IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

_____

No. _____

RUSSELL HAMPTON,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

_____

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

_____

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March 1, 2022

QUESTIONS PRESENTED

Whether, to comply with the Juvenile Delinquency Act, a jury must be instructed that it cannot convict unless it finds that the defendant 'ratified' his participation in any charged conspiracy by engaging in post-majority misconduct (SPLIT IN CIRCUITS).

Whether, where a PSR is revised to increase the sentencing guidelines range after a defendant prevails on appeal, not based on any new information about the crimes or any new misconduct by the defendant, a presumption of retaliation should apply regardless of whether the sentence ultimately imposed is harsher than the original sentence.

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Statutes and Guidelines

Petitioner, Russell Hampton, respectfully prays that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 3, 2017 and on December 15, 2021.

OPINIONS BELOW

The first summary order of the Second Circuit is reported at 681 Fed. Appx. 89, and appears in the Appendix hereto. The second summary order of the Second Circuit is reported at 2021 WL 5918303, and appears in the Appendix hereto.

JURISDICTION

The most recent judgment of the Second Circuit was entered on December 15, 2021. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1254(1).

STATUTE INVOLVED

18 U.S.C. §5032. Delinquency proceedings in district courts; transfer for criminal prosecution

A juvenile alleged to have committed an act of juvenile delinquency, other than a violation of law committed within the special maritime and territorial jurisdiction of the United States for which the maximum authorized term of imprisonment does not exceed six months, shall not be proceeded against in any court of the United States unless the Attorney General, after investigation, certifies to the appropriate district court of the United States that (1) the juvenile court or other appropriate court of a State does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency, (2) the State does

not have available programs and services adequate for the needs of juveniles, or (3) the offense charged is a crime of violence that is a felony or an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), or section 1002(a), 1003, 1005, 1009, or 1010(b)(1), (2), or (3) of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 953, 955, 959, 960(b)(1), (2), (3)), section 922(x) or section 924(b), (g), or (h) of this title, and that there is a substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction.

* * *

STATEMENT OF THE CASE

In April 2009, Petitioner Russell Hampton [hereinafter 'Hampton'] and numerous others were charged in a multi-count indictment with various offenses arising out of their alleged participation, from 2006 to early 2009, in a Rochester, New York street gang called "Chain Gang" or "Wolfpack." In June 2011, trial commenced against Hampton and two others, all of whom were under 18 years of age when most of the alleged misconduct occurred. Hampton was convicted of RICO conspiracy (18 U.S.C. §1962(d)), possessing a firearm in furtherance of that RICO conspiracy (18 U.S.C. §924(c)(1)), and conspiracy to distribute drugs (21 U.S.C. §§841(a)(1) and 846). Hampton was acquitted of possessing a firearm in furtherance of the drug conspiracy. He was sentenced to a total of 30 years.[1]

[1] In 2015, Hampton sought and obtained a sentence reduction under 18 U.S.C. §3582(c)(2), in light of Amendment 782 to the United States Sentencing Guidelines. The court reduced Hampton's sentence by eight months, to 292 months.

The Second Circuit decided Hampton's original appeal in March 2017, affirming his convictions but remanding for resentencing due to a guidelines calculation error. United States v. Scott, 681 Fed. Appx. 89 (2d Cir. 2017). The court rejected challenges under the federal Juvenile Delinquency Act ['JDA'] that the JDA was not complied with, and that as a result, the district court lacked subject matter jurisdiction; that the jury should have been instructed that it could not convict unless it found that the defendants had 'ratified' their participation in the charged conspiracies by engaging in post-majority misconduct; and that the evidence was insufficient to show ratification.

The Second Circuit also held that a RICO conspiracy was a "crime of violence" within the ambit of the 'force' clause of 18 U.S.C. §924(c)(3)(A) – that is, it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." Accordingly, it did not reach the claim that the 'residual' clause of 18 U.S.C. §924(c)(3)(B) was unconstitutional.

Hampton was resentenced in October 2017, and received a total sentence of 25 years – 20 years, concurrent, on the drug and RICO conspiracies, and a consecutive five year term on the §924(c) conviction.

Hampton again appealed, again challenging the §924(c) conviction. While that appeal was pending, this Court decided United States v. Davis, 588 U.S. ___, 139 S.Ct. 2319 (2019), invalidating the residual clause of §924(c). The Second Circuit then vacated Hampton's conviction and sentence on that count, and remanded for a full resentencing.

The district court resentenced Hampton in August 2020. He received concurrent 18 year (216 month) sentences on the two conspiracy counts of conviction. Hampton then appealed, on the basis that the calculation of a higher advisory sentencing guideline range in the revised PSR, after his successful challenge to the firearms conviction, created a presumption of retaliation. In December 2021, the Second Circuit rejected that challenge. United States v. Hampton, 2021 WL 598303 (2d Cir. 2021).

REASONS FOR GRANTING THE PETITION

This case presents issues of substantial legal importance.

A. To comply with the Juvenile Delinquency Act, the jury should have been instructed that it could not convict unless it found that the defendants had 'ratified' their participation in the charged conspiracies by engaging in post-majority misconduct (SPLIT IN CIRCUITS).

The indictment alleged that the co-defendants engaged in a racketeering conspiracy and a drug conspiracy, and possessed firearms in furtherance of those conspiracies, from January 2006 until April 2009. All

three co-defendants were under 18 years of age at the start of the alleged offenses. Hampton was 15 years old when the crimes allegedly commenced.

The defense did not request, and the court did not give, a jury instruction concerning pre- and post-majority conduct of the defendants. As it turned out, of the five predicate acts presented to the jury in support of the racketeering conspiracy count, the jury found that the four underlying acts occurring before February 20, 2008 – that is, before Hampton turned 18 – were proven. It found that the one predicate act occurring after Hampton's eighteenth birthday, the attempted murder of Eric Clay on September 25, 2008, was not proven.

It was plain error to fail to instruct the jury that, in order to convict, it had to find that Hampton ratified the conspiracy after he turned 18 years of age. Although federal courts have jurisdiction over conspiracies begun while a defendant was a minor, but completed after the age of majority, the defendant must be found to have 'ratified' his prior involvement in the conspiracy by continued active participation after he turns 18. United States v. Wong, 40 F.3d 1347, 1365 (2d Cir. 1994), *cert. denied*, 516 U.S. 870 (1995). "Requiring the government to prove ratification when prosecuting age-of-majority-spanning conspiracies ensures that a defendant charged as an adult is not punished solely for an act – the agreement to join the

conspiracy [–] that he committed as a minor." United States v. Machen, 576 Fed.Appx. 561, 565 (6th Cir. 2014)(citation and internal quotation marked omitted).

In Machen, the Sixth Circuit held that, although the evidence was sufficient for the jury to find ratification after age 18, the district court's failure to instruct the jury on ratification was plain error. Id. at 565-66. It reasoned that "the defendant's age at the time of his actions is as dispositive of his guilt as the actions themselves." Id. at 566. Because most of the evidence concerned the defendant's conduct as a minor, and the evidence of his post-majority conduct was "meager in comparison," "[a]lthough a rational jury *could* have found that Machen ratified his participation in the conspiracy after he turned eighteen, it is far from clear that a properly instructed jury *would* have reached that conclusion." Id. (emphasis in original).

The Courts of Appeal are split as to whether the jury – as opposed to the court – must evaluate whether the government has made the requisite threshold demonstration of ratification. Compare United States v. Delatorre, 157 F.3d 1205, 1209 (10th Cir. 1998), *cert. denied*, 525 U.S. 1180 (1999) ("[A] jury may not convict an adult defendant *solely* on the basis of acts of juvenile delinquency," but instead "must find post-majority conduct

sufficient to establish that defendant participated in the conspiracy or racketeering enterprise after attaining the age of eighteen")(internal quotation marks omitted; emphasis in original); United States v. Diaz, 670 F.3d 332, 339 (1st Cir. 2012)("there can be no conviction unless the jury finds that the defendant in some manner ratified his participation in the conspiracy after attaining majority")(internal quotation marks omitted) with Wong, 40 F.3d at 1365 (no jury determination of ratification required); United States v. Doerr, 886 F.2d 944, 969 (7th Cir. 1989)(district court evaluates whether the government has made the requisite threshold demonstration).

The error in failing to instruct the jury that it had to find post-majority conduct sufficient to ratify the defendants' participation was plain error. The principle that a jury cannot convict solely based on pre-18 conduct is well-established. E.g., Wong, 40 F.3d at 1366; Delatorre, 157 F.3d at 1209; United States v. Thomas, 114 F.3d 228, 264 (D.C. Cir. 1997), *cert. denied*, 522 U.S. 1033 (1997); United States v. Welch, 15 F.3d 1202, 1209 (1st Cir. 1993), *cert. denied*, 511 U.S. 1096 (1994); Doerr, 886 F.2d at 969-70; United States v. Cruz, 805 F.2d 1464, 1476-77 (11th Cir. 1986), *cert. denied*, 481 U.S. 1006 (1987).

Moreover, the failure to charge the jury that it could not convict the defendants solely based on their conduct while juveniles seriously affected the fairness and integrity of the proceedings. This Court has repeatedly recognized that youth is "a time of immaturity, irresponsibility, impetuousness, and recklessness." Miller v. Alabama, 567 U.S. 460, 476 (2012)(citation and internal quotation marks omitted). This is not to say that juveniles get a free pass, but rather that where, as here, a charged crime started during the defendant's minority, it is unfair to punish that defendant as an adult unless and until it is proven beyond a reasonable doubt that the crime continued into the defendant's majority. "A juvenile is not absolved of responsibility for his actions, but his transgression is not as morally reprehensible as that of an adult." Graham v. Florida, 560 U.S. 48, 68 (2011)(citation and internal quotation marks omitted).

Accordingly, this Court should grant certiorari to resolve the split in the circuits and make clear that a jury must be instructed that a defendant cannot be convicted of conspiracy based solely on conduct engaged in before he turned 18, and that to convict, the jury must find that the defendant 'ratified' his participation in the charged conspiracies by conduct engaged in after he turned 18.

B. Where a PSR is revised to increase the sentencing guidelines range after a defendant prevails on appeal, not based on any new information about the crimes or any new misconduct by a defendant, a presumption of retaliation should apply regardless of whether the sentence ultimately imposed is harsher than the original sentence.

Although a district court has discretion to depart from the Sentencing Guidelines, the court "must consult those Guidelines and take them into account when sentencing." United States v. Booker, 543 U.S. 220, 264 (2005). The Sentencing Guidelines "are not only the starting point for most federal sentencing proceedings but also the lodestar." Molina-Martinez v. United States, 578 U.S. 189, 200 (2016). Indeed, "[e]ven if the sentencing judge sees a reason to vary from the Guidelines, if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, *then the Guidelines are in a real sense the basis for the sentence*." Id. at 198 (emphasis in original)(internal quotation marks omitted). If the court starts with an incorrect range, regardless of where it ends up, the defendant is entitled to relief. Id.

Here, the district court adopted the revised PSR's calculation of the advisory guideline range of 30 years to life, and sentenced Hampton to concurrent 18 year terms of imprisonment. Even though that sentence represented a 12-year downward variance from the low end of the guideline range, the court's adoption of the PSR, with its new analysis of Hampton's

drug guidelines and criminal history, and its new – and higher – guidelines range, violated his right to due process.

Due process "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives" thereafter. North Carolina v. Pearce, 395 U.S 711, 725 (1969). Vindictiveness is presumed where there is no evidence that "events subsequent to the first trial … have thrown new light upon the defendant's life, health, habits, conduct, and mental and moral propensities." Id. at 724 (internal quotations omitted).

A presumption of vindictiveness attaches to the revised PSR in this case, because it applied the guidelines in a way much more detrimental to Hampton than in previous PSRs, and this was not based upon any "objective information concerning identifiable conduct on the part of the defendant occurring after the time or the original sentencing proceeding." Id. at 726. It simply changed its analysis of defendant's offenses of conviction and his priors.

The newly revised PSR awarded criminal history points to Hampton's prior convictions, which had not been done previously. This was not based on any new information, but rather just a new reading of the guideline commentary. Using "criminal history which was already detailed in the

initial PSR that the district court read and relied upon in imposing [defendant's] original sentence" to penalize a defendant on resentencing is a violation of due process. United States v. Penado-Aparicio, 969 F.3d 521, 525-26 (5th Cir. 2020).

The initial PSR assigned no points to Hampton's three prior drug convictions, finding that pursuant to U.S.S.G. §4A1.2(a)(1), these were relevant conduct to the instant offense. Indeed, the conduct underlying those convictions was expressly set out in the indictment as overt acts. The revised PSR relied upon commentary to the guideline covering RICO offenses, U.S.S.G. §2E1.1, n.4, to treat these as prior sentences and thereby increase Hampton's criminal history score. The Second Circuit found that, by invoking U.S.S.G. §2E1.1, n.4, the 2020 PSR was merely correcting a mistake made in the prior PSRs.

This was not the only way in which Probation altered its interpretation of the Sentencing Guidelines, to Hampton's detriment. The revised PSR also added enhancements to Hampton's base offense level for the drug count – for possession of a firearm (two levels)[2], use of violence (two levels), and maintaining a drug premises (two levels). "Reevaluation of the same 'particulars' of a case that were in the record used for the original

[2] This new enhancement was proper, given that the §924(c) conviction was vacated. The other two enhancements were not.

sentencing" cannot justify a harsher response on resentencing. United States v. Suriano-Hernandez, 31 Fed.Appx. 159, 2001 WL 1751451 at *2 (5th Cir. 2001).

The Second Circuit concluded that because Hampton did not receive an "increased sentence," there was no need or basis to evaluate whether vindictiveness was likely. However, where – as here – the court uses an improperly enhanced guidelines range as its starting point, the fact of the matter is that the defendant was disadvantaged regardless of where the court ultimately ended up. In other words, vindictiveness 'played a part in the sentence he received,' even though that sentence was less severe than the original sentence.

The Second Circuit also concluded that it was not reasonably likely that the district court was being vindictive. However, the claim here is the presumption of vindictiveness attaches to the revised PSR, and that – having relied on that PSR – the court violated his right to due process. The fact that the presumed vindictiveness happened one step earlier in the process, driving the calculation of the guideline range in the PSR, cannot insulate the imposition of the new sentence from a due process challenge.

At his resentencing after the 2017 remand, Hampton's guideline range was 292-365 months. In the 2020 resentencing after the §924(c) count was

vacated, his guideline range was calculated as 360 months to life. The government's ominous prediction in opposing Hampton's ultimately successful initial challenge to his sentence – "this is a case of 'be careful what you wish for,'" Government Brief in United States v. Scott, Second Circuit Docket No. 13-3338, at 45 – apparently found traction. Due process "requires that a defendant be freed of apprehension of such a retaliatory motivation." Pearce, 395 U.S. at 725. Although Hampton did not receive a harsher sentence on the most recent resentencing, the use of a higher guidelines range created a presumption of vindictiveness and violated his right to due process.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Petition for Writ of Certiorari be granted.

March 1, 2022

Respectfully submitted,

/s/ Tina Schneider

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Counsel for Petitioner

APPENDIX