

No. 17-6567

IN THE SUPREME COURT OF THE UNITED STATES

DOMINICK T. JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to establish petitioner's mens rea for aiding and abetting the brandishing of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (1) (A) (ii) and 2.

2. Whether the district court abused the sentencing discretion discussed in Dean v. United States, 137 S. Ct. 1170 (2017), when the court determined the length of petitioner's sentence for his non-Section 924(c) offenses.

3. Whether this Court should overrule its interpretation in Deal v. United States, 508 U.S. 129 (1993), of the statutory term "second or subsequent conviction" in 18 U.S.C. 924(c) (1) (C).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-26) is not published in the Federal Reporter but is reprinted at 702 Fed. Appx. 349.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 2017. The petition for a writ of certiorari was filed on October 27, 2017. 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 Western District of Michigan, petitioner was convicted on one count of conspiracy to commit bank robbery, in violation of 18 U.S.C. 371; three counts of armed bank robbery, in violation of 18 U.S.C. 2113; and three counts of brandishing of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii) and 2. The district court sentenced petitioner to 872 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. 1-26.

1. Petitioner attempted a series of six bank robberies in western Michigan, the first five of which were two-man jobs that petitioner committed with his younger half-brother, Nathan Benson. Pet. App. 2-5. The brothers succeeded in robbing three banks at gunpoint and stole approximately \$128,000 in cash. Id. at 2-3.

a. In late 2013, petitioner approached Benson about robbing a PNC Bank branch in Galesburg, Michigan. Pet. App. 2; Gov't C.A. Br. 6. In February 2014, they met in Michigan to plan the robbery. Pet. App. 2. They agreed that petitioner would be the getaway driver and that Benson would use a firearm to rob the bank, and they determined "how" the robbery would be done. Gov't C.A. Br. 55; see Pet. App. 2.

On May 29, 2014, the brothers drove to the Galesburg bank. Pet. App. 2. Before Benson entered the bank, petitioner called

Benson's cell phone so that they would have an open channel of communication during the robbery. Ibid. When Benson entered the bank, he forced a teller to empty a cash drawer into his bag before forcing the manager and tellers into the bank's vault at gunpoint to collect additional cash. Ibid.; Gov't C.A. Br. 10. While Benson was inside the vault, petitioner told him over the open telephone line that he needed to hurry. Gov't C.A. Br. 10. Benson fled with about \$40,000 in cash and rejoined petitioner. Pet. App. 2. Petitioner later bragged to his girlfriend about news reports showing photographs of Benson as he robbed the bank at gunpoint. Gov't C.A. Br. 53; 1/6/2016 Trial Tr. Vol. II, at 108 (Doc. 145-2).

A few weeks later, petitioner approached Benson about robbing another bank, this time in Comstock Township, Michigan. Pet. App. 3. Benson agreed, and the brothers again discussed "how" they would perform the robbery, including Benson's use of a firearm. Gov't C.A. Br. 55; 1/8/2016 Trial Tr. Vol. IV (4 Trial Tr.) 137 (Doc. 145-4). On July 29, 2014, the brothers executed their plan: Benson robbed the bank at gunpoint, petitioner served as the getaway driver, and they obtained approximately \$80,000 in cash. Pet. App. 3.

In October 2014, the brothers' third bank-robbery attempt fell short. Pet. App. 3. While they were obtaining items for the robbery, an officer pulled the brothers over for a traffic violation and arrested them for unlawful possession of a concealed

weapon. Ibid. Officers seized from the vehicle two loaded semiautomatic pistols, a black bag, garbage bags, gloves, and a ski mask. Ibid.

The arrest did not deter the brothers from their bank-robbery spree. On January 8, 2015, they robbed an Old National Bank branch in Kalamazoo, Michigan. Pet. App. 3. As before, petitioner waited outside and kept in touch with Benson using an open cell-phone call while Benson committed the armed bank robbery. Ibid. Benson obtained \$8000 in cash, but, as he fled, a hidden dye pack exploded, forcing him to abandon the proceeds. Ibid.

In February 2015, petitioner and Benson planned yet another bank robbery, which was thwarted when petitioner got into a winter-weather related traffic accident. Pet. App. 4. Thereafter, Benson refused to participate in another robbery. Ibid.

b. Petitioner promptly recruited three new accomplices to mount a sixth bank-robbery attempt. Pet. App. 4. Petitioner also attempted to recruit a fourth accomplice, Laron Swift, but Swift declined to participate and notified the FBI. Ibid.

Based on Swift's tip, the FBI obtained a warrant and began tracking the location of petitioner's cell phone. Pet. App. 4. On February 27, 2015, the FBI learned that petitioner had returned to Kalamazoo. Ibid. Fearing another robbery was imminent, agents arranged to have local law-enforcement officers locate petitioner. Ibid. Officers traced petitioner to an SUV parked outside a

Comerica Bank branch. Ibid. When the SUV departed shortly thereafter, officers followed the SUV and, after observing a traffic violation, initiated a traffic stop. Ibid. Officers arrested petitioner on an unrelated outstanding warrant, and a subsequent search found a firearm in the vehicle. Id. at 4-5. Petitioner's three new accomplices were also in the SUV. Id. at 4. Two of the accomplices later testified that petitioner had recruited them to rob the Comerica Bank branch but that they had gotten cold feet at the last minute and were returning to Chicago when officers stopped the vehicle. Id. at 5.

2. a. After a federal grand jury indicted petitioner and Benson on seven criminal counts, see Superseding Indictment 1-10 (Doc. 41), Benson entered a plea agreement under which he pleaded guilty to one count of conspiracy, one count of armed bank robbery, and one count of brandishing a firearm in furtherance of a crime violence. Benson Plea Agreement 1, 5 (Doc. 51). Pursuant to the plea agreement, the government dismissed the four remaining counts against Benson. Id. at 6-7; see Benson Judgment 1 (Doc. 118).

b. At petitioner's trial, the government presented over 30 witnesses, including Benson, two other accomplices, and Swift. Gov't C.A. Br. 6, 11 n.1, 23. The government also introduced evidence that included, inter alia, electronic records showing that petitioner's cell phone was in the vicinity of the robberies, Pet. App. 2-3, and video footage showing Benson's use (i.e.,

brandishing) of a firearm during the robberies, Gov't C.A. Br. 10, 54.

Section 924(c) requires a five-year minimum sentence for "us[ing] or carr[ying] a firearm" during and in relation to any crime of violence. 18 U.S.C. 924(c)(1)(A)(i). Section 924(c) increases the minimum sentence to seven years for "brandish[ing]" the firearm, 18 U.S.C. 924(c)(1)(A)(ii), i.e., for "display[ing] all or part of the firearm, or otherwise mak[ing] the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person," 18 U.S.C. 924(c)(4). If a Section 924(c) conviction is "a second or subsequent conviction under [Section 924(c)]," the minimum sentence increases to 25 years. 18 U.S.C. 924(c)(1)(C)(i).

At the close of the government's case and again at the close of the evidence, petitioner moved for a judgment of acquittal. 1/14/2016 Trial Tr. Vol. VIII (8 Trial Tr.) 27-28, 93 (Doc. 145-7). Petitioner argued, as relevant here, that the evidence was insufficient to prove the counts charging petitioner with aiding and abetting Benson in using, carrying, and brandishing a firearm in each of the three bank robberies, in violation of Sections 924(c) and 2. Ibid.; see Superseding Indictment 6, 8, 10. The district court denied the motions, concluding that "sufficient evidence [was] in the record from which a reasonable jury could find that [petitioner] knew that firearms would be brandished during the robberies by his brother." 8 Trial Tr. 32, 94.

The district court instructed the jury on aiding-and-abetting liability for the Section 924(c) counts. 8 Trial Tr. 114-115. As relevant here, at the government's urging, the court instructed that the jury could find petitioner guilty of aiding and abetting the brandishing of a firearm only if it found beyond a reasonable doubt that, inter alia, petitioner "had advance[] knowledge that an accomplice would brandish a firearm during the commission of a crime of violence," i.e., he possessed such knowledge "at a time" at which he could "attempt to alter the plan or had a realistic opportunity to withdraw from the enterprise." Id. at 114-115; see id. at 29. Petitioner acknowledged that "the instructions [we]re acceptable." Id. at 94.

The jury found petitioner guilty on all counts. Verdict 1-3 (Doc. 104). Petitioner banged his fists on the defense table as the judge addressed the jury and then fought with U.S. Marshals in the courtroom before the Marshals restrained him. 1/15/2016 Trial Tr. Vol IX, at 84-85 (Doc. 144). The judge remarked that he had never previously seen "anything like that" in court. Id. at 86.

c. At sentencing, petitioner's counsel acknowledged that, under this Court's precedent, petitioner's three Section 924(c) convictions carried statutorily required consecutive sentences totaling 57 years of imprisonment. Sent. Tr. 15, 20 (Doc. 136); see 18 U.S.C. 924(c)(1)(A)(ii) (seven years for brandishing), (C)(i) (25 years each for second and third counts of conviction),

and (D)(ii) (mandatory consecutive sentences). Counsel nevertheless preserved the argument that petitioner's second and third Section 924(c) convictions should not be deemed "second or subsequent conviction[s]," 18 U.S.C. 924(c)(1)(C)(i), that required 25-year minimum sentences. Sent. Tr. 5; see Pet. Sent. Mem. 2 (Doc. 130) (acknowledging that argument is foreclosed by Deal v. United States, 508 U.S. 129 (1993)). Counsel separately requested a downward variance from the 188- to 235-month advisory Guidelines range for petitioner's conspiracy count and three bank-robbery counts, contending that a sentence less than 188 months would be sufficient because it would run consecutively to the 57 years of imprisonment for petitioner's Section 924(c) offenses. Sent. Tr. 15-16; see PSR ¶ 146 (Doc. 128).

The district court denied petitioner's requests and sentenced petitioner to 872 months of imprisonment: 188 months for the conspiracy and bank-robbery offenses plus consecutive mandatory-minimum sentences (seven, 25, and 25 years) for the three Section 924(c) offenses. Sent. Tr. 28-29. The court recognized that it was "not bound by" the advisory Guideline sentence for the non-Section 924(c) offenses and thus had "discretion" to depart from the 188-month recommendation, but the court declined to do so. Id. at 25-26. The court highlighted the "chilling" nature of the bank robberies and the "seriousness of the crimes"; the likely psychological harm to the individuals present; petitioner's refusal to accept responsibility despite "overwhelming" evidence

of his guilt; and the fact that a "long sentence will protect the public from further crimes of [petitioner]" and "deter[]" other criminal conduct. Id. at 24-25. The sentence, the court added, was not inconsistent with Benson's sentence given that Benson pleaded guilty, did not have petitioner's sentencing enhancements, and rendered substantial assistance to the government. Id. at 26. Finally, the court indicated that a sentence below 188 months on the conspiracy and bank-robbery counts would be too low if Congress later amended the relevant statutes governing the Section 924(c) sentences, but then added that "[m]aybe [it] shouldn't worry about the future" and clarified that the court did not "think [such a potential future amendment] makes a lot of difference" here. Ibid.; cf. id. at 18-19.

4. The court of appeals affirmed in an unpublished, non-precedential opinion. Pet. App. 1-26. Three aspects of that decision are presently relevant. See id. at 11-14, 18-20, 24.

First, the court of appeals rejected petitioner's challenge to the sufficiency of the evidence supporting his convictions for aiding and abetting the brandishing of a firearm during and in relation to the bank robberies. Pet. App. 11-14. The court noted that petitioner "concede[d] that Benson brandished a gun during the robberies" and that the evidence showed that petitioner "knew that Benson would use a gun during the robberies." Id. at 13 & n.3. The court stated that "the government was not required to prove [further] that [petitioner] had advance knowledge that

Benson would brandish a gun as opposed to use it in some other way." Id. at 14 (citing Rosemond v. United States, 134 S. Ct. 1240, 1249 (2014)). "Because the evidence" showed that "[petitioner] planned the robberies," "knew that Benson would use a gun in the course [there]of," and still acted as the getaway driver, the court determined that petitioner had "'full awareness of [the] scope'" of the "'criminal venture'" and was thus properly convicted of aiding and abetting the Section 924(c) offenses. Id. at 13-14 (quoting Rosemond, 134 S. Ct. at 1249).

Second, the court of appeals rejected petitioner's contention that the sentencing court's statement about potential future changes to the statutory sentencing regime rendered its sentence procedurally unreasonable. Pet. App. 18-20. The court of appeals explained that, "[w]hen th[e] passage is read in context of the entire sentencing transcript, it is clear that the district court denied a downward departure because it felt that a lower sentence would not reflect the seriousness of [petitioner's] offenses" and that the "sentence [it ultimately imposed] -- even with the high mandatory minimums [under Section 924(c)] -- was sufficient, but not greater than necessary, punishment." Id. at 19-20. That determination, the court explained, was consistent with Dean v. United States, 137 S. Ct. 1170 (2017), which held that a sentencing court may "'consider a sentence imposed under [Section] 924(c) when calculating a just sentence for the predicate count'" but did not "require[] [a sentencing court] to factor in [Section] 924(c)

mandatory minimums when calculating [such a] sentence.” Pet. App. 20 (quoting Dean, 137 S. Ct. at 1177).

Finally, the court of appeals recognized that, as petitioner acknowledged, this Court’s 1993 decision in Deal foreclosed petitioner’s contention that his second and third Section 924(c) offenses in this case were not “‘second or subsequent’ convictions” under Section 924(c)(1)(C)(i) for which 25-year minimum consecutive sentences are required. Pet. App. 24.

ARGUMENT

Petitioner contends (Pet. 9-14) that the evidence was insufficient to support his convictions for aiding and abetting the brandishing of a firearm under Section 924(c). Petitioner separately contends (Pet. 14-17) that the district court abused its sentencing discretion by considering the possibility that Congress might in the future amend the relevant statutory sentencing scheme. Finally, petitioner asks (Pet. 18-20) this Court to overrule Deal v. United States, 508 U.S. 129 (1993). The judgment of the court of appeals is correct, its non-precedential decision does not warrant this Court’s review, and petitioner fails to provide a sound basis for overruling Deal. No further review is warranted.

1. Petitioner contends (Pet. 9-14) that the court of appeals erred in rejecting his sufficiency-of-the-evidence challenge to his three convictions for aiding and abetting the brandishing of a firearm during and in relation to three bank-

robbery offenses. Petitioner argues (Pet. 12-13) that under Rosemond v. United States, 134 S. Ct. 1240 (2014), the offense of aiding and abetting the “brandishing” of a firearm under Section 924(c) requires “advance knowledge” that the firearm would be brandished by another. The government agrees that such advance knowledge is required and that the contrary view stated in the unpublished decision below is incorrect. Nevertheless, this Court’s review is not warranted in this case, because the jury here was properly instructed on and found such advance knowledge, the evidence is more than sufficient to support that finding, the court of appeals’ decision is not precedential, and no relevant division of authority exists that might warrant certiorari at this time.

a. In Rosemond, this Court held that the offense of aiding and abetting the “use[]” or “carr[ying]” of a firearm during and in relation to a predicate offense, in violation of 18 U.S.C. 924(c)(1)(A)(i), requires “advance knowledge that a confederate would use or carry a gun” during the predicate offense. 134 S. Ct. at 1243, 1249-1250. Only with such “advance knowledge,” the Court reasoned, will the defendant “know[] [the] extent and character” of the criminal scheme at a time at which he could “realistically walk away” from it, such that the defendant may be deemed to “intend[] to facilitate” the firearms offense. Id. at 1248-1249, 1251 n.10; see id. at 1250 (“What matters for purposes

of gauging intent * * * is that the defendant has chosen, with full knowledge, to participate in the illegal scheme.”).

Rosemond did not specifically address the intent required to aid and abet the brandishing of a firearm under Section 924(c)(1)(A)(ii). But in Alleyne v. United States, 570 U.S. 99 (2013), this Court had previously held that, because the “brandishing” prong of Section 924(c)(1)(A)(ii) increases the statutory minimum sentence, brandishing is an element of the offense that must be pleaded in the indictment and found by a jury beyond a reasonable doubt. Id. at 117. Accordingly, after Rosemond was decided, the Department of Justice instructed federal prosecutors that the intent requirement for aiding and abetting a Section 924(c) violation involving brandishing requires proof that the defendant knew in advance that a confederate would brandish a firearm.

In this case, consistent with the Department’s earlier instruction, the government correctly argued in district court that the jury should be instructed that, to find petitioner guilty of aiding and abetting the brandishing of a firearm during and in relation to a crime of violence, the jury must find that, inter alia, petitioner “had advance knowledge that an accomplice would brandish a firearm during the commission of a crime of violence.” Gov’t Proposed Jury Instructions, Instruction No. 20, at 28 (Doc. 78); accord Gov’t Proposed Preliminary Jury Instructions 3 (Doc. 90); 8 Trial Tr. 29. The district court accepted that jury

instruction and instructed the jury accordingly. See pp. 6-7, supra. The jury's verdict thus necessarily reflects a finding that petitioner had advance knowledge that Benson would brandish a firearm during each bank robbery.

On appeal, the government argued that the evidence was sufficient to prove such advance knowledge. Gov't C.A. Br. 53-55. But the government also argued -- mistakenly -- that it need not prove "advance knowledge of how a gun will be used [here, by brandishing it], only that it will be used." Id. at 51. That new argument did not accurately reflect the government's position on the intent required in this aiding-and-abetting context, and it may have contributed to the court of appeals' reliance on that same erroneous view in its non-precedential decision. See Pet. App. 13. The Department of Justice has taken steps to reemphasize its prior guidance nationwide to avoid such errors in the future.

b. Petitioner's evidentiary sufficiency argument does not warrant this Court's intervention in this case. As noted, the jury was properly instructed, and it found beyond a reasonable doubt that petitioner had advance knowledge that Benson would brandish a firearm in each bank robbery. Although petitioner contends (Pet. 11) that the evidence was insufficient to show that he had advance knowledge that a firearm would be "brandish[ed]" (as opposed to merely being "used" or "carr[ied]"), the evidence amply supports the jury's contrary finding. "[V]iewing the evidence in the light most favorable to the prosecution, any

rational trier of fact could have found [such advance knowledge] beyond a reasonable doubt.” Musacchio v. United States, 136 S. Ct. 709, 715 (2016) (citation omitted; emphasis omitted).

Petitioner was the planner and organizer of the three armed bank robberies. Pet. App. 14. And Benson’s testimony showed, in particular, that petitioner planned how firearms would be used during the robberies. Before the first two robberies, the brothers decided “how [the robberies] were going to be done” and “[t]hose conversations include[d] using a gun.” 4 Trial Tr. 137; see Gov’t C.A. Br. 55. No evidence suggests that Benson’s brandishing of a firearm during the robberies departed from the agreed-upon plan. To the contrary, after petitioner listened in real time over his phone as Benson held the PNC Bank staff at gunpoint, Pet. App. 2, petitioner bragged to his girlfriend about news reports depicting Benson robbing the bank at gunpoint, Gov’t C.A. Br. 53, and then approached Benson about committing several more robberies with the same modus operandi, Pet. App. 3-4. A rational jury could thus easily find that the PNC Bank robbery went exactly as petitioner had planned and that petitioner had advance knowledge that a firearm would be brandished. The jury could likewise conclude that such advance knowledge was present for the subsequent robberies, which petitioner and his younger brother also planned together and executed in the same way, see id. at 2-3; Gov’t C.A. Br. 55.

Focusing on the statutory term “use” in Section 924(c), petitioner characterizes (Pet. 11) Benson’s testimony that he and

petitioner made advance plans to "use[]" firearms as insufficient to show advance knowledge of brandishing. Benson's testimony, however, was broader than petitioner suggests. Before discussing the intended "use" of firearms, Benson testified that he and petitioner had planned ahead of time "how [the robberies] were going to be done." 4 Trial Tr. 137; Gov't C.A. Br. 55. From that evidence -- and the fact that a firearm was in fact used during the robbery by brandishing it -- a rational jury viewing the evidence in the light most favorable to the prosecution could infer that petitioner had advance knowledge that a firearm would be brandished.

Petitioner's unduly narrow interpretation of the evidence runs contrary to the well-established rule that, "[i]n any criminal case * * * , the factfinder can draw inferences about a defendant's intent based on all the facts and circumstances of a crime's commission." Rosemond, 134 S. Ct. at 1250 n.9. When a coconspirator like Benson testifies, using lay terms, that he agreed with a getaway driver like petitioner to "use" a firearm to commit a bank robbery and then proceeded to use the firearm by pointing it at bank staff without provocation to demand access to the vault, a jury can reasonably conclude that the conspirators' agreement was, from the outset, to rob the bank at gunpoint. See ibid. ("Of course, if a defendant continues to participate in a crime after a gun was displayed or used by a confederate, the jury can permissibly infer from his failure to object or withdraw that

he had such knowledge.”). That inference is particularly strong here, where petitioner later bragged about the robbery with full knowledge that a firearm was brandished and proceeded to plan and execute more robberies with the same *modus operandi*.

c. Petitioner contends (Pet. 8, 12-13) that review is warranted because, he argues, a division of authority exists with respect to Rosemond’s application to the aiding and abetting of a brandishing offense under Section 924(c). But few courts of appeals have addressed the issue, any tension in their decisions is limited, and no division of authority exists that is relevant to petitioner’s sufficiency challenge. Review by this Court is thus unwarranted at this time.

The court of appeals’ unpublished decision in this case does not itself create a division of authority. Because an unpublished decision is not binding precedent, future panels in the Sixth Circuit “are not bound by [any] holding” it may reflect. United States v. Yates, 866 F.3d 723, 728 (6th Cir. 2017). Petitioner states (Pet. 13) that the Eleventh Circuit “apparently” has adopted the same rule adopted by the panel here. See United States v. Payne, 763 F.3d 1301, 1304 n.2 (11th 2014) (per curiam) (“It does not matter whether [defendant] knew that one of his codefendants would actually brandish a gun in the bank” if the defendant knew that a firearm would be used or carried.). But the per curiam decision in Payne, which was decided without oral argument, ad-

addressed the separate question whether an erroneous failure to obtain sufficient admissions in a guilty plea was harmless beyond a reasonable doubt. Id. at 1304. The government's April 2014 brief in Payne, which was filed shortly after the Court's March 2014 decision in Rosemond, included less than four pages of argument that did not discuss Rosemond or address the intent required to establish aiding and abetting of a Section 924(c) brandishing offense. See Gov't C.A. Br. at 5-8, Payne, supra (No. 13-15699). It is therefore unclear how the Eleventh Circuit would address the question presented in this case if it were confronted with the government's position that aiding and abetting a Section 924(c) brandishing offense requires advance knowledge that a firearm will be brandished.

Consistent with that government position, the Seventh Circuit has concluded in light of Rosemond that jury instructions for aiding and abetting a Section 924(c) brandishing offense must instruct that, to reach a guilty verdict, the jury must find that the defendant "knew in advance" that a compatriot "would be brandishing" a firearm during the predicate offense. See United States v. Armour, 840 F.3d 904, 911 (7th Cir. 2016). Armour's jury-instruction decision does not reflect a division of authority warranting review in this case, because the jury here was properly instructed and found beyond a reasonable doubt that petitioner had such advance knowledge, and the only issue is the sufficiency of the evidence. Indeed, Armour emphasized that the court had "no

doubt" that "evidence that [a defendant] told [a compatriot] to bring his firearm, that [the defendant] led the enterprise, and that [his compatriots] actually brandished firearms during the [predicate offense]" "could easily support a [jury] finding that [the defendant] aided and abetted the brandishing." Ibid. Because the evidence here is even stronger than the evidence that Armour indicated would be sufficient to support the requisite jury finding, nothing indicates that petitioner would have fared any better in the Seventh Circuit.

2. Petitioner separately contends (Pet. 14-17) that the district court erroneously based its sentencing decision on "conjectur[e]" about potential "future" statutory amendments that might "reduce the mandatory years" of imprisonment now required by Section 924(c). Pet. 15, 17. In petitioner's view (Pet. 17), such conjecture suggests that the district court "fe[lt] restricted by [Section] 924(c) to impose" a 57-year mandatory minimum sentence under Section 924(c) and not vary downward from the advisory Guidelines range for his non-Section 924(c) offenses. Petitioner then argues (ibid.) that the district court's sentencing decision is inconsistent with Dean v. United States, 137 S. Ct. 1170 (2017), which held that a sentencing court may consider the fact of the "mandatory minimum under [Section] 924(c)" "when calculating an appropriate sentence for the predicate offense" for a Section 924(c) conviction, id. at 1178; see id. at 1176.

Petitioner is incorrect, and his factbound contentions merit no further review.

The court of appeals correctly determined that the sentencing court did not base petitioner's sentence on its passing observation about potential future changes to the statutory sentencing framework. Pet. App. 19-20. "When that passage is read in context of the entire sentencing transcript," the court explained, "it is clear that the district court denied a downward departure because it felt that a lower sentence would not reflect the seriousness of [petitioner's] offenses" and that the "sentence [it ultimately imposed] -- even with the high mandatory minimums [under Section 924(c)] -- was sufficient, but not greater than necessary, punishment." Ibid. Such an exercise of sentencing discretion is fully consistent with Dean.

Petitioner does not contend otherwise. Petitioner instead disregards the court of appeals' understanding of the district court's decision that forms the basis for the court of appeals' judgment. He thus fails to explain how the court of appeals erred in its interpretation of the district court's decision, which it based on "the entire sentencing transcript," Pet. App. 19. In any event, a disagreement with the court of appeals' judgment based on a factbound dispute about the proper reading of the sentencing transcript in this case does not warrant this Court's review. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not

grant * * * certiorari to review evidence and discuss specific facts.").

3. Petitioner finally contends (Pet. 18-20) that this Court should grant review to overrule its decision in Deal, *supra*. Deal construed the statutory term "second or subsequent conviction" in Section 924(c) to include a defendant's second and subsequent counts of conviction under Section 924(c), even when those convictions arise "in [a] single proceeding" with the defendant's first Section 924(c) conviction, 508 U.S. at 131 (citation omitted). See *id.* at 132-134. Under Deal, petitioner's second and third Section 924(c) convictions in this case are "second or subsequent conviction[s]," which each carry a separate 25-year minimum sentence. See 18 U.S.C. 924(c)(1)(C)(i). Petitioner argues (Pet. 19) that "Deal was wrongly decided" and that Justice Stevens' dissenting decision in Deal reflects the better interpretation of Section 924(c)'s text. Petitioner's arguments lack merit and warrant no further review.

Petitioner does not even attempt to identify the sort of "superspecial justification" that this Court has required to warrant reversing a prior statutory-construction decision like Deal. See Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2410 (2015). Such a decision has "'special force' * * * because 'Congress remains free to alter what [this Court] ha[s] done.'" Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2411 (2014) (quoting John R. Sand & Gravel Co. v. United States, 552

U.S. 130, 139 (2008)). And here, moreover, Congress's subsequent amendments to Section 924(c) have actually ratified Deal's interpretation of Section 924(c).

When Deal interpreted the phrase "second or subsequent conviction" in 1993, the statutory minimum sentence for such a Section 924(c) conviction was 20 years. Deal, 508 U.S. at 130. In 1998, Congress revised Section 924(c), reenacted the identical text that Deal had construed, and increased the minimum sentence for "a second or subsequent conviction" to 25 years. See An Act to Throttle the Criminal Use of Guns, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469 (18 U.S.C. 924(c)(1)(C)). Because "Congress can hardly have been unaware of the * * * construction" of that "key" statutory phrase earlier "adopted by * * * this Court" in Deal, Congress's "'repetition of the same language'" in its 1998 amendment to Section 924(c) reflects its "'intent to incorporate'" Deal's interpretation. Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 85 (2006) (citation omitted); see Lorillard v. Pons, 434 U.S. 575, 580 (1978). That congressional decision to build upon Deal by lengthening Section 924(c)'s mandatory minimum sentence for "second or subsequent conviction[s]" confirms that no sound basis exists for reconsidering Deal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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