

20-5104

No. _____

ORIGINAL

Supreme Court, U.S.
FILED

JUN 18 2020

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Justin TAPP — PETITIONER
(Your Name)

vs.

United States — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals for the Fourth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Justin TAPP
(Your Name)

USP Atwater, P.O. Box 190001
(Address)

Atwater, CA 95301
(City, State, Zip Code)

(Phone Number)

Petitioner Asks

was in fact petitioner subjected to Double Jeopardy?

was in fact petitioner subjected to Systemic Injustice?

was in fact petitioner Biased in his proceedings on multiple levels of
The justice/judicial system in the 4th Circuit

I plead for the Supreme Court to reopen All 9246) convictions as it's
use has been weaponized by prosecutors against minorities

QUESTION(S) PRESENTED

- 1) Is count(2) of petitioners indictment and or sentence constitutional?
As there were never any drug transactions while any parties were armed, no fire arm was ever displayed, present, actively employed there is no evidence on record that supports count(2) on petitioners indictment
- 2) Petitioner was subjected to a conviction for a non-existent offense, an issue which should have been raised by appointed counsel thus petitioner has suffered severely from ineffective assistance of counsel, as no appointed counsel made an effort to shed light on the fact, no gun was ever present during any drug transaction, and was only actively employed during the "Hobbs Act" of an individual uninvolved with the drug conspiracy of count(1) of petitioners indictment
- 1) Petitioner was in fact denied his fifth amendment right to due process of law, where petitioner was convicted on a non-existent offense in light of hairy the miscarriage of justice exception is applicable, where a constitutional violation has resulted in the conviction of one is actually innocent. If allowed to stand it will result in a fundamental miscarriage of justice.
- 1) The First Step Act has brought upon clarification of the "stacking" provision under 924(e)(1)(C) however congress failed to make it retroactive, which is in and of its self cruel unusual punishment of its citizens who have not only been sentenced to clearly unwarranted lengthy sentences, but the sentencing practice of stacking has been addressed, however the individual as in myself and the sentence that is no longer mandated by our laws and clearly grotesque remains in suffering that is akin to only ending slavery for the negro's who weren't born yet. Clearly prejudiced practice
- 1) Circuit Court of Appeals should have in fact remanded and resentenced petitioner in light of clear evidence of separation of predicate offenses thus barring the lower court's ability to charge, convict petitioner of multiple 924(e)'s when multiple 924(e)'s did not occur
- 1) Petitioner is incarcerated under a provision that if he was in fact sentenced today, his sentence would be 20 years less, courts would no longer impose 300 month consecutive sentence. Petitioner's sentence far exceeds what is deemed a fair penalty by U.S. Law.
- 1) It is Extraordinary that a civilized society can fix an issue yet at the same time allow the same issue to cause further harm. Especially when under U.S. Law the individual has served his sentence, paid his debt to society, has long since learned his lesson. The changes to The 924(e) sentencing should be made retroactive.

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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STATUTES AND RULES

OTHER

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's Sixth Amendment rights were violated by Appointed Appeals Counsel, for not presenting the petitioner's clear double jeopardy claim which violated petitioner's Fifth Amendment right to not be subjected to punishment of the same offense twice.

Petitioner was subjected to systemic injustice by The 4th Circuit, I am
a U.S. Citizen of color and I was subjected to Double Jeopardy by
The Prosecutor's office along with The Court Judge Claude M. Hilton Trial Judge,
Judge Leonard D. Wehr Sentencing Judge. All of whom failed to review the
clear issue in the indictment and the fact counsel notified them of the (own)
Single Firearm offense. All that was seen was the color of my skin and the
white individuals testifying against me. please see attachments

JURISDICTION

☒ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was JAN 24th 2020

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from state courts:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

STATEMENT OF THE CASE

On July 31, 2006, after a bench trial, the Court found the defendant guilty of the charged offenses. The Court ultimately sentenced the defendant to a term of 60 months' imprisonment on Count 1; 84 months on Count 2, to run consecutive to the sentence on Count 1; 60 months on Count 3, to run concurrently with the sentence on Count 1; and 25 years on Count 4, to run consecutive to the sentences on Counts 1-2, for a total of term of imprisonment of 37 years.

The following summary from the Fourth Circuit's opinion on direct appeal provides an overview of the defendant's criminal conduct:

Tapp met Robert Leggat in early September 2005 in Fairfax County, Virginia. On September 13, Leggat invited Tapp to his friend Colleen McCartney's house—also in Fairfax—for a party. Tapp brought crack cocaine to the party that he had obtained earlier that day from Chase Wilson and "Suave" in Washington, D.C. Over the next few days, Tapp returned to D.C. at least twice to obtain more crack from Wilson and "Suave" which he, in turn, supplied to McCartney and Leggat.

On September 17, Tapp returned to D.C. to obtain more crack from Wilson and Suave. However, Wilson and Suave became upset because Tapp had yet to pay for the crack cocaine they had supplied to him and they demanded to know to whom Tapp had distributed the crack. The three—Tapp, Wilson, and Suave—then drove to McCartney's home in Fairfax, hoping to collect the money that she owed to Tapp. When they arrived at her home, they found Robert McGhee in one of the bedrooms. While either Wilson or Suave held a gun to McGhee's head, Tapp used a knife to cut McGhee's hair and scalp, ultimately taking a small amount of cash and crack cocaine from him.

REASONS FOR GRANTING THE PETITION

1) Petitioner is Actually/Factually innocent of count (2) use and carry during and in relation to a drug trafficking crime. The Supreme Court in *Bailey* decriminalized § 924(e) where as that section requires active employment of the firearm, a missing element that was never proved in relation to the distributing of narcotics, like the petitioner in *AVIS v. United States*, 417 U.S. 332, 346, 94 S.Ct. 2298, 2305 (1974). Tapp was convicted and sentenced for an act that the law does not make criminal. There can be no doubt that such a defect calls into question the fundamental legality of Tapp's conviction and sentence. In fact, the defect may be of constitutional dimensions since the right not to be imprisoned for a non-existent offense/sentence is probably inherent in the modern interpretation of substantive due process. See *Fiore v. White* 531 U.S. 225, 228-29 (2001) Petitioner avers that the holding of the Supreme Court in *Bailey v. United States*, 116 S.Ct. 501, 133 L.Ed. 2d 472 (1995), where it was very clear that "A defendant cannot be convicted of Section 924(e)(1) without the Government proving some sort of active employment of the firearm. Petitioner was grossly under represented by counsel, who failed to bring attention to the ambiguous statute and legislative silent history. The court is properly governed by the principal of lenity. This construction maxim holds that penal statutes are strictly construed against the government or parties seeking to exact criminal penalties and in favor of the persons on whom such penalties are sought to be imposed." *United States v. Campbell*, 204 F. Supp. 661, 664 (F.D. U.A. 1989) (quoting 3 Southern and Statutory Construction § 59.03, at 6-7 (4th ed. 1988)). See also *Bifulco v. United States*, 447 U.S. 381, 387, 65 L.Ed. 2d 205, 100 S.Ct. 2247 (1980); *Rewis v. United States*, 51 U.S. 808, 812, 28 L.Ed. 2d 493, 91 S.Ct. 1036 (1971) "If Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses." *Bell v. United States*, 349 U.S. 81, 84, 99 L.Ed. 705, 75 S.Ct. 620 (1955). See also *United States v. Chalan*, 812 F.2d 1302 (10th Cir. 1987) (applying principal of lenity, citing *B. The Tenth Circuit decision in Chalan is especially instructive. There, the defendant was convicted of first degree murder, robbery and two § 924(e)(1) counts of using a firearm in relation to a crime of violence. Applying the double jeopardy test set forth in Blockburger v. United States* 48 U.S. 299, 76 L.Ed. 306, 52 S.Ct. 180 (1933), Judge Seymour held that murder and robbery charges were one for purposes of double jeopardy and thus defendant could not be sentenced to consecutive sentences for firearms offenses when double jeopardy barred separate consecutive sentences for the underlying offense. The court, finding that the statute and legislative history were unclear on the issue, invoked the rule of lenity and vacated defendants conviction and sentence on the second § 924(e)(1) charge. *Chalan*, 812 F.2d at 1312-17. 2 The same result should obtain here because Congress has not clearly stated how § 924(e)(1) should be applied in relation to petitioner Tapp's § 924(e) conviction. As clearly noted, there was one possession of a firearm at one point in time the factual scenario for both predicate offenses involves the same use of the same firearm. The Government charged it 2 different ways. Please review sentencing transcripts page 7 lines 18-25, The court and defense counsel *United States v. Tapp* No. 1:06CR157, Friday Nov. 17 2006. Heard before Hon. Judge Leonard D. Weker. Petitioner should have been sentenced to 84 months, as opposed to 84 + 300 months due to the complicated changing of multiple § 924(e)s and the courts clear lack of directives in dealing with the draconian practice of applying 2 predicate offenses to one § 924(e) creating a non-existent offense.

Honorable, Supreme Court Justices,

There is considerable doubt as to whether Mr. Tapp should've been convicted of two distinct §924(c) violations in the first place. The unit of prosecution for §924(c) is based upon "separate uses and or carryings of [w]eapons", not the predicate offense. *United States v. Camps*, 32 F.3d 102, 108 (4th Cir 1994). In other words, "Multiple, consecutive sentences under §924(c) are appropriate [only] whenever there have been multiple, separate acts of firearm use or carriage." *United States v. Lighty*, 616 F.3d 321, 371 (4th Cir 2019). The Fourth Circuit has criticized as "illogical" the idea that the "unit of prosecution" for §924(c) offenses is based upon "[p]redicate offenses... already prescribed by other Federal statutes." *Camps*, 32 F.3d at 108-09. The tenth circuit in an en banc decision authored by then-Judge Gorsuch, came to the same conclusion: "Just as you can't throw more touchdowns during the 4th quarter than the total number of times you have thrown a touchdown, you cannot use a firearm during and in relation to crimes of violence more than the total number of times you have used a firearm." *United States v. Renteria*, 777 F.3d 1145, 1110 (10th Cir 2015) (en banc). "[E]ach charge," therefore, requires an independent use, carry or possession." *Id.* at 1115. Yet in this case, Mr. Tapp was convicted of two separate §924(c) violations for the same use of a firearm (by a coconspirator to steal drugs and money) that occurred on the same day, at the same time, during and in relation to two predicate offenses. This issue was raised by Mr. Tapp's Counsel, Assistant Federal Public Defender Iwan Davis, at his sentencing hearing. The district judge, Judge Leonard Wexler overruled the objection on the ground that Mr. Tapp was convicted of "separate crimes." Sentencing Tr. (Nov 17, 2006). CJA Counsel was appointed to represent Mr. Tapp on Appeal, and filed an Anders brief. Mr. Tapp's convictions were affirmed in an unpublished per curiam decision. With respect to the issue of whether

Mr. Tapp was properly convicted of two separate § 924(c) charges, the Fourth Circuit opinion stated as follows: "Finally counsel addresses whether the consecutive sentences imposed with respect to Counts Two and Four violate the prohibition against double jeopardy because the same gun was used in both offenses, which took place simultaneously. However we have specifically held that multiple, consecutive sentences under section 924(c)(1) are appropriate whenever there have been multiple, ~~separate~~ acts of firearm use or carriage, even when all of those acts related to a single predicate offense. *United States v. Camps*, 32 F.3d 102, 104 (4th Cir. 1998)". In this case, however, there were no separate acts of firearm use, but only a single use that occurred during and in relation to two predicate offenses. Mr. Tapp's 924(c) convictions are predicated on a single use of a firearm committed during and in relation to two predicate offenses specifically he was charged in count 2 of the superseding indictment as follows:

COUNT 2

THE GRAND JURY FURTHER CHARGES THAT:

On or about September 18, 2005, in Fairfax County, Virginia within the Eastern District of Virginia, the defendant JUSTIN TAPP, did unlawfully, knowingly and intentionally use and carry a firearm during and in relation to a drug trafficking crime, to wit: Conspirator to distribute five grams or more of crack cocaine, in violation of title 21, United States Code, sections 841 and 846, as alleged in Count 1 of this indictment and incorporated herein, (in violation of title 18, United States Code, sections 2 and 924(c))

Moreover, Count four of the indictment Alleged:

COUNT 4

THE GRAND JURY FURTHER CHARGES THAT:

On or about September 18, 2005, in Fairfax County, Virginia, within the Eastern District of Virginia, the defendant JUSTIN TAPP, did unlawfully, knowingly and intentionally use and carry a firearm during and in relation to a crime of violence to wit: Robbery affecting commerce in violation of title 18

United States Code, Section 1951, as Alleged in Count 3 of indictment and incorporated herein, (in violation of title 18, United States Code Sections 2 and 924(c)).

Each of these charges were predicated on a single incident: A robbery of money and drugs, at gun point, on September 18, 2005, in which Mr. Tapp was a willing participant in the robbery and conspiracy to distribute drugs, but there was only one independent "use" of a firearm during and in relation to these two predicate offenses on that date. The unit of prosecution for a criminal statute defines "whether conduct constitutes one or several violations of a single statutory provision." *Callanan v. United States*, 364 U.S. 587, 597 (1961) For example, the unit of prosecution applied to drug distribution is defined by "each distinct delivery", *United States v. Elliott*, 849 F.2d 886, 890 (4th Cir. 1988). Continuing offenses, on the other hand, typically are not divisible into separate or distinct acts. See e.g., *Blockburger v. United States*, 284 U.S. 299, 302 (1932) (distinguishing individual drug sales for continuous offenses). The unit of prosecution for a continuing offense like possession of drugs, therefore, is not limited by distinct acts. Cf. *United States v. Benwafield*, 287 F.3d 320, 323 (4th Cir. 2002) ("We hold that § 844(a) does not unambiguously provide the same simultaneous possession of multiple packages of cocaine base in close proximity to one another constitute multiple crimes"). The "use" of a firearm in violation of § 924(c) is not a continuing offense, and is thus divisible by "Each distinct act" that satisfies the verb set forth in the statute and charge. Accordingly, as discussed above, the Fourth Circuit has plainly stated that the unit of prosecution for purposes of § 924(c) is "each separate act of firearm use or carriage, not" the predicate offense. *United States v. Camps*, 32 F.3d 102, 108 (4th Cir. 1994). That said, the Fourth Circuit took a wrong turn in *United States v. Khan*, 461 F.3d 427, 494 (4th Cir. 2006), and held that "as long as the underlying [predicate] crimes are not identical under the Blockburger analysis, then

Consecutive § 924(c) sentences are permissible." The district court ~~at~~ Mr. Tapp's sentencing relied on Khan to reject Mr. Tapp's argument that he should only be held accountable for one violation of § 924(c). Khan is wrong for two reasons. First Blockburger only applies "where the same act or transaction constitutes a violation of two distinct statutory provisions." Blockburger, 284 U.S. at 304 (emphasis added). In "cases involving multiple convictions under a single statutory provision," "often referred to as 'unit of prosecution' cases," "the Blockburger test is not used." United States v. McLaughlin, 164 F.3d 1, 14-15 (D.C. Cir. 1998). Indeed as the Supreme Court has explained: "Because only a single violation of a single statute is at issue here, we do not analyze this case under the so-called 'same evidence' test, which is frequently used to determine whether a single transaction may give rise to separate ~~prosecutions~~, convictions, and/or punishments under separate statutes." *Saahria v. United States*, 437 U.S. 54, 70624 (1978) (citing Blockburger, among other decisions). To determine whether several convictions for violating the same statute constitute one or more offenses, courts must determine the "unit of prosecution" for the statute. That the § 924(c) convictions at issue involve different predicate offenses, and therefore different elements, is immaterial because each conviction involves the same statute (*Cf. Braverman v. United States*, 317 U.S. 49, 54 (1942) ("The single Agreement is the prohibited conspiracy, and however diverse its objects it violates but ~~a~~ single statute"). Second Khan is inconsistent with *United States v. Camps*, 32 F.3d 102, 107-09 & n. 9 (4th Cir. 1994), which held that the unit of prosecution for § 924(c) offenses is determined by whether a person "used" or "carried a firearm on several separate occasions." *Id.* (emphasis added). On the other hand, "A defendant may not be punished multiple times for simultaneous firearm use or carriage." *Id.* n. 9 (emphasis in original). Likewise, the court of appeals held that § 924(c)'s "unit of prosecution is not based upon 'the underlying predicate offense.'" *Id.* at 109. Khan's holding to the contrary cannot overrule *Camps*, and the court must apply the "earliest-case-governs" rule and ~~adhere~~ to the earlier of the

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conflicting opinions". *McMellon v. United States*, 387 F.3d 329, 332 (4th Cir. 2004) (en banc).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Mr. Tapp's, 5th Amendment rights have been violated as he has been given multiple sentences for one '§92.4(c)' offense, depriving him of his liberty and freedom due to his being of African descent, and systemic racism in the federal court system.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Justin T. [Signature]

Date: 6/18/20