No. 12-381

In the Supreme Court of the United States

REINALDO BERRIOS, PETITIONER

v.

UNITED STATES OF AMERICA;
GOVERNMENT OF THE VIRGIN ISLANDS

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

REPLY BRIEF FOR THE PETITIONER

WARREN BRUCE COLE
HUNTER & COLE
1138 King Street, Third Floor
Christiansted, VI 00820

KANNON K. SHANMUGAM
Counsel of Record
C.J. MAHONEY
KEVIN M. LOVECCHIO
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

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This is the rare case in which the government, in response to a petition for certiorari, concedes the existence of a circuit conflict—and the even rarer case in which the government nevertheless takes the position that the conflict need not be resolved. The government correctly recognizes that the courts of appeals are divided on the question whether the consecutive-sentence mandate in 18 U.S.C. 924(c)(1)(D)(ii) is triggered when a defendant is convicted and sentenced under 18 U.S.C. 924(j). The government does not argue that further percolation is necessary, nor does it argue that the conflict is likely to resolve itself.

Instead, the government contends that the question presented does not warrant the Court's review because

the conflict—which involves one of the most frequently invoked federal criminal statutes—is of little or no practical significance. But that contention rests on a series of unfounded and speculative assumptions about how defendants would be sentenced under petitioner's interpretation of Section 924(c)(1)(D)(ii). And this case is a suitable vehicle for resolution of the circuit conflict, because there is no impediment to the Court's consideration of the question presented and the violation of petitioner's constitutional right to be free from double jeopardy was far from harmless.

It is telling that the government devotes much of its brief in opposition to a preview of its arguments on the merits. This case is a straightforward and compelling candidate for certiorari.

1. The government correctly recognizes (Br. in Opp. 16) that the courts of appeals are divided on the interpretation of Section 924(c)(1)(D)(ii), with the Third Circuit joining two other circuits in holding that the consecutive-sentence mandate in Section 924(c)(1)(D)(ii) is triggered when a defendant is convicted and sentenced under Section 924(j), and the Eleventh Circuit holding that it is not. Compare Pet. App. 32a-43a; *United States* v. *Dinwiddie*, 618 F.3d 821, 837 (8th Cir. 2010), cert. denied, 131 S. Ct. 1586 (2011); and *United States* v. *Battle*, 289 F.3d 661, 665-669 (10th Cir.), cert. denied, 537 U.S. 856 (2002), with *United States* v. *Julian*, 633 F.3d 1250, 1252-1257 (11th Cir. 2011).

The government attempts to minimize the significance of the circuit conflict by characterizing it as a "narrow" one, asserting that "five circuits [have] agree[d] with the government that sentences under Section 924(j) must run consecutively" and only the Eleventh Circuit has held to the contrary. Br. in Opp. 9. In counting up the circuits, however, the government gilds the lily: two

of the five circuits cited by the government addressed the issue only in unpublished opinions. See *United States* v. *Hatten*, No. 06-4240, 2007 WL 1977663, at *3 (4th Cir. July 5, 2007); *United States* v. *Staggs*, No. 97-10282, 152 F.3d 931 (table), 1998 WL 447943, at *3 (9th Cir. July 10, 1998).

Among the three remaining circuits, moreover, there was disagreement as to the correct reasoning, even if there was agreement as to the ultimate result. In the decision under review, the Third Circuit rejected the primary rationale of the Eighth and Tenth Circuits—*viz.*, that "subsection (j) merely sets forth sentencing elements to be applied to a subsection (c) offense," Pet. App. 40a—and instead relied on the novel rationale that, even if subsection (j) establishes a distinct offense, "a subsection (j) sentence qualifies as a sentence 'imposed under' subsection (c), even though it is *also* 'imposed under' subsection (j)," *id.* at 42a (emphasis added).

The circuit conflict on the interpretation of Section 924(c)(1)(D)(ii) is therefore not nearly as lopsided or monolithic as the government would have the Court believe. Notably, the government does not argue that further percolation is warranted. The government also does not argue that the conflict is likely to resolve itself—nor could it readily do so, given that it opted not to seek rehearing of the Eleventh Circuit's decision in *Julian*. As a result, *Julian* will bind district courts and panels in the Eleventh Circuit—which encompasses some of the Nation's most active districts for Section 924(c) prosecutions—and the circuit conflict will persist until the Court intervenes to resolve it. In short, this case presents a paradigmatic circuit conflict, on a yes-or-no question of statutory interpretation, that warrants further review.

2. Perhaps because it acknowledges the existence of the circuit conflict, the government uncharacteristically

begins its cert-stage brief with an extended (if labored) discussion of the merits. See Br. in Opp. 10-16. For present purposes, it should suffice to note that the parties' sharply contrasting views about the correct interpretation of Section 924(c)(1)(D)(ii) underscore the need for this Court's review. Compare *ibid.* with Pet. 12-16. But two specific points demand responses here.

a. The government first contends (Br. in Opp. 10-12) that the Third Circuit's interpretation is the "natural" reading of Section 924(c)(1)(D)(ii). Whatever adjectives might validly be applied to the Third Circuit's interpretation, "natural" is not one of them. Section 924(c)(1)(D)(ii) provides 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" (emphasis added). Because petitioner was charged with, and convicted of, a violation of subsection (j), it logically follows that the relevant "term of imprisonment" was "imposed" under subsection (j), not under "this subsection" (*i.e.*, subsection (c)); that the consecutive-sentence mandate in Section 924(c)(1)(D)(ii) was not triggered; and that the district court erred in sentencing petitioner on both the Section 924(j) and felony-murder counts.

In response to that straightforward analysis, the government maintains that petitioner's term of imprisonment was imposed under subsection (c) because subsection (j) merely "sets forth an aggravated version" of the "core offense" established in subsection (c). Br. in Opp. 10. For present purposes, however, the key point is that subsection (j) sets forth a *distinct offense*. The government conceded that point before the Third Circuit, see *id.* at 8 n.3, and it does not argue otherwise before this Court. Instead, the government contends that, because subsection (j) incorporates the elements of a sub-

section (c) offense, a defendant who is convicted and sentenced under subsection (j) has his term of imprisonment imposed under subsection (c) *as well as* subsection (j). *Id.* at 10-11. That is an illogical and untenable interpretation of Section 924(c)(1)(D)(ii)—and, at a minimum, it is not so clearly superior to petitioner's interpretation as to overcome the rule of lenity. See *United States* v. *Santos*, 553 U.S. 507, 514, 515 (2008) (plurality opinion); *id.* at 528 (Stevens, J., concurring in the judgment).

b. The government also contends (Br. in Opp. 12-15) that petitioner's interpretation of Section 924(c)(1)(D)(ii) "would result in sentencing anomalies Congress surely did not intend." *Id.* at 12 (citation omitted). As a preliminary matter, the government's contention is difficult to square with its contention, just a few pages later, that the circuit conflict is of little or no practical significance. *Id.* at 17-20.

But leaving that aside, there is nothing anomalous, much less absurd, about petitioner's text-based interpretation. Congress could readily have concluded that, because a defendant who is convicted and sentenced under Section 924(j) will *typically* receive a longer sentence than a defendant who is convicted and sentenced under Section 924(c), it was simply unnecessary to require any sentences for other offenses to run consecutively. The mere fact that the government can identify *some* circumstances in which a defendant who is convicted and sentenced under Section 924(c) would receive a longer sentence does not defeat the point. Cf. pp. 7-8, *infra* (discussing Guidelines sentences for Section 924(c) and Section 924(j) offenses). And the government offers no explanation for Congress's failure to include a similar provision to Section 924(c)(1)(D)(ii) in subsection (j) when it added that subsection in 1994—or to broaden Section 924(c)(1)(D)(ii) itself so that it could be triggered by a

term of imprisonment imposed under subsection (j). Ultimately, the government, like the Third Circuit, provides no valid justification for disregarding the plain meaning of the statutory text. This Court should grant review and reject the Third Circuit's deeply flawed interpretation.

3. The government's primary argument against certiorari is that the conflict on the interpretation of Section 924(c)(1)(D)(ii) is of little or no significance. See Br. in Opp. 17-20. The government's argument appears to proceed as follows. In jurisdictions (such as the Eleventh Circuit) that have adopted petitioner's interpretation, the government would charge a defendant for the same conduct under Section 924(c) as well as Section 924(j). If the government obtains guilty verdicts on both counts (but does not seek or obtain the death penalty on the Section 924(j) count), the government would ask the court to sentence the defendant on the Section 924(c) count, on the ground that a Section 924(c) sentence (unlike a Section 924(j) sentence) could run consecutively to sentences on other counts. The government would then ask the court to impose the same sentence under Section 924(c) that the defendant would have received under Section 924(j). As a result, a defendant sentenced under petitioner's interpretation of Section 924(c)(1)(D)(ii) would be "effectively subject to the same punishment" as a defendant sentenced under the Third Circuit's interpretation. *Id.* at 10.

There are so many flaws in the government's argument that it is hard to know where to start. As a preliminary matter, although the Eleventh Circuit's decision in *Julian* has been on the books for nearly two years, the government does not cite a single actual case in which it has pursued the foregoing strategy—much less in which that strategy has been successful. The government's ar-

gument therefore rests on nothing more than speculation about how sentencing might operate under petitioner's interpretation of Section 924(c)(1)(D)(ii).

More fundamentally, there is good reason to doubt that district courts would be complicit in any effort to circumvent an adverse interpretation of Section 924(c)(1)(D)(ii) by imposing the same sentence consecutively under Section 924(c) that could not be imposed consecutively under Section 924(j). Assuming that Section 924(j) defines a greater offense and Section 924(c) a lesser included offense for double jeopardy purposes (and that a defendant could not be sentenced under both provisions for the same conduct), it is by no means clear that a district court would even agree to a request to sentence the defendant under Section 924(c) rather than Section 924(j); ordinarily, the appropriate remedy for convictions on both greater and lesser included offenses is to sentence the defendant on the *greater* offense. See, *e.g.*, *United States* v. *Boyd*, 131 F.3d 951, 954-955 (11th Cir. 1997). And where (as here) the government would have sought a life sentence under Section 924(j), it is by no means clear that the government could validly obtain a life sentence under Section 924(c); as the government acknowledges, there is a substantial argument that Section 924(c) permits sentences only for terms of years and not for life. See Br. in Opp. 3.

Even assuming, however, that the government could not only convince a district court to sentence under Section 924(c) but also validly obtain the same sentence under Section 924(c) as under Section 924(j), it is questionable that a court would be *willing* to impose the same sentence, because doing so would ordinarily require the court to depart or vary substantially upward from the presumptive sentence under the Sentencing Guidelines. As the government acknowledges, for Section 924(c) of-

fenses committed by non-career offenders, Section 2K2.4 of the Guidelines provides that the Guidelines sentence is "the minimum term of imprisonment required by statute"—which, for the basic Section 924(c) offense of using or carrying a firearm, is five years. By contrast, for Section 924(j) offenses, Sections 2A1.1 to 2A1.4 of the Guidelines establish the applicable base offense levels—including a base offense level of 43, and therefore a presumptive life sentence, where (as here) the killing would constitute first-degree murder. In the typical case, therefore, a court would have to impose a substantial upward departure or variance in order to equalize a Section 924(c) sentence with a Section 924(j) one. And although the Guidelines do contemplate the possibility of an upward departure where an offense results in death, the very provision the government cites for that proposition makes clear that "[l]oss of life does not automatically suggest a sentence at or near the statutory maximum." Sentencing Guidelines § 5K2.1.

The most that can be said, therefore, is that the government could attempt to mitigate the consequences of an adverse interpretation of Section 924(c)(1)(D)(ii)—with serious doubts as to whether it would be successful in doing so. That is an insufficient basis for denying review here. In the absence of something more than mere speculation, this Court should grant review to resolve the clear and acknowledged circuit conflict on the interpretation of a frequently invoked provision of federal law.

4. The government suggests in passing that, even if the conflict on the interpretation of Section 924(c)(1)(D)(ii) would otherwise warrant the Court's review, this case is an unsuitable vehicle because "[t]he resolution of the question presented does not appear to have any practical significance for petitioner." Br. in Opp. 17. No-

tably, however, the government does not assert that there would be any affirmative impediment to the Court's consideration and resolution of the question presented in this case. The government does not argue that any error in this case was harmless, and for good reason: the government did not argue harmless error below. See Gov't C.A. Br. 144-149.

In all events, any error here was far from harmless. The government seemingly concedes that, if petitioner's interpretation of Section 924(c)(1)(D)(ii) were correct, he would have been convicted and sentenced in violation of the Double Jeopardy Clause. As this Court has explained, double jeopardy violations are rarely if ever harmless, even where the violation would have no effect on the defendant's ultimate sentence, because "[t]he separate *conviction* * * * has potential adverse collateral consequences that may not be ignored." *Ball* v. *United States*, 470 U.S. 856, 865 (1985). To begin with, as the government acknowledges, petitioner was subject to a special assessment on at least one of the two counts at issue. See Br. in Opp. 17 n.4. This Court has previously held that the presence of a special assessment is itself a sufficient "collateral consequence" to defeat a claim of harmless error. See *Rutledge* v. *United States*, 517 U.S. 292, 301-303 (1996).

More generally, if this Court were to adopt petitioner's interpretation of Section 924(c)(1)(D)(ii), the district court would have broad discretion on remand to reconsider petitioner's sentence on the remaining counts—including the ability to take into account any evidence of petitioner's intervening rehabilitation. See *Pepper* v. *United States*, 131 S. Ct. 1229, 1241, 1251 (2011). And even if the district court were to leave in place the life sentence on one of the two counts at issue, vacating one of the convictions would have meaningful consequences,

because it would make it easier for petitioner to obtain postconviction relief or, at a minimum, commutation of the remaining life sentence (insofar as he would need to seek clemency only from either the President or the Governor of the Virgin Islands, rather than from both).

Finally, if the conviction on the Section 924(j) count were vacated, it would potentially allow petitioner to serve at least some of his remaining sentence in the Virgin Islands, where his family and friends are located, rather than at a federal facility thousands of miles away. That consequence may not matter much to the government in its overall administration of the criminal justice system. But it greatly matters to petitioner. Because petitioner has every incentive to litigate the question presented, and because the government concedes that the circuits are divided on that question, we respectfully submit that the correct outcome here is clear. The Court should grant review.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

WARREN BRUCE COLE
HUNTER & COLE
1138 King Street, Third Floor
Christiansted, VI 00820

KANNON K. SHANMUGAM
C.J. MAHONEY
KEVIN M. LOVECCHIO
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

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