No. 17-97

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTWON JENKINS

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

REPLY BRIEF FOR THE UNITED STATES

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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1. The court of appeals held that the definition of a "crime of violence" in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague. Pet. App. 8a. The court based that conclusion on an "extension" of its earlier decision in *United States* v. *Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015), which held that a similarly worded statute, 18 U.S.C. 16(b), is unconstitutionally vague. Pet. App. 8a. In *Sessions* v. *Dimaya*, No. 15-1498 (reargued Oct. 2, 2017), this Court has granted review to consider whether Section 16(b), as incorporated into the provisions of the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, is void for vagueness. If this Court upholds the constitutionality of Section 16(b) in *Dimaya*, that holding would likely supersede the court of appeals' decision in this case. See Pet. 7. If the Court holds that Section 16(b) is unconstitutional, that decision may—depending on the Court's reasoning—inform whether Section 924(c)(3)(B) is properly subject to the same

rule. See Pet. 6-7. The appropriate course, therefore, is to hold the petition for a writ of certiorari in this case pending the decision in *Dimaya* and to dispose of the petition as appropriate in light of that decision.

2. Respondent raises two arguments for denying the petition, neither of which has merit.

a. Respondent contends (Br. in Opp. 4) that because this case concerns the constitutionality of Section 924(c)(3)(B) in the context of a criminal case, and not the constitutionality of Section 16(b) as incorporated into the immigration laws, the decision in *Dimaya* will not necessarily resolve the question presented here. But the extent to which *Dimaya* affects this case will depend on the Court's holding and its reasoning. The court of appeals itself viewed the constitutionality of Section 924(c)(3)(B) as being related to the constitutionality of Section 16(b), and the Court's decision on the latter issue in *Dimaya* may not be limited to the immigration context. As explained in the government's petition (at 6 n.3), this Court appears to be holding other petitions raising constitutional challenges to Section 924(c)(3)(B) pending the decision in *Dimaya*. The same result is appropriate in this case.

b. Respondent also asserts (Br. in Opp. 2-4) that review of the court of appeals' constitutional holding is unwarranted because his conviction under Section 924(c) was obtained in violation of a pretrial proffer agreement with the government and is therefore invalid. Although respondent raised that issue below, see Pet. C.A. Br. 15-25, the court did not address it. If this Court were to grant the petition, vacate the court of appeals' judgment, and remand for further proceedings following the decision in *Dimaya*, respondent could seek to press the issue again, to the extent he preserved

it, as an alternative basis for granting his request for relief. But that possibility is not a reason to deny the petition.

In any event, respondent's claim is insubstantial. Following respondent's arrest, he made a proffer statement to federal agents in which he claimed that the gun used during the kidnapping was hidden in his house. See D. Ct. Doc. 175, at 3 (Feb. 26, 2014). Under the "ground rules" of respondent's proffer, the government agreed not to introduce that statement against respondent "in any criminal case during the government's case in chief." Gov't C.A. App. C1. The rules, however, expressly permitted the government to "make derivative use" of the statement, including by using it to generate "investigative leads," and provided that any such derivative information could be "introduce[d] at trial" against respondent. *Ibid.*

Federal agents searched respondent's house but did not find the gun. Gov't C.A. App. B2-B5. They later recovered the gun from respondent's girlfriend, who had hidden it at a different location. *Id.* at B6-B10. The district court determined prior to trial that the use of the gun as evidence did not violate the proffer agreement, which "expressly provide[d] that the government may derivatively use any information [respondent] provided to pursue investigatory leads." D. Ct. Doc. 175, at 5-6; see D. Ct. Doc. 193, at 2 (Mar. 4, 2014). Respondent did not renew any objection to the introduction of evidence of the gun at trial, see Gov't C.A. Br. 21, and he (not the government) specifically elicited testimony at trial about the content of his proffer statement and his representation that the gun would be found in his house, see *id.* at 13-14 (quoting testimony).

Because respondent affirmatively introduced evidence of his proffer statements at trial and did not contemporaneously object to the introduction of the gun obtained from his girlfriend, he has waived any claim that the government violated the proffer agreement. See, *e.g.*, *Johnson* v. *United States*, 318 U.S. 189, 201 (1943) (noting that a defendant may not "elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him"). Regardless, respondent's claim lacks merit because the proffer agreement specifically allowed the government to make derivative use of his statements. See, *e.g.*, *Kastigar* v. *United States*, 406 U.S. 441, 460 (1972) (noting that "derivative use" of a statement may include using it "as an 'investigatory lead'" or to "focus[] investigation on a witness"). At the very least, the merits of respondent's claim are not so clear as to obviate any need for this Court to review the court of appeals' constitutional ruling. See Br. in Opp. 4 (characterizing claim as merely "arguable").

* * * * *

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be held pending this Court's decision in *Sessions* v. *Dimaya*, No. 15-1498 (reargued Oct. 2, 2017), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

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