No: 23-5954

ORIGINAL

In the Supreme Court of the United States

ARTHUR PICKLO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Section 924(c) of Title 18 provides two, conflicting mandates for a sentencing court: (1) that the § 924(c) sentence must be imposed "in addition to the punishment provided for such crime of violence or drug trafficking crime," and (2) that the § 924(c) sentence may not "run concurrently with any other term of imprisonment imposed on the person."

The question presented is as follows:

Whether the rule of lenity requires a sentencing court to impose a § 924(c) sentence consecutive to only the predicate crime of violence or drug offense, since the conflicting provisions under § 924(c) noted above render the statute ambiguous.

PARTIES TO THE PROCEEDING

Petitioner is Arthur Picklo. Mr. Picklo was the Movant-Appellant below.

Respondent is the United States of America, the Respondent-Appellees below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Arthur Picklo ("Mr. Picklo") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit, whose judgment is herein sought to be reviewed, was entered on June 28, 2023, in an unpublished decision in *Picklo v. United States*, No. 22-11986, 2023 U.S. App. LEXIS 16346 (11th Cir. June 28, 2023), rehearing denied (July 31, 2023).

The opinions of the lower courts, whose relevant judgments are herein sought to be reviewed, are:[1]

Picklo v. United States, No. 22-11986-F, 2023 U.S. App. LEXIS 6671 (11th Cir. Mar. 20, 2023) (order granting certificate of appealability);

Picklo v. United States, Civil Action No. 3:20-CV-00666, Doc. 10 (M.D. Fla. Apr. 19, 2022) (unpublished) (order denying § 2255 motion);

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[1] Each court decision is reproduced in the Appendix.

Picklo v. United States, Civil Action No. 3:20-CV-00666, Doc. 1 (M.D. Fla. June 29, 2020) (unpublished) (motion to vacate under 28 U.S.C. § 2255);

In re Picklo, No. 20-12072-G, 2020 U.S. App. LEXIS 20065 (11th Cir. June 26, 2020) (order permitting second or successive § 2255 motion).

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on May 10, 2023, and rehearing was denied on August 9, 2023. The Jurisdiction of this Court is invoked under Title 28 U.S.C. § 1654(a) and 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

Federal Rule of Appellate Procedure 4(a) and 28 U.S.C. § 2107 are the main statutes and rules referenced in this petition, and they are reproduced in Appendix B.

STATEMENT OF THE CASE AND FACTS

I. COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

A. The criminal proceedings, sentencing, and appeal.

On October 21, 2004, Mr. Picklo was indicted for the following: Count One: "while acting under color of law, did attempt to kill [the victim] ... by the use of a dangerous weapon, that is, a firearm, resulting in bodily injury to [the victim], and did steal a sum of U.S. currency" from the victim in violation of 18 U.S.C. § 242; Count Two: did knowingly, willfully, intentionally and unlawfully take and obtain United States currency from the victim "by means of actual and threatened force, violence, and fear of immediate injury to the [victim], in that [Defendant] shot [the victim] with a firearm at close range" in violation of 18 U.S.C. § 1951; Count Three: "did unlawfully attempt to kill [the victim], with intent to prevent [the victim] from communicating information to a law enforcement officer of the United States ... and the

robbery by actual or threatened force ... from [the victim] in violation of 18 U.S.C. § 1512(a)(l)(C); Count Four: "knowingly used and carried a firearm, which was discharged, during and in relation to and did knowingly possess a firearm in furtherance of crimes of violence" in relation to the charges in Counts One, Two, and Three, in violation of 18 U.S.C. § 924. (Crim. Case, 3:04-cr-304-HLA-PDB, Dkt. 1).

The jury was instructed that Mr. Picklo could be found guilty as to Count 4 only if the jury found that he committed one of the crimes of violence as charged in Counts 1, 2, or 3 of the indictment. (Crim. Case Dkts. 83, pp. 11-22; 136 p. 2). Count 4 references multiple, distinct predicate offenses and the jury's special verdict does not specify which of those offenses the jury found supported Mr. Picklo's conviction as to Count 4. *See In re Picklo,* No. 20-12072-G (11th Cir. June 26, 2020) (Crim. Case Dkt. 84; 136 p. 7). Mr. Picklo was convicted on all counts through a special jury verdict; however, the

verdict did not specify on what offense his § 924(c) conviction was predicated. *Id.* The jury specifically found that the conduct in Count I resulted in bodily injury to the victim and that Mr. Picklo attempted to kill the victim. *Id.*

The United States District Court for the Middle District of Florida imposed a total sentence of 40 years, which comprised of 30 years for the deprivation of rights conviction (18 U.S.C. § 242), 20 years each for the robbery (18 U.S.C. § 1951) and attempted murder of the victim (18 U.S.C. § 1512), all concurrent, plus 10 years to run consecutively for use of a firearm in furtherance of a crime of violence (18 U.S.C. § 924(c)). The court did not specify to which offense the § 924(c) conviction applied.

On appeal to the United States Court of Appeals for the Eleventh Circuit, Mr. Picklo argued that (1) he was not acting "under color of law" to be convicted of the § 242 charge, (2) it was not the kind of robbery that affected interstate commerce, and (3) he did not attempt to murder the victim to prevent disclosure to law enforcement. The court affirmed his conviction and sentence, and Mr. Picklo did not petition to appeal to the Supreme Court.

B. The postconviction proceedings.

Years after his appeals were exhausted, and after his "one shot"[2] at relief under 28 U.S.C. § 2255 was denied, the Eleventh Circuit granted him permission to file a second or successive § 2255 motion challenging his § 924(c) conviction, in light of the Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019), which held that the so-called "residual clause" of § 924(c) was unconstitutionally vague. Since Mr. Picklo's § 924(c) conviction likely rested on his § 242 conviction, which qualified under the residual clause as a crime of violence, the Eleventh Circuit found that Mr. Picklo met the criteria for filing another § 2255 motion in the district court.

The district court, however, found that the error was "harmless" because the § 924(c) sentence had to run consecutive to the sentences on all the charges, so invalidating the § 242 predicate for § 924(c) would not affect the overall sentence, and any of the counts could be valid predicates for the § 924(c) conviction, including the § 242 count. A panel of the

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[2] *Potter v. United States*, 887 F.3d 785 (6th Cir. 2018) ("The Antiterrorism and Effective Death Penalty Act generally gives federal prisoners one shot to attack their sentences in federal court").

Eleventh Circuit granted a certificate of appealability on the following question:

> Whether the district court erred in concluding that Mr. Picklo's conviction for violating 18 U.S.C. § 242 was a "crime of violence" under 18 U.S.C. § 924(c)(3)(A), and, if so, whether Mr. Picklo was entitled to resentencing because his original sentence was based on the erroneous conclusion that § 924(c)(1)(A) required the sentence on Count 4 to run consecutively to the sentence on Count 1, even though he concedes that his conviction on Count 4 is not invalid.

The Eleventh Circuit, citing its precedent that a § 924(c) conviction that may have been predicated on a non-qualifying charge could be harmless if the overall sentence would not have changed absent the error, affirmed the denial of relief. Mr. Picklo filed a motion for panel rehearing and was denied.[3]

[3] As of this filing, a motion to recall the mandate to allow a proper petition for rehearing *en banc* was filed on Sept. 15, 2023, and is still pending in the Eleventh Circuit.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

Supreme Court Rule 10 provides relevant parts as follows:

> **Rule 10: Considerations Governing Review on Certiorari**
>
> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
> >
> > * * *
> >
> > (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Id. Supreme Court Rule 10(a), (c).

I. THE COURT OF APPEALS ERRED IN CHOOSING THE HARSHER OF TWO CONFLICTING PENALTIES IN THE SAME STATUTE FOR THE SAME OFFENSE.

A. The Conflicting Penalties Under Section 924(c).

A panel of the Eleventh Circuit relied on *Granda v. United States*, 990 F.3d 1272 (11th Cir. 2021), in affirming the denial of Mr. Picklo's § 2255 motion. In that case, this Court held that conspiracy to use a firearm in furtherance of a drug trafficking offense or crime of violence that was based on an invalid predicate offense was harmless since the resulting sentence without the error would have been the same as with the error. The Court cited 18 U.S.C. § 924(c)(1)(D)(ii), which provides the following:

> [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.

However, another provision of that subsection says that the § 924(c) sentence must be imposed "in addition to the punishment provided for such crime of violence or drug trafficking crime." § 924(c)(1)(A). And because a § 924(c) conviction can only be predicated on *one* "crime," according to the language of the statute, it must be applied in addition to *only one* of the crimes charged. This means that the language in §

924(c)(1)(D)(ii) conflicts with § 924(c)(1)(A)'s "in addition to" language since the latter provision requires the § 924(c) sentence to be imposed consecutive to all other sentences.

This conflict leaves § 924(c) at odds with itself, and the rule of lenity requires the first provision to apply to Mr. Picklo's case. He should have been granted relief since his § 924(c) sentence was required to run consecutive to the crime of violence, which had a 20-year maximum, for a total of 30 years and not 40.

B. The Legislative History of Section 924(c) Requires the Sentence to Run Consecutive to Only the Predicate Offense.

The original version of § 924(c) was found to be too vague in its language requiring a consecutive sentence, so the Supreme Court had held that if the predicate offense was enhanced and was a harsher penalty, the § 924(c) penalty could not apply. *See, e.g., Simpson v. United States*, 435 U.S. 6, 98 S. Ct. 909 (1978) (federal armed robbery precluded § 924(c) sentence); *Busic v. United States*, 446 U.S. 398, 100 S. Ct. 1747 (1980) (enhanced predicate offense precluded § 924(c) sentence).

In response to these decisions, Congress amended § 924(c) to clarify that the sentence under § 924(c) must be imposed "in addition to" the

predicate offense. *See United States v. Colvin,* 353 F.3d 569 (7th Cir. 2003) (explaining how Congress amended § 924(c) in light of *Busic*). Congress was clear that this "in addition to" language meant that the § 924(c) sentence was an additional punishment to the *predicate* offense.

But the provision under § 924(c)(1)(D)(ii) confuses matters. It says that a § 924(c) sentence is to be imposed consecutively to all sentences imposed. This provision conflicts with § 924(c)(1)(A), and the rule of lenity requires that the more favorable provision should apply in Mr. Picklo's case.

C. The Rule of Lenity Requires the Lesser of the Conflicting Penalties to Apply.

This Court has held that the rule of lenity must be applied "for those situations in which a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute." *United States v. R. L. C.*, 503 U.S. 291, 305-06, 112 S. Ct. 1329 (1992) (cleaned up). This rule applies equally to criminal statutes and sentencing provisions. *Id.* Under the rule of lenity, the more favorable provision of conflicting provisions in a criminal statute must apply to a defendant. *United States v. Santos*, 553 U.S. 507, 514, 128 S. Ct. 2020, 170 L. Ed. 2d 912 (2008) ("The rule of lenity requires

ambiguous criminal laws to be interpreted in favor of the defendants subjected to them").

Applying the rule of lenity here, the provision under § 924(c)(1)(A) requires that Mr. Picklo's § 924(c) must be imposed "in addition to" the *predicate* crime of violence, and not the entire sentence. Since the only crimes of violence that could arguably qualify as valid predicate offenses in light of *Davis* are the robbery and attempted murder charges, imposing the § 924(c) 10-year sentence in addition to one of those sentences would result in a 30-year sentence, and not the 40-year sentence Mr. Picklo is currently serving with the § 924(c) sentence tacked onto the invalid § 242 conviction's 30-year sentence.

The Panel's reliance on *Granda* (and other circuit precedent on this subject) did not account for the conflicting language in § 924(c). In fact, none of the Eleventh Circuit's cases has dealt with this issue. This is why this Court should rehear Mr. Picklo's appeal *en banc* and resolve this important problem before the error ensnares more people, keeping them in prison longer than Congress had intended.

D. The proper remedy in this case is to grant the petition, vacate the lower courts' decisions, and remand to the Eleventh Circuit Court of Appeals for further consideration.[4]

This Court has said that an order granting a petition for a writ of certiorari, vacating the judgment below, and remanding for further proceedings, aka "GVR," is "an integral part of this Court's practice" in cases where it is apparent that the lower court(s) failed to consider (or wrongly considered) a settled area of law or an area that has since changed during the appeal. *Lawrence v. Chater*, 516 U.S. 163, 166 (1996); *see also Id.* at 166 (collecting Supreme Court cases applying a GVR).

A GVR "has some virtues," as this Court said in *Lawrence*, because it (1) "conserves the scarce resources of this Court that might otherwise be expended on plenary consideration"; (2) "assists the court below by flagging a particular issue that it does not appear to have fully considered"; (3) "assists this Court by procuring the benefit of the lower court's insight before [it] rule[s] on the merits"; and (4) "alleviates the potential for unequal treatment that is inherent in our inability to grant plenary review of all pending cases raising similar issues." *Id.* at 167-68.

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[4] A "GVR" is proper in this situation, as this Court has explained in *Lawrence v. Chater*, 516 U.S. 163, 166 (1996).

Since the Eleventh Circuit clearly misapplied this Court's precedent in its rule-of-lenity cases, a GVR would be the proper remedy to allow the court to evaluate, under the proper ruling of this Court, whether Mr. Picklo's motion to vacate his § 924(c) conviction should have been granted for resentencing under the proper provision of § 924(c). This would meet all the criteria above, especially the second provision that a GVR would "flag" this issue for the Eleventh Circuit to correct in the first instance.

CONCLUSION

Based on the foregoing, this Court should grant this request for a Writ of Certiorari and remand to the Court of Appeals for the Eleventh Circuit.

Done this 20 day of OCTOBER 2023.

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