ORIGINAL

18-8603

No. 19 - ____

In The Supreme Court of the United States

GRALYN WHITE

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

I. Did the Fifth Circuit Court of Appeals Err by Failing to Apply the Holdings of *United States v. Lewis*, 907 F.3d 891, 894-95 (5th Cir. 2018). to Hobb's Act Claim

II. Can a consecutive sentence pursuant to 18 U.S.C. §924(c)(1)(a)(ii) for brandishing as an aider and abettor still stand after application of the First Step Act and this Court's recent jurisprudence?

PARTIES TO THE PROCEEDINGS

Petitioner, Gralyn White was the Defendant-Movant in the United States District Court for the Western District of Texas, Midland/Odessa Division in USDC Case No's. 7:15-cv-169 and 7:11-cr-276-1. He was the Petitioner - Appellant in the United States Court of Appeals for the Fifth Circuit in USCA Case No. 17-50710

Respondent, United States of America was the named Plaintiff - Respondent in the United States District Court for the Western District of Texas, Midland/Odessa Division in same above named USDC Cases, and Respondent-Appellee in the United States Court of Appeals for the Fifth Circuit in USCA Case No. 17-50710. No other relevant parties are represented in the instant action.

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The Order of the United States Court of Appeals for the Fifth Circuit denying panel rehearing of the denial of Petitioner's Application for a Certificate of Appealability is unpublished and may be found at USCA Case No. 17-50710; *Gralyn White v. United States* (December 31, 2018) (Appendix-A1).The Judgement and Order of the District Court for the Western District of Texas is unpublished and may be found at USDC Case No.7:15-cv-169; *Gralyn White v. United States of America* (August 1, 2017) (Appendix-A6). [1]

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1. "DE" refers to docket entries on the docket for the United States District Court for the Western District of Texas, Midland/Odessa Division in Case No. 7:15-cv-169, which is immediately followed by the corresponding docket entry number unless so noted.

STATEMENT OF JURISDICTION

The instant matter is an appeal from a final judgment and denial of a Motion to Vacate in the United States District Court. Notice of Appeal was timely filed on August 16, 2017 [DE #277](Appx. - A4), thereby vesting the Fifth Circuit Court Appeals with jurisdiction pursuant to 28 U.S.C. §2253(c)(1)(B), and Rule 22(b). The instant petition is timely and this Court has jurisdiction pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides that defendants in criminal trials have a right to counsel. As the Amendment "envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results[,] ... the right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984)(internal citation and quotation marks omitted).

The Hobbs Act, named after Congressman Sam Hobbs (D-AL) and codified at 18 U.S.C. § 1951, is a U.S. federal law enacted in 1946 that provides: (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so, commits, or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

Section 1951 also proscribes conspiracy to commit robbery or extortion without reference to the conspiracy statute at 18 U.S.C. § 371. Although the Hobbs Act was enacted as a statute to combat racketeering in labor-management disputes, the statute is frequently used in connection with cases involving public corruption, commercial disputes, and corruption directed at members of labor unions.

The Hobbs Act criminalizes both robbery and extortion, where: "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, and, "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

The First Step Act revised section 924(c)(1)(c) by providing that the higher penalty for a "second or subsequent count of conviction" under section 924(c) is triggered only if the defendant has a prior section 924(c) conviction that has become final.

Before the Act, a second or subsequent count of conviction under section 924© triggered a higher mandatory minimum penalty, as well as mandatory "stacking" of these sentences for each count of conviction. This was so because, in *Deal v. United States*, 508 U.S. 129 (1993), this Court held that, even when multiple counts under section 924© were in the same indictment, the conviction on the first count did not have to be final before the mandatory increases and stacking provisions.

STATEMENT OF THE CASE

A. Proceedings in the Courts Below

The instant petition is the result of the initial denial of Mr. White's Application for a Certificate of Appealability ("COA") and denial of reconsideration by a three judge panel at the United States Court of Appeals for the Fifth Circuit on December 13, 20018 and December 31, 2018 respectively. (Appx. A1 & A2)

His application for COA was the result of the denial and dismissal of Mr. White's Motion to Vacate via the provisions 28 U.S.C. §2255 ("§2255"), by the Honorable Robert A. Junell, U.S. District Judge for the Western District of Texas ("district court"). On October 5, 2015, Mr. White initiated his proceeding by filing a timely collateral attack on the judgment of the district court, via 28 U.S.C. §2255 (f)(1) ("§2255"). [DE #260 & #266].

Mr. White's *pro se* §2255 contained twenty-three (23) claims alleging variously, that his trial and appellate counsel were ineffective. His *pro se* §2255 Motion with attached Memorandum of Law raised the

following Grounds for Relief:

(1). Waiver of Movant's presence without authorization; (2). Presentation of conflicting defense theories; (3). Refusal to interview and subpoena exculpatory witness; (4). Failure to investigate and present evidence of third-party culpability; (5). Improperly attempting to establish a Hobbs Act violation; (6). Failure to object to prejudicial hearsay testimony; (7). Failure to object to prejudicial leading questions; (8). Failure to object to opinion testimony on ultimate issue by an expert witness; (9). Failure to prepare Movant for testimony; (10). Presentation of testimony which supported the Government's case; (11). Failure to object to prosecutorial misconduct due to mischaracterization of evidence; (12). Failure to seek a "mere presence" instruction in jury charge; (13). Failure to argue that evidence of Hobbs Act violation was insufficient; (14). Failure to object to constructive amendment of indictment; (15). Failure to object to prosecutorial misconduct during the Government's closing statements; (16). Failure to argue evidence of *mens rea* was insufficient; (17). Failure to object to the Court's response to a note from the jury

seeking clarification; (18). Failure to object to improper increased sentence; (19). Failure to argue the cumulative error doctrine on appeal; (20) Failure to argue insufficiency of evidence on firearm counts on appeal; (21). Failure to challenge constructive amendment of indictment on appeal; (22). Failure to challenge increased sentence on appeal; (23). Failure to present all meritorious claims on appeal; and (24) - By amendment -were claims grounded in *Johnson v. United States*, 135 S.Ct.2551 (2015), and *Beckles v. United States*, 137 S.Ct. 886, 892 (2017).

As Ordered by the district court, on December 29, 2015, Respondent ("government"), answered in Opposition to Mr. White's §2255 [DE# 267], and on January 25, 2016, Mr. White timely filed his *pro se* Reply [DE #270]. Subsequently, Mr. White's §2255 lay dormant on the district court 's docket for roughly nineteen (19) months with nothing more of substance filed or decided save a Supplement filed on March 28, 2016 [DE #271], by Mr. White.

Finally on August 1, 2017, the district

court signed its Order [DE #171], denying in all respects Mr. White's then pending Motion to Vacate filed pursuant to 28 U.S.C. §2255. [DE #275](Appx A6). On August 16, 2017, Mr. White timely filed his notice of appeal [DE #277](Appx. A4), and contemporaneously asked the district court to grant IFP status on appeal [DE # 278]. On September 11, 2017, the district court denied his IFP Motion. [DE #279]. The remaining procedural events are appropriately addressed above.

This Court now has jurisdiction after the denial of Mr. White's application for COA and he timely proceeds seeking intervention by granting his petition for a writ of *certiorari.*

SUMMARY OF THE ARGUMENT

Mr. White's issues turn on the Fifth Circuit's failure to apply it's own findings in *United States v. Lewis*, 907 F.3d 891, 894-95 (5th Cir. 2018), which held: "Conviction for conspiracy to commit Hobbs Act robbery could not serve as the underlying crime of violence predicate for conviction for knowingly using, carrying, or brandishing a firearm to interfere with commerce by robbery. 18 U.S.C.A. §§ 2, 924(c)"

Additionally whether a consecutive sentence pursuant to 18 U.S.C. §924(c)(1)(a)(ii) for brandishing as an aider and abettor may still stand after application of the First Step Act and this Court's recent jurisprudence?

ARGUMENT

I. Did the Fifth Circuit Court of Appeals Err by Failing to Apply the Holding s of *United States v. Lewis*, 907 F.3d 891, 894-95 (5th Cir. 2018). to Hobb's Act Claim

Mr. White claimed in his §2255 that counsel was deficient for failing to argue that the Government had presented insufficient evidence of his *mens rea* for aiding and abetting a robbery. He also claimed that counsel was deficient for not arguing that the evidence of an interstate nexus was insufficient. [Doc. 266 at 37].

In the present case, the district court found that counsel had made a Rule 29 motion for acquittal. [Doc. 205 at 36], and counsel specifically addressed that he believed the Government's evidence of an interstate nexus was insufficient. [*Id.* at 37]. At the close of the defense's case, counsel again made a Rule 29 motion, which was again denied by the Court. [*Id.* at 132], finding that counsel was not deficient for failing to argue insufficient

evidence regarding the Hobbs Act violation or the required *mens rea* for accomplice liability.

To substantiate these findings, the district court noted numerous instances in the record of the Government providing testimony of an interstate nexus [Doc. 205 at 30, 32], and that Movant was an accomplice to the June 21, 2012 robbery. [Doc. 204 at 88, 97, 293-94]. Even if counsel had not argued that the evidence was insufficient, the jury had ample evidence to find an interstate nexus and that Movant was an accomplice in a Hobbs Act robbery. [2]

Relevant here, Mr. White submitted that the Court overlooked application of recent precedent in the form of *United States v. Lewis*, 907 F.3d 891, 894-95 (5th Cir. 2018). The Fifth Circuit vacated and remanded Mr. Lewis' case to the Western District of Texas

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2. In his §2255, Mr. White submitted that although he was indicted for Hobbs Act robbery [DE #129 at 1-2], the district court explained the elements of *Hobbs Act extortion* in its jury charge. [DE #177 at 12, 15]. Mr. White argued that this resulted in a constructive amendment of his indictment. [DE.# 266]

(the very same district court that Mr. White's case is from), because it held first that: "Conviction for conspiracy to commit Hobbs Act robbery could not serve as the underlying crime of violence predicate for conviction for knowingly using, carrying, or brandishing a firearm to interfere with commerce by robbery. 18 U.S.C.A. §§ 2, 924(c)" and last, the "district court's error of convicting and sentencing defendant for knowingly using, carrying, or brandishing a firearm to interfere with commerce by robbery based on Hobbs Act robbery as the crime of violence predicate warranted vacatur of conviction and entire sentence, including sentence based on four-level enhancement for other convictions for possession, use, and carrying a firearm during and in relation to a crime of violence; error was clear and affected defendant's substantial rights, error seriously affected the fairness, integrity, and public reputation of judicial proceedings because defendant's sentence was enhanced by an additional 25 years by the error, and failure to remedy the mistake would have been manifestly unfair. 18 U.S.C.A. §§ 2, 924(c)." (*Id.* at 895)

More recently, and again pending before this Court, with oral argument scheduled for April 17, 2019, is the Fifth Circuit's holding in *United States v. Davis*, *903* F.3d 483 (2018). In Davis the panel noted that the Supreme Court rested its decision in *Dimaya* on its concerns about the language of the statute itself. Although § 16(b) contained linguistic differences to the Armed Career Criminal Act ("ACCA") residual clause the Court had previously invalidated in *Johnson v. United States*, —— U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), it noted that each statute contained "both an ordinary-case requirement and an ill-defined risk threshold," and this " 'devolv[ed] into guesswork and intuition,' invited arbitrary enforcement, and failed to provide fair notice." *Dimaya*, 138 S.Ct. at 1223 (alteration in original) (quoting *Johnson*, 135 S.Ct. at 2559). "Because the language of the residual clause here and that in § 16(b) are identical, this court lacks the authority to say that, under the categorical approach, the outcome would not be the same. We hold that § 924(c)'s residual clause is unconstitutionally vague. Therefore, Defendants' convictions and sentences under Count Two must be vacated. We conclude this decision does not implicate

the sentences on the other counts." *United States v. Clark*, 816 F.3d 350, 360 (5th Cir. 2016). *United States v. Davis*, 903 F.3d 483, 486 (5th Cir. 2018), cert. granted, No. 18-431, 2019 WL 98544 (U.S. Jan. 4, 2019)

Because the failure to apply relevant Circuit precedent to Mr. White's claims appears obvious, it follows that "reasonable jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell,* 537 U.S. 322, 327 (2003). For the reasons addressed above, this Court should Grant the petition to provide clear and indisputable guidance. Alternatively, Grant, Vacate and Remand to the Fifth Circuit Court of Appeals with instructions to grant COA as to this issue.

II. Can a consecutive sentence pursuant to 18 U.S.C. §924(c)(1)(a)(ii) for brandishing as an aider and abettor still stand after application of the First Step Act and this Court's recent jurisprudence?

The First Step Act includes five sentencing reform provisions, yet only Section 403 is relevant here and ensures that defendants cannot receive the 25-year mandatory sentence for a second or subsequent offense under 18 U.S.C. § 924© in their first criminal proceeding for a § 924© offense. This fixes the 924© "stacking" issue (not retroactive, *yet*). Individuals will still receive a 25-year mandatory minimum if they are convicted of a 924© offense after serving a sentence for a first 924© offense.

Section 403 is an overdue change to federal sentencing law. This provision, described as a "clarification of Section 924©," now eliminates the required "stacking" of 25-year mandatory minimums for using a firearm during other crimes for those offenders without a prior record convicted of multiple 924© counts at the same time. In other words,

the extreme 25-year recidivism enhancement of 924© is now to apply only to actual recidivists. The prior requirement of "stacking" 924© counts led to Mr. White's absurdly lengthy sentence of 444 months in the aggregate (See, Count 2ss and 4ss) for conduct alleged as an aider and abettor.

On April 17, 2018, the United States Supreme Court struck down the federal definition of "crime of violence" found in 18 U. S. C. §16(b). The Court's opinion, authored by Justice Kagan makes it clear that the outcome in *Dimaya* is a consequence of the Supreme Court's 2015 decision in *Johnson*, which struck down the "residual clause" of the Armed Career Criminal Act (18 U.S.C. §924(e)) on vagueness grounds. In rejecting the Government's argument to continue in the futile effort to interpret §16(b), Justice Kagan wrote: "The Government would condemn us to repeat the past—to rerun the old ACCA tape, as though we remembered nothing from its first showing. But why should we disregard a lesson so hard learned? "Insanity," Justice Scalia wrote in the last ACCA residual clause case before *Johnson*, "is doing the same thing over and over again, but expecting different results." *Sykes*, 564 U. S. at 28 (dissenting

opinion). We abandoned that lunatic practice in *Johnson* and see no reason to start it again."

It's laudable that the this Court ended this insanity as a prospective matter, but "critically, the now-unconstitutional definition of a "crime of violence" in §16(b) is referenced throughout the federal criminal code within various criminal offenses and sentence enhancements. And, notably, definitional language identical to §16(b) appears in 18 U.S.C. §924(c)(3)(B), which is part of a statute that adds significant amounts of prison time for any possession or use of a gun in connection with a crime of violence. In other words, there are certainly some number of persons including Mr. White, serving federal prison time based on a definition of a "crime of violence" deemed unconstitutionally vague in *Dimaya*." So, the question becomes whether, and if so how, may those, such as Mr. White effectively obtain the relief to which they may be entitled?"

For the reasons addressed above, this Court should Grant, Vacate and Remand to the Fifth Circuit Court of Appeals.

CONCLUSION

For the reasons stated above, this Court should Grant the petition to provide clear and indisputable guidance for the lower courts on such important matters. Alternatively, Grant, Vacate and Remand to the Fifth Circuit Court of Appeals.

Dated: March 12, 2019

Respectfully submitted,

By: _____

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