No. 20-7378

IN THE
SUPREME COURT OF THE UNITED STATES

ISRAEL ERNESTO PALACIOS

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Table of Contents

Table of Authorities

Cases

Statutes

Secondary Sources

Argument

A jury convicted Mr. Palacios under both § 924(c) and § 924(j), even though the former is a lesser-included offense of the latter. On habeas review, the Fourth Circuit had "no trouble" finding that this violated the Double Jeopardy Clause. App. at 7a–8a (stating "that the Double Jeopardy Clause prohibits imposition of cumulative punishments for § 924(c) and § 924(j) convictions based on the same conduct" because the Government "has not suggested that Congress intended to authorize cumulative punishments for convictions under these two statutes" and because "no evidence of such congressional intent" exists). Yet the Fourth Circuit still denied Mr. Palacios habeas relief, finding that his double jeopardy claim was not "sufficiently foreshadowed" at the time of his trial and direct appeal. *Id.* at 8a–11a.

The Government now defends that decision, and asks this Court to deny our petition for a writ of certiorari, by making three basic arguments. First, it argues that no court, at the time of Mr. Palacios's trial and appeal, had decided the precise double jeopardy argument that Mr. Palacios's counsel failed to raise. Resp. at 12–13 (arguing that no court had addressed the "ultimate" question of whether Congress intended double punishments under these statutes). Second, it argues that the courts of appeals have a uniform method for determining when, exactly, an argument is "sufficiently foreshadowed" such that counsel should raise it. *Id.* at 13–16. Finally, it argues that even if the courts of appeals are split on what method to apply, Mr. Palacios's case is not a good vehicle for resolving this question because doing so would

have no "practical effect" on Mr. Palacios's sentence. *Id.* at 11–12, 16–17. None of these arguments warrant denying Mr. Palacios's petition.

I. The statutes, case law, and jury instructions all foreshadowed Mr. Palacios's double jeopardy argument.

The Government argues that no case, at the time of Mr. Palacios's trial and appeal,[1] had decided the precise double jeopardy claim that his counsel failed to raise. Resp. at 12–13. More precisely, it argues that even if everyone at that time treated § 924(c) as a lesser-included offense of § 924(j) under the *Blockburger* test, no case had decided the "ultimate" question of whether Congress intended to allow punishment under both statutes. *Id.* (stating that both questions must be answered in the double jeopardy analysis). That argument has multiple flaws.

First, "Congress is 'aware of the *Blockburger* rule and legislate[s] with it in mind[,]' so the test should control a double jeopardy question absent an indication to the contrary in a statute." *United States v. Gonzales*, 841 F.3d 339, 357 (5th Cir. 2016) (quoting *Albernaz v. United States*, 450 U.S. 333, 342 (1981)). Put another way, unless the relevant statute expressly states that Congress intended double punishments for greater and lesser-included offenses, then the Double Jeopardy Clause prohibits

[1] The Government says that we do not appear to challenge the failure of Mr. Palacios's appellate counsel to raise the double jeopardy argument. Resp. at 8–9 n.1. We do, though, just like we did before the court of appeals. But our petition could have been clearer on that point, and for that we apologize. That said, the facts are the same for both trial counsel and appellate counsel regarding the meaning of "sufficiently foreshadowed"—i.e., nothing about the state of the law had changed by the time of Mr. Palacios's direct appeal. The only difference between the two is that appellate counsel would have had to overcome the plain error standard of review on direct appeal because trial counsel had failed to object to the double jeopardy violation.

double punishments. *Id.*; *see also United States v. Wilson*, 579 F. App'x 338, 348 (6th Cir. 2014) (same).

Second, that matters here because "express language demonstrating the legislature's intent for cumulative punishment is absent in [§] 924(j)." *Gonzales*, 841 F.3d at 357; *see also* App. at 7a–8a (finding by the Fourth Circuit that there was "no evidence" Congress intended double punishments under these statutes). In other words, Congress failed to state that the punishment in § 924(j) was cumulative to the punishment in § 924(c). Thus, the only question that matters for the double jeopardy analysis in this case—i.e., for whether Mr. Palacios's double jeopardy claim was sufficiently foreshadowed—is whether § 924(c) is a lesser-included offense of § 924(j). *Gonzales*, 841 F.3d at 357.

Third, at the time of Mr. Palacios's trial and appeal, multiple sources showed that § 924(j) and § 924(c) were greater and lesser-included offenses, such that Mr. Palacios's counsel should have objected to him being convicted under both. The statutes themselves did so, for example. *See* 18 U.S.C. § 924(j) (penalizing "[a] person who, *in the course of a violation of subsection (c)*, causes the death of a person through the use of a firearm"). So did the jury instructions in Mr. Palacios's case. App. at 4a ("The district court had instructed the jury that, to convict [Mr.] Palacios of the § 924(j) offense, the jury would have to find that he committed the § 924(c) offense."). Likewise, three courts of appeals had decided that § 924(c) was a lesser-included offense of § 924(j). *See United States v. Jimenez-Torres*, 435 F.3d 3, 10 (1st Cir. 2006); *United States v. Battle*, 289 F.3d 661, 668–69 (10th Cir. 2002); *United States v. Allen*,

247 F.3d 741, 767–69 (8th Cir. 2001) *cert. granted, judgment vacated on other grounds*, 536 U.S. 953 (2002). On top of that, the Fourth Circuit had indicated multiple times that § 924(c) was a "necessary conduct element" of § 924(j). *See, e.g., United States v. Robinson*, 275 F.3d 371, 379 (4th Cir. 2001) (noting that a "§ 924(c)(1) violation underlies the § 924(j) charge and is a necessary conduct element of that charge"). Based on that authority, minimally competent counsel would have objected to Mr. Palacios being convicted under both § 924(c) and § 924(j).[2]

Finally, the Government addresses none of that authority in its response to our petition, focusing instead on a lack of case law (at the time of Mr. Palacios's trial and appeal) that expressly addressed whether Congress intended double punishments under § 924(c) and § 924(j). But on top of gliding past the question of whether those statutes describe lesser-included and greater offenses (which is outcome determinative in this case), that elevates the absence of case law over the most direct source of congressional intent available: the statutes' text. *Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, *in the first instance*, be sought in the language in which the act is framed . . . ." (emphasis added)). The Government never explains why *that* expression of congressional

[2] The Government says that the Eleventh Circuit, three years after Mr. Palacios's trial, "rejected the argument" that Congress prohibited cumulative punishments under § 924(c) and § 924(j). Resp. at 7 (citing *United States v. Julian*, 633 F.3d 1250, 1256–57 (11th Cir. 2011)). But that's not accurate, because *Julian* "did not involve a double jeopardy question." *See Gonzales*, 841 F.3d at 357–58 ("The way the [*Julian*] case was charged actually supports the view that punishment should not be imposed for both a section 924(c) and a section 924(j) violation.").

intent isn't controlling here. Because of that, we respectfully ask the Court to grant this petition and request that explanation.

II. The courts of appeals are split on how to determine when an argument is sufficiently foreshadowed.

We argued in our petition that the courts of appeals are split on how to determine when an argument is sufficiently foreshadowed for purposes of showing that counsel acted deficiently by not raising it. Pet. at 4–11. But the Government says in its response that no real split exists and that the cases we relied on "addressed meaningfully different facts." Resp. at 14–16 (arguing that we "point[ed] to no case in which a court of appeals reached a contrary result on similar facts"). That response has two problems.

First, it is factually inaccurate. Take, for example, *United States v. Juarez*, 672 F.3d 381 (5th Cir. 2012) and *Heard v. Addison*, 728 F.3d 1170 (10th Cir. 2013). The Government tries to explain these cases away by saying that counsel in *Juarez* had "failed to investigate" a "potential defense that then-current law, though not decisive, would have supported," and that, in *Heard*, "minimally competent counsel" would have recognized the relevant statutory defense "based on the text of the provision itself." *Id.* at 15–16. But those are the same circumstances we have here. Mr. Palacios's counsel failed to investigate a defense that was supported by "the text of [§ 924] itself," the jury instructions, decisions from three sister circuits, and multiple Fourth Circuit cases that "though not decisive, would have supported" the defense. Pet. at 4–11. Because no meaningful differences exist between these facts and the facts in *Juarez* and *Heard*, there is no way to explain the differing outcomes other than to say

that these courts are applying different tests to determine when a defense is sufficiently foreshadowed.[3]

Second, the courts of appeals have expressly framed the "foreshadowed" test in different ways, and the Government says nothing about that in its response. The Fifth Circuit, for example, requires a defense to be "plausible" based on persuasive authority. *Juarez*, 672 F.3d at 387; *see also United States v. Phea*, 953 F.3d 838, 842 (5th Cir. 2020) ("[T]he absence of directly controlling precedent does not preclude a finding of deficient performance . . . ."). The Eighth Circuit, on the other hand, requires the defense to be "dictated by precedent existing at the time." *Driscoll v. Delo*, 71 F.3d 701, 713 (8th Cir. 1995). Likewise, the Sixth Circuit requires the defense to be "clearly foreshadowed." *Lucas v. O'Dea*, 179 F.3d 412, 420 (6th Cir. 1999). In short, the courts of appeals' formulation of the "foreshadowed" test "has been, at best, patchwork." Ruth Moyer, *Counsel as "Crystal Gazer": Determining the Extent to which the Sixth Amendment Requires that Defense Attorneys Predict Changes in the Law*, 26 GEO. MASON U. CIV. RTS. L.J. 183, 195 (2016) (quoting Richard P. Rhodes, Strickland v. Washington: *Safeguard of the Capital Defendant's Right to Effective Assistance of Counsel?*, 12 B.C. THIRD WORLD L.J. 121, 130 (1992)). The Government's failure to

[3] To be even more specific, the Fifth Circuit, in *Juarez*, concluded that a derivative citizenship defense was foreshadowed by: a Second Circuit opinion that did not expressly interpret the relevant statute, but "express[ed a] belief" about what the statute required; an unpublished Ninth Circuit opinion observing that the omission of certain statutory language supported a derivative citizenship defense; and an immigration law sourcebook. *Juarez*, 672 F.3d at 387. Mr. Palacios had much more authority supporting him here.

address that "patchwork" highlights the need for this Court to grant this petition and review this question.

III. Mr. Palacios's § 924(c) conviction had collateral consequences, which make this case an appropriate vehicle for review.

The Government also contends that because a decision in Mr. Palacios's favor "would have no practical effect on his sentence," he was not prejudiced by counsel's ineffectiveness, making his case an "unsuitable vehicle" for this Court's review. Resp. at 11–12, 17 (arguing that Mr. Palacios's prison term would not change). But this Court has already recognized that additional convictions (and their related, resultant special assessments) have collateral consequences that prejudice criminal defendants, regardless of whether the defendant's overall sentence would be reduced.

In *Ball v. United States*, for example, this Court determined that a felon could not be convicted and concurrently sentenced for both "receiving a firearm" and "possessing" that same weapon. 470 U.S. 856, 862 (1985) ("Congress seems clearly to have recognized that a felon who receives a firearm must also possess it, and thus had no intention of subjecting that person to two convictions for the same criminal act."). In that case, given the defendant's concurrent sentences, a successful appeal did not mean a shorter prison sentence. Still, the Court recognized that a separate criminal conviction "has potential adverse collateral consequences," noting that it may "delay the defendant's eligibility for parole[,] . . . result in an increased sentence under a recidivist statute for a future offense[,] . . . be used to impeach the defendant's credibility[,] and certainly carries the societal stigma accompanying any criminal conviction." *Id.* at 865. In short, an unlawful conviction, even if its presence does not affect

the overall sentence length, still has prejudicial effects. *Id.* at 864 (reasoning that the "second conviction . . . does not evaporate simply because of the concurrence of the sentence").

This Court reiterated that holding in *Rutledge v. United States*, 517 U.S. 292 (1996). There, the defendant was convicted of conspiring to distribute cocaine and conducting a continuing criminal enterprise, and he was sentenced to a concurrent life sentence and a $50 special assessment for each conviction. *See id.* at 294–95. This Court held that the conspiracy to distribute cocaine was a "lesser included offense" of the continuing criminal enterprise offense. *Id.* at 300. But, much as the Government does here, the Government there argued that because the defendant was subject to "multiple life sentences without the possibility of release," the defendant would not practically face consequences from the second conviction as, given that sentence's concurrent nature, the conviction "may not amount to a punishment at all." *Id.* at 301–02. But this Court rejected that argument, finding that the imposition of the second conviction's $50 special assessment plainly constituted a collateral consequence that produced prejudice. *Id.* at 302–03.

Here, Mr. Palacios's conviction under both § 924(c) and § 924(j) demands review because, similar to *Ball* and *Rutledge*, he received an additional $100 special assessment and a conviction that he otherwise would not have on his record. These collateral consequences are exactly the type of prejudice that this Court has recognized as unconstitutional, cumulative punishment under *Ball* and *Rutledge*. Thus,

this case is exactly the type of case that warrants review, regardless of whether Mr. Palacios's overall prison term is affected.

Conclusion

Defense counsel and the courts of appeals lack guidance on how to determine when a defense is sufficiently foreshadowed. We respectfully ask this Court to grant this petition and address this timely, frequently occurring question.

Respectfully submitted,

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