

IN THE SUPREME COURT OF THE UNITED STATES

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CHRISTIAN LEVON ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

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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 claim that armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), does not qualify as a "crime of violence" under 18 U.S.C. 924(c)(3).

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No. 17-7689

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 2, at 1-2) is unreported. The order of the district court (Pet. App. 3, at 1-3) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 2017. The petition for a writ of certiorari was filed on February 5, 2018. 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 Southern District of Mississippi, petitioner was convicted on two counts of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and two counts of brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A). Pet. App. 1, at 1. The district court sentenced petitioner to 225 months of imprisonment, to be followed by five years of supervised release. Id. at 2-3. Petitioner did not appeal his convictions or sentence. In 2016, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. The district court denied petitioner's motion and denied his request for a certificate of appealability (COA). Pet. App. 3, at 2-3. The court of appeals likewise denied a COA. Pet. App. 2, at 2.

1. In 2003, petitioner and an accomplice robbed a branch of Union Planters Bank in Crystal Springs, Mississippi. Presentence Investigation Report (PSR) ¶ 3. Petitioner and his accomplice entered the bank armed with assault rifles and threatened to kill the bank's employees and customers. PSR ¶¶ 3, 6-7. They stole \$5509 and escaped in a car that they had taken during an armed carjacking earlier that day. PSR ¶¶ 3-4. In 2004, petitioner and his accomplice committed a similar robbery at a branch of AmSouth Bank in New Hebron, Mississippi, from which they stole \$2591.33. PSR ¶¶ 5-6.

A federal grand jury charged petitioner with carjacking, in violation of 18 U.S.C. 2119; two counts of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d); and three counts of brandishing a firearm during a crime of violence (the carjacking and armed bank robberies), in violation of 18 U.S.C. 924(c)(1). Indictment 1-4. Pursuant to a plea agreement, petitioner pleaded guilty to the two armed bank robbery counts and the corresponding Section 924(c) counts. Plea Agreement 1. He also waived his right to contest his convictions or sentence in any postconviction proceeding, including through a motion pursuant to 28 U.S.C. 2255. Plea Agreement 2-3. The district court sentenced petitioner to 225 months of imprisonment, comprised of concurrent terms of 57 months of imprisonment on the armed bank robbery counts and two consecutive sentences of 84 months of imprisonment on the Section 924(c) counts. Pet. App. 1, at 2. Petitioner did not appeal his convictions or sentence.

2. In 2016, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. See D. Ct. Doc. 42 (June 7, 2016) (2255 Mot.). As relevant here, petitioner contended that his Section 924(c) convictions were invalid, on the theory that armed bank robbery is not a “crime of violence” as defined in 18 U.S.C. 924(c)(3). 2255 Mot. 1-2. Section 924(c)(3) defines a “crime of violence” as a felony that “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 argued that armed bank robbery does not qualify as a crime of violence under Section 924(c)(3)(A) and that Section 924(c)(3)(B) is unconstitutionally vague in light of Johnson v. United States, 135 S. Ct. 2551 (2015), which held that the “residual clause” of the definition of a “violent felony” in the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii), is void for vagueness. 2255 Mot. 1-2; see D. Ct. Doc. 48, at 4-7, 15-22 (Aug. 8, 2016). The government opposed petitioner’s motion on the grounds that petitioner had waived his right to postconviction review as a condition of his plea agreement and that, in any event, petitioner’s motion was untimely because his challenge to the classification of armed bank robbery as a “crime of violence” under Section 924(c)(3) should have been brought within a year of the date on which conviction became final, as required by 28 U.S.C. 2255(f)(1). See D. Ct. Doc. 47, at 3-6 (July 29, 2016).

The district court denied petitioner’s motion. Pet. App. 3, at 2-3. The court determined that Johnson did not invalidate Section 924(c)(3)(B) and thus petitioner’s claim failed on the merits, irrespective of whether he had waived the claim or it was untimely. Ibid. (citing United States v. Davis, 677 Fed. Appx.

933, 936 (5th Cir. 2017) (per curiam), petition for cert. pending, No. 16-8997 (filed May 1, 2017)). The court declined to issue a COA, on the ground that petitioner had “failed to show that ‘jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right.’” Id. at 3 (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)).

3. The court of appeals issued a summary order denying petitioner’s request for a COA. Pet. App. 2, at 1-2.

#### ARGUMENT

Petitioner contends (Pet. 8-21) that the court of appeals erred in denying a COA on his claim that armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), does not qualify as a “crime of violence” within the meaning of 18 U.S.C. 924(c)(3). That contention does not warrant review by this Court. Petitioner waived his right to seek postconviction review of his convictions or sentence as a condition of his plea agreement. And even if petitioner’s claim were not waived, he cannot show that jurists of reason would debate whether armed bank robbery qualifies as a “crime of violence” under Section 924(c)(3). The petition for a writ of certiorari should be denied.

1. This Court has repeatedly recognized that a defendant may knowingly and voluntarily waive constitutional or statutory 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, 398 (1987) (affirming enforcement of plea agreement's waiver of right to file an action under 42 U.S.C. 1983). Accordingly, the courts of appeals have uniformly held that a defendant's knowing and voluntary waiver of the right to appeal in a plea agreement is enforceable.<sup>1</sup>

Appeal waivers benefit defendants by providing them with "an additional bargaining chip in negotiations with the prosecution." United States v. Teeter, 257 F.3d 14, 22 (1st Cir. 2001). Appeal waivers likewise benefit the government by enhancing the finality of judgments and discouraging meritless appeals. Ibid. Collateral-attack waivers have the same benefits. See, e.g., DeRoo v. United States, 223 F.3d 919, 923 (8th Cir. 2000) ("The 'chief virtues' of a plea agreement \* \* \* are promoted by waivers of collateral appeal rights as much as by waivers of direct appeal rights. Waivers preserve the finality of judgments

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<sup>1</sup> See, e.g., United States v. Teeter, 257 F.3d 14, 21-23 (1st Cir. 2001); United States v. Riggi, 649 F.3d 143, 147-150 (2d Cir. 2011); United States v. Khattak, 273 F.3d 557, 560-562 (3d Cir. 2001); United States v. Marin, 961 F.2d 493, 495-496 (4th Cir. 1992); United States v. Melancon, 972 F.2d 566, 567-568 (5th Cir. 1992); United States v. Toth, 668 F.3d 374, 377-379 (6th Cir. 2012); United States v. Woolley, 123 F.3d 627, 631 (7th Cir. 1997); United States v. Andis, 333 F.3d 886, 889-890 (8th Cir.) (en banc), cert. denied, 540 U.S. 997 (2003); United States v. Navarro-Botello, 912 F.2d 318, 320-322 (9th Cir. 1990), cert. denied, 503 U.S. 942 (1992); United States v. Hernandez, 134 F.3d 1435, 1437 (10th Cir. 1998); United States v. Bushert, 997 F.2d 1343, 1347-1350 (11th Cir. 1993), cert. denied, 513 U.S. 1051 (1994); United States v. Guillen, 561 F.3d 527, 529-532 (D.C. Cir. 2009).

and sentences, and are of value to the accused to gain concessions from the government.") (citation omitted).

Petitioner explicitly waived his right to seek postconviction review of his convictions and sentence as a condition of his plea agreement. See Plea Agreement 3 (waiving "the right to contest the conviction and sentence \* \* \* in any post-conviction proceeding, including but not limited to a motion brought under Section 2255, Title 28, United States Code"). Petitioner does not contend that his waiver was not knowing and voluntary, nor does he identify any other reason for this Court to disregard that waiver in the context of this case. Because petitioner's motion for postconviction relief is barred by his plea agreement, his petition for a writ of certiorari should be denied.

2. Regardless, petitioner's request for a COA was properly denied. A federal prisoner seeking to appeal the denial of a motion for postconviction relief under Section 2255 must obtain a COA. 28 U.S.C. 2253(c)(1)(B). To obtain a COA, the prisoner must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2) -- that is, a "showing that reasonable jurists could debate whether" a constitutional claim "should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quoting Barefoot v.

Estelle, 463 U.S. 880, 893 n.4 (1983)); see Miller-El v. Cockrell, 537 U.S. 322, 327 (2003) (same).

Applying that standard, the court of appeals correctly declined to issue a COA on petitioner's claim that armed bank robbery is not a crime of violence under Section 924(c)(3). To convict a defendant of armed bank robbery, the government must prove that the defendant (1) took 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 by the use of a dangerous weapon or device" while committing the robbery, 18 U.S.C. 2113(d). For the reasons stated in the government's brief in opposition to the petition for a writ of certiorari in Stephens v. United States, cert. denied, No. 17-5186 (Dec. 4, 2017), that offense qualifies as a "crime of violence" under 18 U.S.C. 924(c)(3)(A), because it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." See Br. in Opp. at 6-9, Stephens, supra (No. 17-5186).<sup>2</sup> Every court of appeals to consider whether the federal offenses of bank robbery or armed bank robbery qualify as crimes of violence under Section 924(c)(3)(A) and similar provisions has held that they do. Id. at 7-9. And this Court has repeatedly denied review of that issue,

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<sup>2</sup> We have served petitioner with a copy of the government's brief in opposition in Stephens.

id. at 5 & n.2, including in Stephens, supra, and more recent cases. See, e.g., Perry v. United States, No. 17-6611 (Apr. 2, 2018) (armed bank robbery); Schneider v. United States, 138 S. Ct. 638 (2018) (No. 17-5477) (bank robbery); Castillo v. United States, 138 S. Ct. 638 (2018) (No. 17-5471) (bank robbery).

3. Because armed bank robbery qualifies as a “crime of violence” under Section 924(c)(3)(A), no reason exists to consider petitioner’s argument (Pet. 16-18) that the court of appeals erred in denying a COA on his claim that the alternative “crime of violence” definition in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague. Nor does any reason exist to remand this case to the court of appeals for further consideration in light of this Court’s recent decision in Sessions v. Dimaya, No. 15-1498 (Apr. 17, 2018), slip op. See Pet. 9-10. Dimaya holds that the definition of a “crime of violence” in 18 U.S.C. 16(b) -- the language of which is nearly identical to Section 924(c)(3)(B) -- is unconstitutionally vague. Slip op. 24-25 (majority opinion). But Dimaya does not address the constitutionality of a provision similar to Section 924(c)(3)(A). See id. at 2 (noting that 18 U.S.C. 16(a), which is nearly identical to Section 924(c)(3)(A), was not at issue in Dimaya). This Court’s holding in Dimaya thus does not resolve any question that will affect the outcome of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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