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Federal Mandatory Minimum Sentencing: The 18 U.S.C. 924(c) Tack-On in Cases Involving Drugs or Violence

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Summary

Section 924(c) requires the imposition of one of a series of mandatory minimum terms of imprisonment upon conviction for misconduct involving the firearm and the commission of a federal crime of violence or a federal drug trafficking offense. The terms vary according to the type of firearm used, the manner of the firearm's involvement, and whether the conviction involves a single, first-time offense. Liability extends to co-conspirators and to those who aid or abet in the commission of a violation of the section.

If a machine gun, silencer, short barreled rifle, short barreled shotgun, or body armor is involved, the offense is punished more severely. If the firearm is brandished or discharged, the offense is punished more severely. Repeat offenders are likewise punished more severely. Twenty-five-year mandatory minimum terms for multiple offenses must be served consecutively. The mandatory minimum terms range from imprisonment for five years to imprisonment for life; consecutive mandatory minimum terms may exceed 100 years. In each case the maximum term is life imprisonment.

The United States Sentencing Commission has suggested that Congress consider amending Section 924(c) to (1) address the "stacking" of 25-year charges for multiple offenses; (2) require a prior conviction to trigger repeat offender enhancements; (3) provide sentencing courts with discretion over whether to impose concurrent or consecutive sentences; and (4) clarify the statutory definitions of the terms used in Section 924(c).

Section 924(c) has withstood constitutional challenges based on the Second Amendment's right to bear arms; the Eighth Amendment's cruel and unusual punishments prohibition; the Sixth Amendment's right to jury trial; the Fifth Amendment's double jeopardy proscription; and the Constitution's structural limitations on preservation of the separation of powers and on Congress's authority under the Commerce Clause.

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Introduction

Mandatory minimums are found in two federal firearms statutes. One, the Armed Career Criminal Act, deals exclusively with recidivists.[1] The other, Section 924(c), attaches one of several mandatory minimum terms of imprisonment whenever a firearm is used or possessed during and in relation to a federal crime of violence or drug trafficking.[2] Section 924(c) has been the subject of repeated Supreme Court litigation[3] and regular congressional amendment since its inception in 1968.[4]

Section 924(c), in its current form, imposes one of several different minimum sentences when a firearm is used or possessed in furtherance of another federal crime of violence or of drug trafficking. The mandatory minimums, imposed in addition to the sentence imposed for the underlying crime of violence or drug trafficking, vary depending upon the circumstances:

- imprisonment for not less than five years, unless one of higher mandatory minimums below applies;
- imprisonment for not less than seven years, if a firearm is brandished;
- imprisonment for not less than 10 years, if a firearm is discharged;
- imprisonment for not less than 10 years, if a firearm is a short-barreled rifle or shotgun or is a semi-automatic weapon;
- imprisonment for not less than 15 years, if the offense involves the armor piercing ammunition;
- imprisonment for not less than 25 years, if the offender has a prior conviction for violation of Section 924(c);
- imprisonment for not less than 30 years, if the firearm is a machine gun or destructive device or is equipped with a silencer; and
- imprisonment for life, if the offender has a prior conviction for violation of Section 924(c) and if the firearm is a machine gun or destructive device or is equipped with a silencer.[5]

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[1] 18 U.S.C. 924(e).

[2] 18 U.S.C. 924(c).

[3] See *United States v. O'Brien*, 560 U.S. 218, 2172 (2010)("The Court must interpret, once again, §924(c) of Title 18 of the United States Code"). Other decisions include *Alleyne v. United States*, 133 S.Ct. 2151 (2013); *United States v. Abbott*, 131 S.Ct. 18 (2010); *Dean v . United States*, 556 U.S. 568 (2009); *Watson v. United States*, 552 U.S. 74 (2007); *Harris v. United States*, 536 U.S. 545 (2002); *Castillo v. United States*, 530 U.S. 120 (2000); *Mascarello v. United States*, 524 U.S. 125 (1998); *United States v. Gonzales*, 520 U.S. 1 (1997); *Bailey v. United States,* 516 U.S. 137 (1995); *Smith v. United States*, 508 U.S. 223 (1993); *Deal v. United States*, 508 U.S. 129 (1993).

[4] E.g., P.L. 90-618, 82 Stat. 1223 (1968), 18 U.S.C. 924(c)(1970 ed.); P.L. 91-644, §13, 84 Stat. 1889 (1971), 18 U.S.C. 924(c) (1976 ed.); P.L. 98-473, §1005, 98 Stat. 2138 (1984), 18 U.S.C. 924(c) (1982 ed.)(Supp. II); P.L. 99-308, 100 Stat. 457 (1986), 18 U.S.C. 924(c) (1982 ed.)(Supp. IV); P.L. 100-690, §6460, 102 Stat. 4373 (1988), 18 U.S.C. 924(c) (1988 ed.); P.L. 101-647, §1101,104 Stat. 4829 (1990), 18 U.S.C. 924(c) (1988 ed.)(Supp. II); P.L. 105-386, §1, 112 Stat. 3469 (1998), 18 U.S.C. 924(c) (2000 ed.); P.L. 109-92, §6(b), 119 Stat. 2102 (2005), 18 U.S.C. 924(c)(2000 ed.)(Supp. V).

[5] 18 U.S.C. 924(c)(1), (5).

The mandatory minimum sentences were added to Section 924 as a floor amendment to the Gun Control Act of 1968.[6] The amendment, as introduced, called for a 10-year minimum of imprisonment to be imposed when a firearm was used in the commission of various state and federal crimes of violence.[7] A substitute amendment reduced the minimums from 10 years to one year for a first offense, and from 25 years to five years of subsequent offenses.[8] It limited its application to federal felonies, but also barred a sentencing court from imposing the sanction as a concurrent sentence, from suspending the sentence, or from imposing a probationary sentence.[9] The impact was somewhat mitigated by a 1971 amendment which reduced the minimum for second and subsequent offenses from five years to two years.[10] Moreover, until the Sentencing Reform Act of 1984 eliminated parole, a federal offender was eligible for parole after serving the lesser of one-third of his sentence or 10 years.[11]

The Sentencing Reform Act also rewrote Section 924(c) limiting its application to firearms-related federal crimes of violence, but changing its mandatory minimums to a flat five-year term of imprisonment for first offenders and a flat 10-year term for a second or subsequent conviction.[12]

Section 104 of the Firearms Owners Protection Act expanded the predicate offenses to include drug trafficking as well as crimes of violence and added a flat 10-year minimum for cases involving machine guns or silencers (a flat 20-years for a second or subsequent offense)[13]—which two years later Congress increased to flat sentences of 30 years and life imprisonment, respectively.[14] Congress added the shot-barreled firearms and destructive device provisions in 1990.[15]

Originally, Section 924(c) condemned only "use" of a firearm in connection with certain federal offenses.[16] Then the Supreme Court pointed out in *Bailey* that the word "use" demands more than simple possession.[17] Congress amended the section in 1998 to outlaw not only use during and in

[6] P.L. 90-618, 82 Stat. 1223 (1968).

[7] 114 *Cong. Rec*. 22229 (1968)(amendment offered by Rep. Casey). The original amendment would have also established a 25-year minimum for second and subsequent offenses, *Id.*

[8] 114 *Cong. Rec.* 222231 (1968)(substitute amendment offered by Rep. Poff).

[9] *Id.* Further modifications were offered during the course of the debate, but the language enacted was in large measure that of the Poff substitute, see 114 *Cong. Rec.* 22229-22248 (1968); H.Rept. 90-1956, at 12, 31-32 (1968)(confining the concurrent, suspended, and probationary sentencing provisions to second and subsequent violations), and 82 Stat. 1223 (1968), 18 U.S.C. 924(c)(1970 ed.).

[10] Section 13, P.L. 91-644, 84 Stat. 1889 (1971), 18 U.S.C. 924(c) (1976 ed.).

[11] 18 U.S.C. 4205 (1976 ed.).

[12] Section 1005, P.L. 98-473, 98 Stat. 2138 (1984), 18 U.S.C. 924(c) (1982 ed.)(Supp. II).

[13] P.L. 99-308, 100 Stat. 457 (1986), 18 U.S.C. 924(c) (1976 ed.)(Supp. IV).

[14] Section 6460, P.L. 100-690, 102 Stat. 4373 (1988), 18 U.S.C. 924(c) (1988 ed.).

[15] Section 1101, P.L. 101-647, 104 Stat. 4829 (1990), 18 U.S.C. 924(c) (1988 ed.)(Supp. II).

[16] 18 U.S.C. 924(c)(1970 ed.).

[17] *Bailey v. United States*, 516 U.S. 137, 143 (1995)(emphasis in the original)(Section 924(c) "requires evidence sufficient to show an *active employment* of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense.... '[U]se' must connote more than mere possession of a firearm by a person who commits a drug offense").

relation to a predicate offense, but possession "in furtherance" of a predicate drug trafficking or violent offense as well.[18]

Elements, Components, and Other Factors

Firearm

A "firearm" for purposes of Section 924(c) includes not only guns ("weapons ... which will or [are] designed to or may readily be converted to expel a projectile by the action of an explosive"), but silencers and explosives as well.[19] It includes firearms that are not loaded or are broken;[20] it does not, however, include toys or imitations.[21]

Predicate Offenses

The drug trafficking predicates include any felony violation of the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act.[22] The crime of violence predicates are statutorily defined as any federal felony that satisfies either of two tests, that is, (1) if it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or (2) if it "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."[23]

The Supreme Court has addressed several other aspects of Section 924(c), but it has yet to decide what constitutes a crime of violence for purposes of the section. In *Leocal v. Ashcroft*, however, it had occasion to examine the question under 18 U.S.C. 16 which defines crimes of violence in virtually the same terms.[24]

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[18] Section 1, P.L. 105-386, 112 Stat. 3469 (1998), 18 U.S.C. 924(c) (2000 ed.). The armor piercing ammunition provisions were added in 2005, Section 6(b), P.L. 109-92, 119 Stat. 2102 (2005), 18 U.S.C. 924(c). *United States v. Gurka*, 605 F.3d 40, 43 (1st Cir. 2010).

[19] 18 U.S.C. 921(a)(3), (4) ("(3) The term 'firearm' means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; ... (C) any firearm muffler or firearm silencer; or (D) any destructive device.... (4) The term 'destructive device' means - (A) any explosive, incendiary, or poison gas - (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the preceding clauses ..."); *United States v. York*, 600 F.3d 347, 354 (5th Cir. 2010) (Molotov cocktail constitutes a "firearm" for purposes of Section 924(c)).

[20] *United States v. Cooper*, 714 F.3d 873, 881 (5th Cir. 2013).

[21] *United States v. Garrido*, 596 F.3d 613, 617 (9th Cir. 2010)("Possession of a toy or replica gun cannot sustain a conviction under §924(c)"); *United States v. Roberson*, 459 F.3d 39, 47 (1st Cir. 2006).

[22] 18 U.S.C. 924(c)(2), referring to 21 U.S.C. 801-904, 21 U.S.C. 951-971, and 46 U.S.C. 70501-70507, respectively.

[23] 18 U.S.C. 924(c)(3).

[24] 543 U.S. 1 (2004). 18 U.S.C. 16 provides that "the term 'crime of violence' means - (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

There, it reasoned that the wording of the definition precluded its application to the crime of driving under the influence and causing injury. When the statute speaks of the element involving the "*use* ... of physical force against the person or property of another"—as both Sections 16 and 924(c)(3) do—it means "a higher degree of intent than negligent or merely accidental conduct."[25] When, like Sections 16 and 924(c)(3), it speaks of a "risk that physical force against the person or property of another may be used in the course of committing the offense," it means the "risk that the use of physical force against another might be *required* in committing the offense," not the risk that physical force might inadvertently or negligently be visited upon another.[26] "The ordinary meaning of this term [(the use of physical force)] ... 'calls to mind a tradition of crimes that involve the possibility of more closely related, *active* violence'").[27]

The circuit courts have found a wide range of federal crimes fit the definition.[28] One has used the *Leocal* tests to reconcile the conflicting views in other circuits and decide that firearm possession offenses are not crimes of violence for purposes of Section 924(c).[29]

[25] *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004)(emphasis added).

[26] *Id.* at 10 (emphasis added)(quoting, *United States v. Doe*, 960 F.2d 221, 225 (1st Cir. 1992) ("The reckless disregard in §16 relates not to the general conduct or to the possibility that harm will result from a person's conduct, but to the risk that the use of physical force against another might be *required* in committing a crime.... The ordinary meaning of this term ... 'calls to mind a tradition of crimes that involve the possibility of more closely related, *active* violence'").

[27] *Id.*

[28] *United States v. McGuire*, 706 F.3d 1333, 1336-338 (11th Cir. 2013)(attempting to disable an aircraft in flight)(18 U.S.C. 32(a)(1)); *United States v. Andrews*, 442 F.3d 996, 1002 (7th Cir. 2006)(bank robbery)(18 U.S.C. 2113); *United States v. Jones*, 418 F.3d 726, 729 (7th Cir. 2005)(attempted bank robbery)(18 U.S.C. 2113); *United States v. Green*, 521 F.3d 929, 932-33 (8th Cir. 2008)(kidnapping) (18 U.S.C. 1201); *United States v. Frye*, 489 F.3d 201, 208-209 (5th Cir. 2007)(carjacking)(18 U.S.C. 2119); *United States v. Munro*, 394 F.3d 865, 870-71 (10th Cir. 2005)(attempted seduction of a minor by computer)(18 U.S.C. 2422(b); *United States v. Acosta*, 470 F.3d 132, 135-36 (2d Cir. 2006)(deprivation of civil rights under color of law resulting in injury or involving a dangerous weapon (statutory sentencing factors)(18 U.S.C. 242); *United States v. Pospisil*, 186 F.3d 1023, 1031 (8th Cir. 1999)(interfering with fair housing rights)(42 U.S.C. 3631); *United States v. Acosta*, 470 F.3d at 136-37(conspiracy to oppress the enjoyment of civil rights)(18 U.S.C. 241); *United States v. Turner*, 501 F.3d 59, 67-68 (1st Cir. 2007)(Hobbs Act conspiracy)(18 U.S.C. 1951); *United States v. Desena*, 287 F.3d 170, 181 (2d Cir. 2002))(conspiracy to assault in aid of racketeering) (18 U.S.C. 1959); *United States v. Khan*, 461 F.3d 477, 489-90 (4th Cir. 2006)(conspiracy to violate the Neutrality Act) (18 U.S.C. 960); *id.* at 490 (4th Cir. 2006)(conspiracy to provide material support to a terrorist organization)(18 U.S.C. 2339B); *United States v. Ayala*, 601 F.3d 256, 266-67 (4th Cir. 2010)(RICO conspiracy with 18 U.S.C. 1959 predicates), quoting *United States v. Elder*, 88 F.3d 127, 129 (2d Cir. 1996)("[A] conspiracy 'is itself a crime of violence when its objectives are violent crimes'"); *United States v. Ivezaj*, 568 F.3d 88, 95-96 (2d Cir. 2009)(RICO conspiracy with loan sharking and extortionate predicates); *United States v. Juvenile Male*, 118 F.3d 1344, 1350 (9th Cir. 1997)(RICO conspiracy with Hobbs Act predicates).

Section 924(c) applies overseas to the extent that there is extraterritorial jurisdiction over the predicate offense, *United States v. Shibin*, 722 F.3d 233, 246-47 (4th Cir. 2013); *United States v. Belfast*, 611 F.3d 783, 813-15 (11th Cir. 2010).

[29] *United States v. Serafin*, 562 F.3d 1105, 1107-1116 (10th Cir. 2009)("[T]he danger from an unregistered short-barreled rifle is inherent to its use, not merely in its possession. Although Serafin clearly disregarded the law by possessing an illegal short-barreled rifle, we must confine the scope of §924(c)(3)(B) to active, violent crimes which pose a substantial risk that force may be used during the course of the offense"), citing among others *United States v. Hull*, 456 F.3d 133, 140 (3d Cir. 2006) (possession of an unregistered pipe bomb [included within the definition of firearm in 18 U.S.C. 921(a)(3), (4)] was not a crime of violence under 18 U.S.C. 16); *Henry v. Bureau of Immigration & Customs Enforcement*, 493 F.3d 303, 309 (3d Cir. 2007)(possession of an unregistered pipe bomb with the intent to use was a crime of violence under Section 16); *United States v. Jennings*, 195 F.3d 795, 798 (5th Cir. 1999)(possession of a pipe bomb [without reference to intent] was a crime of violence under Section 16).

Possession in Furtherance

The possession prong of the offense requires that the defendant "(1) knowingly, (2) possessed a firearm, (3) in furtherance of any [federal] drug trafficking crime."[30] The "in furtherance" element compels the government to show some nexus between possession of a firearm and a predicate offense, that is, to show that the firearm furthered, advanced, moved forward, promoted, or in some way facilitated the predicate offense.[31] This requires more than proof of the presence of a firearm in the same location as the predicate offense.[32] Most circuits have identified specific factors that commonly allow a court to distinguish guilty possession from innocent "possession at the scene," particularly in a drug case, that is, "(1) type of drug activity [or violent crime] that is being conducted, (2) accessibility of the firearm, (3) the type of the weapon, (4) whether the possession is illegal, (5) whether the gun is loaded, (6) the proximity to the drugs or drug profits, and (7) the time and circumstances under which the gun is found."[33]

Although the Supreme Court has made it clear that acquiring a firearm in an illegal drug transaction does not constitute "use" in violation of Section 924(c),[34] several of the circuits have found that such acquisition may constitute "possession in furtherance."[35]

Use or Carry

The "use" outlawed in the use or carriage branch of Section 924(c) requires that a firearm be actively employed during and in relation to a predicate offense, that is, either a crime of violence

[30] *United States v. Brown*, ___ F.3d ___, ___, (1st Cir. June 27, 2013); *United States v. Perez*, 661 F.3d 568, 576 (11th Cir. 2011); *but see*, *United States v. Angilau*, 717 F.3d 781, 788 (10th Cir. 2013)("Thus, the elements of §924(c) are (1) using or carrying a firearm (2) during and in relation to (3) any federal crime of violence.... We need not decide whether some form of scienter is also a required element because it would not affect our analysis").

[31] *United States v. Renteria*, 720 F.3d 1245, 1255 (10th Cir. 2013); *United States v. Eller*, 670 F.3d 762, 765 (7th Cir. 2012); *United States v. Parish*, 606 F.3d 480, 490 (8th Cir. 2010); *United States v. Pena*, 586 F.3d 105, 113 (1st Cir. 2009); *United States v. Jeffers*, 570 F.3d 557, 565 (4th Cir. 2009); *United States v. London*, 568 F.3d 553, 559 (5th Cir. 2009); *United States v. Lopez-Garcia*, 565 F.3d 1306, 1322 (11th Cir. 2009).

[32] *United States v. Renteria*, 720 F.3d at 1255; *United States v. Eller*, 670 F.3d at 765; *United States v. Pena*, 586 F.3d at 113; *United States v. Penney*, 576 F.3d 297, 315 (1st Cir. 2009).

[33] *United States v. Renteria*, 720 F.3d at 1255; *see also*, *United States v. Brown*, 715 F.3d 985, 993-94 (6th Cir. 2013); *United States v. Gill*, 685 F.3d 606, 611 (6th Cir. 2012); *United States v. Johnson*, 677 F.3d 138, 143 (3d Cir. 2012); *United States v. Eller*, 670 F.3d at 766; *United States v. London*, 568 F.3d at 559; *United States v. Lopez-Garcia*, 565 F.3d at 1322; *United States v. Perry*, 560 F.3d 246, 254 (4th Cir. 2009); see also *United States v. Chavez*, 549 F.3d 119, 130 (2d Cir. 2008)(noting after quoting the factors that, "while no conviction would lie for a drug dealer's innocent possession of a firearm, ... a drug dealer may be punished under §924(c)(1)(A) where the charged weapon is readily accessible to protect drugs, drug proceeds, or the drug dealer himself"); but see *United States v. Hector*, 474 F.3d 1150, 1157 (9th Cir. 2007)(internal citations omitted)("Although the Fifth Circuit has developed a non-exclusive list of factors ... we have concluded that this approach is not particularly helpful in close cases.... In our most recent case addressing the 'in furtherance question,' we reiterated the importance of the factual inquiry. We declined once again to adopt a checklist approach to deciding this issue and held that it is the totality of the circumstances, coupled with a healthy dose of a jury's common sense when evaluating the facts in evidence, which will determine whether the evidence suffices to support a conviction").

[34] *Watson v. United States,* 552 U.S. 74 (2007).

[35] *United States v. Gurka*, 605 F.3d 40, 44 (1st Cir. 2010)("We join the three circuits holding *Watson* does not affect the prong of 18 U.S.C. §924(c)(1)(A) concerned with 'possession in furtherance'), citing in accord, *United States v. Gardner*, 602 F.3d 97, 103 (2d Cir. 2010); *United States v. Mahan*, 586 F.3d 1185, 1189 (9th Cir. 2009); *see also*, *United States v. Miranda*, 666 F.3d 1280, 1282-284 (11th Cir. 2012); *United States v. Dickerson*, 705 F.3d 683, 688-90 (7th Cir. 2013).

or a drug trafficking offense.[36] A defendant "uses" a firearm during or in relation to a drug trafficking offense when he uses it to acquire drugs in a drug deal,[37] or when he uses it as collateral in a drug deal,[38] but not when he accepts a firearm in exchange for drugs in a drug deal.[39] The "carry[ing]" that the section outlaws encompasses instances when a firearm is carried on the defendant's person as well as when it is simply readily accessible in vehicle during and in relation to a predicate offense.[40]

A firearm is used or carried "during or in relation" to a predicate offense when it has "some purpose or effect with respect" to the predicate offense; "its presence or involvement cannot be the result of accident or coincidence."[41] The government must show that the availability of the firearm played an integral role in the predicate offense.[42]

Discharge and Brandish

The basic five-year mandatory minimum penalty for using, carrying, or possessing a firearm in the course of a predicate offense becomes a seven-year mandatory minimum if a firearm was brandished during the course of the offense and becomes a 10-year mandatory minimum if a firearm was discharged during the course of the offense.[43] The discharge provision applies even if the firearm is discharged inadvertently.[44] Whether a firearm is discharged or brandished is a question that after *Alleyne* must be presented to the jury and proven beyond a reasonable doubt.[45] A firearm is brandished for these purposes when (1) it is displayed or its presence made known (2) in order to intimidate another.[46] Intimidation is a necessary feature of brandishing, but it is no less present when the fear is induced by using the gun as a club rather than merely displaying it.[47]

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[36] *Bailey v. United States*, 516 U.S. 137, 143 (1995); *United States v. Haynes*, 582 F.3d 686, 704 (7th Cir. 2009)); *United States v. Combs,* 369 F.3d 925, 932 (6th Cir. 2004).

[37] *Smith v. United States*, 508 U.S. 223, 228 (1993); *Bailey v. United States,* 516 U.S. 137, 148 (1995).

[38] *United States v. Cox*, 324 F.3d 77, 82 (2d Cir. 2003).

[39] *Watson v. United States*, 552 U.S. at 78.

[40] *Muscarello v. United States,* 524 U.S. 125, 126 (1998)("The question before us is whether the phrase 'carries a firearm' is limited to the carrying of firearms on the person. We hold that it is not so limited. Rather, it also applies to a person who knowingly possesses and carries a firearm in a vehicle, including locked in a glove compartment or trunk of a car, which the person accompanies"); *United States v. Franklin*, 561 F.3d 398, 403 (5th Cir. 2009); *United States v. Winder*, 557 F.3d 1129, 1138-139 (10th Cir. 2009); *United States v. Robinson*, 390 F.3d 853, 878 (6th Cir. 2005); *United States v. Williams*, 344 F.3d 365, 370 (3d Cir. 2003).

[41] *United States v. Mashek*, 606 F.3d 922, 930 (8th Cir. 2010), quoting *Smith v. United States*, 508 U.S. 223, 238 (1993); *United States v. Roberson*, 459 F.3d 39, 48 (1st Cir. 2006); *United States v. Combs,* 369 F.3d 925, 933 (6th Cir. 2004); *United States v. Williams*, 344 F.3d 365, 371 (3d Cir. 2003).

[42] *United States v. Burkley*, 513 F.3d 1183, 1189-190 (10th Cir,. 2008)("A firearm is carried during and in relation to the underlying crime when the defendant avails himself of the weapon and ... the weapon plays an integral role in the underlying offense.... Thus, the government must prove that the defendant intended the firearm to be available for use in the offense").

[43] 18 U.S.C. 924(c)(1)(A)(ii), (iii).

[44] *Dean v. United States*, 556 U.S. 568, 574 (2009).

[45] *Alleyne v. United States*, 133 S.Ct. 2151, 2163 (2013)("Because the finding of brandishing increased the penalty to which the defendant was subjected, it was an element, which had to be found by the jury beyond a reasonable doubt"). *Alleyne* overruled *Harris*, which had held that brandishing was a sentencing factor that might be entrusted to the judge to find by a preponderance of the evidence (*Harris v. United States*, 535 U.S. 545, 556 (2002)).

[46] 18 U.S.C. 924(c)(4)("For purposes of this subsection, the term 'brandish' means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate (continued...)

Short Barrels, Semiautomatics, Machine Guns, and Bombs

For some time, Section 924(c) consisted of a single long paragraph. When Congress added the "possession in furtherance" language, it parsed the section. Now, the general, brandish, and discharge mandatory penalties provisions appear in one part.[48] The provisions for offenses involving a short-barreled rifle or shotgun, a semiautomatic assault weapon, a silencer, a machinegun, or explosives appear in a second part.[49] The provisions for second and consequent convictions appear in a third part.[50]

The circuits are apparently divided over the question of whether the government must show that the defendant knew that the firearm at issue was of a particular type (i.e., short-barreled rifle or shotgun, machine gun, or bomb).[51]

Prior to the division, the Supreme Court had identified as an element of a separate offense (rather than a sentencing factor) the question of whether a machinegun was the firearm used during and in relation to a predicate offense.[52] Thereafter, it concluded that the division was a matter of style rather than substance. Thus, the answer remains the same—use of a short-barreled rifle, semiautomatic assault weapon, silencer, machine gun, or bomb is not a sentencing factor, but an element of a separate offense to be charged and proved to the jury beyond a reasonable doubt.[53] The question of whether a second or subsequent conviction has occurred, however, remains a sentencing factor.[54]

(...continued)

that person, regardless of whether the firearm is directly visible to that person"); *United States v. Carter*, 560 F.3d 1107, 1114 (9th Cir. 2009).

[47] *United States v. Bowen*, 527 F.3d at 1075 (10th Cir. 2008).

[48] 18 U.S.C. 924(c)(1)(emphasis added)("(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime - *(i) be sentenced to a term of imprisonment of not less than 5 years; (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years ...*").

[49] 18 U.S.C. 924(c)(1)("... (B) If the firearm possessed by a person convicted of a violation of this subsection - (i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or (ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years ...").

[50] 18 U.S.C. 924(c)(1)("... (C) In the case of a second or subsequent conviction under this subsection, the person shall - (i) be sentenced to a term of imprisonment of not less than 25 years; and (ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life").

[51] *United States v. Burwell*, 690 F.3d 500, 510-11 (D.C.Cir. 2012)(citing cases evidencing a split).

[52] *Castillo v. United States*, 530 U.S. 120, 121 (2000).

[53] *United States v. O'Brien*, 130 U.S. 2169, 2180 (2010).

[54] *United States v. Rivera-Rivera,* 555 F.3d 277, 291 (1st Cir. 2009); *United States v. Mejia*, 545 F.3d 179, 207-208 (2d Cir. 2008). This is true even after *Alleyne*, because the Court continues to recognize a recidivist exception to the *Apprendi* rule, *see, e.g.*, *Alleyne v. United States*, 133 S.Ct. 2151, 2160 n.1 ("In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), we recognized a narrow exception to this general rule for the fact of a prior conviction. Because the parties do not contest that decision's vitality, we do not revisit it for purposes of our decision today").

Other Sentencing Considerations

The penalties under Section 924(c) were once flat sentences, for example, the penalty for use of a firearm during the course of a predicate offense was a five-year term of imprisonment.[55] Now, they are simply mandatory minimums, each carrying an unspecified maximum term of life imprisonment.[56]

A court may not avoid the mandatory minimums called for in Section 924(c)(1) by imposing a probationary sentence,[57] or by ordering that a 924(c)(1) minimum mandatory sentence be served concurrently with some other sentence.[58] Nor may a court mute the impact of a mandatory minimum sentence by artificially reducing the sentence for the predicate offense.[59]

If a criminal episode involves more than one predicate offense, more than one violation of Section 924(c) may be punished.[60] Moreover, the second or subsequent convictions which trigger enhanced mandatory minimum penalties need not be the product of separate trials, but may be part of the same verdict. Thus, a defendant charged and convicted in a single trial on several counts may be subject to multiple, consecutive, mandatory minimum terms of imprisonment.[61]

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[55] 18 U.S.C. 924(c)(1976 ed.).

[56] *United States v. Shabazz*, 564 F.3d 280, 289 (3d Cir. 2009), citing in accord *United States v. Johnson*, 507 F.3d 793, 798 (2d Cir. 2007); *United States v. Dare*, 425 F.3d 634, 642 (9th Cir. 2005); *United States v. Avery*, 295 F.3d 1158, 1170 (10th Cir. 2002); *United States v. Cristobal*, 293 F.3d 134, 147 (4th Cir. 2002); *United States v. Sandoval*, 241 F.3d 549, 551 (7th Cir. 2001); *United States v. Pounds*, 230 F.3d 1317, 1319 (11th Cir. 2000); *United States v. Silas*, 227 F.3d 244, 246 (5th Cir. 2000).

[57] 18 U.S.C. 924(c)(1)(D)(i).

[58] 18 U.S.C. 924(c)(1)(D)(ii).

[59] *United States v. Chavez*, 549 F.3d 119, 135 (2d Cir. 2008); *United States v. Hatcher*, 501 F.3d 931, 933 (8th Cir. 2007); *United States v. Franklin*, 499 F.3d 578, 584-85 (6th Cir. 2007); *United States v. Roberson*, 474 F.3d 432, 436 (7th Cir. 2007).

[60] *United States v. Sandstrom*, 594 F.3d 634, 658 (8th Cir. 2010)("... [M]ultiple underlying offenses support multiple §924(c) convictions"); *United States v. Catalan-Roman*, 585 F.3d 453, 472 (1st Cir. 2009); *United States v. Penny*, 576 F.3d 297, 316 (6th Cir. 2009)("[W]hen two separate predicate offenses for triggering §924(c)(1) are charged and proved, a defendant may be convicted and sentenced for two separate crimes, even if both offenses were committed in the course of the same event"); *United States v. Looney*, 532 F.3d 392, 396 (5th Cir. 2008).

[61] *Deal v. United States*, 508 U.S. 129, 132 (1993); *United States v. Washington,* 714 F.3d 962, 969-70 (6th Cir. 2013)(noting, however, that the stacking should be governed by the rule of lenity, so that, for example, the 25-year mandatory minimums for second offenses should be stacked starting with a seven-year brandishing sentence rather than a 10-year discharge sentence); *see also*, *United States v. Robles*, 709 F.3d 98, 101 (2d Cir. 2013)("[O]ur sister circuits have consistently upheld sentences imposing consecutive mandatory minimum terms for multiple §924(c) convictions in the same proceeding.... We agree with our sister circuits"); *United States v. Phaknikone*, 605 F.3d 1099, 1101, 1111-112 (11th Cir. 2010)(the defendant was charged with, and convicted for, a string of 15 armed bank robberies for which he received a sentenced of 2005 months (167 years); the court observed that, "Phaknikone also argues that, because each count under section 924 was charged in a single indictment, the district court erroneously applied the higher mandatory minimum of 25 years of imprisonment for second or subsequent conviction, 18 U.S.C. §924(c)(1)(C), to six of his seven convictions. We long ago rejected this argument"); *United States v. Beltran-Moreno*, 556 F.3d 913, 915 (9th Cir. 2009)("In this case, the defendants pled guilty to various drug offenses that, taken together, imposed a mandatory minimum sentence of ten years. They also pled guilty to two §9254(c) charges, the first of which required a mandatory minimum sentence of five years and the second of which required an additional sentenced of twenty-five years. Because the statute does not allow any of these sentences to run concurrently, the mandatory minimum sentence for both defendants is forty years in prison"); *United States v. Watkins*, 509 F.3d 277, 282 (6th Cir. 2007) ("Finally, the district court sentenced Watkins to an additional 7 years for brandishing a firearm during the first robbery, in violation of 18 U.S.C. §924(c), and to 25 years for each count of using or brandishing a firearm during the other five robberies. The length of the firearm sentences are predetermined by §924(c)(1)(C)(i). Pursuant to §924(c)(1(D)(ii), the court then (continued...)

A number of defendants have sought refuge in the clause of Section 924(c) which introduces the section's mandatory minimum penalties with an exception: "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law." Defendants at one time argued that the mandatory minimums of Section 924(c) become inapplicable, if they are subject to a higher mandatory minimum under the predicate drug trafficking offense under the Armed Career Criminal Act (18 U.S.C. 924(e)), or some other provision of law.[62] The Supreme Court rejected the argument in *Abbott*.[63] The clause means that the standard five-year minimum applies except in cases where the facts trigger one of Section 924(c)'s higher minimums.[64]

Section 924(c) and the Sentencing Guidelines

The mandatory minimums of Section 924(c) each carry a maximum of life imprisonment. A defendant's sentencing between the minimum and maximum is a matter that begins with the Sentencing Guidelines. The Sentencing Guidelines were once binding on federal district courts.[65] They are now advisory, but remain the starting point for all federal sentencing.[66] Section 2K2.4 of the Guidelines declares that unless the defendant qualifies as a career offender, the sentence for a violation of Section 924(c) shall be the minimum called for there. The offense level adjustments in chapter 3 (victim vulnerability, role in the offense, abuse of trust/use of special skill, multiple counts, acceptable of responsibility) do not apply in such cases.[67]

In the case of career offenders, Section 4B1.1(c) of the Guidelines supplies the operable provisions.[68] A career offender for these purposes is a defendant who has at least two prior state or federal felony convictions for a crime of violence or a drug trafficking offense.[69] The Guideline sentence for a career offender convicted of violating Section 924(c) varies according to whether he is convicted of Section 924(c) alone and whether the court awards an acceptance of responsibility reduction (the adjustment under chapter 3 are otherwise inapplicable).

A career offender convicted of 924(c) alone is subject to a sentencing range of either: (1) 262-327 (months)(if given a 3 level responsibility reduction); (2) 292-365 (months) (if given a 2 level responsibility reduction); or (3) 360 (months)-life) (if given no responsibility reduction).[70] If the defendant is convicted of other offenses in addition to Section 924(c), his Guidelines sentence is

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(...continued)

ordered that each of the §924(c) gun convictions run consecutively to the underlying offenses").

[62] *United States v. Almany*, 598 F.3d 238, 241-42 (6th Cir. 2010); *United States v. Whitley*, 529 F.3d 150, 153-56 (2d Cir. 2008).

[63] *Abbott v. United States*, 131 S.Ct. 18, 23 (2010).

[64] *Id.*; *United States v. Robles*, 709 F.3d 98, 100-101 (2d Cir. 2013).

[65] 18 U.S.C. 3553(b)(1) (2000 ed.).

[66] *United States v. Booker*, 543 U.S. 220, 245 (2005); *Gall v. United States*, 552 U.S. 38, 49-50 (2007)("[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range.... [A]fter giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the §3553(a) factors to determine whether they support the sentence requested by a party").

[67] U.S.S.G. §2K2.4(b), (c).

[68] U.S.S.G. §4B1.1(c).

[69] U.S.S.G. §§4B1.1(c), 4B1.2(b), (c); *United States v. McFalls*, 592 F.3d 707, 712-17 (6th Cir. 2010).

[70] U.S.S.G §4B1.1(a), (c)(1), (c)(3); *United States v. Shabazz*, 564 F.3d 280, 288-89 (3d Cir. 2009).

the greater of (1) the Guideline sentence for those offenses with the 924(c) mandatory minimum tacked on, or (2) the Guideline sentence for a violation of 924(c) alone.[71]

The Guidelines themselves supply an example of how this last situation might play out:

> The defendant is convicted of one count of violating 18 U.S.C. § 924(c) for possessing a firearm in furtherance of a drug trafficking offense (5 year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(B) [(e.g., trafficking in 5-50 grams of crack cocaine)] (5 year mandatory minimum, 40 year statutory maximum). Applying subsection (c)(2)(A), the court determines that the drug count (without regard to the 18 U.S.C. § 924(c) count) qualifies the defendant as a career offender under §4B1.1(a). Under §4B1.1(a), the otherwise applicable guideline range for the drug count is 188-235 months (using offense level 34 (because the statutory maximum for the drug count is 40 years), minus 3 levels for acceptance of responsibility, and criminal history category VI). The court adds 60 months (the minimum required by 18 U.S.C. § 924(c)) to the minimum and the maximum of that range, resulting in a guideline range of 248-295 months. Applying subsection (c)(2)(B) [(the Guideline sentence for conviction of §924(c) alone)], the court then determines the career offender guideline range from the table in subsection (c)(3) is 262-327 months. The range with the greatest minimum, 262-327 months, is used to impose the sentence in accordance with §5G1.2(e). U.S.S.G. §4B1.1, cmt, app. n.3(E).

After the court has determined the sentencing range under the Guidelines, it determines the defendant's sentence, taking into account the results of the Guidelines' calculation and the other factors referred to 18 U.S.C. 3553(a).[72]

Armor Piercing Ammunition

Section 924(c) has a separate provision which outlaws predicate crime-related use, carriage, or possession of armor piercing ammunition.[73] The provision, added in 2005, greatly resembles a

[71] U.S.S.G §4B1.1(a), (c)(2), (c)(3).

[72] 18 U.S.C. 3553(a)("The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider - (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established for - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); (5) any pertinent policy statement - (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced. (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense").

pre-existing provision in 18 U.S.C. 929.[74] There are two significant differences. Section 924(c)(5) carries a 15-year mandatory minimum with special provisions if a death results from the commission of the offense. Section 929 carries a five-year mandatory minimum with no mention of death-resulting offenses. Yet Section 929 specifically excludes the possibility of probation or concurrent sentencing, while Section 924(c)(5) makes no mention of either. Neither provision appears to have been prosecuted with any regularity.

Aiding, Abetting, and Conspiracy

As a general rule, conspirators are liable for any foreseeable crimes committed by any of their co-conspirators in furtherance of the conspiracy.[75] The rule applies when a defendant's co-conspirator has committed a violation of Section 924(c).[76]

Under federal law, moreover, anyone who commands, counsels, aids, or abets the commission of a federal offense by another is punishable as though he had committed the crime himself, 18 U.S.C. 2.[77] Here too, the general proposition applies to Section 924(c). "[A] defendant is liable of

(...continued)

[73] 18 U.S.C. 924(c)(5)("Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section - (A) be sentenced to a term of imprisonment of not less than 15 years; and (B) if death results from the use of such ammunition - (i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and (ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112").

[74] 18 U.S.C. 929("(a)(1) Whoever, during and in relation to the commission of a crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm and is in possession of armor piercing ammunition capable of being fired in that firearm, shall, in addition to the punishment provided for the commission of such crime of violence or drug trafficking crime be sentenced to a term of imprisonment for not less than five years. (2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.
"(b) Notwithstanding any other provision of law, the court shall not suspend the sentence of any person convicted of a violation of this section, nor place the person on probation, nor shall the terms of imprisonment run concurrently with any other terms of imprisonment, including that imposed for the crime in which the armor piercing ammunition was used or possessed").

[75] *Pinkerton v. United States*, 328 U.S. 640, 646 (1946); *Salinas v. United States*, 522 U.S. 52, 63 (1997).

[76] *United States v. Min*, 704 F.3d 314, 324 n.9 (4th Cir. 2013)("As members of the conspiracy, all of the defendants including Phun, were legally responsible for the possession of firearms, which was a reasonably foreseeable act by their coconspirators in furtherance of that conspiracy"); *United States v. Walker*, 673 F.3d 649, 655 (7th Cir. 2012); *United States v. Merlino,* 592 F.3d 22, 29 (1st Cir. 2010); *United States v. Carter*, 560 F.3d 1107, 1113 (9th Cir. 2009).

[77] *United States v. Bowen,* 527 F.3d 1065, 1078 (10th Cir. 2008)(internal citations omitted)("[A]iding and abetting liability allows a jury to hold an aider and abettor responsible for a substantive offense to the same extent as a principal, even though his act was not the cause of the substantive harm. Acts committed in furtherance of the commission of a crime by another constitute 'abetting'.... To be liable for aiding and abetting, a defendant must (1) willfully associate himself with the criminal venture, and (2) seek to make the venture succeed through some action of his own.... One need not participate in an important aspect of a crime to be liable as an aider and abettor; participation of 'relatively slight moment' is sufficient. Even mere 'words or gestures of encouragement' constitute affirmative acts capable of rendering one liable under this theory").

aiding and abetting the use of a firearm during a crime of violence if he (1) knows his cohort used a firearm in the underlying crime, and (2) knowingly and actively participates in that underlying crime."[78]

Sentencing Commission Recommendations

The Sentencing Commission's report on mandatory minimum sentences suggested several adjustments in Section 924(c):

i. Amend the length of section 924(c) penalties

> Congress should consider amending the mandatory minimum penalties established at section 924(c), particularly the penalties for "second or subsequent" violations of the statute, to lesser terms. Section 924(c), for example, requires a 25-year mandatory minimum penalty for offenders convicted of a "second or subsequent" violation of the statute. Reducing the length of the mandatory minimum penalty would reduce the risk of excessive severity, permit the guidelines to better account for the variety of mitigating and aggravating factors that may be present in the particular case, and mitigate the inconsistencies in application produced by the severity of the existing mandatory minimum penalties.

ii. Make section 924(c) a "true" recidivist statute

> Congress should consider amending section 924(c) so that the increased mandatory minimum penalties for a "second or subsequent" offense apply only to *prior* convictions. In those circumstances, the mandatory minimum penalties for multiple violations of section 924(c) charged in the same indictment would continue to apply consecutively, but would require significantly shorter sentences for offenders who do not have a prior conviction under section 924(c). This would reduce the potential for overly severe sentences for offenders who have not previously been convicted of an offense under section 924(c), and ameliorate some of the demographic impacts resulting from stacking.

iii. Give discretion to impose concurrent sentences for multiple section 924(c) violations

> Congress should consider amending section 924(c) to give the sentencing court limited discretion to impose sentences for multiple violations of section 924(c) concurrently. Congress has recently used this approach in enacting the offense of aggravated identity theft and the accompanying mandatory penalty at 18 U.S.C. § 1028A. This limited discretion would provide the flexibility to impose sentences that appropriately reflect the gravity of the offense and reduce the risk that an offender will receive an excessively severe punishment.

[78] *Id. See also*, *United States v. Kirklin*, 727 F.3d 711, 714 (7th Cir. 2013); *United States v. Rosemond*, 695 F.3d 1151, (10th Cir. 2012)("Aiding and abetting in the use of a firearm during a crime of violence under 18 U.S.C. §924(c) requires proof that the defendant (1) knew his cohort used a firearm in the underlying crime and (2) knowingly and actively participated in that underlying crime"); *United States v. Figueroa-Cartagena*, 612 F.3d 69, 83-4 (1st Cir. 2010)("The indictment alleged that she aided and abetted Alberto and Gabriel in their use and carriage of a firearm during the carjacking. To secure a conviction on that count, the government had to prove that Neliza knew to a practical certainty that her confederates would carry or use a firearm and that she willingly took some step to facilitate the carrying or use"); *United States v. Gomez*, 580 F.3d 94, 104 (2d Cir. 2009).

iv. Amend statutory definitions

> Congress should consider clarifying the statutory definitions of the underlying and predicate offenses that trigger mandatory minimum penalties under section 924(c) and the Armed Career Criminal Act to reduce the risk of inconsistent application and the litigation that those definitions have fostered. To further reduce the risk of inconsistent application, Congress also should consider more finely tailoring the definitions of the predicate offenses that trigger the Armed Career Criminal Act's mandatory minimum penalty.[79]

Constitutional Considerations

Defendants have challenged the constitutionality of Section 924(c) and its application on a number of grounds including contentions that (1) the section is inconsistent with the Second Amendments right to bear arms; (2) the sentence imposed constituted a cruel and unusual punishment in violation of the Eighth Amendment; (3) the procedure used to implement its provisions was contrary to the Sixth Amendment right to trial by jury, and to the Fifth Amendment right to grand jury indictment; (4) imposition of the sanctions violated the prohibition against double jeopardy; (5) Congress lacked the legislative authority to enact the section; and (6) mandatory minimums intrude upon the judicial authority of federal judges in a manner contrary to the separation powers.

Second Amendment

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.[80]

The Supreme Court has explained that the Second Amendment confers an individual right to possess and carry weapons for the defense of his or her person, family, and home.[81] The Court has been quick to point out, however, that the right is not absolute. Without providing a full panoply of exceptions, it observed that the amendment permits such things as "longstanding prohibitions on the possession of firearms by felons and the mentally ill, [and] laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, [and] laws imposing conditions and qualifications on the commercial sale of arms."[82] Consistent with this theme, the circuit courts have held that the Second Amendment cast no constitutional doubt upon Section 924(c).[83]

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[79] *Commission Report II*, 364-65.

[80] U.S. Const. Amend. II.

[81] *District of Columbia v. Heller*, 554 U.S. 570, 628-29 (2008)(internal citations omitted)("The inherent right of self-defense has been central to the Second Amendment right.... [Moreover,] [u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home [a handgun,] the most preferred firearm in the nation to keep and use for protection of one's home and family, would fail constitutional muster"); *see also*, *McDonald v. City of Chicago*, 130 S.Ct. 3020, 3044 (2010)("[T]he Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home").

[82] *District of Columbia v. Heller*, 554 U.S. at 626-27.

[83] *United States v. Bryant*, 711 F.3d 364, 368-70 (2d Cir. 2013), citing in accord, *United States v. Potter*, 630 F.3d 1260, 1261 (9th Cir. 2011); and *United States v. Jackson*, 555 F.3d 635, 636 (7th Cir. 2009).

Cruel and Unusual Punishment

The Eighth Amendment provides in its entirety that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted," U.S. Const. Amend. VIII. Until very recently, there has been little consensus on the Supreme Court regarding the most appropriate test to determine whether punishment in a noncapital case is cruel and unusual. That seems to have changed with *Graham v. Florida*,[84] when a majority of the court referred to one test for "length of term-of-years" cases and another for "categorical cases."

Contemporary Eighth Amendment jurisprudence begins with *Furman v. Georgia*.[85] There, a divided Supreme Court held that the Eighth Amendment, applicable to the states through the Fourteenth Amendment, precluded imposition of the death penalty under the procedures then common in most jurisdictions.[86] Thereafter, the Court's treatment of Eighth Amendment questions followed two paths—one for capital punishment cases and another for imprisonment cases. In the first of the imprisonment cases, *Rummel v. Estelle*, the Court rejected an Eighth Amendment challenge from a prisoner who had been sentenced under a state repeat offender statute to life imprisonment for the fraudulent use of the credit card.[87] Yet three years later in *Solem v. Helm*, the Court found contrary to Eighth Amendment proscriptions a state repeat offender statute which carried a mandatory term of life imprisonment.[88] The Court considered Helm's punishment far more severe than Rummel's, because Helm was ineligible for parole while Rummel would have been eligible in 12 years.[89]

The Court in *Solem* identified three factors to be considered in the Eighth Amendment assessment of punishment in a noncapital case: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on the criminals in the same jurisdiction [for other crimes]; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[90]

Then in *Harmelin v. Michigan*, a splintered Court rejected the Eighth Amendment challenge of a first time offender who had been sentenced to life imprisonment without parole following conviction on serious drug charges.[91] Two distinct theories converged to form the judgment of the Court. Two members of the Court, Justice Scalia and Chief Justice Rehnquist, rejected Harmelin's argument that his sentence was disproportionate to his crime because they saw no proportionality requirement in the Eighth Amendment noncapital cases.[92] Three others, Justices Kennedy,

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[84] 130 S.Ct. 2011 (2010).

[85] 408 U.S. 238 (1972).

[86] Each of the nine Justices wrote a separate opinion in *Furman*, six offering various reasons for support of the per curiam opinion for the Court and three in dissent.

[87] 445 U.S. 263, 265 (1980). Rummel had two earlier theft convictions involving relatively modest amounts, i.e., a forged check for $28.36 and a scam involving $120.75; the credit card conviction involved $80 in goods and services, *id.* at 265-66.

[88] 463 U.S. 277, 303 (1983). Helm, convicted for uttering a "no account" check for $100, had six prior "nonviolent" felony convictions, *id.* at 279-80

[89] *Id.* at 303.

[90] *Id.* at 292.

[91] 501 U.S. 957 (1991).

[92] *Id*. at 994.

O'Connor, and Souter, found the gravity of Harmelin's offense sufficient to satisfy the first factor of the *Solem* test and to dispense with the need to consider the other factors.[93]

The Court remained divided when it took up the next Eighth Amendment challenge to recidivist sentencing in *Ewing v. California*.[94] Three members of the Court, Chief Justice Rehnquist and Justices Kennedy and O'Connor, concluded that a sentence of imprisonment of from 25 years to life for a three-time offender convicted of theft was not unconstitutionally disproportionate.[95] Two others, Justices Scalia and Thomas, concurred in the judgment because neither believed that the Eighth Amendment proscribes disproportionate sentences.[96]

Proportionality is balance: the severity of the punishment weighted against gravity of the offense. Justice O'Connor's *Ewing* opinion indicates that certain of a defendant's individual circumstances, his criminal record for instance, enhance gravity of the offense. Other cases hold out the possibility that other individualistic circumstances, such as the defendant's mental capacity or maturity, may enhance the severity of the punishment. These cases also have their origin in the death penalty cases.

The first of these, *Atkins v. Virginia*, held that the Eighth Amendment barred execution of a mentally retarded defendant.[97] In the years leading up to *Atkins*, a substantial number of state legislatures in capital punishment states had banned execution of the mentally retarded.[98] Elsewhere, though permitted in law, the practice has been abandoned in fact.[99] This, coupled with the fact that a want of defendant capacity undermines the normal expectations and justifications of the criminal justice system, marked execution of the mentally retarded as an Eighth Amendment impermissible excessive punishment.[100]

For much the same reason, the Court shortly thereafter in *Roper v. Simmons* declared that the Eighth Amendment prohibited imposing the death penalty for a crime committed as a juvenile.[101] Next, the Court carried the *Atkins-Roper* line of cases beyond the capital punishment realm. In *Graham v. Florida*, Justice Kennedy explained that "[t]he Court's cases addressing the proportionality of sentences fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances of a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty."[102] In the first line of cases, the *Solem-Harmelin-Ewing* line, the Court employs a proportionality standard, and "it has been difficult for the challenger to establish a lack of proportionality."[103]

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[93] *Id*. at 1004.

[94] 538 U.S. 11 (2003).

[95] *Id.* at 30-31.

[96] *Id.* at 31, 32.

[97] 536 U.S. 304, 321 (2002).

[98] *Id.* at 314-15.

[99] *Id*. at 315-16.

[100] *Id.* at 321 ("Construing and applying the Eighth Amendment in the light of our 'evolving standards of decency,' we therefore conclude that such punishment is excessive and that the Constitution 'places a substantial restriction on the State's power to take the life' of a mentally retarded offender").

[101] 543 U.S. 551, 564-78.

[102] 130 S.Ct. 2011, 2021 (2010).

[103] *Id*.

In the second line of cases, the *Atkins-Roper* line, *Graham* recognized a two-step approach used when the challenge is based on a characteristic of the defendant, such as his mental capacity as in *Atkins* or his age as in *Roper*.[104] First, the Court "considers 'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is a national consensus against the sentencing practice at issue."[105] Second, "guided by 'the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose,' the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution."[106]

Graham challenged his sentence of life imprisonment without the possibility of parole imposed for the commission of a nonhomicide, armed robbery, committed while a child. Using this *Atkins-Roper* approach, the Court concluded that the Eighth Amendment precluded Graham's sentence. It carried that logic forward in *Miller v. Alabama*.[107] The *Miller* defendants had been convicted of capital murder committed while juveniles and had been sentenced to life imprisonment without the possibility of parole.[108] That the Eighth Amendment does not permit, the Court held.[109] The *Miller* sentencing procedures suffered from two previously identified constitutional defects. First, they barred consideration of the mitigating impact of the defendant's age:

> By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. That contravenes *Graham's* (also *Roper's*) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.[110]

Second, the procedure not only failed to account for a paramount culpability-reducing factor, but it also failed to account for the severity of the sentence when imposed upon a child:

> *Graham* makes plain these mandatory schemes' defects in another way: by likening life-without-parole sentences imposed on juveniles to the death penalty itself. Life-without-parole terms, the Court wrote, share some characteristics with death sentences that are shared by no other sentences. Imprisoning an offender until he dies alters the remainder of his life by a forfeiture that is irrevocable. And this lengthiest possible incarceration is an especially harsh punishment for a juvenile because he will almost inevitably serve more years and a greater percentage of his life in prison than an adult offender. The penalty when imposed on a teenager, as compared with an older person, is therefore the same in name only. All of that suggested a distinctive set of legal rules: In part because we viewed this ultimate penalty for juveniles as akin to the death penalty, we treated it similarly to that most severe punishment.[111]

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[104] *Id.* at 2022.

[105] *Id*.

[106] *Id.*

[107] 132 S.Ct. 2455 (2012).

[108] *Id*. at 2461-462.

[109] *Id*. at 2476.

[110] *Id*. at 2466.

[111] *Id.* (internal citations and quotation marks omitted).

Thus, under the current state of the law, the Eighth Amendment bars imposition of a mandatory life term of imprisonment upon juveniles and most likely a particular term of imprisonment in those exceptionally rare cases when the punishment is grossly disproportionate to the offense.

Given the seriousness of Section 924(c) offenses, it is perhaps not surprising that the courts have rejected Eighth Amendment challenges even in the face of severe sentences.[112]

Juries, Grand Juries, and Due Process

The Constitution demands that no person "be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," and that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."[113] Moreover, due process requires that the prosecution prove beyond a reasonable doubt "every fact necessary to constitute the crime" with which an accused is charged, *In re Winship*.[114] After *Winship*, the question arose whether a statute might authorize or require a more severe penalty for a particular crime based on a fact—not included in the indictment, not found by the jury, and not proven beyond a reasonable doubt. Pennsylvania passed a law under which various serious crimes (rape, robbery, kidnapping, and the like) were subject to a mandatory minimum penalty of imprisonment for five years, if the judge after conviction found by a preponderance of the evidence that the defendant had been in visible possession of a firearm during the commission of the offense.[115] Had the Pennsylvania statute created a new series of crimes? For example, had it supplemented its crime of rape with a new crime of rape while in visible possession of a firearm? And if so, did the fact of visible possession have to be proven to the jury beyond a reasonable doubt?[116]

The Supreme Court concluded that visible possession of a firearm under the statute was not an element of a new series of crimes, but was instead a sentencing consideration that had been given a legislatively prescribed weight.[117] As such, the Pennsylvania statutory scheme neither offended due process nor triggered any right to a separate jury finding.[118]

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[112] E.g., *United States v. Haile*, 685 F.3d 1211, 1222 (11th Cir. 2012)("Given the serious nature of possessing a machine gun in furtherance of drug-trafficking crimes, Beckford's 30-year statutory mandatory minimum sentence imposed under §924(c)(1)(B)(ii) is not grossly disproportionate to the offense"); *United States v. Major*, 676 F.3d 803, 812 (9th Cir. 2012)("Major and Huff also argue that section 924(c) violates the Eighth Amendment. We have rejected such challenges before. In *United States v. Harris*, 154 F.3d 1082, 1084 (9th Cir. 1990), we upheld a 95-year sentence under section 924(c) against an Eighth Amendment challenge.... The sentences of Major and Huff are significantly higher in number of years. No one could dispute that sentence of almost 750 years is harsh. But there is no difference in principle between their sentences and the 95-year sentence we upheld in *Harris*"); *United States v. Clark*, 634 F.3d 874, (6th Cir. 2011)(upholding sentence of 1989 years, 150 years of which were attributable to §924(c)); *United States v. Thomas*, 627 F.3d 146, 160 (5th Cir. 2010)("The 1,284-month portion of the sentence he challenges is based on the five convictions for use of a firearm during a crime of violence. The sentences assessed for these five convictions were all mandatory minimums; the last four were 25-year mandatory minimums assigned to repeat weapons offenders.... Hodges' sentence does not constitute cruel and unusual punishment in violation of the Eighth Amendment").

[113] U.S.Const. Amends. V, VI.

[114] 397 U.S. 358, 364 (1970).

[115] 42 Pa.Cons.Stat. 9712 (1982), reprinted in *McMillan v. Pennsylvania*, 477 U.S. 79, 81-2 n.1 (1986).

[116] The right to grand jury indictment was not implicated since the Sixth Amendment right to grand jury indictment applies only to federal prosecutions, *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972).

[117] *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

[118] *Id.* at 84, 93.

There followed a number of state and federal statutes under which facts that might earlier have been treated as elements of a new crime were simply classified as sentencing factors. In some instances, the new sentencing factor permitted imposition of a penalty far in excess of that otherwise available for the underlying offense. For instance, the Supreme Court found no constitutional defect in a statute which punished a deported alien for returning to the United States by imprisonment for not more than two years, but which permitted the alien to be sentenced to imprisonment for not more than 20 years upon a post-trial, judicial determination that the alien had been convicted of a serious crime following deportation.[119]

Perhaps uneasy with the implications, the Court soon made it clear that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the *maximum* penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt," *Apprendi v. New Jersey*.[120] Side opinions questioned the continued vitality of *McMillan*'s mandatory minimum determination in light of the *Apprendi*.[121]

Initially unwilling to extend *Apprendi* to mandatory minimums in *Harris*,[122] the Court did so in *Alleyne v. United States*.[123] Alleyne was convicted under the statute that imposes a series of

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[119] *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998).

[120] 530 U.S. 466, 476 (2000)(emphasis added).

[121] "Thus, the Court appears to hold that any fact that increases or alters the range of penalties to which a defendant is exposed—which, by definition, must include increases or alterations to either the minimum or maximum penalties—must be proved to a jury beyond a reasonable doubt. In *McMillan*, however, we rejected such a rule to the extent it concerned those facts that increase or alter the minimum penalty to which a defendant is exposed. Accordingly, it is incumbent on the Court not only to admit that it is overruling *McMillan*, but also to explain why such a course of action is appropriate under normal principles of *stare decisis*," 530 U.S. at 533 (O'Connor, with Kennedy, Breyer, JJ., and Rehnquist, Ch.J., dissenting).

"[T]his traditional understanding—that a crime includes every fact that is by law a basis for imposing or increasing punishment—continued well into the 20th century, at least until the middle of the century.... I think it clear that the common-law rule would cover the *McMillan* situation of a mandatory minimum sentence.... [A defendant's] expected punishment has increased as a result of the narrowed range and that the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish. The mandatory minimum entitles the government to more than it would otherwise be entitled.... Thus, the fact triggering the mandatory minimum is part of the punishment sought to be inflicted; it undoubtedly enters into the punishment so as to aggravate it, and is an act to which the law affixes punishment. Further ... it is likely that the change in the range available to the judge affects his choice of sentences. Finally, in numerous cases ... the aggravating fact raised the whole range—both the top and bottom. Those courts, in holding that such a fact was an element, did not bother with any distinction between changes in the maximum and the minimum. What mattered was simply the overall increase in the punishment provided by law," 530 U.S. at 518, 521-22 (Thomas, J., concurring); *see also, Rethinking Mandatory Minimums After Apprendi*, 96 NORTHWESTERN UNIVERSITY LAW REVIEW 811 (2002); Levine, *The Confounding Boundaries of "Apprendi-land": Statutory Minimums and the Federal Sentencing* Guidelines, 29 AMERICAN JOURNAL OF CRIMINAL LAW 377 (2002).

[122] *Harris v. United States*, 536 U.S. 545, 568 (2002)("Reaffirming *McMillan* and employing the approach outlined in that case, we conclude that the federal provision at issue, 18 U.S.C. §924(c)(1)(A) (ii), is constitutional. Basing a 2-year increase in the defendant's minimum sentence on a judicial finding of brandishing does not evade the requirements of the Fifth and Sixth Amendments. Congress 'simply took one factor that has always been considered by sentencing courts to bear on punishment ... and dictated the precise weight to be given that factor.' *McMillan*, 477 U.S. at 89-90. That factor need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt").

Of course, *Harris* was not meant to serve as either an endorsement or condemnation of mandatory minimum sentencing as such: "The Court is well aware that many question the wisdom of mandatory minimum sentencing. Mandatory minimums, it is often said, fail to account for the unique circumstances of offenders who warrant a lesser penalty. These criticisms may be sound, but they would persist whether the judge or the jury found the facts given rise to the minimum," 530 U.S. at 568. *See also*, 530 U.S. at 570-71 (Breyer, J., concurring in part and concurring in the judgment): "I do not mean to suggest my approval of mandatory minimum sentences as a matter of policy. During the (continued...)

mandatory minimum penalties upon defendants who carry a firearm during and in furtherance of a crime of violence (5 years for carrying; 7 years for brandishing; 10 years for discharging).[124] The jury found him guilty of carrying; the court concluded the gun had been brandished.[125] The Sixth Amendment requires that the question of brandishing had to be found by the jury, the Court declared:

> *Harris* drew a distinction between facts that increase the statutory maximum and facts that increase only the mandatory minimum. We conclude that this distinction is inconsistent with our decision in *Apprendi* and with the original meaning of the Sixth Amendment. Any fact that, by law, increases the penalty for a crime is an element that must be submitted to the jury and found beyond a reasonable doubt. Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an element that must be submitted to the jury.[126]

Neither the Sixth Amendment, *Apprendi*, nor *Alleyne* limits Congress's authority to establish mandatory minimum sentences nor limits the authority of the courts to impose them. They simply dictate the procedural safeguards that must accompany the exercise of that authority.[127]

Double Jeopardy

The Fifth Amendment declares that "No person shall be ... subject for the same offence to be twice put in jeopardy of life or limb.... "[128] The double jeopardy clause protects against both successive prosecutions and successive punishments for the same offense.[129] The initial test for

(...continued)

past two decades, as mandatory minimum sentencing statutes have proliferated in number and importance, judges, legislators, lawyers, and commentators have criticized those statutes, arguing that they negatively affect the fair administration of the criminal law, a matter concern to judge sand to legislators alike."

"Mandatory minimum statutes are fundamentally inconsistent with Congress' simultaneous effort to create a fair, honest, and rational sentencing system through the use of Sentencing Guidelines. Unlike Guideline sentences, statutory mandatory minimums generally deny the judge the legal power to depart downward, no matter how unusual the special circumstances that call for leniency. They rarely reflect an effort to achieve sentencing proportionality—a key element of sentencing fairness that demands that the law punish a drug 'kingpin' and a 'mule' differently. They transfer sentencing power to prosecutors, who can determine sentences through the charges they decide to bring, and who thereby have reintroduced much of the sentencing disparity that Congress created Guidelines to eliminate. They rarely are based upon empirical study. And there is evidence that they encourage subterfuge leading to more frequent downward departures (on a random basis), thereby making them comparatively ineffective means of guaranteeing tough sentences."

[123] 133 S.Ct. 2151 (2013).

[124] 18 U.S.C. 924(c).

[125] 133 S.Ct. at 2156.

[126] *Id*. at 2155 (internal citations and quotation marks omitted).

[127] Defendants whose appeals were pending when *Alleyne* was announced but who had failed to press available *Apprendi* arguments are at the mercy of the plain error rule (resentencing requires the existence of a plain error that has an impact on the defendant's substantive rights and the presence of a miscarriage of justice should the error not be corrected), *see, e.g.*, *United States v. Kirklin*, 727 F.3d 711, 716017 (7th Cir. 2013)(no miscarriage of justice given the overwhelming evidence); *United States v. Yancy*, 725 F.3d 601-603 (6th Cir. 2013)(defendant who pled guilty could showed no *Apprendi* error); *United States v. Lara-Ruiz*, 721 F.3d 554, 557-60 (8th Cir. 2013)(remand and resentencing required for plain error).

[128] U.S. Const. Amend. V.

[129] *United States v. Dixon*, 509 U.S. 688, 696 (1993); *United States v. Mahdi, 5*98 F.3d 883, 887 (D.C.Cir. 2010); *United States v. Hall,* 551 F.3d 257, 266 (4th Cir. 2009).

whether a defendant has been twice tried or punished for the same offense or two different offenses is whether each of the two purported offenses requires proof that the other does not.[130] Thus, without violating the double jeopardy clause, an individual may be convicted and sentenced for two violations of Section 924(c), if each has a different predicate offense.[131] On the other hand, there is no consensus over whether a single predicate offense may support conviction and sentencing for two or more violations of Section 924(c).[132] Moreover, the conviction for a serious offense will ordinarily preclude prosecution or punishment for a lesser included offense, since the lesser offense consists of only elements found in the more serious offense.[133] For example, a defendant may not be convicted and punished for both a violation of Section 924(c)(use of a firearm in furtherance of a robbery) and of Section 924(j)(use of the same firearm in the same robbery resulting in death).[134]

Commerce Clause Authority

The Constitution gives Congress the power to regulate commerce among the states and between the United States and other nations.[135] It also bestows on Congress the authority to enact such legislation as it considered necessary and proper to carry into execution those other powers which the Constitution vests in Congress, the Government of the United States, or any of its Departments or officers.[136] At the same time, the Constitution reserves to the states and the people those powers which it has not otherwise conveyed.[137] On occasion, the Supreme Court has held that a particular statute was too far removed from Congress's commerce clause power to make the statute constitutionally viable.[138] Defendants have sometimes seized upon these cases to assert that Section 924(c) lies beyond Congress's legislative reach. The courts have yet to be convinced.[139]

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[130] *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *United States v. Angilau*, 717 F.3d 781, 787 (10th Cir. 2013); *United States v. Mahdi*, 598 F.3d at 888; *United States v. Sandstrom*, 594 F.3d 634, 654 (8th Cir. 2010); *United States v. Beltran-Moreno*, 556 F.3d 913, 916 (9th Cir. 2009).

[131] *United States v. Angilau*, 717 F.3d at 781, 788-89; *United States v. Kennedy*, 682 F.3d 244, 257 (3d Cir. 2012); *United States v. Sandstrom*, 594 F.3d at 658; *United States v. Catalan-Roman*, 585 F.3d 453, 472 (1st Cir. 2009); *United States v. Penny*, 576 F.3d 297, 316 (6th Cir. 2009); *United States v. Looney*, 532 F.3d 392, 396 (5th Cir. 2008).

[132] *United States v. Diaz*, 592 F.3d 467, 470-75 (3d Cir. 2010), citing in accord *United States v. Rodriguez*, 525 F.3d 85, 1119 (1st Cir. 2008); *United States v. Batiste*, 309 F.3d 274, 279 (5th Cir. 2002); *United States v. Anderson*, 59 F.3d 1323, 1326-327 (D.C. Cir. 1995); *United States v. Cappas*, 29 F.3d 1187, 1195 (7th Cir. 1994); *United States v. Taylor,* 13 F.3d 986, 992-994 (6th Cir. 1994); *United States v. Lindsay*, 985 F.2d 666, 676 (2d Cir. 1993); *United States v. Hamilton*, 953 F.2d 1344, 1346 (11th Cir. 1992); *United States v. Smith*, 924 F.2d 889, 894-95 (9th Cir. 1991); *United States v. Henning*, 906 F.3d 1392, 1399 (10th Cir. 1990), and to the contrary, *United States v. Lucas,* 932 F.2d 1210, 1222-223 (8th Cir. 1991); *United States v. Camps*, 32 F.3d 108-109 (4th Cir. 1994).

[133] *Rutledge v. United States*, 517 U.S. 292, 306-307 (1996); *United States. Sandstrom*, 594 F.3d at 654*; United States v. Catalan-Roman*, 585 F.3d 453, 472 (1st Cir. 2009).

[134] *United States v. Catalan-Roman*, 585 F.3d at 472.

[135] U.S. Const. Art. I, §8, cl. 3.

[136] U.S. Const. Art. I, §8, ch. 18.

[137] U.S. Const. Amend. X.

[138] *United States v. Morrison*, 529 U.S. 598, 612-13 (2000), quoting *United States v. Lopez*, 514 U.S. 549, 564 (1995)("We rejected these ... arguments because they would permit Congress to 'regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they related to interstate commerce'"); but consider *United States v. Comstock*, 130 S.Ct. 1949 (2010).

[139] *United States v. Belfast*, 611 F.3d 783, 815(11th Cir. 2010); *United States v. Lynch*, 367 F.3d 1148, 1158 (9th Cir. 2004); *United States v. Miller*, 283 F.3d 907, 913-14 (8th Cir. 2002).

Separation of Powers

While "it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another,"[140] the Supreme Court has observed that "Congress has the power to define criminal punishments without giving the courts any sentencing discretion."[141] Thus, the lower federal courts have regularly upheld mandatory minimum statutes when challenged on separation of powers grounds,[142] and the Supreme Court has denied any separation of powers infirmity in the federal sentencing guideline system which at the time might have been thought to produce its own form of mandatory minimums.[143]

[140] *Loving v. United States*, 517 U.S. 748, 757 (1996).

[141] *United States v. Chapman*, 500 U.S. 453, 467 (1991).

[142] *United States v. Major*, 676 F.3d 803, 811 (9th Cir. 2012); *United States v. Cecil*, 615 F.3d 678, 695-96 (6th Cir. 2010); *United States v. Walker*, 473 F.3d 761, 75-6 (3d Cir. 2007); *United States v. Khan*, 461 F.3d 477, 495 n.12 (4th Cir. 2006).

[143] *Mistretta v. United States*, 488 U.S. 361 (1989). Mistretta, sentenced under the guidelines to 18 months' imprisonment for conspiracy to distribute cocaine, argued that the guidelines constituted an unconstitutional delegation of Congress's legislative authority and that the service of judges upon the Commission constituted extrajudicial service at odds with the separation of powers doctrine. The Court rejected both arguments, concluding "that in creating the Sentencing Commission ... Congress neither delegated excessive legislative power nor upset the constitutionally mandated balance of powers among the coordinate Branches," 488 U.S. at 412.

Appendix. 18 U.S.C. 924(c)(text)

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;
(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or
(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and
(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and
(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and
(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

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