under the elements clause because it ‘requires at least an implicit
6 threat to use the type of violent physical force necessary to meet the *Johnson* standard.’” *Id.* at
7 1260 (quoting *United States v. Gutierrez*, 876 F.3d 1254, 1257 (9th Cir. 2017)). “Because
8 completed Hobbs Act robbery is a crime of violence under § 924, attempted Hobbs Act robbery is
9 also a crime of violence.” *Id.* at 1261. Noting that the Seventh and Eleventh circuits agree, the
10 Court reasoned:

11 18 U.S.C. § 924(c)(3)(A) explicitly includes as crimes of violence offenses that
12 have as an element the ‘attempted use’ or ‘threatened use’ of force. . . . An attempt
13 to commit a crime should therefore be treated as an attempt to commit every
14 element of that crime. “When the intent element of the attempt offense includes
15 intent to commit violence against the person of another, . . . it makes sense to say
16 that the attempt crime itself includes violence as an element.”

17 *Id.* at 1261-62 (quoting *Hill v. United States*, 877 F.3d 717, 719 (7th Cir. 2017)). The Court sees
18 no reason to deviate from the Ninth Circuit’s well-reasoned opinion and finds that attempted
19 Hobbs Act robbery is categorically a “crime of violence.”

20 Because Schneider’s conviction may be upheld under the elements clause of § 924(c), the
21 Supreme Court’s decision in *Davis* does not affect his sentence. Schneider also pled guilty and
22 admitted the elements of the predicate offense, attempted Hobbs Act robbery as charged in
23 Count 7: that (1) on November 17, 2015, Defendant attempted to rob the Taco Bell on North Hills
24 Boulevard in Reno; (2) during this robbery, Defendant carried a black pistol which he pointed at
25 employees, and one suspect was wearing an inside-out hooded sweatshirt; (3) when Defendant
26 saw an employee on the phone, he and his accomplice fled; (3) on November 17, 2015, Defendant
27 was arrested by Washoe County Sheriff’s deputies on an outstanding warrant; (4) during an
28 inventory search of the vehicle he was driving, the deputies saw a silver mask, black pistol, and a
black inside-out sweatshirt; and (5) the business is involved in interstate commerce. *See* ECF No.
88 at 5-7. Accordingly, Schneider’s conviction and resulting 84-month sentence for Count 8

1 withstands his constitutional challenge, and his motion to vacate, set aside, or correct his sentence
2 is denied. Because Defendant admitted and was convicted of this underlying offense, which on its
3 own is categorically a crime of violence, the Court need not reach the issue of whether conspiracy
4 to commit Hobbs Act robbery is also a crime of violence in order to uphold his sentence and
5 conviction on Count 8.

6 C. Certificate of Appealability

7 To proceed with an appeal of this Order, Schneider must receive a certificate of
8 appealability from the Court. 28 U.S.C. § 2253(c)(1); FED. R. APP. P. 22; 9TH CIR. R. 22-1; *Allen*
9 *v. Ornoski*, 435 F.3d 946, 950-951 (9th Cir. 2006). For the Court to grant a certificate of
10 appealability, the petitioner must make "a substantial showing of the denial of a constitutional
11 right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). And the petitioner
12 bears the burden of demonstrating that the issues are debatable among reasonable jurists; that a
13 court could resolve the issues differently; or that the issues are "adequate to deserve encouragement
14 to proceed further." *Slack*, 529 U.S. at 483-84 (citation omitted).

15 As discussed above, Schneider has failed to raise a meritorious challenge to his conviction
16 and sentence under section 924(c)—attempted Hobbs Act robbery is categorically a crime of
17 violence pursuant to the Ninth Circuit's decision in *Dominguez*. As such, the Court finds that he
18 has failed to demonstrate that reasonable jurists would find the Court's assessment of his claims
19 debatable or wrong. *See Allen*, 435 F.3d at 950-951. Therefore, the Court denies Schneider a
20 certificate of appealability.

21 IV. CONCLUSION

22 IT IS THEREFORE ORDERED that Petitioner's motion to vacate, set aside, or correct his
23 sentence pursuant to 28 U.S.C. § 2255 (ECF No. 123, corrected ECF No. 124) is **DENIED**.

24 IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**.

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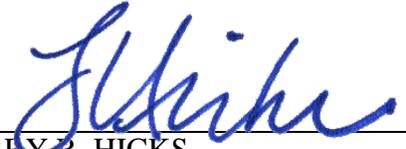
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IT IS FURTHER ORDERED that the Clerk of Court **ENTER** a separate and final Judgment denying Schneider’s § 2255 motion. *See Kingsbury v. United States*, 900 F.3d 1147, 1150 (9th Cir. 2018).

IT IS SO ORDERED.

DATED this 8th day of January, 2021.

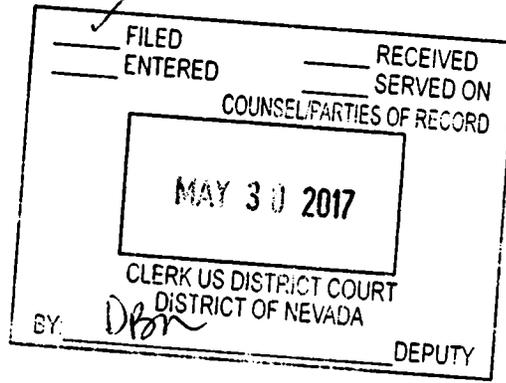


LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

Appendix D

United States v. Anthony Schneider

No. 3:16-CR-00005-LRH-CLB-1, ECF No. 88 (D. Nev. May 20, 2017) (unpublished)
Plea Agreement



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6 UNITED STATES DISTRICT COURT
7 DISTRICT OF NEVADA

8 UNITED STATES OF AMERICA,

Case No. 3:16-cr-0005-LRH-VPC

9 Plaintiff,

PLEA AGREEMENT UNDER
FED. R. CRIM. P. 11 (c)(1)(A) and (B)

10 v.

11 ANTHONY SCHNEIDER,

12 Defendant.

13
14 Plaintiff United States of America, by and through STEVEN W. MYHRE, Acting United
15 States Attorney for the District of Nevada, and MEGAN RACHOW, Assistant United States
16 Attorney, the defendant ANTHONY SCHNEIDER, and the defendant's attorney, LOREN
17 GRAHAM, Esq., submit this Plea Agreement under Fed. R. Crim. P. 11(c)(1)(A and B).

18 **I. SCOPE OF AGREEMENT**

19 The parties to this Plea Agreement are the United States of America and ANTHONY
20 SCHNEIDER, the defendant. This Plea Agreement binds the defendant and the United States
21 Attorney's Office for the District of Nevada. It does not bind any other prosecuting,
22 administrative, or regulatory authority, the United States Probation Office, or the Court.

23 The Plea Agreement sets forth the parties' agreement regarding criminal charge
24 referenced in the Plea Agreement and applicable sentences, fines, restitution, and forfeiture. It

1 does not control or prohibit the United States or any agency or third party from seeking any other
2 civil or administrative remedies directly or indirectly against the defendant.

3 **II. DISPOSITION OF CHARGES AND WAIVER OF TRIAL RIGHTS**

4 A. Guilty Plea. The defendant knowingly and voluntarily agrees to plead guilty to
5 the following charges as set forth in the indictment filed on January 27, 2016:

6 Counts 1, 3, and 4: Interference with Commerce by Robbery, in violation of 18 U.S.C. §
7 1951;

8 Count 7: Attempted Interference with Commerce by Robbery, in violation of 18 U.S.C.
9 § 1951; and

10 Count 8: Use of a Firearm During and in Relation to a Crime of Violence, in violation of
11 18 U.S.C. § 924(c)(1)(A)(ii) and 18 U.S.C. §2.

12 B. Waiver of Trial Rights. The defendant acknowledges that he has been advised and
13 understands that by entering a plea of guilty he is waiving -- that is, giving up -- certain rights
14 guaranteed to all defendants by the laws and the Constitution of the United States. Specifically,
15 the defendant is giving up:

16 1. The right to proceed to trial by jury on all charges, or to a trial by a judge
17 if the defendant and the United States both agree;

18 2. The right to confront the witnesses against the defendant at such a trial, and
19 to cross-examine them;

20 3. The right to remain silent at such a trial, with assurance that his silence
21 could not be used against him in any way;

22 4. The right to testify in his own defense at such a trial if he so chooses;

23 5. The right to compel witnesses to appear at such a trial and testify in the
24 defendant's behalf; and

1 6. The right to have the assistance of an attorney at all stages of such
2 proceedings.

3 C. Withdrawal of Guilty Plea. The defendant will not seek to withdraw his guilty
4 pleas after he has entered them in court.

5 D. Additional Charges. The United States agrees not to bring any additional charges
6 against the defendant arising out of the investigation in the District of Nevada which culminated
7 in this Plea Agreement and based on conduct known to the United States.

8 The United States will move to dismiss any additional charges pending against the
9 defendant in this case at the time of sentencing.

10 **III. ELEMENTS OF THE OFFENSES**

11 A. Counts 1, 3, 4: The elements of Interference with Commerce by Robbery, in
12 violation of 18 U.S.C. § 1951, are:

13 First: The defendant induced the victim to part with property by the wrongful use
14 of actual or threatened force, violence, or fear;

15 Second: The defendant acted with the intent to obtain property; and

16 Third: Commerce from one state to another was affected in some way.

17 B. Count 7: The elements of Attempted Interference with Commerce by Robbery, in
18 violation of 18 U.S.C. § 1951, are:

19 First: The defendant attempted to induce the victim to part with property by the
20 wrongful use of actual or threatened force, violence, or fear;

21 Second: The defendant acted with the intent to obtain property; and

22 Third: Commerce from one state to another would have been affected in some
23 way.

24 Ninth Circuit Manual of Model Jury Instructions, Criminal, § 8.143A (approved 12/2016).

1 C. Count 8: The elements of Use of a Firearm During and in Relation to a Crime of
2 Violence, in violations of 18 U.S.C. § 924(c)(1)(A)(ii) and 18 U.S.C. § 2, are:

3 First: The defendant committed the crime of Attempted Interference with
4 Commerce by Robbery as charged in Count Seven of the Indictment,
5 which is a crime of violence; and

6 Second: The defendant knowingly used, carried, or brandished a firearm during and
7 in relation to that crime or aided and abetted another person in knowingly
8 using, carrying, or brandishing a firearm during and in relation to that
9 crime.

10 A defendant “used” a firearm if he actively employed the firearm during and in relation
11 to Conspiracy to Interfere with Commerce by Robbery.

12 A defendant “carried” a firearm if he knowingly possessed it and held, moved, conveyed
13 or transported it in some manner on his person.

14 A defendant used, carried, or brandished a firearm “during and in relation to” the crime if
15 the firearm facilitated or played a role in the crime.

16 Ninth Circuit Manual of Model Jury Instructions, Criminal, § 8.71 (2014).

17 **IV. FACTS SUPPORTING GUILTY PLEA**

18 A. The defendant will plead guilty because he is, in fact and under the law, guilty of
19 the crimes charged.

20 B. The defendant acknowledges that if he elected to go to trial instead of pleading
21 guilty, the United States could prove his guilt beyond a reasonable doubt. The defendant further
22 acknowledges that his admissions and declarations of fact set forth below satisfy every element
23 of the charged offenses.

24

1 C. The defendant waives any potential future claim that the facts he admitted in this
2 Plea Agreement were insufficient to satisfy the elements of the charged offenses.

3 D. The defendant admits and declares under penalty of perjury that the facts set forth
4 below are true and correct:

5 On November 1, 2015, at approximately 10:25 p.m., the defendant robbed the El Rancho
6 Market located at 2710 WrondeI Way, Reno, Nevada. The defendant pointed what appeared to
7 be an assault rifle at the clerk and demanded cash. The store clerk gave the defendant
8 approximately \$550.00 in cash and the defendant fled. El Rancho Market receives inventory from
9 out of state, and as such is involved in interstate commerce.

10 On November 6, 2015, at approximately 11:00 p.m., the defendant robbed the Little
11 Caesars Pizza restaurant located at 951 West Moana Lane, Reno, Nevada. The defendant entered
12 the restaurant and walked to the employee side of the counter. The defendant pointed the machete
13 at one of the employees and ordered the employee to put all the money in a bag the defendant was
14 holding in his left hand. The employee gave the defendant approximately \$80.00. Little Caesars
15 receives its products from out of state, and as such, is involved in interstate commerce.

16 On November 10, 2015, at approximately 11:00 p.m., the defendant robbed the Valley
17 Liquor Market, located at 505 Denslowe Drive, Reno, Nevada. The defendant walked through
18 the front door and immediately walked to the front counter. The defendant pointed the gun at the
19 employees and demanded that they give him the money from the register. The employees
20 complied and gave the defendant approximately \$400 to \$500. Valley Liquor Market receives
21 some of its inventory from out of state, and as such, is involved in interstate commerce.

22 On November 17, 2015, just after midnight, the defendant and codefendant Jamar Jackson
23 attempted to rob the Taco Bell located at 1110 North Hills Boulevard, Reno, Nevada. The
24 defendant pointed the gun at the employee and both the defendant and Jackson told the employee

1 to open the door. The employee, scared of being shot, pounded on the door until another
2 employee opened the door. The employee then entered the Taco Bell with his hands in the air as
3 the defendant and Jackson followed behind him, with the defendant pointing the gun at the
4 employee's back. When the other employees realized they were being robbed, they ran to a back
5 office and called 911. The defendant and Jackson then followed the employee to the cash registers
6 on the front counter, with the defendant still pointing the gun at the employee. While at the
7 counter, the defendant and Jackson saw an employee on the phone and they fled the restaurant.

8 When the police arrived, they learned the Taco Bell employees were afraid during the
9 robbery, and noticed some employees were even then visibly upset and shaking. The employee
10 held at gunpoint described the gun as a black pistol with a slide that had a rounded shape on top,
11 rather than square. The surveillance video corroborated the employees' statements. In the video,
12 the officer saw one of the suspects was wearing a hooded sweatshirt inside out because the officer
13 saw a white tag hanging off the back near the neckline. The officer also saw the second suspect,
14 later identified as Jackson, wearing black shoes with a shiny white or silver logo on the side. In
15 the video, the officer also saw the two robbers run north toward North Hills Boulevard. Taco Bell
16 receives its products from out of state and, as such, is a business involved in interstate commerce.

17 About 12:58 a.m. on November 17, 2015, Washoe County Sheriff's Office (WCSO)
18 deputies were dispatched to Summit Christian Church located at 7075 Pyramid Way, to
19 investigate a report of subjects siphoning gas from a vehicle on the property. When deputies
20 arrived, they detained Jackson and the defendant. Jackson was sitting in the passenger seat of a
21 silver 1998 Toyota four door sedan registered to the defendant. The defendant was placed under
22 arrest for an outstanding warrant. While completing an inventory search of the vehicle, the
23 deputies saw a silver plastic mask on the backseat directly behind the driver's seat, a black pistol
24 on the floorboard of the driver's side, and a black sweatshirt turned inside out with a white tag on

1 the neckline. The defendant and Jackson used the above-listed items in their attempted robbery
2 of the Taco Bell. The firearm was a black 9mm handgun with a rounded slide consistent with the
3 victim's description.

4 **V. COLLATERAL USE OF FACTUAL ADMISSIONS**

5 The facts set forth in Section IV of this Plea Agreement shall be admissible against the
6 defendant under Fed. R. Evid. 801(d)(2)(A) at sentencing for any purpose. If the defendant does
7 not plead guilty or withdraws his guilty pleas, the facts set forth in Section IV of this Plea
8 Agreement shall be admissible at any proceeding, including a trial, for impeaching or rebutting
9 any evidence, argument or representation offered by or on the defendant's behalf. The defendant
10 expressly waives all rights under Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410 regarding the use
11 of the facts set forth in Section IV of this Plea Agreement.

12 **VI. APPLICATION OF SENTENCING GUIDELINES PROVISIONS**

13 A. Discretionary Nature of Sentencing Guidelines. The defendant acknowledges that
14 the Court must consider the United States Sentencing Guidelines ("USSG" or "Sentencing
15 Guidelines") in determining the defendant's sentence, but that the Sentencing Guidelines are
16 advisory, not mandatory, and the Court has discretion to impose any reasonable sentence up to
17 the maximum term of imprisonment permitted by statute.

18 B. Offense Level Calculations. The parties stipulate to the following calculation of
19 the defendant's offense level under the Sentencing Guidelines, acknowledge that these
20 stipulations do not bind the Court, and agree that they will not seek to apply any other specific
21 offense characteristics, enhancements or reductions, except as otherwise set forth in this plea
22 agreement.

23 ///

24 ///

1 1. Counts 1, 3, 4, and 7: Interference/Attempted Interference with Commerce by
 2 Robbery, 18 U.S.C. § 1951:

Count 1: Base Offense Level [USSG § 2B3.1(a):	20
Firearm brandished [USSG § 2B3.1(b)(2)(C):	5
Count 3: Base Offense Level [USSG § 2B3.1(a):	20
Dangerous weapon brandished [USSG § 2B3.1(b)(2)(E):	3
Count 4: Base Offense Level [USSG § 2B3.1(a):	20
Firearm brandished [USSG § 2B3.1(b)(2)(C):	5
Count 7: Base Offense Level [USSG § 2B3.1(a):	20
USSG § 3D1.4 Determining the Combined Offense Level	4
Combined Offense Level for Counts 1, 3, 4, and 7	29

Reductions:

Acceptance of Responsibility* [USSG § 3E1.1]:	- $\frac{3}{26}$
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13 2. Count 8: 18 U.S.C. § 924(c)(1)(A)(ii): USSG § 2K2.4(b) – The guideline sentence
 14 is the minimum term of imprisonment required by statute and chapters 3 and 4 of the guidelines
 15 shall not apply. Title 18, United States Code, Section 924(c)(1)(A)(ii) requires the Defendant be
 16 sentenced to a term of imprisonment of not less than 7 years that must run consecutive to the
 17 sentence imposed for the underlying crime of violence where the firearm was used.

18 The defendant acknowledges that the statutory maximum sentence and any statutory
 19 minimum sentence limit the Court’s discretion in determining the defendant’s sentence.

20 C. Reduction of Offense Level for Acceptance of Responsibility. Under USSG §
 21 3E1.1(a), the United States will recommend that the defendant receive a two-level downward
 22 adjustment for acceptance of responsibility unless he (a) fails to truthfully admit facts establishing
 23 a factual basis for the guilty plea when he enters the plea; (b) fails to truthfully admit facts
 24 establishing the amount of restitution owed when he enters his guilty plea; (c) fails to truthfully

1 admit facts establishing the forfeiture allegations when he enters his guilty plea; (d) provides false
2 or misleading information to the United States, the Court, Pretrial Services, or the Probation
3 Office; (e) denies involvement in the offense or provides conflicting statements regarding his
4 involvement or falsely denies or frivolously contests conduct relevant to the offense; (f) attempts
5 to withdraw his guilty plea; or (g) commits or attempts to commit any crime.

6 If the defendant's Base Offense Level is calculated as level 16 or greater, pursuant to
7 USSG § 3E1.1(b), the United States will move for an additional one-level downward adjustment
8 for acceptance of responsibility before sentencing because the defendant communicated his
9 decision to plead guilty in a timely manner that enabled the United States to avoid preparing for
10 trial and to efficiently allocate its resources.

11 D. Criminal History Category. The defendant acknowledges that the Court may base
12 his sentence in part on the defendant's criminal record or criminal history. The Court will
13 determine the defendant's Criminal History Category under the Sentencing Guidelines.

14 E. Relevant Conduct. The Court may consider any counts dismissed under this Plea
15 Agreement and all other relevant conduct, whether charged or uncharged, in determining the
16 applicable Sentencing Guidelines range and whether to depart from that range.

17 F. Additional Sentencing Information. The stipulated Sentencing Guidelines
18 calculations are based on information now known to the parties. The parties may provide
19 additional information to the United States Probation Office and the Court regarding the nature,
20 scope, and extent of the defendant's criminal conduct and any aggravating or mitigating facts or
21 circumstances. Good faith efforts to provide truthful information or to correct factual
22 misstatements shall not be grounds for the defendant to withdraw his guilty pleas.

23 The defendant acknowledges that the United States Probation Office may calculate the
24 Sentencing Guidelines differently and may rely on additional information it obtains through its

1 investigation. The defendant also acknowledges that the Court may rely on this and other
2 additional information as it calculates the Sentencing Guidelines range and makes other
3 sentencing determinations, and the Court's reliance on such information shall not be grounds for
4 the defendant to withdraw his guilty pleas.

5 **VII. APPLICATION OF SENTENCING STATUTES**

6 A. Maximum Penalty. The maximum penalty for Interference/Attempted
7 Interference with Commerce by Robbery, in violation of 18 U.S.C. § 1951, is a sentence of not
8 more than 20 years and a fine of \$250,000.00, or both. The maximum penalty for Use of a Firearm
9 During and in Relation to a Crime of Violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii), is a
10 sentence of life imprisonment and a fine of \$250,000.00.

11 B. Factors Under 18 U.S.C. § 3553. The Court must consider the factors set forth in
12 18 U.S.C. § 3553(a) in determining the defendant's sentence. However, the statutory maximum
13 sentence and any statutory minimum sentence limit the Court's discretion in determining the
14 defendant's sentence.

15 C. Additional Mandatory Sentencing Provisions. Pursuant to 18 U.S.C. §
16 924(c)(1)(A)(ii), the defendant shall be sentenced to a term of imprisonment which may not be
17 less than 7 years. Also, the sentence imposed in relation to a violation of 18 U.S.C. § 924(c)
18 must run consecutive to the crime of violence during which the firearm was used, carried or
19 possessed. 18 U.S.C. § 924(c)(1)(D).

20 D. Parole Abolished. The defendant acknowledges that his prison sentence cannot be
21 shortened by early release on parole because parole has been abolished.

22 E. Supervised Release. In addition to imprisonment and a fine, the defendant will be
23 subject to a term of supervised release not to exceed 5 years. 18 U.S.C. § 3583(b)(1). Supervised
24 release is a period of time after release from prison during which the defendant will be subject to

1 various restrictions and requirements. If the defendant violates any condition of supervised
2 release, the Court may order the defendant's return to prison for all or part of the term of
3 supervised release, which could result in the defendant serving a total term of imprisonment up
4 to life imprisonment.

5 F. Special Assessment. The defendant will pay a \$100.00 special assessment per
6 count at the time of sentencing.

7 **VIII. POSITIONS REGARDING SENTENCE**

8 The Government will recommend a sentence within the Sentencing Guideline range as
9 determined by the Court and will recommend that the sentences imposed as to Count 1, 3, 4, and
10 7 run concurrent to each other. The defendant acknowledges that the Court does not have to
11 follow that recommendation. The defendant understands that the sentence imposed in regard to
12 Count 8, a violation of 18 U.S.C. § 924(c)(1)(A)(ii), is a mandatory minimum sentence of 7 years
13 that must run consecutive to the sentence in Count 7.

14 The defendant reserves the right to argue for a sentence below his applicable Sentencing
15 Guidelines range as determined by the Court pursuant to the factors set forth in 18 U.S.C. §
16 3553(a), but, in the event he does, then the government is not bound to recommend a guideline
17 sentence in the defendant's Sentencing Guidelines range as determined by the Court.

18 The United States reserves its right to defend any lawfully imposed sentence on appeal or
19 in any post-conviction litigation.

20 **IX. RESTITUTION**

21 Restitution is mandatory pursuant to 18 U.S.C. § 3663(A).

22 **X. FORFEITURE**

23 The defendant knowingly and voluntarily:
24

1 A. Agrees to the abandonment, the civil administrative forfeiture, the civil judicial
2 forfeiture, or the criminal forfeiture of a Daewood Precision Industries LTD., Model DP51 9mm
3 semi-automatic handgun bearing serial number 15255, and any and all ammunition (“property”);

4 B. Abandons or forfeits the property to the United States;

5 C. Relinquishes all right, title, and interest in the property;

6 D. Waives his right to any abandonment proceedings, any civil administrative
7 forfeiture proceedings, any civil judicial forfeiture proceedings, or any criminal forfeiture
8 proceedings of the property (“proceedings”);

9 E. Waives service of process of any and all documents filed in this action or any
10 proceedings concerning the property arising from the facts and circumstances of this case;

11 F. Waives any further notice to him, his agents, or his attorney regarding the
12 abandonment or the forfeiture and disposition of the property;

13 G. Agrees not to file any claim, answer, petition, or other documents in any
14 proceedings concerning the property;

15 H. Waives the statute of limitations, the CAFRA requirements, Fed. R. Crim. P. 7 and
16 32.2, the constitutional requirements, and the constitutional due process requirements of any
17 proceedings concerning the property;

18 I. Waives his right to a jury trial on the forfeiture of the property;

19 J. Waives all constitutional, legal, and equitable defenses to the forfeiture or
20 abandonment of the property in any proceedings, including but not limited to (1) constitutional
21 or statutory double jeopardy defenses; and (2) defenses under the Excessive Fines or Cruel and
22 Unusual Punishments Clauses of the Eighth Amendment to the United States Constitution;

23 K. Agrees to the entry of an Order of Forfeiture of the property to the United States;
24

1 L. Agrees that forfeiture is immediately due and payable and subject to immediate
2 collection by the United States;

3 M. Agrees and understands the abandonment, the civil administrative forfeiture, the
4 civil judicial forfeiture, or the criminal forfeiture of the property shall not be treated as satisfaction
5 of any assessment, fine, restitution, cost of imprisonment, or any other penalty the Court may
6 impose upon the defendant in addition to the abandonment or the forfeiture; and

7 N. The defendant acknowledges that the amount of the forfeiture may differ from,
8 and may be significantly greater than, the amount of restitution.

9 **XI. FINANCIAL INFORMATION AND DISPOSITION OF ASSETS**

10 Before or after sentencing, upon request by the Court, the United States, or the Probation
11 Office, the defendant will provide accurate and complete financial information, submit sworn
12 statements, and/or give depositions under oath concerning his assets and his ability to pay. The
13 defendant will surrender assets he obtained directly or indirectly as a result of his crimes, and will
14 release funds and property under his control in order to pay any fine, forfeiture, or restitution
15 ordered by the Court.

16 **XII. THE DEFENDANT'S ACKNOWLEDGMENTS AND WAIVERS**

17 A. Plea Agreement and Decision to Plead Guilty. The defendant acknowledges that:

18 (1) He has read this Plea Agreement and understands its terms and conditions;

19 (2) He has had adequate time to discuss this case, the evidence, and this Plea
20 Agreement with his attorney;

21 (3) He has discussed the terms of this Plea Agreement with his attorney;

22 (4) The representations contained in this Plea Agreement are true and correct,
23 including the facts set forth in Section IV; and

24

1 (5) He was not under the influence of any alcohol, drug, or medicine that
2 would impair his ability to understand the Agreement when he considered signing this Plea
3 Agreement and when he signed it.

4 The defendant understands that he alone decides whether to plead guilty or go to trial, and
5 acknowledges that he has decided to enter his guilty pleas knowing of the charges brought against
6 him, his possible defenses, and the benefits and possible detriments of proceeding to trial. The
7 defendant also acknowledges that he decided to plead guilty voluntarily and that no one coerced
8 or threatened him to enter into this Plea Agreement.

9 B. Waiver of Appeal and Post-Conviction Proceedings. The defendant knowingly
10 and expressly waives: (a) the right to appeal the manner in which the Court determined that
11 sentence on the grounds set forth in 18 U.S.C. § 3742; and (b) the right to appeal any other aspect
12 of the conviction or sentence and any order of restitution or forfeiture.

13 The defendant also knowingly and expressly waives all collateral challenges, including
14 any claims under 28 U.S.C. § 2255, to his conviction, sentence, and the procedure by which the
15 Court adjudicated guilt and imposed sentence, except non-waivable claims of ineffective
16 assistance of counsel.

17 The defendant acknowledges that the United States is not obligated or required to preserve
18 any evidence obtained in the investigation of this case.

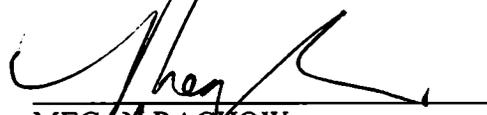
19 **XIII. ADDITIONAL ACKNOWLEDGMENTS**

20 This Plea Agreement resulted from an arms-length negotiation in which both parties
21 bargained for and received valuable benefits in exchange for valuable concessions. It constitutes
22 the entire agreement negotiated and agreed to by the parties. No promises, agreements or
23 conditions other than those set forth in this agreement have been made or implied by the
24 defendant, the defendant's attorney, or the United States, and no additional promises, agreements

1 or conditions shall have any force or effect unless set forth in writing and signed by all parties or
2 confirmed on the record before the Court.

3 STEVEN W. MYHRE
Acting United States Attorney

4
5 DATE 5/30/17



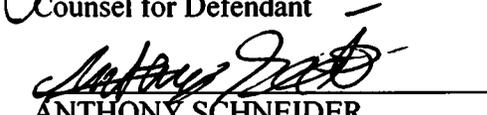
6 MEGAN RACHOW
Assistant United States Attorney

7 DATE 5/30/17



8 LOREN GRAHAM
Counsel for Defendant

9 DATE 5/30/17



10 ANTHONY SCHNEIDER
Defendant

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Appendix E

United States v. Lamar Jackson

No. 3:16-CR-00005-LRH-CLB, ECF No. 113 (D. Nev. Aug. 12, 2019) (unpublished),
Joint Motion to vacate Co-Defendant Lamar Jackson's 924(c) conviction

1 RENE L. VALLADARES
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2 Nevada State Bar No. 11479
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6 Attorney for Jamar Jackson

7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**

9 United States of America,
10 Respondent/Plaintiff,
11 v.
12 Jamar Jackson,
13 Petitioner/Defendant.
14

Case No. 3:16-cr-00005-LRH-VPC-2

**Joint motion to vacate, set aside, or
correct conviction and sentence
under 28 U.S.C. § 2255**

15 **Certification:** This joint motion is timely filed within one year of *United*
16 *States v. Davis*, 139 S. Ct. 2319 (2019), pursuant to 28 U.S.C. § 2255(f)(3).

17 The parties, having discussed this case, the applicable law, and available
18 remedies, have reached a joint stipulation for relief in this case.

19 **I. Procedural History**

20 In 2017, this Court accepted Petitioner Jamar Jackson’s agreement to
21 plead guilty to: conspiracy to commit Hobbs Act robbery under 18 U.S.C. § 1951
22 (Count 1); and use of firearm in furtherance of a crime of violence under 18
23 U.S.C. § 924(c) (Count 2). ECF No. 72. ECF No. 73. The § 924(c) conviction in
24 Count 2 specifically rested on Count 1—conspiracy to commit Hobbs Act robbery.
25 ECF No. 69.
26

1 This Court sentenced Mr. Jackson to the following prison terms: 24 months
2 on Count 1; and 60 months on Count 2, to run consecutively, for a total of 84
3 months. ECF No. 99.

4 **II. The *Davis* Decision**

5 On June 21, 2019, the Supreme Court issued *United States v. Davis*, 139 S.
6 Ct. 2319 (2019), holding that § 924(c)'s residual clause is unconstitutionally
7 vague in violation of the Due Process Clause.

8 **III. Joint Stipulation for Relief**

9 Mr. Jackson and the United States jointly move this Court to vacate the 18
10 U.S.C. § 924(c) conviction and 60-month consecutive sentence in Count 2,
11 pursuant to 28 U.S.C. § 2255. In light of *Davis*, the parties agree that relief is
12 warranted because Count 1's conspiracy to commit Hobbs Act robbery, 18 U.S.C.
13 § 1951, is no longer a qualifying crime of violence under 18 U.S.C. § 924(c). Thus,
14 Mr. Jackson's Count 2 conviction is no longer valid under the law and its
15 attendant 60-month sentence must be vacated.

16 The parties therefore jointly ask this Court to vacate Count 2's conviction
17 and its 60-month consecutive sentence, and remand for a full resentencing on the
18 remaining count—Count 1. *See Dean v. United States*, 137 S. Ct. 1170, 1176
19 (2017).

20 The parties also jointly request this Court order the Probation Office to
21 update Mr. Jackson's Presentence Investigation Report at least 14 days prior to
22 the resentencing hearing to reflect any changes to the Guidelines calculations,
23 sentencing options, and sentencing recommendation in light of the vacatur of his
24 § 924(c) conviction; and to provide any readily available information regarding
25 Mr. Jackson's post-conviction conduct.
26

1 Because he has already served approximately 42 months in federal
2 custody, Mr. Jackson requests that this Court expedite the resentencing. The
3 government does not oppose this request so long as the Probation Office has
4 adequate time to prepare an updated Presentence Investigation Report.
5 Government counsel has consulted with the U.S. Marshal's Office, which advises
6 that Mr. Jackson could be returned to the District of Nevada for resentencing in
7 approximately three weeks from the date the Marshal's Office receives the
8 necessary paperwork. The government will file that paperwork for the transfer
9 as soon as the Court schedules the hearing

10 **Dated:** August 12, 2019.

11 Respectfully submitted:

12 RENE L. VALLADARES
13 Federal Public Defender

 NICHOLAS A. TRUTANICH
 United States Attorney

14 By: s/ Wendi Overmyer
15 Wendi Overmyer
16 Asst. Federal Public Defender
 Counsel for Jamar Jackson

 By: s/ Elizabeth O. White
 Elizabeth O. White
 Assistant United States Attorney
 Counsel for the United States

Service Certificate

I certify that on August 12, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Nevada by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. The following non-CM/ECF participants will be served by U.S. Mail: Mr. Jamar Jackson.

/s/ Stephanie Young
Federal Public Defender Employee

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