No._________

IN THE
SUPREME COURT OF THE UNITED STATES

DAMON WOODARD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should revisit and recede from its decision in *Deal v. United States*, 508 U.S. 129 (1993), which permits the "stacking" of mandatory minimum sentences for first-time offenders under 18 U.S.C. § 924(c)(1)(C) for offenses contained within a single indictment, where subsequent Congressional amendments have superseded *Deal* and clarified that the true intent of the statute is to punish recidivism?

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

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

OPINION AND ORDER BELOW

The order of the United States District Court for the Southern District of Florida, denying Petitioner's amended motion filed pursuant to 28 U.S.C. § 2255 (Case No. 0:19-cv-62289-WPD) appears at appendix B to this petition. The order of the Eleventh Circuit Court of Appeals denying a certificate of appealability (Case No. 19-14896-B) appears at appendix F to this petition.

JURISDICTION

The Eleventh Circuit Court of Appeals (Case No. 19-14896-B) issued its order on April 17, 2020. (App. F). This petition is filed within 150 days of that order. *See* March 19, 2020, Miscellaneous Order (extending deadline to file petition for writ of certiorari). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by indictment in the United States District Court for the Southern District of Florida with four (4) counts of Hobbs Act robbery, in violation of 18 U.S.C. § 1951, and four (4) corresponding counts of brandishing a firearm during and in relation to the Hobbs Act robberies, in violation of 18 U.S.C. § 924(c)(1)(A)(ii).

On June 29, 2018, Petitioner entered an open plea of guilty to the § 924(c) violations alleged in Count 2 (brandishing a firearm in relation to Count 1), and Count 4 (brandishing a firearm in relation to Count 3). The government dismissed the remaining counts. Sentencing was deferred pending preparation of a presentence investigation report (PSI).

On September 10, 2018, in accordance with the requirements of § 924(c)(1)(C)(i) (2017), the district court imposed a mandatory minimum sentence totaling 32 years, which consisted of a 7-year term as to Count 2, followed by a consecutive term of 25 years as to Count 4.

Petitioner did not take an appeal because the plea agreement contained an express appellate waiver.

On September 19, 2019, Petitioner filed an amended motion to vacate, set-aside, or correct sentence pursuant to 28 U.S.C. § 2255 (App. A), raising a single ground that his sentence violates due process because the term "second or subsequent conviction" contained in § 924(c)(1)(C) is vague and should be liberally construed in his favor to mean a sequential conviction after an initial § 924(c) conviction has achieved finality.

The district court entered its order (App. B) denying the amended § 2255 motion on October 8, 2019. The court determined that the First Step Act did not apply retroactively to stacked mandatory minimum sentences imposed before December 21, 2018. *Id.*

Petitioner filed a motion for clarification (App. C), explaining that he was not seeking a retroactive application of the First Step Act, but a *judicial* construction of the term "second or subsequent conviction" contained in § 924(c)(1)(C). The district court denied the motion for clarification, stating: "Congress does not declare statutes to be vague. They can repeal them. They can enact new statutes and give them retroactivity. The Court finds no due process violation. The Motion [DE-12] is Denied. The Court denies a Certificate of Appealabilty." (App. D).

Petitioner thereafter filed an application for a certificate of appealability (App. E) to the Eleventh Circuit Court of Appeals, which was denied by order (App. F) entered April 17, 2020.

This petition timely follows.

REASONS FOR GRANTING THE PETITION

I. Recent Congressional amendments to 18 U.S.C. § 924(c)(1)(C) have "clarified" legislative intent that the term "second or subsequent conviction" actually refers to a violation which occurs *after* a prior § 924(c) conviction has become final.

Nearly three decades ago, in *Deal v. United States*, 508 U.S. 129 (1993), this Court was asked to interpret the meaning of the term "second or subsequent conviction" found in 18 U.S.C. § 924(c)(1)(C). The Court concluded that the term

permitted the "stacking" of mandatory minimums for multiple § 924(c) charges included in the same indictment. *Id.* According to *Deal*, a sentencing court was required to impose a minimum prison sentence of 5 years for a first § 924(c) conviction followed by 20 years for a "second or subsequent" § 924(c) conviction, and those sentences were also required to be served consecutively. *Id.* at 130-31 (quoting the then-applicable version of 18 U.S.C. § 924(c)(1)(C)).

However, *Deal's* interpretation of § 924(c) was not without controversy. Some believed that the statute's reference to a "second" conviction was ambiguous and should not be construed to cover convictions charged in the same indictment as the first conviction. *See e.g.*, *United States v. Abreu*, 962 F.2d 1447, 1453 (10th Cir. 1992), *cert. granted*, *judgment vacated*, 508 U.S. 935 (1993); *United States v. Jones*, 965 F.2d 1507, 1519 (8th Cir. 1992); *Deal*, 508 U.S. at 146 (Stevens, J., dissenting); *United States v. Neal*, 976 F.2d 601, 603 (9th Cir. 1992) (Fletcher, J., dissenting). Under this view, the increased penalties for a "second or subsequent conviction" would apply only to repeat offenders who have previously served a § 924(c) sentence prior to the commission of the second conviction, because "[a] statute designed to punish a second offender more severely when he has not learned from the penalty imposed for his prior offense should not be construed to apply before that penalty has had the chance to have the desired effect on the offender." *Abreu*, 962 F.2d at 1452-53; *see also Neal*, 976 F.2d at 603 (Fletcher, J., dissenting) ("The majority's interpretation drains the statute of its intended impact on the offender. Defendants like Neal, who the majority believes may simultaneously receive first and subsequent convictions, never have the

opportunity to learn from their initial mistakes."); *Gonzalez v. United States*, 224 F.2d 431, 434 (1st Cir. 1955) ("[I]f reformation and retribution are the primary purposes of the legislation, such ends would be served best by applying the statutes only to those offenders who have been convicted prior to the commission of the subsequent offense.").

Several years after *Deal* was decided, the U.S. Sentencing Commission reviewed § 924(c)(1)(C) and declared that the stacking of mandatory minimums results in "overly severe sentences for offenders who have not previously been convicted of an offense under section 924(c)" and recommended that Congress override *Deal* by statutory amendment.[1] According to the Commission, "[t]he sentences for offenders convicted of multiple counts of an offense under section 924(c) were the highest average sentences for any offenders convicted of an offense carrying a mandatory minimum penalty in fiscal year 2010." *Id.* Citing testimony by the Judicial Conference of the United States, the Commission told Congress that sentences under § 924(c) are often greater "than the guideline sentences for offenders who commit the most serious, violent crimes." *Id.* at 361. The Sentencing Commission also acknowledged that "the Judicial Conference has urged Congress on at least two occasions to amend the 'draconian' penalties established at section 924(c) by making it a 'true recidivist statute, if not rescinding it all together.'" *Id.* at 360-61. The Sentencing Commission joined the Judicial Conference of the United States in

[1] U.S. Sentencing Comm'n, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, at 270, 368 (Oct. 2011), available at http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/report-congress-mandatory-minimum-penalties-federal-criminal-justice-system.

concluding that the practice of "stacking" § 924(c) sentences is so unjust that Congress should eliminate it. *Id.* at 364.

In December of 2018, Congress finally responded by passing the First Step Act. Included in this new legislation was a provision - entitled "Clarification of Section 924(c)" - intended to override the interpretation of § 924(c)(1)(C) handed down by this Court in *Deal*:

> Sec. 403 Clarification of section 924(c) of title 18, United States Code
>
> (a) In general. Section 924(c)(1)(C) of title 18, United States Code, is amended, in the matter preceding clause (i), by striking "second or subsequent conviction under this subsection" and inserting "violation of this subsection that occurs after a prior conviction under this subsection has become final."

Pub. L. 115-391, § 403(a), 132 Stat. 5221.

As the title suggests, the new amendment served to clarify legislative intent that the provision was meant to punish *repeat* § 924(c) offenders, and not first-time offenders as permitted by the interpretation handed down by the *Deal* Court. This is further evidenced by the following commentary to the amendment provided by the Senate Committee on the Judiciary:

> Reforming Federal Criminal Sentencing
>
> Clarification of 18 U.S.C. § 924(c) – S.1917 Section 104 applied prospectively: This section clarifies that the enhanced mandatory minimum sentence for using a firearm during a crime of violence or drug crime is limited to offenders who have previously been convicted and served a sentence for such an offense. *Previously the courts interpreted this law intended for repeat offenders as applying also to first-time offenders, sometimes requiring courts to impose overly harsh, decades-long sentences for charges brought in a single indictment.*

S.3649 First Step Act Summary - As Introduced. (emphasis added).

The amendment passed through Congress with overwhelming support. Reformation of this rather draconian law was, undoubtedly, long overdue. Yet, although the amendment was labeled a "clarification" and was intended to rectify this Court's harsh interpretation of § 924(c)(1)(C) in *Deal*, Congress did not make the amendment retroactively applicable. Rather, the statute as amended only applied retrospectively to defendants who were convicted prior to the effective date of the amendment, but who have yet to be sentenced. *See* Pub. L. 115-391, § 403(b), 132 Stat. 5222. ("This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.").

Consequently, there now exists a large number of first-time § 924(c) offenders serving overly-harsh "stacked" mandatory minimum sentences, who are left with no legal recourse because the new amendment only applies retrospectively. These first-time offenders, whom Congress openly acknowledged received an unfair shake because of this Court's interpretation in *Deal*, are now stuck with their draconian stacked sentences merely because they were sentenced before Congress finally decided to take action and clarify § 924(c)(1)(C) to be consistent with its true intent as a recidivist statute.

It now appears this unjust anomaly can only be remedied by this Court; specifically, by revisiting the question considered in *Deal* and construing the statute consistent with its true legislative intent.

II. This Court should revisit and recede from *Deal v. United States*, 508 U.S. 129 (1993).

In good faith, Petitioner asks this Court to revisit *Deal* in light of Congress' express acknowledgment that *Deal's* interpretation of § 924(c)(1)(C) produced an unjust and unintended result. *See Patterson v. McLean Credit Union*, 485 U.S. 617 (1988) ("It is surely no affront to settled jurisprudence to request argument on whether a particular precedent should be modified or overruled.").

Prior to *Deal*, the 10th Circuit Court of Appeals sitting *en banc* construed § 924(c)(1)(C) and determined the phrase "second or subsequent conviction" was vague and ambiguous. The court applied the rule of lenity and concluded the statute should be interpreted to require sequential § 924(c) convictions before the mandatory minimum penalties may be "stacked":

> [W]e conclude that section 924(c) must be strictly construed. Moreover, because the text of the statute and its legislative history reveal an ambiguity concerning the construction Congress intended to give the words "second or subsequent conviction," we must apply the rule of lenity. Under this rule, the words "second or subsequent" mean events that are chronologically sequential, and "conviction" means judgment of conviction. Accordingly, we hold that a defendant may not receive an enhanced sentence under section 924(c) for a second or subsequent conviction unless the offense underlying this conviction took place after a judgment of conviction had been entered on the prior offense. We believe this construction is mandated by the applicable rules of statutory construction, is consistent with the other subsequent-offense statutes enacted by Congress, and best effectuates the purpose underlying such statutes generally.

Abreu, 962 F. 2d at 1453 (10th Cir. 1992).

Congress has now clarified § 924(c)(1)(C) to be consistent with its original intent as a recidivist statute - the same conclusion reached earlier by the 10th Circuit

in *Abreu*. "Subsequent legislation declaring the intent of an earlier statute is entitled to great weight," and "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 380-81 (1969).

To the extent that the original intent of § 924(c)(1)(C) has now been "clarified" by Congress in the First Step Act, Petitioner respectfully suggests that the *Deal* decision be revisited and receded from, and that the pre-amendment version of § 924(c)(1)(C) be construed consistent with the interpretation reached by the 10th Circuit sitting *en banc* in *Abreu*.

Petitioner further asks that any such decision rendered by this Court be given express retroactive effect, so that the numerous defendants like Petitioner whose § 924(c) convictions were unjustly "stacked" as first-time offenders (oftentimes resulting in *de facto* life sentences), may apply for and obtain the appropriate relief.

CONCLUSION

For the reasons stated herein, Petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

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