

No. 22-49

In the Supreme Court of the United States

EFRAIN LORA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the consecutive sentencing provision in 18 U.S.C. 924(c)(1)(D)(ii) applies when sentencing a defendant for causing death through the use of a firearm in the course of violating Section 924(c), pursuant to 18 U.S.C. 924(j).

RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

United States v. Lora, No. 1:14-cr-652-4 (Dec. 23, 2019)

United States Court of Appeals (2d Cir.):

United States v. Lora, No. 20-33 (Feb. 15, 2022)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is unreported but is available at 2022 WL 453368.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 2022. On May 9, 2022, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including July 15, 2022, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the U.S. District Court for the Southern District of New York, petitioner was convicted of aiding and abetting the use of a firearm, during and in relation to a drug trafficking crime, that caused death to another, in violation of 18 U.S.C. 924(j)(1) and

2; and conspiring to distribute cocaine and cocaine base, in violation of 21 U.S.C. 841(b)(1)(A) (2012) and 21 U.S.C. 846. Judgment 1-2; see Superseding Indictment 1-3. The district court sentenced petitioner to 25 years of imprisonment on the conspiracy count and a consecutive term of five years of imprisonment on the Section 924(j) count, to be followed by five years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-11a.

1. Petitioner and three co-conspirators trafficked cocaine and cocaine base in the Bronx. Pet. App. 3a. On August 11, 2002, the group decided to murder Andrew Balcarran, a rival drug dealer, over a dispute about drug territory. *Ibid.* On the day of the murder, petitioner and his co-conspirators went to pick up guns. *Ibid.* Two of petitioner's co-conspirators took the guns and drove away; petitioner, who was in a separate car, then called his armed co-conspirators to let them know that Balcarran was standing in front of his house. *Ibid.* The armed co-conspirators drove to Balcarran's house, shot, and killed him. *Ibid.*

A grand jury in the Southern District of New York returned a superseding indictment charging petitioner with aiding and abetting the use of a firearm, during and in relation to a drug trafficking crime, that causes death to another, in violation of 18 U.S.C. 924(j) and 2; aiding and abetting the intentional killing of a person while engaged in a drug trafficking conspiracy, in violation of 21 U.S.C. 848(e)(1)(A) and 18 U.S.C. 2; and conspiring to distribute five kilograms or more of cocaine and 280 grams or more of cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (2012), and 21 U.S.C. 846. Superseding Indictment 1-3.

The jury found petitioner guilty on all counts. Pet. App. 4a. The district court, however, concluded that there was insufficient evidence to prove the quantity of drugs involved in the offenses and therefore vacated the drug-quantity finding for the conspiracy count and the Section 848(e)(1)(A) count. *Ibid.* The court left the other counts undisturbed. *Ibid.*

2. The Probation Office's presentence report indicated that the guidelines sentence for petitioner's drug-conspiracy count should be 30 years, and his sentence for the Section 924(j) violation should be a minimum of ten years imprisonment and a maximum of life, "to be served consecutively to any other term of imprisonment" pursuant to 18 U.S.C. 924(c) and (j). Presentencing Report (PSR) ¶ 86; see PSR ¶ 87.

Section 924(c) provides that "any person who, during and in relation to any crime of violence or drug trafficking crime * * * uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime" receive a sentence of "not less than 5 years" 18 U.S.C. 924(c)(1)(A)(i). The statutory minimum becomes seven years if the firearm is brandished, 18 U.S.C. 924(c)(1)(A)(ii), and ten years if it is discharged, 18 U.S.C. 924(c)(1)(A)(ii) and (iii). Because Section 924(c) specifies no maximum sentence, it authorizes a sentence of up to life imprisonment. See *Alleyne v. United States*, 570 U.S. 99, 116-117 (2013); *United States v. Dorsey*, 677 F.3d 944, 956-957 (9th Cir. 2012) (collecting cases), cert. denied, 570 U.S. 919 (2013).

Section 924(c) further specifies that "no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of

imprisonment imposed on the person.” 18 U.S.C. 924(c)(1)(D)(ii). And Section 924(j), in turn, provides that if a defendant, “in the course of a violation of subsection (c), causes the death of a person through the use of a firearm,” he “shall * * * be punished by death or by imprisonment for any term of years or for life” if “the killing is a murder,” 18 U.S.C. 924(j)(1), or “be punished as provided” for manslaughter in 18 U.S.C. 1112 when “the killing is manslaughter,” 18 U.S.C. 924(j)(2).

Petitioner objected to the Probation Office’s application of the statutory-minimum and consecutive-sentencing regime of Section 924(c) to his Section 924(j) offense. D. Ct. Doc. 204, at 19-21 (Dec. 13, 2019). The district court rejected petitioner’s objection, citing *United States v. Barrett*, 937 F.3d 126 (2d Cir. 2019), which found that Section 924(j)’s reference to Section 924(c) incorporates that subsection’s penalty enhancements and “consecutive sentencing mandate,” *id.* at 129 n.2. Sent. Tr. 12-13. The court determined, however, that the statutory minimum in this case should be five years, rather than ten because the jury had not been asked to find that the gun was discharged, as is necessary for the ten-year minimum. *Id.* at 13.

At sentencing, the district court decided to impose a below-guidelines sentence of 25 years for petitioner’s drug-conspiracy conviction. Sent. Tr. 24-25. And it imposed a consecutive five-year sentence for the firearm conviction. *Id.* at 29-30; see Judgment 3.

3. The court of appeals affirmed in an unpublished summary order. Pet. App. 1a-11a. In a footnote, the court observed that petitioner had “briefly argue[d]” that Section 924(j) does not require consecutive sentencing, but that the argument was contrary to circuit

precedent. *Id.* at 11a n.3 (citing *Barrett*, 937 F.3d 126, 129 n.2).

ARGUMENT

Petitioner seeks (Pet. 8-25) this Court’s review of whether the district court had discretion to run the sentence for his firearm offense concurrently to his sentence for the underlying drug conspiracy offense. The court of appeals’ unpublished order is correct, and the narrow conflict in the circuits as to whether 18 U.S.C. 924(c)’s consecutive-sentence mandate applies to a conviction for the greater-included offense under 18 U.S.C. 924(j) does not warrant this Court’s review. That issue has limited practical importance, and this Court has repeatedly denied petitions for a writ of certiorari seeking review of it. See *Ventura v. United States*, 140 S. Ct. 158 (2019) (No. 18-8055); *Bran v. United States*, 577 U.S. 1068 (2016) (No. 15-5096); *Berrios v. United States*, 568 U.S. 1143 (2013) (No. 12-381). The same result is warranted here, particularly because petitioner’s sentence is unlikely to change even if he prevails before this Court.

1. The court of appeals correctly determined that the district court was in fact required to run the five-year sentence for petitioner’s firearm offense consecutively to his sentence on the underlying drug-conspiracy offense.

a. Section 924(j) sets forth an aggravated version of the offense established under Section 924(c). The provision at issue here, 18 U.S.C. 924(j)(1), specifies that a “person who, *in the course of a violation of subsection (c)*, causes the death of a person through the use of a firearm, shall * * * if the killing is a murder * * * be punished by death or by imprisonment for any term of years or for life.” 18 U.S.C. 924(j)(1) (emphasis added).

Thus, in order to obtain a conviction under Section 924(j)(1), the government must prove that the defendant's conduct satisfied the elements listed in Section 924(c) and that a person was murdered in the course of the Section 924(c) violation. And because Sections 924(c) and (j) work together to identify the necessary elements, a sentence based on those elements arises "under" both provisions, and Section 924(c)(1)(D)(ii)'s requirement that a "term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person" therefore applies. 18 U.S.C. 924(c)(1)(D)(ii).

Constitutional principles reinforce that understanding. Courts analyzing whether statutory provisions create "two distinct offenses" exposing a defendant to two distinct punishments typically ask whether "*each* statute requires proof of an additional fact which the other does not.'" *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (emphasis added; citation omitted). Here, while Section 924(j) "requires proof of a fact"—a death—"which [Section 924(c)] does not," *ibid.*, Section 924(c) does not require proof of any element distinct from Section 924(j), and there is no countervailing indication that Congress intended to create two distinct, separately punishable offenses, see, *e.g.*, *Garrett v. United States*, 471 U.S. 773, 778-786 (1985). See *United States v. Gonzales*, 841 F.3d 339, 355-358 (5th Cir. 2016) (noting and agreeing with government's concession that double-stacking of punishments under Sections 924(c) and (j) is impermissible), cert. denied, 137 S. Ct. 1234, and 137 S. Ct. 1237 (2017). Instead, Section 924(j) incorporates Section 924(c)'s offense elements, and simply sets forth an additional fact that, if proved beyond a reasonable doubt, broadens the range of

punishments available for the Section 924(c) offense—specifying, for example, that an offense involving murder is subject to capital punishment, 18 U.S.C. 924(j)(1). Accordingly, Section 924(j)'s requirement of additional homicide-related proof does not remove cases in which the government introduces such proof from the scope of offenses defined by Section 924(c); it simply identifies homicide-related crimes that constitute a particularly severe subset of Section 924(c) offenses.

A contrary reading of Section 924 would create an anomaly, under which the lesser-included offense set forth in Section 924(c) would require a consecutive sentence, but additional proof of homicide would eliminate that requirement. Such a result would defeat Section 924(c)'s and 924(j)'s "primary objective" of requiring enhanced punishments for offenders who commit other crimes while using a firearm. *Abbott v. United States*, 562 U.S. 8, 20 (2010); see *Muscarello v. United States*, 524 U.S. 125, 132 (1998); see also *United States v. Bran*, 776 F.3d 276, 281-282 (4th Cir. 2015), cert. denied, 577 U.S. 1068 (2016); *United States v. Berrios*, 676 F.3d 118, 141 (3d Cir. 2012), cert. denied, 568 U.S. 1143 (2013); *United States v. Battle*, 289 F.3d 661, 668 (10th Cir.), cert. denied, 537 U.S. 856 (2002), overruled on other grounds by *United States v. Melgar-Cabrera*, 892 F.3d 1053, 1060 (10th Cir.), cert. denied, 139 S. Ct. 494 (2018); *United States v. Allen*, 247 F.3d 741, 769 (8th Cir. 2001), vacated on other grounds, 536 U.S. 953 (2002), cert. denied, 539 U.S. 916 (2003).

A contrary reading of Section 924 would also be pointless. Because a Section 924(c) violation is a necessary ingredient in every Section 924(j) offense, any defendant guilty of the latter is also guilty of the former. Accordingly, even if the additional requirements of Section

924(j) took it outside the ambit of Section 924(c), the government could nonetheless ensure that a defendant who has committed murder is subject to a consecutive sentence up to life imprisonment by seeking punishment under Section 924(c), rather than Section 924(j).

b. Petitioner's construction of the statute is unsound. He mistakenly contends (Pet. 18), for example, that the court of appeals' approach would render Section 924(c)(5)'s similar penalty scheme for offenses involving "armor piercing ammunition" superfluous. 18 U.S.C. 924(c)(5). But Section 924(c)(5) and Section 924(j) target distinct conduct. Section 924(c)(5) requires proof of armor piercing ammunition, and such a finding will subject the defendant to an increased statutory-minimum sentence of 15 years imprisonment that Section 924(j) itself does not specify.

Petitioner also errs in contending (Pet. 18-20) that his reading is necessary to avoid a Sixth Amendment problem. There is no dispute that the circumstances that can lead to the enhanced punishment specified by Section 924(j) must be proved beyond a reasonable doubt. See *Alleyne v. United States*, 570 U.S. 99, 107-108 (2013); see also Gov't Supp. Br. at 8-12, *United States v. Melgar-Cabrera*, No. 16-2018 (10th Cir.) (Apr. 16, 2018). The issue here is simply whether proof beyond a reasonable doubt of the additional circumstances specified in Section 924(j) eliminates the statutory overlap between Sections 924(c) and 924(j) for purposes of the consecutive-sentencing mandate of Section 924(c)(1)(D)(ii). Recognizing Section 924(c)(1)(D)(ii)'s application does not in any way derogate from a defendant's Sixth Amendment rights with respect to the additional facts required under Section 924(j).

Petitioner’s reliance (Pet. 22) on the rule of lenity is likewise misplaced. That canon “only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended.” *United States v. Castleman*, 572 U.S. 157, 172–173 (2014) (citation omitted). That is not the case here.

2. The court of appeals’ decision in this case is consistent with the decision of five other circuits that have recognized that a Section 924(j) sentence must run consecutively to any other sentence imposed. *Bran*, 776 F.3d at 280-282 (4th Cir.); *Berrios*, 676 F.3d at 140-144 (3d Cir.); *United States v. Dinwiddie*, 618 F.3d 821, 837 (8th Cir. 2010), cert. denied, 562 U.S. 1248, and 562 U.S. 1263 (2011); *Battle*, 289 F.3d at 667-669 (10th Cir.); *United States v. Staggs*, 152 F. 3d 931, 1998 WL 447943, at *3 (9th Cir. 1998) (Tbl.). The First Circuit has suggested that it would adopt that view as well. See *United States v. García-Ortiz*, 657 F.3d 25, 31 (2011) (concluding that the consecutive-sentence mandate “arguably applies to section 924(j),” citing *Dinwiddie* and *Battle*, and remanding the case for resentencing), cert. denied, 565 U.S. 1171 (2012). Only the Eleventh Circuit, in *United States v. Julian*, 633 F.3d 1250 (2011), has adopted petitioner’s interpretation of Section 924(j). See *id.* at 1252-1257.

Petitioner errs in suggesting that the Tenth Circuit recently switched positions on the issue, rejecting its prior decision in *Battle* in order to adopt the Eleventh Circuit’s position. Pet. 13-14 (citing *United States v. Melgar-Cabrera*, 892 F.3d 1053 (10th Cir.), cert. denied, 139 S. Ct. 494 (2018)). In *Battle*, the Tenth Circuit made two determinations regarding Section 924(j). First,

Battle found that Section 924(j) provides sentencing factors and does not define an offense distinct from Section 924(c). 289 F.3d at 666. Second, *Battle* found that Section 924(c)'s mandatory consecutive sentencing rule applies to Section 924(j), explaining “[t]he plain meaning of the words used in [Section] 924(j) unequivocally provide that if the evidence shows a violation of [Section] 924(c) (i.e. the use or carrying of a firearm in the commission of a crime of violence or a drug trafficking crime), a district court must impose a consecutive sentence over and above the punishment prescribed for the violent crime.” *Ibid.*

In *Melgar-Cabrera*, the Tenth Circuit abandoned the first determination but not the second. With the government’s encouragement, the court of appeals overturned “the conclusion articulated in *Battle* that [Section] 924(j) is a sentencing factor rather than a discrete crime,” 892 F.3d at 1060 n.3, which was inconsistent with this Court’s Sixth Amendment jurisprudence. See Gov’t Supp. Br. at 10, *United States v. Melgar-Cabrera*, *supra* (No. 16-2018). But as the government explained in its *Melgar-Cabrera* briefing, that jurisprudence does not undermine *Battle*’s separate determination that Section 924(c)’s consecutive-sentencing scheme applies to a Section 924(j) offense. See *id.* at 10 n.3; see also *Berrios*, 676 F.3d at 142. And nothing in *Melgar-Cabrera*—which did not even involve a consecutive-sentencing issue—suggests otherwise.

Accordingly, petitioner can only point to a narrow conflict with the Eleventh Circuit’s decision in *Julian*, which has existed for more than a decade, has limited practical importance, and does not warrant this Court’s

intervention.* As explained, even if this Court were to accept petitioner's invitation to adopt the Eleventh Circuit's position, it would have little real consequence for defendants, because eligible offenders could simply be punished under Section 924(c) rather than Section 924(j). See pp. 7-8, *supra*.

In any event, district courts would retain discretion under 18 U.S.C. 3584 to impose consecutive sentences for Section 924(j) violations. The gun-committed homicides covered by Section 924(j) are unlikely to result in leniency under any circuit's rule. And the circuit-majority approach cannot result in unduly harsh sentences when district courts are free to adjust the sentences on other counts to account for the mandatory consecutive sentence that the firearm offense requires. See *Dean v. United States*, 137 S. Ct. 1170, 1177 (2017) ("Whether the sentence for the predicate offense is one day or one decade, a district court does not violate the terms of § 924(c) so long as it imposes the mandatory minimum 'in addition to' the sentence for the violent or drug trafficking crime.").

3. The district court's utilization of its sentence-structuring discretion when sentencing petitioner makes further review in this particular case especially unwarranted. The structure that the court adopted makes it highly unlikely that petitioner would benefit from a decision adopting his position on the question presented. Petitioner's guidelines range for his drug

* Petitioner notes (Pet. 14 n.3) that two courts have stated that Section 924(c)'s consecutive sentencing provision does not apply to violations of Section 924(o), which covers conspiracies. But Section 924(o) is plainly different from Section 924(j) because unlike Section 924(j), Section 924(o) does not require a completed Section 924(c) offense.

conspiracy offense was 30 years, plus a mandatory consecutive sentence of five years to life imprisonment on the firearm count. PSR ¶ 87; Sent. Tr. 13. The court stated at sentencing that it “intend[ed] to impose an aggregate sentence of 30 years” and structured the sentence as a below-guidelines sentence of 25 years for the conspiracy offense plus a five-year consecutive sentence for the Section 924(j) offense to achieve that result. Sent. Tr. 28; see *id.* at 29. The record gives no indication that the district court would do anything other than reimpose its carefully selected 30-year total term of imprisonment if petitioner were to prevail before this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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