No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MARK XAVIER WALLACE,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit erred in affirming that the District Court did not err by admitting inadmissible and highly prejudicial hearsay testimony of Government witness Brandon Douglas. (J.A. 646-718). (Argument I)

2. Whether the Fourth Circuit erred in affirming that the District Court did not err by admitting inadmissible and highly prejudicial hearsay testimony of Government witness Wayne Turner. (J.A. 726-734; 747-761). (Argument II)

3. Whether the Fourth Circuit erred in affirming that the District Court did not err by admitting inadmissible and highly prejudicial hearsay testimony of Government witness Willie Berry. (J.A. 726-734; 767-801). (Argument III)

4. Whether the Fourth Circuit erred in affirming that the District Court did not err in declining to give a limiting instruction upon the admission of a taped conversation between Government witness Brenda Rivera and co-defendant Joseph Benson, which was inadmissible and prejudicial hearsay as to the defendant Wallace. (J.A. 761-767). (Argument IV)

5. Whether the Fourth Circuit erred in not reversing the defendant's conviction and sentence and dismissing the Superseding Indictment with prejudice in light of the United States Supreme Court's June 24, 2019 decision in *United States v. Davis, 588 U.S.___ (2019)* holding that 18 United States Code Section 924 (c) (3) (B) is unconstitutionally vague. (Argument V)

RELATED CASES

No. 18-4539

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

JOSEPH JAMES CAIN BENSON, a/k/a Black, a/k/a Boston,

Defendant – Appellant.

No. 18-4540

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

BRYAN LAMAR BROWN, a/k/a Breezy,

Defendant – Appellant.

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OPINION BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit in United States v. MARK XAVIER WALLACE, a/k/a M-EZ, a/k/a Mark Xavier Grinage, II, a/k/a Mark Grinage, a/k/a Mark Xavier Lagrand, a/k/a Mark Xavier Wallace, II, a/k/a Louis Xavier Joseph, a/k/a Mark Wallace, a/k/a Mark Greenwhich, No. 18-4577 is located at Appendix page A1.

JURISDICTIONAL STATEMENT

Defendant-Appellant, Mark Xavier Wallace, appeals from a final Order of the United States Court of Appeals for the Fourth Circuit entered on April 24, 2020 denying Defendant-Appellants' consolidated appeal, which Order became final on June 1, 2020, when a co-defendant's Petition for Rehearing was denied, and which Order in turns affirmed the judgment of conviction and final Order entered by the Honorable Raymond A. Jackson of the United States District Court for the Eastern District of Virginia on August 7, 2018. Defendant-Appellant filed a *pro se* timely notice of appeal from these orders on August 13, 2018.

Defendant-Appellant now files this Petition For A Writ Of Certiorari.

This Court has jurisdiction under 28 U.S.C. §1291.

The undersigned counsel was Court-appointed to represent the defendant-appellant by Order dated August 26, 2020, which Order is attached to the accompanying Motion For Leave To Proceed *In Forma Pauperis*.

Citations to "JA" are to the Joint Appendix filed in the Fourth Circuit. Citations to "A" are to the Appendix appended to this Petition.

STATUTORY PROVISIONS INVOLVED

18 United States Code Section 924(c) (Appendix A50)

18 United States Code Section 924(c)(1) (Appendix A50)

18 United States Code Section 924(c)(3)(B) (Appendix A51)

18 United States Code Section 924(j) (Appendix A51)

Federal Rule of Evidence 801 (Appendix A52)

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Fourth Circuit erred in affirming that the District Court did not err by admitting inadmissible and highly prejudicial hearsay testimony of Government witness Brandon Douglas. (J.A. 646-718). (Argument I)

2. Whether the Fourth Circuit erred in affirming that the District Court did not err by admitting inadmissible and highly prejudicial hearsay testimony of Government witness Wayne Turner. (J.A. 726-734; 747-761). (Argument II)

3. Whether the Fourth Circuit erred in affirming that the District Court did not err by admitting inadmissible and highly prejudicial hearsay testimony of Government witness Willie Berry. (J.A. 726-734; 767-801). (Argument III)

4. Whether the Fourth Circuit erred in affirming that the District Court did not err in declining to give a limiting instruction upon the admission of a taped conversation between Government witness Brenda Rivera and co-defendant Joseph Benson, which was inadmissible and prejudicial hearsay as to the defendant Wallace. (J.A. 761-767). (Argument IV)

5. Whether the Fourth Circuit erred in not reversing the defendant's conviction and sentence and dismissing the Superseding Indictment with prejudice in light of the United States Supreme Court's June 24, 2019 decision in *United States v. Davis, 588 U.S.___ (2019)* holding that 18 United States Code Section 924 (c) (3) (B) is unconstitutionally vague. (Argument V)

STATEMENT OF THE CASE[1]

The Nature of the Case, the Course of Proceedings, and the Disposition in the District Court

On October 16, 2017, the defendant was charged in a Superseding Indictment with use of a firearm resulting in death. (Appendix A42).

Trial by jury was conducted in the Norfolk Division from April 10, 2018 to April 17, 2018, at the conclusion of which all defendants (except defendant Rosuan Kindell) were found guilty.

On August 7, 2018, the Court sentenced the defendant to five hundred and forty months (or 45 years). (Appendix A36).

Defendant timely noted his appeal to the United States Court of Appeals for the Fourth Circuit. On April 24, 2020, the Fourth Circuit issued an opinion (Appendix A1) affirming the Judgment of the District Court, which opinion became final on June 1, 2020, when a co-defendant's Petition for Rehearing was denied. (Appendix A41).

[1] For purposes of efficiency and consistency, this section of the instant Petition is taken essentially verbatim (with some slight edits) from the "STATEMENT OF THE CASE" contained in the opening consolidated Brief Of Appellants filed in the Fourth Circuit on February 20, 2019.

STATEMENT OF FACTS[2]

Procedural History

On October 16, 2017, a grand jury returned a superseding indictment charging the defendant, Mark Xavier Walker, and three co-defendants with one count each of use of a firearm in a crime of violence resulting in death, in violation of Title 18 United States Code § 924 (c) (1) and (j) and Title 18 United States Code § 2. On April 17, 2018, a jury found the defendant guilty.

Three cooperating informants and a detective testified about purported inculpatory statements made by one of the defendants that also implicated one or more co-defendants: (1) Detective Kempf testifying about defendant Wallace's statement that also implicated co-defendant Bryan Brown; (2) Brandon Douglas testifying about co-defendant Brown's purported statement that also implicated defendants Wallace and Joseph Benson; (3) Wayne Turner testifying about co-defendant Benson's purported statement that also implicated defendants Wallace and Brown; and (4) Wille Berry testifying about co-defendant Rosuan Kindell's purported statement that also implicated co-defendant Benson.

The Government introduced statements for the truth of the matter against each declarant/defendant and conceded that the statements were inadmissible against each declarant's co-defendants. (JA 242-243). The Government did not oppose, and sometimes sought, various limiting instructions to remedy the

[2] For purposes of efficiency and consistency, this section of the instant Petition is also taken essentially verbatim (with some slight edits) from the "STATEMENT OF FACTS" contained in the opening consolidated Brief Of Appellants filed in the Fourth Circuit on February 20, 2019, with the exception of the lats two paragraphs on page 8, *infra*, which defendant added herein as specific to this case.

inadmissibility of the statements against non-declarant co-defendants. However, the defendants sought redaction of the statements and ultimately moved for mistrials to ensure that while the purported inculpatory aspects of the statements would still be admitted against each declarant the co-defendants would not be unfairly prejudiced or denied confrontation rights when identified as purported co-actors in the offense. The District Court denied the motions for redaction and mistrial and gave various limiting instructions.

At the close of the Government's case, each defendant made Rule 29 motions for acquittal (JA 819-826) and renewed the motions at the close of all evidence. (JA 832). The motions were denied. (JA 831-832).

On May 1, 2018, defendant Wallace filed a Motion for Acquittal and Motion for New Trial. The District Court denied both motions by Order dated July 17, 2018.

Crime Scene Evidence

On March 13, 2009, Tequila Walker returned to her home at 217 Clipper Drive in Newport News, Virginia, at approximately 4:00 p.m. to find her live-in boyfriend Louis Joseph, Jr. lying dead on the back patio with apparent gunshot wounds. (JA 93-94). Ms. Walker found her five-year-old son J.W. in a back bedroom watching television. He was unharmed but had blood on his T-shirt. (JA 95). Ms. Walker had left the house for work around 9:00 a.m. that morning while Mr. Joseph remained at the house to babysit J.W. (JA 92). During the day, Ms. Walker had texted Mr. Joseph but got no response. (JA 93). The last out-going call or text message from Mr. Joseph's phone occurred at 10:12 a.m. (JA 474).

Susanne Mendola lived across the street from the Joseph residence. (JA 29). That morning, between 11:00 a.m. and 11:30 a.m., Ms. Mendola and her husband returned home from grocery shopping and saw a young boy crying on the sidewalk outside the gate to the back patio of Mr. Joseph's house. (JA 32, 34). After putting away their groceries and coming back outside, they did not see the young boy but saw the backdoor to the Joseph residence close. (JA 32-33).

J.W. was five years old on March 13, 2009 and 14 at the time of trial. (JA 72). J.W. was playing video games when he heard a noise at the front door and saw two men enter the house with handguns. (JA 73). The men told him to go into his bedroom. (JA 74). Before he did so, J.W. saw the men push Mr. Joseph to the ground. (JA 75). While in the bedroom, J.W. heard gunshots. (JA 75). J.W. came out of the bedroom after hearing the gunshots and saw one of the men looking through the couch. (JA 75). After the men left, J.W. saw Mr. Joseph bleeding from his leg and stomach. (JA 76). Mr. Joseph told J.W. to "to get peoples," but J.W. did not understand and returned to his bedroom. (JA 77).

Lekeisha Wayne, Mr. Joseph's cousin, also resided at 217 Clipper Drive in March of 2009, but was out of town on March 13 when Mr. Joseph was killed. (JA 109, 120). She confirmed that Mr. Joseph was a crack cocaine dealer (JA 110), that he consummated drug deals in his garage (JA 111), and that he kept large amounts of cash in the house. (JA 112).

Officer Scott of Newport News Police Department (NNPD) wsa the first to respond to Ms. Walker's 911 all after she found Mr. Joseph's body. (JA 45). He arrived at the residence at approximately 4:45 p.m. (JA 44) and observed that the

front door to the house appeared to have been kicked in. (JA 46). In the front room, he saw a white chair and a pool of blood on the floor with a trial of blood leading from the front room to the back of the house. (JA 49, 52). Following it, he observed that the family room in the back of the house had been ransacked. (JA 49). He saw that the blood trail led out the back door of the house where he found Mr. Joseph's body on the patio. (JA 54).

NNPD Crime Scene Investigator Smithley arrived and observed a gash above Mr. Joseph's right eye, injuries to his ribs, a bullet hole in his genital area, and a bullet hole in his left thigh and right knee. (JA 189). The medical examiner opined that five of six bullets were shot into Mr. Joseph's abdomen, thighs, and scrotum from short range, with the cause of death to be the gunshot wounds to Mr. Joseph's torso and thighs. (JA 270).

Investigator Smithley also recovered a .40 caliber bullet casing on the kitchen counter (JA 165), and three similar bullet casings in the rear family room (JA 169-170), which were later matched to firearms recovered in an undercover operation in New York City in April of 2009. (JA 394). Inv. Smithley found a child's back-pack hanging on the back of a bedroom door with 47 grams of marijuana in it (JA 199-200), and in the master bedroom closet she found black pants with $1,640 in cash in its pocket. (JA 194).

Inv. Smithley observed that the right arm of the white plastic chair in the front room was broken (JA 147) with the broken pieces on the floor. (JA 151). On the back of the chair, around the top rim, she collected a small amount of blood (JA 155), from which a DNA profile was later developed. (JA 326). Upon entering the

profile into a national database, the forensics lab received a hit for a potential DNA match with co-defendant Benson. (JA 328).

To the extent that additional specific facts pertaining to the defendant Wallace are pertinent to this appeal, those additional facts are contained within the various Arguments (Issues I – V below) and are incorporated by reference herein as if adopted herein in full so as not to unduly repeat and duplicate facts in support of this appeal.

Finally, to the extent any additional material facts for this Court's review of defendant's Issues are still necessary, the defendant further respectfully incorporates the remaining facts set forth in the "Statement Of Facts" section at pages 8-20 in the original consolidated opening Brief Of Appellants filed in the Fourth Circuit, again in an effort to avoid needlessly setting forth unnecessary facts or details not essential to the decisions to be made in the instant defendant's appeal.

SUMMARY OF ARGUMENT

1. The District Court erred by admitting inadmissible and highly prejudicial hearsay testimony of Government witness Brandon Douglas. (J.A. 646-718).

2. The District Court erred by admitting inadmissible and highly prejudicial hearsay testimony of Government witness Wayne Turner. (J.A. 726-734; 747-761).

3. The District Court erred by admitting inadmissible and highly prejudicial hearsay testimony of Government witness Willie Berry. (J.A. 726-734; 767-801).

4. The District Court erred in declining to give a limiting instruction upon the admission of a taped conversation between Government witness Brenda Rivera and co-defendant Joseph Benson, which was inadmissible and prejudicial hearsay as to the defendant Wallace. (J.A. 761-767).

Each of the above Supplemental Issues involve the admission, through a Government witness, of hearsay statements as to the defendant Wallace by various co-defendants. The defendant respectfully submits that such testimony was not only inadmissible but so highly prejudicial as to require a new trial as to the defendant Wallace. Although defendant Wallace urged the Court to redact any references to the defendant Wallace in the hearsay testimony, the District Court declined to do so.

5. The defendant's conviction and sentence should be reversed and the Superseding Indictment dismissed with prejudice in light of the United States Supreme Court's June 24, 2019 decision in *United States v. Davis, 588 U.S.___ (2019)* holding that 18 United States Code Section 924 (c) (3) (B) is unconstitutionally vague.

ARGUMENT

I.

THE FOURTH CIRCUIT ERRED IN AFFIRMING THAT THE DISTRICT COURT DID NOT ERR BY ADMITTING INADMISSIBLE AND HIGHLY PREJUDICIAL HEARSAY TESTIMONY OF GOVERNMENT WITNESS BRANDON DOUGLAS.

(J.A. 646-718).

(Issue Presented No. 1)

Standard of Review

As set forth in the opening Brief Of Appellants in the Fourth Circuit below at p. 35:

> This Court reviews "a district court's evidentiary rulings for abuse of discretion." *United States v. Garcia, 855 F.3d 615, 621 (4th Cir. 2017).* But the Court reviews "legal conclusions concerning the rules of evidence or the Constitution de novo." *United States v. Rivera, 412 F.3d 562, 566 (4th Cir. 2005).*

Argument

The Government called one Brandon Douglas in its case-in-chief. (J.A. 657-718). Mr. Douglas' testimony was comprised of his relating to the jury the substance of a conversation which he purportedly had with co-defendant Bryan Brown, including purported statements by Mr. Brown directly implicating the defendant Wallace . *Id.* The defendant Wallace objected *in limine* to the testimony of Mr. Douglas implicating the defendant Wallace on the grounds, *inter alia*, that: (1) the testimony constituted inadmissible hearsay as to the defendant Wallace; and (2) the testimony was so prejudicial as to the defendant Wallace that a limiting instruction would be insufficient to cure the prejudice. (J.A. 646-657).

Defendant Wallace further respectfully asserted that the admission of such evidence would constitute error requiring a mistrial. (J.A. 648).

The District Court overruled defendant Wallace's objections but issued a limiting instruction. (J.A. 652, 694).

In overruling the objections to the evidence, the District Court recognized the significance and materiality of the testimony, stating:

> **THE COURT**: The United States understands the nature of the objection, and your case will rise or fall on whether the Court is right or wrong. The Court believes it's right in its ruling, but if you have a position, you need to state it right here on the record now.

(J.A. 652).

As stated above, however, and as urged by the defendant Wallace at the time of his objection, the defendant respectfully submits that the testimony of Mr. Douglas implicating defendant Wallace was too prejudicial for any curative instruction, thereby requiring a reversal and a new trial as to defendant Wallace.

That the challenged testimony of Mr. Douglas was inadmissible hearsay as to the defendant Wallace under Federal Rule of Evidence 801 is not at issue. That is why the District Court issued a limiting instruction to begin with. However, because the prejudice attaching to the hearsay as to defendant Wallace was so overwhelming, even a limiting instruction was insufficient here, thereby requiring a mistrial and/or a reversal and a new trial.

Indeed, the defendant respectfully advised the Court *in limine* that were such testimony to be received, a mistrial would have to be declared. (J.A. 648).

As held in *United States v. Seeright, 978 F.2d 842, 849 (4th Cir. 1992),* a mistrial should be granted where:

> there is "a reasonable possibility that the jury's verdict was influenced by the material that improperly came before it."

That such improper testimony could reasonably possibly prejudice the jury is clear, given the centrality of Mr. Douglas' testimony to the Government's case.

As pointed out above, the District Court itself recognized the centrality of the testimony, advising the Government that "your case will rise or fall on whether the Court is right or wrong" in admitting the challenged evidence as to Mr. Wallace. (J.A. 652).

While the defendant appreciates and respects the Court's actions in giving a limiting instruction, the remedial steps taken by the Court to cure this erroneous evidence is only one factor to be considered.

As pointed out in *United States v. Nyman, 649 F.2d 208, 213 (4th Cir. 1980),* this Court must consider:

> "the closeness of the case, the centrality of the issue affected by the error, and the steps taken to mitigate the effects of the error."

Notwithstanding that the Court did attempt to "mitigate" the prejudice of the inadmissible testimony, the defendant respectfully submits that "the closeness of the case" and "the centrality of the issue affected by the error" outweigh the curative instruction's intended effect.

Accordingly, the defendant Wallace respectfully submits that the challenged evidence was inadmissible; its prejudice as to defendant Wallace could not be cured by a limiting instruction; a mistrial was warranted; and a new trial is now required in light of this prejudicial, inadmissible evidence as to defendant Wallace.

In light of the foregoing points and authorities, the defendant respectfully submits that the Fourth Circuit erred in upholding the District Court's admission of the above challenged evidence.

II.

THE FOURTH CIRCUIT ERRED IN AFFIRMING THAT THE DISTRICT COURT DID NOT ERR BY ADMITTING INADMISSIBLE AND HIGHLY PREJUDICIAL HEARSAY TESTIMONY OF GOVERNMENT WITNESS WAYNE TURNER.

(J.A. 726-734; 747-761).

(Issue Presented No. 2)

Standard of Review

As set forth in the opening Brief Of Appellants at p. 35:

> This Court reviews "a district court's evidentiary rulings for abuse of discretion." *United States v. Garcia, 855 F.3d 615, 621 (4th Cir. 2017).* But the Court reviews "legal conclusions concerning the rules of evidence or the Constitution de novo." *United States v. Rivera, 412 F.3d 562, 566 (4th Cir. 2005).*

Argument

The Government also called one Wayne Turner in its case-in-chief. (J.A. 747-761). Mr. Turner's testimony was comprised of his relating to the jury the substance of a conversation which he purportedly had with co-defendant Joseph Benson, including purported statements by Mr. Benson directly implicating the

defendant Wallace. *Id.* The defendant Wallace objected *in limine* to the testimony of Mr. Turner on the grounds, again, that such testimony, including the referenced testimony as to the defendant Wallace, was equally inadmissible against defendant Wallace as was the Douglas testimony challenged above for the same reasons. (J.A. 726-734).

The District Court likewise overruled defendant Wallace's objection to the Turner testimony but also granted a limiting instruction. (J.A. 734, 760-761).

For the same reasons urged above as to the prejudicial inadmissibility of the challenged Douglas testimony as to defendant Wallace, the defendant respectfully submits that the admission of the Turner testimony likewise forms the basis for a mistrial and also for a new trial as sought herein.

In light of the foregoing points and authorities, the defendant respectfully submits that the Fourth Circuit erred in upholding the District Court's admission of the above challenged evidence.

III.

THE FOURTH CIRCUIT ERRED IN AFFIRMING THAT THE DISTRICT COURT DID NOT ERR BY ADMITTING INADMISSIBLE AND HIGHLY PREJUDICIAL HEARSAY TESTIMONY OF GOVERNMENT WITNESS WILLIE BERRY.

(J.A. 726-734; 767-801).

(Issue Presented No. 3)

Standard of Review

As set forth in the opening Brief Of Appellants at p. 35:

> This Court reviews "a district court's evidentiary rulings for abuse of discretion." *United States v. Garcia,*

> *855 F.3d 615, 621 (4th Cir. 2017).* But the Court reviews "legal conclusions concerning the rules of evidence or the Constitution de novo." *United States v. Rivera, 412 F.3d 562, 566 (4th Cir. 2005).*

Argument

Finally, the Government called one Willie Berry in its case-in-chief. (J.A. 767-781). Mr. Berry's testimony was comprised of his relating to the jury the substance of conversations which he purportedly had with co-defendants Joseph Benson and Rosuan Kindell (subsequently acquitted). The defendant Wallace objected *in limine* to the testimony of Mr. Berry as well, on the grounds, again, that such testimony was equally inadmissible as to defendant Wallace as were the Douglas and Turner testimony challenged above for the same reasons. (J.A. 726-734).

The District Court likewise overruled defendant Wallace's objection to the Berry testimony and, in this instance, declined even to grant a limiting instruction. (J.A. 734, 800-801).

For the same reasons urged above as to the prejudicial inadmissibility of the challenged Douglas and Turner testimony, the defendant respectfully submits that the admission of the Berry testimony likewise forms the basis for a mistrial and also for a new trial as sought herein.

In light of the foregoing points and authorities, the defendant respectfully submits that the Fourth Circuit erred in upholding the District Court's admission of the above challenged evidence.

IV.

THE FOURTH CIRCUIT ERRED IN AFFIRMING THAT THE DISTRICT COURT DID NOT ERR IN DECLINING TO GIVE A LIMITING INSTRUCTION UPON THE ADMISSION OF A TAPED CONVERSATION BETWEEN GOVERNMENT WITNESS BRENDA RIVERA AND CO-DEFENDANT JOSEPH BENSON, WHICH WAS INADMISSIBLE AND PREJUDICIAL HEARSAY AS TO THE DEFENDANT WALLACE.

(J.A. 761-767).

(Issue Presented No. 4)

Standard of Review

As set forth in the opening Brief Of Appellants at p. 35:

> This Court reviews "a district court's evidentiary rulings for abuse of discretion." *United States v. Garcia, 855 F.3d 615, 621 (4th Cir. 2017).* But the Court reviews "legal conclusions concerning the rules of evidence or the Constitution de novo." *United States v. Rivera, 412 F.3d 562, 566 (4th Cir. 2005).*

Argument

The District Court admitted Government Exhibits 114, 114A, and 114B, all of which related to a conversation between Government witness Brenda Rivera and co-defendant Joseph Benson while Ms. Rivera visited Mr. Benson while Mr. Benson was incarcerated in the Newport News City Jail. (J.A. 761-767). More specifically, Government Exhibit 114 was an audio recording of the entire conversation; Government Exhibit 114A was a transcript of the conversation; and Exhibit 114B is an excerpt from the full recorded conversation, which excerpt the Government played for the jury.

The defendant Wallace respectfully requested a limiting instruction with regard to the preceding Exhibits, instructing the jury that this evidence could only

be considered against co-defendant Benson. However, the District Court declined to grant such an instruction. (J.A. 766-767).

The defendant respectfully submits that the failure to limit the jury's consideration of this evidence to co-defendant Benson alone was prejudicial error requiring reversal and a new trial as well, on the same grounds and for the same reasons cited above in connection with the challenged testimony of witnesses Douglas, Turner, and Berry.

In light of the foregoing points and authorities, the defendant respectfully submits that the Fourth Circuit erred in upholding the District Court's admission of the above challenged evidence.

CIRCUIT JUDGE RICHARDSON'S OPINION CONCURRING IN PART AND CONCURRING IN THE JUDGMENT

The defendant Wallace respectfully notes that Circuit Judge Richardson filed an opinion that concurred in part and concurred in the Judgement.

Significantly, as to the defendant's Statement of Issues 1-4 (admission of various hearsay statements against defendant), Judge Richardson stated as follows:

> … I doubt the district court properly applied Rule 801(d)(2)(A) to admit the portion of Douglas's testimony discussing Wallace and to allow Turner's testimony about Brown and Wallace. Despite these misgivings, I agree that any errors were harmless.

Appendix A35.

Although Judge Richardson found harmless error (which finding defendant respectfully disputes), his comments that he doubted that the District Court had "properly applied" the Federal Rules of Evidence to the admission of certain

prejudicial testimony complained of above should give this Court cause for great concern as to the accuracy of the Fourth Circuit opinion which further supports the grant of certiorari in this case.

V.

THE FOURTH CIRCUIT ERRED IN NOT REVERSING THE DEFENDANT'S CONVICTION AND SENTENCE AND DISMISSING THE SUPERSEDING INDICTMENT WITH PREJUDICE IN LIGHT OF THE UNITED STATES SUPREME COURT'S JUNE 24, 2019 DECISION IN *UNITED STATES V. DAVIS, 588 U.S.___ (2019)* HOLDING THAT 18 UNITED STATES CODE SECTION 924 (C) (3) (B) IS UNCONSTITUTIONALLY VAGUE.

(Issue Presented No. 5)

Standard of Review

This Court reviews "legal conclusions concerning… the Constitution de novo." *United States v. Rivera, supra, at 566.*

Argument

The defendant was convicted under 18 United States Code Section 924 (c) (1) and (j).

On June 24, 2019, some months after the entry of the Judgment Order against the defendant of August 7, 2018, the Unites States Supreme Court held that Section 924 (c) (3)(B) was unconstitutionally vague. *United States v. Davis*, 588 U.S. ____(2019).

The defendant Wallace believes that because he was also convicted under a subsection of Section 924 (c), the Supreme Court's holding applies with equal force to his conviction.

For these reasons, based on this post-sentencing holding by the United States Supreme Court, defendant Wallace respectfully requests that his conviction and sentence be reversed and dismissed with prejudice as having been grounded upon an unconstitutional statute, and the Fourth Circuit erred in upholding the defendant's conviction and sentence in light of the *Davis* decision and the foregoing points and authorities.

CONCLUSION

For the foregoing reasons above, Defendant-Appellant, Mark Xavier Wallace respectfully submits that the conviction and sentence entered against him must be reversed and a new trial granted to him.

In the alternative, Defendant-Appellant, Mark Xavier Wallace respectfully submits that his conviction and sentence must be reversed and the Indictment against him dismissed with prejudice.

STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellant, Mark Xavier Wallace, respectfully requests oral argument. Defendant-Appellant submits that oral argument is essential to assist the Court in reviewing the actual and procedural record and difficult legal issues of this case.

Respectfully submitted,

MARK XAVIER WALLACE

By: _____
Of Counsel

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