No. 22-49

In The
Supreme Court of the United States

EFRAIN LORA,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

AMICUS CURIAE BRIEF OF AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

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AMICUS CURIAE BRIEF OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

The undersigned respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

INTERESTS OF THE *AMICUS CURIAE*

The American Bar Association (ABA) is the largest voluntary association of attorneys and legal professionals in the world. Its members come from all fifty states, the District of Columbia, and the United States territories. Its membership includes attorneys in law firms, corporations, nonprofit organizations, and local, state, and federal governments, as well as judges, legislators, law professors, law students, and associates in related fields.[2]

Since its founding in 1878, the ABA has worked to improve the justice system. The ABA Criminal Justice Standards (ABA Standards) are among the ABA's most

[1] No counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief, and no person or entity, other than the *amicus curiae* or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] Neither this brief nor the decision to file it reflects the views of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief, nor was the brief circulated to any member of the Judicial Division Council before filing.

prominent efforts to improve the criminal justice system, including sentencing. The issue in this case—whether the prohibition on concurrent sentences in 18 U.S.C. § 924(c)(1)(D)(ii) is triggered when a defendant is convicted and sentenced under 18 U.S.C. § 924(j)—lies at the core of many policies in the ABA Standards and its other work in the area of criminal justice. The ABA respectfully suggests that these works, which reflect the consensus of a broad range of practitioners and others involved with sentencing issues, will help the Court consider the issue of statutory construction of Section 924(c) and 924(j).

Begun in 1964 under then-ABA President (and later Associate Justice) Lewis F. Powell, Jr., the ABA Standards "have reflected a consensus of the views of representatives of all segments of the criminal justice system," and are not only viewed as "pre-eminent" but also "balanced and practical." Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 Crim. Just. 10, 10, 14 (Winter 2009). When the final volume of the first edition of the ABA Standards was published in 1974, Warren Burger, Chair of the ABA Standards project until his appointment as Chief Justice of this Court in 1969, described the ABA Standards as "'the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history' and recommended that '[e]veryone connected with criminal justice . . . become totally familiar with [the ABA Standards'] substantive content.'" *Id*. at 10 (quoting

Warren R. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251 (1974)).

The ABA has continued to develop and refine the Standards in the decades since, through the efforts of broadly representative task forces made up of prosecutors, defense lawyers, judges, academics, members of the public, and others with special interests in the subject, as well as the diverse membership of the ABA.[3] Indeed, as the co-reporters of the third edition of the ABA Standards on sentencing have observed, "[t]he [S]tandards' value resides [ ] in the depth of their foundation. Where they take bold stands, . . . there need be no suspicion that the boldness comes from the fringe. In every jurisdiction they may safely be consulted as a structural template for the process of sentencing reform." Kevin R. Reitz & Curtis R. Reitz, *The American Bar Association's New Sentencing Standards*, 6 Fed. Sent'g Rep. 169, 172 (1993).

Courts regularly rely on the ABA Standards in deciding cases. More than 120 United States Supreme Court opinions quote from or cite the Standards or their accompanying Commentary; state supreme courts have cited them in more than 2,400 opinions. Martin Marcus, *supra*, 23 Crim. Just. at 11. *See*, *e.g.*, *Moran v. Burbine*, 475 U.S. 412, 440-41 (1986) (Stevens,

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[3] Once approved by the ABA's House of Delegates, the ABA Standards, including any amendments, become official ABA policy. The House of Delegates consists of more than 500 representatives from states and territories; state and local bar associations; affiliated organizations; ABA sections, divisions, and members; and the Attorney General of the United States, among others.

J., dissenting) (noting that the Court "frequently finds [the ABA Standards] helpful"); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Buchanan v. Kentucky*, 483 U.S. 402, 418 (1987); *Spaziano v. Florida*, 468 U.S. 447, 463 n.8 (1984) (overruled on other grounds in *Hurst v. Florida*, 577 U.S. 92 (2016)); *Estelle v. Williams*, 425 U.S. 501, 504 (1976).

The ABA has also examined the state of the criminal justice system in the United States, including sentencing, through the Justice Kennedy Commission, formed in response to Justice Anthony Kennedy's address to the ABA at its 2003 annual meeting. The Commission presented its report, the Kennedy Commission Report, to the ABA House of Delegates at its 2004 Annual Meeting, which adopted the Report's recommendations as ABA policy.[4]

Collectively, the Standards and the Report disapprove of mandatory minimum sentences for specific offenses, call for judicial discretion in imposing individual sentences, and endorse a system that does not require consecutive sentences for multiple offenses

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[4] While the report bears Justice Kennedy's name, Justice Kennedy did not participate in the work of the Commission, nor did Justice Kennedy endorse or otherwise approve the positions taken in the report. The Report is available through the ABA's website. *See* ABA Justice Kennedy Comm'n, *Reports with Recommendations to the ABA House of Delegates* (Aug. 2004) (Kennedy Comm'n Report), *available at* https://www.americanbar.org/content/dam/aba/publications/criminaljustice/justice-kennedy-commission-reports.pdf.

but instead allows for flexible, graduated punishments.

SUMMARY OF ARGUMENT

Petitioner explains why principles of statutory construction do not compel mandatory consecutive sentences under Section 924(c) (use or possession of a firearm in relation to a crime of violence or drug trafficking) when, as here, the defendant is convicted and sentenced under a different subsection, Section 924(j) (causing the death of a person through use of a firearm while violating Section 924(c)). We do not repeat those arguments.

Instead, the ABA offers the ABA Standards and the Kennedy Commission Report as more support for why the statutory construction urged by Petitioner leads to a principled outcome. The reading urged by Petitioner would, consistent with the ABA Standards, preserve the individual sentencing discretion of the trial judge, limit mandatory consecutive firearm sentences to direct violations of Section 924(c), and thereby cabin a form of mandatory minimum sentencing disfavored by the Standards.

ARGUMENT

The ABA Criminal Justice Standards Support the Statutory Construction Urged by Petitioner.

A. The consecutive sentence imposed on Petitioner represents one form of mandatory minimum sentencing. The ABA Standards and Kennedy Commission Report disfavor mandatory minimum sentences.

As the ABA Standards reflect, the legal profession has long been concerned about mandatory minimum sentences. As far back as 1968, Standard 18-3.2(a) cautioned that it was generally "unsound for the legislature to require that the court impose a minimum period of imprisonment." The second edition of the Standards repeated this caution, this time in Standard 18-4.3(a).

The current third edition of the ABA Standards on Sentencing goes even further, asserting in ABA Criminal Justice Standards Comm., *ABA Standards for Criminal Justice Sentencing*, Standard 18-3.21(b) (3d ed. 1994): "A legislature should not prescribe a minimum term of total confinement for any offense." This "long-standing ABA policy," the Commentary explains, stemmed from research showing that "fixed legislative severity judgments are overly roughshod when applied uniformly to one class of offense, removing the ability of other actors within the [criminal justice] system to respond to case-specific factors." ABA Standards,

Standard 18-3.21 Commentary at 135. *See also* Reitz & Reitz, *supra*, 6 Fed. Sent'g Rep. at 169 (The third edition of "the [S]tandards continue[s] the longstanding ABA policy of disapproving mandatory minimum sentences for specific offenses."). The Kennedy Commission Report also recommended that mandatory minimum sentences be avoided in favor of allowing sentencing courts to consider the unique characteristics of offenses and offenders and to increase or decrease individual sentences. Kennedy Comm'n Report at 26.

The disfavor of mandatory minimum sentences expressed in both the ABA Standards and the Kennedy Commission Report stems from an underlying concern that mandatory minimums imposed by the legislature not only limit the trial court's discretion, but also shift considerable discretion to the prosecutor.

In a world where the charge mandates the sentence, prosecutors' charging and plea decisions drive sentencing. *See* Kennedy Comm'n Report at 3, 6-7. With mandatory minimum sentences for the use of firearms in the commission of felonies, studies show that prosecutors "find ways to circumvent mandatory minimum sentences, by either dismissing cases at earlier stages or plea bargaining to other charges that do not carry mandatory minimums." Jill Farrell, *Mandatory Minimum Firearm Penalties: A Source of Sentencing Disparity?*, 5 Just. Res. & Pol'y 95, 96 (2003). "Ultimately it is the prosecutor who offers the plea bargain to the defense attorney and who plays the primary role in determining which defendants receive the

sentences with or without mandatory minimums." *Id*. at 97. A United States Sentencing Commission report on the charging practices for Section 924(c), for example, showed that the firearm penalty was "not applied in 41% of the bank robbery and drug trafficking cases where it was warranted," and use of the penalty varied by jurisdiction. *Id*. at 98.

As Justice Kennedy himself observed in his speech to the ABA that led to the formation of the Kennedy Commission: a mandatory minimum policy "gives the decision to an assistant prosecutor not trained in the exercise of discretion and takes discretion from the trial judge. The trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way. Most of the sentencing discretion should be with the judge, not the prosecutors." Kennedy Comm'n Report at 3. *Accord*, ABA Standards, Standard 18-2.6 Commentary at 35 ("No legislature or sentencing agency, however diligent, can forecast the appropriate sanction for every particular case. . . . [S]entencing courts are the best-positioned governmental actors to make such case-specific judgments. By institutional training, judges have long experience in rendering particularized outcomes within a legal framework, and their decisions are uniquely public and subject to appellate review.").

Requiring sentences for multiple offenses to be imposed consecutively, as the Government urges here, would go against the policy of allowing judges rather than prosecutors to exercise sentencing discretion in individual cases. Even more troubling, it would endorse

a form of mandatory minimum sentence by requiring sentences for multiple separate offenses to be served sequentially rather than at the same time; such back-to-back sentences constitute a form of mandatory minimum sentencing, which the ABA Standards disfavor.

B. The ABA Standards also favor the exercise of judicial sentencing discretion, including the imposition of concurrent or less than consecutive sentences in individual cases.

Petitioner explains how both federal common and statutory law favor concurrent sentences for multiple offenses and how, "when a criminal statute is silent on whether sentences should run concurrently or consecutively, the choice rests with the sentencing judge—as it has for hundreds of years." Pet. Br. at 12. Indeed, "the concept of individualized sentencing in criminal cases" "has long been accepted in this country." *Lockett v. Ohio*, 438 U.S. 586, 602 (1978) (plurality opinion).

The ABA Standards reflect this, including the importance of safeguarding judicial sentencing discretion in individual cases.

The third edition of the ABA Standards views sentencing as a system comprised of three branches of decisionmakers: legislative, intermediate, and judicial. *See* ABA Standards, Introduction at xviii ("[t]he third edition adopts the premise that sentencing must be viewed as an integrated system with purposes, structures, resource needs, processes, and consequences").

The legislative role extends to basic policy decisions, including sentencing structure and procedures; the intermediate function is embodied in an agency or sentencing commission which does the work "in between" the legislature's statutory commands and the case-by-case decisions of sentencing judges. *See* ABA Standards, Standard 18-1.2 Commentary at 3 ("Under these Standards, the legislative function does not extend to the determination of sentences in specific cases or types of cases. That is the primary responsibility of sentencing courts, which should always have power to adapt the sentence imposed to the relevant circumstances of the offense and the offender. The Standards [also] recognize that the boundaries of discretion of sentencing courts should be delineated and that courts' exercise of sentencing discretion should be guided."); ABA Standards, Standard 18-1.4 Commentary at 6 ("The basic sentencing function of trial courts is to implement legislatively determined policy choices, within the framework of the criminal code, as guided in the exercise of discretion by the agency performing the intermediate function.").

The sentencing function itself, then, should be the work of the courts, authorized by the legislature "to exercise substantial discretion to determine sentences in accordance with the gravity of offenses and the degree of culpability of particular offenders." ABA Standards, Standard 18-2.6(a). *See also* ABA Standards, Standard 18-1.4 ("Imposition of sentences is a judicial function to be performed by sentencing courts. The function of sentencing courts is to impose a sentence upon each offender that is appropriate to the offense and the

offender."). *See generally* Reitz & Reitz, *supra*, 6 Fed. Sent'g Rep. at 172.

Reflecting longstanding common law, the ABA Standards also provide that courts sentencing for multiple offenses should impose "a consolidated set of sentences" and, "in imposing sanctions of total confinement, ordinarily should designate them to be served concurrently." ABA Standards, Standard 18-6.5.[5]

These portions of the ABA Standards therefore support the position taken by Petitioner here too.

CONCLUSION

For these reasons, and for the reasons stated in Petitioner's briefs, this Court should reverse and adopt the statutory construction of Section 924(c) urged by Petitioner.

Respectfully submitted,

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[5] Standard 18-3.7 suggests that, rather than offer choices of concurrent or consecutive sentencing, policymakers should consider recognizing graduated punishments for multiple offenses.

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