

24-5286

No. _____

FILED
JUL 15 2024

OFFICE OF THE CLERK
SUPREME COURT, U.S.

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Kenneth Rose, Pro Se

— PETITIONER

(Your Name)

VS.

United States of America

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Dist. Court S.D. Illinois,
(7th Cir. Court of Appeal denying certificate of appealability)

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Kenneth Rose #14258-025

(Your Name)

P.O. Box 9000-Low

(Address)

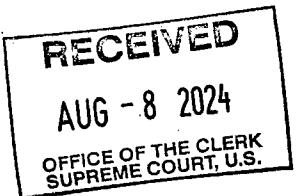
Forrest City, AR 72336

(City, State, Zip Code)

None

(Phone Number)

i.



QUESTION(S) PRESENTED

In Simpson v. U.S. (435 U.S. 6), the Supreme Court held that a defendant convicted of an aggravated bank robbery under 18 U.S.C.A. § 2113(d) could not also be convicted under the general statute of § 924(c) (the same proofs being required) for his conduct growing out of a single transaction.

Was it permissible for the lower court(s) to ignore applying the Court's Simpson precedent under its assumption that Congress overrode the Simpson precedent when it amended 18 U.S.C.A. § 924(c) in 1984?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

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STATUTES AND RULES

- 18 U.S.C. § 2113(d)
- 18 U.S.C. § 924(c)

OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix 1 to the petition and is

[X] reported at LEXIS 121908, July 14, 2023; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

[] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

JURISDICTION

[X] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was Certificate of appealability denied May 13, 2024 No. 23-2645

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[] For cases from state courts:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- U.S. Constitution - Fifth Amendment - Double Jeopardy Clause

STATEMENT OF THE CASE

A. Statutory Background

18 U.S.C.A. § 2113(d) carries an enhanced penalty for a bank robbery committed in violation of § 2113(a), but only when the defendant uses a dangerous weapon or device to commit the crime. Section 2113(d) states;

"Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined...".

18 U.S.C.A. § 924(c) provides that whoever uses a firearm in the commission of a federal felony shall be subject to a penalty in addition to the punishment provided for that felony if it also creates an offense distinct from the underlying felony. Section 924(c) states;

"Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking—...".

On February 28, 1978 the U.S. Supreme Court decided *Simpson v. U.S.* (435 U.S. 6). In its holding the Court opined that in a federal prosecution growing out of a single transaction of bank robbery with firearms, a defendant sentenced under § 2113(d) could not receive an additional consecutive penalty under § 924(c)—the same proofs being required to support convictions under both

statutes—since § 2113(d), as the more specific statute, held precedence over the general statute, § 924(c).

B. Factual Background

On 6/25/2019 Kenneth Rose plead guilty, and was sentenced to serve 36 months of imprisonment for 1 count of armed bank robbery – in violation of 18 U.S.C.A. § 2113(d), and to serve 84 months for count (2) – use of a firearm in furtherance of a crime of violence – in violation of 18 U.S.C.A. § 924(c), for a total term of 120 months to be served consecutively. (3:19-CR-30004-SMY). Rose did not file a direct appeal.

On 3/30/20, Rose filed a motion to vacate, set aside, or correct sentence under 28 U.S.C.A. § 2255, (3:20-CV-00334-SMY), which was filed by the district court on 4/07/20.

On 9/29/20, the government filed its opposition to Rose's § 2255 motion, and on 7/14/23, the U.S. District Court for the Southern District of Illinois issued a memorandum and order denying Rose relief for his claim that his convictions under both § 2113(d) and § 924(c) violated the U.S. Supreme Court's precedent under Simpson—thereby violating his Constitutional rights against double jeopardy, the equal application of the laws and precedents of the United States, and of counsel's ineffective assistance related to these defenses.

On or about August of 2023 Rose petitioned the U.S. Court of Appeals for the Seventh Circuit for a Certificate of Appealability to challenge the District Court's denial of his § 2255 motion. On May 13, 2024 the U.S. Court of Appeals issued an order denying Rose's application for a Certificate of Appealability.

REASONS FOR GRANTING THE PETITION

A. The lower court's opinion conflicts with the statutory interpretation of 18 U.S.C.A. § 924(c) made by the Supreme Court in Simpson.

The Supreme Court held that a single transaction of bank robbery with firearms could not also hold a conviction for use of a firearm during the commission of that offense. The Court reasoned this was because, in an instance such as this, that § 924(c) does not create an offense distinct from the underlying § 2113(d) offense. And because there was no such distinction between these offenses, a prosecution that imposed an additional penalty for the same conduct would invoke a 5th Amendment double jeopardy issue because this clause protects against multiple punishment for the same offense *and* prohibits multiple prosecutions for the same offense. The Court further held that § 2113(d) already carries an enhanced penalty for bank robbery with a firearm—as a specific statute, and therefore has precedence over the more general statute of 924(c).

In sum, the Court summarized its opinion in stating that the use of a firearm during an armed bank robbery was not an appropriate offense for a cumulative penalty under § 924(c) because the charges had already been merged under § 2113(d).

B. The lower court's opinion conflicts with prior lower court rulings established after the Simpson opinion was made.

Subsequent to the Simpson holding, Circuits across the board rendered case decisions consistent with the rationale used by the Supreme Court. Some examples include;

- In Grimes v. U.S. (607 F.2d 6, 2nd Cir., 1979) the Circuit Court held

the government may not prosecute a defendant under both § 924(c) and § 2113(d) since the underlying felony is prosecutable under the latter statute.

- In U.S. v. Vaughn (598 F.2d 336, 4th Cir., 4/04/79) the court found a reduction in sentence was warranted under the change of law established by the Simpson ruling.
- In Johnson v. U.S. (619 F.2d 366, 5th Cir., 6/16/80) the government is noted to concede that Simpson and its progeny are controlling and that Johnson's sentence under § 924(c) could no longer stand; the Circuit Court analyzed the conduct of the government as indicative of the common perception of the statutes, and found that for several years the Department of Justice advised all U.S. Attorneys not to prosecute under both § 2113(d) and § 924— see U.S. v. Rodriguez 612 F.2d 906, 1980 citing 98 S. Ct. 914; and in U.S. v. Barrington (662 F.2d 1046, 5th Cir., 10/21/81) the Court found application of the Simpson rationale against imposing multiple punishments for a single transactional offense.
- In Prince v. U.S. (352 U.S. 322, 7th Cir., 5/08/79) the court held a bank robber who also used a firearm to commit the offense could not be punished cumulatively for two offenses defined under the same bank robbery statute.
- In U.S. v. Scott (804 F.2d 104, 8th Cir., 9/12/86) the Circuit Court acknowledged the Court's Simpson rationale that prevented sentencing under both § 2113(d) and § 924(c).
- In U.S. v. Hearst (466 F. SUPP. 1068, N.D. CAL., 1978) the court held a defendant may not properly be tried for both armed bank robbery under § 2113(d) and for the use of a firearm to commit that felony under § 924(c).
- In U.S. v. Sudduth (458 F.2d 1198, 10th Cir., 1972) the Circuit held § 924(c) was meant to create a separate crime, rather than merely to enhance punishment.

C Stare Decisis from this Court's Gonzales holding should not apply because Gonzales addressed a different conflict-of-law issue that does not square with this issue.

In the 7th Circuit's Harris decision (U.S. v. Harris 832 F.2d 88, Oct.

16, 1987) the court opined that Congress amended 18 U.S.C.A. § 924(c) under the Comprehensive Crime Control Act of 1984 (Pub. L. No. 98-473, § 1005(a), 98 Stat. 1976, 2138-99). And by its amendment, the Circuit held § 924(c) to read as follows:

Whoever, during an in relation to any crime of violence or drug trafficking crime, including a crime of violence or drug trafficking crime, which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device, for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years; and if the firearm is a machinegun, or is equipped with a firearm silencer or firearm muffler, to imprisonment for ten years.

This amendment to § 924(c) appears to be referenced by the Simpson Court in its Gonzales opinion (U.S. v. Gonzales, 520 U.S. 1), but is cited as dicta without addressing the very points it cited in its Simpson ruling, nor does it address its reliance on this statutory version that does not appear as the *actual* amendment that was codified into law under the C.C.C.A. of 1984.

A review of 18 U.S.C.A. § 924(c)'s historical series of amendments shows that on Oct. 12, 1984 § 924(c) was amended and codified into law as follows:

"(c) Whoever—

"(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

"(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States,

shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment

imposed for the commission of such felony."

The discrepancy between these two versions appears to be based upon an adoption of the legislature's proposed amendment, as cited in Harris and Gonzales, and not on the text accepted in the final version.

A reading of the current version of § 924(c) appears as follows:

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

- (i) be sentenced to a term of imprisonment of not less than 5 years;
- (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
- (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years

(18 U.S.C.A. § 924(c)(1)(A))

In this present version, it is apparent that Congress was careful not to overturn the Court's Simpson holding by reference to the introductory expression, "Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, . . ." The other provision of law is readily understood to include the exception carved-out by the Simpson Court.

In addition, the parenthetical inserted as part of § 924(c)(1)(A) reads;

"(including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device)."

This parenthetical creates an indecipherable ambiguity that begs the question(s): (1) does the text serve as elements to the offense?, (2) does the "provides for an enhanced punishment" clause refer only to a 'drug trafficking' crime or does it include any 'crime of violence'?

The punctuation, or lack thereof, indicates only that the enhanced punishment provision can only apply to a 'drug trafficking' crime, for if it were otherwise it would have included a serial comma preceding the disjunctive "or" and preceding the phrase "...that provides for an enhanced punishment...". The absence of these commas renders this parenthetical unconstitutionally vague, warranting review under the rule of lenity.

D. The lower court's opinion has created an ideal opportunity to use this case as a good vehicle to resolve the merits of this issue.

The resolution of this issue will impact a significant portion of § 924 cases that included underlying convictions that already carried enhanced punishments for firearm use or possession in the commission of the offense. Rose proposes that this Court decide this matter fully by addressing the several constitutional transgressions inherent in such prosecutions, such as those under the 5th Amendment's double jeopardy clause—as squared by its Simpson decision, that prohibits multiple prosecutions for the same offense. This Court's resolution is also necessary to consider whether the government's assertion that 18 U.S.C.A. § 924(c) was actually amended and codified into law in the manner described in section C of this petition—an issue that squarely befalls scrutiny under Loper Bright Enterprises v. Raimondo (603 U.S. ___, (2024)) that precludes adopting agency interpretation of a statute, as a matter of law, which is the province of the judiciary. (also 5 U.S.C.A. § 706—requiring courts to hold unlawful and set aside agency action, findings, and conclusions found to be...not in accordance with law.)

E. The holding established by the Supreme Court in Simpson is the controlling admonition underlying the resolution of this issue by certiorari. This matter could also be resolved by summary reversal of the lower court's decision as warranted by the Simpson Court's precedent in this subject.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Kenneth Rose

Date: July 15, 2024

Since the Supreme Court's 1978 *Simpson* decision, Congress has amended § 924(c) in the Comprehensive{1987 U.S. App. LEXIS 6} Crime Control Act of 1984. The amendment altered § 924(c) to provide in relevant part:

Whoever, during and in relation to any crime of violence or drug trafficking crime, including a crime of violence or drug trafficking crime, which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device, for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a machinegun, or is equipped with a firearm silencer or firearm muffler, to imprisonment for ten years . . . (emphasis added).

On its face, § 924(c) clearly indicates that a conviction and sentence under § 924(c) is authorized even when, as here, the underlying offense, § 2113(d), already contains an enhancement provision of its own. Thus, application of the *Simpson* analysis to § 924(c), as amended, can yield but one conclusion -- that Congress specifically did intend to authorize an additional penalty for use of a firearm in the commission of the already enhanced charge{1987 U.S. App. LEXIS 7} of armed robbery of a savings and loan institution.

1984.

Act Oct. 12, 1984 substituted subsec. (c) for one which read:

"(c) Whoever—

“(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

“(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States,

shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.”.

Such Act further (effective on the first day of the first calendar month beginning 36 months after enactment on 10/12/84, as provided by § 235(a)(1) of such Act, as amended by Act Dec. 26, 1985, P. L. 99-217, § 4, 99 Stat. 1728, which appears as 18 USCS § 3551 note, and applicable as provided by such § 235, which appears as 18 USCS § 3551 note), in subsec. (a)(1), in the concluding matter, deleted “, and shall become eligible for parole as the Parole Commission shall determine” following “both”.

(c) (1) (A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

- (i)** be sentenced to a term of imprisonment of not less than 5 years;
- (ii)** if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
- (iii)** if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.