

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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DWAYNE BARRETT,)
Petitioner,)
v.) No. 24-5774
UNITED STATES,)
Respondent.)
- - - - -

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1 P R O C E E D I N G S

2 (11:32 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 24-5774, Barrett versus
5 United States.

6 Mr. Larsen.

7 ORAL ARGUMENT OF MATTHEW B. LARSEN

8 ON BEHALF OF THE PETITIONER

9 MR. LARSEN: Mr. Chief Justice, and
10 may it please the Court:

11 Possessing a gun in violation of
12 924(c)(1)(A) is a lesser-included offense of
13 using it lethally in violation of 924(j). The
14 offenses are therefore the same for purposes of
15 double jeopardy, meaning there's a presumption
16 that Congress did not intend two punishments
17 for one fatal shooting.

18 And this presumption controls unless
19 there is a clear indication that Congress
20 wanted to double-punish, but there isn't any.
21 As Court-appointed amicus acknowledges, 924(j)
22 says nothing about punishment under both
23 statutes. And as detailed in our briefing,
24 neither does 924(c).

25 On the contrary, while 924(c) is very

1 clear that its punishment applies in addition
2 to that for the underlying felony, it does not
3 say its punishment applies in addition to that
4 for a lethal shooting in violation of 924(j).

5 And the reason for this, as Your
6 Honors explained in Lora, is that Congress
7 designed 924(j)'s penalties, which include life
8 in prison and even death, to account for the
9 seriousness of the offense by themselves,
10 without incorporating penalties from subsection
11 (c). Indeed, as the Court also noted in Lora,
12 when Congress wrote 924(j) in 1994, it
13 specifically considered but rejected a proposal
14 to impose multiple punishments for a fatal
15 shooting. Only in 2005 did Congress write
16 924(c)(5) to cumulatively punish fatal gun use
17 but only where armor-piercing ammunition is
18 used. And that is not this case.

19 In short, Your Honors, and as
20 924(c)(5) confirms, Congress knows how to order
21 multiple punishments for a lethal shooting when
22 it wants to. It has not done so here.

23 I welcome the Court's questions.

24 JUSTICE THOMAS: So are you saying
25 that all of 924(c)(1) is a lesser-included

1 offense of 924(j)?

2 MR. LARSEN: So not necessarily, Your
3 Honor. If you're referring to things like
4 machine gun use or use of a silencer, we
5 recognize that question isn't presented here.
6 We addressed it in one of our briefs, the --
7 the scenario of voluntary manslaughter with a
8 machine gun, and we say maybe those are
9 different crimes, maybe they're not.
10 There's --

11 JUSTICE THOMAS: What about -- what
12 about 924(c)(1)(A)(ii) and (iii)?

13 MR. LARSEN: (1)(A)(ii)?

14 JUSTICE THOMAS: That's (i) -- (ii) is
15 brandishing and (iii) is discharge.

16 MR. LARSEN: Ah, yes. So the same
17 answer to our situation involving the machine
18 gun. So perhaps -- this could go either way,
19 Your Honor, in that scenario, which is not, of
20 course, the case here. Strictly speaking, you
21 know, brandishing is a requirement under (c),
22 but brandishing may or may not be an element of
23 924(g).

24 This Court, however, explained in the
25 Whalen case, where there was a lesser-included

1 offense of rape and a greater-included offense
2 of murder, felony murder, the Court said, well,
3 strictly speaking, rape is not an element of
4 felony murder, but it is one way you can commit
5 felony murder. And, in this case, the Court
6 said in Whalen that is the lesser-included
7 offense.

8 So it may be, Your Honor, that in a
9 case where brandishing is shown, discharge is
10 show, use of a machine gun or silencer is
11 shown, and a jury convicts on (j), they will
12 necessarily find that's the lesser-included.
13 Of course, that's not the posture here. We
14 have simple possession, which is always a
15 lesser-included offense of illegal use.

16 JUSTICE KAVANAUGH: Your -- your whole
17 point was that Congress didn't speak clearly
18 enough here. But (c)(1)(D)(ii), as you know,
19 because amicus emphasizes it, I mean, I don't
20 know how that could be clearer.

21 MR. LARSEN: So --

22 JUSTICE KAVANAUGH: "No term of
23 imprisonment imposed on a person under this
24 subsection shall run concurrently with any
25 other term of imprisonment imposed on the

1 person."

2 I mean, that's -- that's very clear,
3 and it starts with "notwithstanding any other
4 provision of law" in (D), notwithstanding
5 any -- any other provision of law, no term of
6 imprisonment imposed shall run concurrently.

7 MR. LARSEN: Indeed, Your Honor. So
8 the operative language to activate this section
9 is that a term of imprisonment has to be
10 imposed under this subsection. That is the
11 question here. May a term of imprisonment be
12 imposed under (c) if someone is punished under
13 (j) for the same offense? That's the question
14 here.

15 And as to that question, (c)(1)(D)(ii)
16 is silent. It doesn't address it. And as the
17 Court has explained, silence cannot be a clear
18 indication to double-punish.

19 JUSTICE KAVANAUGH: And what would
20 be --

21 MR. LARSEN: Also, Your Honor --

22 JUSTICE KAVANAUGH: -- what would be
23 necessary, do you think, to make that clear?

24 MR. LARSEN: What would be necessary
25 would be something like what appears elsewhere

1 in the statute. We have two examples in 924(c)
2 of where Congress has ordered multiple
3 punishments.

4 One, it said, if you possess a gun,
5 you get a punishment for that in addition to
6 the underlying crime of violence. It also in
7 (c)(5) said, if you use a gun loaded with
8 armor-piercing ammunition to kill, you're
9 getting a lot of punishments.

10 JUSTICE KAVANAUGH: (c)(5) came in
11 much later. I mean, this was in '71, right,
12 that 924(c)(1)(D)(ii) came in?

13 MR. LARSEN: Yes. And even when it
14 came in, Your Honor, in Simpson and Busic, this
15 language was in the statute. And this Court
16 said in Simpson and Busic that this language
17 requiring a minimum, requiring it to be
18 consecutive, was not sufficient to constitute a
19 clear indication. That's why Congress had to
20 amend the statute to make it crystal-clear that
21 it wanted to double-punish both possession --

22 JUSTICE KAVANAUGH: So you want it --
23 you want it to be in both 924(j) and in 924(c),
24 the provision that it -- that it can -- can't
25 be concurrent?

1 MR. LARSEN: No, Your Honor. There is
2 no -- there is no provision in either of these
3 statutes addressing this scenario here,
4 saying --

5 JUSTICE JACKSON: And is that because
6 you -- is that because you are distinguishing
7 two convictions versus two punishments? In
8 other words, it seems to me that this provision
9 that Justice Kavanaugh is pointing to is about
10 whether you can run the sentences that have
11 been validly determined relative to two
12 separate convictions -- whether you can run
13 those or have to run those concurrently.

14 But your question is, can we have two
15 separate convictions under these circumstances?

16 MR. LARSEN: Precisely, Your Honor.

17 JUSTICE JACKSON: Right. So that's
18 why this doesn't have anything to do with that.

19 MR. LARSEN: Precisely, Your Honor.

20 JUSTICE JACKSON: The question that's
21 at issue at this -- under double jeopardy, it's
22 can we have two separate convictions for the
23 same offense, for the same conduct, not whether
24 the sentences that flow from those two separate
25 convictions can be run concurrently or -- or --

1 JUSTICE KAVANAUGH: Well, I thought we
2 talked --

3 JUSTICE JACKSON: -- consecutively or
4 whatever.

5 JUSTICE KAVANAUGH: I'm sorry.

6 JUSTICE JACKSON: Yeah.

7 MR. LARSEN: Well --

8 JUSTICE KAVANAUGH: I thought we
9 talked about that in oral argument in Lora.
10 We -- we foresaw, I think, exactly what was
11 going to happen at the oral argument in Lora
12 about -- about this.

13 MR. LARSEN: Well, Justice Jackson,
14 you're absolutely right. We don't get to
15 sentencing unless there's a valid
16 constitutional conviction imposed. That is the
17 question in this case. Can someone be
18 convicted under (c)(1) and also (j) for the
19 same crime? And nothing in the --

20 JUSTICE SOTOMAYOR: So can you
21 explain -- and I think maybe this would address
22 Justice Kavanaugh; he'll correct me if it does
23 not -- what is it in 924(c) that requires, that
24 permits the two sent -- the two convictions to
25 run consecutively? So you're -- I think you're

1 saying an intent to allow for dual convictions
2 is what you need to have Congress show and not
3 speaking only to the length or timing of a
4 sentence, correct? You need more than --

5 MR. LARSEN: Right.

6 JUSTICE SOTOMAYOR: -- length or
7 timing. So what is it in 924(c) that permits a
8 dual conviction?

9 MR. LARSEN: Right. The -- the -- the
10 dual conviction in 924(c)(1)(A) is for gun
11 possession and the underlying crime of violence
12 or drug trafficking offense.

13 JUSTICE SOTOMAYOR: Okay.

14 MR. LARSEN: Congress is very clear
15 you can stack those punishments. And if you
16 do, in fact, impose a sentence under (c) in
17 that scenario, that sentence will have to run
18 consecutive to the underlying offense.

19 That is not this case, Your Honor.

20 JUSTICE SOTOMAYOR: All right. But,
21 if it's dual convictions, generally, you have a
22 drug offense for carrying a firearm, you get
23 a sentence for that, you have to run this
24 consecutively.

25 What is it in the statute that you say

1 makes it clear that it's speaking not just
2 about punishment but about conviction as well?

3 MR. LARSEN: Well, when it talks about
4 punishment, conviction, sentence, these words
5 in the case law are kind of used
6 interchangeably. The idea under the Double
7 Jeopardy Clause is that you can't be punished
8 twice for the same offense.

9 We know here we're talking about one
10 offense. So the question is, is there any
11 clear indication that Congress wanted someone
12 like Mr. Barrett to get multiple punishments?

13 And I think it's important to remember
14 that when Congress wrote 924(j), the statutes
15 didn't look like they look today.

16 In 1994, 924(c)'s penalty was a fixed
17 five years. It was not a minimum. So Congress
18 found that insufficient. They're like: If you
19 kill someone, you need more than five years in
20 prison.

21 It wrote (j) to allow for the death
22 penalty and up to life in prison. It rejected
23 the proposal that a fatal shooting should be
24 subject to (c)'s multiple punishment regime.
25 And this Court explained in Lora it designed

1 (j) to account for the seriousness of killing
2 by itself.

3 There's no indication that Congress
4 thought that someone sentenced to death under
5 (j) or up to life in prison should get five
6 years on top. What's the point of that?

7 There may be something strange
8 nowadays when we look at (c) saying it's a
9 minimum of five and, you know, why -- why
10 would Congress want to have a minimum for gun
11 possession but not fatal use? But this Court
12 unanimously rejected that argument in Lora.

13 That was the government's argument
14 there. If you have a minimum for possession,
15 you've got to have one for lethal use.

16 This Court said, no, there's no
17 indication in the statute of that. Congress
18 didn't clearly indicate that that's what it
19 wanted.

20 JUSTICE ALITO: Well, when we -- when
21 we interpret what a particular provision means
22 today, don't we have to look at the entire --
23 all of the relevant provisions that are in
24 place at the present time?

25 MR. LARSEN: Yes, Your Honor. And I

1 think it's very telling that in the 30-plus
2 years since (j) was written --

3 JUSTICE ALITO: In other words, we
4 have to -- you know, we have to assume that
5 it's all meant to fit together somehow, right?

6 MR. LARSEN: I think it's fair to look
7 at the passage of time, the passage of time,
8 Your Honor, and I think that works in our favor
9 because there's no suggestion by anyone here
10 that in 1994 Congress wanted someone sentenced
11 to death to get five years on top.

12 It may seem odd now that five is a
13 floor rather than a fixed term, but Congress
14 has had 31 years, Your Honor, to address this
15 problem if it is a problem. Congress has
16 decided it's not a problem. And why? Because
17 (j) is enough on its own to punish someone who
18 lethally uses a gun.

19 JUSTICE ALITO: Do you think that a
20 clear congressional desire to provide multiple
21 punishments for a greater- and lesser-included
22 offense can be inferred from the penalty
23 scheme?

24 MR. LARSEN: Well, I think --

25 JUSTICE ALITO: Can it ever be

1 inferred from the penalty scheme?

2 MR. LARSEN: If I'm -- I'm -- so the
3 penalty -- Your Honor says the penalty scheme.
4 So every statute has a penalty.

5 JUSTICE ALITO: Suppose that --
6 suppose --

7 MR. LARSEN: Right.

8 JUSTICE ALITO: -- that the -- the
9 maximum penalty for the greater offense in the
10 sense that it includes more elements is one
11 year, but the maximum penalty for the
12 lesser-included offense in that it has fewer
13 elements is two years.

14 Do you think it would be -- that a
15 clear congressional desire to have multiple
16 punishments in that situation could be
17 inferred?

18 MR. LARSEN: No, Your Honor. And
19 there is a case that we found after briefing
20 by Judge Posner, it's U.S. v. Peel, P-e-e-l,
21 Seventh Circuit, 2010.

22 There, the judge explained the
23 lesser-included offense was obstruction of
24 justice with a 20-year maximum. The greater
25 offense in that case was bankruptcy fraud,

1 which is a five-year max. So it's exactly the
2 scenario that Your Honor has just posited, this
3 weird situation where the greater offense
4 actually has a lower penalty.

5 Judge Posner says, same offense, no
6 clear indication to double punish, I'm sending
7 it back for one of them to be -- one conviction
8 to be vacated.

9 JUSTICE ALITO: Well, are we bound by
10 that decision?

11 MR. LARSEN: No, but I think it's a
12 good example --

13 JUSTICE ALITO: Then why does it make
14 sense?

15 MR. LARSEN: I think it makes sense
16 because --

17 JUSTICE ALITO: Why does it make --
18 why does it make sense?

19 MR. LARSEN: I think it makes sense,
20 Your Honor, because it's entirely in line with
21 this Court's consistent jurisprudence that
22 because courts don't decide punishments, it's
23 Congress that does so.

24 Courts have to be very careful before
25 they decide that Congress wanted to pile on and

1 double-punish one crime. It needs a clear
2 indication.

3 And the fact that two different
4 statutes may require punishment, may require
5 even minimum punishments, or even have clauses
6 saying notwithstanding any other provision
7 of law, don't suspend this sentence, I'm
8 describing now the scenario as in Rutledge.

9 This Court said that is not enough to
10 be a clear indication to double-punish. There
11 must be more. And, here, there is no more.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 What exactly short of express language
15 would you say allows multiple punishments?

16 MR. LARSEN: So the two examples that
17 both we and the government cite in (c), mainly
18 (c)(1)(A) and (c)(5), there's language -- it's
19 not the same language, you can use different
20 language -- it clearly indicates there that
21 Congress did want multiple punishments.

22 And I think we do look to the text.
23 That's the best expression of Congress's
24 intent. And, here, there simply is no text
25 indicating a wish to double-punish in this

1 scenario.

2 CHIEF JUSTICE ROBERTS: Okay. Justice
3 Thomas?

4 Justice Alito?

5 JUSTICE ALITO: Well, just out of
6 curiosity, suppose there is a -- a person who
7 is committing a crime and this person is very
8 well versed in the -- in statutory -- in -- in
9 the criminal code and in our double jeopardy
10 jurisprudence.

11 And so this person commits an offense
12 that has two elements, A and B, and the maximum
13 punishment for that offense is five years, and
14 the person says: Wow, if I get caught and
15 convicted, I don't want to go to jail for five
16 years, but I know that if I commit two other
17 elements, C and D, then the maximum penalty
18 for that offense is only one year. So let me
19 go ahead and commit the -- the -- the greater
20 offense.

21 Does that make any sense?

22 MR. LARSEN: So such a -- such a
23 skilled defendant may engage in that conduct,
24 Your Honor. There are ample safeguards in
25 place to protect against any injustice.

1 In that scenario, the person would be
2 tried and convicted of both offenses, and if
3 they are, in fact, the same and there's no
4 clear indication to pile them on top of each
5 other, he would be subject to punishment under
6 either one.

7 If the government or the court feels
8 that they need to use the statute with the
9 higher maximum, they'll be punished under that
10 one.

11 And that's the situation here, Your
12 Honors. If Mr. Barrett is ultimately punished
13 under (c) instead of (j), he still faces up to
14 life in prison.

15 And the government has pointed to
16 no scenario in which someone punished under
17 (c) -- or rather under (j) gets -- gets off or
18 gets a light sentence.

19 JUSTICE ALITO: Well, what I'm getting
20 at is that under your view, a defendant who
21 commits a murder while violating 924(c) can be
22 sentenced to less time than a defendant who
23 does not commit murder while violating 924.

24 MR. LARSEN: Right.

25 JUSTICE ALITO: Isn't that right?

1 MR. LARSEN: So, yes, Your Honor.

2 "Can be," I think, is the key phraseology
3 there.

4 So, in addition to the fact that
5 amicus has cited no actual example of this ever
6 happening, there is also the safeguard in
7 addition to what I've discussed of appellate
8 review.

9 If some crazy judge says: I'm giving
10 you a day in jail for killing somebody, you can
11 bet there's going to be a government appeal and
12 a -- a review in court is going to most likely
13 find that unreasonable.

14 There are multiple safeguards here.
15 No injustice is going to result from our
16 reading of the statute, which is the only
17 reasonable reading given the text here.

18 CHIEF JUSTICE ROBERTS: Justice
19 Sotomayor?

20 JUSTICE SOTOMAYOR: There is another
21 situation in which we found that the sentences
22 should be running consecutively, and that's
23 Garrett.

24 MR. LARSEN: Ah, yes.

25 JUSTICE SOTOMAYOR: In Garrett, the

1 RICO versus the substantive crime, correct?

2 And so distinguish that case.

3 MR. LARSEN: Garrett could not --

4 JUSTICE SOTOMAYOR: Where we looked
5 at -- there was no language there, but it was
6 the nature of the statute.

7 MR. LARSEN: Garrett could not be more
8 unlike the scenario here, Your Honor.

9 The two crimes there was one --
10 literally one on one day on importation of
11 marijuana on one day. The other crime was a
12 years-long, multi-state, spanning all of the
13 coasts of the country, continuing criminal
14 enterprise.

15 This Court looked at the statutes,
16 said Congress could not possibly have intended
17 that if you import marijuana on one day, you
18 then get a get-out-of-jail-free card for the
19 next several years of your continuing criminal
20 enterprise.

21 That is -- and in the court -- in
22 the court's decision -- or rather discussion of
23 this situation there, it contrasted that
24 scenario to the one here, a single course of
25 conduct.

1 Here, (j) requires that the shooting
2 occur in the course of a violation of (c), and
3 that's what happened. Mr. Dore shot Mr.
4 Dafalla within seconds or minutes of robbing
5 his compatriots. This was not something
6 spanning years or months. This is one course
7 of action, the classic and simple situation.

8 JUSTICE SOTOMAYOR: Going back to
9 Justice Alito's question about does it make any
10 sense that the lesser-punished crime would --
11 Congress would want that one to control, that
12 wasn't the case when the statute was passed,
13 correct?

14 MR. LARSEN: Absolutely right.

15 JUSTICE SOTOMAYOR: So we have to
16 discern intent at the time the statute was
17 passed, correct?

18 MR. LARSEN: Yes. I do think it's
19 fair, as Justice Alito indicated, to look at
20 what's happened since then. But looking at
21 that only helps our position because Congress
22 has had over 30 years to change this scenario
23 if it felt like something unjust was --

24 JUSTICE SOTOMAYOR: And they did it in
25 one situation.

1 MR. LARSEN: That's right, for
2 armor-piercing ammunition, not the case here.

3 JUSTICE SOTOMAYOR: Exactly.

4 MR. LARSEN: Correct.

5 CHIEF JUSTICE ROBERTS: Justice Kagan?
6 Justice Gorsuch?

7 JUSTICE GORSUCH: I had a question
8 from a totally different direction, Mr. Larsen.

9 So everybody's litigated on the
10 premise that Congress can double-punish for
11 greater- and lesser-included offenses if it
12 speaks clearly, but it must speak clearly.
13 Where does that presumption come from?

14 MR. LARSEN: It comes from a couple of
15 places that -- Your Honors talked about this in
16 the Whalen decision. Number one, separation of
17 powers. Courts don't write laws punishing
18 criminal conduct. They don't set the
19 penalties. Congress does that. That function
20 by the Constitution is committed to Congress.
21 So courts are very careful --

22 JUSTICE GORSUCH: Well, we normally
23 interpret statutes without a thumb on the
24 scale. And you asked us, everybody asks us, to
25 put a thumb on the scale. Where does that

1 thumb come from?

2 MR. LARSEN: Yes. The presumption,
3 right, because we're -- we're afraid --

4 JUSTICE GORSUCH: Yeah.

5 MR. LARSEN: -- of violating the
6 separation of powers --

7 JUSTICE GORSUCH: Where -- where --

8 MR. LARSEN: -- and we're also
9 afraid --

10 JUSTICE GORSUCH: Is that lenity? Is
11 that -- are you just afraid to utter the word?

12 MR. LARSEN: I -- no. I'm a great fan
13 of lenity, and I -- I believe Your Honor is
14 too. Maybe not everyone in the room is a fan
15 of lenity, but I am.

16 But putting lenity to the side --

17 JUSTICE GORSUCH: It has to come from
18 somewhere.

19 MR. LARSEN: Yes. It comes from the
20 historical practice that Con- -- that
21 historically speaking, legislatures don't
22 double-punish one crime, right? And also,
23 constitutionally, it's the legislature that
24 decides on the punishment, not a court. So a
25 court, before it veers out of its lane and says

1 you have to double-punish this person, there
2 better be something very clear from Congress
3 indicating that that's allowed because, as the
4 Court said in Whalen, if we get this wrong, we
5 violate not only the separation-of-powers
6 principle, but we also trench especially
7 harshly on the individual freedom aspects that
8 are protected by the Double Jeopardy Clause.

9 JUSTICE GORSUCH: And -- and this
10 Court has sometimes said the presumption, but
11 in other cases, it said there is no -- double
12 jeopardy prohibits two punishments for one
13 offense, and that includes greater and lesser.
14 I'm thinking of Pearce; I'm thinking of Shiro.
15 How do we reconcile, like, Hunter on the one
16 hand and those cases on the other?

17 MR. LARSEN: Well, Hunter -- Hunter
18 was just Missouri's version of 924(c). You
19 know, if you commit a crime with a gun, you get
20 a punishment for the gun in addition to the
21 punishment for the underlying crime. Nothing
22 in Hunter speaks to the situation here.

23 JUSTICE GORSUCH: Well, I'm wondering,
24 Hunter was issued during the Grady era when we
25 treated Blockburger as a -- a tool of statutory

1 interpretation and, therefore, kind of a
2 presumption, if you will. But Dixon overruled
3 Grady, right? And so I wonder, you know, is
4 Hunter still good law, or is it Shiro and
5 Pearce?

6 And -- and let me add on to that, you
7 know, the possibility of punishment, dual
8 punishments, for greater- and lesser-included
9 offenses really wasn't possible for much of our
10 history because you didn't have joinder of
11 criminal offenses. And so, necessarily, once
12 you try one, you're done. You know, you try
13 the greater and you're done and there is no
14 opportunity for double punishment. So I'm just
15 wondering what you make of all of that.

16 MR. LARSEN: Well, historically
17 speaking also, Your Honor, most -- most
18 felonies resulted in losing of life.

19 JUSTICE GORSUCH: Death.

20 MR. LARSEN: Yes. So this question
21 wasn't, you know, as present that it -- as it
22 is nowadays. But the Court has consistently
23 adhered to the Blockburger rule for over 100
24 years. Even in Blockburger, it cited a case
25 from 1911, citing a Massachusetts case from the

1 19th Century. The Court has had many
2 opportunities it's observed in Rutledge and
3 other cases to abandon this rule, and it
4 hasn't.

5 And it's just a presumption. We -- we
6 acknowledge that. The presumption can be
7 overcome. But that's what's missing here, Your
8 Honor.

9 JUSTICE GORSUCH: And I'm wondering,
10 why -- why can the presumption be overcome?

11 MR. LARSEN: Because the Court has
12 decided that despite the double --

13 JUSTICE GORSUCH: Then why does the
14 Double Jeopardy --

15 MR. LARSEN: Yes.

16 JUSTICE GORSUCH: -- Clause say --

17 MR. LARSEN: That's precisely right.

18 JUSTICE GORSUCH: -- you can't be
19 punished twice for one offense? We have one
20 offense here.

21 MR. LARSEN: And that's the funny
22 thing that I also, you know, discovered in this
23 case, Your Honor. Despite those plain words of
24 the Double Jeopardy Clause, the Court has
25 consistently understood that to be a check on

1 courts and not on the legislature because
2 punishments --

3 JUSTICE GORSUCH: Thank you,
4 Mr. Larsen.

5 MR. LARSEN: -- can be whatever
6 Congress says they are.

7 CHIEF JUSTICE ROBERTS: Justice
8 Kavanaugh?

9 JUSTICE KAVANAUGH: Well, the lower --
10 the Second Circuit here -- I mean, I feel
11 unfortunate position they're in because they're
12 trying to interpret Lora, right? So you talk
13 about 31 years. They're interpreting Lora and
14 they say, after Lora, where we said that
15 Congress specifically chose to locate 924(j)
16 outside 924(c) -- they're separated by several
17 unrelated subsections -- we said this
18 reinforces the conclusion, and the Second
19 Circuit said that Congress intended to create
20 different crimes subject to different penalty
21 schemes, 924(c) focusing on the firearm, 924(j)
22 focusing on the death caused by the use of
23 firearm.

24 And -- and, again, that was discussed
25 at oral argument in Lora. In fact, the

1 government cautioned us against not answering
2 this question in the way that the Second
3 Circuit, you know, ended up saying. And now
4 we're back.

5 So what -- you know, Lora has got to
6 be part of your analysis here. How do you --
7 how do you explain Lora?

8 MR. LARSEN: Lora favors us, Your
9 Honor.

10 JUSTICE KAVANAUGH: Why?

11 MR. LARSEN: Because it's odd that the
12 Second Circuit said, you know, we're kind of
13 compelled now by Lora to reach this conclusion.

14 JUSTICE KAVANAUGH: You think that's
15 odd? Okay.

16 MR. LARSEN: I think it's odd.

17 JUSTICE KAVANAUGH: Keep going.

18 MR. LARSEN: And this is why, Your
19 Honor.

20 JUSTICE KAVANAUGH: I don't think it's
21 that odd, but anyway.

22 MR. LARSEN: Well, the reason I think
23 it's odd, Your Honor, is because this Court
24 said that our position in this case aligns with
25 Your Honor's ruling in Lora, right? This Court

1 said, you know, (j) does not incorporate (c)'s
2 penalties. Congress wrote (j) to punish a
3 killing. The penalties it set out were
4 sufficient in themselves. It didn't want to
5 replicate. It didn't want to pile on.

6 And although the precise question here
7 was reserved, Your Honor, whether these two
8 crimes are the same for double jeopardy
9 purposes, there is no dispute among the parties
10 that they are the same. So the only question
11 is, is there a clear indication? Is there
12 special authorization, to use the phrase in
13 Whalen, from Congress to double-punish one --
14 the one fatal shooting here?

15 And there simply isn't. Amicus has
16 not pointed to anything saying so.

17 JUSTICE KAVANAUGH: Well, I think
18 they've pointed to in 1994 when Congress comes
19 in with (j), they already know that
20 924(c)(D)(1)(ii) -- (D)(ii), sorry,
21 (c)(1)(D)(ii) already says that any new
22 punishment will be consecutive.

23 MR. LARSEN: So -- so (c)(1) --

24 JUSTICE KAVANAUGH: So that -- if
25 Congress knows that in '94, they don't -- they

1 know they don't have to put something in to
2 make clear that it's double-punished. It's
3 already by -- by definition going to be
4 double-punished given what that already says,
5 correct?

6 MR. LARSEN: So (c)(1) -- no, Your
7 Honor, respectfully, (c)(1)(D)(ii), as Justice
8 Sotomayor was describing, is an instruction on
9 how a sentence should run if imposed under (c).
10 That's the question here. If we assume --

11 JUSTICE KAVANAUGH: You said the
12 question was an intent by Congress to
13 double-punish.

14 MR. LARSEN: That's correct. So did
15 Congress want a sentence to be imposed under
16 (c) along with one under (j) for one crime?
17 That's the question to which (c)(1)(D)(ii) says
18 nothing.

19 And, finally, Your Honor, if we
20 presuppose (c)(1)(D)(ii) applies here, we
21 presuppose the answer to the question.

22 JUSTICE KAVANAUGH: Last, the Second
23 Circuit also noted that the district judge said
24 he was going to do a 50-year sentence
25 regardless here. That -- the Second Circuit

1 can deal with that, I suppose, even if you
2 prevail.

3 MR. LARSEN: Ah, yes. And just --
4 just to be clear, you know, Lora came up while
5 we were waiting -- while we were litigating
6 Barrett in the -- in the court below, so we
7 filed supplemental briefing based on Lora, and,
8 you know, the district judge rejected our
9 argument given circuit law at the time, but he
10 specifically told Mr. Barrett, you know, if I'm
11 wrong, you'll be back here for a new sentence.
12 So --

13 JUSTICE KAVANAUGH: Right. And that's
14 why the Second Circuit didn't find it --

15 MR. LARSEN: Right.

16 JUSTICE KAVANAUGH: -- harmless.

17 MR. LARSEN: Right. So we don't know
18 what the judge will do on remand. We don't.

19 JUSTICE KAVANAUGH: Yeah. Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Barrett?

22 Justice Jackson?

23 JUSTICE JACKSON: So can I just follow
24 up on the Lora clarification here? I guess
25 Justice Kavanaugh makes a point about the

1 Second Circuit believing that Lora compelled
2 its view. But I guess, as I understand your
3 argument, you are saying that Lora signaled
4 that Congress intended (j)'s punishment to
5 supplant (c), not supplement (c), that the fact
6 that there was a separate punishment scheme in
7 (j), but the elements were the same because
8 they were overlapping, meant that where the (j)
9 scenario occurred with the additional element,
10 Congress meant for it to be the punishment
11 scheme that you used in that scenario?

12 MR. LARSEN: One punishment for one
13 crime, Your Honor, yes. The fact that there
14 are different statutes here --

15 JUSTICE JACKSON: Yes.

16 MR. LARSEN: -- you know, (c) versus
17 (j), that was -- that was a feature of all of
18 Your Honors' cases. That was the situation in
19 Whalen, that was the situation in Rutledge.
20 They were different statutes. They had
21 different penalties. Didn't matter. They were
22 the same offense for double jeopardy purposes,
23 and because there wasn't a clear indication to
24 double punish, this Court said no double
25 punishment.

1 JUSTICE JACKSON: In going to Justice
2 Alito's questions about the Peel scenario, I
3 guess I didn't understand that odd circumstance
4 to be presented on these facts because I
5 thought that (j) allowed for additional
6 punishment, in other words, that we didn't have
7 a situation in which (j) was capping the
8 punishment lower than (c) would allow.

9 Is that right?

10 MR. LARSEN: That is correct. The
11 only difference is, you know, in this
12 particular case, under (c), the minimum is five
13 years. No one thinks Mr. Barrett is getting
14 five years, right?

15 JUSTICE JACKSON: Right.

16 MR. LARSEN: And --

17 JUSTICE JACKSON: But the -- and
18 that's because the minimum is not really at
19 issue in a case like this when you're talking
20 about death. I mean, what we care about is the
21 maximum in a situation in which the harms and
22 the offense is so egregious, correct?

23 MR. LARSEN: That's right, Your Honor.
24 And justice can be done under either one of the
25 statutes here. The simple point is that

1 convictions cannot be entered under both
2 statutes.

3 JUSTICE JACKSON: Right. And doesn't
4 it have to be done -- I mean, aren't sentencing
5 judges also bound by other statutory provisions
6 that require them to provide sentences that are
7 sufficient but not greater than necessary, that
8 avoid unwarranted sentencing disparities?

9 So it's not even realistic, I think,
10 given the sentencing judges' other obligations,
11 that you would be in a situation in which a
12 sentencing judge would sentence someone who had
13 used a gun to a fatal result less than someone
14 who had just used a gun, correct?

15 MR. LARSEN: I agree, Your Honor. And
16 that's why amicus has cited not even one
17 example of that ever happening.

18 JUSTICE JACKSON: Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Ms. Brown.

22 ORAL ARGUMENT OF AIMEE BROWN

23 ON BEHALF OF THE RESPONDENT

24 IN SUPPORT OF THE PETITIONER

25 MS. BROWN: Thank you, Mr. Chief

1 Justice, and may it please the Court:

2 Section 924(c)(1)(A) is a
3 lesser-included offense of 924(j), which
4 triggers the Blockburger presumption against
5 cumulative punishments. Nothing in the
6 statutory text, structure, or history rebuts
7 that presumption.

8 The text points in the opposite
9 direction. Congress expressly authorized
10 cumulative punishments for 924(c) and its
11 predicate, but when Congress enacted 924(j) and
12 made 924(c) the predicate, it omitted that
13 language. That different text indicates a
14 different intent.

15 The court of appeals focused on
16 924(c)'s mandatory minimum and consecutive
17 sentencing provisions, but those provisions
18 address the proper sentence after a conviction,
19 not whether a defendant can be convicted under
20 924(c) and another provision.

21 Amicus also relies on structural
22 arguments that 924(c) and (j) involve different
23 harms, subsections, and penalties, but 924(c)'s
24 predicate offenses share those features, yet
25 Congress specifically authorized cumulative

1 punishments there.

2 And Congress's history with 924(c)
3 confirms that it understood the clarity this
4 Court has required to authorize cumulative
5 punishments. Because there's no clear
6 indication Congress did so here, the
7 Blockburger presumption controls.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: Are you approaching
10 the point where you're going to require a clear
11 statement rule?

12 MS. BROWN: No, Your Honor. And we
13 resisted that -- that implication in our reply
14 brief as well. We don't think that this is a
15 requirement that there has to be language in
16 the text of the statute.

17 We agree with the -- the Court's
18 decision in Garrett, where the Court held,
19 looking at the statutory text along with the
20 structure, the context, the history, that
21 cumulative punishment had been authorized, and
22 we think that that same analysis should apply
23 in -- in every case.

24 It is -- it is a statutory
25 interpretation question, and the Court should

1 take account of the full toolkit for statutory
2 interpretation in -- in -- in that instance.

3 JUSTICE JACKSON: Does your position
4 differ from Barrett's in any meaningful way?

5 MS. BROWN: So, I mean, I think that
6 to the extent that Barrett was suggesting that
7 there might be some kind of clear statement
8 rule and relying on the sovereign immunity
9 decisions, which do I think require some kind
10 of heightened -- some kind of language
11 specifically in the statutory text, we do
12 resist that.

13 There is a part of Petitioner's
14 opening brief that -- that discusses lenity.
15 We don't think that the Rule of Lenity analysis
16 should be applied here either. But, as far as
17 the -- the construction of the statutory text
18 itself, I think we're -- we're aligned.

19 JUSTICE KAVANAUGH: Can you take me
20 through the history of how the government got
21 here? Because, in the oral argument in Lora,
22 it was explained that if the Court disagrees
23 with us on this, and the Court did disagree, it
24 should say that these are separate offenses for
25 purposes of Blockburger because for the reasons

1 I've just noting, it really makes no sense to
2 have one offense. Okay? That's the
3 government's words.

4 And then -- and I specifically asked
5 then later how we should write the opinion to
6 avoid this problem, and the government lawyer
7 very succinctly and clearly said, the Court
8 should also make clear that because of the
9 intertwined relationship to the two questions,
10 these are separate offenses for Blockburger.

11 Now that was ultimately left open.
12 The Second Circuit, I think, reasonably,
13 debatably, but reasonably read Lora as
14 supporting what the government was saying we
15 should have made clear.

16 So what happened then?

17 MS. BROWN: So our argument in Lora
18 was essentially that the statutory construction
19 question that we were -- that the Court was
20 facing there, whether 924(g) incorporates all
21 of 924(c), including of its penalties, we
22 thought that that was intertwined with the
23 double jeopardy question and that those two
24 questions should rise and fall together.

25 And we also thought that one reason

1 that our interpretation was the better one was
2 that otherwise you would have these implausible
3 results where a 924(j) offense could be
4 punished -- could receive a lower punishment
5 than 924(c).

6 And I think that the Court in Lora
7 rejected two of those points. It rejected the
8 idea that the -- the statutory analysis in Lora
9 rises and falls with the double jeopardy
10 question. The Court expressly said that its
11 analysis there was -- was -- was consistent
12 with or could be consistent with the -- the
13 government's longstanding double jeopardy
14 position.

15 And then the Court in Lora went on to
16 explain that it didn't find the possibility of
17 924(j) having the ability to be sentenced at a
18 lower -- a lower punishment than 924(c)
19 implausible because, instead of applying these
20 mandatory minimums or this consecutive sentence
21 mandate, Congress in 924(j) chose a different
22 approach to sentencing.

23 And that approach is the kind of
24 standard approach that Congress uses for murder
25 and manslaughter offenses where, instead of

1 constraining judicial discretion through the
2 use of minimums or consecutive sentence
3 mandates, Congress goes in a different
4 direction. It authorizes sentences up to the
5 death penalty for murder, any term of years,
6 life imprisonment, and the same penalties in
7 Section 1112 that apply to manslaughter
8 offenses in other places as well.

9 And the Court expressly said in Lora
10 as well that it viewed there to be indications
11 from the statutory text that Congress intended
12 for 924(j) to take account of the seriousness
13 of the offense without incorporating the
14 penalties from subsection (c).

15 So, because of that, I think we
16 decided after looking through and analyzing the
17 decision in Lora that our interpretation for
18 double jeopardy purposes was still the -- the
19 better interpretation of the statute because, I
20 think, the Court had rejected the kind of
21 premises that we had built into the analysis
22 earlier.

23 JUSTICE KAVANAUGH: Okay. That's
24 helpful.

25 In overcoming the presumption, though,

1 can you look at -- and this is Justice Alito's
2 question from before -- whether Congress has
3 specified that they should not be concurrent.

4 MS. BROWN: So I think that that could
5 be some kind of indication in certain
6 circumstances --

7 JUSTICE KAVANAUGH: In other words --

8 MS. BROWN: Sure. Sorry.

9 JUSTICE KAVANAUGH: -- if they were --
10 it's said in both provisions.

11 MR. BROWN: That they're consecutive
12 sentences?

13 JUSTICE KAVANAUGH: Mm-hmm.

14 MS. BROWN: So I do think that a
15 consecutive sentence provision is, as my friend
16 said, an indication of how the offense should
17 be -- should be sentenced and not necessarily
18 an authorization for the punishment in the
19 first instance.

20 I think the best way to see the
21 distinction between those two is to compare the
22 language in 924(c)(1)(A) that does authorize
23 cumulative punishments with the
24 924(c)(1)(D)(ii) language.

25 And so the language that we think is

1 the authorizing language is on page 1a of our
2 appendix, and it's that it says that the
3 punishment should be in addition to the
4 punishment provided for such crime of violence
5 or drug trafficking crime.

6 JUSTICE KAVANAUGH: And that's good
7 enough?

8 MS. BROWN: That's -- that's the
9 authorization language that we see here. That
10 is certainly good enough. That's similar
11 language to what Congress used in (c)(5). In
12 fact, it was broader in (c)(5) and said that
13 punishment should be in addition --

14 JUSTICE KAVANAUGH: But, if that's
15 good enough, couldn't Congress -- and I'm sorry
16 to prolong this, but if that's good enough,
17 couldn't Congress in '94, when they're putting
18 (j) in, think: Well, we don't have to put in
19 "in addition" because it already makes clear in
20 924(c)(1)(D)(ii) that no term shall run
21 concurrently?

22 MS. BROWN: So that is --

23 JUSTICE KAVANAUGH: I mean, that just
24 seems as a matter of English language, those
25 two things seem to me the same. And if you've

1 conceded that the first "in addition to" would
2 make it multiple offenses, I'm -- and Congress
3 in '94, yeah, they could have gone through the
4 exercise, but I think, you know, they read
5 (c)(1)(D)(ii) and it's like, yeah, of course.
6 No term of imprisonment, notwithstanding any
7 other provision of law.

8 MS. BROWN: So, again, I think that
9 (c)(1)(D)(ii) is -- is focused on a different
10 question and that's the question of, when you
11 have a sentence, how is it structured with
12 other sentences.

13 JUSTICE KAVANAUGH: I guess that's --
14 but you've already conceded -- and conceded --

15 MS. BROWN: So --

16 JUSTICE KAVANAUGH: -- I don't want to
17 use, but "in addition" language --

18 MS. BROWN: -- the --

19 JUSTICE KAVANAUGH: -- punishment in
20 addition would be good enough.

21 MS. BROWN: The punishment in addition
22 would be good enough it was -- if it were
23 specific to the offenses at issue here. But,
24 in (c)(1)(A), it's only authorizing cumulative
25 punishment for the (c)(1)(A) offense and its

1 predicate.

2 JUSTICE JACKSON: And is that because
3 you're reading punishment to mean conviction?

4 MS. BROWN: Punishment, we think, does
5 include both a conviction and a sentence. And
6 that's consistent with what this Court held in
7 Ball. In that case, the punishments were -- or
8 the sentences themselves, excuse me, were --
9 were concurrent sentences, and so the
10 government had argued that it was a harmless
11 error for double jeopardy purposes because you
12 were really only serving the same time you
13 would serve otherwise.

14 The Court in Ball said that that is
15 incorrect. For purposes of double jeopardy,
16 the conviction is part of the punishment and
17 that is --

18 JUSTICE JACKSON: Okay. But we don't
19 have the word punishment in the (d) subsection,
20 right?

21 MS. BROWN: That's correct.

22 JUSTICE JACKSON: We're talk -- in the
23 D subsection, we're talking about the sentence,
24 no term of imprisonment shall be imposed to run
25 concurrently. And you only get to the sentence

1 after you have the punishment/conviction.

2 MS. BROWN: Correct. And so that's
3 why we see the authorizing language in
4 (c)(1)(A) as doing the work of authorizing
5 cumulative punishments in the specific instance
6 in which the offense is the (c)(1)(A) offense
7 and its predicate offense.

8 JUSTICE JACKSON: And if that --
9 and -- and we -- and you're saying we would
10 have needed that kind of language in the (j)
11 scenario in order to arrive at the same --

12 MS. BROWN: Yes, that's correct. And
13 if you thought that the (c)(1)(D)(ii) language
14 were sufficient to authorize cumulative
15 punishments on its own, then that would mean
16 that the language I was just pointing you to in
17 (c)(1)(A) would be superfluous. And that's a
18 superfluity that would have existed at the time
19 Congress was enacting the statute as well.

20 JUSTICE KAVANAUGH: Right. But, I
21 mean, superfluity is usually defeated by
22 notwithstanding any other provision of law.
23 But I take -- I understand your argument on
24 that and I understand Justice Jackson's point.
25 I think the Second Circuit was quite reasonable

1 in what it -- what it did in the wake of Lora.

2 Let me ask you another question. Does
3 this matter from the government's perspective
4 in terms of sentences that will actually be
5 imposed in the real world in cases of this
6 nature?

7 MS. BROWN: So I think likely not, in
8 practice because --

9 JUSTICE KAVANAUGH: That's why I
10 assumed you are where you are.

11 MS. BROWN: The government is going to
12 have the ability to dismiss convictions or
13 dismiss the guilty verdicts that it gets on
14 certain counts before sentencing happens. Ad
15 so it can have the ability to choose, I think,
16 which of the counts a sentence is imposed
17 under. And that might take into account the --
18 the sentencing exposure that we think is going
19 to occur under either (j) or -- or (c), and we
20 can choose which one we think is the more
21 appropriate under those circumstances.

22 JUSTICE KAGAN: Do you think that
23 there are cumulative punishments authorized for
24 both (j) and the predicate offense?

25 MS. BROWN: We don't, no, because

1 there's no language in 924(j) that authorizes
2 those cumulative punishments for the predicate
3 offense of (c) or (c)'s own predicate. It's
4 like they --

5 JUSTICE KAGAN: I really meant (c)'s
6 own predicate.

7 MS. BROWN: Correct, yes. There's --

8 JUSTICE KAGAN: So you think you --
9 your position is consistent all the way
10 through, we're going to make you have language,
11 and because there's no language for the
12 original predicate offense, let's say, a
13 robbery or something --

14 MS. BROWN: Mm-hmm.

15 JUSTICE KAGAN: -- that cumulative
16 punishment is not authorized?

17 MS. BROWN: We think that that is the
18 necessary implication of the language in the --
19 in the text of this statute here. If Congress
20 had put (j) into subsection (c), then of course
21 that language authorizing punishment in
22 addition to the cumulative offense would apply
23 to that part of -- of the subsection as well,
24 but because it put it in its own subsection,
25 that introductory language just doesn't apply.

1 And it is also a lesser-included
2 offense. So the same analysis that you have
3 here would apply there as well.

4 JUSTICE KAGAN: Okay.

5 MS. BROWN: I did want to address just
6 a couple of the kind of results-based or
7 anomalies that -- that amicus has suggested
8 might occur under our interpretation and
9 especially with respect to Justice Thomas's
10 earlier question about the machine gun
11 hypothetical.

12 We believe that under the -- under
13 that hypothetical, the -- these would be two
14 separate offenses for purposes of Blockburger
15 because then both would have an element that
16 the other would not. And Congress can indicate
17 an intent to authorize cumulative punishments
18 by adding elements to the two offenses that
19 would authorize -- that would -- that would
20 make them separate offenses for purposes of
21 Blockburger. So we don't think that the
22 analysis here would apply in the same way to
23 924(c)(1)(B) offenses in that same way.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Justice Thomas?

2 Justice Alito?

3 Justice Sotomayor?

4 Justice Kagan?

5 Justice Gorsuch?

6 JUSTICE GORSUCH: You know exactly
7 what I'm going to ask you.

8 (Laughter.)

9 JUSTICE GORSUCH: The government
10 acknowledges that there's a presumption that
11 when I'm doing a normal statutory
12 interpretation here, there's a presumption
13 against two punishments for one double jeopardy
14 offense. Where does that come from?

15 MS. BROWN: I think it is largely a
16 factor of -- of -- of the courts presuming that
17 Congress generally doesn't intend to authorize
18 cumulative punishments for the same offense --

19 JUSTICE GORSUCH: Why?

20 MS. BROWN: -- under Blockburger.

21 JUSTICE GORSUCH: Why do you presume
22 -- that's just repeating the words back to me.
23 Why? Why do we presume that?

24 MS. BROWN: I think originally there
25 were some -- there were some early cases that

1 did suggest that, under the Double Jeopardy
2 Clause, the Double Jeopardy Clause applied to
3 cumulative punishments as well. And so there
4 was this form of constitutional avoidance.

5 In later cases, the Court made very
6 clear that the -- the constitutional analysis
7 and the statutory analysis collapse into one
8 another, as long as Congress has, in fact,
9 authorized it. Then -- then that's fine. And
10 we think that that's sufficient.

11 JUSTICE GORSUCH: All right. Let --
12 let me just stop you there --

13 MS. BROWN: Sure.

14 JUSTICE GORSUCH: -- and just say I
15 think you've got two possible answers. One is
16 lenity, which is rooted in the separation of
17 powers and the presumption that we -- of
18 freedom, of liberty. And I -- I took that to
19 be Mr. Larsen's answer after a while.

20 The other answer is it might come from
21 the Double Jeopardy Clause itself, which, after
22 all, says you cannot be punished twice for the
23 same offense, in which case it's not a
24 presumption. It's the law.

25 Now, I know we said it's a presumption

1 in Hunter, but Hunter was back when we were
2 treating Blockburger not as authoritative under
3 the Double -- Double Jeopardy Clause, but as a
4 tool of statutory interpretation. We've
5 rejected that since in Dixon. We overruled
6 Grady. And since then, we've said in Shiro and
7 Pearce you can't have two punishments for one
8 crime, two sets of punishments. Of course, a
9 punishment might include a term of imprisonment
10 and supervised -- yada, yada, but you can't
11 have two sets of punishments for one crime. So
12 we've spoken out of both sides of our mouth on
13 this.

14 Would you object to a footnote at
15 least acknowledging we've spoken out of both
16 sides of our mouth on this and applying the
17 presumption anyway?

18 MS. BROWN: So I -- we certainly don't
19 object to applying the presumption as the Court
20 has done in all of these case. I -- I would
21 push back a little on the idea that we think
22 that -- or the idea that this is compelled by
23 the Double Jeopardy Clause itself.

24 JUSTICE GORSUCH: Or at least our
25 precedents. I mean, we -- what did -- Pearce

1 and Shiro say it.

2 MS. BROWN: Sure. If you were going
3 back to original principles in the Double
4 Jeopardy Clause, it actually --

5 JUSTICE GORSUCH: You might be shocked
6 to hear I'm interested in that.

7 MS. BROWN: I -- I am somewhat
8 unsurprised, but it does refer to being twice
9 be put in life or limb, not for the --

10 JUSTICE GORSUCH: For the same
11 offense.

12 MS. BROWN: Yes, for the same offense.
13 But Congress, of course, can define offenses
14 however it chooses to do so.

15 JUSTICE GORSUCH: Of course.

16 MS. BROWN: It can also define
17 punishments, so it --

18 JUSTICE GORSUCH: But once you got one
19 offense, you get one set of punishments is a
20 natural conclusion from that text.

21 MS. BROWN: I think --

22 JUSTICE GORSUCH: And we have said
23 that twice.

24 MS. BROWN: I think what Justice
25 Scalia said when he was looking at the original

1 meaning of this, is that, in fact, it was -- it
2 -- the Double Jeopardy Clause should apply to
3 successive prosecutions but not to --

4 JUSTICE GORSUCH: And -- but that's
5 what --

6 MS. BROWN: -- cumulative punishments.

7 JUSTICE GORSUCH: Ah, I agree with
8 that, right? And his point was, well, there
9 might be multiple punishments for one
10 offense --

11 MS. BROWN: Mm-hmm.

12 JUSTICE GORSUCH: -- and that's fine.
13 And I -- of course, fines, imprisonment,
14 supervised. Ah, but what is a successive
15 prosecution? Through most of our history, you
16 couldn't have a successive prosecution. There
17 was no joinder of offenses. But now there is,
18 and we use Blockburger to tease it out.

19 And here we have, as you concede, one
20 offense. One offense. Forget about (j) and
21 (c). There's one offense. Why isn't the --
22 the natural implication, again, in the last --
23 I'll leave you alone after this, I promise --
24 the natural implication and our precedents that
25 say you get one set of punishments, the obvious

1 implication? Or at least we should acknowledge
2 the tension between our cases on this, which
3 speak out of both sides of their mouth.

4 MS. BROWN: So I -- again, I don't
5 think we would object to any kind of, you know,
6 footnote that suggests something like that,
7 that could be revisited in future cases in
8 which the issue was briefed, but we would
9 encourage the Court to continue to adhere to
10 the -- the precedents that do apply the
11 Blockburger presumption and that do acknowledge
12 Congress has the authority to punish in this --
13 in this way.

14 JUSTICE GORSUCH: Thank you,
15 Mr. Brown.

16 CHIEF JUSTICE ROBERTS: Justice
17 Kavanaugh?

18 Justice Barrett?

19 Justice Jackson?

20 MS. BROWN: Thank you.

21 CHIEF JUSTICE ROBERTS:

22 Thank you, counsel.

23 Mr. McCloud.

24

25

1 ORAL ARGUMENT OF CHARLES L. McCLOUD
2 COURT-APPOINTED AMICUS CURIAE
3 IN SUPPORT OF THE JUDGMENT BELOW

4 MR. McCLOUD: Thank you, Mr. Chief
5 Justice, and may it please the Court:

6 Petitioner and his crew used guns to
7 rob Gamar Dafalla. That robbery violated
8 Section 924(c). When Mr. Dafalla resisted, one
9 of those guns was used to murder him. That
10 murder violated Section 924(j).

11 The Second Circuit correctly held that
12 Congress intended Petitioner's separate
13 violations to be punished separately, subject
14 to the sentencing schemes of both statutes, not
15 one or the other. Text, structure, and history
16 support that conclusion.

17 Petitioner and the government
18 disagree. They say that if Congress wanted to
19 authorize cumulative punishment, Blockburger
20 required it to speak more clearly. But this
21 Court has already rejected attempts to convert
22 Blockburger from a rule of thumb into a
23 conclusive presumption.

24 Precedent also shows that there's no
25 one-size-fits-all approach Congress must follow

1 in this area. Sometimes it's true that
2 Congress says punishment under one statute is
3 in addition to punishment under another
4 statute. But other times, like in Garrett,
5 Congress makes its intent clear through
6 statutory structure and purpose, creating
7 separate offenses targeting separate evils.

8 Here Section 924(c)'s consecutive
9 sentence mandate makes clear that Congress
10 wanted that provision to impose additional
11 punishment on top of the punishment a defendant
12 received for any other offense. And after Lora
13 Sections 924(c) and 924(j) are undoubtedly
14 different offenses. On top of that, this Court
15 typically assumes that Congress acts
16 rationally.

17 But Petitioner's and the government's
18 interpretation means that the way to avoid
19 Section 924(c)'s otherwise unavoidable
20 mandatory penalties is to kill someone.
21 Congress did not intend that irrational result,
22 and the Constitution doesn't require it.

23 This Court should interpret
24 Section 924(c) and 924(j) to complement each
25 other, not to conflict, and affirm the judgment

1 below.

2 I welcome the Court's questions.

3 JUSTICE THOMAS: Wouldn't you have an
4 easier argument for the -- for 924(c)(1)(A)(ii)
5 and (iii) than you would for (i)?

6 MR. McCLOUD: I -- I think that's
7 right. I heard my friends on the other side
8 concede that they now view those as
9 establishing different offenses that would not
10 be subject to the double jeopardy bar.

11 I think that with respect to the
12 statutory text, the argument is fairly similar.
13 It is true that there is use of the "in
14 addition to" language in (c)(1), but as we
15 pointed out in our brief, this is not a magic
16 words requirement. I heard Petitioner's
17 counsel suggest that Congress had made it
18 crystal clear in (c)(1)(A) by using the words
19 "in addition to."

20 But the standard is not whether
21 Congress was crystal clear. It's whether it
22 was clear. And I think it is clear from the
23 structure and from the purpose and the history
24 of these provisions that Congress viewed (c) as
25 imposing additional mandatory punishment on top

1 of any other punishment that a defendant
2 received for a relevant offense.

3 JUSTICE JACKSON: Isn't the question
4 here -- excuse me -- whether the defendant can
5 receive additional punishment under (j)? I
6 mean, fine, (c) might have been intended to be
7 stacked, (c).

8 But I thought the issue before us
9 today is whether you can punish under (j),
10 given the Blockburger test and the relationship
11 between (c) and (j).

12 MR. McCLOUD: So, Justice Jackson, I
13 have three responses to that question.

14 The first is, when the Court has
15 looked at the double jeopardy question in the
16 past, it has not typically asked whether there
17 was an authorization for a cumulative
18 conviction.

19 So in a case like Whalen, which is a
20 very good case for Petitioner, the Court asked
21 whether there was an authorization for a
22 cumulative sentence, and that's exactly the
23 same way that Petitioner phrased the question
24 presented in his petition. He said, can he
25 get two sentences for his two convictions.

1 JUSTICE JACKSON: Isn't that just sort
2 of, you know, language differences? I mean,
3 there is a fundamental understanding that
4 the Double Jeopardy Clause is about the
5 punishments -- the United States says, you
6 know, punishment, I say conviction -- versus
7 the sentence.

8 MR. McCLOUD: Well, I think that the
9 sentence is a form of punishment. It is, in
10 fact, probably the most critical form of
11 punishment --

12 JUSTICE JACKSON: I understand. But
13 the Double -- you're not raising a double
14 jeopardy problem when you say that I have --
15 my sentence has been run concurrently or
16 consecutively. You're talking about something
17 different than the core constitutional mandate
18 that you cannot be punished/convicted for the
19 same offense.

20 MR. McCLOUD: And I -- I think the
21 core mandate goes to the question of whether
22 there is an authorization for punishment. I
23 think (d)(2) is such an authorization because
24 it speaks to the sentence.

25 I think that Petitioner's argument

1 on (d)(2) is just another variation in his
2 magic-words requirement. He is saying that
3 not only must Congress say punishment is in
4 addition to, but it must say a conviction is in
5 addition to. And I don't see any basis for
6 that requirement in this Court's precedent.

7 JUSTICE KAVANAUGH: You said --

8 MR. McCLOUD: The last thing I would
9 say on this point --

10 JUSTICE KAVANAUGH: Well, you said you
11 had three responses. I wanted to make sure you
12 got them all out.

13 MR. McCLOUD: The third response is,
14 even if you think that (c)(1)(D)(ii) is not
15 dispositive on this question, it is certainly a
16 relevant piece of data about Congress's intent.
17 It shows that at least with respect to a large
18 subset of the (c) offenders, Congress thought
19 that there would be additional unavoidable
20 punishment. And there is no reason to think
21 that Congress --

22 JUSTICE JACKSON: Punish -- additional
23 unavoidable punishment relative to the
24 predicate offense in (c).

25 MR. McCLOUD: No, Your Honor. In

1 fact, Congress amended (d)(2) --

2 JUSTICE JACKSON: Yeah.

3 MR. McCLOUD: -- to specifically say
4 that it refers to any other offense, not just
5 the predicate, in response to this Court's
6 decision in Simpson and Busic.

7 So Congress was --

8 JUSTICE JACKSON: Any other offense.
9 And the question here is whether this is the
10 same offense.

11 MR. McCLOUD: And -- and I think
12 that's the relevance of Lora, Your Honor,
13 because Lora shows Congress intended these
14 provisions not simply to create a supercharged
15 version of (c), but instead for (j) to stand on
16 its own, to be a distinct offense that's
17 subject to its own distinct penalty scheme.

18 And so the best way, I think, to
19 reconcile what Congress was trying to do is, as
20 Justice Kavanaugh referenced earlier, Congress,
21 when it enacted (j), understood that it already
22 had the consecutive sentence mandate on the
23 books. It had enforced that multiple times
24 and, in fact, reinforced it when this Court
25 improperly narrowed (c) in Simpson and Busic.

1 And so from Congress's perspective,
2 I think it would have been clearer that anyone
3 who receives that (j) conviction would get
4 the (j) penalties and the unavoidable (c)
5 penalties.

6 And there are really two possibilities
7 on the table here. One is, Congress enacted
8 (j), but it intended for (c) to do most of the
9 work. I -- I think that's what I heard my
10 friend Ms. Brown suggest is going to be the
11 government's approach when these anomalies
12 arise. It will just focus on (c).

13 But that raises the question of why
14 would Congress go to the trouble to enact (j)
15 at all?

16 JUSTICE JACKSON: Because it was
17 trying to bring the death penalty into play.

18 MR. McCLOUD: And I think, Justice
19 Jackson, that answer would be plausible if all
20 Congress had done was create (j)(1). But, of
21 course, Congress didn't stop at (j)(1). It
22 enacted the manslaughter provisions in (j)(2).

23 And with respect to (j)(2), the
24 anomalies are truly anomalous.

25 JUSTICE JACKSON: I understand.

1 But Ms. Brown says that there was
2 already a preexisting set of punishments and
3 circumstances for murder and manslaughter.

4 And Congress, I would think, could be
5 rationally understood to be trying to import
6 those in a situation in which a person had
7 committed the crime and the crime is the (c)
8 set of elements, and murder or manslaughter
9 resulted.

10 MR. McCLOUD: I actually agree with
11 that explanation. I think what Congress was --

12 JUSTICE JACKSON: Then why would you
13 get two -- two convictions under those
14 circumstances?

15 MR. McCLOUD: Because Congress created
16 that (j) offense, the separate offense, in a
17 way that is independent of (c).

18 JUSTICE JACKSON: That just begs the
19 question. I'm suggesting it's not a separate
20 offense. I am saying what Congress was doing
21 with (j) is just making available the penalties
22 that exist when, with respect to the one
23 offense, a murder or manslaughter happens, a
24 crime -- a death occurs.

25 MR. McCLOUD: So then, Justice

1 Jackson, I think I go back to the anomalies
2 that I raised with respect to (j)(2), which is,
3 you have a scenario where the maximum that is
4 authorized under (j)(2) for the manslaughter is
5 15 years or eight years; whereas, the minimum
6 that would be required under (c) would be five
7 years currently, but it could be much higher
8 than that.

9 And then, of course, with respect
10 to the other (c) offenses, the machine gun,
11 et cetera, you would have a much more
12 significant anomaly.

13 Now, I have heard Petitioner and the
14 government both to concede that those are
15 separate offenses, so I take the point that
16 that anomaly is not quite as powerful, but I
17 think that ultimately it shows that Congress
18 wanted these offenses to punish the full
19 gravity of the harm committed by someone who
20 carries a gun during a violent crime and
21 then uses that gun to commit a killing.

22 And I -- I want to be clear, the
23 consequence of this position is not that every
24 single defendant will receive cumulative
25 punishment. I agree that it is ultimately up

1 to the sentencing court to decide what the
2 appropriate punishment is. And there may be
3 cases where a cumulative sentence is not
4 appropriate.

5 The question is, did Congress and
6 the Constitution bar district courts from
7 determining that, in some circumstances,
8 cumulative punishment was warranted.

9 And I think based on the text,
10 structure, and history, for all the reasons we
11 have said, there is no evidence that Congress
12 wanted that bar.

13 JUSTICE KAVANAUGH: What do you say to
14 the government's point that this really isn't
15 going to prevent them -- or prevent a district
16 judge who wants to sentence heavily from
17 sentencing heavily in cases, and there's
18 a killing, so presumably it's going to be
19 sentenced heavily, one would usually suspect?

20 MR. McCLOUD: I think that that is
21 right as a factual matter. I guess I would
22 push back and say, the question is not can
23 district courts and prosecutors figure out a
24 workaround. The question is, what did Congress
25 intend?

1 And when you look at the provisions --
2 JUSTICE KAVANAUGH: I -- I agree with
3 that on the legal analysis. I'm just -- you
4 know, you have looked at this carefully, kind
5 of how this would play out. And it seems like
6 a district judge, like the district judge in
7 this case, seems to at least have an idea of
8 50 years in mind, that that would -- that would
9 -- nothing we're talking about here is really
10 going to affect any of that.

11 MR. McCLOUD: I think that's right.
12 And I don't have any basis, to be clear, to
13 question what Ms. Brown said about the
14 practical consequences going forward. I do
15 think this is something courts can work out.

16 I will note, you know, Petitioner
17 pointed out we didn't cite an example of one of
18 these anomalies. I think the explanation for
19 that is that prior to Lora, the government had
20 won the Lora argument in every court of appeals
21 except the Eleventh Circuit, which actually
22 agrees with the position I'm advocating on
23 double jeopardy, so you never had a sit- -- a
24 situation where someone was not getting the
25 (c) penalties along with the (j) penalties,

1 because you can merge the two offenses.

2 JUSTICE KAVANAUGH: Right. So the
3 31 years reference is really just not accurate,
4 in your view. Is that what you're saying
5 there?

6 MR. McCLOUD: Exactly right.

7 JUSTICE KAVANAUGH: And so all that
8 really matters is post-Lora in the Second
9 Circuit. Yeah. Okay.

10 MR. McCLOUD: Exactly. But again, I'm
11 not disputing that it is possible under the
12 government's position to construct an
13 appropriate sentence.

14 My point is, I don't think that's
15 exactly how Congress wanted the statutory
16 scheme to operate.

17 And I read this Court's precedents to
18 suggest that is the operative question, what
19 was Congress's intent, not simply what can the
20 government do operationally on that.

21 JUSTICE JACKSON: Can we take into
22 account 3553(a) when assessing that?

23 I mean, Congress was obviously
24 legislating against the backdrop of a system
25 in which it had already told district judges,

1 sentencing judges, to sentence proportionally
2 based on what happens in terms of the facts,
3 et cetera.

4 So in that world, the anomalies that
5 you're identifying maybe Congress wasn't
6 worried about because it had already instructed
7 the court to make sure that the penalties in a
8 situation like this are higher.

9 MR. McCLOUD: I think that would be
10 plausible if all Congress had done was adopt
11 (j)(1), the murder provision, because those are
12 the sort of anomalies that a district court
13 could work out.

14 If you have a situation like the
15 (j)(2) penalties where you have a floor that is
16 very low and a ceiling under the other statute
17 that's very high, that is not something a
18 district court could really reconcile.

19 But I take the point that 3553(a)
20 certainly was operating in the background. And
21 the Second Circuit noted that in the ordinary
22 course, of course, a district court is going to
23 take account of the (c) penalty in fashioning
24 the (j) remedy. I think that's certainly
25 appropriate for the court to do.

1 I would like to turn just briefly to
2 the precedent and the question of the status of
3 Blockburger.

4 So Justice Gorsuch, I actually read
5 this Court's cases to suggest that Blockburger
6 is not a substantive canon, it is more of a
7 linguistic canon, to borrow a phrase from
8 Justice Barrett.

9 It is a tool of statutory construction
10 that the court applies to determine Congress's
11 intent but it is ultimately just a proxy for
12 Congress's intent.

13 And so Blockburger yields in the face
14 of clear evidence of a congressional intent to
15 authorize cumulative punishment.

16 JUSTICE GORSUCH: I still think you
17 need some account of why we have that canon in
18 this context but no others.

19 MR. McCLOUD: I agree. I think --

20 JUSTICE GORSUCH: Not many others. I
21 mean, there has to be an account, right? Why?

22 MR. McCLOUD: I agree. I think that
23 that is an area of this Court's double jeopardy
24 precedents that's under-theorized. There was a
25 pretty robust debate about this the status of

1 Blockburger with respect to cumulative
2 punishment, in particular, in the '80s in cases
3 like Ball and Garrett and Albernaz. And I
4 don't know that the Court landed at any sort of
5 satisfactory --

6 JUSTICE GORSUCH: All right.
7 Hunter -- Hunter just said it. And that's what
8 we've been doing ever since. But we also said
9 the opposite in Shiro and Pierce. So.

10 MR. McCLOUD: That's right. And,
11 Justice Gorsuch, I don't have any particular
12 dog in that fight.

13 JUSTICE GORSUCH: Yeah, I didn't --
14 that's why I wasn't going to bother you with
15 it, but you -- you brought it up, counsel.

16 (Laughter.)

17 MR. McCLOUD: Your Honor, I brought it
18 up simply because --

19 JUSTICE GORSUCH: So you -- you put
20 the dog in the fight this time.

21 (Laughter.)

22 MR. McCLOUD: Well, let me defend the
23 dog.

24 (Laughter.)

25 MR. McCLOUD: I reference that because

1 I do think it is a strong indication that
2 Petitioner cannot be right in the suggestion
3 that Congress really does have to use the words
4 "in addition to."

5 Text is one part of the analysis that
6 this Court has performed in double jeopardy
7 cases, but it is not the entirety of the
8 analysis. Courts look to things like statutory
9 structure and history and purpose.

10 And I think if you look to that
11 evidence in this case, it suggests an intent
12 for cumulative punishment.

13 JUSTICE ALITO: Well, isn't the answer
14 -- isn't part of the answer that if you don't
15 have Blockburger, you have the vexing question
16 of defining what is an offense for double
17 jeopardy purposes? And the -- that could be
18 defined more narrowly than Blockburger or it
19 could be defined more broadly than -- than
20 Blockburger?

21 MR. McCLOUD: I think that's right.
22 And I don't mean to suggest that Blockburger is
23 not useful. It's particularly useful in cases
24 like Ball, where Congress is essentially using
25 different words to focus on and criminalize the

1 same act.

2 But in cases like this one or like in
3 Garrett, where you have a compound predicate
4 offense, I think Blockburger becomes less
5 useful. Justice Rehnquist wrote a number of
6 opinions expressing that view. The government
7 endorsed it in Garrett.

8 And I think it remains true that
9 Blockburger in such cases can sometimes obscure
10 what Congress intended, rather than clarifying.

11 CHIEF JUSTICE ROBERTS: Justice
12 Thomas, anything further?

13 Justice Alito? No?

14 Justice Gorsuch?

15 Justice Kavanaugh?

16 Justice Barrett?

17 Justice Jackson?

18 Thank you, counsel.

19 MR. McCLOUD: Thank you, Your Honor.

20 CHIEF JUSTICE ROBERTS: Rebuttal,
21 Mr. Larsen?

22 REBUTTAL ARGUMENT OF MATTHEW B. LARSEN

23 ON BEHALF OF THE PETITIONER

24 MR. LARSEN: Thank you, Mr. Chief

25 Justice. Just a couple of points to clarify.

1 Rutledge and Ball make very clear you
2 cannot impose two convictions, if we have a
3 double jeopardy problem here. It's not just
4 about the sentence. And if you can't impose
5 two convictions, then we don't get to
6 (c)(1)(D)(ii) about how a sentence under (c)
7 should run. That's a procedural instruction,
8 not a substantive authorization to twice punish
9 one crime.

10 I did want to address Justice
11 Kavanaugh's point about notwithstanding. This
12 language was in the statute in Rutledge. The
13 drug statute in Rutledge said -- 8 -- 841,
14 notwithstanding any other provision of law, the
15 court shall not suspend this sentence.
16 Likewise, in the CCE statute, "this sentence
17 shall not be suspended." Each of those
18 sentence -- each of those statutes said you
19 cannot avoid a sentence.

20 Mr. Rutledge was convicted under both
21 of them. This Court said only one conviction
22 can stand. There is a double jeopardy problem
23 here, and there's no clear indication allowing
24 double punishment. That is the situation, Your
25 Honor.

1 This Court has traditionally
2 recognized that different statutes with
3 different penalties, even minimum penalties,
4 even ones that can't be avoided or suspended,
5 language like this does not speak to the
6 question here. The question is whether
7 Congress has clearly authorized twice punishing
8 one crime. It hasn't done so.

9 Amicus has pointed to no text in these
10 statute saying so, he's pointed to no history
11 saying so. In fact, Congress specifically
12 rejected the proposal to double punish a lethal
13 shooting when it wrote 924(j). It -- as this
14 Court explained in *Lora*, Congress decided if
15 you're going to get sentenced to death or up to
16 life in prison under (j), we don't need to put
17 the five years on top. There's no point in
18 that.

19 Congress has not authorized two
20 punishments for the one crime here, Your
21 Honors. This Court should reverse the judgment
22 below.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Mr. McCloud, this Court appointed you

1 to brief and argue this case as an amicus
2 curiae in support of the judgment below. You
3 have ably discharged that responsibly, for
4 which we are grateful.

5 The case is submitted.

6 (Whereupon, at 12:35 p.m., the case
7 was submitted.)

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Official - Subject to Final Review

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