No. 20-7378

IN THE SUPREME COURT OF THE UNITED STATES

ISRAEL ERNESTO PALACIOS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the absence of an objection on double-jeopardy grounds to cumulative punishments for violating 18 U.S.C. 924(c) and (j), a claim that no appellate court had yet recognized, constituted deficient performance that would support a claim of ineffective assistance of counsel.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Md.):

United States v. Palacios, No. 05-cr-393 (Mar. 30, 2017)

United States Court of Appeals (4th Cir.):

United States v. Palacios, No. 08-5174 (Apr. 30, 2012)

United States v. Palacios, No. 18-6067 (May 30, 2018)

United States v. Palacios, No. 18-6067 (Dec. 15, 2020)

Supreme Court of the United States:

Palacios v. United States, No. 11-10137 (Oct. 1, 2012)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 982 F.3d 920. The opinion of the district court (Pet. App. 13a-34a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 2020. The petition for a writ of certiorari was filed on March 5, 2021. 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 District of Maryland, petitioner was convicted of conspiring to participate in a racketeering enterprise, in violation of 18 U.S.C. 1962(d); conspiring to commit murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(5); murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1); using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c); and murder resulting from the use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(j). Judgment 1. Petitioner was sentenced to three concurrent terms of life imprisonment, a concurrent term of 120 months of imprisonment for conspiring to commit murder in aid of racketeering, and a consecutive term of 120 months of imprisonment for using a firearm during and in relation to a crime of violence, all to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed, 677 F.3d 234, and this Court denied a petition for a writ of certiorari, 568 U.S. 834.

In 2017, the district court denied petitioner's motion to vacate, correct, or set aside his sentence under 28 U.S.C. 2255. Pet. App. 13a-34a. The court of appeals affirmed. Id. at 1a-12a.

1. Petitioner was a member of the MS-13 gang originally formed in Los Angeles in the 1980s. 677 F.3d at 238. Petitioner

co-founded the Langley Park Salvatruchas, a local MS-13 subgroup, known as a "clique." Id. at 238-239. Petitioner initially served as the clique's "second word" (its second in command) and later became its "first word" (the clique's leader). Ibid.

While serving as second word, petitioner and Roberto Argueta, the first word at the time, heard rumors that Nancy Diaz, a friend of clique members, was fraternizing with members of a rival gang. 677 F.3d at 239. The two men investigated the rumors and raised the issue at a clique meeting. Ibid. After discussion, petitioner and other clique leaders decided that Diaz should be killed. At the end of the meeting, Argueta, with petitioner at his side, issued a final order to kill Diaz. Ibid.

Two gang members, Jesus Canales and Jeffrey Villatoro, carried out the order. 677 F.3d at 239. They drove Diaz and a friend, Alyssa Tran, to a cemetery on the pretense that the four would drink and socialize together. Ibid. Once inside the cemetery, however, one of the men shot Diaz in the back of the head, killing her. Id. at 239-240. Villatoro then shot Tran in the face. Id. at 240. When the men discovered that Tran had not died, Canales stabbed her twice in the chest. Ibid. Tran nonetheless survived. Ibid.

2. A jury found petitioner guilty of the offenses described above. Judgment 1. The district court sentenced petitioner to a statutorily mandated term of life imprisonment for the murder-in-

aid-of-racketeering conviction. Judgment 2; see 18 U.S.C. 1959(a)(1). The court also sentenced petitioner to two additional concurrent terms of life imprisonment: one for murder resulting from the use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(j), and the other for racketeering conspiracy, in violation of 18 U.S.C. 1962(d). Judgment 2. In addition, the court sentenced petitioner to a concurrent sentence of 120 months of imprisonment for conspiracy to commit murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(5), and a consecutive term of 120 months of imprisonment for using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). Judgment 2; see 18 U.S.C. 924(c)(1)(D)(ii) ("[N]o term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.").

The court of appeals affirmed petitioner's convictions and sentence, 677 F.3d 234, and this Court denied a petition for a writ of certiorari, 568 U.S. 834.

3. Petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255, in which he "raise[d] five claims of ineffective assistance by his trial and appellate counsel." Pet. App. 17a-18a. As relevant here, petitioner argued

that counsel performed deficiently by failing to seek dismissal or reversal of either the Section 924(c) charge or the Section 924(j) charge, on the ground that cumulative punishment for both offenses violated the Double Jeopardy Clause of the Fifth Amendment. See Id. at 18a, 28a-29a.

The district court denied the motion in 2017. Pet. App. 13a-34a. As relevant here, the court perceived "a circuit split" on whether dual punishments for violating Section 924(c) and (j) contravene the Double Jeopardy Clause, and observed that the Fourth Circuit had "not yet weighed in on" the issue. Id. at 29a. "Given that the law in the Fourth Circuit remains unclear, and that most of the cases composing this circuit split * * * were decided after Petitioner's trial," the court determined that "it was not unreasonable for his attorneys to fail to object to his sentence on double jeopardy grounds." Ibid. The court declined to issue a certificate of appealability (COA). Id. at 34a.

3. The court of appeals granted a COA on petitioner's ineffective-assistance claim based on the failure to raise a double-jeopardy challenge. Pet. App. 1a. The court then affirmed. Id. at 1a-12a.

The court of appeals observed that to succeed on an ineffective-assistance claim under Strickland v. Washington, 466 U.S. 668 (1984), a defendant "must show that counsel performed in a constitutionally deficient manner and that the deficient

performance was prejudicial." Pet. App. 5a. "To avoid the distorting effects of hindsight," the court explained, "claims under Strickland's performance prong are evaluated in light of the available authority at the time of counsel's allegedly deficient performance." Ibid. (citation omitted). The court stated that the deficient-performance standard requires counsel "to make arguments that are sufficiently foreshadowed in existing case law, * * * [b]ut counsel does not perform deficiently by failing to raise novel arguments that are unsupported by then-existing precedent or by failing to anticipate changes in the law, or to argue for an extension of precedent." Id. at 5a-6a (citations and internal quotation marks omitted).

The court of appeals then held, as none of its precedent had, that multiple punishments for violations of Section 924(c) and (j), based on the same conduct, violate the Double Jeopardy Clause. Pet. App. 6a-8a. The court explained that the Double Jeopardy Clause precludes multiple punishments for the same criminal offense "unless Congress intended to authorize such multiple punishment." Id. at 6a. The court determined that Section 924(c) and (j) define the "same offense" for purposes of the Double Jeopardy Clause because "§ 924(c) is a lesser-included offense of § 924(j)" under the test set forth in Blockburger v. United States, 284 U.S. 299, 304 (1932). Pet. App. 7a; see id. at 6a-7a. And the court found "no evidence" that "Congress intended to authorize

cumulative punishments for convictions under these two statutes." Id. at 7a; see id. at 8a.

The court of appeals emphasized that "[t]he dispositive issue before [it], however," was not the double-jeopardy question itself, but instead "whether counsel's performance at trial in 2008 fell outside of the 'wide range' of competent assistance because counsel failed to adequately raise the double jeopardy challenge." Pet. App. 8a (citation omitted). The court found that it did not. Id. at 8a-11a. The court observed that "at the time of [petitioner's] trial, no court had addressed" whether the Double Jeopardy Clause prohibited cumulative punishments for convictions under Section 924(c) and (j) based on the same conduct. Id. at 8a. Rather, the first court of appeals to consider the issue did so in 2011 -- three years after petitioner's trial -- and "rejected the argument." Id. at 9a (citing United States v. Julian, 633 F.3d 1250, 1256-1257 (11th Cir. 2011)). Although another court of appeals came to a contrary conclusion a few months later, the Fourth Circuit in this case noted that the law on the double-jeopardy issue was "far from settled even in 2011, let alone at the time of [petitioner's] trial in 2008." Ibid. (citing United States v. García-Ortiz, 657 F.3d 25, 28 (1st Cir. 2011), cert. denied, 565 U.S. 1171 (2012)). The Fourth Circuit also pointed out that at the time of petitioner's trial, "a then-recent unpublished opinion" of its own -- while not directly addressing

the issue -- "cast doubt on the likelihood of success" of the double-jeopardy argument. Ibid.

The court of appeals acknowledged that some cases decided before petitioner's trial had "recognized or suggested that the offense specified in § 924(c) is a lesser-included offense of that specified in § 924(j)." Pet. App. 9a. The court observed, however, that those cases arose in different contexts, and that none addressed the "second step of the double jeopardy analysis," id. at 11a -- namely, whether Congress intended to impose cumulative punishments, id. at 9a-11a. "For all of these reasons," the court could not "conclude that the double jeopardy claim that [petitioner] now presses was sufficiently foreshadowed at the time of trial to render his counsel's failure to raise it constitutionally deficient representation." Id. at 11a. And because the court determined that petitioner failed to demonstrate that his counsel performed deficiently, the court did not address whether petitioner could demonstrate the prejudice element of an ineffective-assistance claim. Ibid.[1]

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[1] The court of appeals also determined that petitioner could not demonstrate that he received ineffective assistance on appeal. Pet. App. 11a n.2. The court explained that "appellate counsel is ineffective only for failing to raise issues that were clearly stronger than those presented," and it could not "conclude that it was clear at the time that the double jeopardy argument was stronger than those arguments his appellate counsel did present," including "numerous arguments challenging the jury's finding of [petitioner's] guilt." Ibid. (citation omitted). Petitioner does not appear to challenge that determination in this Court. See

ARGUMENT

Petitioner renews the contention (Pet. 11-13) that his counsel's performance was deficient under Strickland v. Washington, 466 U.S. 668 (1984), because counsel did not anticipate and make the argument that punishing him under 18 U.S.C. 924(c) and (j) would violate the Double Jeopardy Clause. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or of another court of appeals. Furthermore, even if the question presented otherwise warranted this Court's review, this case would be an unsuitable vehicle for considering it. Petitioner cannot demonstrate that he would likely obtain relief under the standard for which he advocates, and as a practical matter, petitioner's term of imprisonment would not be affected by a decision in his favor. The petition for a writ of certiorari should be denied.

1. a. The court of appeals correctly determined that petitioner failed to satisfy Strickland's deficient-performance requirement.

To establish ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984), a defendant must prove both deficient performance and prejudice. Id. at 687. Strickland's deficient-performance element requires a showing that

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Pet. 5 (focusing on whether petitioner's claim was "sufficiently foreshadowed at the time of his trial") (citation omitted); see also, e.g., Pet. 3, 9, 10, 11, 13-14.

"counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Ibid. A defendant must therefore "show that counsel's representation fell below an objective standard of reasonableness" under "prevailing professional norms" and overcome the "strong presumption" that counsel's conduct fell "within the wide range of reasonable professional assistance." Id. at 688-689. In addition, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689.

The court of appeals correctly determined that the performance of petitioner's counsel did not fall below that well-established objective standard. As the court explained, at the time of petitioner's trial and sentencing, no court of appeals had addressed the question whether multiple punishments for convictions under Section 924(c) and (j) based on the same conduct violated the Double Jeopardy Clause. Pet. App. 8a. Nor do the circumstances suggest that the resolution of such a claim was obvious; the first court of appeals to address the issue -- three years later -- rejected the claim of a double-jeopardy violation. Id. at 9a (citing United States v. Julian, 633 F.3d 1250, 1257 (11th Cir. 2011)). While other courts of appeals later reached a

contrary conclusion, the court here correctly determined that petitioner's counsel did not perform deficiently by failing to raise an issue that no appellate court had addressed and that -- even under subsequent legal developments -- would be uncertain to succeed. See id. at 11a. Petitioner thus has not overcome the "strong presumption that counsel's representation was within the wide range of reasonable professional assistance." Harrington v. Richter, 562 U.S. 86, 104 (2011) (citation and internal quotation marks omitted).

That absence of any unconstitutionally deficient performance is reinforced by the practical inconsequence of the issue to petitioner's overall case, which would obviate any need to raise it. If petitioner had succeeded on such a claim, he presumably would have avoided his ten-year consecutive sentence for violating Section 924(c). See, e.g., United States v. García-Ortiz, 657 F.3d 25, 31 (1st Cir. 2011) (finding a double-jeopardy violation and vacating defendant's consecutive Section 924(c) sentence); United States v. Gonzales, 841 F.3d 339, 359 (5th Cir. 2016) (same), cert. denied, 137 S. Ct. 1234, and 137 S. Ct. 1237 (2017). But even without that ten-year sentence, petitioner would have remained subject to a mandatory life sentence for his murder-in-aid-of-racketeering conviction, as well as two concurrent life sentences for racketeering conspiracy and murder in violation of Section 924(j). A successful double-jeopardy challenge therefore

would have had no effect on petitioner's term of imprisonment (though it would have entitled him to a refund of the $100 special assessment he was required to pay because of his Section 924(c) conviction). Pet. App. 29a & n.4; see 18 U.S.C. 3013. It was not objectively deficient for counsel to focus his efforts on other aspects of petitioner's defense and forgo a double-jeopardy challenge. Cf. Pet. App. 11a n.2 (noting appellate counsel's reasonable decision to focus on challenges to petitioner's guilt).

b. Petitioner nonetheless contends (Pet. 11-13) that his counsel's performance was deficient because, under the analysis set forth in Blockburger v. United States, 284 U.S. 299 (1932), a Section 924(c) offense is a lesser-included offense of Section 924(j). As the court of appeals observed, however, the Blockburger inquiry is only one of two analytical steps necessary to conclude that the Double Jeopardy Clause precluded cumulative punishments for petitioner's Section 924(c) and (j) offenses. See Pet. App. 7a-8a. The court must also determine that Congress did not in fact intend to impose cumulative punishments, which in that event would not violate the Double Jeopardy Clause. See Missouri v. Hunter, 459 U.S. 359, 368-369 (1983) (holding that where the legislature "specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under Blockburger, a court's task of statutory construction is at an end," and cumulative punishments imposed

following "a single trial" do not violate the Double Jeopardy Clause); see, e.g., United States v. McLaughlin, 164 F.3d 1, 8 (D.C. Cir. 1998) ("[F]ailing the Blockburger test does not necessarily imply that two provisions may not be applied together, as the ultimate question is one of legislative intent."). Here, the first court of appeals to address the question of legislative intent -- three years after petitioner's trial -- determined that Congress did intend to permit cumulative punishments for violations of Section 924(c) and (j). See Julian, 633 F.3d at 1257. Petitioner thus has not demonstrated that his counsel acted ineffectively in not raising the double-jeopardy argument in the district court.[2]

2. Petitioner contends (Pet. 4-11, 14) that this Court's review is warranted to resolve an alleged circuit conflict regarding application of Strickland's deficient-performance requirement to cases in which counsel did not make an argument in circumstances where the law was unsettled. That contention lacks merit.

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[2] The government has since determined that, notwithstanding Julian, an insufficient basis exists to conclude that Congress intended cumulative punishments for violations of 18 U.S.C. 924(c) and 924(j) based on the same conduct. The government therefore will not seek to "'double stack' Section 924(c) and Section 924(j) sentences for the same conduct on top of other sentences." Br. in Opp. at 19 n.5, Berrios v. United States, 568 U.S. 1143 (2013) (No. 12-381).

Petitioner acknowledges (e.g., Pet. 3-4) that the courts of appeals generally agree that the deficient-performance requirement may be satisfied where counsel fails to raise an argument that is "sufficiently foreshadowed" by existing precedent. Petitioner asserts, however (Pet. 4), that the courts disagree as to the "degree to which a claim must be 'sufficiently foreshadowed' by existing precedent such that failure to raise that claim constitutes deficient performance." But the decisions that petitioner cites simply reflect the courts' application of the deficient-performance standard from Strickland to the particular circumstances present of each case. In this case, for example, no court had addressed the relevant legal question, and the first court to do so (three years after petitioner's trial) rejected the legal argument that, according to petitioner, his counsel should have asserted. See Pet. App. 8a-9a. In those circumstances, the court correctly determined that his counsel's omission of such an argument was not objectively deficient. See id. at 9a-11a; see pp. 10-13, supra. Petitioner points to no case in which a court of appeals reached a contrary result on similar facts.

Petitioner appears to acknowledge (Pet. 5-7) that the Third, Sixth, and Eight Circuits take a similar approach to the court of appeals in this case. He cites (ibid.) several decisions in which those courts determined that defense counsel did not perform deficiently by not advancing an argument foreclosed by then-

binding circuit precedent that was later overturned. See Bullard v. United States, 937 F.3d 654, 661-662 (6th Cir. 2019), cert. denied, 140 S. Ct. 2789 (2020); Anderson v. United States, 762 F.3d 787, 793–794 (8th Cir. 2014), cert. denied, 574 U.S. 1103 (2015); see also United States v. Davies, 394 F.3d 182, 190–191 & nn. 6-7 (3d Cir. 2005).[3] While those decisions involve different circumstances from this case, and petitioner correctly declines to assert (Pet. 5-7) that they conflict with the decision below, petitioner does contend (Pet. 8) that the Fifth and Tenth Circuits have taken a different approach, under which "a claim or defense is sufficiently foreshadowed when it is 'plausible' based on persuasive authority." But the decisions on which petitioner relies (Pet. 8-9) addressed meaningfully different facts and would not compel either court to find deficient performance here.

In United States v. Juarez, 672 F.3d 381 (5th Cir. 2012), for example, defense counsel admitted that he had "failed to investigate the facts or law necessary to make an informed and competent decision" regarding a potential defense that then-current law, though not decisive, would have supported. Id. at 388; see id. at 387-388. And in Heard v. Addison, 728 F.3d 1170 (10th Cir. 2013), the court of appeals determined that "minimally

[3] Petitioner cites (Pet. 5-6) the portion of Bullard in which the court of appeals applied Strickland's prejudice requirement. 937 F.3d at 662. The court's application of the deficient-performance requirement is consistent with the decision below. See id. at 661-663.

competent counsel" would have recognized a potential argument that the defendant's "conduct was not criminal under the statute" based on the text of the provision itself. Id. at 1179-1180. The other cases petitioner cites likewise involved meaningfully different facts. See United States v. Phea, 953 F.3d 838, 842 (5th Cir. 2020) (per curiam) (concluding that counsel was ineffective due to failure to raise constructive-amendment argument based on language of statute); United States v. Cuthbertson, 833 Fed. Appx. 727, 734-735 (10th Cir. 2020) (same where, inter alia, court of appeals had "strong[ly] impli[ed]" that argument was correct); United States v. Demeree, 108 Fed. Appx. 602, 605 (10th Cir. 2004) (same where out-of-circuit authority had adopted the forgone argument), cert. denied, 543 U.S. 1169 (2005). The different outcomes in these cases are best understood to reflect the courts of appeals' application of the Strickland standard to the differing circumstances before them, not to apply a fundamentally distinct conception of that standard that would require a different result in this case.

3. Even if the question presented otherwise warranted this Court's review, this case would be an unsuitable vehicle for such review.

First, petitioner cannot show that he would prevail even under his preferred construction of the standard. He suggests (Pet. 4) that "persuasive authority addressing the claim can be enough,"

but no such persuasive authority existed in his case. Instead, the decision below observed that at the time of petitioner's trial, no court of appeals had decided the question whether cumulative punishments for Section 924(c) and (j) offenses based on the same conduct violated the Double Jeopardy Clause.

Second, a decision in petitioner's favor would have no practical effect on his sentence. See, e.g., The Monrosa v. Carbon Black Exp., Inc., 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation."); Supervisors v. Stanley, 105 U.S. 305, 311 (1882) (explaining that this Court does not "decide abstract questions of law * * * which, if decided either way, affect no right" of the parties). As discussed above, see pp. 11-12, supra, even if petitioner's consecutive ten-year sentence for violating Section 924(c) were vacated, petitioner would remain subject to a statutorily mandated life sentence and two additional, concurrent life sentences.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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