

Nos. 23-1002 and 23-1150

In the Supreme Court of the United States

TONY R. HEWITT, PETITIONER

v.

UNITED STATES OF AMERICA

COREY DEYON DUFFEY AND JARVIS DUPREE ROSS,
PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR

Solicitor General

Counsel of Record

NICOLE M. ARGENTIERI

Principal Deputy Assistant

Attorney General

ANDREW C. NOLL

Attorney

Department of Justice

Washington, D.C. 20530-0001

SupremeCtBriefs@usdoj.gov

(202) 514-2217

QUESTION PRESENTED

Whether Section 403 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5221-5222, which reduced certain mandatory consecutive sentences under 18 U.S.C. 924(c) for “any offense that was committed before the date of enactment of [the] Act, if a sentence for the offense has not been imposed as of such date,” applies at a defendant’s post-Act resentencing following the vacatur of the defendant’s pre-Act sentence.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

United States v. Duffey, No. 08-cr-167 (Feb. 3, 2010)

United States v. Ross, No. 08-cr-167 (Feb. 22, 2010)

United States v. Hewitt, No. 08-cr-167 (May 7, 2010)

United States v. Ross, No. 08-cr-167 (Sept. 28, 2012)

United States v. Duffey, No. 08-cr-167 (Nov. 15, 2012)

United States v. Hewitt, No. 08-cr-167 (Dec. 6, 2012)

Ross v. United States, No. 15-cv-3233 (Aug. 3, 2017)

Duffey v. United States, No. 15-cv-500 (Jan. 17, 2018)

Hewitt v. United States, No. 16-cv-603 (Aug. 13, 2018)

Ross v. United States, No. 19-cv-586 (Mar. 29, 2019)

Hewitt v. United States, No. 21-cv-1397 (Aug. 19, 2021)

Duffey v. United States, No. 20-cv-1686 (June 14, 2021)

Ross v. United States, No. 20-cv-2245 (Nov. 2, 2021)

United States v. Duffey, No. 08-cr-167 (Mar. 14, 2022)

United States v. Ross, No. 08-cr-167 (Mar. 29, 2022)

United States v. Hewitt, No. 08-cr-167 (Nov. 8, 2022)

United States Court of Appeals (5th Cir.):

United States v. Hewitt, No. 09-10827 (Sept. 28, 2009)

United States v. Duffey, No. 10-10103 (Jan. 3, 2012)

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United States v. Ross, No. 12-11021 (Nov. 7, 2013)

United States v. Ross, No. 12-11021 (Oct. 8, 2014)

Ross v. United States, No. 17-10954 (Jan. 11, 2018)

Duffey v. United States, No. 18-10138 (Mar. 7, 2018)

In re Ross, No. 19-10365 (May 13, 2019)

United States v. Hewitt, No. 18-11359 (Aug. 23, 2019)

In re Ross, No. 20-10845 (Dec. 14, 2020)

In re Duffey, No. 20-10644 (Jan. 7, 2021)

In re Hewitt, No. 20-10501 (Jan. 28, 2021)

United States v. Duffey, No. 22-10265 (Feb. 2, 2024)

Supreme Court of the United States:

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OPINIONS BELOW

The opinion of the court of appeals (Hewitt Pet. App. 1a-16a; Duffey & Ross Pet. App. 1a-19a) is reported at 92 F.4th 304. Prior opinions of the court of appeals are not published in the Federal Reporter but are reprinted at 456 Fed. Appx. 434 and 582 Fed. Appx. 528.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 2024. The petitions for writs of certiorari were filed on March 8, 2024 (Hewitt), and April 19, 2024

(Duffey and Ross). 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 Texas, petitioners were convicted on multiple counts of conspiracy, attempted bank robbery, and bank robbery, as well as corresponding counts of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). Hewitt Judgment 1-4; Duffey 2010 Judgment 1-4; Ross Judgment 1-4; see Hewitt Pet. App. 2a.¹ Hewitt was sentenced to 4260 months of imprisonment, to be followed by five years of supervised release. Hewitt Judgment 2, 5. Duffey was sentenced to 4253 months of imprisonment, to be followed by five years of supervised release. Duffey 2010 Judgment 2, 5. Ross was sentenced to 3960 months of imprisonment, to be followed by five years of supervised release. Ross Judgment 2, 5. The court of appeals affirmed the bulk of petitioners' convictions, but vacated four of the counts, 456 Fed. Appx. 434, and this Court denied Hewitt's petition for a writ of certiorari, 566 U.S. 1029.

On remand, the district court resentenced Hewitt to 3550 months of imprisonment, Duffey to 3653 months of imprisonment, and Ross to 3425 months of imprisonment, with each petitioner's term to be followed by five years of supervised release. Hewitt Am. Judgment 2, 5; Duffey Am. Judgment 2, 5; Ross Am. Judgment 4-6. The court of appeals affirmed, 582 Fed. Appx. 528, and this Court denied Hewitt's petition for certiorari, 574

¹ Unless otherwise specified, all citations to district court documents are to those in No. 08-cr-167, and all citations to the petition appendix are to the appendix in No. 23-1002.

U.S. 1201. Petitioners' subsequent motions for post-judgment relief under Section 2255 were denied by the district court. Pet. App. 3a.

In 2020 and 2021, the court of appeals granted each petitioner authorization to file a second or successive motion under 28 U.S.C. 2255. 20-cv-1686 D. Ct. Doc. 10 (Jan. 7, 2021) (Duffey); 20-cv-2245 D. Ct. Doc. 6 (Dec. 14, 2020) (Ross); 21-cv-1397 D. Ct. Doc. 2 (Jan. 28, 2021) (Hewitt). The district court subsequently vacated seven of Hewitt's and Duffey's Section 924(c) convictions and six of Ross's Section 924(c) convictions, and ordered resentencing on petitioners' remaining counts. D. Ct. Doc. 672 (June 14, 2021) (Duffey); D. Ct. Doc. 683 (Aug. 19, 2021) (Hewitt); D. Ct. Doc. 700 (Nov. 2, 2021) (Ross). Hewitt was resentenced to 1625 months of imprisonment, Duffey was resentenced to 1560 months of imprisonment, and Ross was resentenced to 1625 months of imprisonment, with each petitioner's term to be followed by five years of supervised release. Hewitt Second Am. Judgment 3-4; Ross Second Am. Judgment 3-4; Duffey Second Am. Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-16a.

1. Between January and June 2008, petitioners and several confederates conspired to commit a series of bank robberies in the Dallas-Fort Worth area of Texas. See Hewitt Presentence Investigation Report (Hewitt PSR) ¶¶ 5-26. The group, known as the "Scarecrow Bandits," stole a total of more than \$350,000 from several financial institutions. *Id.* ¶¶ 6, 26. Hewitt and Duffey were the group's leaders; they recruited members and notified them of the time and place of those robberies, with Hewitt giving orders during the robberies. See, *e.g.*, *id.* ¶¶ 7, 42. On June 2, 2008, while poised to rob a bank in Garland, Texas, petitioners and

several of their confederates were arrested while in possession of masks, handcuffs, rope, stun guns, loaded weapons, and ammunition. *Id.* ¶¶ 6, 8-10.

Each petitioner was charged with multiple counts of conspiracy, attempted bank robbery, and bank robbery; Ross was also charged with kidnapping. Pet. App. 2a; Superseding Indictment 1-55. In addition, Hewitt and Duffey were charged with 14 counts of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c), and Ross was charged with 13 Section 924(c) counts. Superseding Indictment 1-55. Petitioners and two co-defendants proceeded to trial, and a jury returned a guilty verdict against each petitioner on all counts. D. Ct. Doc. 238 (Aug. 12, 2009).

2. For the firearm counts, at the time of petitioners' offenses, 18 U.S.C. 924(c)(1)(C) provided for a minimum consecutive sentence of 25 years of imprisonment in the case of a "second or subsequent conviction" under Section 924(c), including when that second or subsequent conviction was obtained in the same proceeding as the defendant's first conviction under Section 924(c). 18 U.S.C. 924(c)(1)(C)(i) (2006); see *Deal v. United States*, 508 U.S. 129, 132-137 (1993). The district court accordingly sentenced Hewitt to a total of 4260 months of imprisonment, which included concurrent sentences of 300 months or less on each of the non-Section 924(c) counts, a consecutive 60-month sentence on the first Section 924(c) count, and 13 consecutive 300-month sentences on the subsequent Section 924(c) counts. Hewitt Judgment 2. The court sentenced Duffey to a total of 4253 months of imprisonment, which included concurrent sentences of 293 months or less on each of the non-Section 924(c) counts, a consecutive 60-month sentence on the first Section 924(c) count, and 13 consecutive 300-

month sentences on the subsequent Section 924(c) counts. Duffey Judgment 2. And the court sentenced Ross to a total of 3960 months of imprisonment, which included concurrent sentences of 300 months or less on each of the non-Section 924(c) counts, a consecutive 60-month sentence on the first Section 924(c) count, and 12 consecutive 300-month sentences on the subsequent Section 924(c) counts. Ross Judgment 2.

Petitioners appealed, and the court of appeals vacated two of each petitioner's convictions for attempted bank robbery as well as the associated Section 924(c) convictions, but otherwise affirmed. 456 Fed. Appx. at 445. This Court denied Hewitt's petition for a writ of certiorari. 566 U.S. 1029. And on remand, the district court resentenced petitioners on the remaining counts, sentencing Hewitt to 3660 months of imprisonment, Hewitt Am. Judgment 2; Duffey to 3653 months of imprisonment, Duffey Am. Judgment 2; and Ross to 3425 months of imprisonment, Ross Am. Judgment 4-5. Those sentences included a consecutive 60-month sentence for each petitioner's first Section 924(c) count, as well as consecutive 300-month sentences on each petitioner's remaining Section 924(c) counts (11 for Hewitt and Duffey; 10 for Ross). The court of appeals affirmed Hewitt's and Ross's sentences, 582 Fed. Appx. at 529-530, and dismissed Duffey's appeal, No. 12-11021 (Nov. 7, 2013). This Court denied Hewitt's petition for a writ of certiorari. 574 U.S. 1201.

The district court denied petitioners' subsequent motions to vacate their convictions and sentences under 28 U.S.C. 2255. 15-cv-500 D. Ct. Doc. 22, at 22 (Dec. 29, 2017) (Duffey) (report and recommendation); 15-cv-500 D. Ct. Doc. 23, at 1-2 (Jan. 17, 2018) (Duffey) (adopting report and recommendation); 16-cv-603 D. Ct. Doc. 55,

at 18 (July 25, 2018) (Hewitt) (report and recommendation); 16-cv-603 D. Ct. Doc. 58, at 1-2 (Aug. 13, 2018) (Hewitt) (adopting report and recommendation); 15-cv-3233 D. Ct. Doc. 8 (June 22, 2017) (Ross) (report and recommendation); 15-cv-3233 D. Ct. Doc. 9 (Aug. 3, 2017) (Ross) (adopting report and recommendation).

3. On December 21, 2018, Congress enacted the First Step Act of 2018 (First Step Act), Pub. L. No. 115-391, 132 Stat. 5194. Among other things, the First Step Act changed the statutory penalties for violations of 18 U.S.C. 924(c). § 403(a), 132 Stat. 5221-5222.

Section 403 of the Act amended Section 924(c)(1)(C) to provide for a minimum consecutive sentence of 25 years of imprisonment only in the case of a “violation of [Section 924(c)] that occurs after a prior conviction under [Section 924(c)] has become final.” § 403(a), 132 Stat. 5221-5222. Congress specified that, in addition to applying prospectively, Section 403 also would apply to pre-Act offenses in some instances. Specifically, Section 403(b) of the Act provides that the amendment “appl[ies] to any offense that was committed before the date of enactment of” the Act “if a sentence for the offense has not been imposed as of such date of enactment.” § 403(b), 132 Stat. 5222.

4. In 2019, this Court held in *United States v. Davis*, 588 U.S. 445 (2019), that the “crime of violence” definition in Section 924(c)(3)(B) is unconstitutionally vague. *Id.* at 450. Applying *Davis*, the court of appeals subsequently determined that conspiracy to commit bank robbery does not qualify as a predicate crime of violence under the remaining “crime of violence” definition in Section 924(c)(3)(A), because the conspiracy offense does not have “as an element the use, attempted use, or threatened use of physical force against the person or

property of another,” 18 U.S.C. 924(c)(3)(A). See *United States v. Reece*, 938 F.3d 630, 635-636 (5th Cir. 2019).

Based on those precedents, the court of appeals granted petitioners authorization to file a second or successive Section 2255 motion under to vacate their Section 924(c) convictions that were predicated on conspiring to commit bank robbery. See 20-cv-1686 D. Ct. Doc. 10 (Duffey); 20-cv-2245 D. Ct. Doc. 6 (Ross); 21-cv-1397 D. Ct. Doc. 2 (Hewitt). After petitioners moved for relief, the government agreed that those convictions should be vacated, and the district court accordingly granted each petitioner’s motion, vacated the relevant Section 924(c) convictions, and ordered resentencing on the remaining counts. D. Ct. Doc. 672, at 2 (Duffey); D. Ct. Doc. 683, at 2 (Hewitt); D. Ct. Doc. 700, at 2 (Ross).

At the time of Duffey’s and Ross’s resentencings, the government took the view that the reduced penalties in Section 403 of the First Step Act did not apply to a defendant sentenced before the Act’s enactment, even if the defendant’s sentence was subsequently vacated and he obtained a resentencing. The government therefore opposed Duffey’s and Ross’s contention that they should be resentenced under Section 403(a). D. Ct. Doc. 730, at 1-3 (Feb. 7, 2022); D. Ct. Doc. 747, at 1-3 (Mar. 21, 2022). The district court agreed with the government’s position. Duffey Sent. Tr. 13; Ross Sent. Tr. 22-23. And it resentenced Duffey to 1560 months of imprisonment and Ross to 1625 months of imprisonment, with each sentence including a consecutive 60-month sentence on the first Section 924(c) count and four consecutive 300-month sentences on the remaining Section 924(c) counts. Duffey Second Am. Judgment 3; Ross Second Am. Judgment 3.

By the time of Hewitt’s sentencing, the government had reexamined its position, and it informed the district court that it had “concluded that the best reading of Section 403” is that defendants like petitioners “should receive the benefit of the Act’s reduced statutory minimum sentences.” D. Ct. Doc. 771, at 2-3 (Oct. 5, 2022). The government therefore joined Hewitt’s objection to the Probation Office’s conclusion that a consecutive 25-year statutory minimum sentence applied to each of his subsequent Section 924(c) convictions. *Id.* at 1. The district court, however, overruled the parties’ objection and adhered to its view that Section 403’s amended penalties did not apply. Hewitt Sent. Tr. 22-23. The court resentenced Hewitt to 1625 months of imprisonment, which included a consecutive 60-month sentence on the first Section 924(c) count and four consecutive 300-month sentences on the subsequent remaining Section 924(c) counts. Hewitt Second Am. Judgment 3-4.

5. The court of appeals affirmed, rejecting petitioners’ and the government’s argument that the district court should have applied Section 403(a) at petitioners’ resentencings. Pet. App. 5a-11a. The court construed Section 403 as unambiguously “drawing the line for” application of the amended penalties “at the date on which a sentence—whether later-vacated or with ongoing validity—was imposed.” *Id.* at 11a. And “because sentences for [petitioners’] offenses had been imposed * * * prior to the First Step Act’s December 21, 2018 enactment date,” the court held that Section 403 “does not apply.” *Id.* at 12a.

ARGUMENT

Petitioners renew their contention (Hewitt Pet. 10-15; Duffey & Ross Pet. 15-22) that Section 403 of the First Step Act should have been applied at their

resentencings, which followed the vacatur of their pre-Act sentences. The government agrees that the best reading of Section 403(b) is that Section 403's amended statutory penalties apply at any sentencing that takes place after the Act's effective date, including a resentencing. But the disagreement in the courts of appeals is shallow and recent. The prospective practical importance of the issue, moreover, is limited, and legislation introduced in Congress may provide relief to petitioners and other defendants who were originally sentenced before the First Step Act's enactment. This Court recently denied a petition for a writ of certiorari presenting the same issue. *Carpenter v. United States*, No. 23-531 (Feb. 20, 2024). It should follow the same course here.

1. For the reasons explained in the government's brief in opposition in *Carpenter*, the government agrees with petitioners that the decision below adopted an incorrect interpretation of Section 403.² See Br. in Opp. at 8-12, *Carpenter, supra* (No. 23-531). Petitioners assert (Hewitt Pet. 6-10; Duffey & Ross Pet. 9-14) that further review is warranted because the courts of appeals are divided concerning application of Section 403 at a defendant's resentencing. But it continues to be the case that the shallow and recent disagreement in the courts of appeals regarding the question presented does not warrant this Court's review at this time.

The Sixth Circuit is the only other court of appeals that has adopted the position of the court below, holding that Section 403 does not apply at the resentencing of a defendant who had been initially sentenced before the

² The government has served each petitioner with a copy of the brief in opposition in *Carpenter, supra*, (No. 23-531), which is also available on this Court's electronic docket.

First Step Act's enactment. *United States v. Jackson*, 995 F.3d 522, 524-525 (2021), cert. denied, 142 S. Ct. 1234 (2022). The Third and Ninth Circuits, however, have both correctly interpreted Section 403 to apply at a resentencing held following the Act's enactment. *United States v. Mitchell*, 38 F.4th 382, 386-389 (3d Cir. 2022); *United States v. Merrell*, 37 F.4th 571, 575-578 (9th Cir. 2022); see *Mitchell*, 38 F.4th at 392-393 (Bibas, J., concurring in the judgment).

No other circuit has yet addressed the question presented in a published decision, and no court of appeals has considered the question presented en banc. And petitioners are incorrect in asserting that the situation in the circuits now materially differs from the situation when this Court declined to review the same issue in *Carpenter*. While they highlight (*e.g.*, Hewitt Pet. 6) the decision below as a new development, the decision below was brought to this Court's attention when it considered and denied the petition in *Carpenter*. Letter from Counsel for Pet., to Scott S. Harris, Clerk of Court, *Carpenter*, *supra* (No. 23-531) (Feb. 2, 2024).

Petitioners err in asserting that the conflict is “[i]n reality * * * deeper,” Hewitt Pet. 8; see *id.* at 8-9 & n.2; Duffey & Ross Pet. 13-14 & n.3, than what is indicated by the actual holdings of published circuit decisions that have directly addressed the question presented. Petitioners rely (*ibid.*), for example, on unpublished decisions from the Second and Fourth Circuit that do not bind those circuits or squarely decide the question presented. See *United States v. Bethea*, 841 Fed. Appx. 544 (4th Cir. 2021) (considering the application of different provision of the First Step Act, Section 401); *United States v. Walker*, 830 Fed. Appx. 12, 17 n.2 (2d Cir. 2020) (addressing Section 403's application in a footnote

observing the parties' apparent agreement on the issue). The published Second Circuit decision petitioners cite (Duffey & Ross Pet. 14-15 n.3), *United States v. Brown*, 935 F.3d 43 (2d Cir. 2019), noted only that remand would offer the defendant the "opportunity to argue that he should benefit from section 403(b) of the First Step Act," without taking a position on the question. *Id.* at 49.

Petitioners also cite (Hewitt 8; Duffey & Ross Pet. 13) *United States v. Uriarte*, 975 F.3d 596 (2020), in which the en banc Seventh Circuit found Section 403 applicable to a defendant who was sentenced before the enactment of the First Step Act, and whose sentence was vacated on appeal *before* the First Step Act's enactment. See *id.* at 598. As a result, he was "a convicted, but unsentenced, federal defendant" on the Act's effective date. *Id.* at 599. And the Seventh Circuit expressly distinguished the situation of a defendant who, like petitioners, "was under a sentence at the time of [the Act's] enactment." *Id.* at 602 n.3; see *id.* at 606 n.1 (Barrett, J., dissenting) (emphasizing that "nothing in the majority opinion—which turns entirely on the fact that [the defendant] was not subject to a sentence on the Act's effective date—suggests an answer" to "the question whether a *postenactment* vacatur would retroactively have the same effect"). Thus, as the court of appeals recognized below, the Seventh Circuit has "left open the question" presented here. Pet. App. 7a n.2.

2. This Court's review also is unwarranted because of the modest prospective importance of the question presented and the pendency of legislation that would obviate the need for this Court's intervention.

Petitioners significantly overstate (Hewitt Pet. 17; Duffey & Ross Pet. 24-25) the degree to which the

question presented will recur. The Fifth and Sixth Circuits' divergence from other circuits' view of Section 403's applicability will arise and be outcome-determinative only in a discrete set of cases. Petitioners highlight (*ibid.*) the number of defendants who have been convicted of an offense under Section 924(c). But the question whether to apply Section 403's reduced penalties arises only when a defendant has been convicted of more than one Section 924(c) offense. Even then, the question will only arise in the small set of cases in which a defendant was sentenced for multiple Section 924(c) offenses before December 2018, and then obtains collateral relief under which he is still subject to convictions for more than one of them, but is entitled to resentencing for some or all. The question's importance is thus limited and will diminish over time.

While petitioners observe (Hewitt Pet. 18; Duffey & Ross Pet. 25) that new decisions may provide grounds for challenging the application of Section 924(c) itself, see, *e.g.*, *United States v. Taylor*, 596 U.S. 845 (2022), only a subset of Section 924(c) convictions will be subject to those decisions, and only a further subset of those would implicate the question presented here. If, as is often the case, a Section 924(c) conviction is vacated altogether, no resentencing will occur for that offense.³

³ As petitioners note (Hewitt Pet. 3-4, 17-18; Duffey & Ross Pet. 25-26), Section 401(c) of the First Step Act's identically worded "applicability" provision reduces the statutory-minimum penalties associated with certain recidivist drug-trafficking offenses and narrows the kinds of predicate convictions that trigger those penalties. See § 401(c), 132 Stat. 5221. But those amendments will only be relevant at the resentencing of defendants whose sentences were enhanced under 21 U.S.C. 841(b)(1)(A) or (b)(1)(B), or 21 U.S.C.

The Court’s review is particularly unwarranted at this time because Congress is currently considering legislation that would permit Section 403 of the First Step Act (as well as Section 401), to be applied retroactively to defendants sentenced before the Act’s enactment. See First Step Implementation Act of 2023, S. 1251, 118th Cong., 1st Sess. (introduced in the Senate on Apr. 20, 2023). If enacted, that legislation would permit a district court to “impose a reduced sentence as if sections 401 and 403 of the First Step Act of 2018 * * * were in effect at the time the * * * offense was committed.” *Id.* § 101(c); see *id.* § 101(a). The legislation would allow for relief for any defendant sentenced before the Act’s enactment—including, but not limited to, defendants like petitioners who were resentenced after the Act’s date of enactment—and would thus obviate the need for this Court’s intervention.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

NICOLE M. ARGENTIERI
*Principal Deputy Assistant
Attorney General*

ANDREW C. NOLL
Attorney

MAY 2024

960(b)(1) or (b)(2), and whose sentencing range would be different under the amendments made by Section 401.