

No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2017

DAVID BRILEY

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether the procedure and involvement by the government in showing the photo lineup to witness Sue Graff rendered the identification of Mr. Briley unduly suggestive and unreliable. Disclosure for the first time at trial by witness Graff that she viewed the store video with a government agent denied Mr. Briley his right to due process under *Brady v. Maryland*, 373 U.S. 83 (1963)?

II.

Whether the district court erred in failing to dismiss Count 2 or Count 4 each charging violations of 18 U.S.C. § 924(c), as multiplicitous and a violation of the Double Jeopardy Clause, and whether one of Mr. Briley's § 924(c) firearm counts should be vacated on either constitutional or statutory grounds?

III.

Whether the evidence produced by the government at trial was insufficient to sustain Mr. Briley's conspiracy, firearms and robbery convictions?

a. Whether the eyewitness identification by Sue Graff as being in New Buffalo, Michigan on April 21, 2014, was tainted, and even if considered did not place Mr. Briley at the scene at either Medawar or Tapper's, or as participant in a robbery conspiracy?

b. Whether the circumstantial evidence adduced by the government failed to show that Mr. Briley was involved in the crimes charged?

c. Whether the district court abused its discretion in denying Mr. Briley's motions for judgment of acquittal and for a new trial?

IV.

Whether Mr. Briley is entitled to relief on the issues on appeal of codefendant's that Petitioner Briley joined in the Sixth Circuit pursuant to F.R.A.P. Rule 28(i)?

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

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DAVID BRILEY,

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PETITION FOR WRIT OF CERTIORARI

Petitioner DAVID BRILEY, respectfully petitions that a Writ of Certiorari issue to review the judgment of the Sixth Circuit Court of Appeals.

OPINIONS AND ORDERS BELOW

The Sixth Circuit's opinion affirming the judgment of the U. S. District Court, is published at *United States v. Pembroke, et. al.*, 876 F.3d 812 (6th Cir, 2017). Rehearing *En Banc* was denied on January 22, 2018. This decision and other relevant orders of the district court are reproduced in the Appendix to this petition.

JURISDICTION OF THE SUPREME COURT

The U.S. Sixth Circuit Court of Appeals issued its published opinion on November 15, 2017. Pet. App. 1a-13a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution, Amendment V.

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 offence 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.

U.S. Constitution, Amendment IV.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 922(g)(1) of Title 18 of the United States Code

(g) It shall be unlawful for any person--

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

* * *

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Section 924(a)(1)(D)(2), (c)(1)(A) and (c)(1)(C), of Title 18 of the United States Code

18 U.S.C. 924(a)(1)(D)(2) sets forth the penalties for violation of 18 U.S.C. 922. 18 U.S.C. 924(c)(1)(A) provides for an enhanced punishment if a crime

of violence is committed by the use of a deadly or dangerous weapon. 18 U.S.C. 924(c)(1)(C), requires a mandatory consecutive sentence of not less than 25 years “In the case of a second or subsequent conviction under this subsection.”

Section 1951 of Title 18 of the United States Code

18 U.S.C. § 1951(b)(1), Interference with Commerce by Threats of Violence, provides in pertinent part:

(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 so to do, or 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.

(b) As used in this section--

* * *

(1) The term “robbery” means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

Section 2703(c)(1)(B), and 2703(d) of Title 18 of the United States Code

(c)Records concerning electronic communication service or remote computing service.--(1) A governmental entity may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications) only when the governmental entity—

* * *

(B) obtains a court order for such disclosure under subsection (d) of this section

* * *

(d) Requirements for court order.--A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. In the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State. A court issuing an

order pursuant to this section, on a motion made promptly by the service provider, may quash or modify such order, if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider.

STATEMENT OF THE CASE

Mr. Briley was charged in all counts of a five-count Second Superseding Indictment, along with codefendant's Nathaniel Pembroke, Shaheed Calhoun, and Orlando Johnson, in: Count 1, Interference With Commerce by Robbery; Aiding and Abetting, 18 U.S.C. §§ 1951(a), and 2; Count 2, Possession of a Firearm in Furtherance of a Crime of Violence; Aiding and Abetting, 18 U.S.C. §§ 924(c), and 2; Count 3, Conspiracy to Interfere With Commerce by Robbery, 18 U.S.C. § 1951(a); Count 4, Possession of a Firearm in Furtherance of a Crime of Violence; Aiding and Abetting, 18 U.S.C. §§ 924(c), and 2; and Count 5, Possession of a Firearm by a Felon; Aiding and Abetting, in violation of 18 U.S.C. §§ 922(g), and 2. The offenses occurred on April 22, 2014, in the Eastern District of Michigan and elsewhere.

All four defendants were found guilty by jury verdict on all five counts at a trial before U.S. District Judge Laurie J. Michelson, on December 18, 2015.

The Government's theory at trial was that the defendants in two vehicles, left Philadelphia, Pennsylvania, drove north to Milwaukee, Wisconsin, then south back through Chicago, Illinois, and ultimately to New Buffalo, Michigan, on April 21, 2014 where they stayed at a Comfort Inn overnight. The next day the group drove to the Grand Rapids, Michigan area where they attempted to rob the Paul Medawar Fine Jewelry Store ("Medawar") at approximately 12:30 p.m. in the afternoon. The attempted robbery at Medawar was unsuccessful, and they fled the scene after

Pembrook was shot in the arm by one of the store's owners. The group traveled across the state to West Bloomfield, Michigan, cased out and robbed a Tapper's Diamonds and Fine Jewelry store ("Tapper's"), at around 5:15 p.m. the same day, obtaining some 137 Rolex watches valued at nearly one million dollars. They then drove back to Philadelphia where they returned a rental vehicle and Pembrook obtained medical treatment for his gunshot wound.

The district court denied the defendant's mid-trial Rule 29 motions for judgment of acquittal in a deferred ruling on December 21, 2015. Renewed post-trial motions for judgment of acquittal or for a new trial were filed and joined in by all defendants. The district court denied these motions and a supplemental motion joined in by Mr. Briley.

Mr. Briley was sentenced on May 13, 2016, to 12 months in prison on counts 1, 3 & 5 to be served concurrently to each other but consecutive two counts 2 and 4. On count 2, 84 months consecutive to counts 1, 3, & 5 and Count 4 a term of 300 months be served consecutive two all other sentences, for a total sentence of 396 months. Concurrent 2 year terms of supervised release were imposed on each count. Petitioner appealed to the Sixth Circuit and in a published opinion dated November 15, 2017, *United States v. Pembrook, et. al.*, 876 F.3d 812 (6th Cir, 2017. Pet. App. 1a-13a. His convictions and sentences were affirmed. A petition for rehearing *en banc* was denied on January 22, 2018. Pet. App. 30a.

REASONS FOR GRANTING THE PETITION

Review should be granted because Mr. Briley's convictions were based on a faulty and unreliable eyewitness identification that was tainted by the government's suggestive photo lineup and involvement of an agent in reviewing videos with their key witness that was not disclosed to the defense prior to trial in violation of the government's obligations under *Brady v Maryland*.

The second superseding indictment was multiplicitous, contrary to the statute, and resulted in an improper second or subsequent 18 U.S.C. § 924(c) conviction that was not supported by a separate predicate offense and resulted in an additional 25 year consecutive sentence. This error was not cured by a special verdict because the jury had no authority to control the improper charge. Conspiracy to commit Hobbs Act Robbery under 18 U.S.C. § 1951, is not a crime of violence under § 924(c) in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). A similar issue is pending decision in this Court in the case of *Sessions v. Dimaya*, No. 15-1498, 137 S.Ct. 31 (2016).

Mr. Briley's convictions were based on the government's speculative circumstantial proofs, tainted identification evidence and were insufficient to support the jury verdicts.

The government's failure to obtain a warrant to obtain cell site data was contrary to the Stored Communications Act an issue argued by codefendants and in which Mr. Briley joined both in the district and circuit courts. A similar issue is pending before this Court in the case of *Timothy Ivory Carpenter v. United States*, No.

15-402, 137 S.Ct. 2211 (2017), a case that is ripe for decision this term, oral arguments having been heard on November 29, 2017. Mr. Briley's convictions were obtained in violation of his Fourth, Fifth and Sixth Amendment Constitutional rights and must be reversed and dismissed or a new trial granted.

I. The procedure and involvement by the government in showing the photo lineup to witness Sue Graff rendered the identification of Mr. Briley unduly suggestive and unreliable. Disclosure for the first time at trial by witness Graff that she viewed the store video with a government agent denied Mr. Briley his right to due process under Brady v. Maryland, 373 U.S. 83 (1963).

Despite many video cameras and numerous eyewitnesses at the two crime scenes none of the witnesses were able to identify Mr. Briley as one of the perpetrators. The government relied on the out of court identification of Mr. Briley the night before the robberies by a gas station clerk, Sue Graff, who interacted with him for about 20 seconds. She identified Briley in a photo lineup after viewing a security video some two months later, according to her trial testimony with someone from law enforcement. On appeal Petitioner Briley maintained that that Graff's identification was unreliable because: (1) she initially claimed the video was too "grainy" and she did not have her proper eyeglasses to view it; (2) she made no written statement, but just initialed her choice on the photo array (for Briley, number 4 of 6); (3) she told police her recollection was based on Briley's washed out skin and lips, "like Michael Jackson" but omitted Briley's "most remarkable feature, that Briley had a beard with no mustache"; (4) at trial, she identified the wrong person on the photo-array (number 1 instead of 4) until the prosecutor directed her to her initials by

Briley's photo (number 4), which changed her mind; and (5) the prosecutor did not ask her to identify Briley at trial, but relied solely on the photo lineup.

At trial Graff disclosed for the first time that she viewed the video with a police investigator. Briley submitted that this viewing influenced her tenuous and equivocal identification. So uncertain was Ms. Graff that she was not asked by the government to attempt to identify Briley in-person at trial. The Sixth Circuit decision stated:

“...the district court believed Detective DeBoode's testimony that police did not view the surveillance video with Graff, a finding of fact regarding witness credibility to which we owe great deference on appeal”

citing, *Pembroke*, 2015 WL 6328186 at *4. Pet. App. 5a

Since Graff did not reveal that she viewed the video with the police until trial Mr. Briley did not have that information prior to trial when he filed his motion to suppress the photo lineup. The district court decided Mr. Briley's motion without knowledge of this fact, and based its denial in large part on the fact that there was no government involvement in the process of Ms. Graff independently viewing the video and identifying Mr. Briley from a photograph. The district court in denying Petitioner's motion to suppress, concluded that there was no suggestiveness that could be attributed to the government and that Briley's motion to suppress was “not an argument that the “procedure itself” [that] rendered the lineup unduly suggestive...” Pet. App. 67a. With Ms. Graff's revelation at trial this conclusion would have erroneous, as was court's finding that it was not required to address the issue of reliability.

Five factors are considered when determining the reliability of a pretrial identification: 1) the opportunity of the witness to view the criminal at the time of the

crime; 2) the witness's degree of attention at the time of the observation; 3) the accuracy of the witness's prior description of the criminal; 4) the level of certainty of the witness when confronted by the criminal; and 5) the length of time between the crime and confrontation. *Manson v Brathwaite*, 432 U.S. at 98, 114 (1977); *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). Applying the five criteria to the instant case:

1) Ms. Graff had only about 20 seconds of conversation with the stranger she had never seen before and that she later identified as Mr. Briley;

2) She was working as a cashier and waiting on other customers at the time concentrating on her job and not any individual;

3) Her prior description was confined to the Calhoun's clothes, his "bomber jacket" and Briley's skin tone and not to any other obvious facial features;

4) Ms. Graff never identified Mr. Briley in person and chose photo #1 at trial as the person she saw in the store that night incorrectly identifying someone other than Mr. Briley's photo;

5) Ms. Graff identified the photograph some 2 full months after the event.

None of Ms. Graff's involvement on these factors suggest reliability for her identification of Mr. Briley and the district court ruling to the contrary adopted by the court of appeals was error. The identification was unduly suggestive and should have been suppressed. Moreover, the brief encounter implicates concerns related to cross-racial identification. See, e.g., *United States v. Smithers*, 212 F.3d 306, 313 (6th Cir. 2000).

a. Disclosure for the first time at trial by witness Graff that she viewed the store video with a government agent denied Mr. Briley his right to due process under *Brady v. Maryland*, 373 U.S. 83 (1963).

The Sixth Circuit opinion, Pet. App. 5a, stated:

As for Briley's Brady claim, the record contains no evidence that any government agent showed the surveillance video to Graff, much less coached her, and the government is not obliged to produce evidence that it does not have or that does not exist. See *United States v. Graham*, 484 F.3d 413, 417 (6th Cir. 2007) ("Brady clearly does not impose an affirmative duty upon the government to take action to discover information which it does not possess."); *United States v. Edwards*, 442 F.3d 258, 266 (5th Cir. 2006) ("The prosecution has no duty to turn over to the defense evidence that does not exist." (editorial marks omitted)); *United States v. Sukumolachan*, 610 F.2d 685, 687 (9th Cir. 1980) ("Brady [] does not require the government to create exculpatory material that does not exist." (citation omitted)).

The district court properly denied this motion.

Mr. Briley in his Rule 29 & 33 motions argued that the government violated its obligations under *Brady* when it failed to disclose that witness Sue Graff had reviewed the in-store video with a police officer/FBI agent, prior to reviewing the photo spread with Detective DeBoode, and failed to disclose the identity of that agent, citing the Fifth Amendment to the U.S. Constitution; the Supreme Court's holdings in *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), *United States v. Agurs*, 427 U.S. 97 (1976), *United States v. Bagley*, 473 U.S. 667 (1985), *Kyles v. Whitley*, 514 U.S. 419 (1995) and their progeny; and Federal Rule of Criminal Procedure 16. He argued that the government had a duty to disclose this information and the identity of the agent prior to trial for several reasons. First, the government through the testimony of Detective Deboode assured the court at the evidentiary hearing that the photo lineup process was fair, appropriate and conducted without any undue influence or suggestiveness. He indicated that Ms.

Graff had reviewed the video on her own, or with store personnel who were not involved in the investigation, when in fact she testified she did so with a government agent. Pet. App. 31a-41a.

The failure to disclose this government assisted viewing and the identity of the agent deprived defendants of access to a potential witness to Sue Graff's uncertainty and equivocation about identification as required by *Giglio*, and of information that would be useful in impeaching her as a witness. The government was obligated to make those disclosures in advance of the suppression hearing and most certainly prior to trial for the information to be useful under *Brady*.

Moreover, under *Kyles v. Whitley*, 514 U.S. 419, 442 n.134, 445-451 (1995), knowledge of exculpatory information by law enforcement (police, FBI, DEA, etc.) working with the government on a case is imputed to the government. Clearly, the law enforcement officer that reviewed the video with Sue Graff was working with the government. It was a joint federal and state task force that interviewed potential witnesses, at the Shell station when Sue Graff was identified as a possible witness. The video was given to the task force by the gas station management. Only the government and gas station management had access to the video after its evidentiary significance was identified.

The fact that the video was given to law enforcement prior to being viewed by Sue Graff was also not disclosed. It is also significant that no investigative report detailing this video viewing encounter was provided to the defense during discovery, thereby making it impossible for the defense to anticipate this issue. The bottom line

here is that the prosecution had an obligation to disclose and failed to comply with its obligation.

Mr. Briley was alleged to have been in the Shell station for a total of 3 minutes on the night of April 21, 2014. Ms. Graff had face to face interaction with the person she identified as Mr. Briley for only about 20 seconds as he purchased his items. She admitted she had no recollection of any customers the night before or after, and there was nothing remarkable or memorable about the night of April 21st. The identifiers that she referred to in addition to skin tone was that a codefendant wore a bomber jacket and it was warm that night.

The district court in denying Mr. Briley's Rule 29 and 33 motions, Pet. App. 49a, concluded that Ms. Graff's trial testimony about viewing the video with an agent was simply unclear,

“...Given the Government's representations, DeBoode's testimony, and Graff's own equivocation on the issue, it is anything but clear that Graff met with a government agent to watch the tape. Even if she did, there was no testimony or other evidence that the manner in which Graff reviewed the video influenced or impacted her identification of Briley in any way. Accordingly, there is no basis to find that the Government suppressed evidence with respect to Graff-much less that it was material, favorable to Briley, and might have resulted in a different outcome in the case.”

The district court's resolution of this issue ignores that fact that without any knowledge of the agent's name or involvement in the viewing of the video and photo lineup, Mr. Briley had no opportunity to develop these factual matters at the suppression motion or at trial, since Ms. Graff did not recall who the agent was or when the viewing took place, having left her notes at home. It is clear that this evidence at a minimum would have a tendency to provide information regarding the

fairness of the show up procedure, and impeachment of both Graff and Deboode, understanding that Graff was the prosecution's key witness against Mr. Briley providing the only direct testimony that placed him in the company of the other defendant's during the time of the conspiracy.

As such, the withheld information was clearly *Brady v. Maryland*, 373 U.S. 83 (1963), material. "suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87." Mr. Briley sustained his burden of showing that "the Government suppressed evidence, that such evidence was favorable to the defense, and that the suppressed evidence was material." *United States v. Smith*, 749 F.3d 465, 489 (6th Cir. 2014) (quoting *United States v. Graham*, 484 F.3d 413, 416 (6th Cir. 2007). The very fact that Ms. Graff viewed the video with a police agent present, was made aware that a crime was being investigated, and was aware that her identification of a potential suspect was critical to the case being investigated, would have provided material information for counsel to inquire further on the impact of these influences on her identification of Mr. Briley as a suspect. The defense would have called Ms. Graff as a witnesses at the suppression hearing and thoroughly examined her regarding these issues and the district court would have had this evidence to consider. It is not mere speculation but reasonable probable that the result of the suppression hearing and ultimately the trial would have been different.

II. The district court erred in failing to dismiss Count 2 or Count 4 each charging violations of 18 U.S.C. § 924(c), as multiplicitous and a violation of the Double Jeopardy Clause. One of Mr. Briley’s § 924(c) firearm counts should be vacated on either constitutional or statutory grounds.

The Sixth Circuit in its opinion Pet. App. 10a, stated:

Briley also argues that the counts are duplicative, quoting *United States v. Vichitvongsa*, 819 F.3d 260, 269 (6th Cir. 2016) (“the government must prove both a use, carry, or possession, *as well as* a qualifying crime”), and insists that the robbery and conspiracy offenses occurred simultaneously, were based on the same course of conduct, and were limited to only one actual act of brandishing.

To be sure, *Vichitvongsa* holds that “one affirmative firearm act (brandishing a handgun) [that] simultaneously commit[s] *two* predicate offenses (conspiring to commit Hobbs Act robbery and to traffic drugs), ... does not support two § 924(c) convictions,” because *Vichitvongsa* only used the gun once. *Id.* at 267. Thus, we acknowledged that “the imposition of separate consecutive sentences for multiple § 924(c) violations occurring during the same criminal episode [is] lawful,” *id.* at 269 (quotation marks omitted), ***830** but “the defendant must use, carry, or possess a firearm—even if it is the same [firearm]—more than once,” *id.* at 269, so the question is “whether the defendant made more than one choice to use, carry, or possess a firearm,” *id.* at 270. Briley is right about the law but wrong about the facts. As the district court explained repeatedly: the defendants used, carried, or possessed a firearm in (1) possessing and transporting for the purpose of the robberies (conspiracy); (2) robbing the Medawar store (here charged as part of the conspiracy); and (3) robbing the Tapper's store (robbery). Focusing on the

Medawar robbery as the basis for the conspiracy, the two crimes (Medawar-based conspiracy and Tapper's robbery) did not occur simultaneously, were not the same course of conduct, and were not limited to only one actual act of brandishing. These were two separate crimes.

Codefendant Calhoun filed a motion to dismiss count two or four of the indictment due to multiplicity, in which Mr. Briley joined. The motion was denied by written order. Pet. App. 78.

Calhoun argued that either count two or four should be dismissed as multiplicitous because it charged a single offense in two counts and violated their

rights against double jeopardy, citing *United States v. Ehle*, 640 F.3d 689, 694 (6th Cir. 2011), U.S. Const. Am. V, and *Jones v. Thomas*, 491 U.S. 376, 381 (1989). Pet. App. 73a-74a.

The two counts of possession of a firearm in furtherance of a crime of violence were charged for predicate crimes that were committed simultaneously Count 1, the robbery charge and Count 3, the conspiracy and were premised on the same conduct. The Tapper's robbery was charged separately in Count 1 and was also included along with the Medawar attempt as part of the conspiracy charged in Count 3. Consequently, "...The offenses are not based on separate and distinct conduct that could permit prosecution of multiple counts of §924(c). Rather, they are based on the same unit of prosecution." Pet. App. 75a.

Calhoun's motion stated that "the salient inquiry for the court in addressing this issue is whether the predicate offenses involved the same conduct," rather than the nature of the predicate offense, citing *United States v. Cureton*, 739 F3d 1032, 1043-45 (7th Cir. 2014) (holding a defendant could not receive multiple convictions for using a firearm in connection with a violent felony when predicate offenses had been committed simultaneously and without any distinction in conduct, although the predications contained different elements). Mr. Briley adopted these arguments on appeal. Pet. App. 15a-16a.

At the motion hearing the government acknowledged that the Medawar robbery was included in the conspiracy charge because it occurred in the Western District and his office did not have proper venue to charge it in the Eastern District

of Michigan. The AUSA insisted that the gun was used “more than once” in the conspiracy that included Medawar and later at Tapper’s and that the two distinct gun counts were warranted. He proposed that a special verdict form would cure any problem. After hearing argument by the respective parties, and analyzing and distinguishing the cases relied upon in the briefs submitted, the court denied the motion, Pet. App. 78a, adopting the argument by the government, that the defendants made two choices: first, to use the gun as they were planning the robberies of Tapper’s and Medawar; and second, to use the gun during the commission of the Tapper’s robbery.

The court did indicate that the potential merger of the counts could be revisited at sentencing. However, a special verdict form was utilized with the jury finding “conduct separate and distinct” in Count 4 from that charged in Count 1. Pet. App. 57a-58a. In the course of explaining its decision on the motion, the district court cited the cases of *United States v. Cole*, 526 F.App’x 638, 641, (6th Cir. 2013), as having “Never extended *Johnson* beyond its facts and has routinely distinguished *Johnson*”, and *United States v. Martin*, 516 F. App’x 433, 445 (6th Cir. 2013), distinguishing *Johnson* [*United States v. Johnson*, 25 F.3d 1335, 1338 (6th Cir. 1994) (en banc)], which held, “possession of one or more firearms in conjunction with predicate offenses involving simultaneous possession of different controlled substances should constitute only one offense under § 924(c)(1).”

This Sixth Circuit in *Vichitvongsa*, 810 F.3d at 267, stated:

“The rationale of *Johnson* applies to the instant case. *Johnson* took *one* affirmative firearm act (possessing guns) while simultaneously committing

two predicate offenses (possessing two controlled substances), and this was not enough to substantiate two § 924(c) convictions. Similarly, in each robbery, Vichitvongsa took *one* affirmative firearm act (brandishing a handgun) while simultaneously committing *two* predicate offenses (conspiring to commit Hobbs Act robbery and to traffic drugs), and this does not support *two* § 924(c) convictions. Stated differently, replace conspiracy to commit Hobbs Act robbery and conspiracy to traffic drugs with possession of cocaine and possession of Dilaudid, and we have *Johnson*.”

(emphasis in original)

Vichitvongsa was decided on statutory grounds, *Id.*, at 267, and did not address the *Blockburger v. United States*, 284 U.S. 299, 304 (1932), multiplicity test. Instead, the Court, citing and quoting freely from the case of *United States v. Rentz*, 777 F.3d 1105, 1109-14 (10th Cir. 2015), noted that the rule of lenity dictates that courts not default to the most severe interpretation of a statute, concluding that in order to sustain multiple § 924(c)(1) convictions, “the government must prove both a use, carry, or possession, as well as a qualifying crime.” *Vichitvongsa*, 810 F.3d at 269.

Here, Mr. Briley was convicted of two counts under § 924(c)(1) under circumstances where the two predicate offenses alleged by the government occurred simultaneously, were based on the same course of conduct, and where there was only one affirmative firearm act (brandishing). These proofs do not support two firearm convictions. Consequently, his conviction on one of the § 924(c)(1) counts should be vacated.

Mr. Briley is mindful that in *Vichitvongsa*, the charges of concern were two separate conspiracies, and the Court stated that it did not overrule cases that hold separate 924(c) charges may be brought for ongoing episodes where more than one crime is committed with a gun. See, *Id.*, at 269-70 citing, *United States v. Burnette*,

170 F.3d 567, 572 (6th Cir. 1999). See also, *United States v. Nabors*, 901 F.2d 1351, 1357-59 (6th Cir. 1990). What differentiates the instant matter from those cases is that Count 3 includes conspiracy conduct (Tapper's) that is the same conduct for which a 924(c) count was already charged. Despite the special verdict, there was no brandishing of a weapon incident to the Medawar conspiracy included in Count 3. The jury was instructed that the conspiracy was complete upon the agreement to commit the crime of armed robbery. There was no requirement that the substantive crime actually be completed nor was there any actual brandishing of a weapon incident to the conspiracy charge. If the rule of *Vichitvongsa*, is to be upheld, i.e., that, "the government must prove both a use, carry, or possession, as well as a qualifying crime," any actual use of a firearm took place at Medawar during the substantive offense, and the substantive robbery attempt of Medawar was not charged or decided by the jury at Mr. Briley's trial.

Charging the Medawar conspiracy along with the Tapper's robbery in Count 3, was a back-door attempt by the government to include an offense for which they admittedly had no proper venue. Clearly, the substantive robbery attempt and a 924(c) brandishing count could have been charged by the U.S. Attorney for the Western district of Michigan. Here it was not, and the government's efforts to extend its charging authority for the sole purpose of adding another 25 years of consecutive prison time on Mr. Briley and his codefendants should not be condoned by this Court. As was recently observed by the Supreme Court, in *McDonnell v. United States*, 579 U.S. ____; 136 S. Ct. 2355 (2016), "...we cannot construe a criminal statute on the

assumption that the Government will use it responsibly.” *Id.*, at 2375. The same holds here as it relates to the charging process. The rule of lenity should be applied and it was error for the court to default to the most severe interpretation of the 924(c) statute. *Vichitvongsa*, 810 F.3d at 269, quoting *Rentz*, 777 F.3d at 1113.

Mr. Briley’s convictions should be vacated either on the statutory grounds of *Vichitvongsa* and *Johnson*, or on the basis of multiplicity as a violation of the Double Jeopardy Clause.

III. The evidence produced by the government at trial was insufficient to sustain Mr. Briley’s conspiracy, firearms and robbery convictions.

a. The eyewitness identification by Sue Graff as being in New Buffalo, Michigan on April 21, 2014, was tainted, and even if considered did not place Mr. Briley at the scene at either Medawar or Tapper’s, or as participant in a robbery conspiracy.

b. The circumstantial evidence adduced by the government failed to show that Mr. Briley was involved in the crimes charged.

c. The district court abused its discretion in denying Mr. Briley’s motions for judgment of acquittal and for a new trial.

The Sixth Circuit decision Pet. App. 9a, acknowledged Mr. Briley’s insufficiency arguments but concluded that “six things” produced by the government, taken together, were sufficient to permit a rational juror to convict Briley:

(1) the #7819–phone was linked to Briley by calls to his family and friends, followed the robbery pattern, and had nine calls on the day of the robberies to the Calhoun and Johnson phones; (2) the jury saw the Tapper’s exterior video, in which Briley was recognizable getting out of the Passat, walking around, and returning to the black minivan (from which three masked robbers next emerged, wearing the same outfits as the Medawar robbers had worn); (3) the jury saw the surveillance video of the black minivan at the Medawar robbery and of both the Passat and minivan at the New Buffalo Comfort Inn the night before; (4) the jury saw the Shell station surveillance video with the “grainy” images, and heard testimony (from cashier Sue Graff) that identified Briley as one of the customers; (5) Briley’s cell phone seized by police contained a photograph of him wearing the same recognizable outfit as

in the Shell video and outside Tapper's; and (6) Pembroke called Briley from his hospital room the day after the robberies. This evidence is enough to support a juror's conclusion that Briley was one of the robbers, and Briley's arguments to the contrary do not undermine this conclusion in any meaningful way.

a. The eyewitness identification by Sue Graff as being in New Buffalo, Michigan on April 21, 2014, was tainted, and even if considered did not place Mr. Briley at the scene at either Medawar or Tapper's, or as a participant in a robbery conspiracy.

As is indicated in issue I, Ms. Graff revealed for the first time at trial that she viewed the in-store video with a government agent, and only after she was shown still photographs was she able to identify Mr. Briley because the film was grainy and she did not have proper eyeglasses. At trial she was not asked nor did she identify Mr. Briley. In fact she initially identified another individual as having been the person she identified in the photo lineup. Her testimony was confused and equivocal, and her memory lacking in detail. She thought that she was contacted about the video and identification a few days after April 21st, when it was actually over a month later, in early June. Her identification of the photograph took place more than 2 months after her brief 20 second encounter with the individual she identified as Mr. Briley. Her significant deficiencies on the five *Biggers*, factors for consideration in determining reliability render her out of court photographic identification of Mr. Briley was unreasonably suggestive, unreliable, fatally tainted and should have been suppressed. Because the government failed in establishing an untainted identification of Mr. Briley as one of the perpetrators, it failed to establish an essential element of the crimes beyond a reasonable doubt and his convictions must be vacated. "...the Due Process Clause protects the accused against conviction except

upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In Re Winship*, 397 U.S. 358, 364 (1970). This includes the identification of the defendant as the perpetrator of the crime.

b. The circumstantial evidence adduced by the government failed to show that Mr. Briley was involved in the crimes charged.

The government’s circumstantial evidence consisted of 1) a photograph from Mr. Briley’s cell phone that allegedly depicted him wearing plaid shirt similar to that worn by one of the perpetrators, at the Shell station on the night of April 21st and the next morning at the Comfort Inn; 2) Surveillance video that showed a person who “looked like” Mr. Briley near the Medawar and Tapper’s crime scenes, and 3) A cell phone number [(267) 506–7819], that was tracked to and from the crime scenes alleged to have been used by Mr. Briley before and around the time of the crimes, because calls were made from that number to people associated with him. Mr. Briley will address this evidence in turn.

1) The person identified by Ms. Graff wore a long plaid shirt that extended below his jacket. FBI Agent Brian Max confiscated Mr. Briley’s only verified cell phone, (267) 210-6615 when he was arrested and retrieved a photograph from it depicting what Agent Max believed was a shirt similar to that was worn by Mr. Briley, when identified by Sue Graff. There was nothing in the record or in the evidence produced at trial that supported the closing argument by the government that this was the “exact same shirt” that Mr. Briley wore on April 21, 2014 in New Buffalo, Michigan.

Detective Deboode admitted that he did not know if it was the same shirt depicted. He simply indicated it was his opinion that the person seen wearing the shirt on the evening of the 21st at the Shell station was the same person who left on the morning of the 22nd from the Comfort Inn, even though that person was not wearing the shirt the next morning. Deboode admitted he did not actually see that person get into the van with the others and leave. To credit this quality of evidence as anything more than mere speculation would be a disservice to the notion of due process.

2) The surveillance video from the Shell station in New Buffalo, from Medawar, and in the area of Orchard Lake Mall and Tapper's, at best was inconclusive. None of the images depicted could be identified with any certainty. The best the government could do was argue that they showed something that they clearly did not. The various law enforcement testimony interpreting the video footage, indicated that the person presumed to be Mr. Briley had a "similar build" or was wearing "similar clothes." "Similar" is simply not enough to sustain the government's trial burden of proof beyond a reasonable doubt. Moreover, despite the many video cameras and numerous eyewitnesses at the crime scenes none of the individuals were able to identify Mr. Briley as one of the perpetrators.

3) The government through Agent Max, and the testimony of Ron Witt, a T-Mobile employee, acknowledged that the cell phone with number 6615 never left the Philadelphia area and was used for both text messaging and voice calls at specific times on April 21 and 22, 2014, when the other targeted phones were traveling in

Michigan. In fact, on April 21 at 10:52 p.m. there was an incoming text message from 7918 to 6615, Mr. Briley's cell phone.

The only basis for attributing the 7819 number to Mr. Briley was that it reflected calls to his family members and a friend. There was no direct evidence that he ever owned the phone with the 7819 number, ever used that phone, or ever had it in his possession. There was no subscriber information associated with the phone nor was there any identifying information on the phone that indicated it belonged to Mr. Briley.

When he was arrested the only phone Mr. Briley possessed was his with number 6615. In an email to his daughter from prison introduced into evidence at trial by the government, Mr. Briley wrote her that the only phone number that he had was 6615. On the other hand, the government was not in any way able to connect the 7819 number to Mr. Briley other than by piling inference upon inference. The jury was required to conclude that because the 7819 phone contained a history of calls to people that Mr. Briley had some association with, that fact established that the phone belonged to him; that further, he possessed the phone in late April 2014; and while he possessed the phone he was involved in committing crimes in Michigan. This was impermissible. The only way for the jury to reach that conclusion is to violate the longstanding rule against "piling inference upon inference." *United States v. Sliwo*, 620 F.3d 630, 635 (6th Cir. 2010); *United States v. Swafford*, 512 F.3d 833, 843 (6th Cir. 2008). See also, *United States v. McDowell*, 498 F.3d 308 (5th Cir. 2007), (conviction set aside for aiding and abetting the use of the U.S. Mail to deliver obscene

material finding “a class example of the above-condemned “pil[ing] inference upon inference.”)

c. The district court abused its discretion in denying Mr. Briley’s motions for judgment of acquittal and for a new trial.

In denying Mr. Briley’s motion for judgment of acquittal and for a new trial, the district court ruled:

“...Here, the Government presented a photo lineup identification of Briley as one of the men who shopped at the Shell gas station on April 21, 2014. The man Graff identified as Briley was wearing a plaid shirt that was similar to the shirt Briley was wearing in the photo taken from his cell phone. Detective Deboode testified that the vehicles associated with the robberies left and returned to the Comfort Inn around that time. The jury was also shown the video of the Shell station customers and thus able to make their own assessment as to whether Briley was involved. The Government also presented still frame images from Orchard Lake Mall, showing a man who looked like Briley walking outside of the Tapper’s store shortly before the robberies and returning to the white Passat. And the phone number that the cell-site analysis connected to the other Defendants also made over 100 calls to Briley’s friend Steven Brown, five calls to Briley’s stepmother, and calls to Briley’s ex-wife; a jury could think the phone was Briley’s. This evidence, combined with the other evidence of the robberies as discussed above, was sufficient for a rational trier of fact to convict Briley.”

Pet. App. 46a

The district court’s rationale emphasized the three evidentiary items discussed above, the plaid shirt, the Graff identification, and the cell phone, and added that the jury saw the Shell station video and were able to “make their own assessment as to whether Briley was involved,” and that the person Graff identified was associated with the vehicles used by the robbers. First, as argued above, the Graff identification should have been suppressed, if not for being unduly suggestive and unreliable but also because the district court did not have the benefit of Ms. Graff’s testimony when ruling on Mr. Briley’s motion to suppress, to evaluate and determine if her decision

was unduly influenced by law enforcement who viewed the video with her. The video referenced by the court was that which Ms. Graff stated was too “grainy” to identify any of the individuals in it, and was later shown the large still photograph of Mr. Briley obtained from his driver’s license. It is unlikely that the same video of poor quality was decisive or particularly useful to the jury in arriving at their decision. The self-serving opinion evidence from law enforcement about the similarity of the shirt, the government’s inability to place Mr. Briley at either crime scene or its failed efforts to connect the cell number 7819 to Mr. Briley did not provide sufficient evidence for the jury to find guilt beyond a reasonable doubt. Not one of the individuals claimed to be the recipient of those many calls made from number 7819 testified on behalf of the government at trial that they received a call from him on the 7819 number.

Mr. Briley is mindful that a reviewing court may set aside the jury’s verdict on the ground of insufficient evidence only “if no rational trier of fact could have agreed with the jury.” *Cavazos v. Smith*, 132 S.Ct. 2, 4 (2011), citing, *Jackson v. Virginia*, 443 U.S. 307 (1979) and that circumstantial evidence standing alone can sustain a guilty verdict. *United States v. Parkes*, 668 F.3d 295, 302 (6th Cir. 2012).

Where, as here, the circumstantial evidence “amounts to only a reasonable speculation and not to sufficient evidence.” *Newman v. Metrish*, 543 F.3d 793, 796 (6th Cir. 2008) (citing cases), this Court must, draw the line, “between valid circumstantial evidence, and evidence which requires a leap of faith in order to support a conviction” *United States v. White*, 932 F.2d 588, 590 (6th Cir. 1991), and

must uphold its longstanding rule that “charges of conspiracy are not to be made out by piling inference upon inference.” *United States v. Sliwo*, 620 F.3d 630, 638 (6th Cir. 2010) quoting, *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943).

Mr. Briley maintains that his motion for a new trial should have been granted because no rational trier of fact could have found the elements of the crime beyond a reasonable doubt based on the forgoing evidence. *Jackson v. Virginia*, 443 U.S. at 319. Likewise, for the reasons outlined, the denial of Mr. Briley’s motion for judgment of acquittal was a clear and manifest abuse of discretion, even after giving the prosecution the benefit of all inferences that could reasonably be drawn from the testimony produced by the government. *Smith*, 749 F.3d at 477.

IV. Certiorari should be granted on issues on appeal of codefendant’s that Petitioner Briley joined in the Sixth Circuit pursuant to F.R.A.P. Rule 28(i).

In the circuit court Mr. Briley, pursuant to Federal Rule of Appellate Procedure 28(i), and adopted by reference and joined in the issues and legal arguments raised by his codefendants in their appellate briefs. Pet. App. 14a-16a.

Mr. Briley joined in the issues of his codefendant’s that argued Conspiracy to commit Hobbs Act Robbery under 18 U.S.C. § 1951, is not a crime of violence under § 924(c) in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). The Sixth Circuit rejected those arguments based on its decision in *United States v. Taylor*, 814 F.3d 340, 376-79 (6th Cir. 2016), which held that § 924(c)(3)(B) is not vague. The Sixth Circuit recognized that the codefendants sought to preserve this claim on the possibility that the case of *Sessions v. Dimaya*, No. 15-1498, 137 S.Ct. 31 (2016), pending in this Court on the question of whether 18 U.S.C. § 16(b) is

unconstitutionally vague per *Johnson*, will result in their favor. Pet. App. 11a. Mr. Briley likewise contends for purposes of this petition that since § 16(b) and § 924(c)(3)(B) are materially identical, if this Court decides that § 16(b) is vague in *Dimaya*, then § 924(c)(3)(B) other also be vague entitling him to resentencing.

The next group of issues joined by Mr. Briley in the circuit court related to the testimony of jailhouse snitch James Jenkins who was permitted to testify about a conversation with a codefendant in which the codefendant confessed to the crime and that implicated the other codefendants as also guilty. Mr. Briley was unable to cross-examine the codefendant, violating his right to confront his accusers violated and the failure of the government to provide impeachment evidence in violated *Brady* and *Giglio*. As stated by codefendant Calhoun, the district court erred by allowing admission of jail house snitch testimony against Calhoun and his co-defendants.

Mr. Briley also joined in the other codefendant's iteration of his own argument set forth above at Issue II above, essentially that the district court erred in denying Calhoun's motion for acquittal on count four because it alleged the same §924(c) offense charged in count two. Otherwise stated by codefendant Pembroke, the verdict form impermissibly required the jury to find him guilty of violating § 924(c) based on either duplicative proof for two 924(c) charges or for conduct solely outside of the district of his alleged crime. Pet. App. 16a.

Finally, Mr. Briley joined in his codefendant's issues related to the claim of district court error in denying codefendant Calhoun's motion to suppress historical cell site location information. Pet. App. 15a. The arguments included that the

government's collection of business records containing cell-site location information was a search under U.S. Const. amend. IV that required probable cause and the issuance of a search warrant before seizure. This issue implicates the Stored Communications Act, 18 U.S.C. § 2703 et seq., The substance of the arguments presented below jointly by the defendants in this matter are before this Court in the case of *Timothy Ivory Carpenter, v. United States*, No. 15-402, 137 S.Ct. 2211 (2017), currently pending decision after oral argument on November 29, 2017. Mr. Briley also joined in Mr. Calhoun's petition for rehearing and rehearing *en banc* on this issue that was denied by the circuit court on January 22, 2018. Pet. App. 17a-30a. Mr. Briley requests that this Court consider these joinder issues as fully adopted by him in this petition.

CONCLUSION

Petitioner David Briley, requests that this Court grant his petition for writ of certiorari, or alternatively, hold any action on his petition in abeyance pending decisions in the *Dimaya* and *Carpenter* cases for consideration of his petition.

Respectfully submitted,

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Dated: **April 12, 2018**

No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2017

DAVID BRILEY

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

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

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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