NO._____

In The
Supreme Court of the United States

REGINALD DAUSHAWN EARL TATE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals properly affirmed the trial court's improper sentencing of the defendant pursuant to 18 U.S.C. §924(c)(1)(A)(ii) for brandishing firearm in relation to a Hobbs Act robbery where the defendant was neither convicted nor sentenced for a crime of violence or a drug trafficking crime and in which Rule 11 was violated?

PARTIES TO THE PROCEEDINGS

Reginald Daushawn Earl Tate is the Petitioner.

The United States is the Respondent.

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BASIS FOR JURISDICTION IN THE SUPREME COURT

Petitioner, Reginald Daushawn Earl Tate, requests the Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit entered September 15, 2022. The United States Court of Appeals for the Fourth Circuit denied the petition for rehearing/rehearing *en banc* on October 18, 2022. This Court has jurisdiction to consider this petition under 28 U.S.C. §1254(1).

The United States District Court for the Western District of North Carolina had jurisdiction under 18 U.S.C. §3231. The United States Court of Appeals for the Fourth Circuit had jurisdiction under 28 U.S.C. §1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Supreme Court Rule 10(a):

> a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

Amendment V, United States Constitution:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

18 U.S.C. 924(c)(1)(A)(ii):

> (c)
> (1)
> (A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
> (i)
> be sentenced to a term of imprisonment of not less than 5 years;
> (ii)
> if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

STATEMENT OF THE CASE

Tate was charged in Counts One, Four and Seven of the bill of indictment with unlawfully conspiring with others to obstruct, delay and affect commerce and the movement of articles and commodities in commerce by robbery. He was charged with Hobbs Act robbery in Counts Two and Five. In Counts Three, Six and Nine he was charged with brandishing a firearm during and in relation to and in furtherance of a crime of violence. In Count Eight he was charged with an attempted Hobbs Act robbery; and finally, in Count Ten he was charged with being a convicted felon in possession of a firearm.

Petitioner entered into a plea agreement with the United States in which he agreed to plead guilty to Counts One, Three, Four and Seven. Pursuant to the plea agreement Counts Two, Five, Six, Eight, Nine and Ten were dismissed. The trial court imprisoned him for a term of 97 months in Counts One, Four and Seven to run concurrently and 84 months on Count Three to run consecutively to the sentences imposed in Counts One, Four and Seven.

ARGUMENT

Question

> Whether the United States Court of Appeals for the Fourth Circuit properly affirmed the trial court's improper sentencing of the petitioner pursuant to 18 U.S.C. §924(c)(1)(A)(ii) for brandishing a firearm in relation to a crime of violence where the petitioner was neither convicted nor sentenced for a crime of violence or a drug trafficking crime and in which Rule 11 was violated?

It is the 84 month consecutive sentence imposed in Count Three which gives rise to this petition. The violations of law contained in Counts One, Four and Seven to which petitioner pled guilty and was sentenced are neither drug trafficking crimes or crimes of violence. They are, instead, charges of conspiracy to commit Hobbs Act robbery. In order for a sentence to be imposed for a violation of Count Three for brandishing a firearm in relation to a drug trafficking crime or a crime of violence (to which petitioner pled guilty), petitioner contends that he must also be convicted and sentenced for either a drug trafficking crime or a crime of violence. Since neither Counts One, Four or Seven are such crimes, he cannot be sentenced on a plea to Count Three. Subsequent to the dismissal of Counts Two, Five, Six, Eight and Ten there were no drug trafficking crimes or crimes of violence of which petitioner was convicted or sentenced.

The language contained in Count Three is somewhat confusing. It alleged that the defendants "aiding and abetting each other, during and in relation to a crime of violence... unlawfully use or carry one or more firearms, and, in furtherance of such crimes of violence, did possess said firearms...one or more of

said firearms was brandished". Moreover, the indictment alleges in Count Three that the firearm was brandished in violation of 18 U.S.C. §924(c)(1)(A)(ii) which provides a penalty of seven years "*in addition to the punishment provided for such crimes of violence*." (Emphasis added). In other words the statute envisions this to be additional punishment for the underlying drug trafficking crime or the crime of violence. Since the conspiracies to commit Hobbs Act robberies described in Counts One, Four, and Seven are neither drug trafficking crimes or crimes of violence envisioned by 18 U.S.C. § 924(c)(1)(A)(ii), there is no sentence for such crimes to be enhanced. Therefore, the trial court improperly sentenced the petitioner under Count Three, and the Court of Appeals erred in affirming that 84 month consecutive sentence. Moreover, Count Three charges both possession of a firearm in commission of a crime of violence and brandishing of the firearm. The plea of guilty would be to the lesser of these crimes, to wit: the possession.

The issue being addressed is whether or not petitioner was subject to sentencing under 18 U.S.C. §924(c)(1)(A)(ii) in that he was not convicted of or sentenced to a crime of violence or a drug trafficking crime. The trial court in its statement of reasons adopted the presentence report without change. Further the trial court in its statement of reasons concluded that one or more counts of conviction carry a minimum imprisonment. The presentence report provided, *inter alia*, that the statutory provisions for Count Three citing 18 U.S.C. §924(c)(1)(A)(ii) would be a minimum term of imprisonment of seven years and maximum term of life. Further, the presentence report provides it must be imposed consecutively to

any other count. (Actually, it must be imposed consecutively to a sentence imposed for a crime of violence or a drug trafficking crime). As noted above the actual minimum sentence would only be five years under 18 U.S.C. §924(c)(1)(A)(ii) as argued herein. 18 U.S.C. §924(c)(1)(A)(ii) provides that the penalty for the brandishing of a firearm should be "*in addition to the punishment provided for such crime of violence or drug trafficking crime".* (Emphasis added). It is the respectful contention of petitioner that this statute is a sentence enhancement provision for violations which are either crimes of violence and/or drug trafficking crimes. The petitioner must be convicted of either a crime of violence or a drug trafficking crime for the provision to apply. Petitioner was not convicted of or sentenced to either. In fact, the United States took dismissals of all the charged crimes of violence; and there was no charge of a drug trafficking crime. There simply was no charged crimes of violence or drug trafficking crimes remaining after the court dismissed these counts.

The petitioner's conviction of conspiracies to commit a Hobbs Act robberies cannot be enhanced since the conviction of conspiracy to commit a Hobbs Act robbery is not a crime of violence. The Fourth Circuit decided that 18 U.S.C. §924(c)(3)(B) (the residual clause) is unconstitutional. "(T)he text and structure of §924(c)(3)(B) plainly sets forth a definition of 'crime of violence' that fails to comport with due process." *United States v. Simms,* 914 F.3d 229, 232 (4th Cir. 2019) (*en banc*). Likewise petitioner contends that any preceived lack of precision or clarity in the statute at hand concerning sentencing thereunder when there is no conviction

or sentencing for a crime of violence or a drug trafficking offense is likewise violative of due process. Although petitioner contends the statute is clear in stating that it is a sentence enhancement to a sentence for a violation of a crime of violence or a drug trafficking violation, petitioner contends at very least the statute is vague in that respect. Congress can revise the statute to clear any perceived ambiguity. As set forth in the concurring opinion of Justice Gorsuch in *Sessions v. Dimaya*, 584 U.S. __, __, 138 S.Ct. 1204, 1233, 200 L.Ed.2d 549, __(2018), the vagueness doctrine does not prevent the legislative body from acting in any matter it chooses but only requires that it do so with clarity. Until Congress so acts, this petitioner should not be a victim of any perceived vagueness.

United States v. Davis, 588 US ___, 139 U.S. Ct. 2319, 204 L.Ed.2d 757 (2019) determined that 18 U.S.C. §924(c)(3)(B) is unconstitutionally vague in that Congress has not "adopted a case-specific approach to defining crimes of violence" for purpose of this statute. *Davis*, 139 S.Ct. at 2336. *Davis* also notes that the problem can be addressed by Congress. The petitioner's convictions for conspiracy to commit robberies are not crimes of violence or drug trafficking crimes. In *Johnson v. United States,* 576 U.S. 591, 135 S.Ct. 2551, 192 L.Ed. 2d 569 (2015) this Court concluded that the Fifth Amendment's due process clause is violated by a criminal law which is vague. Further, *Johnson* held that the residual clause of the Armed Career Criminal Act is violative of due process. *See also, Welch v. United States*, 578 U.S., __, 136 S.Ct. 1257, 1262, 194 L.Ed.2d 387 (2016) in which this Court repeated that the residual clause of the Armed Career Criminal Act failed "because

applying [a 'serious potential risk'] standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense." *Welch* held that *Johnson* is retroactive to cases on collateral review.

The punishment for brandishing found in 18 U.S.C.§924(c)(1)(A)(ii) is not a freestanding statute but only an enhancement for the punishment provided for crimes of violence or drug trafficking crimes. Therefore, even though the Fourth Circuit has held that a Hobbs Act robbery is a crime of violence in *United States v. Benson,* 957 F.3d 218 (4th Cir. 2020), it is not relevant to this case for the reasons set forth above. *See also, United States v. Mathis,* 932 F.3d 242 (4th Cir. 2019). Another circuit has held that Hobbs Act robbery is not a crime of violence. *United States v. O'Connor,* 874 F.3d 1147 (10th Cir. 2017) held that even a Hobbs Act robbery is not categorically a crime of violence under the Career Offender Sentencing Guidelines enumerated offense clause. In *Bridges v. United States,* 901 F.3d 793 (7th Cir. 2021) the Seventh Circuit concluded that a Hobbs Act robbery is not a crime of violence under the sentencing guidelines. This case did not, however, arise under a §921(c) enhancement. *United States v. Eason*, 953 F.3d 1184 (11th Cir. 2020) also concluded that a Hobbs Act robbery cannot be a predicate for a career offender sentence enhancement. Also, the Fourth Circuit held in *United States v. McCollum*, 885 F.3d 300 (4th Cir. 2018) that a conspiracy to commit murder in aid of racketeering is not a crime of violence under the guidelines.

Moreover, the Fourth Circuit's *en banc* decision in *United States v. Chapman*, 666 F.3d 220 (4th Cir. 2012) (*en banc)* is relevant to the facts of this case. As noted

both in *Chapman* and in *United States v. Vann*, 660 F.3d 771, 774 (4th Cir. 2011)(*en banc*) when an indictment charges elements in the conjunctive (an example is an allegation of Hobbs Act robbery and Hobbs Act conspiracy as predicates) the defendant does not admit to both. "Indictments often allege conjunctive elements that are disjunctive in the corresponding statute, and this does not require either that the government prove all of the statutorily disjunctive elements or that a defendant admit to all of them when pleading guilty." *Vann*, 660 F.3d at 774. As stated in *Chapman,* "when a defendant pleads guilty to a formal charge in the indictment which alleges conjunctively the disjunctive components of a statute, the rule is that the defendant admits to the least serious of the disjunctive statutory conduct". *Chapman,* 666 F.3d at 227-28. Therefore the petitioner's plea must assume that his plea was to the Hobbs Act conspiracy conduct not the Hobbs Act robbery conduct and to possession of a firearm and not brandishing. The Fourth Circuit relying on *Simms*, in *United States v. Ali,* 991 F.3d 561, 572 (4th Cir. 2021) said that a conspiracy to commit a Hobbs Act robbery is not a crime of violence under 18 U.S.C.§924(c).

In the Sixth Circuit case of *United States v. Camp*, 903 F.3d 594 (6th Cir. 2018) defendant pled guilty, *inter alia,* to a Hobbs Act robbery and using a firearm in connection to the robbery. The defendant appealed aruing that Hobbs Act robbery is not a crime of violence and therefore cannot be a predicate for a §924(c) conviction, but the court held that a Hobbs Act robbery is a crime of violence and a predicate under §924(c). In *United States v. Rodriguez*, No. 18-1606, No. 18-1664 (3rd Cir.

May 1, 2019) the Third Circuit noted that under binding circuit precedent a Hobbs Act robbery "is a crime of violence under §924(c)(3)(A) *when coupled with a conviction under that statute*." (Emphasis added). The defendant therein had pled builty to a Hobbs Act robbery and to brandishing a firearm to further a crime of violence under 18 U.S.C. §924(c)(1). The defendant had sought to claim that a Hobbs Act robbery is not a crime of violence under that statute but to no avail.

In *McCarthy v. United States*, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969) the Court addressed the issue of the consequence for failure to follow Rule 11 mandate. *McCarthy* arose on a direct appeal involving the failure of the trial court to comply with Rule 11. The Court concluded

> that prejudice inheres in a failure to comply with Rule 11, for non-compliance deprives the defendant of the Rule's procedural safeguard, that are designed to facilitate a more accurate determination of the voluntariness of his plea. Our holding that a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew...

McCarthy at 471-472. In the case at bar, petitioner was not advised at his Rule 11 hearing that the brandishing sentence must be in addition to his sentence imposed for a crime of violence or a drug trafficking crime. The magistrate judge in his Rule 11 hearing advised him that the brandishing charge contained in Count Three was "in relation to and in furtherance of a crime of violence, specifically the Hobbs Act Robbery at the Kay Jewelers...Now, by operation of that statute, any sentence you receive on count three would be consecutive or additional to any other sentence you receive on these other counts. In other words, it carries a consecutive sentence." A9 This statement of the magistrate judge is incorrect. It is not consecutive to "any

other sentence you receive on these other counts"; it is, in fact, consecutive to a sentence that he would receive for a crime of violence or a drug trafficking crime. Since he was not convicted of nor did he receive a sentence for a crime of violence or a drug trafficking crime this statement of the magistrate judge was both incorrect and misleading. In *United States v. Boone*, 543 F.2d 1090 (4th Cir. 1976) the court held that when the "district court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11," the defendant's conviction must be reversed; and he must be allowed to withdraw his plea. *See also, United States v. Journet*, 544 F. 2d 633 (2nd Cir. 1976). Failure to properly and accurately advise the defendant of matters mandated by Rule 11 undermines the confidence in the plea itself which is the very purpose of Rule 11. A guilty plea in such circumstance is vacated.

REASONS FOR GRANTING THIS PETITION

Petitioner was convicted as a result of a plea to three counts of conspiracy to commit Hobbs Act robbery and to one count of brandishing a firearm during and in relation to and in furtherance of a crime of violence in violation of 18 U.S.C. §924(c)(1)(A)(ii). He was correctly and properly sentenced to the three conspiracies; however, since he was not convicted of nor sentenced to a crime of violence or a drug trafficking event he was improperly sentenced to an 84 month sentence to run consecutively to the sentences he received for the conspiracy counts. This is so for the reason that the brandishing statute which he pled guilty to is only a sentence enhancement penalty. In order for the trial court to sentence him under that

statute, there must be a conviction for a crime of violence or a drug trafficking case in which he brandished a firearm for there to be a sentence to enhance. Since he was not convicted of a drug trafficking offense or a crime of violence, he cannot be properly sentenced under 18 U.S.C. §924(c)(1)(A)(ii). Consequently, petitioner was improperly sentenced to 84 months without statutory authority in violation of the due process clause of the Fifth Amendment. At a very minimum he should be entitled to the benefit of the rule of lenity. The undersigned has been unable to find any case in which the defendant was sentenced under 18 U.S.C. §924(c)(1)(A)(ii) without having been convicted of and sentenced to at the same time a crime of violence or a drug trafficking offense. Therefore, the issue raised in this appeal appears to be a question of first impression. The indictment includes crimes of violence including Hobbs Act robberies, but these offenses were dismissed pursuant to the plea agreement. The conspiracies to commit Hobbs Act robberies which he did plead to are neither crimes of violence nor drug trafficking offenses. Importantly the improper advice given to petitioner at his Rule 11 hearing by the magistrate judge mandates a vacatur. It is clear that the government considered the appeal significant in that it sought and received three separate stays of the appeal subsequent to petitioner filing his brief and prior to filing its brief before the Fourth Circuit. Petitioner requested oral arguments before the Fourth Circuit, but the case was decided in an unpublished opinion without the benefit of oral arguments. Severe prejudice inheres to petitioner from the foregoing.

CONCLUSION

Based on the foregoing, petitioner respectfully requests his case be considered for a grant of a petition for certiorari to correct the errors of the Court of Appeals for the Fourth Circuit as set forth above.

Respectfully submitted,

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