NO. 91-8199

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS LEE DEAL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITIONER'S OUT-OF-TIME PETITION FOR REHEARING

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas
Attorney of Record

H. MICHAEL SOKOLOW
First Asst. Federal Public Defender
Attorneys for Petitioner
440 Louisiana, Suite 1350
Houston, Texas 77002-1056
Telephone: (713) 718-4600

TABLE OF CONTENTS

Page

Table of Contents i

Table of Citations ii

I. Procedural History. 1

II. There Is No Jurisdictional Bar to Granting Rehearing. 2

III. This Court Should Grant Rehearing and Hold that a "Second or Subsequent Conviction" Under 18 U.S.C. § 924(c)(1) (1988 ed., Supp. III) Means a Conviction Under § 924(c) that Occurs After Another § 924(c) Conviction Has Become Final 3

Conclusion 8

Certificate of Counsel 9

Appendix:
Deal v. United States, 508 U.S. 129 (1993) 10

TABLE OF CITATIONS

Page

CASES

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 6

Barnhill v. Johnson, 503 U.S. 393 (1992) 6

Bowles v. Russell, 551 U.S. 205 (2007) 3

Deal v. United States, 508 U.S. 129 (1993) 2, 4-6

Deal v. United States, 506 U.S. 814 (1992) 2, 4

Schacht v. United States, 398 U.S. 58 (1970) 3

United States v. Deal, 954 F.2d 262 (5th Cir. 1992) 2

United States v. R.L.C., 503 U.S. 291 (1992) 6

United States v. Rawlings, 821 F.2d1543 (11th Cir. 1987) 5

United States v. T.M., 413 F.3d 420 (4th Cir. 2005) 3

Yates v. United States, 135 S. Ct. 1074 (2015) 6

STATUTES AND RULES

18 U.S.C. § 922(g) 1

18 U.S.C. § 924(c) ..... *passim*

18 U.S.C. § 924(c)(1) (1988 ed., Supp. III) ..... *passim*

18 U.S.C. § 924(c)(1)(C) 6, 7

18 U.S.C. § 2113(a) 1

TABLE OF CITATIONS– (Cont'd)

Page

STATUTES AND RULES – (Cont'd)

18 U.S.C. § 2113(d) 1

Sup. Ct. R. 44.1 2

MISCELLANEOUS

Brief for Petitioner, *Deal v. United States*, 1992 WL 532711 (U.S. filed Nov. 19, 1992) 2, 4

First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, § 403 5-7

Pub. L. No. 105-386, 112 Stat. 3469 3

PETITION FOR REHEARING

Petitioner, Thomas Lee Deal, respectfully requests that the Court grant this motion for rehearing in his case for the reasons that follow:

I. Procedural History.

Mr. Deal was charged in a thirteen-count superseding indictment with six different bank robberies, in violation of 18 U.S.C. § 2113(a) and (d), with six different uses of a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1), and with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). (J.A. 2).[1]

A jury returned a verdict of guilty on all counts (J. A. 28). After the verdict, but prior to sentencing, the United States Probation Office prepared a presentence investigation report, which recommended that the court impose a sentence of imprisonment of 105 years for the violations of 18 U.S.C. § 924(c)(1). (R. Tab 58, filed under seal). Mr. Deal timely objected to the proposed sentence of 105 years on the ground that the twenty-year enhancement was not applicable to five of his § 924(c) violations. (J.A. 21).

At the sentencing hearing, the district court overruled the objection and sentenced Mr. Deal to serve a term of imprisonment of 168 months for the bank robberies and for being a felon in possession of a firearm, followed by a term of imprisonment of 105 years for the violations of 18 U.S.C. § 924(c). (J.A. 26-27).

Mr. Deal timely appealed to the Fifth Circuit Court of Appeals. On February 7, 1992, that court entered its opinion affirming Mr. Deal's conviction and sentence,

---

[1] The Joint Appendix ("J.A.") is available at *Deal v. United States*, 1992 WL 12012194 (U.S. Nov. 19, 1992).

concluding that earlier decisions in other circuits had properly decided that a first conviction and a "second or subsequent conviction" under 18 U. S. C. § 924(c) can result from the same indictment. *United States v. Deal*, 954 F.2d 262, 263 (5th Cir. 1992) (J. A. 33-34).

This Court granted certiorari on October 5, 1992. *Deal v. United States*, 506 U.S. 814 (1992) (J. A. 35). In the brief he filed in this Court, Mr. Deal argued that the term "second or subsequent conviction" in 18 U.S.C. § 924(c)(1) was ambiguous, even after an examination of the legislative history, and that due process required the application of the rule of lenity. Brief for Petitioner, *Deal v. United States*, 1992 WL 532711, at *8-*25 (U.S. filed Nov. 19, 1992). He thus contended that "second or subsequent conviction" meant a conviction entered later in time and that his twenty-year sentences had to be vacated and remanded for resentencing to no more than a five-year sentence for each. *Id.* at *23-*25.

In its opinion, the Court held that, although "[i]t is certainly true that the word 'conviction' can mean either the finding of guilt or the entry of a final judgment on that finding[,] . . . [i]n the context of § 924(c)(1), we think it unambiguous that 'conviction' refers to the finding of guilt by a judge or a jury that necessarily precedes the entry of a final judgment of conviction." *Deal v. United States*, 508 U.S. 129, 131-32 (1993).

II. There Is No Jurisdictional Bar to Granting Rehearing.

Under this Court's rules, "[a]ny petition for the rehearing of any judgment or decision of the Court on the merits shall be filed within 25 days after entry of the judgment or decision, unless the Court or a Justice shortens or extends the time." Sup. Ct. R. 44.1.

In addition, "[t]he procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require." *Schacht v. United States*, 398 U.S. 58, 64 (1970); *see also Bowles v. Russell*, 551 U.S. 205, 212 (2007) (noting that the Court "ha[s] treated the rule-based time limit for criminal cases differently, stating that it may be waived"). The Court thus is not jurisdictionally barred from granting rehearing.

III. This Court Should Grant Rehearing and Hold that a "Second or Subsequent Conviction" Under 18 U.S.C. § 924(c)(1) (1988 ed., Supp. III) Means a Conviction Under § 924(c) that Occurs After Another § 924(c) Conviction Has Become Final Now that Congress Has "Clarified" the Meaning of the Statute and Made Clear that Courts Have Been Imposing "Inappropriately Lengthy Sentences" by Interpreting § 924(c)(1) to the Contrary.

In 1990, when Mr. Deal committed the offenses in this case, 18 U.S.C. § 924(c) provided in pertinent part as follows:

> Whoever, during and in relation to any crime of violence . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence . . ., be sentenced to imprisonment for five years. . . . In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years. . . .

18 U.S.C. § 924(c)(1) (1988 ed., Supp. III).[2]

As discussed above, after Mr. Deal was convicted at the same trial of six violations of § 924(c)(1) that were alleged in the same indictment and was sentenced to five years in prison on one § 924(c)(1) count and twenty years in prison on each of the five others, he

[2] In 1998, Congress amended 18 U.S.C. 924(c)(1) by, among other things, increasing the minimum sentence for a second or subsequent conviction to 25 years under 18 U.S.C. 924(c)(1)(C) in the newly amended version of the statute. *See* Pub. L. No. 105-386, 112 Stat. 3469; *see also United States v. T.M.*, 413 F.3d 420, 426 (4th Cir. 2005).

appealed, and this Court granted certiorari. *Deal v. United States*, 506 U.S. 814 (1992) (J. A. 35). In the brief he filed in this Court, Mr. Deal argued that the term "second or subsequent conviction" in 18 U.S.C. § 924(c)(1) was ambiguous, even after an examination of the legislative history, and that due process required the application of the rule of lenity. Brief for Petitioner, *Deal v. United States*, 1992 WL 532711, at *8-*25 (U.S. filed Nov. 19, 1992). He thus contended that "second or subsequent conviction" meant a conviction entered later in time and that his twenty-year sentences had to be vacated and remanded for resentencing to no more than a five-year sentence for each. *Id.* at *23-*25.

In its opinion, the Court held that, although "[i]t is certainly true that the word 'conviction' can mean either the finding of guilty or the entry of a final judgment on that finding[,] . . . [i]n the context of § 924(c)(1), we think it unambiguous that 'conviction' refers to the finding of guilty by a judge or a jury that necessarily precedes the entry of a final judgment of conviction." *Deal v. United States*, 508 U.S. 129, 131-32 (1993). The Court reasoned that § 924(c)(1) "would be incoherent" if "conviction" were construed to mean "judgment of conviction." *Id.* at 132.

In dissent, Justice Stevens, joined by Justices Blackmun and O'Connor, reviewed the history of § 924(c), as well as the government's filings in a number of cases before this Court, and concluded that, "[i]n light of this history, I would find no ambiguity in the phrase 'subsequent conviction' as used in § 924(c)." *Deal*, 508 U.S. at 141 (Stevens, J., dissenting). As Justice Stevens explained:

> Like its many counterparts in the Criminal Code, the phrase clearly is intended to refer to a conviction for an offense committed after an earlier

> conviction has become final; it is, in short, a recidivist provision. When that sensible construction is adopted, of course, the grammatical difficulties and the potential for prosecutorial manipulation that trouble the majority are avoided entirely.
>
> Even assuming, however, that the meaning of § 924(c)'s repeat offender provision is not as obvious as I think, its history belies the notion that its text admits of only one reading, that adopted in [*United States v.*] *Rawlings*[, 821 F.2d1543 (11th Cir. 1987)]. Surely it cannot be argued that a construction surfacing for the first time 19 years after enactment is the only available construction. Indeed, even after *Rawlings*, there is no consensus on this point; some courts—and some Government prosecutors—continue to apply § 924(c) as a recidivist statute. . . .
>
> At the very least, this equivocation on the part of those charged with enforcing § 924(c), combined with the understanding of repeat offender provisions current when § 924(c) was enacted, render the construction of § 924(c) sufficiently uncertain that the rule of lenity should apply. . . .
>
> . . .
>
> Section 924(c) of the Criminal Code mandates an enhanced, 20–year sentence for repeat offenders. Between 1968, when the statute was enacted, and 1987, when textualism replaced common sense in its interpretation, the bench and bar seem to have understood that this provision applied to defendants who, having once been convicted under § 924(c), failed to learn their lessons from the initial punishment and committed a repeat offense. The contrary reading adopted by the Court today, driven by an elaborate exercise in sentence parsing, is responsive to neither historical context nor common sense. Because I cannot agree with this unwarranted and unnecessarily harsh construction of § 924(c), the meaning of which should, at a minimum, be informed by the rule of lenity, I respectfully dissent.

Deal, 508 U.S. at 141-43, 146 (Stevens, J., dissenting) (footnotes, citations, parentheticals, and internal quotation marks omitted).

Over twenty-five years later, on December 21, 2018, Congress enacted a provision in the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, § 403 [hereinafter cited and referred to as "First Step Act"], that has the heading "Clarification of Section 924(c)

of Title 18, United States Code." *See id.* (some capitalization omitted). In this clarification, Congress amended the enhancement provision in 18 U.S.C. § 924(c)(1)(C), *see supra* text, at 4 n.2, "by striking 'second or subsequent conviction' and inserting 'violation of this subsection that occurs after a prior conviction under this subsection has become final.'" First Step Act § 403(a). It is significant that Congress labeled this amendment of § 924(c)(1) a "clarification" because the statute would not have required any clarification if it had been "unambiguous." *Compare Deal*, 508 U.S. at 131-32. Moreover, "the title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998); *see also Yates v. United States*, 135 S. Ct. 1074, 1083 (2015).

In addition, not only do the use of the word "clarification" in the heading of this provision of the First Step Act and the text of the provision demonstrate that "second or subsequent conviction" was indeed unclear in § 924(c)(1) and that Congress actually intended it to mean a "'violation of this subsection that occurs after a prior conviction under this subsection has become final,'" First Step Act § 403(a), but the legislative history of the First Step Act[3] reinforces and makes clear what the heading and text show:

> Section 5. Clarification of Section 924(c) of Title 18, United States Code. This section expands the enhanced penalties for violent firearms offenders to those with prior firearm convictions. ***It also revises section 924(c) of title 18 to address inappropriate "stacking" of Federal firearms charges***. As the law currently reads, defendants who are convicted of a first offense under that section receive a mandatory, consecutive, minimum penalty of 5 years.

[3] *See generally Barnhill v. Johnson*, 503 U.S. 393, 401 (1992) (stating that "appeals to statutory history are well taken only to resolve statutory ambiguity") (citation and internal quotation marks omitted); *United States v. R.L.C.*, 503 U.S. 291, 298 (1992) (turning to legislative history to resolve ambiguity).

> For each "second or subsequent offense," the penalty jumps to 25 years. In some cases, ***courts have interpreted "second or subsequent" to include multiple charges in the same indictment. In "stacking" charges this way, some defendants have received inappropriately lengthy sentences.*** This section clarifies that an enhancement under 924(c) can only apply after a defendant has had an intervening conviction under 924(c) or under State law for the same conduct. This section also reduces the enhanced penalty from 25 to 15 years. This "stacking" fix applies retroactively, though the sentence reduction does not.

H.R. REP. 114-888, 20, 2016 WL 7471588, at *20 (emphasis added). In other words, "stacking" charges in the same indictment based on an interpretation of "second or subsequent conviction" that results in "inappropriately lengthy sentences" could only result from the fact that courts misinterpreted the phrase "second or subsequent" contrary to the intent of Congress. *See id.*[4] Now that Congress has clarified what it intended "second or subsequent conviction" to mean, this Court should grant rehearing to correct its decision in this case.

For the foregoing reasons, this Court should grant rehearing and hold that a "second or subsequent conviction" under 18 U.S.C § 924(c)(1) (1988 ed., Supp. III) means a § 924(c) conviction that occurs after another § 924(c) conviction has become final.

[4] Although the First Step Act states that the new language in 18 U.S.C. 924(c)(1)(C) applies "to any offense that was committed before the date of enactment of this Act, if a sentence of the offense has not been imposed as of such date of enactment," First Step Act § 403(b), that does not affect the analysis of the phrase "second or subsequent conviction" in Mr. Deal's case. Mr. Deal is not claiming that the new statute applies to him, but instead is requesting that the Court rehear his case and construe "second or subsequent conviction" in the prior version of the statute that applied to him in light of the clarification that Congress now has provided on the meaning of that phrase.

CONCLUSION

For these reasons, the petitioner, Thomas Lee Deal, respectfully prays that the Court grant rehearing in this case.

Date: February 25, 2019

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

By: H. Michael Sokolow
H. MICHAEL SOKOLOW
First Asst. Federal Public Defender
Attorneys for Petitioner
440 Louisiana, Suite 1350
Houston, TX 77002-1056
Telephone: (713) 718-4600

NO. 91-8199

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS LEE DEAL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

CERTIFICATE OF COUNSEL

Pursuant to Sup. Ct. R. 44.1, as counsel for petitioner, I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

H. Michael Sokolow

H. MICHAEL SOKOLOW

113 S.Ct. 1993
Supreme Court of the United States

Thomas Lee DEAL, Petitoner,
v.
UNITED STATES.

No. 91–8199.
|
Argued March 1, 1993.
|
Decided May 17, 1993.

Synopsis

Defendant was convicted in the United States District Court, Southern District of Texas, Norman W. Black, Chief Judge, of six counts of bank robbery, six counts of carrying and using firearm during and in relation to crime of violence, and one count of being felon in possession of firearms, and was sentenced to 5 years' imprisonment on first count of carrying and using firearm during and in relation to crime of violence, and 20 years on each of remaining five counts of that offense, terms to run consecutively. Defendant appealed, challenging sentence. The Fifth Circuit Court of Appeals, 954 F.2d 262, affirmed. Certiorari was granted. The Supreme Court, Justice Scalia, held that: (1) "conviction," within meaning of statute mandating 20–year sentence in case of second or subsequent conviction for using or carrying firearm during and in relation to any crime of violence, refers to finding of guilt by judge or jury that necessarily precedes entry of final judgment of conviction, rather than meaning "judgment of conviction," and (2) statute does not require that previous sentence become final prior to instant offense in order for enhanced sentence to be imposed for instant offense.

Affirmed.

Justice Stevens, filed dissenting opinion in which Justices Blackmun and O'Connor joined.

West Headnotes (4)

[1] Statutes
⇐ Context

Meaning of word in statute cannot be determined in isolation, but must be drawn from context in which it is used.

129 Cases that cite this headnote

[2] Sentencing and Punishment
⇐ Convictions and Dispositions Usable for Enhancement

Sentencing and Punishment
⇐ Order of convictions

"Conviction," within meaning of statute mandating 20–year sentence in case of second or subsequent conviction for using or carrying firearm during and in relation to any crime of violence, refers to finding of guilt by judge or jury that necessarily precedes entry of final judgment of conviction, rather than meaning "judgment of conviction," and, thus, defendant convicted of six counts of that offense will properly receive 20–year sentences on second through sixth counts, even if single judgment is entered on all counts. 18 U.S.C.A. § 924(c)(1).

187 Cases that cite this headnote

[3] Sentencing and Punishment
⇐ Necessity that predicate conviction precede offense

Statute mandating 20–year sentence in case of "second or subsequent conviction" for using or carrying firearm during and in relation to crime of violence does not require that previous sentence become final prior to commission of offense in order for enhanced sentence to be imposed for that offense; "second conviction" does not mean "first offense after earlier conviction." 18 U.S.C.A. § 924(c)(1).

174 Cases that cite this headnote

[4] Sentencing and Punishment
⇐ Weapons and explosives

Sentence of 105 years imposed on defendant convicted on six counts of carrying and using firearm during and in relation to crime

of violence was not so glaringly unjust as to warrant application of rule of lenity in construing statutory mandate of 20–year imprisonment in case of second or subsequent conviction, so as to bar imposition of 20–year sentences on second through sixth counts where single judgment was entered on all counts. 18 U.S.C.A. § 924(c)(1).

182 Cases that cite this headnote

**1994 *129 *Syllabus* *

On the basis of his use of a gun in committing six bank robberies on different dates, petitioner Deal was convicted, in a single proceeding, of six counts of carrying and using a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1). Section 924(c)(1) prescribes a 5–year prison term for the first such conviction (in addition to the punishment provided for the crime of violence) and requires a 20–year sentence "[i]n the case of [a] second or subsequent **1995 conviction under this subsection." The District Court sentenced Deal to 5 years imprisonment on the first § 924(c)(1) count and to 20 years on each of the five other counts, the terms to run consecutively. The Court of Appeals affirmed.

Held: Deal's second through sixth convictions in a single proceeding arose "[i]n the case of his second or subsequent conviction" within the meaning of § 924(c)(1). There is no merit to his contention that the language of § 924(c)(1) is facially ambiguous and should therefore be construed in his favor under the rule of lenity. In context, "conviction" unambiguously refers to the finding of guilt that necessarily precedes the entry of a final judgment of conviction. If it referred, as Deal contends, to "judgment of conviction," which by definition includes both the adjudication of guilt and the sentence, the provision would be incoherent, prescribing that a sentence which has already been imposed shall be 5 or 20 years longer than it was. Deal's reading would have the strange consequence of giving a prosecutor unreviewable discretion either to impose or to waive the enhanced sentence by opting to charge and try a defendant either in separate prosecutions or under a single multicount indictment. The provision also cannot be read to impose an enhanced sentence only for an offense committed after a previous sentence has become final. While lower courts have held that statutes providing enhancement for "subsequent offenses" apply only when a second offense has been committed after conviction for the first, those decisions depend on the fact that it cannot legally be known that an "offense" has been committed until there has been a conviction. The present statute does not use the term "offense," and so does not require a criminal act after the first conviction; it merely requires a conviction after the first conviction. Nor is the rule of lenity called for on grounds that the total length *130 of Deal's sentence (105 years) is "glaringly unjust." Under any conceivable reading of § 924(c)(1), some criminals convicted of six armed bank robberies would receive a sentence of that length. It is not "glaringly unjust" to refuse to give Deal a lesser sentence merely because he escaped apprehension and conviction until the sixth crime had been committed. Pp. 1996–1999.

954 F.2d 262 (CA 5 1992) affirmed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, KENNEDY, SOUTER, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BLACKMUN and O'CONNOR, JJ., joined, *post,* p. ——.

Attorneys and Law Firms

Dola Jean Young, Houston, TX, for petitioner.

Miguel A. Estrada, Washington, DC, for respondent.

Opinion

Justice SCALIA delivered the opinion of the Court.

Between January and April 1990, petitioner committed six bank robberies on six different dates in the Houston, Texas, area. In each robbery, he used a gun. Petitioner was convicted of six counts of bank robbery, 18 U.S.C. §§ 2113(a) and (d), six counts of carrying and using a firearm during and in relation to a crime of violence, § 924(c), and one count of being a felon in possession of firearms, § 922(g). Title 18 U.S.C. § 924(c)(1) (1988 ed., Supp. III) provides:

"Whoever, during and in relation to any crime of violence ... uses or carries a firearm, shall, in addition

> to the punishment provided for such crime of violence ..., be sentenced to imprisonment for five years.... In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years...."

***131** The United States District Court for the Southern District of Texas sentenced petitioner to 5 years' imprisonment on the first § 924(c)(1) count and to 20 years on each of the other five § 924(c)(1) counts, the terms to ****1996** run consecutively. The United States Court of Appeals for the Fifth Circuit affirmed the convictions and sentence. 954 F.2d 262 (1992). We granted certiorari on the question whether petitioner's second through sixth convictions under § 924(c)(1) in this single proceeding arose "[i]n the case of his second or subsequent conviction" within the meaning of § 924(c)(1). 506 U.S. 814, 113 S.Ct. 53, 121 L.Ed.2d 22 (1992).

Petitioner contends that the language of § 924(c)(1) is facially ambiguous, and should therefore be construed in his favor pursuant to the rule of lenity. His principal argument in this regard is that the word "conviction" can, according to the dictionary, have two meanings, "either the return of a jury verdict of guilt or the entry of a final judgment on that verdict," Brief for Petitioner 4; and that the phrase "second or subsequent conviction" could therefore "mean 'an additional finding of guilt rendered at any time' " (which would include petitioner's convictions on the second through sixth counts in the single proceeding here) or " 'a judgment of conviction entered at a later time,' " (which would not include those convictions, since the District Court entered only a single judgment on all of the counts), *id.*, at 7.

[1] It is certainly correct that the word "conviction" can mean either the finding of guilt or the entry of a final judgment on that finding. The word has many other meanings as well, including "[a]ct of convincing of error, or of compelling the admission of a truth"; "[s]tate of being convinced; esp., state of being convicted of sin, or by one's conscience"; "[a] strong persuasion or belief; as, to live up to one's *convictions;* an intensity of thorough *conviction.* " Webster's New International Dictionary 584 (2d ed. 1950). But of course susceptibility of all of these meanings does not render the word "conviction," whenever it is used, ambiguous; all but one of the ***132** meanings is ordinarily eliminated by context. There is not the slightest doubt, for example, that § 924(c)(1), which deals with punishment in this world rather than the next, does not use "conviction" to mean the state of being convicted of sin. Petitioner's contention overlooks, we think, this fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used. See *King v. St. Vincent's Hospital,* 502 U.S. 215, 221, 112 S.Ct. 570, 574, 116 L.Ed.2d 578 (1991); *Davis v. Michigan Dept. of Treasury,* 489 U.S. 803, 809, 109 S.Ct. 1500, 1504, 103 L.Ed.2d 891 (1989); *United States v. Morton,* 467 U.S. 822, 828, 104 S.Ct. 2769, 2773, 81 L.Ed.2d 680 (1984).

[2] In the context of § 924(c)(1), we think it unambiguous that "conviction" refers to the finding of guilt by a judge or jury that necessarily precedes the entry of a final judgment of conviction. A judgment of conviction includes both the adjudication of guilt and the sentence. See Fed.Rule Crim.Proc. 32(b)(1) ("A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication *and sentence*" (emphasis added)); see also Black's Law Dictionary 843 (6th ed. 1990) (quoting Rule 32(b)(1) in defining "judgment of conviction"). Thus, if "conviction" in § 924(c)(1) meant "judgment of conviction," the provision would be incoherent, prescribing that a sentence which has already been imposed (the defendant's second or subsequent "conviction") shall be 5 or 20 years longer than it was.

Petitioner contends that this absurd result is avoided by the "[i]n the case of" language at the beginning of the provision. He maintains that a case is the "case of [a defendant's] second or subsequent" entry of judgment of conviction even before the court has entered that judgment of conviction and even before the court has imposed the sentence that is the prerequisite to the entry of judgment of conviction. We think not. If "conviction" meant "entry of judgment of conviction," a "case" would surely not be the "case of his second or subsequent conviction" *until* that judgment of conviction was entered, by ****1997** which time a lower sentence than that which ***133** § 924(c)(1) requires would already have been imposed. And more fundamentally still, petitioner's contention displays once again the regrettable penchant for construing words in isolation. The word "case" can

assuredly refer to a legal proceeding, and if the phrase "in the case of" is followed by a name, such as "*Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803)" that is the apparent meaning. When followed by an act or event, however, "in the case of" normally means "in the event of"—and we think that is its meaning here.

The sentence of § 924(c)(1) that immediately follows the one at issue here confirms our reading of the term "conviction." That sentence provides: "Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection." That provision, like the one before us in this case, is obviously meant to control the terms of a sentence *yet to be imposed.* But if we give the term "convicted" a meaning similar to what petitioner contends is meant by "conviction"—as connoting, that is, the entry of judgment, which includes sentence—we once again confront a situation in which the prescription of the terms of a sentence cannot be effective until it is too late, *i.e.,* until after the sentence has already been pronounced. [1]

We are also confirmed in our conclusion by the recognition that petitioner's reading would give a prosecutor unreviewable discretion either to impose or to waive the enhanced sentencing provisions of § 924(c)(1) by opting to charge and try the defendant either in separate prosecutions or under a multicount indictment. Although the present prosecution ***134** would not have permitted enhanced sentencing, if the same charges had been divided into six separate prosecutions for the six separate bank robberies, enhanced sentencing would clearly have been required. We are not disposed to give the statute a meaning that produces such strange consequences. [2]

[3] The dissent contends that § 924(c)(1) must be read to impose the enhanced sentence only for an offense committed after a previous sentence has become final. Though this interpretation was not mentioned in petitioner's briefs, and was put forward only as a fallback position in petitioner's oral argument, see Tr. of Oral Arg. 4, the dissent thinks it so "obvious," *post,* at 2001, that our rejection of it constitutes a triumph of "textualism" over "common sense," *post,* at 2004, and the result of "an elaborate exercise in sentence parsing," *ibid.* We note, to begin with, that most of the textual distinctions made in this opinion—*all* of them up to this point—respond to the elaborate principal argument of petitioner that "conviction" means "entry of judgment." It takes not much "sentence parsing" to reject the quite different argument of the dissent that the terms "subsequent offense" and "second or subsequent conviction" mean exactly the same thing, so that "second conviction" means "first offense after an earlier conviction."

No one can disagree with the dissent's assertion that "Congress sometimes uses ****1998** slightly different language to convey the same message," *post,* at 1999—but when it does so it uses "slightly different language" *that means the same thing.* "Member of the House" instead of "Representative," for ***135** example. Or "criminal offense" instead of "crime." But to say that "subsequent offense" means the same thing as "second or subsequent conviction" requires a degree of verbal know-nothingism that would render government by legislation quite impossible. Under the terminology "second or subsequent conviction," in the context at issue here, it is entirely clear (without any "sentence parsing") that a defendant convicted of a crime committed in 1992, who has previously been convicted of a crime committed in 1993, would receive the enhanced sentence.

The dissent quotes extensively from *Gonzalez v. United States,* 224 F.2d 431 (CA1 1955). See *post,* at 1999–2000. But far from supporting the "text-insensitive" approach favored by the dissent, that case acknowledges that "[i]n construing subsequent offender statutes ... the decisions of the courts have varied depending upon the particular statute involved." 224 F.2d, at 434. It says, as the dissent points out, that federal courts have "uniformly" held it to be the rule that a second offense can occur only after conviction for the first. *Ibid.* But those holdings were not arrived at in disregard of the statutory text. To the contrary, as *Gonzalez* goes on to explain:

> " 'It cannot legally be known that an offense has been committed until there has been a conviction. A second offense, as used in the criminal statutes, is one that has been committed after conviction for a first offense.' " *Ibid.* (quoting *Holst v. Owens,* 24 F.2d 100, 101 (CA5 1928)).

The present statute, however, does not use the term "offense," so it cannot possibly be said that it requires a criminal act after the first conviction. What it requires is a *conviction* after the first conviction. There is utterly no ambiguity in that, and hence no occasion to invoke the rule of lenity. (The erroneous lower-court decisions

cited by the dissent, see *post,* at 2001–2002, do not alter this assessment; ***136** judges cannot cause a clear text to become ambiguous by ignoring it.)

In the end, nothing but personal intuition supports the dissent's contention that the statute is directed at those who " 'failed to learn their lessons from the initial punishment,' " *post,* at —— (quoting *United States v. Neal,* 976 F.2d 601, 603 (CA9 1992) (Fletcher, J., dissenting)). Like most intuitions, it finds Congress to have intended what the intuitor thinks Congress *ought* to intend.[3] And like most intuitions, it is not very precise. "[F]ailed to learn their lessons from the initial punishment" would seem to suggest that the *serving* of the punishment, rather than the mere pronouncement of it, is necessary before the repeat criminal will be deemed an inadequate student—a position that certainly appeals to "common sense," if not to text. Elsewhere, however, the dissent says that the lesson is taught once "an earlier conviction has become final," *post,* at 2004 —so that the felon who escapes during a trial that results in a conviction becomes eligible for enhanced punishment for his later crimes, though he has seemingly been taught no lesson except that the law is easy to beat. But no matter. Once text is abandoned, one intuition will serve as well as the other. We choose to follow the language of the statute, which gives no indication that punishment of those who fail to learn the "lesson" of prior conviction or of prior punishment is the sole purpose of § 924(c)(1), to the exclusion of other penal goals such as taking repeat offenders off the streets for especially long periods, or simply visiting society's retribution upon repeat offenders more severely. We do not agree with the dissent's suggestion that these goals defy "common sense." ****1999** It seems to us eminently sensible to punish the second murder, for ***137** example, with life in prison rather than a term of years—whether or not conviction of the first murder (or completion of the sentence for the first murder) has yet occurred.

[4] Finally, we need not tarry over petitioner's contention that the rule of lenity is called for because his 105–year sentence "is so glaringly unjust that the Court cannot but question whether Congress intended such an application of the phrase, 'in the case of his second or subsequent conviction.' " Brief for Petitioner 24. Even under the dissent's reading of § 924(c)(1), some criminals whose only offenses consist of six armed bank robberies would receive a total sentence of 105 years in prison. We see no reason why it is "glaringly unjust" that petitioner be treated similarly here, simply because he managed to evade detection, prosecution, and conviction for the first five offenses and was ultimately tried for all six in a single proceeding.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice STEVENS, with whom Justice BLACKMUN and Justice O'CONNOR join, dissenting.

Congress sometimes uses slightly different language to convey the same message. Thus, Congress uses the terms "subsequent offense," "second or subsequent offense," and "second or subsequent conviction" in various sections of the Criminal Code, all to authorize enhanced sentences for repeat offenders.[1] On some occasions, Congress meticulously defines the chosen term to identify those offenses committed after a prior conviction "has become final";[2] more frequently, ***138** it relies on settled usage and the reader's common sense to impart the same meaning.

In certain sections of the Code, even absent a definition, the context makes perfectly clear that the word "subsequent" describes only those offenses committed after a prior conviction has become final. Title 18 U.S.C. § 1302, for instance, which prohibits mailing of lottery tickets, authorizes a 5–year prison sentence for "any subsequent offense." A literal reading of that phrase, like the one adopted by the majority today, presumably would justify imposition of five 5–year sentences if a defendant who sold six lottery tickets through the mail were charged in a single indictment. But it is absurd to think that Congress intended to treat such a defendant as a repeat offender, subject to penalty enhancement, "simply because he managed to evade detection, prosecution, and conviction for the first five offenses and was ultimately tried for all six in a single proceeding." *Ante,* at 1999.

In other Code sections, where context is less illuminating, the long-established usage of the word "subsequent" to distinguish between first offenders and recidivists is sufficient to avoid misunderstanding by anyone familiar with federal criminal practice.[3] Thus, in a 1955 opinion construing the undefined term "subsequent offense," the

First Circuit noted that most "subsequent offender" statutes had been construed to provide that any offense "committed subsequent to a conviction calls for the increased penalty." **2000 *Gonzalez v. United States,* 224 F.2d 431, 434 (1955). The court continued:

> "In the United States courts uniformly this has been held to be the rule. In *Singer v. United States,* [278 F. 415 (1922)], the Court of Appeals for the Third Circuit considered a substantially similar statute to that presently before us and held that a second offense within the *139 meaning of the statute could occur only after a conviction for the first offense. See, e.g., *United States v. Lindquist,* [285 F. 447 (WD Wash.1921)], and *Biddle v. Thiele,* [11 F.2d 235 (CA8 1926)]. The Court of Appeals for the Fifth Circuit said in *Holst v. Owens,* [24 F.2d 100, 101 (1928)]: 'It cannot legally be known that an offense has been committed until there has been a conviction. A second offense, as used in the criminal statutes, is one that has been committed after conviction for a first offense. Likewise, a third or any subsequent offense implies a repetition of crime after each previous conviction.' Similarly, in *Smith v. United States,* [41 F.2d 215, 217 (CA9 1930)], the court stated: 'In order that a conviction shall affect the penalty for subsequent offenses, it must be prior to the commission of the offense.' " *Ibid.*

Congress did not define the term "subsequent conviction" when it enacted § 924(c) in 1968. It is fair to presume, however, that Congress was familiar with the usage uniformly followed in the federal courts. See *NLRB v. Amax Coal Co.,* 453 U.S. 322, 329, 101 S.Ct. 2789, 2794, 69 L.Ed.2d 672 (1981); *Perrin v. United States,* 444 U.S. 37, 42–45, 100 S.Ct. 311, 314–316, 62 L.Ed.2d 199 (1979). Indeed, given the settled construction of repeat offender provisions, it is hardly surprising that Congressman Poff, who proposed the floor amendment that became § 924(c), felt it unnecessary to elaborate further. Cf. *Morissette v. United States,* 342 U.S. 246, 263, 72 S.Ct. 240, 250, 96 L.Ed. 288 (1952) ("[W]here Congress borrows terms of art ... absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them"). It is also unsurprising that there appears to have been no misunderstanding of the term "second or subsequent conviction" for almost 20 years after the enactment of § 924(c).

Section 924(c) was construed by this Court for the first time in *Simpson v. United States,* 435 U.S. 6, 98 S.Ct. 909, 55 L.Ed.2d 70 (1978), a case involving sentencing of a defendant who had committed two bank robberies, two months apart. Convicted in two separate *140 trials, the defendant was sentenced in each for bank robbery, and in each to 10 years under § 924(c), then the maximum authorized term for a first-time offender. *Id.,* at 9, 98 S.Ct., at 911. Apparently, nobody considered the possibility that the defendant might have been treated as a repeat offender at his second trial, and sentenced under § 924(c)'s "second or subsequent conviction" provision. In any event, despite the fact that the literal language of the statute would have authorized the § 924(c) sentences, *id.,* at 16–17, 98 S.Ct., at 914–915 (REHNQUIST, J., dissenting), the Court set them aside, applying the rule of lenity and concluding that Congress did not intend enhancement under § 924(c) when, as in Simpson's case, a defendant is also sentenced under a substantive statute providing for an enhancement for use of a firearm. *Id.,* at 14–15, 98 S.Ct., at 913–914.

In *Busic v. United States,* 446 U.S. 398, 100 S.Ct. 1747, 64 L.Ed.2d 381 (1980), the Court construed the first offender portion of § 924(c) even more narrowly than in *Simpson,* again rejecting a literal reading of the statutory text that would have supported a contrary result. In his dissenting opinion, Justice Stewart succinctly described § 924(c) as a "general enhancement provision—with its stiff sanctions for first offenders and even stiffer sanctions for recidivists." [4] This understanding that the term "second or subsequent **2001 conviction" was used to describe recidivism seemingly was shared by other judges, as several years were to elapse before the construction adopted by the Eleventh Circuit in *141 *United States v. Rawlings,* 821 F.2d 1543, cert. denied, 484 U.S. 979, 108 S.Ct. 494, 98 L.Ed.2d 492 (1987), and endorsed by the Court today, appeared in any reported judicial opinion.

At oral argument, the Government was unable to tell us how the "second or subsequent conviction" language of § 924(c) was construed by Government prosecutors prior to 1987, when *Rawlings* was decided. Tr. of Oral Arg. 27–28. It seems to me, however, quite likely that until 1987, the Government read the "second or subsequent" section of § 924(c) as a straightforward recidivist provision, just as Justice Stewart did in 1980. That reading certainly would comport with the Government's submissions to this Court in *Simpson, supra,* and *Busic, supra,* both of which describe the "second or subsequent conviction" provision in terms of recidivism. [5] It would be consistent, too, with the reported cases involving § 924(c) sentencing,

which make clear that the district courts were routinely imposing consecutive 5–year sentences when defendants were convicted of two separate offenses under § 924(c), apparently without objection from the Government that the second conviction warranted a longer sentence. See, *e.g., United States v. Henry,* 878 F.2d 937, 938 (CA6 1989); *United States v. Jim,* 865 F.2d 211, 212 (CA9), cert. denied, 493 U.S. 827, 110 S.Ct. 93, 107 L.Ed.2d 58 (1989); *United States v. Fontanilla,* 849 F.2d 1257, 1258 (CA9 1988); *United States v. Chalan,* 812 F.2d 1302, 1315 (CA10 1987).

In light of this history, I would find no ambiguity in the phrase "subsequent conviction" as used in § 924(c). Like its many counterparts in the Criminal Code, the phrase clearly is intended to refer to a conviction for an offense committed ***142** after an earlier conviction has become final; it is, in short, a recidivist provision. When that sensible construction is adopted, of course, the grammatical difficulties and the potential for prosecutorial manipulation that trouble the majority, see *ante,* at 1996–1997, are avoided entirely. See *United States v. Neal,* 976 F.2d 601, 603 (CA9 1992) (Fletcher, J., dissenting) ("common-sense reading of § 924(c)" as recidivist statute).

Even assuming, however, that the meaning of § 924(c)'s repeat offender provision is not as obvious as I think, its history belies the notion that its text admits of only one reading, that adopted in *Rawlings.* Surely it cannot be argued that a construction surfacing for the first time 19 years after enactment is the only available construction. Indeed, even after *Rawlings,* there is no consensus on this point; some courts—and some Government prosecutors —continue to apply § 924(c) as a recidivist statute.[6] In ****2002** *United States v. Nabors,* 901 F.2d 1351 (CA6), cert. denied, 498 U.S. 871, 111 S.Ct. 192, 112 L.Ed.2d 154 (1990), for instance, a case decided in 1990, the Court of Appeals purported to follow *Rawlings,* but actually affirmed imposition of two 5–year sentences for convictions on two distinct § 924(c) violations.[7] Similarly, in *United States v.* ***143** *Luskin,* 926 F.2d 372 (CA4), cert. denied, 502 U.S. 815, 112 S.Ct. 68, 116 L.Ed.2d 43 (1991), decided a year later, the Court of Appeals upheld three 5–year sentences for three violations of § 924(c) committed on separate dates, even though the minimum mandatory penalty for a "second or subsequent conviction" was 10 years at the time of trial. Significantly, the Government did not challenge the 5–year sentences on the second and third convictions.[8]

At the very least, this equivocation on the part of those charged with enforcing § 924(c), combined with the understanding of repeat offender provisions current when § 924(c) was enacted, render the construction of § 924(c) sufficiently uncertain that the rule of lenity should apply. Cf. *Simpson,* 435 U.S., at 14–15, 98 S.Ct., at 913–914; see *United States v. Abreu,* 962 F.2d 1447, 1450–1451 (CA10 1992) (en banc). As one district court judge said of § 924(c), in the course of a 1991 sentencing:

> "The statute is not a model of clarity. Its use of the word 'conviction' rather than wording describing the offense suggests an intent to reach recidivists who repeat conduct after conviction in the judicial system for prior offenses. The legislative history suggests that Congress was trying to impose draconian punishment 'if he does it a second time.' 114 Cong.Rec. 22231, 22237 (1968). It is unclear whether this means a second time as a recidivist or a second time offender who has not faced deterrence by a prior sentence. Criminal statutes must be strictly construed. ***144** *Nabors* [901 F.2d, at 1358] said that '§ 924(c)(1) is, at best, hard to follow in simple English...' With Mr. Godwin in front of me, I decline to hold him to a higher test than one found difficult by appellate court judges." *United States v. Godwin,* 758 F.Supp. 281, 283 (ED Pa.1991).

In an effort to cure § 924(c) of any ambiguity, the Court undertakes an intricate grammatical analysis, with an emphasis on the word "conviction."[9] According to the ****2003** Court, the "conviction" referred to in § 924(c) must be a finding of guilt, preceding the entry of final judgment, because sentence is imposed with the final judgment; if "conviction" referred to the final judgment itself, there would be no opportunity for sentence enhancement. *Ante,* at 1996. The "absurd[ity]" of this situation, *ibid.,* which, I note, has thus far eluded all of the courts to apply § 924(c) as a recidivist ***145** statute, see *supra,* evaporates if we assume that sentencing judges are gifted with enough common sense to understand that they may, upon entry of a second final judgment, enhance the sentence incorporated therein. In any event, the majority's conclusion that a "second or subsequent conviction" is a finding of guilt leaves unanswered the question dispositive here: whether that second conviction (finding of guilt *or* entry of judgment) is subject to enhancement if it is not for

an offense committed after a prior conviction has become final.

The Court finds additional support for its conclusion in the fact that at least some contrary readings of § 924(c) would "give a prosecutor unreviewable discretion either to impose or to waive the enhanced sentencing provisions" through the manner in which she charged a crime or crimes. *Ante,* at 1997. I have already pointed out that the majority's particular concern is not implicated if § 924(c) is treated as a straight-forward recidivist provision, *supra,* at 2001; under that construction, a defendant who commits a second § 924(c) offense before trial on the first would not be eligible for sentence enhancement whether the two counts were tried separately or together. I would add only that the Court's alternative reading does not solve the broader problem it identifies. As the Government concedes, see Tr. of Oral Arg. 31–32, prosecutors will continue to enjoy considerable discretion in deciding how many § 924(c) offenses to charge in relation to a criminal transaction or series of transactions. An armed defendant who robs a bank and, at the same time, assaults a guard, may be subject to one or two § 924(c) charges; the choice is the prosecutor's, and the consequence, under today's holding, the difference between a 5– and a 15–year enhancement. Cf. *United States v. Jim,* 865 F.2d, at 212 (defendant charged with three counts under § 924(c), each arising from the same criminal episode); *United States v. Fontanilla,* 849 F.2d, at 1257 (same).

***146** Section 924(c) of the Criminal Code mandates an enhanced, 20–year sentence for repeat offenders. Between 1968, when the statute was enacted, and 1987, when textualism replaced common sense in its interpretation, the bench and bar seem to have understood that this provision applied to defendants who, having once been convicted under § 924(c), "failed to learn their lessons from the initial punishment" and committed a repeat offense. See *United States v. Neal,* 976 F.2d, at 603 (Fletcher, J., dissenting). [10] The contrary reading adopted by ****2004** the Court today, driven by an elaborate exercise in sentence parsing, is responsive to neither historical context nor common sense. Because I cannot agree with this unwarranted and unnecessarily harsh construction of § 924(c), the meaning of which should, at a minimum, be informed by the rule of lenity, I respectfully dissent.

All Citations

508 U.S. 129, 113 S.Ct. 1993, 124 L.Ed.2d 44, 61 USLW 4474

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Petitioner also argues that the terms "second" and "subsequent" admit of at least two meanings—next in time and next in order or succession. That ambiguity is worth pursuing if "conviction" means "judgment," since a judgment entered once-in-time can (as here) include multiple counts. The point becomes irrelevant, however, when "conviction" means (as we hold) a finding of guilt. Unlike a judgment on several counts, findings of guilt on several counts are necessarily arrived at successively in time.

2 The dissent contends that even under our reading of the statute, "prosecutors will continue to enjoy considerable discretion in deciding how many § 924(c) offenses to charge in relation to a criminal transaction or series of transactions." *Post,* at 2002. That discretion, however, pertains to the prosecutor's universally available and unvoidable power *to charge or not to charge* an offense. Petitioner's reading would confer the extraordinary new power *to determine the punishment for a charged offense* by simply modifying the manner of charging.

3 The dissent quotes approvingly the ungarnished policy view that " 'punishing first offenders [*i.e.,* repeat offenders who have not yet been convicted of an earlier offense] with twenty-five-year sentences does not deter crime as much as it ruins lives.' " *Post,* at 2003, n. 10 (quoting *United States v. Jones,* 965 F.2d 1507, 1521 (CA8 1992)).

1 See, *e.g.,* 18 U.S.C. § 1302 ("subsequent offense" related to mailing of lottery tickets); § 1735 ("second or subsequent offense" related to sexually oriented advertising); § 844(h) ("second or subsequent conviction" for felonious use of explosives).

2 See, *e.g.,* 21 U.S.C. § 859(b) (1988 ed., Supp. III) (distribution of drugs to minors); 21 U.S.C. § 860(b) (1988 ed., Supp. III) (distribution of drugs near schools); 21 U.S.C. § 962(b) (importation of controlled substances).

3 See, *e.g.,* 18 U.S.C. § 2114 ("subsequent offense" of mail robbery), as interpreted in *United States v. Cooper,* 580 F.2d 259, 261 (CA7 1978) ("obvious" that "subsequent offense" language must be read as applying only to offenses committed after conviction on a prior offense).

4 446 U.S., at 416, 100 S.Ct., at 1758. His full comment:

> "I agree with the holding in *Simpson* that Congress did not intend to 'pyramid' punishments for the use of a firearm in a single criminal transaction. Yet I find quite implausible the proposition that Congress, in enacting § 924(c)(1), did not intend this general enhancement provision—with its stiff sanctions for first offenders and even stiffer sanctions for recidivists—to serve as an alternative source of enhanced punishment for those who commit felonies, such as bank robbery and assaulting a federal officer, that had been previously singled out by Congress as warranting special enhancement, but for which a lesser enhancement sanction than that imposed by § 924(c) had been authorized."

5 See Brief for United States in *Busic v. United States,* O.T. 1979, No. 78–6020, p. 19 ("Section 924(c) establishes mandatory minimum sentences, requires increasingly severe sentences for recidivists (without possibility of suspension or probation), and prohibits concurrent sentencing"); Brief for United States in *Simpson v. United States,* O.T. 1977, No. 76–5761, pp. 13–14 (discussing application of sentencing provisions "[i]f the gun-wielding bank robber were a recidivist").

6 Dismissing these cases, as well as those decided pre-*Rawlings,* as a long line of "erroneous lower-court decisions," *ante,* at 1998, cannot explain why 19 years passed before the correct interpretation of a statute of "utterly no ambiguity," *ibid.,* made its first reported appearance.

7 There is some tension between the notion that the text of the statute is clear and unambiguous and the Court of Appeals' explanation for its holding:

> "While § 924(c)(1) is, at best, hard to follow in simple English, we concur with the reasoning in *Rawlings* that two distinct violations of the statute trigger the subsequent sentence enhancement provisions of § 924(c)(1). Thus, the commission of two violations of § 924(c)(1) would result in a five-year consecutive sentence for the first conviction and a ten-year consecutive sentence for the second § 924(c)(1) conviction. However, because of the complexity of this issue, we find the district court's failure to sentence Nabors to a ten-year consecutive sentence for his second § 924(c)(1) conviction not clearly erroneous." *United States v. Nabors,* 901 F.2d 1351, 1358–1359 (CA6), cert. denied, 498 U.S. 871, 111 S.Ct. 192, 112 L.Ed.2d 154 (1990).

8 "The 1988 amendment raised the penalty for repeat violators of the statute to twenty years. In the version that was in effect at the time of the present crimes, the penalty for repeat violators was ten years. Arguably, the district judge should have sentenced appellant to one five-year and two ten-year consecutive terms of imprisonment for his convictions under Counts V through VII. However, since the United States has not counter-appealed on this point, we will not address it." *United States v. Luskin,* 926 F.2d 372, 374, n. 2 (CA4), cert. denied, 502 U.S. 815, 112 S.Ct. 68, 116 L.Ed.2d 43 (1991).

9 The Court also suggests that use of the word "conviction," rather than "offense," distinguishes this statute from the repeat offender provisions discussed in *Gonzalez v. United States,* 224 F.2d 431 (CA1 1955), *supra,* at 1996. Of course, the majority's textualist approach would lead to the same result if § 924(c)'s enhancement were reserved for "second or subsequent offenses": At the time of sentencing for two violations committed on separate dates, one violation is "second or subsequent" to the other, and the conviction itself always will establish that two "offenses" have indeed been committed. See *ante,* at 1998.

> It is true, as the Court points out in passionate defense of its reading, that the words "offense" and "conviction" are not identical. What is at issue here, however, is not whether the terms mean the same thing in all usages, but whether they mean the same thing when they are used by Congress to identify the class of repeat offenders subject to enhanced sentences. Cf. *ante,* at 1996 (context gives meaning to word "conviction"). If there is any difference between the terms as so used, it only lends further support to the conclusion that § 924(c) is a recidivist provision. As discussed above, repeat offender statutes couched in terms of "offense" were understood at the time of § 924(c)'s enactment to identify offenses committed after a prior *conviction.* See *supra,* at 1999–2000. *A fortiori,* "use of the word 'conviction' rather than wording describing the offense suggests an intent to reach recidivists who repeat conduct after conviction in the judicial system for prior offenses." *United States v. Godwin,* 758 F.Supp. 281, 283 (ED Pa.1991).

10 "However, punishing first offenders with twenty-five-year sentences does not deter crime as much as it ruins lives. If, after arrest and conviction, a first offender is warned that he will face a mandatory twenty-year sentence if he commits

the same crime again, then the offender will know of the penalty. Having already served at least five years in prison, he will have a strong incentive to stay out of trouble. Discouraging recidivism by people who have already been in prison and been released serves a far more valuable purpose than deterring offenders who have yet to be arrested and have no knowledge of the law's penalties." *United States v. Jones*, 965 F.2d 1507, 1521 (CA8 1992) (internal citation omitted).

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.

NO. 91-8199

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS LEE DEAL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(7), petitioner Thomas Lee Deal asks leave to file the accompanying Petition for Rehearing to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed in forma pauperis. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A(b) and (c), in the United States District Court and on appeal to the United States Court of Appeals for the Fifth Circuit.

Date: February 25, 2019

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

H. Michael Sokolow

H. MICHAEL SOKOLOW
First Assistant Federal Public Defender
Attorneys for Petitioner
440 Louisiana, Suite 1350
Houston, Texas 77002-1056
Telephone: (713) 718-4600