No. 13-10639

IN THE SUPREME COURT OF THE UNITED STATES

PATRICK HENRY JOSEPH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

LESLIE R. CALDWELL
Assistant Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals abused its discretion by declining to consider petitioner's claim that he was improperly sentenced as a career offender in light of Descamps v. United States, 133 S. Ct. 2276 (2013), when petitioner did not raise his Descamps claim in his opening brief on appeal.

IN THE SUPREME COURT OF THE UNITED STATES

No. 13-10639

PATRICK HENRY JOSEPH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1) is not published in the Federal Reporter but is reprinted at 559 Fed. Appx. 928.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 2014. The petition for a writ of certiorari was filed on June 18, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Southern District of Florida to two counts of possessing 28 grams or more of crack cocaine with the intent to distribute it, and one count of possessing a detectable amount of cocaine with the intent to distribute it, all in violation of 21 U.S.C. 841(a)(1). Pet. App. A-1 at 1-2. He was sentenced to 210 months of imprisonment. Id. at 1. The court of appeals affirmed. Id. at 1-3.

1. In early 2012, petitioner sold crack cocaine to a confidential informant and undercover officer during several controlled narcotics operations. Pet. App. A-1 at 2. In May 2012, petitioner was indicted on three counts of violating 21 U.S.C. 841(a)(1). Gov't C.A. Br. 1. On petitioners' motion, his trial was continued twice, and he ultimately pleaded guilty to the charged offenses on the day before his trial was to begin. Id. at 2-3.

Petitioner's Presentence Investigation Report (PSR) assigned petitioner an advisory Sentencing Guidelines range of 210 to 262 months, based on a total offense level of 32 and a criminal history category of VI. PSR para. 92. Petitioner's total offense level included a two-level reduction for acceptance of responsibility under Sentencing Guidelines § 3E1.1(a). PSR para. 35.

The PSR classified petitioner as a career offender under Sentencing Guidelines § 4B1.1(a) based on two prior "controlled substance offense" convictions: (1) a 2001 conviction for possession of cocaine and cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841,[1] and (2) a 2002 conviction for use of a communication facility to commit a felony based on petitioner's brokering of a three-kilogram cocaine deal with a co-conspirator, in violation of 21 U.S.C. 843(b).[2] PSR paras. 34, 53-54. As a career offender, petitioner's adjusted offense level was enhanced from 26 to 34, and he was automatically assigned a criminal history category of VI. PSR paras. 34, 56. Without the career offender designation, petitioner would have been assigned a criminal history category of V based on 12 criminal history points. Ibid. Those criminal history points were based on four prior convictions: his two drug convictions, a 1999 federal

---

[1] See United States v. Joseph, No. 1:00-cr-45-SPM-2 (N.D. Fla.).

[2] See United States v. Joseph, No. 1:01-cr-543-UU-15 (S.D. Fla.). Section 843(b) makes it a crime for "any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or any acts constituting a felony" under Title 21. 21 U.S.C. 843(b). Sentencing Guidelines § 4B1.2 comment. (n.1) provides that a Section 843(b) offense qualifies as a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a "controlled substance offense."

conviction for making a false statement in a passport application, and a 2007 state conviction for being a felon in possession of a firearm and carrying a concealed weapon. PSR paras. 52-56.

On November 28, 2012, the district court sentenced petitioner to 210 months of imprisonment. See Pet. App. A-3 (sentencing transcript). Petitioner objected to the PSR only on the ground that the government should have sought to reduce his total offense level by a third point for acceptance of responsibility under Sentencing Guidelines § 3E1.1(b). Id. at 3. Petitioner did not object to his classification as a career offender based on his two prior drug convictions. Ibid. The district court sentenced petitioner to 210 months of imprisonment, the bottom of his advisory guidelines range, stating that petitioner had a "terrible record." Id. at 28; see Pet. App. A-4 (Judgment).

Petitioner appealed. On May 31, 2013, petitioner filed his opening brief in the court of appeals. Petitioner's only argument was that the government should have sought a third point of reduction for acceptance of responsibility pursuant to Guidelines § 3E1.1. See Pet. App. A-5 at 2; Pet'r C.A. Br. 24-37.

On June 20, 2013, this Court announced its decision in Descamps v. United States, 133 S. Ct. 2276. The Court held in

Descamps that, under the Armed Career Criminal Act, 18 U.S.C. 924(e), courts may not apply the "modified categorical approach" to prior convictions under statutes with a single indivisible set of elements, but must use the "strict categorical approach" instead. Id. at 2283-2286. On June 25, 2013, petitioner filed an unopposed motion in the court of appeals seeking to withdraw his opening brief and to file a replacement brief raising a claim that the district court committed plain error by sentencing him as a career offender based on his conviction for using a communication facility to facilitate the commission of a felony in violation of 21 U.S.C. 843(b). Pet. App. A-5 at 2. Petitioner proposed to argue in a new brief that Section 843 is "an 'indivisible' statute that, by its 'elements,' is not 'categorically' a 'controlled substance offense'" and thus should not be subject to the modified categorical approach following the Court's decision in Descamps. Ibid.

On July 8, 2013, the court of appeals denied petitioner's motion to file a replacement brief, based on circuit precedent holding that a party may not raise new issues on appeal in a supplemental brief. Pet. App. A6 (citing United States v. Hembree, 381 F.3d 1109 (11th Cir. 2004)).

The court of appeals affirmed petitioner's sentence, finding no error in the district court's decision to grant petitioner only a two-level reduction for acceptance of

responsibility instead of the three levels he sought. Pet. App. A-1 at 2-3.

ARGUMENT

Petitioner contends (Pet. 13-37) that the Eleventh Circuit's practice of declining to consider claims that are not raised in a party's opening brief on appeal, even when this Court issues a relevant decision while the appeal is pending, violates the retroactivity principle of Griffith v. Kentucky, 479 U.S. 314 (1987), and conflicts with the decisions of other circuits. Petitioner's contentions are without merit and do not warrant this Court's review.

1. In Griffith, this Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases * * * pending on direct review or not yet final." 479 U.S. at 328. Because the petitioner in Griffith had preserved the claim on which he sought review, the Court did not have occasion to consider the interplay between the retroactivity rule adopted in that case and principles of waiver, forfeiture, and other prudential doctrines. See id. at 317, 318. The Court in Griffith explained that retroactive application of new rules on direct appeal is necessary both because of "the nature of judicial review" and in order to "treat[] similarly situated defendants the same." Id. at 323. That rationale is consistent with application of procedural-

default rules to bar consideration of claims that have not been adequately preserved. Defendants who have not preserved a claim of error are not "similarly situated" with those who have. Cf. Shea v. Louisiana, 470 U.S. 51, 59-60 (1985) (holding that it is not inequitable to draw a distinction between a defendant who raises a claim on collateral attack and one who raises it on direct review because "the one litigant already has taken his case through the primary system" and "[t]he other has not"). As one judge from the Eleventh Circuit has explained, application of procedural-bar rules does not offend principles requiring the retroactive application of new constitutional rules to cases open on direct review:

> Retroactivity doctrine answers the question of which cases a new decision applies to, assuming that the issue involving that new decision has been timely raised and preserved. Procedural bar doctrine answers the question of whether an issue was timely raised and preserved, and if not, whether it should be decided anyway. It makes no more sense to say that a procedural bar should not be applied in this situation because doing so undermines or frustrates retroactive application of a Supreme Court decision, than it does to say that procedural bars should not be applied in any situation because doing so undermines or frustrates the constitutional doctrines and commands underlying the issue that is held to be defaulted.

United States v. Ardley, 273 F.3d 991, 992 (Carnes, J., concurring in denial of rehearing en banc), cert. denied, 533 U.S. 962 (2001) and 535 U.S. 979 (2002).

This Court has indicated on several occasions that the retroactivity principle embodied in Griffith is consistent with

the application of procedural-default rules. In Shea, for example, the Court held that the rule announced in Edwards v. Arizona, 451 U.S. 477 (1981), would be applied retroactively to cases pending on direct review. Shea, 470 U.S. at 59. In so doing, the Court explicitly noted that the retroactive application of Edwards was "subject, of course, to established principles of waiver, harmless error, and the like." Id. at 58 n.4. More recently, as petitioner notes (Pet. 21), the Court in United States v. Booker, 543 U.S. 220 (2005), cited Griffith in noting that courts were bound to apply its holding invalidating the mandatory Sentencing Guidelines "to all cases on direct review." Id. at 268. But the Court noted in the same paragraph that it "expect[ed] reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain error' test." Ibid. Booker plainly implied that "plain error" is only one of a number of "prudential doctrines" that may preclude relief; abandonment is another.

2. Petitioner contends (Pet. 27-30) that the Eleventh Circuit's application of its procedural-bar rule conflicts with every other circuit's general approach to retroactivity and with some other circuits' application of retroactivity principles to Descamps claims not raised in an appellant's opening brief. Petitioner is incorrect.

a. The Federal Rules of Appellate Procedure provide that an appellant's brief "must contain * * * appellant's contentions and the reasons for them." Fed. R. App. P. 28(a)(8)(A). The courts of appeals have uniformly interpreted that provision to establish a general procedural rule that "[a]n appellant waives any issue which it does not adequately raise in its initial brief." Playboy Enters. v. Public Serv. Comm'n, 906 F.2d 25, 40 (1st Cir.), cert. denied, 498 U.S. 959 (1990).[3] The

[3] See, e.g., United States v. Quiroz, 22 F.3d 489, 490-491 (2d Cir. 1994) ("It is well established that an argument not raised on appeal is deemed abandoned, and we will not ordinarily consider such an argument unless manifest injustice otherwise would result.") (citations and internal quotation marks omitted); Ghana v. Holland, 226 F.3d 175, 180 (3d Cir. 2000) ("[I]f an appellant fails to comply with these [Rule 28] requirements on a particular issue, he normally has abandoned and waived that issue on appeal.") (quoting Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993)) (brackets and ellipsis omitted); Shopco Dist. Co. v. Commanding Gen. Of Marine Corps Base, 885 F.2d 167, 170 n.3 (4th Cir. 1989) (holding that any claim not raised in a party's initial brief will be deemed waived) (collecting authorities); United States v. Miranda, 248 F.3d 434, 443 (5th Cir. 2001) ("Failure to satisfy the requirements of Rule 28 as to a particular issue ordinarily constitutes abandonment of the issue."), cert. denied, 534 U.S. 980 (2001) and 534 U.S. 1086 (2002); Bickel v. Korean Air Lines Co., 96 F.3d 151, 153 (6th Cir. 1996) ("We normally decline to consider issues not raised in the appellant's opening brief.") (quoting Priddy v. Edelman, 883 F.3d 438, 446 (6th Cir. 1989)), cert. denied, 519 U.S. 1093 (1997); Holman v. Indiana, 211 F.3d 399, 406 (7th Cir.) (finding arguments not raised in initial briefs waived), cert. denied, 531 U.S. 880 (2000); Sweat v. City of Ft. Smith, 265 F.3d 692, 696 (8th Cir. 2001) ("[C]laims not raised in an initial appeal brief are waived."); Greenwood v. FAA, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief."); Adams-Arapahoe Joint Sch. Dist. No. 28-J v. Continental Ins. Co., 891 F.2d 772, 776 (10th Cir. 1989) (holding that

courts of appeals have recognized that this rule is not jurisdictional and therefore that courts have authority, in the exercise of their discretion, to address issues not timely raised by the parties. See, e.g., United States v. Miranda, 248 F.3d 434, 443-444 (5th Cir. 2001) (noting that "the issues-not-briefed-are-waived rule is a prudential construct that requires the exercise of discretion" and that a court may consider an issue that was not timely raised "where substantial public interests are involved"), cert. denied, 534 U.S. 980 (2001) and 534 U.S. 1086 (2002); United States v. Quiroz, 22 F.3d 489, 490-491 (2d Cir. 1994) (court will review issue not raised in the brief where manifest injustice would otherwise result); Leer v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988) (same); see also Fed. R. App. P. 2 (granting courts discretion to suspend most rules for "good cause").

Consistent with the practice of other courts of appeals, the Eleventh Circuit has established a "prudential rule" of declining to entertain an issue not raised in a party's initial or opening brief on appeal. United States v. Levy, 416 F.3d

---

"[a]n issue not included in either the docketing statement or the statement of issues in the party's initial brief is waived on appeal"); Maryland People's Council v. FERC, 760 F.2d 318, 319-320 (D.C. Cir. 1985) (deeming an issue waived where a party did not raise it until supplemental briefing); Becton Dickinson & Co. v. C.R. Bard, Inc., 922 F.2d 792, 799 (Fed. Cir. 1990) ("[A]n issue not raised by an appellant in its opening brief * * * is waived.").

1273, 1275 (11th Cir. 2005), cert. denied, 546 U.S. 1011 (2005); United States v. Dockery, 401 F.3d 1261, 1263 (per curiam), cert. denied, 546 U.S. 944 (2005); accord United States v. Ardley, 242 F.3d 989, 990 (11th Cir.), cert. denied, 533 U.S. 962 (2001) and 535 U.S. 979 (2002). It has also held that a party may not raise through a supplemental brief an issue that was omitted in his principal brief. United States v. Hembree, 381 F.3d 1109, 1110 (11th Cir. 2004). But the Eleventh Circuit has further recognized its authority to relieve litigants of the consequences of default and to address an issue on the merits to avoid a manifest injustice. See, e.g., United States v. Rivera Pedin, 861 F.2d 1522, 1526 n.9 (11th Cir. 1988) (pursuant to Rule 2, considering an issue raised only in co-defendant's brief, despite defendant's failure to adopt issue by reference); Gramegna v. Johnson, 846 F.2d 675 (11th Cir. 1988) (pursuant to Rule 2, vacating judgment based on issue raised by the court sua sponte); see also United States v. Levy, 391 F.3d 1327, 1335 (11th Cir. 2004) (Hull, C.J., concurring in denial of rehearing en banc) ("The issue is not whether this Court has the power to consider issues not raised in the initial brief; of course it does.").

b. Although the court of appeals refused to allow petitioner to raise a Descamps claim because it was not raised in his opening brief, the Eleventh Circuit has occasionally

exercised its discretion to consider such claims. Recently, in United States v. Estrella, No. 12-15815, 2014 WL 3362166, at *7 (11th Cir. July 10, 2014), the Eleventh Circuit considered whether a state statute was divisible under Descamps in evaluating a defendant's claim that his sentence was improperly enhanced based on a prior conviction under that statute, even though the defendant's opening brief was filed before Descamps was issued and therefore did not expressly raise a divisibility argument. See 2013 WL 775669. The Eleventh Circuit reversed the sentence after ruling that the prior conviction was not a crime of violence under the Guidelines.

In United States v. Ramirez-Flores, 743 F.3d 816 (11th Cir. 2014), the Eleventh Circuit considered whether a state burglary statute was divisible after Descamps in evaluating a defendant's claim that his sentence was improperly enhanced with a prior conviction under that burglary statute, even though the defendant first raised his Descamps claim at oral argument in the Eleventh Circuit, well after "completed briefing." 743 F.3d at 820. The Eleventh Circuit reviewed the defendant's divisibility claim for plain error because the defendant did not raise it in the district court, and it ultimately concluded that

the defendant could not show that any error was plain or obvious. 743 F.3d at 821-823.[4]

The Eleventh Circuit thus does not invariably decline to consider a Descamps claim unless the defendant raises a Descamps claim in his opening brief. Whatever tension exists between cases (such as petitioner's) in which the Eleventh Circuit has refused to consider an appellant's Descamps claim and cases such as Ramirez-Flores and Estella is for the Eleventh Circuit to resolve in the first instance. See Wiesniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

In any event, rules governing the consideration of claims not initially raised in an opening brief on appeal may appropriately be viewed as local rules that can differ from circuit to circuit. So long as such local rules are reasonable, see Thomas v. Arn, 474 U.S. 140, 146-148 (1985), and consistent with Acts of Congress and the Federal Rules of Appellate Procedure, see Fed. R. App. P. 47(a), there is no requirement of

---

[4] In Jones v. United States, 743 F.3d 826 (11th Cir. 2014), the Eleventh Circuit applied Descamps to a defendant's claim that his prior burglary conviction was invalid because it was based on a non-generic indivisible statute. Although the defendant did not raise the issue in the district court, his opening brief in the Eleventh Circuit noted that this Court had recently granted a petition for a writ of certiorari in Descamps and then argued that he would prevail on appeal if Descamps was decided in Descamps' favor. See 2012 WL 5465576 *25-*28. Petitioner could have alerted the Eleventh Circuit in his opening brief that Descamps was pending in this Court in a similar fashion.

"uniformity among the circuits in their approach to [such] rules," Ortega-Rodriguez v. United States, 507 U.S. 234, 251 n.24 (1993). Thus, in Arn, this Court held that the Sixth Circuit had not abused its discretion by promulgating a rule that a party waived the right to appellate review of a district court judgment that adopted a magistrate judge's recommendation when the party failed to file objections with the district court identifying those issues on which review was desired. The Court explained that the Sixth Circuit's "nonjurisdictional waiver provision," like the rule at issue here, would ordinarily "preclud[e] appellate review of any issue" not raised in the manner prescribed, although the court of appeals could "excuse the default in the interests of justice." Id. at 147, 148, 155. Noting that such a rule was supported by sound considerations of judicial economy, id. at 148, the Court concluded that the court of appeals had authority to adopt "procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution." Id. at 146-147 (quoting Cupp v. Naughten, 414 U.S. 141, 146 (1973)).

The Eleventh Circuit has determined that (at least ordinarily) judicial economy is best served by declining to consider claims not raised in an opening appellate brief, even where those claims rest on decisions rendered after the filings were made. The court of appeals is in the best position to

judge whether its practice unduly encourages litigants to preserve then-meritless claims, cf. Johnson v. United States, 520 U.S. 461, 468 (1997) (declining to adopt an interpretation of plain error that would encourage "a long and virtually useless laundry list of objections"), or instead requires litigants to make a careful assessment of possibly meritorious claims in their initial filings so that the appellate process can efficiently narrow the issues for review. As petitioner notes (Pet. 31), the Eleventh Circuit has had years of experience with its practice and has determined (at least generally) to adhere to it. This Court's review of that court's exercise of discretion in that regard is not warranted.

This Court has repeatedly denied petitions for writs of certiorari in cases in which the Eleventh Circuit has declined to entertain a claim solely because it was not raised in the petitioner's opening brief on appeal. See Levy v. United States, 546 U.S. 1011 (2005); Masters v. United States, 546 U.S. 946 (2005); Dockery v. United States, 546 U.S. 944 (2005); Senn v. United States, 546 U.S. 940 (2005). The same disposition is appropriate here.

3. In addition, this case would not be a good vehicle to decide the merits of petitioner's divisibility claim under Descamps for several reasons. First, the Eleventh Circuit's unpublished order does not establish any precedent and therefore

cannot be said to implicate any legal rule that warrants this Court's attention.

Second, as petitioner conceded in the court of appeals, see Pet. App. A-5 at 2, his Descamps divisibility claim would be reviewed only for plain error because he did not challenge the validity of his Section 843(b) conviction as a career-offender predicate in the district court. Under the plain-error standard, petitioner would have to show that there was (1) an error; (2) that was plain, i.e., clear or obvious; (3) that affected his substantial rights; and (4) that, if left uncorrected, would seriously affect the fairness, integrity, or public reputation of judicial proceedings. United States v. Marcus, 560 U.S. 258, 262 (2010); Fed. R. Crim. P. 52(b). Although petitioner correctly observes (Pet. 13-14) that some courts of appeals have held that Section 843(b) is non-generic or overbroad, e.g., United States v. Jimenez, 533 F.3d 1110, 1113 n.2 (9th Cir. 2008) (considering the "drug trafficking offense" guideline); United States v. Williams, 176 F.3d 714, 717 n. 3 (3d Cir. 1999) (considering the career offender guideline), no court of appeals has held that Section 843(b) is indivisible in light of Descamps. Accordingly, even if petitioner could meet the "error" prong of the plain-error test, he could not meet the "clear or obvious" prong of that test. See Ramirez-Flores, 743 F.3d at 822-823 (holding on plain-error

review that it was not clear or obvious that state burglary statute was indivisible).

Third, petitioner's claim arises under the Sentencing Guidelines, not the Armed Career Criminal Act. Even assuming error in application of the career offender guideline, the advisory status of the Guidelines diminishes the legal importance of Guidelines determinations because courts may adjust sentences upward or downward to take into account particular facts even after calculating the offense level or criminal history. Here, petitioner's extensive criminal history included four convictions that were counted towards his criminal history category calculation, and other convictions that were not counted. PSR paras. 38-55. Even if petitioner were not a career offender, the district court could have imposed the same 210-month sentence based on petitioner's "terrible record," Pet. App. A-3 at 28, after applying the factors in 18 U.S.C. 3553(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

LESLIE R. CALDWELL
Assistant Attorney General

THOMAS E. BOOTH
Attorney

SEPTEMBER 2014