No. 10-9436

In the Supreme Court of the United States

JOHN WORMAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court's admission into evidence of certain out-of-court declarations was harmless error or prejudicial plain error.

2. Whether a district court, in sentencing a defendant for both an offense under 18 U.S.C. 924(c) and a predicate crime of violence or a drug-trafficking crime, may reduce the sentence for the underlying crime in order to compensate for the mandatory minimum sentence required for the Section 924(c) offense.

3. Whether the court of appeals reviewed the reasonableness of petitioner's sentence under a deferential abuse-of-discretion standard, consistent with *Gall* v. *United States*, 552 U.S. 38 (2007).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 622 F.3d 969.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 2010. A petition for rehearing was denied on November 5, 2010. The petition for a writ of certiorari was filed on January 28, 2011. 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 Northern District of Iowa, petitioner was found guilty of mailing non-mailable matter, in violation of 18 U.S.C. 2 and 1716; possessing a destructive device,

in violation of 26 U.S.C. 5845(f), 5861(d), and 5871; transporting a destructive device, in violation of 18 U.S.C. 844(d); and possessing and using a destructive device in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(B)(ii). He was sentenced to one month of imprisonment on the first three counts and a consecutive term of 360 months of imprisonment on the Section 924(c) count, to be followed by three years of supervised release. The court of appeals affirmed petitioner's convictions, but it reversed his one-month sentence on the first three counts of conviction and remanded for resentencing. Pet. App. 1-17.

1. Petitioner worked for 18 years at Winnebago Industries (Winnebago) in northern Iowa. In 1991, Paulette Torkelson, who had less seniority than petitioner, was promoted to be his manager. Petitioner disliked Torkelson's management style, spoke negatively of her, and listed on index cards several complaints he had about her. Before Torkelson became petitioner's manager, he had received generally good performance reviews, but Torkelson gave him poor reviews. In 1994, she gave him the lowest possible rating in various categories of performance, and the company's upper management forced him to accept a significant demotion or be fired. Petitioner refused the demotion, was fired, was "extremely angry" about the situation, and was ultimately escorted from the workplace upon his termination. Pet. App. 2, 8; Gov't C.A. Br. 3, 17, 13-18.

Petitioner later started his own business building trailers and metal shipping racks. In 2002, at the recommendation of petitioner's wife—another longtime Winnebago employee who was still working there at the time—Winnebago's Stitchcraft division agreed to order shipping racks from petitioner, whose revenues in-

creased significantly as a result. But in 2003, Torkelson was transferred to the Stitchcraft division, and she thereafter suggested to a manager that the company could make its own racks at less expense. In March 2005, the company stopped buying racks from petitioner. Randy Weiland, a Stitchcraft employee and one of petitioner's friends, told petitioner about rumors that Torkelson was behind the cancellation of his rack deal with Stitchcraft. Pet. App. 2-3; Gov't C.A. Br. 19-21.

About three months later, in June 2005, someone left a suspicious, stamped package addressed to Torkelson in a local post office. Torkelson was an antiques collector and the package was labeled as being from an antique store, but it did not include any return address and the listed phone number was not a working line. Authorities inspected the package, found an old Westinghouse radio inside, and discovered a pipe bomb within the radio. To render it safe, the authorities detonated the bomb, which contained Bullseye double-base smokeless gunpowder, an especially explosive variety of gunpowder containing nitroglycerin. A forensic analyst determined that the bomb could have held up to 51 grams of the gunpowder. Pet. App. 2-3; Gov't C.A. Br. 4-14, 22-23.

The ensuing investigation focused on petitioner, who was once a firearms dealer and was known to be proficient with gunpowder. In July 2005, officers searched his house. They found the index cards listing his complaints about Torkelson from over a decade earlier; a notebook of newer complaints about her, dated 2004; empty and partially empty stamp books that contained the same stamps that appeared on the package containing the bomb; galvanized pipe; radio components; soldering guns; and a drill whose bit contained fibrous

pressboard material that was consistent with the pressboard backing on old Westinghouse radios. The officers also discovered Bullseye double-base smokeless gunpowder that was physically consistent with the gunpowder recovered from the bomb. One can of petitioner's Bullseye gunpowder was missing 42.5 grams of the powder. Pet. App. 2-3; Gov't C.A. Br. 14-15, 21-23.

Authorities further discovered that only one store in northern Iowa, a Staples store in Mason City, sold the kinds of labels that appeared on the package containing the bomb. The store was about 20 miles from petitioner's house. The store's records showed that five days before the package appeared in the nearby post office, someone had paid cash for two items from the store: labels and a stamp kit of the kind used on the package. Nearby surveillance cameras showed that a white truck with a truck-topper had entered the Staples parking lot before the purchase and that a large white dog was in the truck at the time. Petitioner owned a white truck with a truck-topper and a large white dog, and a visual comparison led a video analyst to conclude that petitioner's truck was the one that appeared in the surveillance footage. Additionally, other Staples records reflected that petitioner had previously bought stamp kits from the store using his credit card. Pet. App. 3; Gov't C.A. Br. 23-25, 29-30.

Authorities seized petitioner's truck to search for trace evidence. Petitioner was not at home at the time, because he had left in his Jeep. The day after his truck was seized, petitioner burned his Jeep. That same day, petitioner took the Jeep to a salvage yard. A few days later, officers seized the remains of the Jeep, which had no wheels and no battery. When authorities interviewed petitioner, he admitted to burning the Jeep, saying that

he had put it up on blocks, drained it of oil, and run the engine until the vehicle caught fire. Petitioner had done this, he said, to test how long the engine could run without oil. Petitioner claimed that when the vehicle caught fire, he had removed the wheels and battery, and poured fuel on it until it was engulfed in flames. Pet. App. 4-5; Gov't C.A. Br. 28-29, 33.

2. A grand jury in the United States District Court for the Northern District of Iowa charged petitioner in a second superseding indictment with mailing nonmailable matter, in violation of 18 U.S.C. 2 and 1716; possessing a destructive device, in violation of 26 U.S.C. 5845(f), 5861(d), and 5871; transporting a destructive device, in violation of 18 U.S.C. 844(d); and possessing and using a destructive device in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(B)(ii).

a. At petitioner's jury trial, the government introduced witness testimony and documentary evidence reflecting the facts described above. The government also introduced certain out-of-court declarations to which petitioner objected: (1) two Stitchcraft employees testified that they had heard "conversation[s]" at work that Torkelson was involved in the company's decision to stop buying racks from petitioner, 3 Dist. Ct. Tr. 379 (Tr.); see *id.* at 473-476; (2) a postal inspector who had interviewed petitioner and his wife testified that petitioner's wife said during the interview that "everything had been going fine in her department" at Stitchcraft "until Miss Torkelson came * * * and then the racks ended," 6 Tr. 973; and (3) an employee of the salvage yard to which petitioner had taken his Jeep testified that the yard's weighmaster told her that petitioner had said "[a]n electrical short" caused the fire that burned his Jeep, 5 Tr. 932. Petitioner objected to these declarations on hear-

say grounds, but the district court admitted them into evidence, concluding that they were not offered for their truth. 3 Tr. 374-379; *id.* at 473-476; 5 Tr. 931-932; 6 Tr. 972-973. The jury found petitioner guilty on all counts. Pet. App. 5.

b. Petitioner's advisory Guidelines range on the first three counts of conviction (mailing, possessing, and transporting a destructive device) was 168 to 210 months of imprisonment. Presentence Investigation Report (PSR) para. 73 ; see Pet. App. 5, 14-15. Under 18 U.S.C. 924(c)(1)(B)(ii), the district court was required to impose a consecutive term of imprisonment of not less than 360 months on the fourth count of conviction (possessing and using a destructive device in furtherance of a crime of violence). PSR paras. 51, 73; see Pet. App. 5, 14-15.

In view of the mandatory minimum consecutive sentence of 360 months on the Section 924(c) count, and given that petitioner was 58 years old, the district court at sentencing observed that "unless [I] go all the way down to one day or one month or something" on the first three counts of conviction, "the statistical odds are very high that the defendant's going to die in prison." Pet. App. 81; see *id.* at 71-73, 79-80. The court thus considered whether "a total sentence of 361 months" would be "sufficient but not greater than necessary in this case" under the sentencing factors enumerated in 18 U.S.C. 3553(a). *Id.* at 80. Petitioner argued that a 361-month overall sentence would indeed be sufficient and that the court should vary downward to a one-month sentence on the first three counts of conviction. *Id.* at 83-84.

Ultimately, the district court varied downward from the advisory range of 168 to 210 months on the first three counts of conviction, sentencing petitioner to one month of imprisonment on those counts. Pet. App. 93.

It sentenced petitioner to the minimum consecutive term of 360 months on the Section 924(c) count. *Ibid.* The court explained that the "substantial variance" on the first three counts was "necessary to achieve the overarching sentencing principle of 3553(a) which is to achieve a sentence that is sufficient but not greater than necessary." *Ibid.* The court emphasized that even with the downward variance, petitioner would be "84 years old" at the time of his release, "if he's fortunate enough to live that long." *Id.* at 94. In the court's view, giving petitioner "some ray of hope" that he "may be released" during his lifetime could "facilitate [his] correctional treatment." *Id.* at 95. The court also noted that petitioner had "[n]o prior criminal history," a stable marriage, and steady employment. *Id.* at 93.

3. Petitioner appealed his convictions, and the government cross-appealed petitioner's one-month sentence on the first three counts of conviction (mailing, possessing, and transporting a destructive device), claiming that it was substantively unreasonable. The court of appeals affirmed petitioner's convictions, but it reversed his one-month sentence and remanded for resentencing. Pet. App. 1-17.

a. Petitioner renewed his argument that certain out-of-court declarations admitted at trial were inadmissible hearsay. Pet. App. 5-6; see Pet. C.A. Br. 20-34. He also contended that the declarations were unduly prejudicial and should have been excluded under Federal Rule of Evidence 403. Pet. App. 7.[1] The court of appeals agreed

[1] Although petitioner had contemporaneously objected at trial on Rule 403 grounds to the testimony by two Stitchcraft employees about conversations that they had overheard at Stitchcraft, see 3 Tr. 377-378, he had not raised similar objections to the testimony about out-of-court

with petitioner that the out-of-court statements were inadmissible. *Id.* at 6-9. The court observed, however, that "[a]n evidentiary ruling is harmless if the substantial rights of the defendant were unaffected, and the error had no, or only a slight, influence on the verdict." *Id.* at 10 (citing *United States* v. *Crenshaw*, 359 F.3d 977, 1003-1004 (8th Cir. 2004)). Applying that test to petitioner's case, the court found the admission of each statement harmless given the overall "weight of the evidence." *Ibid.*

b. "Because the government [did] not allege procedural error," the court of appeals reviewed the one-month sentence for substantive reasonableness "under a deferential abuse of discretion standard." Pet. App. 15. The court stated that "[a]n abuse of discretion occurs when," *inter alia*, a sentencing court "gives significant weight to an improper or irrelevant factor." *Ibid.* After reviewing the sentencing transcript "in context," the court found that the district court here did give significant weight to an improper factor: by "lumping all the counts together and focusing on the total sentence" that petitioner faced, the district court effectively "used the presence of the [Section] 924(c) mandatory minimum to reduce [petitioner's] sentence on the first three counts." *Id.* at 16-17. The court of appeals observed that, under circuit precedent, "[t]he severity of a mandatory consecutive sentence is an improper factor that a district court may not consider when sentencing a defendant on related crimes." *Id.* at 16 (citing *United States* v. *Williams*, 599 F.3d 831, 834 (8th Cir.), cert. denied, 130 S. Ct. 2134 (2010)); see *id.* at 17 (consideration of

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statements made by petitioner's wife and the salvage yard weighmaster, see 5 Tr. 931-932; 6 Tr. 972-973.

this factor in a Section 924(c) case "defeat[s] Congress's intent to enhance the punishment for using a weapon in a crime of violence").

The court of appeals thus remanded the case to the district court for a resentencing at which this factor would not be considered. Pet. App. 17. In doing so, however, the court otherwise "decline[d] to express an opinion" on whether and to what extent petitioner's "age, length of marriage, lack of criminal history, and hope of release" could justify a variance on the first three counts of conviction. *Id.* at 17 n.2.

ARGUMENT

Petitioner claims that this Court should grant certiorari to review (1) whether the district court's admission into evidence of certain out-of-court declarations was prejudicial error (Pet. 8-26); (2) whether a district court, in sentencing a defendant for both an offense under 18 U.S.C. 924(c) and a predicate crime of violence or a drug-trafficking crime, may reduce the sentence for the underlying crime in order to compensate for the mandatory minimum sentence required for the Section 924(c) offense (Pet. 36-38); and (3) whether the court of appeals reviewed the reasonableness of petitioner's sentence under a deferential abuse-of-discretion standard (Pet. 27-35). The first and third claims are fact-bound, and this Court has recently twice declined to review the second claim, which is in an interlocutory posture in this case in any event. With respect to all three claims, the decision below is correct and further review is not warranted.

1. Petitioner renews his claim (Pet. 8-26) that certain out-of-court declarations admitted at his trial were inadmissible hearsay, violated Federal Rule of Evidence

403, and so prejudiced his defense that they warranted a new trial. As an initial matter, to the extent that petitioner challenges the admissibility of those out-of-court statements, the court of appeals agreed with petitioner that the statements were inadmissible. Pet. App. 6-9. Thus, the only question presented here is whether admission of the statements was harmless error (in the case of statements by Stitchcraft employees and the salvage yard weighmaster) or prejudicial plain error (in the case of statements by petitioner's wife). See pp. 5-6, 7 n.1, *supra*. Petitioner does not dispute that the court of appeals correctly stated the harmless-error standard. Indeed, using the same formulation as the court of appeals, see Pet. App. 10, petitioner states that "[a]n evidentiary error is harmless when * * * the substantial rights of the defendant were unaffected and * * * the error did not influence or only had a slight influence on the verdict." Pet. 8.

Petitioner simply disagrees (Pet. 9-10, 18, 26) with the court of appeals' application of that standard to the facts of this case. But the court of appeals' fact-bound determination of harmlessness was based on a lengthy trial record, and it does not present any issue of enduring legal importance for this Court to resolve. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts."). And in any event, the court of appeals was correct that any error was harmless in view of the other evidence presented by the government at trial. Far from being "decisive" and "crucial," the out-of-court statements at issue were cumulative and inconsequential. Pet. 9. Petitioner offers no sustained argument about why this Court should second-guess the court of appeals' record-bound finding to that effect.

With respect to the testimony about conversations among Stitchcraft employees and a statement by petitioner's wife to a postal inspector, that evidence was cumulative of other evidence indicating that petitioner disliked Torkelson and had motive to send her a pipe bomb. Other evidence demonstrated that Torkelson was promoted to be petitioner's boss even though he had more seniority; petitioner disliked her management style and spoke negatively of her; petitioner catalogued his complaints about her and kept that list for more than a decade afterward; she gave him poor performance reviews after he had received good ones for years; petitioner was ultimately fired from Winnebago after receiving those poor reviews; petitioner's friend, Randy Weiland, told him about rumors that Torkelson may have caused petitioner to lose his rack deal with Stitchcraft; and the bomb was sent just a few months after Stitchcraft stopped buying racks from petitioner. Pet. App. 2-3; Gov't C.A. Br. 3, 13-21, 23.

Similarly, the salvage yard weighmaster's statement—*i.e.*, that petitioner had said "[a]n electrical short" caused the fire that burned his Jeep, 5 Tr. 932—was cumulative of other evidence that petitioner attempted to conceal his offenses. Other evidence demonstrated that petitioner burned his Jeep the very day after authorities seized his truck. Moreover, the explanation that petitioner gave authorities about the fire was facially implausible, particularly because it conflicted with the account of a neighbor who saw the Jeep burning. Pet. App. 4; Gov't C.A. Br. 28-29, 33. The jurors' decision to credit or reject that explanation did not turn in any significant measure on petitioner's additional contradictory explanation for the fire to the salvage yard's weighmaster—especially in light of the government's

omission of that additional explanation from its closing argument. See 3:08-cr-03012-MWB, Docket entry No. 114, at 31-35 (N.D. Iowa Sept. 21, 2009).

Finally, even absent any evidence of petitioner's motive to harm Torkelson and his attempts to evade detection, the forensic evidence from his house and from the bomb itself overwhelmingly pointed to him as the culprit. Petitioner was proficient with gunpowder; the same variety of smokeless gunpowder that was used in the bomb was found at his house; the amount of gunpowder missing from one can was consistent with the amount that the bomb contained; the radio used to conceal the bomb was a Westinghouse and the material found in petitioner's drill bit was consistent with the pressboard backing on Westinghouse radios; stamp books found at petitioner's house matched the stamps that appeared on the package containing the bomb; and video evidence and store records tended to show that petitioner had bought labels of the sort that appeared on the package just days before the package was sent. Gov't C.A. Br. 11, 14-15, 21-25, 29-30. In those circumstances, the court of appeals correctly concluded that admission of the out-of-court statements did not warrant a new trial.

2. Petitioner contends (Pet. 36-38) that the district court, in sentencing him for both his Section 924(c) offense and his predicate offenses, was entitled to reduce his sentence for the predicate offenses in order to compensate for the mandatory minimum sentence required for the Section 924(c) offense. The court of appeals correctly held to the contrary. This Court has recently twice declined to review this issue, see *Franklin* v. *United States*, 131 S. Ct. 1675 (2011) (No. 10-7435); *Calabrese* v. *United States*, 130 S. Ct. 1879 (2010)

(No. 09-446), and there is no reason for a different result in this case.

a. Petitioner relies heavily (Pet. 36-38) on the requirement in 18 U.S.C. 3553(a) that a district court impose a sentence "sufficient * * * but not greater than necessary" to achieve the purposes of sentencing. Section 3553(a) requires a court to consider a host of general factors in setting a defendant's total sentence, but those standards do not apply where "otherwise specifically provided." 18 U.S.C. 3551(a). Section 924(c)(1)(A) provides that its mandatory minimum sentence "shall" be imposed "in addition to the punishment" for the predicate offense or offenses. Thus, as this Court recently emphasized, Section 924(c)'s "longstanding thrust" is its "insistence that sentencing judges impose *additional* punishment for [Section] 924(c) violations." *Abbott* v. *United States*, 131 S. Ct. 18, 27 (2010) (emphasis in original); see *id.* at 29 (the statute's "command" that "all [Section] 924(c) offenders shall receive additional punishment for their violation of that provision" is "reiterated three times").

Petitioner's argument also conflicts with Congress's prohibition in Section 924(c)(1)(D) on concurrent punishments. Section 924(c)(1)(D)(ii) provides that, "[n]otwithstanding any other provision of law, * * * no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed." Reducing the sentence on the underlying crime to compensate for the mandatory minimum sentence under 18 U.S.C. 924(c) would effectively result in a sentence for the predicate offense that, to the

extent of the reduction, runs concurrent with the sentence for the 924(c) offense. See *United States* v. *Chavez*, 549 F.3d 119, 135 (2d Cir. 2008) ("[I]f the court reduces the prison term imposed for that underlying count on the ground that the total sentence is, in the court's view, too severe, the court conflates the two punishments and thwarts the will of Congress.").[2]

b. In addition to the court below, three courts of appeals have concluded that a district court may not consider a consecutive sentence imposed for a violation of 18 U.S.C. 924(c) when imposing a sentence for the predicate offense under 18 U.S.C. 3553(a). See *United States* v. *Calabrese*, 572 F.3d 362, 369-370 (7th Cir. 2009), cert. denied, 130 S. Ct. 1879 (2010); *Chavez*, 549 F.3d at 135; see also *United States* v. *Franklin*, 622 F.3d 650, 653-656 (6th Cir. 2010), vacated on other grounds, 131 S. Ct. 1675 (2011).

Petitioner is correct (Pet. ii, 6-7, 37) that the First Circuit has taken a different approach, at least in the

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[2] Petitioner contends in the alternative that, as a factual matter, "the district court did not consider the mandatory minimum consecutive sentence for [the Section 924(c) count] as a factor for granting the downward variance." Pet. 32 (capitalization altered). That fact-bound contention does not warrant review. In any event, the sentencing transcript plainly belies it. The district court was focused on whether "a *total* sentence of 361 months" would be "sufficient but not greater than necessary" to achieve the purposes of sentencing. Pet. App. 80 (emphasis added). The court clearly believed that it had the authority to decide "how much weight" to give to the fact that "Congress intended [the 360-month sentence on the Section 924(c) count] to be consecutive." *Id.* at 87. The court of appeals was correct in concluding that the district court's statements, "taken in context," "lump[ed] all the counts together" and "demonstrate[d] that the district court used the presence of the [Section] 924(c) mandatory minimum to reduce [petitioner's] sentence on the first three counts." *Id.* at 16-17.

context of a government motion for a substantial-assistance departure under Sentencing Guidelines § 5K1.1. *United States* v. *Webster*, 54 F.3d 1, 4 (1st Cir. 1995). In that context, the First Circuit held that, "in departing from a guideline sentence" on an underlying drug-trafficking count, "the district court is free to exercise its own judgment as to the pertinence, if any, of a related mandatory consecutive sentence" under Section 924(c). *Ibid.* There is no square conflict, however, between *Webster* and other appellate decisions, because *Webster* did not address a district court's authority to consider a mandatory consecutive sentence under Section 3553(a) (rather than under Section 5K1.1 of the Guidelines). *Id.* at 3-4.

In any event, *Webster* was decided before four other courts of appeals held that a district court may not consider a consecutive sentence imposed for a violation of 18 U.S.C. 924(c) when imposing a sentence for the predicate offense under 18 U.S.C. 3553(a). And *Webster* was decided before this Court in *Abbott* emphasized Section 924(c)'s "insistence that sentencing judges impose *additional* punishment for [Section] 924(c) violations." 131 S. Ct. at 27 (emphasis in original). In light of those more recent decisions, the First Circuit should be permitted the opportunity to reevaluate *Webster*. Indeed, the First Circuit has recently suggested that a district court may not consider a Section 924(c) mandatory consecutive sentence when imposing sentence for a predicate offense. See *United States* v. *Vidal-Reyes*, 562 F.3d 43, 52 (2009) (noting that cases interpreting Section 924(c) have applied its "bar on considering the mandatory term in sentencing on other counts of conviction * * * to sentencing for predicates of the [Section] 924(c) offense"). Since *Vidal-Reyes* was decided, this

Court has denied review of the same issue presented here in a case in which the defendant claimed a conflict between the First Circuit and the other courts of appeals. See *Calabrese*, *supra*. There is no reason for a different result in this case.

c. Even if there were a circuit conflict, this case would not provide a suitable opportunity to address it. The court of appeals reversed petitioner's sentence on the first three counts of conviction and remanded for resentencing. Pet. App. 17. Petitioner has not yet been resentenced, and that interlocutory posture "alone furnishe[s] sufficient ground for the denial" of the certiorari petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); see also *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in denial of a writ of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 280-281 & n.63 (9th ed. 2007).

The absence of a final judgment is especially significant here, because the court of appeals "decline[d] to express an opinion" on whether and to what extent petitioner's "age, length of marriage, lack of criminal history, and hope of release" could justify a variance on the first three counts of conviction. Pet. App. 17 n.2. Accordingly, it is unclear whether and to what extent the Court's resolution of the legal question—*i.e.*, the district court's authority to consider the Section 924(c) mandatory consecutive sentence when imposing sentence on the other three counts of conviction—will have any practical bearing on petitioner's ultimate sentence.

3. Petitioner incorrectly argues (Pet. 27-35) that the court of appeals decided the reasonableness of his sentence under a de novo standard of review, in violation of *Gall* v. *United States*, 552 U.S. 38 (2007). Petitioner acknowledges that "the [c]ourt of [a]ppeals stated the appropriate review was [for] an abuse of discretion." Pet. 7; see Pet. App. 15 ("Because the government does not allege procedural error, this court reviews for reasonableness under a deferential abuse of discretion standard.") (citing *United States* v. *O'Connor*, 567 F.3d 395, 397 (8th Cir.), cert. denied, 130 S. Ct. 480 (2009), which in turn cites *Gall*). Petitioner contends (Pet. 7), however, that the court of appeals then disregarded the abuse-of-discretion standard and reviewed the district court's sentence de novo.

As a threshold matter, that fact-bound contention does not merit review. In any event, the court of appeals correctly held that the district court had abused its discretion because it had "used the presence of the [Section] 924(c) mandatory minimum to reduce [petitioner's] sentence on the first three counts, defeating Congress's intent to enhance the punishment for using a weapon in a crime of violence." Pet. App. 17. As explained above, see pp. 13-14, *supra*, "[t]he severity of a mandatory consecutive sentence is an improper factor that a district court may not consider when sentencing a defendant on related crimes." Pet. App. 16 (citing *United States* v. *Williams*, 599 F.3d 831, 834 (8th Cir.), cert. denied, 130 S. Ct. 2134 (2010)). Because the district court committed legal error by relying on Section 924(c)'s mandatory consecutive sentence to reduce petitioner's sentence on the predicate offenses, the court of appeals correctly concluded that the district court had abused its discretion and that resentencing on the predi-

cate offenses was required. See *Koon* v. *United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law.").[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2011

[3] Petitioner argues (Pet. 30-32) that the court of appeals should have given greater deference to the district court's belief that a variance was warranted in view of, *inter alia*, petitioner's age, marriage, lack of criminal history, and hope for release. The court of appeals, however, "decline[d] to express an opinion" on those factors, leaving the district court free to consider them at resentencing. Pet. App. 17 n.2.