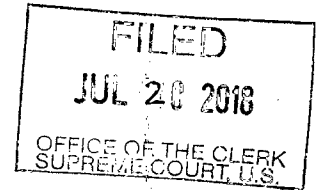


18-7340

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES



ERIC DILLION — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEAL/SEVENTH CIRCUIT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ERIC DILLION

16319-027

(Your Name)

U.S.P. McCreary

P.O. BOX 3000

(Address)

PINE KNOT, KY 42635

(City, State, Zip Code)

(Phone Number)

QUESTION PRESENTED

- (1). SINCE 18 U.S.C. § 924(j) IS A DISCRETE OFFENSE THAT DOES NOT CONTAIN A MANDATORY MINIMUM SENTENCE OR REQUIRE A CONSECUTIVE SENTENCE, DID THE SEVENTH CIRCUIT APPEALS COURT ERR WHEN IT SIDED WITH THE DISTRICT COURT THAT §924(j) REQUIRES A MINIMUM OF 10-YEAR CONSECUTIVE SENTENCE PURSUANT TO 18 U.S.C. § 924 (c)?
- (2). IN LIGHT OF THE TENTH CIRCUIT OVERRULING UNITED STATES V. BATTLE, DOES THIS IMPLY THE CIRCUITS THAT FOLLOWED THE BATTLE REASONING SHOULD RECONSIDER THEIR POSITION, NOW THAT THE TENTH CIRCUIT HAS ANNOUNCED IN MELGAR-CABRERAS THAT BATTLE WAS WRONGFULLY DECIDED?

LIST OF PARTIES

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

United States v. Eric Dillion. Reg.No 16319-027
Mr. Nathaniel L. Whalen,U.S. Attorney's Office.

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- 18 U.S.C § 924(J)
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OTHER

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Statutory provisions involved in this case consist of the following:

18 U.S.C. § 924(c)

18 U.S.C. § 924(j)

18 U.S.C. § 1951(a)

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

- ☒ reported at 720 Fed.Appx.310: United States v. Dillion,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

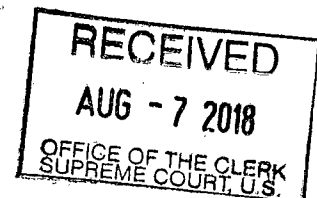
☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.



JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was April 23, 2018.

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

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

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

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

☐ For cases from **state courts**:

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

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

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

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

STATEMENT OF THE CASE

At 4:30 a.m. on January 20, 2016, Mr. Dillion entered a convenience store in Hammond, Indiana. (PSR at §5). He had a pistol drawn and told the clerk to empty the register. The Clerk complied, but Mr. Dillion thought the clerk pressed the alarm button. He shot the clerk and fled without the money.

A grand jury charged Dillion in a 3-count indictment. Count 1 charged robbery in violation of 18 U.S.C. § 1951(a); Count 2 charged him with using a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A); Count 3 charged 18 U.S.C. § 924(j) based on the commission of murder.

The Government dismissed the § 924(c) count at sentencing after Mr. Dillion pleaded guilty to an open plea. Dillion pled guilty to Counts 1 & 3. The PSR stated that the § 924(j)(1) conviction from Count 3 carried a 10-year mandatory minimum sentence which had to be run consecutive to any imprisonment for the robbery charge in Count 1.

The Seventh Circuit court of Appeals decided that the District Court were not wrong in how the Court applied the interpretation of § 924(j) in Dillion's case.

REASONS FOR GRANTING THE PETITION

This Court should Grant the Writ to give the Criminal Justice System, and defendants charged in various cases like the one at hand some sort of guidance as to how Congress meant for the § 924(j) statute to affect criminal defendants charged.

SUMMARY OF ARGUMENT

I. The Courts around the globe has been considering whether §924(j) incorporates the consecutive sentence rule that was scripted in the §924 (c) subsection of the §924 statute. The problem arises out of how congress intended for the §924 Statute subsections should apply; and whether subsection (c) affects subsection (j) for sentences purposes.

The problem that caused the uproar started with United States v. Battle, a Tenth Circuit case, and United States v. Allen, an eighth Circuit case that interpreted 924 (j) to be a sentencing provision, and not a discrete offense with its own elements that must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt. Majority of the Circuits has followed the ruling in Battle, to come to the conclusion as to how §924(j) applies to a crime of violence that is outlined in subsection (c) of the §924 statute.

How Congress intended for the statute to apply has been construed in various forms by Circuits in the United States , which has led to unfavorable results to criminal defendants who selected to go to trial on the accusation of murder, only to turn around and have the Sentencing Court, or Probation Department to consider the §924 (j) provision as a sentencing issue, and not facts that should be found by a jury.

This Court is being asked to render an holding that will give the court's guidance as to what Congress meant when it created subsection (c) and section (j), and whether or not Congress intended for the §924 (c) consecutive punishment applied to a total different section of the § 924 statute-(j). If this Court finds that the consecutive sentence section of (c) has no affect on (j), this Court also conclude whether Congress intended for §924 (j) to have a statutory-mandatory minimum sentence of ten-years; it will better serve the Department of Justice , Courts, and lawyers who represent criminal defendants to have clarity as to whether §924(j) is a distinctive offense.

The Seventh Circuit position in *USA v. Dillion* sends the signal that since the other circuits has concluded that §924 (j) should run consecutively, this automatically implies that Congress intended for subsection (c) to have an affect on (j). The Eleventh Circuit in *United States v. Julian* concluded that §924 (j) Statute can carry "any number of years . . . up to life . . . or death" and has its own sentencing scheme with its own elements. The problem with the Seventh Circuit, it has created a conflict within the Circuit as to whether §924 (j) can apply concurrently to a Hobbs Act robbery; in *United States v. Thomas*, 794 F.3d 705; 2015 U.S. App. LEXIS 12506. The defendant was charged with murdering the owner of a gun store, violating 18 U.S.C. §924-(C) and (J) and 1951. The district court sentenced Thomas to 240 months on Counts One and two, and a term of life on Count Three, and a term of 120 months on each Counts Five and Six shall be served consecutively to each other but concurrently with the prison term imposed on Count Three. Even with the §924(c) and (j), the District court ran Thomas' crime of violence in subsection (j) concurrent; years later, in the same Federal Building, the district court sentenced Dillion for §1951 Hobbs act, and 924 (j) consecutively to one another.

This Court should clarify, and provide a proper legal analysis that clearly outlines Congress's intent when it structured the §924 statute. A ruling on the §924 statutory provisions involved in this case, and various cases around the United States will clear up some of the confusions that has wasted judicial resources on this issue since *Battle* first went outside the clear intent Congress provided in enacting the §924 Statute.

ARGUMENT.

II. Since 18 U.S.C. § 924 (j) is a discrete offense that does not contain a mandatory minimum sentence or require a consecutive sentence, the Court of Appeals for the Seventh Circuit erred when it determined that § 924-(j) required a minimum of a Ten-year consecutive sentence pursuant to 18 U.S.C. § 924(c).

(A). Standard of Review

Statutory interpretation begins with a statute's plain language. see *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985). "Courts must presume that a legislative says in a statute what it means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)(Citations omitted). As a matter of long-standing Supreme Court precedent, when a statute's language is plain, "the sole function of the courts is to enforce it according to its term." see *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

If the meaning of a statute is unclear from the statutory language itself, a court may look beyond the express language employed. see *United States Fire Ins.Co. v. Banker car rental*, 132 F.3d 1153, 1157 (7 th Cir. 1997)(citation omitted). The Statute language and design as a whole may then provide guidance for determining the statute's meaning. See *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281,291 (1988). Courts must avoid interpreting a statute in a way that makes a word or phrase meaningless or redundant, See *Gustafson v. Alloyd Co., Inc* 513 U.S. 561,574-75(1995). *Kungys v. United States*, 485-U.S. 759,778 (1988).

Courts must also interpret statutes in a way that does not lead to absurd results. See *Sturges v. Crowninshield*, 17 U.S. 122,202-03 (1819) (Marshall, C.J.)(plain meaning of a provision should apply unless "the absurdity and injustice of applying the

provision of the case, would be so monstrous, that all mankind would without hesitation, unite in rejecting the application"); See *Treadway v. Gateway Chevrolet Oldsmobile, Inc.*; 362 F.3d 971, 976 (7th Cir. 2004). Even the Seventh circuit had explained in "A statute might be absurd because it's linguistically incoherent . . . [b]ut when a statute's language is clear, we won't correct the statute simply because it makes a bad substantive choice." *Jasklowski v. Daniels*, 427 F.3d 456, 462 (7th Cir. 2005) (also stating that: "The dearth of modern 'substantive absurdity' decision is readily understandable. Scholars as well as judges have recognized that a power to fix statutes substantively would give the Judicial Branch too much leeway to prefer its views about what makes for 'good' laws over those of Legislative Branch. See, e.g., John Manning, *The Absurdity Doctrine*, 116 Harv.L.Rev. 2387 (2003); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 Stan.L.Rev. 1833 (1998)").

(B). Analysis

After looking to §924(j)'s plain language, the district court said: " I don't think it is a foolish conclusion at all to say that it's not consecutive." (App.at 7). But rather than treating the plain language as dispositive and giving it affect like it should, the district court decided it should take a "pragmatic view of it and try to ascertain what Congress really had in mind when they passed the statute" (App.at.7). The district court then said there would be a "ridiculous result" if §924 (j) was not read to have a mandatory consecutive sentence, (App. at 7). The judge concluded that since a defendant who uses a firearm in a Hobbs Act

robbery is subject to a 5-year mandatory consecutive sentencing for using a gun, it would be "sensible" for a defendant who killed someone during a Hobbs Act robbery to have no mandatory minimum sentence under § 924 (j). (app.at 8). The judge's analysis was incorrect, thus, the Seventh Circuit erred when it misread congress' intent when it modeled the §924 (j) statute, the Panel conclusion was flawed as well, and only serves to consistently misapply the plain language of the statute.

Because the judge determined that §924(j)'s plain language could reasonable be read as having no mandatory minimum consecutive sentence, he should have ended his analysis there. Since the statute's language was plain, "the sole function of the court [was] to enforce it according to its terms." See **Caminetti, 242 U.S. at 485.** instead, the judge went further and tried to discern Congress's intent. Given that §924(j)'s meaning was clear from the statutory language itself, it was impermissible to look beyond §924 (j)'s express language. See **United States Fire Ins.co., 132 F.3d- at 1157.** the statute's language abd design as a whole could only be used for guidance in determining §924(j)'s meaning if the statute's express language was unclear. See **K mart Corp., 486 U.S. at 291.** Having found §924(j)'s express language was not unclear (App.at 7), the judge was prohibit from trying to ascertain Congressional intent or rely on it to reach a conclusion.

There are still other problems which make the judge's conclusion unsound: One problem is that construing §924 (j) to incorporate §924(c)'s mandatory minimum 10-year consecutive sentence reads §924(j)'s minimum punishment provision out-of-statute. Section §924(j)(1) authorizes a judge

to impose, on the low end of its statutory range, "any term of years. Id. since a § 924(j)(1) offense necessarily involves possession of a firearm through the incorporation of § 924(c)'s elements, there is no way to impose an "any term of years " sentence per § 924(j)(1) because a 5-year mandatory minimum sentence will always be required via § 924(c)(1)(A)(i). Similarly, if a defendant brandishes a firearm or discharges it, 7-year and 10-year mandatory minimums apply and, again, there is no way to impose "any term of years" via § 924(j)(1). So, construing § 924(j)(1) to incorporate § 924(c)(1)(A)(iii)'s 10-year mandatory minimum---like the District court did here---interprets § 924(j)(1) in a way that makes a phrase meaningless. that's impermissible. See *Gusta*, 513 U.S. at 574-75; *Kungys*, 485 U.S. at 778.

Another problem is that the judge wrongly found that there would be a "ridiculous result" if § 924(j)(1) was read to have no mandatory minimum consecutive sentence. (App. at 7-8). In the judge's view, because § 924(c)'s 5-year mandatory minimum consecutive sentence applies in a Hobbs Act robbery where a gun is used, there must be a mandatory consecutive sentence for § 924(j)(1) crime since § 924 (j)(1) punishes a defendant who cause a death while using a firearm to commit a crime of violence. (App. at 7-8). that is a criticism of the legislature's substantive choice about the respective penalties for § 924(c)(1)(A) and § 924(j)(1). That criticism may be fair; however, it does nothing to show that § 924(j)(1) is incoherent and needing a court to correct it. See *Jasklowski*, 427 F.3d at 462. Moreover, the criticism does not make the absence of a mandatory consecutive punishment in § 924(j)(1) an injustice 'so monstrous, that all mankind would, without hesitation, unite in rejecting the application". *sturges*, 17 U.S. at 202-03; *Jasklowski*, 427 F.3d at 462.

The lack of unhesitating, uniform rejection set as a benchmark in *Sturges* is evident from a case the district court cited, *United States v. Julian*, 633 F.3d 1250 (11th Cir. 2011). Julian said that § 924(c)'s mandatory consecutive sentence provision does not apply unless a defendant is convicted of a § 924(c) offense. 633 F.3d at 1253, citing § 924(c)-(1)(D)(ii). Insofar as there was a concern that the penalty for a § 924(j)-offense might be less punitive than § 924(c) because § 924 (j) has no mandatory consecutive provision, Julian explained that § 924 (j) is a death penalty eligible offense that can be charged in addition to a § 924(c) crime. 633 F.3d at 1256.

Julian was unpersuaded by the government's argument that imposition of sentences under both § 924(c) and § 924 (j) would violate the Fifth Amendment's Double Jeopardy Clause. *Id.* at 1256. Julian said that if Statutes authorizes cumulative punishment for the same offense, "a court may impose cumulative punishment without running afoul of the Double jeopardy Clause." *Id.*, quoting *United States v. Kaiser*, 893 F.3d 1300,1304 (11th Cir. 1990). Julian also noted the government indicted the defendant under § 924(j), § 924(c), and § 1951(a). *Id.* at 1252. The main point of section 924 (j) is to extend the death penalty to second degree murders that occur in the course of a violation of section § 924(c). *Id.* at 1256, citing Violent Crime Control and Law Enforcement Act of 1994, Pub.L.103322, § 60013. By treating the facts necessary to convict the defendant of § 924(j) as elements, the government understood that § 924 (j) was a distinct offense. *Id.* at 1255. All of this led the Eleventh Circuit to conclude that § 924(j) did not contain a mandatory minimum consecutive provision and that the district court erred by imposing one under § 924(j). *Id.* at 1257. therefore, Julian vacated and remanded for resentencing. *Id.*

III. NOW THAT THE TENTH CIRCUIT HAS OVERRULED BATTLE SHOULD DEFENDANTS WITH 924 (j) SENTENCES BE ALLOWED TO HAVE THE STATUTORY ELEMENTS OF THE § 924 (J) PROVISION DECIDED BY A JURY?

Standard of Review

The Supreme Court explained in *United States v. O'Brien*, ---U.S.--- 130 S.Ct. 2169,2174 (2010) that "[e]lements of a crime must be charged in an indictment and proved to a jury beyond a reasonable doubt . . . Sentencing factors, on the other hand, can be proved to a judge at sentencing judge at sentencing by a preponderance of the evidence." The O'Brien case surely informed charging decisions in subsequent cases.

Various Courts in the Federal System has followed the incorrect ruling in *Battle* that § 924 (j) is just a sentencing provision with an attachment to § 924 (c) consecutive punishment clause . Looking at the District Court's ruling in this case that it "was persuaded by the majority view" in regards to whether § 924 (j) requires a consecutive sentence; not only does Courts follow the incorrect interpretation of § 924 (j) based on *Battle*, but only recently the tenth Circuit acknowledged in *United States v. Melgar-Cabreras* (10 th Cir. 2018), that the ruling in *Julian* had persuaded the Court to consider whether *Battle* had been wrongfully decided . The Tenth Circuit acknowledged that *Battle* was decided on shaky grounds.

(A). Legal analysis.

The seventh Circuit has yet to decide how § 924 (j) applies in an publish opinion,in regards to whether its a "Sentencing Provision" or a discrete offense with its own elements that must be charged in the indictment,submitted to a jury,and proved beyond a reasonable doubt.This has

caused a problem within the Circuit, and Circuit's around the Globe. The problem with the Seventh Circuit is that it suffers from the same incorrect interpretation that was relied on by the Tenth Circuit in Battle.

The Department of Justice's view on the § 924 (j) issue is important since the DOJ is responsible for the federal government's law enforcement and administration of justice via the prosecutors who appear on behalf (such as the assistant U.S. Attorneys). Whereas the government argued back in 2001 to the Eighth Circuit and in 2002 to the Tenth Circuit that § 924(j) is a sentencing factor, in 2012 and 2014 the government conceded in the Third Circuit, and second Circuit that § 924 (j) is a discrete crime. So, the evolved view of the DOJ's prosecutors who argued the issue over the last decade-and-a-half is that § 924(j) can be separately charged and punished.

Silently, the Seventh Circuit has charged defendants with § 924(j) as being a discrete offense with its own elements that must be submitted to a jury and proven beyond a reasonable doubt. Earlier cases show that the Seventh Circuit has rejected the § 924(j) interpretation in a case that was argued on 28 U.S.C. § 2255 that § 924(j) should have been submitted to the jury. In U.S. v. Antonio Sherrod. Case No. 08-2013, there, Sherrod was charged with Count One carjacking under 2119(3); Count Two, Carrying and using a firearm in a crime of violence, § 924(c) and (j)(1); Count Three, possession of a firearm by a convicted felon.

Sherrod argued in his § 2255 that under Count two, the jury should have been instructed on the elements of § 924(j) and the elements that make up § 1111(a) federal first-degree murder statute. The Government argued that it operated under the felony Murder Doctrine where it was not required to prove the elements of § 924(j) even though the indictment clearly charged the § 924 (j) crime.

In Dillion's case, the prosecutors independently charged the § 924(j) crime, which was contrary to prior defenses the Government used in Sherrod's Motion for Post-conviction relief.

A ruling from this Court will clear up any mis-interpretation of what Congress meant when it enacted the § 924(j) statute. Did Congress mean for criminal defendants to be criminally charged with violating a statute that creates an aggravated punishment? Was it Congress's intent for the § 924(j) statute to have a mandatory-consecutive ten-year penalty?

The Seventh Circuit's opinion in Dillion's case suggests that, it was agreeing with the district court about Julian being the only case that believed that Congress meant for § 924(j) to be a discrete offense; and that § 924(j) had no ten-year mandatory minimum consecutive punishment that needed to be dictated by § 924 (c) consecutive punishment clause. The reasons why the Seventh Circuit sided with the District Court against Dillion is clear from the Opinion that since United states v. Berrios, 676 F.3d 118, 140-44 (3d Cir. 2012); United states v. Bran, 776 F.3d 276, 281-82(4th cir.2015); United States v. Dinwiddie, 618 F.3d 821, 837 (8th Cir. 2010); United States v. Battle, 289 F.3d 661, 665-69 (10 th Cir. 2002); since Julian 's weight was not greater than the vast amount of cases that held a contrary ruling in regards to how Congress meant for § 924)(j) to apply somehow Julian was wrongfully decided. Now with the Tenth Circuit agreeing that Julian's interpretation was right, the Seventh Circuit should be reversed, and in light of Melgar-Cabreras' overruling battle all circuits should be given an analysis to follow by this Court .

CONCLUSION

Respectfully, this Court is being asked to appoint counsel to fully litigate the claims raised in this brief. The issues outlined herein has been a constant problem for Judges, prosecutors, and lawyers to figure out. This Court is being asked to intervene and give everyone in the field of Criminal Justice guidance as to how the

the § 924 (j) statute is to be applied from a legal standpoint. Any relief this Court deems necessary will provide some sense of relief for criminal defendant who may have had their sentences ran consecutively based on a mis-interpretation of a statute like § 924(j).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT THIS BRIEF WAS SENT TO THE UNITED STATES SUPREME COURT ON JULY 20, 2018 , USING THE INMATE MAILBOX IN THE HOUSING UNIT OF 2-B AT UNITED STATES FEDERAL PENITENTIARY MC CREARY.

Respectfully submitted

/S/ ERIC DILLION

Eric Dillion 7/20/2018

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Eric Dillion.

Eric Dillion

Date: July 20, 2018.