

No. 10-323

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JOSHUA HUCKABEE

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

PETITION FOR A WRIT OF CERTIORARI

NEAL KUMAR KATYAL
*Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217*

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.”

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.

In the Supreme Court of the United States

No. 10-323

UNITED STATES OF AMERICA, PETITIONER

v.

JOSHUA HUCKABEE

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

PETITION FOR A WRIT OF CERTIORARI

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-3a) is unreported but is available at 2010 WL 2303369.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 2010. 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*, 5a-6a.

STATEMENT

Following a guilty plea in the United States District Court for the District of Connecticut, respondent was convicted of possession of 50 grams or more of cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (Count 1); possession of a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i) (Count 2); and being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1) (Count 3). The district court sentenced respondent to ten years of imprisonment, consisting of concurrent terms of ten years on Count 1 and five years each on Counts 2 and 3. App., *infra*, 2a. The court of appeals affirmed. *Id.* at 2a-3a.

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.”).

Most courts of appeals have held that the statute’s prefatory “except” clause means that a defendant convicted of an offense under Section 924(c)(1) must be sen-

tenced to the mandatory minimum term set forth in that provision unless another penalty provision elsewhere in Section 924(c) or “the United States Code[] requires a higher minimum sentence for *that* [Section] 924(c)(1) offense.” *United States v. Easter*, 553 F.3d 519, 526 (7th Cir. 2009) (per curiam), petition for cert. pending, No. 08-9560 (filed Mar. 26, 2009); *United States v. Villa*, 589 F.3d 1334, 1342-1343 (10th Cir. 2009) (“[T]he prefatory clause to [Section] 924(c) refers only to a minimum sentence provided by [Section] 924(c) or any other statutory provision that proscribes the conduct set forth in [Section] 924(c).”), petition for cert. pending, No. 09-1445 (filed May 26, 2010).

The Second and Sixth Circuits, however, have interpreted the “except” clause to mean that a defendant is exempt from a mandatory minimum consecutive sentence for violating Section 924(c)(1) if the defendant faces a higher mandatory minimum sentence for a different offense “arising from the same criminal transaction or operative set of facts” as the Section 924(c) offense. *United States v. Williams*, 558 F.3d 166, 171 (2d Cir. 2009), petition for cert. pending, No. 09-466 (filed Oct. 20, 2009); see *United States v. Whitley*, 529 F.3d 150, 158 (2d Cir. 2008); *United States v. Almany*, 598 F.3d 238 (6th Cir. 2010), petition for cert. pending, No. 09-1497 (filed June 8, 2010). For example, the courts in *Williams* and *Almany* held the defendants there, each of whom possessed a firearm in furtherance of a drug trafficking crime, were not subject to the five-year minimum term of imprisonment prescribed by Section 924(c)(1)(A)(i) because each was subject to a ten-year minimum term under 21 U.S.C. 841(b)(1)(A) for his underlying drug trafficking crime. *Williams*, 558 F.3d at 167-168; *Almany*, 598 F.3d at 242.

2. Respondent pleaded guilty pursuant to a plea agreement to the offenses listed above, p. 2, *supra*. Count 1 carried a ten-year minimum term of imprisonment (see 21 U.S.C. 841(b)(1)(A)), and Count 2, a five-year minimum term (see 18 U.S.C. 924(c)(1)(A)(i)). Finding *Williams* controlling, and over the government's objection, the district court sentenced respondent to ten years of imprisonment on Count 1 and five years each on Counts 2 and 3, all to run concurrently, to be followed by five years of supervised release. C.A. App. 29, 140, 144-145, 176.

3. The government appealed to preserve its argument that *Williams* was wrongly decided and that respondent was subject to a mandatory minimum consecutive five-year sentence on Count 2. Gov't C.A. Br. 10-11. The court of appeals affirmed, relying on *Williams* and *Whitley*.^{*} App., *infra*, 2a-3a. The court declined the government's request to defer its decision pending this Court's decisions in *Abbott v. United States*, No. 09-479 (oral argument scheduled for Oct. 4, 2010), and *Gould v. United States*, No. 09-7073 (oral argument scheduled for Oct. 4, 2010). App., *infra*, 3a. The court of appeals granted the government's motion to recall and stay its mandate. *Id.* at 4a.

^{*} The government noted that the district court's imposition of any sentence at all for Count 2 seemed inconsistent with *Williams* and *Whitley*. See Gov't C.A. Br. 23 n.10. The court of appeals nonetheless described *Whitley* as holding "that a mandatory minimum sentence imposed under [Section] 924(c) need not run consecutively to a greater mandatory minimum sentence under [another law]." App., *infra*, 2a. In any event, respondent's total term of imprisonment is unaffected by the sentence on Count 2, he did not appeal his sentence, and—most importantly for present purposes—both the district court and the court of appeals understood *Williams* to be controlling.

REASONS FOR GRANTING THE PETITION

On October 4, 2010 this Court will hear argument in *Abbott, supra*, and *Gould, supra*, regarding the meaning of the “except” clause of Section 924(c). This case presents the same issue as *Abbott* and *Gould*: whether the “except” clause of Section 924(c) exempts a defendant from the mandatory minimum consecutive sentence prescribed for violating that provision when he also faces a greater mandatory minimum sentence on another count of conviction involving different conduct. Respondent, like the defendant in *Gould* (and like the defendants in the pending petitions in *Williams, supra* and *Almany, supra*), faced a five-year minimum term of imprisonment for violating Section 924(c)(1) and a ten-year minimum term under 21 U.S.C. 841(b)(1)(A) for an underlying drug trafficking crime. See *United States v. Gould*, 329 Fed. Appx. 569, 569-570 (5th Cir. 2009) (per curiam). The court of appeals in *Gould* held that the “except” clause of Section 924(c) did not exempt Gould from the mandatory minimum consecutive five-year term of imprisonment for violating that statute. *Ibid.* Because the resolution of *Abbott* and *Gould* will affect the proper disposition of this case, this petition should be held pending the Court’s decisions in *Abbott* and *Gould*.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court’s decisions in *Abbott* and *Gould*, and disposed of as appropriate in light of those decisions.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

SEPTEMBER 2010

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 09-1308-cr

UNITED STATES OF AMERICA, APPELLANT

v.

JOSHUA HUCKABEE, DEFENDANT-APPELLEE

SUMMARY ORDER

APPEARANCES:

FOR APPELLANT: JAMES R. SMART, Assistant United States Attorney (William J. Nardini, Assistant United States Attorney, *of counsel*), for Nora R. Dannehy, United States Attorney for the District of Connecticut, New Haven, Connecticut.

FOR APPELLEE: FRANCIS L. O'REILLY, O'Reilly & Shaw, LLC, Southport, Connecticut.

JON O. NEWMAN, CHESTER J. STRAUB, REENA RAGGI,
Circuit Judges.

Appeal from the United States District Court for the District of Connecticut (Peter C. Dorsey, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the March 18, 2009 judgment of the district court is AFFIRMED.

Defendant Joshua Huckabee pleaded guilty to possession with intent to distribute 50 grams or more of cocaine base, *see* 21 U.S.C. § 841(a)(1), (b)(1)(A); possession of a firearm in furtherance of a drug trafficking crime, *see* 18 U.S.C. § 924(c)(1)(A)(i); and possession of a firearm by a convicted felon, *see id.* §§ 922(g)(1), 924(a)(2). On appeal, the United States challenges the district court's decision to run 60-month prison sentences on each of the firearms counts concurrently with each other and with the 120-month mandatory sentence on the drug count. To the extent the district court based its decision on *United States v. Williams*, 558 F.3d 166 (2d Cir. 2009), the government contends that *Williams* was wrongly decided.

Title 18 U.S.C. § 924(c), which criminalizes using or carrying a firearm during or in relation to a crime of violence or a drug trafficking crime, requires a mandatory minimum term of incarceration over and above any sentence imposed based on the underlying 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). In *United States v. Whitley*, 529 F.3d 150, 158 (2d Cir. 2008), we interpreted this “except” clause to mean that a mandatory minimum sentence imposed under § 924(c) need not run consecutively to a greater mandatory minimum sentence under the Armed Career Criminal Act, 18 U.S.C.

§ 924(e). In *Williams*, we declined to confine *Whitley* to cases where the greater mandatory minimum was itself provided in § 924, instead concluding that the § 924(c) “except” clause applied to any greater mandatory minimum, including those prescribed in 21 U.S.C. § 841(b)(1)(A). See *United States v. Williams*, 558 F.3d at 171.

The issue has split the circuits, and the United States has petitioned for a writ of *certiorari* in *Williams*. See 78 U.S.L.W. 3254 (U.S. Oct. 20, 2009) (No. 09-466). In fact, the Supreme Court has granted *certiorari* in *United States v. Abbott*, 574 F.3d 203 (3d Cir. 2009), *cert. granted*, 130 S. Ct. 1284 (2010), and *United States v. Gould*, 329 F. App’x 569 (5th Cir. 2009), *cert. granted*, 130 S. Ct. 1283 (2010), which adopt constructions of the § 924(c) mandate that differ from ours. Nevertheless, in the absence of contrary controlling authority from the Supreme Court, our precedents require affirmance. See *United States v. Jass*, 569 F.3d 47, 58 (2d Cir. 2009) (noting 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”).

The judgment of the district court is AFFIRMED.

FOR THE COURT:
CATHERINE O’HAGAN WOLFE,
Clerk of Court

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 09-1308-cr

UNITED STATES OF AMERICA, APPELLANT

v.

JOSHUA HUCKABEE, DEFENDANT-APPELLEE

[Filed: Aug. 5, 2010]

ORDER

IT IS HEREBY ORDERED that the Government's motion to recall the mandate and to stay issuance of the mandate for 90 days is GRANTED.

FOR THE COURT,

CATHERINE O'HAGAN WOLFE

CATHERINE O'HAGAN WOLFE, Clerk

Judy Pisanont, Motions Staff Attorney

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

6a

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.