

No. 18-8055

IN THE SUPREME COURT OF THE UNITED STATES

KEVIN VENTURA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that a jury instruction error was harmless in light of the jury's findings on other counts and the evidence as a whole.
2. Whether the statutory-minimum and consecutive sentencing provisions of 18 U.S.C. 924(c)(1)(A) and (D)(ii) apply when sentencing a defendant on the greater-included offense, set forth in 18 U.S.C. 924(j) (as amended), of causing death through the use of a firearm in the course of violating Section 924(c).

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OPINION BELOW

The order of the court of appeals (Pet. App. 1-5) is not published in the Federal Reporter.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 2018. A petition for rehearing was denied on November 14, 2018 (Pet. App. 6). The petition for a writ of certiorari was filed on February 12, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on three counts of using a firearm in connection with a crime of violence or drug trafficking crime and causing death to another, in violation of 18 U.S.C. 924(j) and 2; murder for hire, in violation of 18 U.S.C. 1958 and 2; and conspiracy to commit murder for hire, in violation of 18 U.S.C. 1958 and 2. Judgment 1. He was sentenced to life plus 45 years of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-5.

1. Petitioner ran the day-to-day operations of his father's marijuana distribution business in northern Manhattan. Gov't C.A. Br. 4. The business was highly profitable, and petitioner and his father guarded their territory from encroachment by competing drug dealers. Id. at 4-5.

In the spring of 1995, petitioner learned that another marijuana business was operating out of a 99-cent store in his territory and decided to burn down the store with the help of his friend Edwin Torrado. Gov't C.A. Br. 5. When petitioner and Torrado entered the store, Torrado thought the store clerk, Noel Montanez, was reaching for a gun, and Torrado shot him. Id. at 6. Petitioner then set fire to the store. Ibid. Montanez died from the gun shot. Ibid.

Petitioner and Torrado were arrested and, in their absence, petitioner's father turned to his nephew, Eugene Garrido, to manage the drug business. Gov't C.A. Br. 7. When the charges against petitioner were dismissed, however, Garrido refused to cede his position, and as a result, petitioner and his father decided to kill Garrido. Id. at 8. Petitioner recruited two brothers for the job, offering to pay them \$10,000. Ibid. Petitioner then showed them where Garrido lived, arranged for a rental car for transportation of the brothers to and from the murder, and provided a gun. Ibid. To give himself an alibi, petitioner arranged to be in the Dominican Republic on the day of the murder, but he called the hitmen from there to direct them as to the date and time to carry out the hit. Ibid. The two hitmen carried out the orders, shooting and killing Garrido and another man, Carlos Penzo, who attempted to intervene. Id. at 8-9. Petitioner's father's girlfriend paid the first cash installment for the murder and petitioner paid the rest. Id. at 9.

2. A federal grand jury charged petitioner with three counts of using a firearm in connection with a crime of violence or drug trafficking crime and causing the death of another (the murders of Montanez, Garrido, and Penzo), in violation of 18 U.S.C. 924(j) and 2; conspiracy to commit murder for hire, which resulted in the shooting deaths of Garrido and Penzo, in violation of 18 U.S.C. 1958; and murder for hire, which resulted in the shooting

deaths of Garrido and Penzo, in violation of 18 U.S.C. 1958 and 2. Gov't C.A. Br. 1-2.

As relevant here, the district court instructed the jury that, in order to find petitioner guilty on the Section 924(j) charges for the murders of Garrido and Penzo, the jury needed to find that, "in the course of using or carrying the firearm during and in relation to the predicate marijuana distribution conspiracy, or possessing it in furtherance of the predicate marijuana distribution conspiracy, [petitioner] caused the death of" Garrido and Penzo. C.A. App. 1638. The court further explained that, in order to find that petitioner had caused the death of the victims, the jury was required to determine that petitioner's conduct "was a substantial factor in causing the death and [the victims] would not have died except for [petitioner's] conduct." Id. at 1627, 1638. The district court next instructed the jury on the elements of the murder-for-hire counts and conspiracy to commit murder-for-hire counts, but it did not instruct the jury that the jury was required to determine whether "death resulted" from those offenses in order to return a guilty verdict on those counts. Id. at 1642-1649; Pet. App. 4. Petitioner did not object to that omission in the charge. Pet. App. 4. The jury found petitioner guilty on all counts. Ibid.

3. a. The current version of the base statute underlying petitioner's three convictions for using a firearm in connection with a crime of violence or drug trafficking crime and resulting

in death, Section 924(c) of Title 18 of the United States Code, provides that "any person who, during and in relation to any crime of violence or drug trafficking crime * * * 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," receive a sentence of "not less than 5 years." 18 U.S.C. 924(c)(1)(A)(i). Section 924 sets forth higher statutory-minimum sentences in a number of circumstances, including if the firearm was brandished (seven years) or discharged (ten years). 18 U.S.C. 924(c)(1)(A)(ii) and (iii); see also 18 U.S.C. 924(c)(1)(B)(i), (ii), and (C). Because the statute specifies no maximum sentence, it authorizes a sentence up to life imprisonment. See Alleyne v. United States, 570 U.S. 99, 117 (2013); United States v. Dorsey, 677 F.3d 944, 956-957 (9th Cir. 2012) (collecting cases), cert. denied, 570 U.S. 919 (2013).¹

Section 924(c)'s "basic purpose" is to combat the "dangerous combination of drugs and guns" by "seek[ing] to persuade the man who is tempted to commit a Federal felony to leave his gun at home." Muscarello v. United States, 524 U.S. 125, 132 (1998) (citations and internal quotation marks omitted). It accomplishes

¹ At the time of petitioner's offenses in 1995 and 1996, Section 924(c) did not include the "possession" prong, and imposed a mandatory consecutive sentence of five years of imprisonment for a first conviction and a 20-year sentence for a second or subsequent conviction. 18 U.S.C. 924(c) (1994); see Abbott v. United States, 562 U.S. 8, 16-18 (2010) (comparing earlier and current versions of the statute).

that objective by requiring that the penalties for possession or use of a firearm in connection with specified offenses be consecutive to any other penalties imposed on the offender. See Abbott v. United States, 562 U.S. 8, 12 (2010); see also 18 U.S.C. 924(c) (1) (A) (providing that the penalty for a violation of Section 924(c) shall be "in addition to" the punishment provided for the "crime of violence or drug trafficking crime"). Section 924(c) provides that "no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person." 18 U.S.C. 924(c) (1) (D) (ii). Section 924(c) therefore displaces the ordinary discretion of a district court to impose sentences either consecutively or concurrently. See 18 U.S.C. 3584(a) ("Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively."); see also Setser v. United States, 566 U.S. 231, 234 (2012).

Section 924(j) sets forth an aggravated version of the Section 924(c) offense, providing that, if the defendant, "in the course of a violation of subsection (c), causes the death of a person through the use of a firearm," he shall be punished as follows:

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

18 U.S.C. 924(j).² To be convicted under Section 924(j), therefore, a person's conduct must meet both the elements of the Section 924(c) core offense as well as the elements of either murder or manslaughter as defined under federal law.

b. Following the verdict in this case but before sentencing, the district court issued an order asking the government to "address whether there was any requirement to pose an interrogatory to the jury in connection with the two 18 U.S.C. § 1958 counts as to whether 'death result[ed]' from the offenses in order to trigger the mandatory minimum sentence of life." D. Ct. Doc. 335, at 1 (Aug. 3, 2015) (brackets in original). The government responded that, under the circumstances of this case, the court had not been required to give that instruction, because the "death results" requirement had been charged in the indictment, and the jury's findings on the Section 924(j) counts as to the deaths of Garrido and Penzo necessarily demonstrated that the jury also found that death resulted from petitioner's murder-for-hire conduct. D. Ct. Doc. 336, at 3-4 (Aug. 3, 2015). Petitioner argued, however, that the Sixth Amendment precluded a "death resulted" sentence in the absence of a specific instruction on that issue in the context of the murder-for-hire counts. D. Ct. Doc. 337, at 2 (Aug. 4, 2015). Petitioner also argued that the requirements for statutory-minimum and consecutive sentences under

² At the time of petitioner's offenses, Section 924(j) was codified as Section 924(i).

Section 924(c) did not apply to Section 924(j). D. Ct. Doc. 256, at 1-3 (Oct. 9, 2014).

At sentencing, the district court found the government's position that a statutory life sentence applied to the murder-for-hire counts to be correct. C.A. App. 1731-1733. The court also determined that a consecutive 45-year term of imprisonment was required for the three Section 924(j) counts. Id. at 1733-1735. Accordingly, the court sentenced petitioner to two concurrent terms of life imprisonment on the murder-for-hire counts, to be followed by a total of 45 years on the three Section 924(j) counts. Id. at 1740-1741. Although the court noted its general dissatisfaction with statutory mandatory sentences that "effectively take away a Court's discretion to impose a sentence * * * which is sufficient but no greater than necessary to comply with the sentencing factors set out in [18 U.S.C. 3553(a)]," id. at 1736, the court explained that "there's nothing that [the court] said which the parties should take away from as indicating what [the court's] decision would be" if it had sentenced petitioner solely under the Section 3553(a) factors. Id. at 1740.

4. The court of appeals affirmed in a non-precedential summary order. Pet. App. 1-5. The court rejected petitioner's argument that the penalty provisions in Section 924(c), including the consecutive-punishment provision, do not apply to Section 924(j) convictions. Id. at 3. And although the court concluded that the district court had erred by failing to instruct the jury

to determine whether "'death resulted' within the context of the murder for hire counts" -- and assumed that petitioner had adequately preserved that error in contesting his sentence, even though he had not challenged the jury instructions -- the court of appeals determined that the error was harmless. Id. at 4. The court explained that "the evidence was overwhelming that the deaths did result from [petitioner's] murder for hire conduct," and the jury found petitioner guilty of causing the death of the same two victims through the use of a firearm in its verdict on the Section 924(j) counts. Id. at 4-5. The court noted that petitioner's defense had been that "he was not involved in any plot against his cousin at all," which the jury rejected "wholesale." Id. at 5.

ARGUMENT

Petitioner contends (Pet. 9-14) that his mandatory life sentences on the two murder-for-hire counts were unlawful because the jury did not specifically find that "death resulted" from his conduct. But the court of appeals correctly determined that such error was harmless, and its factbound determination does not warrant this Court's review. Petitioner additionally contends (Pet. 15-19) that this Court should resolve a conflict among the courts of appeals over whether Section 924(j) incorporates the enhanced penalty provisions in Section 924(c). The narrow conflict that petitioner identifies has little practical importance and likewise does not warrant this Court's review. Moreover, this case would be an unsuitable vehicle to address that question,

because the two terms of life imprisonment for petitioner's other convictions would eliminate any possibility of a practical benefit for him from a lower, or concurrent, sentence on his Section 924(j) convictions.

1. The court of appeals correctly denied relief on petitioner's claim of instruction-related error.

A violation of Section 1958 is subject to a maximum sentence of ten years' imprisonment unless personal injury results, in which case the maximum sentence is 20 years' imprisonment, or unless death results, in which case the maximum sentence is death or life imprisonment. 18 U.S.C. 1958(a). Here, the district court did not submit to the jury the question whether death resulted from petitioner's Section 1958 violations. Although petitioner did not object to those instructions, the court of appeals assumed, without deciding, that petitioner had preserved a claim that his Sixth Amendment rights had been violated by the absence of a jury finding on a penalty-enhancing fact. Pet. App. 4.

The court of appeals correctly determined, however, that the instruction's omission was harmless. As the court explained, overwhelming evidence established that "death resulted" from petitioner's murder-for-hire conduct. Pet. App. 4. Furthermore, the jury's finding that petitioner caused the murder of the same two victims in the course of using or carrying the firearms necessarily established that a jury would similarly find that "death resulted" from petitioner's murder-for-hire scheme. See

id. at 4-5. Petitioner's factbound -- and unsupported -- claim that the jury might have concluded that the deaths of the two victims did not necessarily result from his telephone call instructing the hitmen to carry out the murder that he had commissioned and planned does not merit this Court's review.

And this case is an unsuitable candidate even for review of that factbound question of harmlessness, because the court of appeals only presumed, but did not decide, that petitioner's instruction-related claim was subject to the harmless-error review appropriate for preserved claims, notwithstanding the absence of an objection when the instructions were given.

2. Petitioner separately contends (Pet. 15-19) that this Court's review is warranted to resolve a conflict over whether petitioner's convictions for the aggravated firearm-homicide offense under Section 924(j) are subject to mandatory sentences under Section 924(c)(1)(A) and (D)(ii) that must be consecutive to the sentences on his other counts of conviction. The court of appeals correctly found that the statute required mandatory and consecutive sentencing in this case. This Court has denied petitions for a writ of certiorari that asserted the same circuit conflict. See Bran v. United States, 136 S. Ct. 792 (2016) (No. 15-5096); Berrios v. United States, 568 U.S. 1143 (2013) (No. 12-381). The same result is warranted here.

a. The court of appeals correctly determined that a sentence on a conviction for causing death through the use of a

firearm under Section 924(j) must incorporate Section 924(c)'s penalty provisions and run consecutively to any other sentence imposed.

Section 924(j) sets forth an aggravated version of the offense established under Section 924(c).³ As relevant here, Section 924(j)(1) provides that "[a] person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall * * * if the killing is a murder * * * be punished by death or by imprisonment for any term of years or for life." 18 U.S.C. 924(j)(1). In order to obtain a conviction under Section 924(j)(1), the government must prove both that a defendant's conduct satisfied the elements listed in Section 924(c) and that the defendant murdered a person in the course of the Section 924(c) violation. The most natural reading of the mandatory- and consecutive-sentence mandate in Section 924(c) is therefore that a sentence for violation of the aggravated offense is "imposed on a person under" both Section 924(c) and Section 924(j), because those provisions work together to identify the elements necessary for imposition of the sentence. 18 U.S.C. 924(c)(1)(D)(ii); see United States v. Berrios, 676 F.3d 118, 143 (3d Cir. 2012), cert. denied, 568 U.S. 1143 (2013).

³ Petitioner's arguments are based on the current version of Section 924(c). Because the differences between the two versions are not relevant to the question presented, this brief likewise addresses the current version.

Contrary to petitioner's contention (Pet. 16-19), the phrase "any term of imprisonment" in Section 924(j)'s penalty provisions is most sensibly construed to apply to "any term of imprisonment" between the applicable minimum term as provided in Section 924(c) and life imprisonment. 18 U.S.C. 924(c) (1) (D) (ii).

Petitioner's reading of Section 924 would create an anomaly, under which the lesser-included offenses set forth in Section 924(c) would subject the offender to a mandatory consecutive sentence, but proof of the aggravated homicide-related offense under Section 924(j) would not. A person who is found guilty of Section 924(j) (1) has necessarily committed murder (as defined by federal law) and has violated Section 924(c). Permitting district courts to sentence violators of Section 924(j) concurrent with other terms of imprisonment, including the underlying crime of violence or drug trafficking crime, would defeat Section 924(c) and 924(j)'s "primary objective" of imposing enhanced punishments on offenders who commit other crimes while using a firearm. Abbott v. United States, 562 U.S. 8, 20 (2010); see Muscarello v. United States, 524 U.S. 125, 132 (1998); see also United States v. Bran, 776 F.3d 276, 281-282 (4th Cir. 2015), cert. denied, 136 S. Ct. 792 (2016); Berrios, 676 F.3d at 141; United States v. Battle, 289 F.3d 661, 668 (10th Cir.), cert. denied, 537 U.S. 856 (2002), overruled on other grounds by United States v. Melgar-Cabrera, 892 F.3d 1053, 1060 (10th Cir.), cert. denied, 139 S. Ct. 494 (2018); United States v. Allen, 247 F.3d 741, 769 (8th Cir. 2001),

vacated on other grounds, 536 U.S. 953 (2002), cert. denied, 539 U.S. 916 (2003).

The court of appeals' decision in this case is consistent with five other circuits that have held that a Section 924(j) sentence must run consecutively to any other sentence imposed. See Bran, 776 F.3d at 280-282 (4th Cir.); Berrios, 676 F.3d at 140-144 (3d Cir.); United States v. Dinwiddie, 618 F.3d 821, 837 (8th Cir. 2010), cert. denied, 562 U.S. 1248 and 562 U.S. 1263 (2011); Battle, 289 F.3d at 667-669 (10th Cir.); United States v. Staggs, No. 97-10282, 1998 WL 447943, at *3 (9th Cir. July 10, 1998). The First Circuit has suggested that it would adopt that view as well. See United States v. García-Ortiz, 657 F.3d 25, 31 (2011) (concluding that the consecutive-sentence mandate "arguably applies to section 924(j)," citing Dinwiddie and Battle, and remanding the case for resentencing), cert. denied, 565 U.S. 1171 (2012). Only the Eleventh Circuit has adopted petitioner's interpretation of Section 924(j). See United States v. Julian, 633 F.3d 1250, 1252-1257 (2011).⁴

That narrow conflict has limited practical importance and does not warrant this Court's review. Because Section 924(c) is a lesser-included offense of the aggravated offense set forth in

⁴ Petitioner cites (Pet. 16-17) United States v. Galan, 436 Fed. Appx. 467 (6th Cir. 2011), as support for his position, but the question whether Section 924(j) incorporates the mandatory consecutive sentencing provisions of Section 924(c) was not presented in that case.

Section 924(j)(1), any defendant guilty of the latter is also guilty of the former. The only difference between the maximum punishments available under the two provisions is that Section 924(j)(1) authorizes the death penalty. Section 924(c) and the aggravated offense of Section 924(j)(1) otherwise authorize the same maximum punishment: life imprisonment. Accordingly, even if Section 924(j) did not require statutory minimum terms and consecutive sentencing, a defendant could nonetheless be subject to a consecutive sentence up to life imprisonment if the government were to charge the defendant with both Section 924(c) and Section 924(j). In non-capital cases, the government could ultimately seek punishment under only Section 924(c), which indisputably imposes mandatory minimum sentences and a consecutive-sentence mandate.⁵ District court judges also retain discretion under 18 U.S.C. 3584 to impose consecutive sentences for Section 924(j) violations. And the gun-committed homicides covered by Section 924(j) are unlikely to result in leniency under any circuit's rule.

Review is not warranted in this case, in particular, because petitioner would be unlikely to gain from a favorable ruling. Petitioner was sentenced to two terms of life imprisonment on his other, murder-for-hire convictions. Even if this Court were to

⁵ Although the Eleventh Circuit has suggested that punishment could conceivably be imposed on a defendant under both Section 924(c) and Section 924(j) for the same conduct, Julian, 633 F.3d at 1256, the government has concluded that Congress did not intend that result. The government will therefore not seek to "double stack" Section 924(c) and Section 924(j) sentences for the same conduct on top of other sentences.

adopt petitioner's interpretation of Section 924(c), vacate his consecutive 45-year term on the Section 924(j) convictions, and remand for resentencing, petitioner would still be required to serve a sentence of life imprisonment so long as those other convictions remain in force.⁶

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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⁶ Contrary to petitioner's suggestion (Pet. 19), even if this Court were to grant certiorari on the first question presented and vacate petitioner's life sentences on the murder-for-hire convictions, nothing in the record suggests that the district court would resentence petitioner to a term less than life imprisonment for causing the murders of the three victims.