A P P E N D I C E S

APPENDIX A

COURT OF APPEALS DECISION DENYING
MOTION TO RECALL THE MANDATE

APPENDIX B

DISTRICT COURT JUDGMENT OF SENTENCE AND COMMITMENT

APPENDIX C

PRE-SENTENCING LETTER CHALLENGING ENHANCEMENT

APPENDIX D

EXCERPT OF SENTENCING TRANSCRIPT

APPENDIX E

COURT OF APPEALS DECISION INTERPRETING ENHANCING STATUTE

APPENDIX F

MOTION TO RECALL MANDATE

A1

S.D.N.Y.-N.Y.C.
90-cr-653
Sweet, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 26th day of June, two thousand nineteen.

Present:

Pierre N. Leval,
Rosemary S. Pooler,
Denny Chin,
Circuit Judges.

United States of America,

Appellee,

v. 19-459

Jean Bernier, AKA Charles Watson,

Defendant-Appellant.

Appellant, pro se, moves to recall the mandate affirming his conviction. Upon due consideration, it is hereby ORDERED that the motion is DENIED because Appellant does not present "exceptional circumstances" warranting the recall of the mandate and the reinstatement of his appeal. *See United States v. Redd*, 735 F.3d 88, 90-92 (2d Cir. 2013) (internal quotation marks omitted); *Sargent v. Columbia Forest Prods., Inc.*, 75 F.3d 86, 89 (2d Cir. 1996).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

Catherine O'Hagan Wolfe

B1

AO 245 S (Rev. 4/90) Sheet 1 - Judgment in a Criminal Case

United States District Court

Southern District of New York

UNITED STATES OF AMERICA
V.
Jean Bernier
(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 90Cr. 0653(01)(RWS)

Susan Kellman
Defendant's Attorney

THE DEFENDANT: Jean Bernier

☐ pleaded guilty to count(s) _____.
☑ was found guilty on count(s) 1,2,3,4,5,6, and 7 by the Court after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18,USC Sections 2113(a),(d)(2)	armed robbery	3-23-90	1 and 4
18,USC Sections 924(c)	use of a firearm during the commission of a crime of violence	5-14-90	
		3-23-90 and 5-14-90	2 and 5
18,USC Section 922(g)(1) and 2	unlawful possession of a firearm in and affecting commerce	3-23-90	3
18,USC Section 922(g)(1) and 2	unlawful possession of a firearm in and affecting commerce	5-14-90 6-26-90	6 and 7

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984..

☐ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).
☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.
☐ It is ordered that the defendant shall pay a special assessment of $ 350.00, for count(s) 1,2,3,4,5,6, and 7, which shall be due ☑ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 130-46-9170

Defendant's Date of Birth: 7-6-57

6-18-91
Date of Imposition of Sentence

Defendant's Mailing Address:
Defendant is incarcerated

Signature of Judicial Officer

ROBERT W. SWEET U.S.D.J
Name & Title of Judicial Officer

Defendant's Residence Address:
Same as above

6-18-91
Date

S. DISTRICT COURT FILED JUN 18 1991 S.D. OF N.Y.

Certified as a true copy on 3/4/93
U.S. Dist. Court
By _____ Deputy Clerk

MICROFILM
JUN 18 1991 PM

B2

AO 245B (Rev. 4/90) Sheet 2 - Imprisonment

Defendant: Jean Bernier
Case Number: 90Cr. 0653(01)(RWS)

Judgment—Page 2 of 3

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of _____.

(10)TEN)years on each of Counts 1,3,4,6 and 7 to be served concurrent with each other.

(5)(FIVE)years on Count 2 to be served consecutive to Counts 1,3,4,6 and 7.

(20)(TWENTY)years on Count 5 to be served consecutive to Counts 1,2,3,4, 6 and 7.

Total Term of Imprisonment is (35)(THIRTY FIVE)years.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States marshal.
☐ The defendant shall surrender to the United States marshal for this district,
  ☐ at _____ a.m. / p.m. on _____.
  ☐ as notified by the United States marshal.
☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,
  ☐ before 2 p.m. on _____.
  ☐ as notified by the United States marshal.
  ☐ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

B3

Defendant: Jean Bernie
Number: 90Cr. 0653(01(RWS)

Judgment—Page 3 of 6

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of (3) (THREE) YEARS

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☐ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release

☐ The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer,
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons
6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician,
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered,
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court,
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement

6 U S GPO 1990 722 448 10998

C 1

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(212) 732-7200
FAX: (212) 732-7339

JOYCE C. LONDON, ESQ.
ASSOCIATE

June 10, 1991

Hon. Robert W. Sweet
United States District Judge
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: U.S.A. v. Bernier
90 Cr. 0653 (RWS)

Dear Judge Sweet:

This letter is in response to the sentencing calculations contemplated by the Court's preliminary sentencing opinion of February 25, 1991, and the Government's letter of April 4, 1991 setting forth its objections to those calculations.

The 924(e) Issue

Defendant, Bernier was found guilty on Counts Three, Six and Seven which charged that on or about March 23, May 20, and June 26, 1990, respectively, the defendant, after having been convicted of a felony offense on or about May 20, 1985, did possess a firearm in violation of 18 U.S.C. § 922 (g)(1).

According to 18 U.S.C.§924(e), if a person violates § 922 (g)(1) and has three (3) previous convictions for a violent felony or a serious drug offense or both, committed on occasions different from one another, such person shall be ... imprisoned for not less than Fifteen (15) years. In order to trigger the sentencing provision of § 924(e), the following three (3) violent felony acts were considered.

In 1976, Mr. Bernier was charged with second degree robbery for stealing a woman's pocketbook. He eventually pleaded guilty to third degree robbery for which he served one year in prison. Subsequently, at the sentencing of Mr. Bernier for a 1983

conviction for attempted robbery in the third degree, counsel for Mr. Bernier successfully argued that Mr. Bernier's prior 1976 felony plea allocution was unconstitutional, because defendant's felony plea did not meet the criteria of the Boykin test. The Assistant District Attorney at this sentencing, having reviewed the plea minutes of Mr. Bernier's 1976 felony plea, agreed that the earlier plea was unconstitutional in that it left out the right of the defendant to confront and cross-examine the witnesses in front of him and also the defendant's right to remain silent. The Assistant District Attorney then acknowledged that "the defendant is not a second felony offender." (1983 Sent. Mins. at 3). Accordingly, Mr. Bernier was not sentenced at the 1983 sentencing as a predicate felon, based on the unconstitutionality of 1976 plea.

The 1976 felony conviction thus should not now be used as one of the three previous felony convictions to enhance Mr. Bernier's present sentence. The plea was insufficient to sustain Mr. Bernier's predicate felon status at his 1983 sentencing. To this day, it remains an unconstitutional plea.

The second felony conviction used to trigger the 924(e) enhancement was Mr. Bernier's 1983 conviction for attempted robbery in the third degree. Mr. Bernier challenged this 1983 felony conviction in 1985 in state court, alleging that the 1983 plea was coerced because his attorney threatened to withdraw her representation if he did not go forward with the plea. The Court, however, ruled that there was no basis to set aside that conviction. Bernier requests a hearing at this time to determine whether that Court's ruling in 1985, based upon his counsel's coercive conduct, would invalidate that conviction as well on the grounds that Mr. Bernier was essentially unrepresented by counsel. Were the Court, after a factual hearing, to find in favor of Bernier, then his sentence, pursuant to Section 924(e), would be further reduced and his status as a career offender, albeit not relevant now, would be erroneous. The third felony conviction used to trigger the 924(e) enhancement was Mr. Bernier's 1985 guilty plea to second degree robbery.

Based on the above facts, it is clear that Mr. Bernier, at most, has only two (2) prior felony convictions which should be counted against him. Thus, §924(e) is not the appropriate sentencing section which correlates with Mr. Bernier's §922(g)(1) convictions. Rather, §924(a)(2) is the appropriate section. Section 924(a)(2) provides for not more than Ten (10) years imprisonment for violations of §922(g)(1), as opposed to the Fifteen (15) year term of imprisonment required pursuant to §924(c).

Accordingly, on Counts Three, Six and Seven Bernier should face a mandatory sentence of not more than Ten (10) years pursuant to 18 U.S.C. §924(a)(b)(2) instead of the "not less than Fifteen (15) years without possibility of parole" pursuant to 18 U.S.C. §924(e)(1). This Ten (10) year sentence may be served concurrently with the sentence on the armed robbery counts.

The Court's sentencing opinion of February 25, 1991 stated that it intended to impose a Fifteen (15) year sentence for possession of a firearm by a felon followed by Twenty-Five (25) years for using a firearm during the Commission of the two (2) bank robberies, thus subjecting Mr. Bernier to a statutory minimum of Forty (40) years.

For the reasons outlined above, we submit that Mr. Bernier should be sentenced to no more than Ten (10) years on Counts Three, Six and Seven for possession of a firearm by a felon.

The 924(c) Issue

Mr. Bernier was charged with and found guilty of two counts (Counts Two and Five) of using a firearm during the commission of a violent crime in violation of 18 U.S.C. §924(c). With regard to these §924(c) counts, the Court has ruled in its Sentencing Opinion dated February 25, 1991 that both the first and second violations of §924(c) may be charged in a single indictment. Thus, Mr. Bernier faces a minimum of Twenty-Five (25) years on these two counts, consecutive to any other sentence. Mr. Bernier respectfully objects to this ruling and submits that the §924(c) enhancement should not be triggered by two (2) violations charged in the same indictment.

Title 18 U.S.C. Section 924(c) provides that "[w]hoever, during and in relation to any crime of violence ... for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence ... be sentenced to imprisonment for five (5) years. ... In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years. ..."

The issue in this case is the interpretation of the phrase "second or subsequent". Specifically, whether the statute must be interpreted in such a fashion that the "second or subsequent" conviction must be on a second or subsequent indictment, and cannot be a second or subsequent conviction on the same indictment.

This is a case of first impression in the Second Circuit. To date, only three (3) other circuits have considered the issue. The Eleventh Circuit has held that both the first and second violations

of §924(c) may be charged in a single indictment. United States v. Rawlings, 821 F.2d 1543 (11th Cir.), reh'g denied 829 F.2d 1132 (11th Cir.), cert denied, 484 U.S. 979, 108 S.Ct. 494 (1987). The Eleventh Circuit in reaching this holding found that the plain language of the statute was controlling. Rawlings, 821 F.2d at 1547. This holding has been followed by both the Seventh and Eight Circuits. See United States v. Foote, 898 F.2d 659 (8th Cir. 1990); United States v. Bennett, 908 F.2d 189 (7th Cir. 1990).

Section 924(c) was adopted as an amendment to the Gun Control Act of 1968. At the time of its adoption, there were no federal sentencing guidelines -- nor were the guidelines contemplated (to this writer's knowledge).* The intent of Congress in passing §924(c) was to send a clear message that if a person commits a federal felony using a gun, is caught and convicted, he is certain to go to jail. And, that repeat offenders will be punished more harshly. 114 Cong. Rec. 22231 (1968).

With the adoption of the federal sentencing guidelines on November 1, 1987, federal sentences under the guidelines became much more severe. A guideline sentence in conjunction with a §924(c) mandatory consecutive sentence is a harsh punishment. A guideline sentence with a second enhancement pursuant to §924(c) becomes Draconian.

Since this issue is still open in the Second Circuit, we strongly argue that the Court should not adopt the rule of the other circuits because these harsh results could not have been contemplated by the Congress back in 1968.

Career Offender Issue

The Court, in its Sentencing Opinion dated February 25, 1991, has stated that it intends to downwardly depart from the sentence specified by the guidelines. This departure is predicated on the Court's belief that the instant case presents a situation "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." Specifically, the Court wrote "there is no indication that the Sentencing Commission contemplated the case in which an offender's sentence would be enhanced both by the career criminal provisions of the guidelines and by the enhancement provision for a second violation of § 924(c)."

Mr. Bernier is not challenging the Court's finding that he fits the guideline criteria for a career criminal pursuant to

---

*Frankly, the federal sentencing guidelines seem an unlikely Johnson Administration agenda.

Guideline 4B1, at this time. But in the event that the government appeals the Court's decision to downwardly depart based on the fact that the guidelines do not adequately take into account the effect of the double enhancement pursuant to §924(c) and the career criminal provisions, and seeks to have Mr. Bernier's status as a career criminal reinstated, Mr. Bernier wishes to reserve the right to challenge the finding that he is a career criminal at that time, in the unlikely event that it becomes necessary.

For the reasons outlined in this letter, we submit to the Court that Mr. Bernier should be sentenced to no more than Ten (10) years to be served concurrently on Counts Three, Six and Seven. In the event that the Court rules that a second or subsequent violation of §924(c) must be in a separate indictment, then the Ten (10) year sentence should only be followed by a mandatory Five (5) year consecutive sentence.

Very truly yours,

Susan G. Kellman

SGK/pb

cc: A.U.S.A. Miguel Estrada
U.S.P.O. Thomas E. Mixon
Mr. Jean Bernier

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA

v. 90 Cr. 653

JEAN BERNIER,

Defendant.

----------x

June 11, 1991
1:30 p.m.

Before:

HON. ROBERT W. SWEET

District Judge

APPEARANCES

OTTO G. OBERMAIER,
United States Attorney for the
Southern District of New York,
MIGUEL ESTRADA
Assistant United States Attorney

SUSAN KELLMAN
Attorney for defendant

other side of the isle.

What is clear from a reading of it, the Government, the people in 1983, determined that it was appropriate to not sentence Mr. Bernier as a second felony offender, and I think given that decision by the People, and in their prosecution, their own perception was this was an inappropriate method for the state court to proceed.

I would hate to think Mr. Bernier would be sentenced now as a three-time felony predicate, if that's an expression we can use just for its descriptiveness because somebody should have corrected the record and didn't correct the record.

What is clear, the court has adopted the statements by the defense counsel in '83, and the Government's concurrence with those factors. I think it would be unfair to characterize it as a waiver since the People make an affirmative decision, they agree he's not a second felony offender, state law requires he not be given the sentence he were given if in fact he were a second felony offender.

THE COURT: Mr. Bernier, anything you want to add to what your counsel has stated on your behalf?

THE DEFENDANT: Yes. I had wanted to speak about the Rawlings issue, the second enhancement of 924(c). I thought that shouldn't be applied. That's a big jump from

five to twenty years, and I won't quite agree with Rawlings what second subsequent means for one to be sentenced before incarcerated for something, and then punished after that would be okay, but to be punished immediately for a second subsequent and first conviction, I disagree with that, and I believe counsel raised -- I guess we disagree also -- and on the career offender issue. I'm talking about the guidelines career offender, 924(e). Counsel raised that also in her papers, and I would disagree with that adjudication also, but I assume you're willing to go ahead with sentencing.

I'm basically angry and frustrated at this whole process. I think there should be some type of balance, you know, regardless of what type of behavior is being punished for, and to give me a 40 or 50 year sentence is basically giving me a death sentence. Whether it is your fault or not, that is not the point here, it has to be done, and telling me that for the rest of my life I should be banned from society, I really don't know how to accept this. Age 33, I don't think I should reject myself, and that's what they're asking me to do at this point in time.

I know people who committed more heinous crime and damage and they still have an opportunity to be given to chance to go back out to society, and I can't quite grasp it, and I shall never grasp it. If I am made to do all this time, and I don't personally believe I shall ever finish the

time, I would not give society the pleasure of having me rot in jail, and this is a matter of disbelief at the type of time that I face and lack of understanding.

THE COURT: Thank you, sir.

I've reviewed the letters that have been submitted to me, which will be a part of this record.

I am going to modify the sentencing opinion. I am going to disregard the '76 conviction. As I understand it, that will mean there will be a 35 year term of imprisonment, and the remainder of the sentence remains in effect.

As to the 924(c) point, I don't agree with Ms. Kellman. I think that can all come in in the same indictment.

Anything further?

MS. KELLMAN: Nothing, your Honor.

MR. ESTRADA: Just note our objections for the record, for the reasons set forth in our letters, your Honor.

THE COURT: Of course, of course.

Mr. Bernier, my clerk reminds me it was so long ago I did forget, you did go to trial, you have a right to appeal, you have a right to be represented by a lawyer free of charge on that appeal.

MR. ESTRADA: One final matter, he was convicted

on seven felony counts, which carries a fifty-year mandat assessment.

MS. KELLMAN: $50, not 50 years.

THE COURT: $350 on top of everything else.

(Court is adjourned))

E1 SDNY 90-cr-653 Sweet

MANDATE

United States Court of Appeals

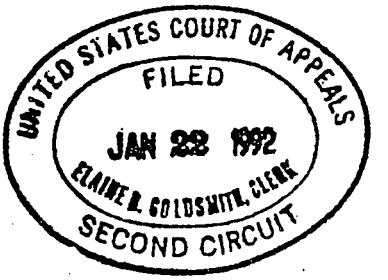
FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 22nd day of January, one thousand nine hundred and ninety-two.

PRESENT: HON. WILLIAM H. TIMBERS
HON. ROGER J. MINER
HON. FRANK X. ALTIMARI

Circuit Judges,



UNITED STATES OF AMERICA,

Appellee-Cross-Appellant,

-against-

91-1370
91-1408

JEAN BERNIER, also known as Charles Watson,

Defendant-Appellant-Cross-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED and DECREED that the judgment of said district court be and it hereby is affirmed in accordance with the opinion of this court.

ELAINE B. GOLDSMITH, Clerk
By:

Edward J. Guardaro

A TRUE COPY
ELAINE B. GOLDSMITH
by Kathy Brown
Deputy Clerk

ISSUED AS MANDATE. 2-13-92

E2

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 448--August Term, 1991

(Argued December 3, 1991 Decided JAN 22 1992

Docket Nos. 91-1370, -1408

UNITED STATES OF AMERICA,

Appellee-Cross-Appellant,

-against-

JEAN BERNIER, also known as Charles Watson

Defendant-Appellant-Cross-Appellee.

Before: TIMBERS, MINER and ALTIMARI, Circuit Judges.

Appeal from judgment of the United States District Court for the Southern District of New York (Sweet, J.) convicting appellant after a bench trial on two counts of using a firearm during the commission of a crime of violence, and imposing enhanced penalty of twenty years for the second conviction.

Affirmed.

E-3

MIGUEL A. ESTRADA, Assistant United States Attorney, New York, NY (Otto G. Obermaier, United States Attorney, Daniel C. Richman, Assistant United States Attorney, New York, NY, of counsel), for Appellee-Cross-Appellant.

SUSAN G. KELLMAN, New York, NY, for Defendant-Appellant-Cross-Appellee.

E-4

PER CURIAM:

Defendant-appellant Jean Bernier, also known as Charles Watson, was arrested on July 30, 1990, in connection with the March 1990 robbery of a branch office of Seamen's Bank, and the May 1990 robbery of a branch office of Chase Manhattan Bank. An indictment for both robberies, filed on October 4, 1990, charged Bernier with two counts of bank robbery, see 18 U.S.C. § 2113; two counts of using a firearm during the commission of a crime of violence, see id. § 924(c); and three counts of possession of a firearm by a convicted felon, see id. § 922(g). After a bench trial, Bernier was convicted of all counts on December 4, 1990. In addition to the sentences imposed for the other convictions, Judge Sweet imposed a five year sentence for one of the section 924(c) convictions, and an enhanced 20 year sentence for Bernier's other section 924(c) conviction. In total, Bernier was sentenced to imprisonment for a term of 35 years.

Bernier now challenges the imposition of the enhanced 20 year penalty. He argues that neither the language of section 924(c) nor the intent of Congress supports imposition of the enhanced sentence for the second of two simultaneous convictions under the statute. Bernier also suggests that the statute does not provide notice, consistent with due process, of such a sentencing scheme.

Bernier also contends that he was denied the effective assistance of counsel at trial, in violation of his Sixth Amendment rights, and that one of the counts in his indictment

should have been dismissed with prejudice as brought in violation of 18 U.S.C. § 3161 (Speedy Trial Act). While the United States filed a notice of appeal challenging the district court's downward departure from the United States Sentencing Guidelines range for Bernier's non-section 924(c) convictions, the parties stipulated on October 1, 1991, to dismissal of the government's cross-appeal. We will address only Bernier's section 924(c) claim, which raises an issue of first impression in this Circuit, having considered Bernier's other contentions and found them to be without merit. For the reasons that follow, the judgment of the district court is affirmed.

DISCUSSION

We begin our analysis of Bernier's section 924(c) claim with the language of the statute, and give the words used in the statute their ordinary meaning. See Moskal v. United States, 111 S. Ct. 461, 465 (1990) (citations omitted); Netherlands Shipmortgage Corp. v. Madias, 717 F.2d 731, 733 (2d Cir. 1983) (citations omitted). Section 924(c) provides, in pertinent part, that

> "[w]hoever, during and in relation to any crime of violence . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence . . . be sentenced to imprisonment for five years . . . . In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years . . . ."

See 18 U.S.C. § 924(c)(1) (emphasis added). The plain language of the statute -- "second or subsequent" -- means that the enhanced 20 year penalty must be imposed notwithstanding the

simultaneity of the second conviction. While it is conceivable that the word "subsequent" is used as a synonym for the word "second" in section 924(c), the use of the connector "or" (rather than "and"), and the absence of commas around the "or subsequent" phrase, suggest that each word in the statute was meant to be different; hence the use of different words.

Indeed, courts must give effect to every word of a statute where possible. See Bowsher v. Merck & Co., 460 U.S. 824, 833 (1983) (citing Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 163 (1982)). The sole exception to this rule of construction applies where the statute groups words together in a list, in which case the words should be given a related meaning. See Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys., 468 U.S. 207, 218 (1984) (citing Third Nat'l Bank v. Impac Ltd., 432 U.S. 312, 322 (1977)). No "list" appears in section 924(c), which contains only two words. Accordingly, each word should be given separate effect according to its plain meaning.

Bernier's attempt to draw an analogy between section 924(c) and section 4B1.1 of the United States Sentencing Guidelines, which requires convictions separated in time to enhance a sentence, is misplaced. Section 4B1.1 of the Guidelines states that a "career offender" is one who has "two prior felony convictions." See U.S.S.G. § 4B1.1 (emphasis added). Section 4B1.2(3) of the Guidelines further elaborates that "'two prior felony convictions' means . . . the defendant

committed the instant offense subsequent to sustaining at least two felony convictions." See id. § 4B1.2(3). Therefore, as we have pointed out, the language of the Sentencing Guidelines plainly requires that the conviction for which an enhanced penalty is imposed occur after the other convictions. See United States v. Chartier, 933 F.2d 111, 113-14 (2d Cir. 1991). This language is much different from the language of section 924(c). We have held that even as to the two prior felony convictions required for enhancement under the Sentencing Guidelines, a conviction for the first felony offense need not precede commission of the second felony offense. See id. at 114; see also United States v. Mitchell, 932 F.2d 1027, 1028 (2d Cir. 1991) (per curiam) (analogous holding under 18 U.S.C. 924(e) (Armed Career Criminal Act)).

The provisions of section 924(e) demonstrate that when Congress intends to require prior convictions as a predicate for enhanced sentencing, it uses clear language to effectuate its intent. See 18 U.S.C. § 924(e) (enhanced sentence imposed on person who "violates section 922(g) of this title and has three previous convictions . . . for a violent felony . . . committed on occasions different from one another"). Because section 924(c) clearly mandates enhanced sentencing in the case of a second but simultaneous conviction under the statute, we also believe that the statute does not violate due process on grounds of vagueness or lack of notice. See Kolender v. Lawson, 461 U.S. 352, 357 (1983) (criminal statute consistent with due process

where offense is defined in such a way that ordinary people can understand what is prohibited and arbitrary or discriminatory enforcement is not encouraged).

Although we need not consider the legislative history of section 924(c) because of the statute's clarity, we note that the legislative history surveyed by Bernier does not contradict the plain language of the statute. Rather, the legislative history makes clear the intent of Congress to deter multiple commissions of a crime with a gun. Bernier contends that deterrence is most effective when the enhanced penalty is imposed only in connection with a subsequent conviction. We do not agree. Under the plain language of section 924(c), an enhanced deterrent effect is felt (if at all) as soon as the first crime is committed, rather than later, when the first conviction is obtained. Surely this provides deterrence at least as effective as that provided by Bernier's preferred interpretation of the statute. Nor is there any basis in the legislative history for claiming, as Bernier does, that Congress intended to give defendants a "second chance" or a "chance to learn their lesson." The theme of deterrence present in the legislative history, clearly reflected by the language of the statute, suggests that the lesson is to be learned, if necessary, all at once.

We note also that our conclusion about the applicability of enhanced sentencing under section 924(c) has been reached, on similar reasoning, by the Fourth Circuit, see United States v. Raynor, 939 F.2d 191, 193-94 (4th Cir. 1991);

the Sixth Circuit, see United States v. Nabors, 901 F.2d 1351, 1358 (6th Cir.), cert. denied, 111 S. Ct. 192 (1990); see also United States v. Livingston, 941 F.2d 431, 435-36 (6th Cir. 1991); the Seventh Circuit, see United States v. Bennett, 908 F.2d 189, 194 (7th Cir.), cert. denied, 111 S. Ct. 534 (1990); the Eighth Circuit, see United States v. Foote, 898 F.2d 659, 668 (8th Cir.), cert. denied, 111 S. Ct. 112 (1990); and the Eleventh Circuit, see United States v. Rawlings, 821 F.2d 1543, 1545-46 (11th Cir.), cert. denied, 484 U.S. 979 (1987). While the Third Circuit has reversed a section 924(c) case with instructions to impose only a single 5 year sentence for two section 924(c) convictions, it appears to have done so because the government stipulated five years as the appropriate penalty. See United States v. Torres, 862 F.2d 1025, 1032 (3d Cir. 1988).

CONCLUSION

The judgment of the district court is affirmed.

F 1

UNITED STATES OF AMERICA,

Appellee,

-against-

JEAN BERNIER,

Defendant-Appellant.

AFFIDAVIT IN SUPPORT
OF
MOTION TO RECALL MANDATE

91-1370

Jean-Gabriel Bernier, Appellant pro se in the above captioned matter declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. That on June 11, 1991, Appellant after having been convicted at trial in December, 1990, was sentenced to the following:

a) Ten years each on three counts of 18 U.S.C. § 922(g);

b) Ten years each on two counts of 18 U.S.C § 2113(a) & (d) to run concurrent to the above;

c) Five years on one count of 18 U.S.C. 924(c) and Twenty years on a second count of 924(c) to run consecutive to the first count of 924(c) and consecutive to the above;

A total of Thirty-five years.

See Exhibits A-1.

2. That prior to sentencing by the Honorable Judge Sweet, Defendant's attorney at the time, Ms. Susan Kellman, filed a letter with the court objecting to the enhancement of the sentence for the "second and subsequent" conviction of 924(c) when the second conviction is simultaneous with the first 924(c) conviction. Exh. B-3.

3. That at the sentencing, Appellant went on the record objecting to

F-2

the 20-year "second and subsequent" enhancement for 924(c) occurring at the same time on the basis that the statute called for incarceration on the first one before the enhancement kicked in for a second and subsequent 924(c) conviction. Exh. C-2.

4. The issue was raised on appeal in this Court as a matter of first impression in the Court. The Court opined that the intent of Congress was to enhance the second and subsequent 924(c) even if the second 924(c) conviction is "simultaneous" with the first 924(c) conviction. By Order dated January 22, 1992, the Court affirmed the district court judgment. Exh. D. The Mandate issued on February 13, 1992. Exh. E.

5. On December 21, 2018, President Donald J. Trump signed the "First Step Act" into law. Section 403 of the Act called "Clarification of Section 924(c) of Title 18, United States Code" struck out the premise for enhancement from "second or subsequent conviction under this subsection" to "violation of this subsection that occurs after a prior conviction under this subsection has become final". The exact meaning to the statute which Defendant-Appellant had advocated twenty-eight years prior and rejected by the Court. Exh. F.

6. Section 403 was made to apply to any defendant sentenced subsequent to its passage.

Respectfully Submitted,

Dated: 01/07/19

Jean Bernier
29463-054
~~FMC Butner~~ FCI Allenwood
~~P.O. Box 1600~~ P.O. Box 2000
Butner, N.C. 27509

F-3

UNITED STATES OF AMERICA,

Appellee,

-against-

JEAN BERNIER,

Defendant-Appellant.

MEMORANDUM OF LAW
IN SUPPORT OF
MOTION TO RECALL MANDATE

91-1370

The courts of appeals are recognized to have an inherent power to recall their mandates, subject to review for an abuse of discretion. See Coleman v. Thompson, 523 U.S. 538, 549(1998). Amendments to the federal judicial code in 1948 extended this power beyond the current term of court and the Court has the power to reopen a case at any time. See Sargent v. Columbia Forest Products, Inc., 75 F.3d 86, 89(2d Cir. 1995).

In light of the profound interests in repose attaching to the mandate of a court of appeals, however, the power can be exercised only in extraordinary circumstances. The sparing use of the power demonstrates it is one of last resort, to be held in reserve against grave, unforeseen contingencies. See Coleman, id. No formal test governs the exercise of this discretionary power.[1/] See Taylor v. v. United States, 822 F.3d 84, 90(2d Cir. 2016).

1/. As there is no formal test to guide the exercise of the Court's discretionary power, one is reminded of Justice Stewart's famous test for obscenity propounded in Jacobellis v. Ohio, 378 U.S. 184, 197 (1964), "I know it when I see it".

Whether the power is exercised at all falls within the discretion of the court, but such discretion should be employed to recall a mandate only when good cause or unusual circumstances exist sufficient to justify modification or recall of a prior judgment. See Zipfel v. Halliburton, 861 F.2d 565, 567(9th Cir. 1988). One circumstance that may justify recall of a mandate is a supervening change in governing law that calls into serious question the correctness of the court's judgment." See Yong Wong Park v. United States, 441 Fed. Appx. 18, 20(2d Cir. 2011) citing Mancuso v. Herbert, 166 F.3d 97, 100(2d Cir. 1999).

The Court's ruling that the second conviction for a 924(c) offense is subject to the twenty-year enhancement(now twenty- five years) even if simultaneously obtained with the first 924(c) conviction has been specifically abrogated by Section 403 of the "First Step Act", signed into law in December, 2018 by the President of the United States of America, Donald J. Trump. The section "clarified" the meaning of the 924(c) statute as to when an enhancement for a subsequent conviction can be meted out. The section did not change any of the penalties, forfeitures and liabilities of the statute.

In discussing equitable considerations we can not ignore the fact that [fifteen additional years] imprisonment based on an incorrect legal ruling is a quintessential miscarriage of justice. See Cornell v. Nix, 119 F.3d 1329, 1333 (8th Cir. 1996). Which ruling Appellant specifically objected to at all stages of the adjudicatory process on the specific basis which Congress made clear as to the meaning of the statute from its origination in passing section 403. Cf. Bottone v. Umited States, 350 F.3d 59, 63-4(2d Cir. 2003)(suggesting if Bottone had raised the issue he based his motion to recall the mandate during his direct appeal, it may have been considered).

F-5

A court is prohibited from imposing criminal punishment beyond what Congress in fact has enacted by a valid law. A court lacks the power to exact a penalty that has not been authorized by law. See Welch v. United States, 194 L. Ed. 2d 387, 403(2016). Where the conviction or sentence in fact is not authorized by substantive law, then finality interests are at their weakest. Welch, supra at 401. As Justice Harlan wrote in Mackey v United States, 401 U.S. 667, 693(1971), "there is little societal interest in permitting the criminal process where it ought properly never to repose". In appropriate cases, the principles of comity and finality that inform the concepts of [recalling the mandate and reconsideration] of a legal ruling by the Court] must yield to the imperative of correcting a fundamentally unjust incarceration. See Murray v. Carrier, 477 U.S. 478, 495(1986).

The fundamental miscarriage of justice exception seeks to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case. See Schlup v. Delo, 513 U.S. 298, 324(1995). To ensure that the fundamental miscarriage of justice exception would remain rare and would only be applied in the "extraordinary case" while at the same time ensuring that the exception would extend relief to those who were truly deserving, this Court explicitly tied the miscarriage of justice exception to the petitioner's innocence. See Schlup, supra at 321.

It would be difficult to think of one who is more innocent of a sentence than a defendant sentenced under a statute that by its very terms does not even apply to the defendant. See Jones v. Arkansas, 929 F.2d 375, 381(8th Cir. 1990); See also, United States v. Maybeck, 23 F.3d 888, 893-94(4th Cir. 1993)(actual innocence in the non-capital sentencing context).

Appellant believes that he has shown that the Court has the power to recall its mandate in this matter. Appellant further believes that the Court is compelled to reconsider its ruling in light of the unusual circumstance of Congress explicitly abrogating the Court's ruling on the exact same basis which Appellant had raised to the Court on his direct appeal.

The dictionary defines extraordinary as "going beyond what is usual,regular or customary". Merriam-Webster's Collegiate Dictionary, Tenth Edition, 1999. By all definitions, the instant circumstance does not occur on a usual, regular or customary basis. Moreover such an occurence rarely exposes an error which works such a manifest injustice.

A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manisfest injustice. See Christianson v. Colt Industries, 486 U.S. 800, 817(1988).

Two considerations before Appellant takes leave of the Court. The first consideration is the matter of precedent. That consideration is easily resolved by the Court's ruling in Gilmore v. Shearson/ American Express, Inc., 811 F.2d 108, 111(2d Cir. 1986), which held that the Court was not bound by precedent when guided by higher authority or by Congress.

The second consideration which might have to be addressed is Title 1 § 109, the general savings statute. Appellant foresees the Government hiding behind the skirt of that statute as they had successfully done with the "Fair Sentencing Act" in the early 2010s. But, there is a major, decisive difference between the FSA and the clarification of 924(c) by Congress.

§ 109 states in pertinent part that "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide,...".

Appellant first posits that the Court is not circumscribed by any statute to recognize that it has made an error in interpreting a statute, 924(c), in one of its rulings, no matter what source the Court draws upon to recognize its error. The Court is using its inherent Article III authority to correct one of its rulings in order to cure a miscarriage of justice. That authority is independent and stems from the United States Constitution. It can not be limited by a statute.

Second and more importantly, § 109 is not applicable to the " Clarification of 924(c)" embodied in the "First Step Act", to limit its use to cases sentenced prior to its passage. The language of the clarification does not amend any of the penalties, forfeitures or liabilities of the 924(c) statute that § 109 addresses. The

clarification simply states explicitly the methods employed in determining whether the punishment is to be imposed rather than changing the quantum of punishment attachmed to the crime. As such, it is a procedural change. See Lynce v. Mathis, 519 U.S. 433, 447 fn. 17(1997).

The savings clause does not preserve discarded remedies and procedures. See Warden v. Marrero, 417 U.S. 653, 661-62(1974). There is in short, nothing of substance to preserve, for that which was still is. See United States v. Blue Sea Line, 553 F.2d 445, 450 (9th Cir. 1971). § 109 can not prevent the correction of a penalty which was erroneously imposed through an incorrect procedure. Iterating Justice Harlan in Mackey, supra at 693,"there is little societal interest in permitting the criminal proces to restat a point where it properly never to repose". Especially so, when that penalty is over the statutory maximum the court is authorized to impose.

WHEREFORE, the Appellant respectfully requests that the Court recalls the mandate of February 13, 1992 and reconsider its decision of January 22, 1992 and remand this matter to the district in order for Appellant to be properly sentenced pursuant to the proper interpretation of the 924(c) statute as clarified by Congress; and, should the Court find that a more learned and robust briefing of the Appellant's argument would aid the Court in its adjudication, Appellant urges the Court to appoint counsel.

Dated: 01/07/19

Respectfully Submitted,

Jean Bernier
29463-054
FCI Allenwood
P.O. Box 2000
White Deer, Pa. 17887

F-9

CERTIFICATE OF SERVICE

Jean Bernier, Appellant in the foregoing matter, declares under penalty of perjury pursuant to 28 U.S.C. § 1746 that he forwarded a copy of the foregoing Motion To Recall The Mandate to the Office of the United States Attorney for the Southern District of New York addressed to One St. Andrew's Plaza, New York, New York, 10007 via the United States Postal Service Service by first-class postage.

Respectfully Submitted,

Dated: 01/07/19

Jean Bernier
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