No. 20-5355

IN THE SUPREME COURT OF THE UNITED STATES

EDDIE DAVID COX, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court violated the Double Jeopardy Clause by resentencing petitioner on all of the remaining counts of conviction underlying his original sentencing package -- including counts for which he had already served the term of imprisonment specified in the initial sentencing order -- after petitioner's successful efforts to vacate sentence enhancements on two of the remaining counts.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (C.D. Ill.):

Cox v. Smith, No. 08-cv-1266 (June 23, 2009) (order dismissing petition under 28 U.S.C. 2241)

Cox v. Krueger, No. 17-cv-1099 (Oct. 19, 2017) (order granting petition under Section 2241)

United States District Court (W.D. Mo.):

United States v. Cox, No. 89-cr-196 (Mar. 5, 1990) (original judgment)

Cox v. United States, No. 94-cv-993 (Nov. 6, 1996) (order granting in part motion under 28 U.S.C. 2255)

Cox v. United States, No. 94-cv-993 (Apr. 3, 2012) (order denying motion for relief under Federal Rule of Civil Procedure 59(e))

Cox v. United States, No. 16-cv-666 (Nov. 4, 2016) (order dismissing second or successive Section 2255 motion)

United States v. Cox, No. 89-cn-196 (Mar. 8, 2018) (judgment following resentencing)

United States Court of Appeals (7th Cir.):

Cox v. Smith, No. 09-3676 (June 11, 2010) (dismissing appeal from dismissal of Section 2241 petition)

United States Court of Appeals (8th Cir.):

United States v. Cox, No. 90-1386 (Oct. 4, 1991) (direct appeal)

Cox v. United States, Nos. 98-2145 and 98-2146 (Apr. 5, 2000) (affirming partial grant of Section 2255 relief and denial of Section 3582(c)(2) relief)

Cox v. United States, No. 12-1939 (May 21, 2012) (affirming order denying Rule 59(e) motion)

Cox v. United States, No. 13-1845 (Apr. 26, 2013) (denying certificate of appealability)

Cox v. United States, No. 16-2029 (Oct. 6, 2016) (denying authorization to file second or successive Section 2255 motion)

United States v. Cox, No. 18-1630 (Mar. 25, 2019) (affirming judgment following resentencing)

United States v. Cox, No. 18-1630 (Mar. 6, 2020) (affirming judgment following remand)

Supreme Court of the United States:

Cox v. United States, No. 91-6890 (Mar. 9, 1992) (direct appeal)

Cox v. United States, No. 10-6852 (Nov. 8, 2010) (denying petition for writ of certiorari from Nos. 98-2145 and 98-2146 (8th Cir.))

Cox v. United States, No. 19-5027 (Oct. 15, 2019) (granting, vacating, and remanding in light of Rehaif v. United States, 139 S. Ct. 2191 (June 21, 2019))

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 2-9, 11-13) are not published in the Federal Reporter but are reprinted at 766 Fed. Appx. 423 and 796 Fed. Appx. 322.[1]

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2020. The petition for a writ of certiorari was filed on August

[1] The appendix to the petition for a writ of certiorari is not consecutively paginated. This brief refers to the pages as if they were consecutively paginated, with the appendix cover page as page 1.

3, 2020. 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 Western District of Missouri, petitioner was convicted on twelve counts, including conspiracy to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) (1988) and 21 U.S.C. 846 (Count 1); possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) (1988) (Count 3); and two counts of possession of a firearm after a prior felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1) (Counts 5 and 8). 3/5/90 Judgment 1-1A. Petitioner was sentenced to concurrent terms of life imprisonment on Counts 1, 5, and 8, and shorter concurrent terms of imprisonment on each remaining count. Id. at 2-2A. The court of appeals reversed petitioner's conviction on Count 1 and otherwise affirmed, 942 F.2d 1282, and this Court denied a petition for a writ of certiorari, 503 U.S. 921.

After many unsuccessful attempts to challenge his convictions and sentence -- and one successful motion under 28 U.S.C. 2255 that resulted in a reduced sentence on Count 3 -- petitioner filed a successful habeas petition under 28 U.S.C. 2241 in the United States District Court for the Central District of Illinois. See Pet. App. 3. That court vacated petitioner's sentences on Counts 5 and 8 and ordered that petitioner be transferred to the Western District of Missouri for resentencing. Ibid. There, the district

court resentenced petitioner to an aggregate term of 966 months of imprisonment, to be followed by three years of supervised release. Ibid.; 3/8/18 Judgment 2-3. The court of appeals affirmed. Pet. App. 2-9. After this Court vacated the panel decision and remanded for further consideration in light of Rehaif v. United States, 139 S. Ct. 2191 (2019), see 140 S. Ct. 396, the court of appeals affirmed once more and reinstated its vacated opinion, Pet. App. 11-13.

1. Six different times during the summer of 1989, petitioner impersonated a law-enforcement agent while in possession of a firearm, typically while engaged in drug-related activity. Presentence Investigation Report (PSR) ¶ 7. During a traffic stop, he told police officers that he was an undercover officer in the Department of Justice, and officers later found a gun under the front seat. PSR ¶ 8. He twice robbed a drug dealer in his home, stealing money, firearms, and approximately 70 grams of cocaine, all under the pretense that he was an agent with the Federal Bureau of Investigation. PSR ¶¶ 9-10, 12. He returned to the drug dealer's home twice more, each time pretending to investigate narcotics trafficking and threatening the occupants. PSR ¶¶ 13-16. And he later posed as an agent with the Drug Enforcement Administration when he asked someone in a parking lot where he could find people dealing drugs. PSR ¶ 17.

In November 1989, a grand jury in the Western District of Missouri returned a 12-count indictment charging petitioner with

conspiring to distribute and to possess with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) (1988) and 21 U.S.C. 846 (Count 1); two counts of impersonating an officer or employee of the United States and acting as such, in violation of 18 U.S.C. 912 (Counts 2 and 12); possessing cocaine with intent to distribute, in violation of 21 U.S.C 841(a)(1) (1988) (Count 3); two counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951 (Counts 4 and 7); two counts of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 18 U.S.C. 924(e)(1) (1988) (Counts 5 and 8); and four counts of impersonating an officer or employee of the United States and conducting a search, in violation of 18 U.S.C. 913 (Counts 6, 9-11). Indictment 1-7.

Following a jury trial, petitioner was convicted on all counts. 3/5/90 Judgment 1. Because the district court found that petitioner had at least three prior convictions for "violent felon[ies]" or "serious drug offense[s]" that were "committed on occasions different from one another," 18 U.S.C. 924(e), it determined that the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), specified a statutory sentencing range of 15 years to life imprisonment on Counts 5 and 8, see PSR ¶ 60; 3/5/90 Sent. Tr. 13, 27-28. In light of petitioner's lengthy criminal history -- including prior convictions for kidnapping, bank robbery, and conspiring to traffic narcotics, see PSR ¶¶ 47, 51-52 -- the district court sentenced petitioner to life imprisonment. See 3/5/90 Sent. Tr. 33-38. In particular, the district court imposed

concurrent life sentences on Counts 1, 5, and 8; concurrent terms of 36 months of imprisonment on Counts 2, 6, and 9-12; a concurrent term of 360 months of imprisonment; and concurrent terms of 240 months of imprisonment on Counts 4 and 7, all to be followed by concurrent terms of supervised release on Counts 1 and 3. 3/5/90 Judgment 2-3. The court of appeals reversed petitioner's conviction on Count 1 but otherwise affirmed his convictions and sentence. 942 F.2d 1282, 1285-1286. This Court denied a petition for a writ of certiorari. 503 U.S. 921.

2. In 1994, petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. See 94-cv-993 Docket entry No. 1 (W.D. Mo. Oct. 18, 1994). After the case was reassigned to a new district judge, see 94-cv-993 Docket entry No. 30 (W.D. Mo. May 8, 1996); id. No. 33 (W.D. Mo. Aug. 9, 1996), the district court reduced petitioner's sentence on Count 3 to 210 months of imprisonment, to be followed by three years of supervised release, but otherwise denied relief. See 94-cv-993 Docket entry No. 37 (W.D. Mo. Nov. 6, 1996). The court of appeals affirmed. 210 F.3d 378, 2000 WL 349283 (Tbl.).

Petitioner thereafter filed a series of unsuccessful motions and applications challenging his convictions and sentence. See Gov't C.A. Br. 7-9 (cataloging motions, appeals, and dispositions); see also 08-cv-1266 Docket entry No. 15 (C.D. Ill. June 23, 2009) (dismissing Section 2241 petition). In one such application, filed in 2016, petitioner sought leave to file a

successive Section 2255 motion on the ground that he no longer qualified for a sentence under the ACCA on Counts 5 and 8 because, among other things, a prior Kansas conviction for kidnapping did not qualify as a "crime of violence" in light of Johnson v. United States, 576 U.S. 591 (2015), and a prior conviction for conspiracy to conceal heroin did not qualify as a "serious drug offense" because it predated the Controlled Substances Act, 21 U.S.C. 801 et seq. See Pet. App. 3; 16-2029 Docket entry (8th Cir. Apr. 28, 2016). The court of appeals denied the application. See Pet. App. 3; 16-2029 Docket entry (8th Cir. Oct. 6, 2016).

In 2017, petitioner filed a Section 2241 petition in the Central District of Illinois, raising the same argument that he had attempted to raise in his 2016 application to file a successive Section 2255 motion -- namely, that his kidnapping and heroin conspiracy convictions did not support a sentence enhancement under the ACCA. See No. 17-1099, 2017 WL 4706898 (Oct. 19, 2017). The district court in the Central District of Illinois granted the motion and vacated petitioner's ACCA sentences on Counts 5 and 8. Id. at *6; Pet. App. 3. It further ordered that petitioner be transferred to the Western District of Missouri for resentencing. Ibid.

3. The district court in the Western District of Missouri conducted a de novo resentencing. Pet. App. 3. At the hearing, the district court acknowledged petitioner's argument that he should be resentenced solely on Counts 5 and 8, but the court found

that it had the "authority to take into consideration all counts" and that doing so would be "reasonable and appropriate herein based upon the statutory considerations." 3/7/18 Sent. Tr. 3. The court also recognized that the current guidelines recommendation for petitioner's offenses, taken as a whole, was 168 to 210 months. Ibid. The court found, however, that a much longer sentence was appropriate in light of petitioner's "lengthy and extensive criminal history," which was "extremely repetitive," and involved conduct that was both "violent" and "extremely destructive." Id. at 6. The court observed in particular that, before petitioner's incarceration for the relevant offenses, he had shown a "lack of willingness to reform [his] conduct upon sentence after sentence," which suggested that a life sentence was appropriate. Id. at 7.

Accordingly, after "taking into consideration all of the factors set forth under 18 U.S.C. Section 3553," 3/7/18 Sent. Tr. 7, the court sentenced petitioner to an aggregate term of 966 months of imprisonment, comprising concurrent terms of 36 months of imprisonment on Counts 2, 6, and 9-12; a consecutive term of 210 months on Count 3; consecutive terms of 240 months on Counts 4 and 7; and consecutive terms of 120 months on Counts 5 and 8. Id. at 8; 3/8/18 Judgment 2. The court also imposed concurrent three-year terms of supervised release on each count. 3/7/18 Sent. Tr. 9; 3/8/18 Judgment 3. The court added that if it were limited to resentencing only on Counts 5 and 8, it would have imposed consecutive 120-month terms on each of those counts, to be followed

by concurrent three-year terms of supervised release. 3/7/18 Sent. Tr. 8-9.

4. The court of appeals affirmed. Pet. App. 2-9. It observed that the case was "in an odd procedural posture" because the district court in the Central District of Illinois had left the district court in the Western District of Missouri with "the unfortunate task of conducting a resentencing according to an order from the Central District that is in tension with [the Eighth Circuit's] mandates affirming [petitioner's] sentence and denying [his] application for leave to file a successive § 2255 motion." Id. at 3-4. Nevertheless, the court of appeals determined that the district court in the Western District of Missouri had authority to resentence petitioner because the district court did not "re-examine" any issue already decided by the Eighth Circuit. Id. at 4.

As relevant here, the court of appeals rejected petitioner's contention that the Double Jeopardy Clause permitted resentencing only on Counts 5 and 8 because he had finished serving his terms of imprisonment on the other counts. Pet. App. 5. The court observed that it had previously recognized that "'resentencing on the served portion of . . . two interdependent sentences does not violate double jeopardy,'" and that a prisoner who "collaterally attacks a portion of a judgment reopens the entire judgment 'and cannot selectively craft the manner in which the court corrects that judgment.'" Ibid. (quoting United States v.

Alton, 120 F.3d 114, 116 (8th Cir.), cert. denied, 522 U.S. 976 (1997)). The court also rejected petitioner's claims that his sentence was procedurally and substantively unreasonable. Id. at 5-7.

Judge Kelly concurred in part and dissented in part. Pet. App. 7-9. She agreed with the majority that the district court had the authority to resentence petitioner and to "unbundle Cox's sentencing package and resentence him on all counts." Id. at 7. But she would have found the sentence substantively unreasonable, on the theory that the district court erred in considering petitioner's original sentence at the resentencing. Id. at 7-9.

5. Petitioner filed a petition for a writ of certiorari, that asserted, among other things, that he should have the opportunity to challenge his convictions on Count 5 and 8 in light of Rehaif, supra, and that this Court should resolve a purported circuit conflict as to whether the Double Jeopardy Clause bars a package resentencing that includes revised sentences on counts for which the sentence imposed in the original package has expired. 19-5027 Pet. 16-17, 19-20. This Court granted the petition, vacated the court of appeals' judgment, and remanded the case for further consideration in light of Rehaif. 140 S. Ct. 396.

On remand, the court of appeals rejected petitioner's Rehaif claim, observing that because petitioner had raised the issue for the first time on appeal, it could be reviewed only for "plain error." Pet. App. 12. It found that petitioner could not satisfy

that standard because he was unable to demonstrate that any error affected his substantial rights. Ibid. The court of appeals therefore reinstated its vacated opinion affirming the district court's resentencing determination. Id. at 13.

ARGUMENT

Without specifically arguing that the court of appeals erred in its disposition of his appeal, petitioner contends (Pet. 11) that this Court should grant review because the decision below conflicts with decisions of the Fourth Circuit concerning whether the Double Jeopardy Clause prevents a court from resentencing a defendant on counts that were part of an original sentencing package if the sentence for those counts in the original package has expired at the time of the resentencing. The court of appeals correctly affirmed petitioner's current sentence, and neither the Fourth Circuit nor any other court of appeals that has addressed the issue would find that petitioner's resentencing violated the Double Jeopardy Clause. This Court has denied review of another petition for a writ of certiorari presenting a similar question, Rozier v. United States, 568 U.S. 1196 (2013) (No. 12-7008), and the same result is warranted here.

1. The court of appeals correctly affirmed the district court's decision to resentence petitioner on all of his counts after the original sentences for two of his offenses were vacated. Pet. App. 5.

As this Court observed in Greenlaw v. United States, 554 U.S. 237 (2008), when a defendant is found guilty on a multi-count indictment, the resulting sentences are often viewed as a "package," such that a "successful attack by a defendant on some" counts of conviction necessitates resentencing on all remaining counts to ensure that the new aggregate sentence is "adequate to satisfy the sentencing factors in 18 U.S.C. 3553(a)." Id. at 253. The Court recognized that a package resentencing of this kind may sometimes result in a new aggregate sentence identical to the original, meaning that a "defendant ultimately may gain nothing from his limited success on appeal." Id. at 254. But the Court observed that revisiting all of the components of an original sentencing package "ensures that the sentence 'will suit not merely the offense but the individual defendant.'" Ibid. (quoting United States v. Pimienta-Redondo, 874 F.2d 9, 14 (1st Cir.) (en banc) (in turn quoting Wasman v. United States, 468 U.S. 559, 564 (1984)), cert. denied, 493 U.S. 890 (1989)). Accordingly, the courts of appeals have uniformly held that when a district court on collateral review vacates a defendant's sentences on some counts forming part of a broader package, the district court may revisit the sentences on other counts to "review the efficacy of what remains in light of the original [sentencing] plan." United States v. Townsend, 178 F.3d 558, 567 (D.C. Cir. 1999) (citations omitted); see ibid. (citing cases from every numbered circuit).

Consistent with that approach, the courts of appeals have repeatedly rejected the assertion that the Double Jeopardy Clause prohibits a district court from resentencing a defendant on interdependent sentences when one or more of the sentences that compose the sentencing package are vacated on collateral review. See Pet. App. 5. The Double Jeopardy Clause generally prohibits a court from increasing a defendant's sentence in a later proceeding if the defendant has a legitimate expectation of finality in his original sentence. See United States v. DiFrancesco, 449 U.S. 117, 139 (1980). But a defendant who challenges one of his interdependent convictions "has no expectation of finality in his original sentence, having put at issue the validity of the entire sentence." United States v. Benbrook, 119 F.3d 338, 340 (5th Cir. 1997); accord, e.g., United States v. Radmall, 340 F.3d 798, 801 (9th Cir. 2003); United States v. Easterling, 157 F.3d 1220, 1224 (10th Cir. 1998); United States v. Watkins, 147 F.3d 1294, 1297-1298 (11th Cir. 1998). Therefore, "there is no double jeopardy bar to enhancing an unchallenged part of an interdependent sentence to fulfill the court's original intent." Pasquarille v. United States, 130 F.3d 1220, 1222-1223 (6th Cir. 1997) (quoting United States v. Harrison, 113 F.3d 135, 138 (8th Cir. 1997)); accord, e.g., Radmall, 340 F.3d at 801; Townsend, 178 F.3d at 569-570; United States v. Triestman, 178 F.3d 624, 630-632 (2d Cir. 1999); Watkins, 147 F.3d at 1297-1298;

United States v. Rodriguez, 112 F.3d 26, 31 (1st Cir.), cert. denied, 522 U.S. 895 (1997).

Before the court of appeals, petitioner did not dispute that the Double Jeopardy Clause generally permits package resentencing; instead he argued only that his particular resentencing was unconstitutional because he had "fully discharged" his sentences on all counts other than Counts 5 and 8. Pet. App. 5. In rejecting that contention, the court of appeals relied on its precedent establishing that resentencing even "on the served portion" of a sentencing package "does not violate double jeopardy." Id. (quoting United States v. Alton, 120 F.3d 114, 116 (8th Cir.), cert. denied, 522 U.S. 976 (1997)). That is because "the interrelationship between [a defendant's] sentences on the separate counts mean[s] that his expectations regarding finality . . . can relate only to his entire sentence, not the discrete parts." Radmall, 340 F.3d at 801 (citation and internal quotation marks omitted). .

2. In his petition for certiorari review, petitioner does not attempt to identify any error in the merits of the court of appeals' double-jeopardy determination. Instead, he contends (Pet. 11) that certiorari is warranted because the court of appeals' determination "conflicts with decisions from the Fourth Circuit." But neither the Fourth Circuit nor any other court of appeals that has reached the issue would find that the resentencing in this case violated the Double Jeopardy Clause.

Every court of appeals to address the issue has agreed that the Double Jeopardy Clause does not prevent a court from resentencing a defendant on all of the extant counts that constitute a sentencing package, even if the defendant has finished serving one or more of those interdependent sentences. See, e.g., Radmall, 340 F.3d at 801; Townsend, 178 F.3d at 569-570; Triestman, 178 F.3d at 631-632; Easterling, 157 F.3d at 1224; Pasquarille, 130 F.3d at 1222-1223; Benbrook, 119 F.3d at 340; Alton, 120 F.3d at 116; United States v. Smith, 103 F.3d 531, 535 (7th Cir. 1996), cert. denied, 520 U.S. 1248 (1997).

The Fourth Circuit is no exception. Petitioner cites (Pet. 11) United States v. Silvers, 90 F.3d 95 (4th Cir. 1996), for the proposition that "once a defendant fully serves a sentence for a particular crime, the Double Jeopardy Clause's bar on multiple punishments prevents any attempt to increase thereafter a sentence for that crime." Id. at 101. But the Fourth Circuit has since clarified that a defendant has not "fully discharged" a sentence for a particular count if that sentence was imposed as part of a "unified term of imprisonment" that the defendant has not yet completed. United States v. Smith, 115 F.3d 241, 247 (4th Cir.), cert. denied, 522 U.S. 922 (1997). Thus, in Smith, the Fourth Circuit has rejected a double-jeopardy challenge where a defendant was resentenced on three counts after he had finished serving the 37-month sentences for two of those counts. Ibid. The court recognized that, where the "sentencing package theory" applies,

"resentencing of the defendant d[oes] not implicate double jeopardy," even where the defendant has completed the term of imprisonment for one or more of the underlying counts. Ibid. The court explained that because the district court had imposed an "aggregate" 97-month sentence for all three counts, the defendant had not "fully discharged" his sentence -- and had no "'expectation of finality'" for double-jeopardy purposes -- until that aggregate sentence was completed. Id. at 246-247 (citation omitted); see also United States v. Douthit, 133 F.3d 918, 1998 WL 23079, at *1 & n.* (4th Cir. 1998) (Tbl.) (per curiam) (applying Smith's holding and noting that Smith supersedes any contrary suggestion in Silvers); United States v. Butler, 122 F.3d 1063, 1997 WL 576534, at *1 & n.* (4th Cir.) (Tbl.) (per curiam) (same), cert. denied, 522 U.S. 1034 (1997).[2]

It is undisputed here that petitioner was originally sentenced to an "aggregate" sentence, Smith, 115 F.3d at 247, of life imprisonment. Indeed, the original sentencing court initially "simply sentence[d] [petitioner] to life," citing petitioner's lengthy criminal history and the need to protect the public from such offenders. 3/5/90 Sent. Tr. 33. It was only

[2] Petitioner also cites (Pet. 11) United States v. Olivares, 292 F.3d 196, cert. denied, 537 U.S. 888 (2002), in which the Fourth Circuit rejected a double-jeopardy challenge brought by a defendant who was retried and resentenced after his sole count of conviction was vacated, id. at 197-200. The court in Olivares explained that Smith and Silvers had no bearing on the outcome in that case because those cases, like petitioner's, involved resentencing on counts that were not vacated. See id. at 199.

after the government reminded the district court to specify a sentence for each count that the court acknowledged and fulfilled its requirement to do so. Id. at 35-37. Thus, even in the Fourth Circuit, petitioner's double-jeopardy challenge would have failed.

3. In any event, this case would be an unsuitable vehicle in which to address the question presented. As the court of appeals observed, the case arises in an "odd procedural posture" because the resentencing was carried out by a district court in the Eighth Circuit pursuant to a grant of habeas relief by a district court in the Seventh Circuit, based on a challenge that the Eighth Circuit itself had deemed an improper basis for relief on collateral review. Pet. App. 3; see id. at 3-5; see pp. 5-8, supra. While the Eighth Circuit ultimately concluded that the district court had authority to perform the resentencing, the "odd" posture could complicate or preclude this Court's review of the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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