No. 24-5774

IN THE

Supreme Court of the United States

DWAYNE BARRETT,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

Founded in 1958, the National Association of Criminal Defense Lawyers (NACDL) is a non-profit, voluntary professional bar association that works on behalf of criminal-defense attorneys to ensure justice and due process for those accused of crime or

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[1] No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to this brief's preparation or submission.

misconduct. NACDL has a nationwide membership of many thousands of members, including private criminal-defense lawyers, public defenders, military-defense counsel, law professors, and judges. In total, NACDL has about 40,000 affiliates. It is the only nationwide professional bar association for both public defenders and private criminal-defense lawyers. NACDL is dedicated to advancing the proper, efficient, and fair administration of justice.

NACDL files numerous *amicus* briefs each year in this Court and other federal and state courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal-defense lawyers, and the criminal-justice system. Consistent with its mission, NACDL is deeply committed to ensuring that federal courts do not improperly impose cumulative punishments contrary to the intent of Congress and the presumption against such punishments recognized in *Blockburger v. United States*, 284 U.S. 299 (1932).

INTRODUCTION

Federal courts have long "presumed that Congress does *not* intend for a defendant to be cumulatively punished for two crimes where one crime is a lesser included offense of the other." *Almendarez-Torres v. United States*, 523 U.S. 224, 231 (1998). That presumption, recognized in *Blockburger v. United States*, 284 U.S. 299 (1932), is meant to be a strong one, as it guards "not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers." *Whalen v. United States*, 445 U.S. 684, 689 (1980).

The threshold for overcoming the presumption, therefore, is high. Cumulative punishments may be imposed only "if Congress clearly indicates that it intended to allow courts to impose them." *Rutledge v. United States*, 517 U.S. 292, 303 (1996). Mere "silence" or "ambiguity" about Congress' purpose will not suffice. *See Albernaz v. United States*, 450 U.S. 333, 340-41 (1981).

Thus, in the rare case in which the presumption did not control, this Court not only found explicit contrary instructions from Congress in the text of the statute, but also undertook a "factual inquiry as to legislative intent" to determine whether there was "clear" evidence in the legislative history confirming that Congress intended to authorize cumulative punishments. *Garrett v. United States*, 471 U.S. 773, 779 (1985). When combined with the statutory text, sources such as congressional reports, the stated views of leading legislators, and other historical evidence made it "indisputable that Congress intended" to authorize multiple punishments. *Id.* at 784.

That type of evidence is the subject of this brief. After studying the legislative history of 18 U.S.C. § 924(j), *amicus curiae* NACDL has identified no clear evidence of congressional intent to authorize cumulative punishments.[2] Thus, as Petitioner, the United States, and the majority of circuits to address this question have concluded, there is "insufficient indication that Congress intended sentences to be imposed under both subsection 924(j) and the lesser included offense of subsection 924(c) for the same conduct to overcome the *Blockburger* presumption." *United States v. Gonzales*, 841 F.3d 339, 358 (5th Cir. 2016).

ARGUMENT

18 U.S.C. § 924(j) was enacted through the Violent Crime Control and Law Enforcement Act of 1994 ("1994 Crime Control Act"). *See* Pub. L. No. 103-322, title VI, § 60013, 108 Stat. 1796, 1973 (1994) (originally codifying the provision as § 924(i)). The legislative history of that omnibus criminal law does not, as far as NACDL's research shows, reveal any clear intent to authorize cumulative punishments under § 924(j) and § 924(c).

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[2] Among other material, NACDL reviewed congressional reports, congressional research service reports, debates, sponsor statements, and news articles relating to the 1994 Crime Control Act. NACDL also identified 22 bills leading up to the 1994 Crime Control Act that proposed precursor language to § 924(j) and reviewed the text of those proposals and related reports and commentary.

I. The Legislative History Of § 924(j) Lacks Clear Evidence Of Intent To Authorize Cumulative Punishments.

When Congress intends to authorize cumulative punishments, Congress does not hide the ball or reference its intentions obliquely. As Petitioner discusses, Congress regularly includes explicit instructions in the text of criminal laws when it intends for punishment to be "in addition to" the penalties for another offense. *See* Pet. Br. 28 & n.3 (collecting statutes). The same type of language, moreover, also tends to appear in the legislative history. For example, during floor debates, legislators emphasize the "separate penalties" they intend to enact. *Garrett*, 471 U.S. at 783-84 (quoting Representative Poff). Combined with express instructions in the statutory text, these repeated references to cumulative punishment make it so that "[t]he intent to create a separate offense could hardly be clearer." *Id.* at 782.

In short, Congress knows how to be explicit when it intends to authorize cumulative punishments. But when it came to § 924(j), there is no clear indication of such intent.

A. Congress Knows How To Be Clear When It Intends To Authorize Cumulative Punishments.

Two examples illustrate how Congress clearly expresses its intent to authorize cumulative punishments.

The first is § 924(c) itself. When Congress amended that provision in 1971, it used language that clearly authorized two punishments: one for the

underlying predicate offense, and another for the use of a gun in connection with that predicate offense. *See* Pub. L. No. 91-644, title II, § 13, 84 Stat. 1880, 1889 (1971) (implementing ranges of punishment "in addition to the punishment provided for the commission of [the underlying] felony" and prohibiting any sentence "under this subsection" from running "concurrently" with the sentence imposed for the underlying felony); *see also, e.g.*, *United States v. Singleton*, 16 F.3d 1419, 1425 (5th Cir. 1994) ("§ 924(c) clearly indicates Congress's intent to punish cumulatively violations of §§ 924(c) and 2119.").

That intent is evident not just in the text of § 924(c), but also in the provision's legislative history. For example, a House Report described the provision as creating "additional penalties for the use of a firearm." H. Rep. 91-1768, p. 20-21 (1970). Those penalties, the Report explained, "could not run concurrently with any sentence imposed for the underlying Federal felony." *Id.*

Legislators discussing the amendment used similar language. In 1970, Senators Mansfield and Scott proposed the amendment when the Senate received H.R. 17825—what would later be enacted as Public Law 91-644—from the House. *See* 116 Cong. Rec. 35586, 35734 (Oct. 8, 1970). In urging his colleagues to support the amendment, Senator Mansfield explained that "what [his amendment] does is to *make it a crime itself* the mere carrying of a gun in the commission of a crime." 116 Cong. Rec. at 35734 (emphasis added). He emphasized that the "sentence imposed will be *in addition to* and not concurrent with the sentence for the underlying crime." *Id.* (emphasis added).

This was not an isolated comment. Senator Mansfield said the same thing when he previously introduced a bill containing the same language. *See* 115 Cong. Rec. 34793, 34838-39 (Nov. 19, 1969) ("[W]ith this measure on the books, the indictment would contain *a separate count* for a violation of this provision of the criminal law. . . . [T]he crime itself must be established in the first instance, before the criminal may be convicted *in addition* for using or carrying a gun." (emphasis added)); *see also* 116 Cong. Rec. at 35734 (Sen. Mansfield noting his proposed amendment to H.R. 17825 "has passed the Senate twice already, once in the form of a bill, unanimously"). And as Senator Dominick later reiterated in connection with a separate proposal "designed to insure congressional intent," the "intent of Congress in passing Senator Mansfield's [October 1970] amendment was to create a separate crime for carrying or using a firearm in the commission of a felony, and to have sentencing for the two felonies run consecutively." 118 Cong. Rec. 27208, 27270 (Aug. 8, 1972). These repeated statements in the legislative history "fortified" the plain meaning of the statutory text and made clear that Congress intended to depart from the normal *Blockburger* presumption. *See Garrett*, 471 U.S. at 782.[3]

The second example comes from the 103rd Congress—the same Congress that enacted § 924(j).

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[3] Congress later confirmed its intent to authorize cumulative punishments even where "the underlying felony statute 'provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device.'" *United States v. Gonzales*, 520 U.S. 1, 10 (1997) (quoting the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1005(a), 98 Stat. 1837, 2138-2139).

During discussions about the 1994 Crime Control Act, members of the House considered a proposal to create a parallel offense in § 924(c) based on state-law predicate crimes. Under that proposal, Congress would enact a new federal offense for using a gun in connection with a state crime of violence or drug trafficking offense. *See* 140 Cong. Rec. 17182, 17233 (July 20, 1994) (statement by Rep. McCollum) (describing § 2405 of the Senate amendment to H.R. 3355).

Although Congress ultimately rejected this proposal, the language used in the legislative history makes clear that it was intended to authorize cumulative punishments. Like Senators Mansfield and Dominick before him, Representative McCollum repeatedly explained that the federal sentence was meant to be imposed "in addition to" the sentence for the underlying state offense. *See, e.g.*, *id.* ("This particular provision . . . would mean that there would be a new Federal crime, *in addition to* the State conviction for the underlying crime of violence or drug trafficking." (emphasis added)); *id.* at 17234 (explaining that the provision gives federal prosecutors the "opportunity to prosecute . . . *in addition to* the State offense for this new Federal offense of using or possessing the gun" (emphasis added)). Just as Senator Mansfield did for § 924(c), Representative McCollum emphasized that the proposal would "giv[e] the option to the Federal prosecutors to be able to, *in addition to* that State conviction, come in and say, 'If there is a gun involved, we are going to prosecute a separate crime.'" *Id.* at 17235 (emphasis added).

As these examples show, Congress knows how to be explicit about cumulative punishments. It often uses language like "in addition to" to make clear that penalties may be added together. And because authorizing cumulative punishments is a significant step, Congress emphasizes it repeatedly, leaving no doubt about Congress' intentions.

B. The Legislative History Of Section 924(j) Lacks Clear References To Cumulative Punishments.

In contrast to these examples, Congress did not clearly express a similar intent when it came to § 924(j). After searching through the legislative history of § 924(j)—beginning with an early version of the statutory language proposed in 1989 and concluding with the passage of the 1994 Crime Control Act—NACDL has found no clear indication of an intent to authorize cumulative punishments. The House Report summarizing the 1994 Crime Control Act, for example, did not make any reference to the idea that the punishment authorized under § 924(j) should be imposed "in addition to" any punishment under § 924(c). *See* H. Rep. 103-711, p. 388 (1994) (describing Title VI, including § 60013 of the Act, which contained the language of § 924(j)). Nor did NACDL find repeated references—like those by Senator Mansfield and Representative McCollum—to additional or cumulative punishments in floor debates or other statements.

This is consistent with the conclusion of the majority of circuit courts that there is not the clear evidence of intent required to depart from the *Blockburger* presumption. *See United States v. Palacios*, 982 F.3d 920, 924-25 (4th Cir. 2020) ("The

Government has not suggested that Congress intended to authorize cumulative punishments for convictions under these two statutes. And we can find no evidence of such congressional intent."); *Gonzales*, 841 F.3d at 357-58 (finding no "intent by Congress to impose cumulative punishment under both subsections for the same conduct"); *United States v. Wilson*, 579 F. App'x 338, 348 (6th Cir. 2014) ("[T]here is no indication that Congress authorized multiple punishments."); *see also United States v. Garcia-Ortiz*, 657 F.3d 25, 28 (1st Cir. 2011) (concluding the "plain language of section 924(j) indicates no such desire"). The Second Circuit is the only circuit to suggest Congress had such an intent, and the court's decision did not cite any legislative history to support that conclusion. Pet. App. 48a-66a. That is no surprise, as the parties never identified any such evidence in their briefing.

At most, therefore, the legislative history is "silent on the question." *Albernaz*, 450 U.S. at 340. Congress' silence must be interpreted in light of the assumption that "Congress was aware of the *Blockburger* rule and legislated with it in mind." *Id.* at 342. Because the legislative history does not make it "indisputable that Congress intended" to authorize cumulative punishments, the ordinary presumption controls. *Garrett*, 471 U.S. at 784.

II. The Legislative History Indicates That Section 924(j) Provides A Separate Track For The Most Severe § 924(c) Offenses.

Although Congress' silence is sufficient for purposes of the question presented, NACDL notes that the legislative history goes further and provides some affirmative support for Petitioner's account of

Congress' purpose. There are several indications that, rather than intending to add a sentence under § 924(j) on top of one under § 924(c), Congress appears to have been focused on carving out the most severe § 924(c) violations and placing them on a separate track.

NACDL found one early indication of this approach in debates from June 1990, when Senator Gramm proposed an early precursor to § 924(j) as an amendment to S.1970. *See* 136 Cong. Rec. 16189, 16255 (June 28, 1990). At the time, § 924(c) provided that using or carrying a firearm during and in relation to a crime of violence would be punished by five years in prison, and using or carrying a machinegun or a gun equipped with a silencer or muffler would be punished by thirty years. 18 U.S.C. § 924(c) (1988); *see* Pub. L. No. 100-690, subtitle N, § 6460, 102 Stat. 4181, 4373 (1988). Senator Gramm's proposal would have amended § 924(c)(1)(A) to state that possession of a firearm during a crime of violence or drug trafficking crime would be punished by "not less than 10 years without release"; discharging a firearm would be punished by "not less than 20 years without release"; and possession of a machinegun or a firearm equipped with a silencer or muffler would be punished by "30 years without release." 136 Cong. Rec. at 16255. In addition, Senator Gramm's proposal added: "If the death of a person results from the discharge of a firearm, with intent to kill another person, by a person during the commission of such crime, the person who discharged the firearm shall be sentenced to death or life imprisonment without release." *Id.*

Senator Gramm described his proposal as a "simple stairstep procedure" whereby § 924(c) was stratified into different levels. *Id.* at 16256. According

to the proposal, a person would receive "10 years in prison without release for possessing a firearm during a drug trafficking crime or violent crime; 20 years in prison without release for discharging it; and the death penalty or life in prison if you kill somebody." *Id.*[4]

Although S.1970, with Senator Gramm's amendment, ultimately died in the House, his "stairstep" concept carried forward as Congress amended § 924(c). In 1998, Congress split § 924(c) into three levels: possessing, brandishing, and discharging a firearm. *See Abbott v. United States*, 562 U.S. 8, 13 (2010). As to those levels, at least, this Court has recognized that a person is "subject to the highest mandatory minimum specified for his conduct." *Id.* Thus, if "he possessed, brandished, and discharged a gun, the mandatory penalty would be 10 years"—the penalty for discharging, the most severe of the three levels. *Id.* Congress did not create a scheme whereby the person would be subject to the cumulative total of the 5-, 7-, and 10-year penalties for all three levels. *Id.*

By the same token, it follows that, if the defendant "causes the death of a person through the use of a firearm," he elevates to the ultimate level under § 924(j). Under that provision, he may "be punished by death or by imprisonment for any term of years or

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[4] *See also* Helen Dewar, *Senate Votes For Proposal To Curtail Spread of Assault Weapons,* WASH. POST (Nov. 9, 1993), https://www.washingtonpost.com/archive/politics/1993/11/10/senate-votes-for-proposal-to-curtail-spread-of-assault-weapons/c9b288f2-af7b-4973-b711-00012f0f2ab9/ (describing a similar proposal made by Senator Gramm in 1993).

for life," 18 U.S.C. § 924(j)(1), but he does not also face punishment under § 924(c).

One other indication that the 103rd Congress took this multi-level approach came from another capital offense created by the 1994 Crime Control Act. As amended by the Act, the human smuggling statute provided that knowingly bringing a non-citizen to the United States other than through a designated port of entry shall be punished by "not more than 10 years"; that doing so and causing "serious bodily injury" or placing someone's life in jeopardy shall be punished by "not more than 20 years"; and that doing so and causing a death shall be punished "by death or imprisonment for any term of years or for life." *See* Pub. L. No. 103-322, title VI, § 60024, Sept. 13, 1994, 108 Stat. 1981 (adding 8 U.S.C. § 1324(a)(1)(B)(i), (iii), (iv)).

Like § 924(c) and § 924(j), these punishments are a "set of graduated" alternatives, not punishments that may be combined with one another. *Valle de Sol Inc. v. Whiting*, 732 F.3d 1006, 1024 (9th Cir. 2013). In describing a prior proposal to amend the smuggling statute that did not include the death penalty, for example, Senator Simon noted that the bill "creates a 20-year penalty for smugglers if bodily harm to an alien occurs, and allows *up to* life imprisonment if an alien dies." 139 Cong. Rec. 17947, 18039 (July 30, 1993) (emphasis added). In other words, a person who violates the most severe version of the offense is placed on that track, which—like § 924(j)—authorizes death or imprisonment for any term of years, including life. *See Lora v. United States*, 599 U.S. 453, 462 & n.3 (2023) (noting that Congress "authorized the death penalty, but also a flexible range of lesser

sentences for 'any term of years'" for several offenses, including § 924(j) and the human smuggling offense listed under § 60024 of the 1994 Crime Control Act).

These indications from the legislative history reinforce the dispositive point under this Court's precedents: that there is an "absence of a clear indication" that Congress intended to depart from the *Blockburger* presumption. *Whalen*, 445 U.S. at 692.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Second Circuit.

Respectfully submitted,

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