

No. 17-651

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

DOUGLAS D. JACKSON,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Seventh Circuit

**BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI**

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BRIEF IN OPPOSITON

The government asks this Court to hold the case pending the disposition of *Sessions v. Dimaya*, No. 15-1498, but there is no sound reason for such delay. The petition concerns a limited enhancement to a sentence that is already lengthy, delaying the case will unduly complicate the district court's current task on remand from the court of appeals, and the government's position in this case is inconsistent with its brief in opposition to certiorari in a case presenting the same question. Moreover, the Court's disposition of *Sessions v. Dimaya*, No. 15-1498, may not resolve this case, as the government concedes.

STATEMENT

Respondent Douglas R. Jackson was convicted in the United States District Court for the Northern District of Indiana for transporting a minor in interstate commerce with the intent that the minor engage in sexual activity (18 U.S.C. § 2423(a)), sex trafficking of a minor (18 U.S.C. § 1591(a)), and possessing a firearm in furtherance of a crime of violence ((18 U.S.C. § 924(c)). Pet. App. 1a. Mr. Jackson was 25 at the time of the offense, and the minor was 15. *Id.*

The district court sentenced Mr. Jackson to 295 months (approximately 25 years) in prison. *Id.* 8a. That sentence reflected a guidelines sentence of 235 months for the § 2423(a) and § 1591(a) offenses, plus a 60-month enhancement under § 924(c). *Id.*

Mr. Jackson appealed his sentence to the United States Court of Appeals for the Seventh Circuit. *Id.* As

relevant here, the court of appeals vacated the 60-month enhancement under § 924(c), finding the statute unconstitutionally vague. *Id.* 14a. The court of appeals also held that the district court had incorrectly applied a two-level increase to arrive at the sentencing range for the predicate offenses. *Id.* at 14a-16a.

The government petitioned for certiorari, asking this Court to review the court of appeals' conclusion that § 924(c) is unconstitutionally vague.

REASONS FOR DENYING THE PETITION

1. There is no question that Mr. Jackson will face a lengthy sentence for the serious crimes of which he was convicted. Even without the § 924(c) enhancement, the district court sentenced him to 235 months (nearly 20 years) in prison on the other counts. On remand from the court of appeals, all that remains for the district court at resentencing is to adjust the previous 235-month sentence on the predicate counts to factor out the two-level guidelines increase applied at the original sentencing.

At the end of the day, Mr. Jackson will be severely punished. Whether he faces an additional 60 months in prison pursuant to the § 924(c) enhancement is not a sufficiently important question to warrant granting certiorari or, as the government requests, holding the case until the Court disposes of *Dimaya*.

2. Holding this case would complicate the district court's current task on remand—to resentence Mr. Jackson. In doing so, the district court must ensure that it imposes a sentence “sufficient, but not greater than necessary,” to effectuate the sentencing

rationales codified in 18 U.S.C. § 3553(a). As this Court recently held, the district court may “consider a sentence imposed under § 924(c) when calculating a just sentence for the predicate count.” *Dean v. United States*, 137 S. Ct. 1170, 1177 (2017). The problem is that the government’s petition for certiorari leaves the § 924(c) sentence in limbo. If the district court wishes to take the § 924(c) sentence into account, as *Dean* permits, it must guess as to whether there will ultimately be a § 924(c) sentence at all. A prompt denial of certiorari would resolve this difficulty.

4. As the government concedes, *Dimaya* may not resolve the issue this case presents. Resp. Br. 7-9. The delay and complication a hold would create may not even be counterbalanced by any benefit gained by waiting.

5. The government’s position in this case is inconsistent with its brief in opposition to certiorari in *Prickett v. United States*, No. 16-7373. In that brief, submitted on April 3, 2017, the government contends that “the circuit conflict concerning the constitutionality of Section 924(c)(3)(B) does not warrant review at this time.” Br. in Opp. at 9, *Prickett, supra* (No.16-7373). The government argued that the Seventh Circuit could eventually reconsider its position without this Court’s intervention. *Id.* at 10-11, *Prickett, supra* (No.16-7373). More specifically, the government observed that the Seventh Circuit could reconsider the issue either in a subsequent en banc decision or in a subsequent panel decision because “[t]he Seventh Circuit . . . permits panels of that court to overrule prior panel decisions without the need for en banc review if the decision is circulated to all active

judges before publication and a majority does not request en banc consideration of the issue.” *Id.* (citing 7th Cir. R. 40(e)).

While the government asks the Court to deny review in *Prickett* because the Seventh Circuit could reconsider its position on the invalidity of § 924(c), the government could have—but did not—ask the Seventh Circuit to do just that in this case, by petitioning for rehearing or rehearing en banc.

Two months after submitting its brief in opposition in *Prickett*, the government petitioned for certiorari on the same issue in *United States v. Jenkins*, No. 17-97, urging the Court on July 19, 2017 to hold the case pending the disposition of *Dimaya*. Now the government has asked the Court to do the same in this case. All of the reasons for denying certiorari that were advanced by the government itself in *Prickett* remain true today and the government has not even attempted to explain the basis for its change in position. The Court should not reward this inconsistency, either by holding the case or granting certiorari.

In sum, the combination of factors present here counsels a prompt denial of certiorari. The government’s positions are not consistent, the case is unimportant because the § 924(c) enhancement is but a small part of a long sentence, holding the case will complicate Mr. Jackson’s resentencing, and waiting for the outcome of *Dimaya* may prove a fruitless exercise.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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