No. 10-681

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

DONAHUE DEWAR AND SHARON KING

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 924(c) of Title 18 requires specified mandatory consecutive sentences for committing certain weapons offenses in connection with "any crime of violence or drug trafficking crime," "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law." 18 U.S.C. 924(c)(1)(A).

The question presented is whether the "except" clause permits a district court not to impose a mandatory minimum consecutive sentence under Section 924(c) if the defendant is also subject to a greater mandatory minimum sentence on a different count of conviction charging a different offense involving different conduct.

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The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-6a) is unreported but is available at 2010 WL 1718727.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 2010. A petition for rehearing was denied on August 31, 2010 (App., *infra*, 7a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 924(c)(1) of Title 18 of the United States Code is reproduced in the appendix to this petition. App., *infra*, 8a-9a.

STATEMENT

1. Section 924(c)(1) of Title 18 makes it unlawful to use or carry a firearm during and in relation to, or to possess a firearm in furtherance of, a drug trafficking crime or a crime of violence. See 18 U.S.C. 924(c)(1)(A). The minimum sentence for that offense is five years of imprisonment, "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law." *Ibid.* The term of imprisonment must be "in addition to the punishment provided for"—and run consecutively to the sentence imposed for—the underlying "crime of violence or drug trafficking crime." *Ibid.*; see 18 U.S.C. 924(c)(1)(D)(ii) ("Notwithstanding any other provision of law * * * no term of imprisonment imposed * * * under this subsection shall run concurrently with any other term of imprisonment imposed * * *, including any term of imprisonment imposed for the [underlying] crime.").

In *Abbott* v. *United States*, No. 09-479 (Nov. 15, 2010), this Court held that under the "except" clause, "a defendant is subject to a mandatory, consecutive sentence for a [Section] 924(c) conviction, and is not spared from that sentence by receiving a higher mandatory minimum on a different count of conviction." *Abbott*, slip op. 3.

2. Following a jury trial in the United States District Court for the Southern District of New York, respondents were convicted of various drug-trafficking offenses and possession of a firearm in furtherance of a

drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i). The district court determined that respondent Dewar was subject to mandatory minimum terms of 20 years of imprisonment on certain drug trafficking convictions. Dewar Sent. Tr. 36. The court sentenced respondent Dewar to 240 months of imprisonment, consisting of various terms on the drug-trafficking convictions, and a five-year term on the Section 924(c) conviction, all to run concurrently. Dewar Judgment 1-3. The district court determined that respondent King was subject to mandatory minimum terms of 10 years of imprisonment on certain drug-trafficking convictions. King Sent. Tr. 32. The court sentenced respondent King to 121 months of imprisonment, consisting of various concurrent terms on the drug-trafficking convictions, and no term of imprisonment on the Section 924(c) conviction. King Judgment 1-3.

3. All parties appealed, and the court of appeals affirmed in all respects. App., *infra*, 1a-6a. As relevant here, the government argued that the district court erred in failing to impose consecutive terms of at least five years of imprisonment on respondents' Section 924(c) convictions. Gov't C.A. Br. 73-75. The government acknowledged, however, that this was not error under then-controlling circuit precedent, which held that the mandatory minimum consecutive sentences provided in Section 924(c) are "inapplicable where the defendant is subject to a longer mandatory minimum sentence for a drug trafficking offense that is part of the same criminal transaction or set of operative facts as the firearm offense." *Id.* at 74 (quoting *United States* v. *Williams*, 558 F.3d 166, 171 (2d Cir. 2009), petition for cert. pending, No. 09-466 (filed June 8, 2010), and citing *United States* v. *Whitley*, 529 F.3d 150, 158 (2d Cir. 2008)). The

court of appeals accepted this concession, though it acknowledged that this Court "ha[d] granted two petitions for writs of certiorari on this issue," referring to *Abbott*, *supra*, and its companion case, *Gould* v. *United States*, No. 09-7073. App., *infra*, 5a-6a.

REASONS FOR GRANTING THE PETITION

This Court's decision in *Abbott*, *supra*, overruled the circuit precedent on which the court of appeals relied in affirming respondents' sentences. See *Abbott*, slip op. 5 n.2 (citing *United States* v. *Williams*, 558 F.3d 166, 171 (2d Cir. 2009)). Under *Abbott*, a defendant—like respondents here—"is not spared from [the mandatory consecutive Section 924(c)] sentence by virtue of receiving a higher mandatory minimum on a different count of conviction." *Id.* at 3. Thus, both respondents should have received terms of at least five years of imprisonment on their Section 924(c) convictions, to run consecutively to the terms of imprisonment imposed on their other offenses of conviction. The appropriate course would be to vacate the court of appeals' judgment and remand for further proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment vacated, and the case remanded for further proceedings in light of *Abbott* v. *United States*.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

NOVEMBER 2010

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 08-5958-cr, 08-6222-cr, 09-1338-cr, 10-0403-cr

UNITED STATES OF AMERICA,
APPELLEE-CROSS-APPELLANT

v.

CHARLES ERNEST DEWAR, ALSO KNOWN AS TROOPER, DEFENDANT

DONAHUE DEWAR, ALSO KNOWN AS BLOOD, ALSO KNOWN AS KIRK DAWAR, AND SHARON KING,
DEFENDANTS-APPELLANTS-CROSS-APPELLEES

Filed: Apr. 29, 2010

SUMMARY ORDER

Before: DENNIS JACOBS, Chief Judge, JOSEPH M. MCLAUGHLIN, ROBERT D. SACK, Circuit Judges.

Appeals and cross-appeals from judgments of the United States District Court for the Southern District of New York (Robinson, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgments of the district court be **AFFIRMED**.

Defendants-appellants-cross-appellees Donahue Dewar and Sharon King appeal from judgments of conviction entered in the United States District Court for the Southern District of New York (Robinson, *J.*), following a jury trial. The government cross-appeals from the judgments of conviction on a narrow issue relating to the sentences imposed on Dewar and King. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review.

For substantially the reasons stated by the district court in its September 6, 2007 amended decision and order, we reject defendants' challenges to the evidence recovered from the Lexus automobile (the "Lexus") and from Apartment 1 at 3443 Mickle Avenue (the "Residence"). Reviewing for abuse of discretion, we conclude that the district court properly denied an evidentiary hearing regarding the police stop of the Lexus because Dewar failed to contest the facts presented in the declaration of Detective Sergeant Edward Lucas (the "Lucas Declaration") and thereby failed to create a material issue. *See United States v. Finley*, 245 F.3d 199, 203 (2d Cir. 2001).

Reviewing the district court's factual findings for clear error and legal determinations *de novo*, we conclude that the district court properly denied defendants' motions to suppress the evidence recovered from the Lexus and the Residence. *See United States v. Rodriguez*, 356 F.3d 254, 257 (2d Cir. 2004). First, the district court properly determined that probable cause supported the Lexus stop and the arrests of Dewar and his brother based on (i) the indicia of reliability of the confidential informant (the "CI") set forth in the Lucas Declaration, (ii) the monitored and recorded conversations

between the CI and defendants, and (iii) police surveillance of the Residence. *See Caldarola v. Calabrese*, 298 F.3d 156, 162 (2d Cir. 2002) ("In general, probable cause to arrest exists when the officers have knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime." (internal quotation marks omitted)).

Second, regarding the Residence, the district court properly rejected defendants' challenges based on the particularity of the search warrant and the purported staleness of the information described in the affidavit submitted in support of the search warrant. The search warrant—sought by local police and issued by a local judge for purposes of a local investigation—did not have to satisfy the 10-day requirement of the then-current version of Federal Rule of Criminal Procedure 41(e)(2)(A)(i). *See United States v. Burke*, 517 F.2d 377, 382 (2d Cir. 1975). A single sentence in the Statement of Facts of Dewar's pre-trial motion failed to raise an argument that the seizure of objects beyond the purported scope of the search warrant's description rendered the police conduct an impermissible general search, and defendants thus waived any such argument pursuant to Federal Rule of Criminal Procedure 12(b)(3)(C).

We reject defendants' challenges to the jury instructions. The district court properly instructed the jury regarding Dewar's knowledge and intent. *See United States v. Gilliam*, 994 F.2d 97, 102 (2d Cir. 1993) ("[T]he cases interpreting [Federal Rule of Evidence] 404(b) allow the district court to do essentially what was done in this case: the defendant does not challenge the ele-

ment of the crime, the jury is told that the element of the crime is met, but no extraneous evidence to prove that element is introduced."); *accord United States v. Tarricone*, 996 F.2d 1414, 1421 (2d Cir. 1993); *United States v. Colon*, 880 F.2d 650, 659 (2d Cir. 1989). Because both Dewar and King were convicted of the conspiracy charged in Count One of the relevant indictment, Defendants cannot demonstrate plain error based on the district court's omission of an instruction that the CI could not be a co-conspirator during his cooperation with the investigation. Similarly, Defendants cannot establish plain error based on the district court's omission of specific unanimity charges as to (i) the object of the conspiracy for Count One in light of the jury's unanimous finding that the conspiracy involved five or more kilograms of cocaine; (ii) the predicate drug offense for Count Five in light of the jury's unanimous conviction on each of the three predicate offenses, *see United States v. Gomez*, 580 F.3d 94, 103-04 (2d Cir. 2009); or (iii) the particular firearm for Count Five, *see, e.g., United States v. Perry*, 560 F.3d 246, 257 (4th Cir. 2009); *United States v. Wise*, 515 F.3d 207, 214-15 (3d Cir. 2008); *United States v. Hernandez-Albino*, 177 F.3d 33, 40 (1st Cir. 1999); *United States v. Morin*, 33 F.3d 1351, 1353-54 (11th Cir. 1994); *United States v. Correa-Ventura*, 6 F.3d 1070, 1075-87 (5th Cir. 1993).

Assuming King's severance motion was properly presented, and reviewing for abuse of discretion, the district court properly denied it. *See United States v. Yousef*, 327 F.3d 56, 150 (2d Cir. 2003). The district court carefully instructed the jury that King contested the knowledge and intent element of the charged offenses, thereby minimizing any prejudice arising from the jury instructions regarding Dewar's knowledge and

intent. *See United States v. Snype*, 441 F.3d 119, 129 (2d Cir. 2006) ("As the Supreme Court has frequently observed, the law recognizes a strong presumption that juries follow limiting instructions.").

We reject Dewar's challenges relating to the government's filing of a prior felony information. Although the district court omitted the colloquy required under 21 U.S.C. § 851(b), it did not rely on the prior felony information in sentencing Dewar:

> [I]t is my view that a sentence of twenty years or 240 months was or is the appropriate sentence regardless of what the mandatory minimum is; that in light again of this defendant's history and characteristics and the circumstances of this offense, that some very significant punishment needs to be put in place. And, so, whether a ten or a twenty-year mandatory minimum sentence were found, I would have imposed a sentence of 240 months, and I just want that to be clear.

This lucid statement renders any error harmless. *See United States v. Deandrade*, — F.3d —, 2010 WL 842324, at *4 (2d Cir. Mar. 12, 2010). Moreover, Dewar failed to rebut the "presumption of regularity" attaching to the government's filing of the prior felony information. *United States v. Sanchez*, 517 F.3d 651, 671 (2d Cir. 2008).

The government cross-appeals the district court's decisions not to impose consecutive sentences for Dewar and King's 18 U.S.C. § 924(c) convictions. The government concedes that the district court complied with the law of this Circuit, but contends that the law of this Circuit is error. *See United States v. Williams*, 558 F.3d

166 (2d Cir. 2009); *United States v. Whitley*, 529 F.3d 150 (2d Cir. 2008). As a preliminary matter, the government requests that we defer ruling on the cross-appeals until the legal issue has been clarified by the Supreme Court, as the government expects. We are aware that the Supreme Court has granted two petitions for writs of certiorari on this issue. *See United States v. Gould*, 329 Fed. App'x 569 (5th Cir. 2009), *cert. granted*, 130 S. Ct. 1283 (Jan. 25, 2010) (No. 09-7073); *United States v. Abbott*, 574 F.3d 203 (3d Cir. 2009), *cert. granted*, 130 S. Ct. 1284 (Jan. 25, 2010) (No. 09-479). However, a "panel is bound by prior decisions of this court unless and until the precedents established therein are reversed *en banc* or by the Supreme Court." *United States v. Jass*, 569 F.3d 47, 58 (2d Cir. 2009). Accordingly, we conclude that the district court properly declined to impose the consecutive sentences provided in § 924(c).

We have considered all of the contentions in these appeals and cross-appeals and have found them to be without merit. Accordingly, the judgments of the district court are hereby **AFFIRMED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 08-5958-cr, 08-6222-cr, 09-1338-cr, 10-0403-cr

UNITED STATES OF AMERICA,
APPELLEE-CROSS-APPELLANT

v.

CHARLES ERNEST DEWAR, ALSO KNOWN AS
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DONAHUE DEWAR, ALSO KNOWN AS BLOOD,
ALSO KNOWN AS KIRK DAWAR, AND SHARON KING,
DEFENDANTS-APPELLANTS-CROSS-APPELLEES

[Filed: Aug. 31, 2010]

Sharon King having filed a petition for panel-rehearing, or, in the alternative, for rehearing *en banc,* and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc,*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK.

/s/ CATHERINE O'HAGAN WOLFE
CATHERINE O'HAGAN WOLFE

[SEAL OMITTED]

APPENDIX C

18 U.S.C. 924(c)(1) provides:

Penalties

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, 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—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) 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.