

No. 09-479

In the Supreme Court of the United States

KEVIN ABBOTT, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES

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Petitioner was convicted under 18 U.S.C. 924(c)(1)(A), which provides for minimum prison sentences “[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law.” He contends (Pet. 16-23) that the “except” clause of Section 924(c)(1)(A) exempts him from the five-year mandatory consecutive sentence imposed by that provision because the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e), mandated a greater minimum sentence on a different count of conviction for a related firearms offense. The court of appeals rejected that argument and affirmed petitioner’s sentence, which includes the consecutive five-year term prescribed by Section 924(c)(1)(A). Pet. App. 7a-21a.

Petitioner notes (Pet. 8-14) that the court of appeals’ decision conflicts with the Second Circuit’s decisions in

United States v. Whitley, 529 F.3d 150 (2d Cir. 2008), and *United States v. Williams*, 558 F.3d 166 (2d Cir. 2009), petition for cert. pending, No. 09-466 (filed Oct. 20, 2009). In *Williams*, the Second Circuit held, following its decision in *Whitley*, that the “except” clause exempts a defendant from any sentence under Section 924(c)(1)(A) whenever he is subject to a higher mandatory sentence for a different offense “arising from the same criminal transaction or operative set of facts.” 558 F.3d at 171.

The government filed a petition for a writ of certiorari to review the Second Circuit’s decision in *Williams*. *United States v. Williams*, No. 09-466, petition for cert. pending (filed Oct. 20, 2009). As that petition explains, the Second Circuit’s interpretation of the “except” clause is incorrect. In addition to the court below, seven courts of appeals have rejected the Second Circuit’s reading of Section 924(c) in *Williams*. See Pet. App. 14a-16a; *United States v. Segarra*, 582 F.3d 1269, 1272-1273 (11th Cir. 2009) (per curiam); *United States v. London*, 568 F.3d 553, 564 (5th Cir. 2009), petition for cert. pending, No. 09-5844 (filed Aug. 11, 2009); *United States v. Pulido*, 566 F.3d 52, 65 & n.6 (1st Cir. 2009), petition for cert. pending, No. 09-5949 (filed Aug. 14, 2009); *United States v. Easter*, 553 F.3d 519, 525-527 (7th Cir. 2009) (per curiam), petitions for cert. pending, No. 08-9560 (filed Mar. 26, 2009), and No. 08-10584 (filed May 20, 2009); *United States v. Jolivette*, 257 F.3d 581, 586-587 (6th Cir. 2001); *United States v. Studifin*, 240 F.3d 415, 421-424 (4th Cir. 2001); *United States v. Alaniz*, 235 F.3d 386, 386-390 (8th Cir. 2000), cert. denied, 533 U.S. 911 (2001). Two of those courts, in addition to the court below, have held, in conflict with *Whitley*, that a higher mandatory minimum sentence for a related firearms

offense does not exempt a defendant from a Section 924(c) sentence. Pet. App. 16a-19a; *Easter*, 553 F.3d at 524-527; *Studifin*, 240 F.3d at 421-424.

Petitioner contends that his petition raises an issue not present in *Williams*: whether the “except” clause applies when a defendant who violates Section 924(c) is subject to a higher mandatory minimum sentence for a related firearms offense. Pet. 3. But the Court’s disposition of *Williams* will likely affect the proper resolution of this case: An offense arising from the same transaction or operative facts as a Section 924(c) offense includes a related firearms offense (*Whitley*) or the underlying drug trafficking or violent offense (*Williams*).

For the reasons stated in the *Williams* petition, that case provides an appropriate vehicle to resolve the conflict that exists between the courts of appeals over the proper interpretation of Section 924(c). Accordingly, this petition should be held for *United States v. Williams*, and then disposed of as appropriate in light of this Court’s disposition of that case.*

Respectfully submitted.

ELENA KAGAN
Solicitor General

DECEMBER 2009

* The government waives any further response to the petition unless this Court requests otherwise.