

IN THE SUPREME COURT OF THE UNITED STATES

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KENNETH J. JACKSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was entitled to the benefit of Section 403 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5221, which applies "to any offense that was committed before the date of enactment of [the] Act, if a sentence for the offense has not been imposed as of such date," where he was sentenced before the First Step Act's enactment and was then subject to a post-Act resentencing as a result of the post-Act vacatur of one of his convictions.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Ohio):

United States v. Jackson, No. 15-cr-453 (Aug. 24, 2017)

United States v. Jackson, No. 15-cr-453 (June 24, 2019)

United States Court of Appeals (6th Cir.):

United States v. Jackson, No. 17-3896 (Mar. 12, 2019)

United States v. Jackson, No. 19-3623 (Apr. 22, 2021)

United States v. Jackson, No. 19-3711 (Apr. 22, 2021)

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No. 21-5875

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 995 F.3d 522. The opinion of the district court is not published in the Federal Supplement but is available at 2019 WL 2524786.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 2021. A petition for rehearing en banc was denied on June 30, 2021 (Pet. App. B1). The petition for a writ of certiorari was filed on September 28, 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 Northern District of Ohio, petitioner was convicted on three counts of brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii), and three counts of carjacking, in violation of 18 U.S.C. 2119(2). 8/24/17 Judgment 1. Petitioner was sentenced to 771 months of imprisonment, to be followed by three years of supervised release. 8/24/17 Judgment 2-3. The court of appeals vacated one of petitioner's Section 924(c) convictions and remanded for resentencing. Pet. App. A2-A3. On remand, the district court resentenced petitioner to 276 months of imprisonment, to be followed by three years of supervised release. 6/24/19 Judgment 2-3. The court of appeals then vacated that sentence and again remanded for resentencing. Pet. App. A6.

1. In July and August 2015, petitioner and four co-defendants committed a series of carjackings in the Tremont neighborhood of Cleveland, Ohio. 5/28/19 Presentence Investigation Report (PSR) ¶¶ 16-29. In the early morning hours of July 25, 2015, petitioner and three co-defendants approached a man leaving his workplace, ordered him to lie on the ground, and pistol-whipped him. 5/28/19 PSR ¶ 16. One of the accomplices placed a gun to the victim's head while the others searched his pockets. Ibid. Petitioner and his co-defendants then absconded with the victim's vehicle (a GMC Denali), cell phone, wallet, currency, and credit

cards. Ibid. The next day, petitioner and one of his co-defendants approached two different individuals and likewise ordered them to the ground, placed a gun to their heads, and robbed them of their vehicles (two Toyota Corollas), cell phones, and wallets. 5/28/19 PSR ¶ 18. The men told the victims not to "get up until you hear us leave or we'll shoot you." 5/28/19 PSR ¶ 19.

A federal grand jury in the Northern District of Ohio returned an indictment charging petitioner with five counts of carjacking, in violation of 18 U.S.C. 2119(2), and five associated counts of brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (1) (A) (ii). Indictment 1-11. During trial, the district court dismissed two of the carjacking and two of the associated 924(c) counts against petitioner on the government's motion. 5/2/17 Tr. 938-939; D. Ct. Doc. 123 (May 2, 2017). A jury found petitioner guilty of the remaining three carjacking and three Section 924(c) counts. D. Ct. Doc. 125 (May 3, 2017).

Before sentencing, the Probation Office prepared a presentence report. Section 924(c) requires a minimum consecutive seven-year sentence for the first conviction for brandishing a firearm in connection with a crime of violence. 18 U.S.C. 924(c) (1) (A) (ii). At the time of petitioner's sentencing, Section 924(c) (1) (C) further required a minimum consecutive sentence of 25 years of imprisonment in the case of a "second or subsequent conviction" under Section 924(c), 18 U.S.C. 924(c) (1) (C) (i)

(2006), including where that second or subsequent conviction was entered in the same proceeding as the defendant's first conviction under Section 924(c), Deal v. United States, 508 U.S. 129, 132-137 (1993). Accordingly, the Probation Office informed the district court that the statutory-minimum term of imprisonment was seven years for petitioner's first Section 924(c) count and 25 years each for the second and third Section 924(c) counts. 8/9/17 PSR ¶¶ 69, 105. The presentence report calculated an advisory guidelines range for the carjacking counts of 87 to 108 months of imprisonment, for a total guidelines range of 771 to 792 months of imprisonment. 8/9/17 PSR ¶ 107.

On August 23, 2017, the district court sentenced petitioner to 771 months of imprisonment, to be followed by three years of supervised release. 8/24/17 Judgment 2-3; see 8/23/17 Tr. 22. The court entered judgment on August 24, 2017, Judgment 1.

2. Petitioner subsequently appealed. See Pet. App. A2. On December 21, 2018, while petitioner's appeal was pending, Congress enacted the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5221. In the First Step Act, Congress amended Section 924(c) (1) (C) to require a 25-year minimum sentence only in the case of a "violation of [Section 924(c)] that occurs after a prior conviction under [Section 924(c)] has become final." § 403(a), 132 Stat. 5221-5222. Congress specified that the amendment "shall apply to any offense that was committed before the date of enactment of

[the First Step Act], if a sentence for the offense has not been imposed as of such date of enactment." § 403(b), 132 Stat. 5222.

On March 12, 2019, the court of appeals affirmed petitioner's carjacking convictions and two of petitioner's section 924(c) convictions, but vacated petitioner's third Section 924(c) conviction. 918 F.3d 467, 494. The court reasoned that because petitioner used the same firearm during the two July 26, 2015 carjackings "to simultaneously further two different criminal acts," petitioner "made a single choice" to use a firearm on that day, supporting only a single Section 924(c) conviction for that episode. Id. at 492-493 (citation, emphasis, and internal quotation marks omitted). And because the court had vacated one of petitioner's convictions, it "remand[ed] for resentencing." Id. at 494.

3. On remand, the parties disputed the application of the First Step Act's amendment to Section 924(c) to the two Section 924(c) convictions that the court of appeals had not disturbed. In light of "'background' legal principles," the district court declined to "interpret Section 403(b) in a manner that prevents a defendant" from benefiting from that provision. 2019 WL 2524786, at \*2. The court sentenced petitioner to consecutive seven-year (84-month) terms on each of the two Section 924(c) counts, but increased his sentence for the three carjacking counts from 87 months of imprisonment to 108 months of imprisonment, for a total

sentence of 276 months of imprisonment. 6/24/19 Judgment 2-3; see Pet. App. A3.

Petitioner appealed the increased sentence on his carjacking counts, and the government filed a cross-appeal challenging the district court's conclusion that Section 403 of the First Step Act applied at petitioner's resentencing. Pet. App. A3. The court of appeals found that the district court had erred in applying the First Step Act's post-sentencing amendment and remanded. Id. at A6.

The court of appeals explained that the Act's text "creates a straightforward test" that looks to a defendant's status "as of December 21, 2018 and ask[s] whether -- at that point -- a sentence had been imposed on him." Pet. App. A3. The court found that the provision's use of the present-perfect tense, "has been imposed," "makes December 21, 2018" -- the date of the Act's enactment -- "the date of inquiry." Ibid. And it reasoned that "Congress's use of the indefinite article 'a' indicates that the statute does not refer only to the final sentence a defendant receives." Ibid.

The court of appeals then explained that the vacatur of petitioner's sentence, rendering him "without a sentence for three months in 2019[,] does not change the fact that as of December 21, 2018, a sentence had been imposed on him." Pet. App. A4. The court explained the "crucial difference" between petitioner's case and its prior decision in United States v. Henry, 983 F.3d 214 (2020), which had deemed Section 403 applicable to a defendant

whose sentence had been vacated before the First Step Act's enactment. Pet. App. A4 & n.1. The court observed that for the defendant in Henry, but not petitioner, "on December 21, 2018, it was as if a sentence had never been imposed." Id. at A4.

Judge Moore dissented. Pet. App. A7-A9. She would have concluded that Section 403 applied to petitioner, irrespective of the time at which his original sentence was vacated. Ibid. Judge Moore reasoned that the vacatur rendered petitioner's initial sentence "'a nullity,'" meaning, in her view, that "the vacated sentence is not 'a sentence' for the purposes of the First Step Act." Id. at A7 (citation omitted). Judge Moore also criticized the majority's focus on Congress's use of the indefinite article "a," as "placing undue emphasis on this one-letter article." Id. at A8 (brackets and citation omitted).

#### ARGUMENT

Petitioner renews his claim (Pet. 7-16) that Section 403 of the First Step Act applies at his resentencing, which followed the post-enactment vacatur of his pre-Act sentence. The court of appeals' decision does not conflict with any published decision of another court of appeals, and this case would be an unsuitable vehicle for reviewing the question presented both because of its interlocutory posture and because petitioner's particular circumstances may support affirmance on grounds that lack broader applicability. No further review is warranted.

1. This case does not implicate any conflict that warrants this Court's review.

Petitioner's brief assertion (Pet. 6-7) that the decision below conflicts with the Seventh Circuit's en banc decision in United States v. Uriarte, 975 F.3d 596 (2020), is mistaken. In Uriarte, the Seventh Circuit found Section 403 applicable to a defendant who was sentenced before the enactment of the First Step Act, but whose sentence was vacated on appeal before the First Step Act's enactment. Id. at 598. The Seventh Circuit expressly distinguished the situation of a defendant, like petitioner, "who was under a sentence at the time of [the Act's] enactment, but subsequently had his sentence vacated," noting that such a defendant "would not" "fall[] neatly within the statute's language" and observing that the defendant in Uriarte did not present "that scenario." Id. at 602 n.3; see id. at 606 n.1 (Barrett, J., dissenting) (emphasizing that "nothing in the majority opinion -- which turns entirely on the fact that [the defendant] was not subject to a sentence on the Act's effective date -- suggests an answer" to "the question whether a postenactment vacatur would retroactively have the same effect"). Thus, as the court of appeals in this case recognized (Pet. App. A4 n.1), the decision below does not conflict with the Seventh Circuit's decision in Uriarte.

The absence of such a conflict is illustrated by petitioner's own invocation (Pet. 9) of the Sixth Circuit's prior decision in

United States v. Henry, 983 F.3d 214 (2020), which, like the Seventh Circuit's decision in Uriarte, found Section 403 applicable to a defendant whose sentence had been vacated before the First Step Act's enactment. Id. at 216-217. The court of appeals explained that the pre-Act vacatur in Henry made a "crucial difference" from the circumstances here. Pet. App. A4. And any tension between the Sixth Circuit's decisions would not itself warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).\*

2. In any event, this case is an unsuitable vehicle for analyzing the question presented. First, the decision below was remanded for resentencing, and the interlocutory posture of this case "alone furnishe[s] sufficient ground for the denial" of the petition for a writ of certiorari. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam) (explaining that a case remanded

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\* Petitioner does not rely on the Fourth Circuit's unpublished decision in United States v. Bethea, 841 Fed. Appx. 544 (2021), which the court of appeals viewed as reaching a contrary conclusion from its decision in this case. See Pet. App. A5. In Bethea, a divided panel applied Section 403 to a resentencing ordered as collateral relief where defense counsel had deficiently failed to file a pre-First Step Act appeal. 841 Fed. Appx. at 545, 547. In those unusual factual circumstances, the status of the sentence at the precise time of the First Step Act's enactment, had a timely appeal been filed, is unknowable, and, in any event, the Fourth Circuit's unpublished decision does not create binding precedent, see id. at 545, meaning that the Fourth Circuit will be free to address the question anew in a subsequent case.

to district court "is not yet ripe for review by this Court"). "[E]xcept in extraordinary cases, [a] writ [of certiorari] is not issued until final decree." Hamilton-Brown Shoe Co., 240 U.S. at 258. Following the proceedings on remand, petitioner will have an opportunity to raise the claims pressed here, in addition to any claims that may arise from his resentencing, in a single petition for a writ of certiorari. See Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam). This case presents no justification to depart from this Court's usual practice of declining to review interlocutory petitions.

Second, because of the particular circumstances of petitioner's case, it is not clear that any decision would provide broader guidance on the question presented. In the appeal that triggered resentencing, the court of appeals vacated only one of petitioner's Section 924(c) convictions, 918 F.3d 467, 494. Accordingly, in remanding for resentencing on petitioner's remaining convictions, the court did not determine that petitioner's original sentences on the Section 924(c) counts had been flawed or invalid at the time they were imposed. See Pepper v. United States, 562 U.S. 476, 507 (2011). This case therefore could be resolved on the narrow basis that the sentences for the two remaining Section 924(c) offenses had "been imposed as of" the date of the First Step Act's enactment because the sentences for those offenses were legally valid at the time of the enactment of the First Step Act and have never been deemed legally invalid.

See § 403(b), 132 Stat. 5222 (applying where “a sentence for the offense has not been imposed as of such date”) (emphasis added). The potential for such a circumstance-specific resolution renders the case a poor vehicle for further review of the more expansive question presented in the petition.

CONCLUSION

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

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FEBRUARY 2022