

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

EFRAIN LORA,)
)
) Petitioner,)
)
) v.) No. 22-49
)
) UNITED STATES,)
)
) Respondent.)
)

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IN THE SUPREME COURT OF THE UNITED STATES

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EFRAIN LORA,)

Petitioner,)

v.) No. 22-49

UNITED STATES,)

Respondent.)

- - - - -

Washington, D.C.

Tuesday, March 28, 2023

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:26 a.m.

APPEARANCES:

LAWRENCE D. ROSENBERG, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

ERICA L. ROSS, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:26 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 22-49, Lora versus United States.

Mr. Rosenberg.

ORAL ARGUMENT OF LAWRENCE D. ROSENBERG
ON BEHALF OF THE PETITIONER

MR. ROSENBERG: Mr. Chief Justice, and may it please the Court:

Subsection 924(j) does not include or incorporate a bar against concurrent sentences.

The government admits that at common law and under sentencing law, the default was to allow judges discretion to sentence concurrently or consecutively. The government also admits that, standing alone, subsection 924(j) does not bar concurrent sentences.

What the government says is that the bar of subsection 924(c)(1)(D)(ii) applies. But that bar specifically applies only to sentences "imposed under this subsection." That is subsection (c), not another subsection, such as subsection (j). And that distinction is compelled by this Court's precedent in Koons

1 Buick.

2 Moreover, there is nothing in the
3 penalty provision of subsection (j) that refers
4 to subsection (c). Indeed, Congress enacted
5 subsection (j) as a new subsection, not as a
6 part of subsection (c).

7 And it makes sense that there is
8 discretion under subsection (j). (j)(1)
9 primarily was concerned with imposing the death
10 penalty for a murder by the use of a firearm and
11 doesn't implicate consecutive sentences. And
12 (j)(2) has a wide variety of conduct from
13 involuntary manslaughter to voluntary
14 manslaughter.

15 The government's answer to all of this
16 is that somehow subsection (c) is wholly
17 incorporated into subsection (j) by implication.

18 But that can't be right. Nothing in
19 the text supports that, and it creates
20 impossibilities. For example, voluntary
21 manslaughter with a machine gun has a mandatory
22 minimum penalty under subsection (c) of 30 years
23 but a maximum penalty of 15 years under
24 subsection (j). They can't coexist.

25 This Court should hold that subsection

1 (j) means what it says and reverse the court
2 below.

3 I welcome the Court's questions.

4 JUSTICE THOMAS: What do you do with
5 the government's argument that seems to suggest
6 that it's simply an accumulation of the
7 penalties, an aggregation or an increase of the
8 penalties under (c)?

9 MR. ROSENBERG: It's not just that,
10 and the reason is it defines a separate crime,
11 right? So there are additional elements, the
12 element of a death, in subsection (j). It's not
13 just an enhanced penalty provision. It actually
14 creates a new crime. And if it didn't do that,
15 you would run into the constitutional problems
16 we discuss in our brief because you have to have
17 the additional element of a death proven beyond
18 a reasonable doubt by the jury.

19 JUSTICE THOMAS: How could this have
20 been written to come out in the government's
21 favor from your perspective?

22 MR. ROSENBERG: It could have been
23 written a lot of ways. So number one is
24 Congress could have said Section (C) in
25 (c)(1)(D)(ii). It could have said that the bar

1 applies to this section, not subsection.
2 Subsection (j) could have referred back to
3 subsection (c) or (c)(1)(D)(ii) in the penalty
4 provision, which it didn't do. I suppose there
5 are other ways that Congress could have written
6 it as well. I mean, Congress could have
7 included subsection (j) in subsection (c) at the
8 outset, and it didn't do that.

9 And it was very important, I think, if
10 you look at the -- the history, that Congress
11 really wanted to make a special emphasis in --
12 in (j) that it was doing something new, right?
13 It was adding the death penalty for the use of a
14 firearm. It was adding this really pretty broad
15 variety of conduct in (j)(2) for manslaughter.
16 And it purposely did not include it in
17 subsection (c).

18 And so the only, I think, natural
19 conclusion that we can draw is that Congress did
20 have a reason for doing it separately, and we
21 believe that the text of that -- of that
22 subsection really controls here.

23 CHIEF JUSTICE ROBERTS: It's right,
24 though, isn't it, that a conviction under
25 subsection 924(j), you can't get one unless you

1 prove beyond a reasonable doubt a violation of
2 subsection (c)?

3 MR. ROSENBERG: That is true. The --
4 the underlying factual elements of having a drug
5 trafficking crime or a crime of violence do have
6 to be proven. I would just add, though, that
7 it's not the same thing as actually charging
8 somebody under subsection (c), right? And so
9 the government in the ordinary course does not
10 charge under both subsections. It
11 hypothetically could, but it usually doesn't.
12 And so it's different from a situation where a
13 criminal defendant was charged under (c) and
14 charged under (j) --

15 CHIEF JUSTICE ROBERTS: What is the --
16 what is the substantive difference? The
17 government has to prove the (c) violation beyond
18 a reasonable doubt.

19 MR. ROSENBERG: The substantive
20 difference is that the defendant isn't convicted
21 under (c).

22 CHIEF JUSTICE ROBERTS: Oh, I know
23 that.

24 MR. ROSENBERG: Yeah.

25 CHIEF JUSTICE ROBERTS: That -- I'm

1 not sure that is substantive --

2 MR. ROSENBERG: Okay.

3 CHIEF JUSTICE ROBERTS: -- as opposed
4 to technical in terms of you're -- you're --
5 you're -- whether you're going to be charged
6 under (c) or not, if you're charged under (j),
7 you still have to prove all the elements of (c).

8 MR. ROSENBERG: Well, the factual
9 elements of the generic (c) crime, not the more
10 specific ones of the sub- -- sub-crimes, but,
11 yes --

12 CHIEF JUSTICE ROBERTS: Yeah.

13 MR. ROSENBERG: -- that -- that is
14 true. That is true. But we don't think it
15 moves the needle for the government for the
16 reason I was getting at, is that it's still not
17 a conviction under (c) because the only --
18 indictment, charge, conviction, and sentence was
19 imposed under (j) rather than under (c). But I
20 think your factual point is absolutely right,
21 Mr. Chief Justice.

22 JUSTICE ALITO: Perhaps the text of
23 the provision dooms the government's position,
24 but they do have -- and that's a question that
25 we can talk about -- but they do have this

1 argument about what Congress had in mind.

2 Suppose that someone during a drug
3 trafficking offense shoots somebody and the
4 person doesn't die, so that's a -- a violation
5 of (c), right? And that cannot be made
6 consecutive to the sentence on the drug
7 trafficking offense -- it cannot be made
8 concurrent with the sentence on the underlying
9 drug trafficking offense.

10 MR. ROSENBERG: Under (c).

11 JUSTICE ALITO: Under (c).

12 MR. ROSENBERG: Correct. Right.

13 JUSTICE ALITO: That's correct. But
14 then, if the person dies and then the charge is
15 under (j) --

16 MR. ROSENBERG: Yeah.

17 JUSTICE ALITO: -- the sentence could
18 be made concurrent?

19 MR. ROSENBERG: Well, it depends on
20 how it's charged, right? If -- if -- you're
21 saying that the person was injured, charged
22 under (c), convicted under (c), then later dies?

23 JUSTICE ALITO: No, no.

24 MR. ROSENBERG: Yeah.

25 JUSTICE ALITO: Dies before the case

1 is tried.

2 MR. ROSENBERG: Yeah.

3 JUSTICE ALITO: But, while the person
4 is lingering in the hospital --

5 MR. ROSENBERG: Yeah.

6 JUSTICE ALITO: -- all the
7 government -- the government has a potential (c)
8 conviction --

9 MR. ROSENBERG: Right.

10 JUSTICE ALITO: -- which cannot be
11 made concurrent.

12 MR. ROSENBERG: Right.

13 JUSTICE ALITO: But, if the person
14 dies, then it can be made concurrent.

15 MR. ROSENBERG: Right.

16 JUSTICE ALITO: And the government's
17 argument is this makes no sense. Congress
18 couldn't have possibly wanted a result like
19 that.

20 MR. ROSENBERG: Well --

21 JUSTICE ALITO: What's your answer to
22 that?

23 MR. ROSENBERG: Well, I think the
24 first answer is that the person could be charged
25 with the death penalty, right, potentially for

1 that murder. And so then, number one, the
2 sentence is much more severe, and, number two,
3 the whole issue of concurrent or consecutive
4 sentences is irrelevant.

5 So -- so I think that's part of what
6 may have been going on with Congress, is they --
7 they put this as a separate subsection,
8 realizing that the death penalty was kind of a
9 unique special circumstance.

10 I also think that there are,
11 particularly in -- in the involuntary
12 manslaughter area, and we included a few
13 examples of this in our brief, where you would
14 very much like to have discretion in crimes
15 where there is not much of a mens rea to cause
16 death, but because death was caused, there's
17 probably going to be a fairly high or somewhat
18 higher penalty anyway, and you may not want to
19 run it concurrently -- or, rather, consecutively
20 with a gun charge because you may have somebody
21 in those circumstances who had little to no mens
22 rea in an involuntary manslaughter situation
23 going to jail for 20 or 25 or 30 years. And so
24 there is some of that in there as well.

25 But I think probably the primary

1 concern was adding the death penalty, and it
2 didn't make a whole lot of sense to add a bar on
3 concurrent sentences when you're introducing the
4 death penalty.

5 JUSTICE KAVANAUGH: They weren't
6 assuming, though, that all the crimes would be
7 -- committed under (j) would be death penalty by
8 any stretch.

9 MR. ROSENBERG: Right. That's
10 correct.

11 JUSTICE KAVANAUGH: So it would still
12 have effect in all those other cases that would
13 still be under (j).

14 MR. ROSENBERG: It -- it would, but,
15 remember, all we're saying is it preserves
16 discretion. In an appropriate circumstance, a
17 trial judge absolutely can still sentence
18 consecutively.

19 JUSTICE KAVANAUGH: Right. I'm just
20 getting to the point I -- I tend to doubt
21 Congress really intended your result.

22 MR. ROSENBERG: Well --

23 JUSTICE KAVANAUGH: You -- you -- so I
24 take that heroic effort to explain why Congress
25 might have wanted to get to this result. I

1 think your better argument for me is that's just
2 what it says.

3 MR. ROSENBERG: Well, I -- I -- I
4 would agree with this in this respect, Justice
5 Kavanaugh. I do think the textual argument is
6 the strongest argument here, and I think it's
7 really sort of a dispositive argument because
8 the text says what it says.

9 And it's really not susceptible of the
10 government's interpretation, particularly not
11 the position the government took in its brief.
12 I mean, I suppose there were other ways that you
13 could potentially try to argue this, but to
14 argue that subsection (c) is entirely
15 incorporated into subsection (j), it not only
16 conflicts in the way I've said, but it violates
17 that principle that you're not supposed to, I
18 guess, import elephants through mouse holes.

19 And in the few words that says -- that
20 sets forth in the prefatory phrase that, you
21 know, in the course of violating subsection (c),
22 that means that I think we counted there's like
23 700 words of subsection (c) automatically comes
24 into subsection (j).

25 JUSTICE JACKSON: But, with respect to

1 the intent, though, I mean, don't you also have
2 the argument that the statute actually in (j)
3 increases the maximums, that -- that it -- yes,
4 it doesn't necessarily have or specifically
5 incorporate the floors that (c) has, but
6 Congress sometimes also expresses its intentions
7 with respect to the seriousness of offenses by
8 making the statutory maximum higher.

9 MR. ROSENBERG: Yeah.

10 JUSTICE JACKSON: Isn't that also
11 what's going on here?

12 MR. ROSENBERG: I think that's
13 absolutely correct, Justice Jackson, yes, and
14 that is another element to this.

15 JUSTICE JACKSON: So it doesn't --
16 it's not necessarily the case that your position
17 leads to the view that it's sort of nonsensical
18 because Congress was pointing to a more serious
19 offense and giving lighter penalties.

20 MR. ROSENBERG: Correct. I think
21 that's absolutely right. I think it's the full
22 gamut. And, again, because of that, because of
23 all of those features of subsection (j), I think
24 that just suggests having the discretion to
25 modify the sentences where appropriate, but,

1 again, in many of these cases, I would think a
2 judge would sentence consecutively, wouldn't use
3 his or her discretion to sentence concurrently,
4 but there are those sort of rare circumstances
5 where that would occur.

6 And then, of course, the sort of, you
7 know, elephant in the room, the death penalty
8 situation, where, obviously, we wouldn't be
9 having consecutive sentences.

10 JUSTICE ALITO: Can I ask you a
11 question about section (c)(1)(C), capital C --

12 MR. ROSENBERG: Okay.

13 JUSTICE ALITO: -- which is on 2(a),
14 the addendum to the -- the SG's brief. And the
15 provision says, "In the case of a violation of
16 this subsection that occurs after a prior
17 conviction under this subsection has become
18 final, then very stiff mandatory minimums" --
19 "minimums apply."

20 MR. ROSENBERG: Yeah.

21 JUSTICE ALITO: Okay? So two
22 situations, and it concerns whether there's
23 first a (c) violation and then a (j) violation
24 or first a (j) violation and then a (c)
25 violation.

1 So, in the first situation, there's a
2 conviction under (c). So this would count
3 because it is obviously a conviction under (c),
4 okay, in the case of a violation of this
5 subsection, which occurs after a prior
6 conviction under this subsection. So the prior
7 conviction is under this subsection. So that
8 counts. And then the (j) conviction would also
9 count because this would be a conviction that is
10 "a violation of (c)," right?

11 MR. ROSENBERG: I'm not sure that it
12 would. I would say this. I think that -- that
13 there is some additional ambiguity in this
14 provision potentially. I don't think it's
15 necessary to resolve this case.

16 I'm not sure it would, though, because
17 my point that I was making to the Chief
18 Justice's question is that we don't think,
19 although, again, I don't think you need to
20 decide this, we don't think that a conviction
21 under (j) is also a conviction under (c), even
22 though those prefatory elements of (c) do have
23 to be found.

24 And so I think a good criminal defense
25 lawyer might argue in that circumstance that it

1 wouldn't apply because the -- the conviction, at
2 least the conviction under (j) wouldn't have
3 been a conviction under this subsection because
4 it wasn't a conviction under (c).

5 JUSTICE ALITO: Well --

6 MR. ROSENBERG: I don't know if I
7 answered --

8 JUSTICE ALITO: -- (j) says a person
9 who in the course of a violation of subsection
10 (c) --

11 MR. ROSENBERG: Yeah.

12 JUSTICE ALITO: -- causes. So you
13 don't think that there -- that there would be a
14 -- this would be in the course of a violation of
15 subsection (c) under (j)?

16 MR. ROSENBERG: I -- I -- I -- I think
17 it's arguable, but I think -- I think that there
18 is also an argument that it isn't because,
19 unless there was actually a conviction under
20 (c), I -- I'm not sure that that word
21 "violation" effectively is perfected until
22 there's actually a conviction under (c).

23 JUSTICE ALITO: But you're reading an
24 awful lot into the -- the use of "in violation"
25 as opposed to "under." But, here, you seem to

1 be reversing course.

2 In any event, if that's -- if it -- if
3 it is as I described so that --

4 MR. ROSENBERG: Okay.

5 JUSTICE ALITO: -- there would be --
6 the mandatory minimums would come into play in
7 that situation, now we reverse the sequence.

8 First, there's a (j) conviction, and
9 you say that's not under (c), so it doesn't
10 count. And then it's followed by a (c)
11 conviction. Well, there would be no mandatory
12 minimums there.

13 MR. ROSENBERG: Under this provision,
14 but there would be other mandatory minimums I
15 understand.

16 JUSTICE ALITO: But not under this
17 provision.

18 MR. ROSENBERG: That's correct.

19 JUSTICE ALITO: So you have this weird
20 situation where whether or not the sentence can
21 be consecutive or concurrent depends on the
22 sequence of the -- of the violations, whether
23 (c) comes first or (j) comes first.

24 MR. ROSENBERG: Yeah, and that's why I
25 think my answer is that while I understand where

1 you're -- you're -- you're coming from, and I do
2 think the prosecutors could make that argument,
3 I think there's also room to read the statute to
4 say that this -- this -- this particular
5 provision isn't triggered unless you've actually
6 had a conviction under (c), not just --

7 JUSTICE JACKSON: And doesn't the
8 prosecution control that? I thought -- I
9 thought it depended on what was being charged.

10 MR. ROSENBERG: It does. It does.

11 JUSTICE JACKSON: Right. So, if they
12 charge a (c) -- a (j) violation, although they
13 might have to prove the predicates from (c), if
14 the only thing on the table is (j) because
15 that's the way they've charged it, then they're
16 stuck with the penalty structure that attaches
17 to (j), right?

18 MR. ROSENBERG: I agree, yes.

19 JUSTICE JACKSON: And if they charge
20 it as a (c) -- I mean, they're sort of --
21 they're making the decision upfront as to which
22 set of penalties they intend to argue for.

23 MR. ROSENBERG: Right. Right. And as
24 you pointed out, you know, subsection (j) has --
25 has higher maximums in a variety of ways, and

1 that may be one reason why the government would
2 want to prosecute under (j) rather than --

3 JUSTICE JACKSON: But, surely, the
4 government knows and then they make a decision,
5 do we want to make this a (j) or (c), do we want
6 to charge both? And then, when we get down to
7 brass tacks in terms of which one, sort of like
8 a lesser included offense scenario, we then
9 decide. But it seems like the government has a
10 lot of control over which one of these penalty
11 regimes take place in any given case.

12 MR. ROSENBERG: They do.

13 JUSTICE ALITO: Is that your argument?
14 So that if -- your argument is dependent on the
15 fact that (c) was not mentioned in the
16 indictment and is not mentioned in the judgment
17 of sentence?

18 MR. ROSENBERG: I don't think it --

19 JUSTICE ALITO: So, if they charged in
20 violation of (c) and (j) and that's what the
21 judgment of sentence said, this would be a
22 different case? Is that your argument? I
23 didn't understand that to be your argument.

24 MR. ROSENBERG: Well, let's put it
25 this way. I don't think it's necessary for --

1 to decide the case, but I think, in that
2 circumstance, you would have to then resolve
3 this question of whether you actually have to
4 charge under (c), and we think you would have to
5 charge under (c) to get the -- the sort of other
6 benefits of (c).

7 JUSTICE ALITO: I'm not sure I
8 understand. Maybe --

9 MR. ROSENBERG: So --

10 JUSTICE ALITO: -- I have a block on
11 this. Would you like us to rule -- do you think
12 we should just say the government decided it
13 wasn't going to mention (c) in the indictment
14 and it's not in the judgment of sentence,
15 therefore, that's the end of the case?

16 MR. ROSENBERG: I think that would be
17 a very reasonable way to decide the case, yes.

18 JUSTICE KAGAN: But you're suggesting
19 that if the next time around with the next
20 person the government had said (c) and (j), what
21 would follow?

22 MR. ROSENBERG: I think that's a more
23 complicated situation. The government says they
24 can't do it, right? The government says in
25 their brief steadfastly they think there's a

1 double jeopardy problem doing it.

2 Our answer is that's not nearly as
3 clear as the government seems to say, but they
4 seem to think it. So I think, at that point,
5 the onus would be on the government to try to
6 justify why they would be able to do both,
7 contrary to what they've said, you know, for at
8 least 10 years apparently.

9 But I do think that's a different
10 circumstance. It's not this case. And I think,
11 as Justice Jackson suggested, there are good
12 reasons to choose either (c) or (j) in an
13 appropriate case. And that's what the
14 government has done.

15 But, hypothetically, you know, there
16 -- there may be circumstances where they try to
17 charge under both, and then that question has to
18 be addressed.

19 JUSTICE SOTOMAYOR: Actually, this
20 issue of which you charge under is up to the
21 government, and, really, the only time they have
22 -- they have to make a choice is when they're
23 seeking the death penalty, correct? Because,
24 when you think about it, a life sentence is
25 permissible for virtually all of the crimes that

1 are being charged that -- that cause a death,
2 correct?

3 MR. ROSENBERG: Usually, yes. And I
4 think there may be a few rare circumstances
5 where the maximums elsewhere in (j) might come
6 into play, but, yes, usually, I think it's the
7 death penalty is the main reason.

8 JUSTICE SOTOMAYOR: And so the
9 government can charge even a death under (c) if
10 it doesn't intend to seek the death penalty?

11 MR. ROSENBERG: It could potentially
12 try to do that, yes.

13 JUSTICE ALITO: Suppose a person is
14 charged under (j)(2), a person who in the course
15 of a violation of subsection (c) causes the
16 death of a person through the use of a firearm,
17 shall, if the killing is manslaughter, as
18 defined in Section 1112, be punished as provided
19 in that section.

20 MR. ROSENBERG: Yes.

21 JUSTICE ALITO: So, in that situation,
22 is the person convicted under (j) and 1112 or
23 just under (j)?

24 MR. ROSENBERG: I think it's just
25 under (j), but (j) then specifically

1 incorporates that penalty provision, which gives
2 the maximums for involuntary manslaughter and
3 voluntary manslaughter. For voluntary, it's 15
4 years, and for involuntary, it's eight years.

5 But it -- you wouldn't -- you wouldn't
6 consider that person to have been convicted
7 under 1112 because they wouldn't have been
8 charged, tried, and convicted under 1112. It
9 would just be (j).

10 JUSTICE ALITO: Do you think it's ever
11 possible for somebody to be convicted under two
12 -- under the operation jointly of two separate
13 provisions?

14 MR. ROSENBERG: Potentially, if it is
15 clearly charged that way. Maybe in the lesser
16 included offense instruction situation, but even
17 there, I think you would have to have a verdict
18 that made it clear that the defendant was being
19 convicted under the lesser --

20 JUSTICE ALITO: If it's --

21 MR. ROSENBERG: -- included offense as
22 well.

23 JUSTICE ALITO: -- if it's charged
24 that way? I mean, it's very common for somebody
25 to be -- to be charged with an offense in

1 violation of 18 U.S.C. Section 2 and another
2 provision.

3 MR. ROSENBERG: Mm-hmm.

4 JUSTICE ALITO: So there, what --
5 under what provision is the person convicted?

6 MR. ROSENBERG: If it's charged that
7 way, I mean, again, it depends on the actual
8 circumstances of the case, but I -- I think
9 there you definitely have to have the charge
10 under the provision you're talking about.

11 Again, I think a criminal defense
12 attorney would argue that there has to be
13 something on the verdict form that makes clear
14 that they're being convicted under both
15 statutes. But, certainly, it helps if you're
16 being charged under the statute.

17 Here, they're not charged under (c),
18 they're not tried under (c), they're not
19 convicted under (c), so you can't say that this
20 was a sentence imposed under (c).

21 CHIEF JUSTICE ROBERTS: Anything
22 further?

23 Thank you, counsel.

24 Ms. Ross.

25

1 ORAL ARGUMENT OF ERICA L. ROSS

2 ON BEHALF OF THE RESPONDENT

3 MS. ROSS: Thank you, Mr. Chief

4 Justice, and may it please the Court:

5 Section 924(j)(1) provides enhanced
6 federal penalties for the most serious Section
7 924(c) offenders, those who not only bring a gun
8 to a crime of violence or drug trafficking crime
9 but actually take it out and use it to kill
10 someone. In doing so, Section 924(j) does not
11 eliminate the basic sentencing requirements of
12 Section 924(c).

13 Under ordinary principles of statutory
14 interpretation, this Court should harmonize
15 Sections 924(c) and (j). And under the Court's
16 Blockburger precedent, the most natural way to
17 do that is to read Section 924(j) to create an
18 aggravated version of the same Section 924(c)
19 offense.

20 In cross-referencing subsection (c),
21 Section 924(j) sweeps in all of subsection (c)'s
22 provisions. It does not, as my friend suggests,
23 pick and choose particular factual elements.

24 And Section 924(c) states that its
25 mandatory minimum sentence shall apply to any

1 person who engages in the basic offense conduct.
2 As the questions this morning have indicated,
3 Petitioner plainly falls within that category.

4 Section 924(j) then incorporates --
5 then requires that the court consider whether to
6 add additional punishment for the homicide.
7 Whatever overall sentence the court chooses, it
8 is therefore imposed under both Sections 924(c)
9 and (j), and the consecutive sentencing
10 requirement applies.

11 Now my friend says that reading --
12 this reading causes conflict between the
13 mandatory minimum sentences in Section 924(c)
14 and Section 924(j)'s incorporation of the
15 punishments for murder and manslaughter and, in
16 particular, the involuntary manslaughter
17 provision he was discussing this morning.

18 But those provisions can be harmonized
19 in the way I've just described. Indeed, Section
20 924(c)(5), on page 3a of the Government's
21 appendix, necessarily works this way. It
22 includes its very own 15-year mandatory minimum
23 for using armor-piercing ammunition and then
24 adds on top the same murder and manslaughter
25 penalties nearly verbatim as Section 924(j).

1 Just as there's no internal
2 inconsistency in Section 924(c)(5), there's no
3 internal inconsistency in the government's
4 reading of Sections 924(c) and (j).

5 I welcome the Court's questions.

6 JUSTICE THOMAS: What do you do with
7 the language in 924(c) that refers to
8 sentences -- it says notwithstanding any other
9 provision of law, no sentence imposed on a
10 person under this subsection. I -- I -- I would
11 get -- understand your argument if it said
12 "section," but "subsection." So how do you
13 reconcile that with your -- what you just said?

14 MS. ROSS: Sure, Justice Thomas. I
15 want to first take the "under" piece of that
16 question and then explain why we think this
17 section was not a way to write the statute.

18 So, for "under," we think, as this
19 Court explained in National Association of
20 Manufacturers, under Zekmelion, it has to take
21 its meaning from context. In that case, the
22 Court described the word "under" as meaning by
23 reason of the authority of. We think it's clear
24 here that Section 924(c) is providing at least
25 some of the authority for the 924(j) sentence.

1 It's providing the -- the factual elements, as
2 my friend explained, although I think we
3 disagree about precisely which ones. And in our
4 view, it's providing the mandatory minimum
5 penalty as well as the consecutive sentencing
6 requirement itself.

7 And so we do think that a sentence
8 that is imposed for a violation of subsection
9 (j), which necessarily requires, as the Chief
10 Justice was noting, a jury to find the elements
11 of (c) is imposed under both subsections.

12 JUSTICE KAGAN: Well, but why is that,
13 Ms. Ross? I mean, suppose that (j) had not said
14 in the course of a violation of subsection (c)
15 but just repeated all of subsection (c)'s
16 language. Then what?

17 MS. ROSS: So I think that would be a
18 much more difficult case, and my friend would
19 have a much better argument. I think the
20 problem with his argument is that what he would
21 like you to do, if you look at page 1a of the
22 Government's appendix, is look at paragraph
23 (c)(1)(A), start reading about two -- two-and-a-
24 half lines down where it says "Any person who,"
25 read all the way through there, stop at the

1 penultimate line of that sort of lead paragraph
2 where it says "shall" and incorporate only that
3 bracketed content.

4 That's, of course, not what Section
5 924(j) says. It refers to subsection (c) as a
6 whole. It doesn't reference paragraph
7 (c)(1)(A). It doesn't reference any of the
8 particular elements.

9 JUSTICE JACKSON: But it also doesn't
10 say if you're convicted of subsection (c). I
11 mean, I think that's the problem for your
12 argument. It says "in the course of a violation
13 of subsection (c)."

14 And so I don't understand why the
15 government believes in this case that it's
16 entitled to the penalty structure that comes
17 with Section (c) if a person is convicted of (c)
18 when (j) doesn't say and it could easily have
19 said any person who's convicted of subsection
20 (c), et cetera.

21 MS. ROSS: So, Your Honor, I think it
22 is certainly true that -- that Congress could
23 have been clearer in this provision. My point
24 was simply that it also doesn't say what
25 Petitioner is suggesting.

1 We think the best reading of this
2 statute is that (c) provides the basic elements
3 of the offense. It provides the basic
4 sentences. And then (j) sort of comes in to say
5 and when there's a death, we're going to add
6 these other penalties.

7 And I think that's consistent, as I
8 was saying in my introduction, with how (c)(5)
9 works. I think it necessarily has to work that
10 way. And so we think there's -- there's nothing
11 wrong with sort of taking these provisions as
12 they come, walking through (c) before you get to
13 (j).

14 JUSTICE JACKSON: So what do you do
15 with the fact that (j) was actually enacted at a
16 different time than (c)?

17 MS. ROSS: So --

18 JUSTICE JACKSON: And that suggests to
19 me that Congress was careful and thoughtful
20 about the placement of (j). They could have put
21 it in (c) to accomplish what you've talked
22 about, but they didn't. And (j) has its own
23 penalty provision, not specifically
24 cross-referenced in any way to (c)'s penalty
25 provisions.

1 So I guess it just sort of seems to me
2 that the enactment history also undermines the
3 government's view that (j) is supposed to be
4 ordering some sort of aggregation of the (c)
5 penalties.

6 MS. ROSS: Certainly. So we actually
7 think that the history is quite helpful for us,
8 and if I could just explain why. I think there
9 are three really key dates here.

10 The first is that in 1968 Congress
11 enacted this provision (c) without any
12 concurrent consecutive requirement. A couple of
13 years later, it adds the -- the consecutive
14 sentences bar. And then, in 1994, as Your Honor
15 noted, Congress added subsection (j).

16 And I think what's really significant
17 at that time is that when Congress did so and it
18 cross-referenced subsection (c) as a whole,
19 subsection (c) was much simpler than it is
20 today. It involved only three paragraphs,
21 paragraphs (1), (2), and (3). Paragraphs (2)
22 and (3), as today, defined drug trafficking
23 crime and crime of violence. Everyone agrees
24 that those have to come in, that the
25 cross-reference to -- to (c) and (j) necessarily

1 includes those.

2 And then, in paragraph (c)(1), it
3 included all of the substance of the offense.
4 So it included the base offense elements. It
5 included certain mandatory minima, for example,
6 if a particular type of weapon was used. And it
7 included the bar on consecutive sentences.

8 And I think it's particularly unlikely
9 in 1994, when Congress cross-referenced
10 subsection (c) as a whole, that what it really
11 meant to do was -- was take subsection (c)(1) --
12 (c)(2) and (3) and then particular words and
13 phrases out of (c)(1). I think, when Congress
14 said subsection (c), it meant subsection (c).

15 JUSTICE JACKSON: But, of course, it
16 doesn't say subsection (c) as a whole. It just
17 says a violation of subsection (c). I -- I
18 appreciate that you keep saying that every time
19 you talk about subsection (c) as it's referenced
20 in (j), but that's not what it says.

21 MS. ROSS: It's correct that it --
22 it -- it says a violation of subsection (c), but
23 if you look at subsection (c) --

24 JUSTICE JACKSON: Which you can commit
25 without reference to subsection (c)'s cumulative

1 penalties or any penalty, any of the mandatory
2 minimums or anything like that, right? It's not
3 the government's position that you wouldn't have
4 a violation of subsection (c) without, you know,
5 the penalty structure.

6 MS. ROSS: I think that's correct,
7 Your Honor, but I think it's also not true that
8 Congress was sort of focusing on those elements
9 in particular. I think another point that was
10 discussed earlier with respect to -- to what
11 Congress was doing in this provision was, you
12 know, the focus on the death penalty.

13 And while I think that that is
14 obviously something was concerned with --
15 Congress was concerned with when it added
16 subsection (j), it's clear that Congress also
17 knew, as Justice Kavanaugh was pointing out
18 earlier, that term-of-year sentences would
19 continue to apply for (j) violations. That's in
20 the language of (j)(1), of course.

21 And we think that it's just completely
22 implausible that at the time that Congress was
23 enacting this statute, it meant to keep a
24 mandatory minimum consecutive sentence, as this
25 Court explained in Abbott, explained three --

1 Congress explained three times over that it's so
2 important that individuals who engage in that
3 base offense conduct receive that mandatory
4 minimum consecutive sentence but at the same
5 time eliminated that when the person actually
6 takes the gun out and kills someone.

7 JUSTICE SOTOMAYOR: It is correct,
8 isn't it, that under your theory, subparagraph
9 (c)(5)(B) is superfluous?

10 MS. ROSS: So, Justice Sotomayor, I
11 think that's respectfully not quite the right
12 way to look at it. I think anyone who was
13 sentenced under Section (c)(5)(B) would have to
14 be sentenced under Section (c)(5)(A) as well,
15 and so you sort of have to take (c)(5) as a
16 whole. And, of course, (c)(5), because it's
17 providing --

18 JUSTICE SOTOMAYOR: But still, why add
19 it if how you kill somebody is irrelevant under
20 your view?

21 MS. ROSS: I --

22 JUSTICE SOTOMAYOR: Because they're
23 all going to get the same sentence, so why did
24 Congress add (c)(5)(B)?

25 MS. ROSS: I don't think there's a

1 good explanation in the legislative history,
2 Justice Sotomayor. I think my best guess is --
3 JUSTICE SOTOMAYOR: That's because
4 your reading doesn't treat them separately. You
5 want us to mesh them together. That's the
6 reason why. Petitioner's reading gives a
7 reason. You're absolutely right. If you do it
8 in this way, you're going to get this minimum.
9 If you don't do it in this way, you get the
10 maximum under (j) alone.

11 MS. ROSS: So, if I'm understanding
12 the question correctly, Justice Sotomayor, I
13 think the difference Petitioner posits between
14 (c)(5)(B) and (j) is, you know, everybody agrees
15 that (c)(5)(B) has its own mandatory minimums --
16 or excuse me, (c)(5)(A) has its own mandatory
17 minimum. So then he says the work that (c)(5)
18 --

19 JUSTICE SOTOMAYOR: No I'm talking
20 about (c)(5)(B).

21 MS. ROSS: Right. And he says that
22 the work that (c)(5)(B) is doing is that it is
23 requiring a consecutive sentence, whereas, under
24 (j), that's optional.

25 And, respectfully, I just think

1 there's no indication that Congress was seeking
2 to distinguish between these provisions in that
3 way. I think the far better reading is probably
4 that Congress was just trying to be complete and
5 make sure that there was no confusion that
6 the -- the same penalties that apply in (j)
7 would still apply if you killed someone through
8 the use of the armor-piercing ammunition.

9 JUSTICE KAGAN: Isn't the truth of the
10 matter here that Congress just made a mistake?

11 MS. ROSS: Your Honor, if you thought
12 that Congress just made a mistake, particularly,
13 you know, we haven't really discussed the
14 Blockburger question, I do want to get there,
15 but if you thought that Congress made a mistake
16 such that, you know, the right result from the
17 language was that this is all one offense, we
18 have to charge (j) or (c), but when we charge
19 (j), when we recognize what Congress recognized
20 is a far more serious offense, then we lose the
21 -- the mandatory minimum consecutive penalty in
22 (c), you know, I think that might be a case for
23 an absurdity type of construction because it is
24 so implausible, but, of course, we don't think
25 you need to get there because we think the text

1 and the structure and the history of this
2 statute are themselves sufficient to -- to
3 clarify whatever ambiguity there is here.

4 JUSTICE SOTOMAYOR: Why is it --

5 JUSTICE KAVANAUGH: Do --

6 JUSTICE SOTOMAYOR: -- absurd? You
7 have a sentence that gives you permission to
8 impose the death penalty. That's a really big
9 difference.

10 We do things -- we rule under
11 absurdity where it makes no sense whatsoever.
12 The whole purpose of (j) was to give the
13 prosecutor even more of a weapon, death.

14 MS. ROSS: So a couple of points on
15 that, Your Honor. I think, obviously, that is a
16 purpose of (j), but I think, as I was noting,
17 you know, there are inevitably going to be
18 term-of-year sentences under (j), and in that
19 instance, I think it is quite implausible. You
20 don't even need to get to absurdity.

21 I'd point to this Court's decision in
22 Abbott, where it rejected implausible, bizarre
23 results under 924(c). It -- it's quite
24 implausible that Congress intended when you
25 actually take the gun out and kill someone with

1 it for a lesser sentence to be possible than
2 when it's simply in -- in the --

3 JUSTICE KAVANAUGH: But was there a --

4 MS. ROSS: -- defendant's pocket on
5 that.

6 JUSTICE KAVANAUGH: Keep going, I'm
7 sorry.

8 MS. ROSS: Oh. On that, I just wanted
9 to point out, you know, my friend was talking
10 about it makes sense to have discretion perhaps
11 in the involuntary manslaughter context. You
12 know, a few points on that.

13 One is that I think involuntary
14 manslaughter here is really the tail wagging the
15 dog. If you look at pages 9 to 10 of
16 Petitioner's reply brief, where he's talking
17 about this -- you know, most of his examples are
18 involuntary manslaughter, and then, on page 23,
19 he's talking about, you know, the physician who
20 is going to prescribe suicide-inducing drugs and
21 he brings his gun because he's concerned that
22 the family is going to violently intervene and
23 then the gun goes off and it kills the -- the --
24 excuse me, the -- the elderly patient. I think
25 that's so unlikely that that should not sort of

1 drive the -- the train here.

2 And I think it's also true that --
3 that even that doesn't make sense because
4 Congress, of course, didn't want discretion when
5 no manslaughter occurred. And so it doesn't
6 make any sense to say you need it --

7 JUSTICE KAVANAUGH: What --

8 MS. ROSS: -- when you committed the
9 base conduct but also committed involuntary
10 manslaughter.

11 JUSTICE KAVANAUGH: -- what I think
12 Congress was generally concerned and is still
13 concerned about what it views as light sentences
14 in cases involving guns, so 924, drug and crimes
15 of violence where guns are -- are carried or
16 used.

17 But, if you think about 924(j), do you
18 think Congress was concerned that judges were
19 imposing light sentences when there was a
20 killing as well?

21 MS. ROSS: So -- so I think, quite
22 frankly, Justice Kavanaugh, Congress was
23 probably concerned that the existing federal
24 murder statute just wouldn't reach this conduct
25 because it applies only in the special maritime

1 and territorial jurisdiction of the United
2 States. And so that, I think, is why you get
3 924(j) as an independent provision --

4 JUSTICE KAVANAUGH: Right --

5 MS. ROSS: -- versus not an
6 independent --

7 JUSTICE KAVANAUGH: -- but you want to
8 read in the -- the no -- no concurrent sentence
9 provision into 924(j), and I -- I realize I'm
10 reconstructing here, so -- but Congress could
11 think, okay, there's a problem with light
12 sentencing in certain kinds of drug/gun cases,
13 but I'm not sure they would have thought there's
14 a problem of light sentencing in cases where
15 there's a killing. But I'm --

16 MS. ROSS: So -- so two points on
17 that, Your Honor, maybe three. The first, I
18 guess, which is a nonpoint, is that I don't have
19 anything specific in the legislative history on
20 this.

21 The second point, you know, I think
22 you could probably always say something like
23 that in mandatory minimum cases. You know, the
24 -- it's sort of self-evidently serious conduct
25 and, therefore, maybe you don't need a mandatory

1 minimum, yet Congress goes ahead and does it.

2 JUSTICE KAVANAUGH: Well --

3 MS. ROSS: And the third point is just
4 that in 924(c)(5), I think you could make
5 exactly that argument and, of course, Petitioner
6 agrees that that falls under (c) and therefore
7 has the -- the bar on consecutive sentences --
8 or, excuse me, the bar on concurrent sentences.
9 And so all we think is that, you know, when you
10 kill somebody without the armor-piercing
11 ammunition, the same -- the same rule applies.

12 JUSTICE JACKSON: But can I go back to
13 the absurdity point? Because I guess I'm
14 wondering the opposite of what Justice Kagan
15 said was, which -- which is, isn't the truth of
16 the matter that we have a different Congress in
17 1994 than we had in 1968 so that, when (j) was
18 created, perhaps that Congress made a different
19 policy choice about the determination of
20 mandatory minimums versus increasing the
21 maximums, all of that seems perfectly rational
22 to me as opposed to absurd.

23 So can you speak to that kind of
24 thought process?

25 MS. ROSS: Certainly. You know, I --

1 I just want to caution I think we're sort of
2 pretty far into speculating about what Congress
3 may or may not have thought. We really don't
4 have anything on this, I think, from the
5 relevant period.

6 JUSTICE JACKSON: True, but you made
7 the absurdity argument, and what that --

8 MS. ROSS: Sure.

9 JUSTICE JACKSON: -- calls upon us to
10 do is to evaluate the extent to which Congress's
11 determination is or is not absurd.

12 And what I'm positing is that a
13 Congress in 1994 that is looking at (j) and the
14 circumstances that you describe as someone dying
15 in the context of use-and-carry scenarios could
16 have decided we're not going to put another
17 mandatory minimum in this.

18 Instead, we're going to offer the
19 government the death penalty. We're going to
20 increase -- make it any term of years, which
21 means that the government can argue at
22 sentencing consecutiveness. The government can
23 argue that this should be really much higher
24 than a 924. We're going to blow the top off of
25 the maximums, and that's the way we want to

1 handle this situation. Why is that absurd?

2 MS. ROSS: So -- so I think that's
3 just not the way this Court has thought about
4 924(c). If you look at Abbott, I think the
5 Court could have said precisely that in Abbott.
6 It was construing the "in addition to" language.

7 JUSTICE JACKSON: I'm asking how the
8 Court looks at -- at (j), not 924(c). What --
9 why is it absurd for a Congress that is enacting
10 (j) to have had a separate penalty structure
11 that did not incorporate the mandatory minimums
12 of (c) but instead took care of that
13 circumstance through, as the text says here,
14 giving the death penalty, increasing the
15 maximums and the like?

16 MS. ROSS: Again, you know, I think it
17 is just fundamentally at odds. I think,
18 generally, this Court looks at a statute as a
19 whole, even when pieces are amended at different
20 times. I think that's what the Court did do in
21 Abbott. And I think it would not make sense to
22 say, you know, Congress built on this by
23 allowing the death penalty but at the same time
24 thinking that a five-year mandatory consecutive
25 term was simply too much. I -- I -- I don't

1 think that sort of holds up as a matter of
2 logic.

3 JUSTICE ALITO: We have sort of a
4 strange situation here where Petitioner argues
5 -- invokes the rule of lenity but argues that --
6 at least this is what I got from the brief --
7 that it's possible for the government to charge
8 a (c) violation and a (j) violation separately.
9 They would be two -- there would be two separate
10 violations. And you, on the other side, say,
11 no, you can't do that.

12 So could you comment on this?

13 MS. ROSS: Absolutely, Justice Alito.
14 I appreciate the opportunity to do so.

15 First off, I think you're absolutely
16 correct. I heard my friend this morning say
17 that, you know, the double jeopardy issue isn't
18 as clear as we say. In his brief, I think it's
19 pellucid. I would tell you pages 15, 17, and 22
20 of the reply brief, where he's quite clear that
21 he thinks, as Your Honor mentioned, that we can
22 charge, convict, and get cumulative punishments
23 on both (c) and (j).

24 Now I think that makes sense if you
25 think these are standalone punishment provisions

1 for the reasons I was just describing. It just
2 makes no sense to think that Congress put the
3 government in this catch-22 where, on the one
4 hand, it can, you know, charge what everybody
5 agrees is the lesser offense in (c), be
6 guaranteed a mandatory minimum consecutive
7 sentence, but it has to leave on the shelf this
8 provision that Congress, clearly concerned about
9 gun murders in the course of 924(c) violations,
10 created, or, on the other hand, it can charge
11 the (j) but lose the mandatory minimum
12 consecutive sentence.

13 I think that doesn't make sense, and I
14 think, if you come to a reading where you think
15 these are separate penalty provisions, that's
16 actually the best evidence that these are, in
17 fact, separate offenses for Blockburger.

18 We, by contrast, have long taken the
19 position based on this Court's Blockburger
20 jurisprudence that these are one offense.
21 Generally, when you have a greater and a lesser
22 included offense in the same section of a
23 statute, we do -- you know, this Court's cases
24 have treated those as the same offense. And so
25 we reconcile the statute by saying it's one

1 offense, and that means that, you know, the (c)
2 penalties come along with the greater (j)
3 offense.

4 If the Court disagrees with us on
5 this -- I think this is extremely important in
6 practice -- I think it has to or it should say
7 that these are separate offenses for purposes of
8 Blockburger because, for the reasons I was just
9 noting, you know, it really makes no sense to
10 have one offense, but the government has to
11 choose one or the other.

12 JUSTICE KAVANAUGH: And then --

13 JUSTICE KAGAN: But, if --

14 JUSTICE KAVANAUGH: -- the government,
15 going forward, will charge both.

16 MS. ROSS: That's correct, Justice
17 Kavanaugh. And, again --

18 JUSTICE KAVANAUGH: So the -- the
19 problem is really retrospective from your
20 perspective, because, going forward, you'll
21 charge 924(c) and 924(j) in circumstances like
22 this?

23 MS. ROSS: That's correct with one
24 wrinkle. You know, we've talked a little bit
25 about what 924(j) gets us in terms of the -- or

1 -- or permits in terms of the death penalty.
2 924(j) and 924(c) are also different for statute
3 of limitations purposes. So 924(c) is subject
4 to the default five-year federal statute of
5 limitations. 924(j)(1) at least, as a capital
6 offense, has no statute of limitations. And so
7 there will be cases, quite frankly, this case
8 included, in which the government only can go
9 forward on a (j) count.

10 CHIEF JUSTICE ROBERTS: If that were
11 the --

12 JUSTICE KAGAN: If the Court were to
13 --

14 CHIEF JUSTICE ROBERTS: I'm sorry. Go
15 ahead.

16 JUSTICE KAGAN: No, go ahead.

17 CHIEF JUSTICE ROBERTS: Would -- if
18 you do go with both, aren't you going to be
19 confronted with the problem that your friend
20 talked about, which, for the same offense, you
21 could get one sentence that says the minimum of
22 30 years and the other one maximum 15?

23 MS. ROSS: I don't think so, Chief --
24 Mr. Chief Justice, because I think these --
25 we're talking about separate counts here. So

1 he's saying that we can bring, you know, a
2 three-count indictment, Count 1 is the
3 underlying crime of violence or drug -- drug
4 trafficking crime, Count 2 is the (c), and Count
5 3 is the (j). And so, you know, you would then
6 have those sentences.

7 And I think, to go to Justice
8 Kavanaugh's point, you know, that actually -- or
9 perhaps it may have been Justice Alito's point
10 -- that actually may not be more lenient in
11 practice because I think, as in this case, you
12 know, the court here had a (j) in front of it.
13 It, as most, if not all, courts of appeals do,
14 read (j) to include the mandatory minimum on
15 (c), and it said, you know, I think the (c)
16 five-year mandatory minimum here is sufficient
17 given the other counts in the indictment.

18 I think you couldn't do that on
19 Petitioner's rule if these are separate charges
20 and separate convictions and separate
21 punishments because the separate (j) offense
22 would require its own sentence, and that
23 sentence would have to be subject to subsection
24 (c)'s consecutive sentencing requirement in the
25 sense that it, like all other sentences, would

1 have to be consecutive to (c).

2 So I think Petitioner's rule actually
3 is -- is less lenient in a number of cases.

4 JUSTICE KAGAN: If the Court were to
5 rule for Mr. Lora on the question presented on
6 the theory that this language in (j), "in the
7 course of violation of subsection (c)," does not
8 incorporate all of subsection (c), and the Court
9 were to leave it at that, and the Court were to
10 say nothing about the Blockburger question,
11 which isn't really before us in the same way,
12 what would the government do? Would the
13 government then say, okay, things have changed,
14 we're viewing this differently now, we're going
15 to start charging (c) and (j)?

16 MS. ROSS: So I think we might well
17 take that course, Justice Kagan, again, because
18 I think that's sort of the natural consequence
19 of treating the (j) as not incorporating the (c)
20 penalties.

21 But I think there's a sort of
22 on-the-ground practical reason why I would
23 counsel the Court against doing that, and that's
24 because a number of courts of appeals have
25 precedent on the Blockburger question. And so I

1 think -- and generally holding in line with the
2 government's view that they're one offense, but
3 also holding that, you know, (j) incorporates
4 (c)'s penalties.

5 And so I think, if you dismantle half
6 of that without dismantling all of it, we could
7 be in a position where courts of appeals, under
8 their prior panel rules, might not think that
9 they could reverse that precedent and would have
10 to go en banc. And it's just, you know, a use
11 of judicial resources that I think is
12 unnecessary. Given that the parties have joined
13 issue on this question, I think it's well
14 presented in the papers here.

15 JUSTICE KAVANAUGH: Can I just be very
16 clear? You said you would counsel against us
17 doing -- and I want to be exactly sure on what
18 you're counseling us against doing.

19 MS. ROSS: I appreciate it, and I
20 appreciate the Court's indulgence in my
21 counseling anything.

22 You know, I -- I think what the Court
23 should not do is hold that Petitioner is correct
24 that the (j) -- that (j) does not include the
25 (c) sentencing provisions but leave open whether

1 this is one or two offenses for Blockburger
2 purposes. Obviously, we also think you
3 shouldn't do that and hold it's one offense for
4 Blockburger purposes. We think, if you're going
5 to say, as Mr. Lora argues, that (j) does not
6 sweep in the (c) penalties, then we think the
7 Court should also make clear, as Mr. Lora
8 argues, that, you know, in part, because of
9 that, given the intertwined relationship between
10 the two questions, these are separate offenses.

11 JUSTICE KAVANAUGH: If they don't --

12 JUSTICE JACKSON: But that's not the
13 Blockburger test. I don't understand. So
14 you're -- you're suddenly now asking us as a
15 result of this case to revisit Blockburger and
16 what it says about when there are separate
17 offenses?

18 MS. ROSS: No, Justice Jackson. To --

19 JUSTICE JACKSON: So you've already
20 said that this fails the Blockburger test.
21 That's the government's view. And I understood
22 Justice Kagan to be saying, can we not talk
23 about that in this case, whether it meets the
24 Blockburger test or not, and still rule in favor
25 of Mr. Lora? And you're saying no. But I don't

1 understand why that is.

2 MS. ROSS: Sure. So we take the
3 Blockburger test as it exists. We think, under
4 the Blockburger test, we have the better reading
5 of the statute. We think it's a greater and a
6 lesser included offense. That's normally one
7 offense. But the natural consequence of that is
8 that the penalty provisions of (c) apply to (j)
9 as well.

10 JUSTICE JACKSON: All right. Can we
11 disagree with that part of it without revisiting
12 whether it's one or a different offense? You've
13 said two different things in that. I mean, I
14 didn't understand Blockburger to speak to the
15 penalties in this way.

16 MS. ROSS: So I think one of the clues
17 you might look to in the Blockburger analysis,
18 and we think the clearest clue in this case if
19 you come out in Mr. Lora's direction, is whether
20 it's a standalone penalty scheme or it's
21 incorporating another provision's penalty. And
22 I think that is how the two are related.

23 Now, again --

24 JUSTICE JACKSON: And what's your
25 answer to that question? You say it -- it -- it

1 satisfies the Blockburger test, meaning that
2 they are one and the same, like a lesser
3 included offense, but it also incorporates the
4 other penalty. Is that your view?

5 MS. ROSS: I might have lost you
6 there, but I think what we say as our frontline
7 position -- I want to be clear about this
8 because I think it's extremely important. Our
9 frontline position is that these are one offense
10 for purposes of Blockburger. That is because,
11 you know, (c) -- (j) cross-references (c),
12 they're in the same section, they're part of the
13 same -- you know, they're a greater and lesser
14 included offense, cases like Brown versus Ohio
15 and Garrett, which strongly suggest they're one
16 offense.

17 If they're one offense, we think it is
18 necessarily true that the penalties of (c) are
19 read into (j) because all (j) is doing at that
20 point is adding an additional element and it's
21 increasing the penalty.

22 JUSTICE JACKSON: Is that what
23 Blockburger says? If they're one offense, then
24 the penalties of one necessarily get imported
25 into the other? That's what I'm asking you.

1 MS. ROSS: I don't think that's what
2 Blockburger --

3 JUSTICE JACKSON: All right. So that
4 would be --

5 MS. ROSS: -- itself says. I do think
6 --

7 JUSTICE JACKSON: -- you if we decided
8 in your favor using the Blockburger standard in
9 the way you want us to?

10 MS. ROSS: I don't think that's quite
11 right in the sense that I think subsequent cases
12 in that line look to features of the statute and
13 sort of their level of interdependent -- the two
14 crimes' level of interdependentness -- or
15 interdependence. And one of those clues, I
16 think, would be the -- the way that the penalty
17 provisions interact.

18 JUSTICE SOTOMAYOR: Counsel, I'm
19 having a whole lot of problem here. You just
20 started this section on saying that you couldn't
21 charge 924(c) because it has a five-year
22 limitation. So we're going to hypothesize that
23 you could have and, if you did, that you
24 didn't -- wouldn't have violated the Double
25 Jeopardy Clause. That's what you want us to do?

1 MS. ROSS: So, Justice Sotomayor --

2 JUSTICE SOTOMAYOR: To hypothesize
3 that you could have and wouldn't.

4 MS. ROSS: Justice Sotomayor, I think
5 what we're asking you to -- so let me rephrase
6 this.

7 I think Petitioner was very clear in
8 his briefs that there's no anomaly on his
9 reading. There's no problem with saying that
10 (j) doesn't incorporate the (c) penalties
11 because the government can also bring a (c)
12 charge whenever it can bring a (j) charge, with
13 the exception of statute of limitations
14 questions, which are sort of on a -- on a
15 different --

16 JUSTICE SOTOMAYOR: Well, that -- that
17 hurts you too because it makes it different not
18 just in terms of the maximum but also gives you
19 a greater statute of limitations than (c) does.
20 So there's a lot of reasons to treat (j)
21 differently and separately, because you're
22 getting two benefits, one, a greater maximum,
23 and second, a longer statute of limitations.

24 MS. ROSS: I certainly understand
25 that, Justice Sotomayor. Of course, our

1 fundamental submission is that -- that Congress,
2 having given us those things, it's irrational to
3 think -- didn't think that at least the
4 mandatory minimum for the base offense --

5 JUSTICE SOTOMAYOR: Well --

6 MS. ROSS: -- was required.

7 JUSTICE SOTOMAYOR: -- to go back to
8 Justice Jackson's question, we can't know what
9 Congress was thinking except that it knew to add
10 armor in (c) and yet it created (j) separately.
11 And what it did in (j) was to raise the
12 statutory maximum and give you a statute of
13 limitations benefit.

14 MS. ROSS: Of course, it did the same
15 things in (c)(5). I think the better
16 understanding of (c)(5) is probably --

17 JUSTICE SOTOMAYOR: No, it -- it
18 didn't -- it made a minimum of -- it -- it
19 didn't. It just added armor-piercing.

20 MS. ROSS: No, (c)(5)(B) does give you
21 a -- a maximum sentence of the death penalty and
22 therefore --

23 JUSTICE SOTOMAYOR: Yes, so it could
24 --

25 MS. ROSS: -- would give you the

1 heightened statute of limitations --

2 JUSTICE SOTOMAYOR: -- have done it
3 that way too, and it just didn't, so the --

4 MS. ROSS: Well, I think the better
5 explanation on (c)(5) is probably that
6 armor-piercing ammunition is sort of of a flavor
7 with the other enhancements that are in (c)
8 throughout, so machine gun, you know, different
9 types of weapons, things like that. And so
10 (c)(5) may have been included there.

11 But, of course, you know, I -- I -- I
12 don't have a legislative history cite for you on
13 that.

14 JUSTICE SOTOMAYOR: Well, I don't know
15 what -- what --

16 MS. ROSS: We're all just speculating
17 about why Congress did what it did here.

18 JUSTICE SOTOMAYOR: Maybe we should
19 just go back to the language.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Justice Thomas?

23 JUSTICE THOMAS: You were going to
24 counsel us on how best to write an opinion if we
25 came out in favor of Mr. Lora, and I don't think

1 you quite finished.

2 MS. ROSS: Thank you, Justice Thomas.
3 So I -- I've tried to explain that I think, if
4 you hold that (j) -- you don't walk through (c)
5 first, you don't apply (c)'s "any person who"
6 language, which we think clearly applies to a
7 person who violates (j).

8 If you disagree with us on that, then
9 we think you would be saying that (j)'s penalty
10 provision -- or, excuse me, (c)'s penalty
11 provisions are not read into (j), and at that
12 point, I think you would explain, as Mr. Lora
13 did in his briefs, that the reason that doesn't
14 create an anomaly where the lesser conduct in
15 (c) has a greater in this sense penalty of a
16 consecutive mandatory sentence is that, in fact,
17 the government is able to charge both (c) and
18 (j) separately and to obtain cumulative
19 punishments on each going forward because they
20 are separate offenses.

21 CHIEF JUSTICE ROBERTS: Justice Alito?

22 JUSTICE ALITO: If we agree with --
23 excuse me, if we agree with Petitioner, could
24 someone convicted under (j) be placed on
25 probation?

1 MS. ROSS: So --

2 JUSTICE ALITO: Would (c) --
3 (c)(1)(D)(i) apply?

4 MS. ROSS: So, frankly, Justice Alito,
5 I -- I think the answer depends on the
6 classification of the manslaughter and -- or of
7 (j) as a certain type of felony. I think it is
8 possible in -- depending on how you sort of
9 squint at the relevant statutes in an
10 involuntary manslaughter case perhaps, but I
11 think it's just sort of untested. I -- I'm not
12 sure the answer to that question.

13 CHIEF JUSTICE ROBERTS: Justice
14 Sotomayor?

15 Justice Kagan?

16 JUSTICE KAVANAUGH: Just to quickly
17 summarize your answer to Justice Thomas just now
18 because I want to be very clear on this.

19 If you lose on your main argument and
20 they prevail, then you can, you think, charge
21 both (c) and (j), and you will, presumably, and
22 you will defend that against any Blockburger or
23 other kind of argument?

24 MS. ROSS: I -- I think that is likely
25 the case. You know, I don't want to commit the

1 Department because it would obviously --

2 JUSTICE KAVANAUGH: Yes.

3 MS. ROSS: -- depend a bit on what the
4 Court's opinion said.

5 JUSTICE KAVANAUGH: I'm not committing
6 you on the policy. I'm just saying --

7 MS. ROSS: Right.

8 JUSTICE KAVANAUGH: -- you would have
9 the authority to, you think, and you may do so
10 and you would defend that if you lose on the
11 main submission in this case.

12 MS. ROSS: I thank that's right,
13 Justice Kavanaugh. Blockburger is, of course, a
14 rule of legislative intent. It's a presumption.
15 And so I think depending on what else you think
16 the legislature intended, we sort of have to
17 readjust and rethink how we've approached this
18 question.

19 JUSTICE KAVANAUGH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Barrett?

22 Justice Jackson?

23 JUSTICE JACKSON: So I guess I don't
24 understand a point about Blockburger, and it's a
25 little -- it goes back to what Justice Kavanaugh

1 just said.

2 I heard you say that Mr. Lora's
3 position is that (c)'s penalty provisions are
4 not read in, and the reason why that doesn't
5 create an anomaly is because they are separate
6 offenses. That's his view.

7 MS. ROSS: Correct.

8 JUSTICE JACKSON: All right. What if
9 we agree that the reason why they don't create
10 an anomaly is, first, because that's -- the text
11 obviously says -- doesn't say they're read in,
12 but, setting that aside, they don't create an
13 anomaly because (j) is still broad enough to
14 allow for the greater penalty because the -- the
15 government sets this up as a catch-22 that --
16 and that's really underlying your Blockburger
17 concern.

18 You said earlier, you know, the
19 government would have to leave on the shelf the
20 mandatory minimums in (c) if it picks (j). But
21 I guess I don't understand why they're not --
22 why the government perceives itself to be losing
23 the opportunity for a higher penalty if it picks
24 (j).

25 You still go to court and you still

1 say a killing happened in the context of this
2 carrying -- carrying an offense, and so, Your
3 Honor, in your discretion to impose the death
4 penalty or the term of years or whatever, we
5 argue that you should give this person more than
6 a person who just would have gotten five years
7 under the mandatory minimum, and, as Justice
8 Kavanaugh pointed out, nine times out of ten you
9 would get it because the court sees a death in
10 the situation, and (j) permits the court to
11 impose a higher penalty for that.

12 So it's not a situation in which, by
13 picking (j), you somehow are relegated to
14 smaller or lesser penalties in a way that might
15 implicate your Blockburger concern.

16 MS. ROSS: So -- so, respectfully,
17 Justice Jackson, of course, on the -- the
18 frontline textual issue, which I took you to put
19 to one side, we disagree.

20 JUSTICE JACKSON: Yes, yes.

21 MS. ROSS: Moving to the anomaly
22 point, I think the anomaly is sort of at a -- a
23 finer level of gradation than that. I think
24 it's not just, you know, would a -- a court
25 necessarily reach this result nine times out of

1 ten. We hope that's true. But we think
2 Congress didn't leave it to that nine times out
3 of ten for what it's actually doing.

4 JUSTICE JACKSON: But maybe they did
5 in (j), just not in (c). I mean, the only
6 anomaly that you see or that you're pointing to
7 is the fact that in a (c) situation, Congress
8 sets a floor and doesn't let the court go below,
9 and in a (j) situation, it doesn't. It gives it
10 a broader range. It throws off the maximum.
11 And you have to argue in a (j) situation that,
12 Judge, you should give a much higher penalty
13 here, which the government would certainly do,
14 and nine times out of ten the court would agree.

15 MS. ROSS: Right, but -- but, to go
16 back to where the Chief Justice started this
17 morning, you know, the (j) necessarily includes
18 the (c). Anybody who's convicted of (j) has
19 been found -- not -- not just violated out in
20 the world but has been found by a jury or agreed
21 in a plea agreement that they violated every
22 element of (c).

23 JUSTICE JACKSON: Isn't -- isn't the
24 only --

25 MS. ROSS: And so the idea --

1 JUSTICE JACKSON: -- isn't the only
2 thing that the government is saying is that and,
3 therefore, it incorporates the -- the -- the
4 block on the judge's discretion with respect to
5 the floor? That's your only point, because,
6 fine, so it incorporates all the elements, but
7 the only real difference between those two from
8 the government's perspective is that in a (c)
9 situation, the court can't go below five years.
10 In a (j) situation, they could. But, because a
11 (j) situation involves a death, my question is,
12 under what circumstance is a court actually
13 going to go below the five years?

14 MS. ROSS: So I think it's not just
15 the mandatory minimum, it's also, of course, the
16 mandatory consecutive nature of the sentence. I
17 think --

18 JUSTICE JACKSON: And if they get
19 death, it doesn't matter, says your friend on
20 the other side.

21 MS. ROSS: Sure, but I think Congress
22 necessarily knew both because of the words of
23 the statute and because, of course, the
24 mandatory death penalty had long been held
25 unconstitutional that there would be term of

1 years sentences under this provision, and so I
2 don't think it makes sense to say that Congress
3 thought, you know, we need to make sure there's
4 a five-year at a minimum -- and, obviously, they
5 go up from there -- consecutive sentence when
6 someone holds the gun in their pocket.

7 But, if they take it out and kill
8 someone, you know, all bets are off because
9 we're going to increase it on the -- the other
10 end. I just don't think that that's the best
11 reading of the statute.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Rebuttal, Mr. Rosenberg?

15 REBUTTAL ARGUMENT OF LAWRENCE D. ROSENBERG
16 ON BEHALF OF THE PETITIONER

17 MR. ROSENBERG: I just have five
18 brief -- excuse me, brief points.

19 First of all, my friend on the
20 government's side admits that we don't know what
21 Congress's intent really was. But the
22 hypotheticals and anomalies are all resolved
23 effectively by two or three points.

24 One is that discretion still remains
25 even under our reading, and so, in circumstances

1 where someone deserves a harsher sentence, a
2 greater sentence, or consecutive sentences, the
3 judge can certainly do that. And so I think
4 that solves a lot of the problems.

5 Secondly, we go back to the plain text
6 of the statute. It simply doesn't permit the
7 government's reading. There really is no good
8 answer to the -- the text that says "imposed
9 under this subsection."

10 The government talks about the
11 National Association of Manufacturers case, but
12 that case actually supports our position. In
13 that case, the Court said that you couldn't say
14 that something that was tangential to or took
15 some meaning from actually arose under a
16 particular statutory provision. There, it was
17 Section 1311. And it's the same issue here.

18 Just because subsection (c) mentions
19 -- excuse me, subsection (j) mentions subsection
20 (c), it doesn't mean that the authority for the
21 sentence comes out of subsection (c). In fact,
22 in the Bifulco case that we cited in our brief,
23 the -- the Court specifically said that you --
24 you arise under a specific subsection or section
25 when your conviction, trial, and sentence is

1 based on that subsection.

2 The third point is, in respect to
3 (c)(5)(B) that Justice Sotomayor asked about, I
4 agree with -- with the questions that Justice
5 Sotomayor asked. The point is that the penalty
6 provision of (c)(5)(B) would be rendered
7 superfluous entirely of subsection (j)'s penalty
8 provision under the government's reading.

9 And, more to the point, if the -- if
10 Congress thought that subsection (c) was
11 incorporated into subsection (j), it never would
12 have needed to repeat those penalty provisions
13 in (c)(5). It just doesn't make any sense that
14 that's what Congress was intending to do.

15 The fourth point is that when Congress
16 did major body work to this whole section, I
17 believe in 1998, it left (j) as separate, and --
18 and we included later (c)(5) in (c), not in (j),
19 and that does suggest a different desire to
20 treat subsection (j), and we've talked about
21 that, whether it was to introduce the death
22 penalty or the other reasons we -- we discussed,
23 Congress has had the intent to keep (j)
24 separate.

25 And then, finally, with respect to

1 Blockburger and that thorny nest, I would just
2 say this. This case, while we certainly did
3 brief the issue, in part, in the briefs, this
4 case really doesn't present the Blockburger
5 question.

6 This is a case where our client could
7 not have been charged under (c) because of the
8 statute of limitations concern. The lower court
9 didn't address Blockburger. And at the end of
10 the day, it's probably best left to another case
11 to address Blockburger and -- and all of its
12 significance in this context.

13 What we suggest is simply that the
14 Court should reverse and hold that subsection
15 (j) means what it says, that it does not include
16 the consecutive sentence requirement of
17 subsection (c), and -- and, in all likelihood,
18 just leave it at that or -- or any other further
19 explanation, but I don't think the Blockburger
20 point is something the Court needs to get into.

21 Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel. The case is submitted.

24 (Whereupon, at 12:28 p.m., the case
25 was submitted.)

Official - Subject to Final Review

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