No. 07-455

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

AHMED RESSAM,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Section 844(h)(2) of Title 18, United States Code, prescribes a mandatory ten-year term of imprisonment for any person who "carries an explosive during the commission of any felony which may be prosecuted in a court of the United States." The question presented is whether Section 844(h)(2) requires that the explosives be carried "in relation to" the underlying felony.

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STATEMENT

The government prematurely presses for further review of this case, before even imposition of a final sentence, to resolve a conflict between the circuits twenty years in the making that is of no importance to the sentence in this case or to the prosecution and punishment of other terrorism cases. The question presented is purely academic and certiorari should be denied.

1. The original sentencing centered on two themes: (1) the seriousness of Mr. Ressam's criminal activity and (2) his significant post-conviction cooperation. The seriousness of the misconduct is self-evident and was accurately detailed in the opinion of the court of appeals. Pet. App. 3a-6a. Mr. Ressam's cooperation extended over an eighteen-month period and involved scores of debriefings by law enforcement personnel and prosecutors from throughout North America and Europe. He identified dozens of terrorists, described the composition and function of terrorist cells, detailed the location and membership of particular cells, provided information about the recruitment and training of terrorists, described the financing of terrorist operations, and revealed methods used to conceal identities of terrorists. He provided this intelligence during a critical point in history, both before and after the September 11th attacks. His information was distributed to law enforcement agencies throughout the world.

2. At sentencing, both parties recommended sentences significantly below the sixty-five-year low end of the guideline range as calculated by the probation department. The probation department's calculations were disputed by the defense, C.A. E.R. 555-563, but in the end, were of little importance in light of the government's recommendation of thirty-five years, C.A. E.R. 572, and the defense recommendation of "substantially lower" than twenty years. C.A. E.R. 547. While the sentencing judge did not, given the positions of the parties, express an opinion as to the appropriate guideline range, he did explain he had done his "best to arrive at a period of confinement that appropriately recognizes the severity of the intended offense," the "cooperation of Mr. Ressam, even though it did terminate prematurely," and the importance of notice to others that they "should be prepared to sacrifice a major portion of their life in confinement" should they violate the law of this country. C.A. E.R. 856. He imposed a twenty-two-year term of imprisonment. C.A. E.R. 855.

3. The government appealed the sentence after which Mr. Ressam filed a cross-appeal challenging his conviction on Count 9, which charged a violation of 18 U.S.C. § 844(h)(2). The court of appeals vacated that conviction and remanded the case for resentencing because of its decision on Count 9 and, "[e]ven more significantly," because "the law applicable to sentencing is in flux." Pet. App. 13a. It reasoned that "the district court should have the initial opportunity to impose a sentence consistent with evolving law." Pet.

App. 14a. In the end, the sentence, not the survival of the Section 844(h)(2) conviction, will mark the importance of this case.

REASONS FOR DENYING THE WRIT

I. THE QUESTION PRESENTED IS OF NO PRACTICAL IMPORTANCE.

A. This Case

Resolution of the question presented is not important to this case, and certainly need not be resolved now, before the resentencing ordered by the court of appeals. Under the unique circumstances of this case, the presence or absence of a conviction on Count 9 will not affect the sentence the district court imposes.

1. This Court typically awaits final judgment before exercising certiorari jurisdiction. *See Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (*per curiam*); *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of petition for a writ of certiorari). Here, the court of appeals remanded the case for resentencing, so there is not yet a final judgment. Pet. App. 14a; *Burton v. Stewart*, 127 S. Ct. 793, 798 (2007) (*per curiam*). The lack of finality "alone [is] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co. v. Wolf Bros. Co.*, 240 U.S. 251, 258 (1916). Interlocutory review is discouraged "unless it

is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Const. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U.S. 372, 384 (1893). Indeed, for more than two decades the Solicitor General has consistently argued for denial of certiorari in federal criminal cases until rendition of final judgment. *See* Robert L. Stern, et al., *Supreme Court Practice* § 4.18, at 258 n.59 (8th ed. 2002). Awaiting final judgment risks no prejudice, inconvenience, embarrassment or miscarriage of justice.

2. *Resolution of the question presented will not* affect the sentence in this case. Petitioner offers no argument as to how the demise of Count 9 might influence the final outcome. The record supports that Mr. Ressam's sentence will not be affected by the absence of a conviction on Count 9. This was an unusual case where even the government's sentencing recommendation of thirty-five years fell well below the sixty-five-year low end of the government's interpretation of the guideline sentencing range. C.A. E.R. 572. It is hard to imagine the government will lower its recommended sentence should it now calculate the low end of the guideline range to be fifty-five years. For the district court, this was a case that involved balancing the severity of the terrorism offense with Mr. Ressam's cooperation and the need for general deterrence. The district court stated: "[T]his sentencing is one that I have struggled with a great deal, more than any other sentencing that I've had in the 24 years I've been on the bench." C.A. E.R.

856. The district court's struggle was over the full circumstances of the case, not the particulars of the charges contained in the indictment. This was made clear when the court directed allocation of the penalty "according to the statutory minimums among the counts in consecutive and concurrent as necessary to arrive at a total of 22 years." C.A. E.R. 855. The sentencing judge's focus was on the total punishment, not the counts of conviction. The same is true of the government's recommendation.

Upon remand, the remaining eight counts of conviction carry statutory maxima in excess of 100 years imprisonment. Absent Count 9, the district court retains considerable discretion to impose a sentence that reflects the severity of Mr. Ressam's offenses, the extent of his cooperation, and the need for deterrence. The ultimate outcome in this case, while not certain, will not be influenced by the court of appeals' decision to vacate the conviction on Count 9. Because Count 9 has no independent significance, interlocutory appeal is unwarranted.

3. Finally, the only sense in which the question presented "matters in this case," Pet. Cert. 9; Pet. App. 7a, is the product of a charging mistake. When charging Mr. Ressam with violating Section 844(h)(2), the government specifically and exclusively selected as the predicate felony the charge of "making a false statement to a U.S. Customs Inspector." C.A. E.R. 13. Because it is undisputed there was no evidence at trial showing that the explosives facilitated or played a role in the crime of lying on

the customs declaration, it matters in this case, as it was charged, whether the statute requires a relationship between the carrying of explosives and the predicate felony. The question, however, would not have arisen had the government linked the Section 844 violation with the allegation of a conspiracy to commit an act of terrorism (Count 1). There was ample evidence produced at trial that the explosives in Mr. Ressam's trunk aided the conspiracy to commit an act of terrorism. Petitioner's question arises and matters in this case not because of the facts of the case but because of the way in which the government chose to charge it.

B. Other Cases

The government's argument as to the importance of the question presented for review is tellingly short and acknowledges that Section 844(h)(2) "is not a frequently used provision," and, when used, "it may be that in many cases the government will be able to establish that the carrying of explosives 'facilitated or played a role in' the underlying offense." Pet. Cert. 20 (internal citation omitted). These observations are correct and themselves diminish the importance of the question presented. The government attempts to inflate the significance of the question presented by asserting that the issue "is increasingly important in terrorism prosecutions" and that properly construing the statute assists "the government's ability to obtain an appropriate sentence" in terrorism cases. Pet.

Cert. 13. But these are naked assertions, unsupported by reference to a single past or ongoing case. The government offers only hypothetical and unlikely situations where a problem might emerge. Pet. Cert. 21. Review of the handful of actual cases in the post-9/11 era that involved convictions under Section 844(h)(2) demonstrates that petitioner's concern is unfounded.

1. The Department of Justice reports that in the five years between September 11, 2001, and August 31, 2006, a total of 288 people were convicted or pleaded guilty in terrorism or terrorism-related cases. Fact Sheet: Department of Justice Anti-Terrorism Efforts Since Sept. 11, 2001 (Sept. 5, 2006).[1] Petitioner does not claim that its interpretation of Section 844(h)(2) was instrumental in any one of those cases. Indeed, a review of the convictions in terrorism cases that included a conviction or guilty plea on a Section 844(h)(2) offense reveals that in every one of those cases there was a relationship between the carrying of explosives and the alleged predicate felony.[2] For

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[1] http://www.usdoj.gov/opa/pr/2006/September/06_opa_590.html (last visited Nov. 1, 2007).

[2] Absent any specific illustrations from the government, Respondent requested information on Section 844(h) convictions from the Administrative Office of the United States Courts. Respondent reviewed that information and determined that in the period from October 1, 1999, through September 30, 2006, there were eleven convictions or guilty pleas involving a violation of Section 844(h)(2), including Mr. Ressam's case. Seven of those cases were terrorism or terrorism-related cases.

example, in *United States v. Mohamed Rashed Daoud Al-'Owhali,* No. 98-01023 (S.D.N.Y), the government charged that the defendants "used and carried bombs in connection with the attacks on the United States embassies in Nairobi, Kenya and Dar es Salaam, Tanzania." Seventh Superseding Indictment (on file with Respondent). In *United States v. Al-Timimi,* No. 04-00385 (E.D. Va.), a government press release notes that Al-Timimi was convicted of "counseling others to use firearms and explosives in furtherance of crimes of violence." Press Release, U.S. Department of Justice (April 26, 2005).[3] In *United States v. Randall Royer and Ibrahim Al-Hamdi,* No. 03-00296 (E.D. Va.), the government asserted that one defendant carried, and the other aided the carrying of, explosives "in furtherance of a conspiracy to undertake a military operation against India." Press Release, U.S. Department of Justice, *Two Defendants in Virginia Jihad Case Plead Guilty to Weapons Charges, Will Cooperate With Ongoing Investigation* (Jan. 16, 2004).[4] A relationship between Section 844(h)(2) and the underlying felony regularly appears in terrorism prosecutions and, as suggested by the government, is not difficult to establish. Pet. Cert. 20. This being so, the government's contention that the question

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[3] http://www.usdoj.gov/usao/vae/Pressreleases/04-AprilPDFArchive/05/42605TimimiPR.pdf (last visited Nov. 1, 2007).

[4] http://www.usdoj.gov/opa/pr/2004/January/04_crm_030.htm (last visited Nov. 1, 2007).

presented is important to the successful prosecution of terrorism cases is not well taken.

2. The government's professed concern that in hypothetical cases in the future its interpretation of the statute will be important in obtaining lengthy sentences in terrorism cases, Pet. Cert. 13, 21, is similarly unrealistic. In federal prosecutions involving the illegal use or possession of explosives, the government has available an arsenal of serious charges with lengthy penalties. This case is illustrative. In addition to the Section 844(h)(2) violation listed in Count 9, Mr. Ressam was charged with and convicted of placing explosives in proximity to a terminal (Count 2), with a maximum sentence of twenty years; smuggling explosives into the United States (Count 6), with a maximum sentence of twenty years; transporting explosives without a permit (Count 7), with a maximum sentence of ten years; and possessing an unregistered explosive device (Count 8), with a maximum sentence of ten years. Even absent a conviction on the Section 844(h)(2) count, the remaining counts of conviction, including explosives and non-explosives counts, leave more than 100 years of potential punishment. The spawn of explosives-related charges and penalties was effectively used in this case and would be available in many circumstances, further diminishing petitioner's assertion of the importance of the decision of the court of appeals on district court sentencing decisions.

The infrequency of Section 844(h)(2) prosecutions, the consistent appearance of a relationship to

the underlying felony in Section 844(h)(2) in terrorism prosecutions brought to date, the array of additional explosives-related charges that might be filed in a terrorism case, and the unusual – and unlikely to be repeated – charging mistake in this case combine to deflate petitioner's hypothetical concern as to the potential effect of the court of appeals' decision on future terrorism prosecutions and punishments.

II. THIS CASE DOES NOT PRESENT AN IMPORTANT CONFLICT.

In support of the petition, the government relies on the disagreement between the circuit courts regarding the question presented in this case.[5] While a conflict may provide a basis for granting a writ, review is not automatic and review is properly denied when the conflict does not implicate an "important matter." Sup. Ct. R. 10(a). A disagreement between a limited number of lower courts that took over twenty years to arise, and the resolution of which will not affect this case or others, is not a conflict implicating an important matter.

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[5] As noted by the government, the Fifth Circuit in *United States v. Ivy*, 929 F.2d 147 (5th Cir. 1991), endorsed the holding in *United States v. Rosenberg*, 806 F.2d 1169 (3d Cir. 1986), the decision in conflict with the decision in this matter. Because that endorsement was not essential to the holding in *Ivy*, the language construing Section 844(h)(2) "is best regarded as dicta," Resp. C.A. Op. Br. 17 n.4, or "an alternative holding." Pet. App. 7a. Whether on point or not, *Ivy* is best viewed as illustrative of how infrequent and therefore, unimportant, the conflict is.

1. How frequently an issue arises is significant in determining whether it is important enough to merit review. *See, e.g., Massachusetts Trustees of Eastern Gas and Fuel Assocs. v. United States*, 377 U.S. 235, 237 (1964); *see also* Stern, *Supreme Court Practice*, § 4.4 at 228 ("the important and recurring nature of the issue in conflict often plays a decisive role in the grant or denial of certiorari"). Here, the government acknowledges that Section 844(h)(2) "is not a frequently used provision." Pet. Cert. 20. It was not until twenty years after the Third Circuit's decision in *United States v. Rosenberg*, 806 F.2d 1169 (3d Cir. 1986), that the Ninth Circuit addressed this issue of "first impression" and reached a different result.

2. The importance of this limited and recent disagreement between the circuits is further lessened by the interlocutory posture of this case. Even where a circuit split exists, interlocutory review is disfavored absent a showing that (a) review is "fundamental to the further conduct of the case," *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945), or (b) the issue implicates important rights. *See Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 502 (1989) (Scalia, J., concurring) ("The importance of the right asserted has always been a significant part of our collateral order doctrine."). As discussed above, resolution of the case is of no practical consequence to this case or others.

This disagreement identified by the government, which took twenty years to arise, does not involve an important matter. If, as the government alleges, that

changes in the future and the conflict does impact a particular case, this Court can resolve the disagreement at that time.

III. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S JURISPRUDENCE.

The Ninth Circuit correctly concluded that Section 844(h)(2) "requires a relationship between the underlying crime and the act of carrying an explosive." Pet. App. 2a. This conclusion, that Congress did not impose a mandatory consecutive ten-year sentence for the coincidental carrying of an explosive while committing an unrelated felony, is supported by this Court's jurisprudence on statutory interpretation.

1. "Over and over" this Court has held that plain-meaning analysis of a statute "'must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993) (quoting *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1849)); *see also Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."). An examination of the statute as a whole compels the

conclusion that the government must prove a relationship between the carrying of explosives and the charged felony to trigger the imposition of a mandatory ten-year sentence. 18 U.S.C. § 844(h)(1) imposes a mandatory consecutive ten-year sentence for the *use* of explosives to commit a felony. Under the government's proposed interpretation of the statute, Subsection (h)(2) would impose an identically harsh penalty for the coincidental carrying of an explosive. Identical punishment for such different offenses makes no sense.

2. When interpreting a statute, the Court must choose "'a sensible construction' that avoids attributing to the legislature either 'an unjust or an absurd conclusion.'" *United States v. Granderson*, 511 U.S. 39, 56 (1994) (quoting *In re Chapman*, 166 U.S. 661, 667 (1897)). *See also Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (expanding the word "individual" in 2 U.S.C. § 692(a)(1) to include corporations and other entities to avoid "an absurd and unjust result which Congress could not have intended") (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982)).

The government's proposed interpretation of Section 844(h)(2) could in many instances lead to absurd results. This is particularly true in light of the statute's broad definition of "explosives" in 18 U.S.C. § 844(j), which has been interpreted to include among other things, the gunpowder in ammunition inside a loaded handgun. *See United States v. Davis*, 202 F.3d 212, 219 (4th Cir. 2000). For example, absent a

relational element, a mandatory, consecutive ten-year sentence would be imposed on a police officer who, while lawfully carrying a loaded handgun, accepts a bribe, unrelated to his possession of a handgun.

That the government's interpretation of Section 844(h)(2) would lead to absurd results was specifically noted by one member of the Ninth Circuit panel who asked the government at oral argument:

> Court: If, for example, Mr. Ressam was a licensed dynamite practitioner driving across the border in order to go to a construction site or a mine in Washington and use his dynamite and in the meanwhile he happened to be carrying something else that he didn't want the Customs to know about like, you know, diamonds, and they asked him what did he have and he said nothing, he would have violated the statute as you construe it.
>
> Government: That's correct, Your Honor. And it would certainly be –
>
> Court: What's the logic of that?
>
> Government: Your Honor it would be, I would suggest that under that extremely unusual scenario, that it would be up to the government to decide whether it would choose to indict under those facts –

Media Access, United States Court of Appeals for the Ninth Circuit, Oral Arguments, *United States v. Ressam,* No. 05-30422 (Nov. 13, 2006).[6]

3. The rule of lenity provides further support for the Ninth Circuit's conclusion. "The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-60 (1987), *superseded by statute on other grounds*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181. *See also Granderson*, 511 U.S. at 154 ("In these circumstances – where text, structure, and history fail to establish that the Government's position is unambiguously correct – we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor."). As discussed above, it is perfectly rational to interpret the statute as requiring the government prove a relationship between the carrying of the explosives and the charged penalty before a mandatory consecutive ten-year sentence is applied.

4. Finally, as fully discussed in the Ninth Circuit's opinion, the legislative history supports the conclusion that Section 844(h)(2) includes a relational element. Pet. App. 9a-11a.

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[6] http://www.ca9.uscourts.gov/ca9/media.nsf/Media+Search?OpenForm&Seq=1 (last visited Nov. 1, 2007).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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