

IN THE SUPREME COURT OF THE UNITED STATES

ERNEST ROMOND GIBBS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court exceeded the scope of its discretion when, after granting petitioner's motion under 28 U.S.C. 2255 and vacating one of his counts of conviction, it left in place his terms of imprisonment on two remaining counts of conviction and declined to consider evidence of his post-sentencing conduct.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Carter, No. 03-cr-636 (Jan. 24, 2006)

Gibbs v. United States, No. 16-cv-2033 (Apr. 5, 2019)

Leggett v. United States, No. 16-cv-1826 (Aug. 26, 2019)
(denying co-defendant's motion under 28 U.S.C. 2255)

Carter v. United States, No. 19-cv-4563 (Jan. 4, 2022)
(denying co-defendant's motion under 28 U.S.C. 2255)

United States Court of Appeals (11th Cir.):

United States v. Gibbs, No. 06-10728 (June 26, 2007)

Leggett v. United States, No. 19-14296 (Jan. 23, 2020)
(denying certificate of appealability from denial of co-defendant's motion under 28 U.S.C. 2255)

Gibbs v. United States, No. 20-14188 (Aug. 27, 2021)

Supreme Court of the United States:

Gibbs v. United States, No. 07-6790 (Oct. 29, 2007)

Leggett v. United States, No. 19-8828 (Oct. 5, 2020) (denying co-defendant's petition for writ of certiorari)

IN THE SUPREME COURT OF THE UNITED STATES

No. 21-6466

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v.

UNITED STATES OF AMERICA

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-15) is not published in the Federal Reporter but is available at 2021 WL 3825176.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 2021. The petition for a writ of certiorari was filed on November 23, 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 Georgia, petitioner was convicted of conspiring to commit robbery in violation of the Hobbs Act, 18 U.S.C. 1951(a); attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2; and causing the death of another person by use of a firearm during the commission of a crime of violence, in violation of 18 U.S.C. 924(c) (1) (A) (iii), (j) (1), and 2. Judgment 1; see Superseding Indictment 1-3. The district court sentenced petitioner to consecutive 20-year terms of imprisonment on the Hobbs Act counts and a consecutive term of life imprisonment on the Section 924(j) count. Judgment 2. The court of appeals affirmed. 237 Fed. Appx. 550. Petitioner later moved under 28 U.S.C. 2255 to vacate the Section 924(j) conviction. The district court granted the motion, but declined to reduce petitioner's sentence on the Hobbs Act counts. Pet. App. 16-24. The court of appeals affirmed. Id. at 1-15.

1. In 2003, petitioner and several associates attempted to rob an armored truck. Presentence Investigation Report (PSR) ¶¶ 15-20. As two guards protecting the truck approached a bank to retrieve deposits, petitioner and one of his associates, Michael Leggett, emerged from around a corner and opened fire, discharging seven rounds from their handguns. Pet. App. 3; PSR ¶¶ 16-17, 20, 28. They gave no warning and made no demands. Pet. App. 3; PSR ¶ 17. One of the guards was killed instantly; the other was

wounded. Pet. App. 3; PSR ¶¶ 18-19. Petitioner grabbed two empty canvas bags that the wounded guard had been carrying and fled. Pet. App. 3; PSR ¶¶ 19-20.

A federal grand jury in the Northern District of Georgia charged petitioner with conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2; and causing the death of another person by use of a firearm during the commission of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(iii), (j)(1), and 2. Superseding Indictment 1-3. The indictment specified that the crime of violence underlying the Section 924(j) count was the charged conspiracy to commit Hobbs Act robbery. Id. at 3. Petitioner proceeded to trial, where the jury found him guilty on all counts. Pet. App. 2-3.

At sentencing, the district court determined that petitioner's offense level under the Sentencing Guidelines was "at least a 43" (the Guidelines' highest level) because a victim was killed under circumstances constituting murder under 18 U.S.C. 1111. Pet. App. 4; see id. at 3-4 (discussing United States Sentencing Guidelines §§ 2A1.1, 2B3.1(c) (2004)). Petitioner's recommended sentence under the Guidelines was life imprisonment, with a statutory-maximum term of 240 months of imprisonment on each of the Hobbs Act counts. Id. at 4. The district court emphasized that petitioner's offense involved a premeditated robbery and felony murder, and it found no basis to conclude that

petitioner would not commit an act of violence again. Id. at 4-5. The court sentenced petitioner to consecutive terms of 240 months of imprisonment on each of the Hobbs Act counts, and a consecutive sentence of life imprisonment on the Section 924(j) count. Id. at 5. The court declined to impose a term of supervised release, deeming it unnecessary in light of the life-imprisonment sentence. Ibid.

Petitioner appealed his convictions and sentence, and the court of appeals affirmed. 237 Fed. Appx. 550. This Court denied a petition for a writ of certiorari. 552 U.S. 1005.

2. In 2016, petitioner filed a pro se motion under 28 U.S.C. 2255 to vacate his Section 924(j) conviction in light of Johnson v. United States, 576 U.S. 591 (2015), which held that the “residual clause” of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e) (2) (B) (ii), is void for vagueness, 576 U.S. at 597. Pet. App. 5. The district court denied the motion as foreclosed by circuit precedent. Id. at 5-6.

Petitioner thereafter filed a pro se motion to reconsider or amend the judgment under Federal Rule of Civil Procedure 59(e), and in the alternative, he requested that the motion be held in abeyance pending this Court’s resolution of Davis v. United States, 139 S. Ct. 2319 (2019). Pet. App. 6; see C.A. App. 47-65. The district court appointed counsel for petitioner. Pet. App. 6. After this Court held in Davis that the definition of a “crime of violence” in 18 U.S.C. 924(c) (3) (B) is unconstitutionally vague,

see 139 S. Ct. at 2336, petitioner filed an amended motion under Rule 59(e) asserting that his Section 924(j) conviction was no longer valid because it was predicated on a "crime of violence" (conspiracy to commit Hobbs Act robbery) that qualified as a "crime of violence" only under Section 924(c)(3)(B). Pet. App. 6; C.A. App. 75-91. Petitioner requested that the district court vacate the Section 924(j) conviction and revisit his remaining sentences on the Hobbs Act counts after conducting a resentencing hearing. Pet. App. 6; C.A. App. 90-91.

In response, the government agreed that petitioner's Section 924(j) conviction should be vacated. Pet. App. 6. But the government opposed petitioner's request for a resentencing hearing, arguing that it was apparent from the original sentencing record that the absence of a life sentence on the Section 924(j) count would not have affected the district court's determination of the appropriate sentences for the Hobbs Act counts. Id. at 6-7; see C.A. App. 97-101. In particular, the government observed that the district court had imposed independent, consecutive sentences on each of the Hobbs Act counts; that petitioner's Guidelines range was unchanged without the Section 924(j) count; that nothing about the vacatur of petitioner's Section 924(j) conviction undermined the court's determination that petitioner's offense conduct warranted a sentence of life imprisonment; and that petitioner had been given the opportunity to present mitigating evidence at his original sentencing. C.A. App. 98-100. In a reply brief,

petitioner stated for the first time that he wished to present evidence of his post-sentencing rehabilitation, but he did not describe that evidence. Id. at 109.

The district court granted petitioner's Rule 59 motion and vacated petitioner's Section 924(j) conviction. Pet. App. 16-24. But the court left petitioner's sentences on the Hobbs Act counts "as originally imposed, with the exception of * * * adding a term of supervised release" of five years on each count, to be served concurrently. Pet. App. 23; see id. at 23-24. The court found that "any further reduction of sentence would undermine the objectives of sentencing" as described in 18 U.S.C. 3553(a)(2). Pet. App. 21; see id. at 20-23. The court explained that it had reviewed the record, the sentencing transcript, and the presentence report, and had determined that consecutive terms of 240 months of imprisonment on the remaining counts remained appropriate in light of the sentencing factors in Section 3553(a). Id. at 7, see id. at 22-23. In making that determination, the court relied on the seriousness of petitioner's offense; his history and characteristics (including his mental health, upbringing, and prior criminal conduct); and the need to avoid an unwarranted sentencing disparity with petitioner's co-defendant (Leggett), who had received a 480-month sentence after pleading guilty to

conspiring to commit Hobbs Act robbery and use of a firearm during a crime of violence. Id. at 22-23.*

3. The court of appeals affirmed. Pet. App. 1-15.

The court of appeals first determined that the district court had not erred in declining to conduct a formal resentencing hearing, because the sentence modification in this case was not a "critical stage of the proceedings" such that due process would have required petitioner's presence. Pet. App. 8; see id. at 8-12 (citing United States v. Brown, 879 F.3d 1231 (11th Cir. 2018), and United States v. Thomason, 940 F.3d 1166 (11th Cir. 2019), cert. denied, 140 S. Ct. 1213 (2020)). In particular, the court of appeals found that the legal defect that had required vacatur of petitioner's Section 924(j) conviction had no effect on his Hobbs Act convictions, as the sentences were independent and petitioner would have faced the same recommended sentence under the Guidelines even absent the Section 924(j) conviction. Id. at 11-12. The court further determined that the proceedings here did not require the district court to exercise significant discretion, as petitioner's Guidelines range had not changed and the district court did not increase petitioner's sentence. Id. at 12.

Next, the court of appeals rejected petitioner's claim that the district court had committed procedural error by declining to receive evidence of his post-sentencing conduct. Pet. App. 12-15.

* The district court had since reduced Leggett's sentence to 360 months of imprisonment after he provided substantial assistance to the government. Pet. App. 7-8, 23.

The court of appeals acknowledged this Court's holding in Pepper v. United States, 562 U.S. 476 (2011), that a district court may consider post-sentencing conduct when it resentences a defendant after an appellate court vacates the original sentence. Pet. App. 14 (citing 562 U.S. at 499-500). But the court of appeals observed that neither this Court nor the court of appeals has held that a district court must consider such evidence. Id. at 14-15. And the court of appeals observed that, here, the district court had conducted a thorough review, including several Section 3553(a) factors, and had adequately explained its determination that those considerations outweighed any potential evidence regarding petitioner's rehabilitation. Id. at 15. The court of appeals explained that "the district court was entitled to give more weight to the nature of the offense than [petitioner's] most current personal characteristics or potential evidence regarding his post-sentencing rehabilitation," ibid., and found no abuse of discretion.

ARGUMENT

Petitioner contends (Pet. 10-19) that the district court erred when it granted his motion to vacate his Section 924(j) conviction, but left in place his two remaining terms of imprisonment, and declined to receive evidence of his post-sentencing conduct. That contention lacks merit, and the court of appeals' unpublished decision does not conflict with any decision of this

Court or another federal court of appeals. Further review is unwarranted.

1. Relying on Pepper v. United States, 562 U.S. 476 (2011), petitioner asserts (Pet. 10-14) that the district court here was required to receive and review any evidence that he wished to offer concerning his post-sentencing conduct. Pepper, however, simply rejected a court of appeals' rule that had altogether precluded consideration of post-sentencing rehabilitation in a resentencing proceeding. See 562 U.S. at 486-487. The Court explained that such a rule was inconsistent with the judicial tradition of offender-specific sentencing and with 18 U.S.C. 3661, which authorizes sentencing courts to consider information concerning a defendant's background, character, and conduct. Pepper, 562 U.S. at 487-493. As the court of appeals recognized (Pet. App. 15), however, this Court did not mandate consideration of such evidence in every resentencing proceeding. To the contrary, the Court emphasized the "'wide discretion'" that district courts enjoy "in the types of evidence they may consider when imposing sentence," and the Court held only that "a district court at resentencing may consider evidence of the defendant's postsentencing rehabilitation." Pepper, 562 U.S. at 480-481 (emphasis added) (quoting Williams v. New York, 337 U.S. 241, 246 (1949)); see id. at 487 (similar use of "may" in describing the question presented).

Petitioner acknowledges that this Court in Pepper "left what consideration, if any, to give a defendant's post-sentencing

rehabilitation to the district court's discretion." Pet. 11-12 (quoting Pet. App. 14). And petitioner does not suggest that the district court in this case considered itself to be precluded from considering his post-sentencing conduct. Instead, he asserts (Pet. 14) that under Pepper, "a court's discretion kicks in only after the court studies a defendant's proffered evidence, not before." But petitioner fails to locate that rule in Pepper, which "allow[ed] district courts" to review and utilize evidence of post-sentencing conduct without requiring that they do so. 562 U.S. at 502; see id. at 513 (Breyer, J., concurring in part and concurring in the judgment) (explaining that the question presented was whether a district court "might sometimes take account of a (re-sentenced) offender's post-sentencing rehabilitation," and agreeing that it could).

Petitioner's suggestion (Pet. 14) that the district court here was bound to receive evidence of post-sentencing rehabilitation is at odds with Pepper's observation that such evidence may be "irrelevant" where "the narrow purposes of [a] remand proceeding" would not logically require consideration of that evidence. Pepper, 562 U.S. at 505 n.17. That observation reflects that the nature of the proceeding -- which turns on the kind of error at issue, the structure of the defendant's original sentence, and the scope of the district court's authority, see Pet. App. 8-12 -- may determine the relevance of post-sentencing conduct in any particular case. Thus, for example, the court of appeals in United

States v. Richardson, 948 F.3d 733 (6th Cir.), cert. denied, 141 S. Ct. 344 (2020), found that the district court had permissibly declined to consider evidence of post-sentencing conduct where the court of appeals had directed a limited remand for the district court to consider whether to vacate a defendant's Section 924(c) conviction. See id. at 743.

Petitioner does not challenge the district court's decision in this case, upheld by the court of appeals, to conduct a limited proceeding rather than a full resentencing. See Pet. App. 8-12. And in that context, the district court permissibly determined that evidence of post-sentencing rehabilitation would not have materially affected that proceeding, which was informed by other Section 3553(a) factors. As the court of appeals observed, the district court was "thorough" in "reviewing the record," "weighing several of the § 3553(a) factors," and "considering relevant facts." Id. at 15; see id. at 20-23. The district court also "adequately explained" its determination that, in the circumstances here, vacatur of petitioner's Section 924(j) conviction did not warrant changing his terms of imprisonment on the Hobbs Act counts in light of, inter alia, the serious "nature and circumstances of the convictions," petitioner's "history and characteristics," and "the need to avoid sentencing disparities" with petitioner's co-defendant, who had received a sentence of 480 months of imprisonment. Ibid.; see id. at 22-23. In addition, the district court correctly observed that vacatur of petitioner's

Section 924(j) conviction did not affect the Sentencing Guidelines' recommendation for his sentence. See id. at 20 n.3. After considering all of those factors, the court's ultimate determination that a further reduction in petitioner's sentence would "undermine the objectives of sentencing," id. at 21, was well within the court's "wide discretion," Pepper, 562 U.S. at 480 (citation omitted).

2. Petitioner asserts (Pet. 15-17) that the decision below conflicts with decisions of the First, Second, Third, and Sixth Circuits. But the court of appeals' unpublished decision here did not establish binding precedent, see Lenis v. United States Att'y Gen., 525 F.3d 1291, 1292 n.3 (11th Cir. 2008) (citing 11th Cir. R. 36-2), and therefore did not create a circuit conflict warranting this Court's review. And in any event, petitioner identifies no court of appeals whose precedent would require a different result in this case.

Petitioner cites (Pet. 15) United States v. Leahy, 668 F.3d 18 (2012), in which the First Circuit stated in dictum that "a sentencing court must consider evidence of a defendant's rehabilitation as part of its analysis." Id. at 25. The court in Leahy affirmed the judgment under review, however, because the district court had considered evidence of the defendant's rehabilitation and was "not required to impose a lesser sentence as a result." Ibid. And the First Circuit has since clarified that "Pepper plainly says that a district court 'may,' not must, consider post-

sentencing conduct." United States v. Rodriguez-Rosado, 909 F.3d 472, 481 (2018) (quoting Pepper, 562 U.S. at 490, and citing United States v. Navarro, 693 Fed. Appx. 459, 460 (7th Cir. 2017), and United States v. Parker, 762 F.3d 801, 812 (8th Cir. 2014)).

Petitioner next cites (Pet. 16) the Second Circuit's unpublished summary order in United States v. White, 655 Fed. Appx. 42 (2016), in which the court stated that a district court must "take into account such material changes in circumstance as have arisen since the original proceeding," and determined (with the government's agreement) that the defendant's post-sentencing rehabilitation so qualified. Id. at 44. As explained above, however, the district court here permissibly determined that petitioner's post-sentencing conduct was not material in light of all the other factors bearing on his sentence. And the Second Circuit, like the First Circuit, has not treated district courts as invariably required to consider evidence of post-sentencing rehabilitation at all resentencing proceedings. See United States v. Sandford, 859 Fed. Appx. 602, 603 (2021) (summary order) (rejecting argument that a district court erred in not considering a defendant's post-sentencing rehabilitation because the resentencing required only that the court make a "narrow determination" whether the defendant's "corrected criminal history score would result in a different sentence").

Finally, petitioner cites (Pet. 16-17) decisions of the Third and Sixth Circuits, all but one of which are unpublished, remanding

with instructions for a district court to consider evidence of post-sentencing rehabilitation. See United States v. Diaz, 639 F.3d 616, 623 (3d Cir. 2011); United States v. Bailey, 459 Fed. Appx. 118, 122 (3d Cir. 2012); United States v. Gapinski, 422 Fed. Appx. 513, 523 (6th Cir. 2011). Each of those cases, however, involved a pre-Pepper resentencing proceeding in which the district court had failed to recognize the scope of its discretion to consider such evidence. See Diaz, 639 F.3d at 622-623 (noting that the district court had relied erroneously on pre-Pepper authority, and remanding to give the district court an "opportunity to take counsel from the Supreme Court's instructions in Pepper"); Bailey, 459 Fed. Appx. at 121-122 (explaining that "the law applied by the trial court is now contrary to that which exists as we consider this matter on appeal," and remanding "in accordance with the mandates of Pepper"); Gapinski, 422 Fed. Appx. at 520 (remanding because the court of appeals' "prior opinion [had] concluded, without the benefit of the Supreme Court's decision in Pepper, that the district court could not vary downward from the Guidelines range based on [the defendant's] post-sentencing rehabilitation efforts").

Petitioner identifies nothing in the record here indicating that the district court believed that it was limited in its ability to consider evidence of post-sentencing rehabilitation. And in any event, both the Third and Sixth Circuits have since recognized, in unpublished decisions, that a district court need not consider

evidence of post-sentencing rehabilitation in a subsequent sentence-related proceeding. See United States v. Robinson, 813 Fed. Appx. 62, 64 (3d Cir. 2020) ("Though Pepper held that a defendant's postsentencing conduct 'may be highly relevant to several § 3553(a) factors,' it also held that courts need not consider this at resentencing.") (quoting 562 U.S. at 491); United States v. Penalosa, 648 Fed. Appx. 508, 528 (6th Cir. 2016) ("The Pepper line of decisions nowhere holds that courts must consider post-sentence conduct.") (citation and internal quotation marks omitted).

3. Finally, even if the question presented otherwise warranted further review, this case would not be a suitable vehicle in which to address it. In the district court, petitioner never described the evidence of rehabilitation that he wished to present, and he has not explained how that evidence would have warranted a lower sentence notwithstanding the serious nature of his offense, his Guidelines range of life imprisonment, and the 480-month sentence that his co-defendant received after pleading guilty.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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