09-1308-cr

To Be Argued By:
JAMES R. SMART

==========

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-1308-cr

UNITED STATES OF AMERICA,

Appellant,

-vs-

JOSHUA HUCKABEE,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

==========

BRIEF FOR THE UNITED STATES OF AMERICA

==========

NORA R. DANNEHY
United States Attorney
District of Connecticut

JAMES R. SMART
WILLIAM J. NARDINI *(of counsel)*
Assistant United States Attorneys

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATUTES

RULES

GUIDELINES

Statement of Jurisdiction

The district court (Peter C. Dorsey, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on March 18, 2009. JA9; JA176-78. On March 24, 2009, the government filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b)(1)(B). JA9; JA179. This Court has appellate jurisdiction pursuant to 18 U.S.C. § 3742(b).

The Solicitor General of the United States has authorized this appeal.

Statement of Issue Presented for Review

Did the district court err in sentencing defendant for the offense under 18 U.S.C. § 924(c)(1) of possessing a firearm in furtherance of a drug trafficking crime, without applying the five-year minimum consecutive sentence mandated by that provision, on the grounds that defendant also faced a greater mandatory minimum term of incarceration for the drug trafficking crime?

Although the government concedes that the district court correctly applied this Court's recent decision in *United States v. Williams*, 558 F.3d 166, 171-75, *reh'g denied,* __ F.3d __, No. 07-2436 (2d Cir. June 22, 2009), and further concedes that this Court currently is bound on this issue by *Williams*, to preserve its appellate rights, the government respectfully submits that the district court's ruling was in error because *Williams* was incorrectly decided.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-1308-cr

UNITED STATES OF AMERICA,
Appellant,

-vs-

JOSHUA HUCKABEE,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

This appeal concerns the issue recently addressed by this Court in *United States v. Williams*, 558 F.3d 166, 171-75, *reh'g denied,* __ F.3d __, No. 07-2436 (2d Cir. June 22, 2009): the applicability of the five-year mandatory minimum consecutive sentence for possession of a firearm in furtherance of a drug trafficking crime under 18 U.S.C. § 924(c)(1), where defendant faces a greater mandatory minimum term of incarceration for a drug trafficking crime. The government concedes that this Court's decision

in *Williams* bound the district court – and binds this Court – requiring the conclusion that the mandatory five-year consecutive term of imprisonment for the 18 U.S.C. § 924(c) charge in Count Two was inapplicable, because defendant faced a greater mandatory minimum for the drug trafficking crime in Count One.

The government believes that *Williams* was incorrectly decided, and intends to file a petition for writ of *certiorari* in that case. To preserve its right to seek further review here, in the event that the Supreme Court grants *certiorari* in *Williams* and reaches a different conclusion, the government takes the present appeal.

Statement of the Case

On October 17, 2007, a grand jury returned a three-count indictment against defendant. Count One charged defendant with possession with intent to distribute 50 grams or more of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A). Count Two charged defendant with possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i). Count Three charged defendant with possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). On October 25, 2007, defendant pleaded guilty to all three counts pursuant to a plea agreement signed that same day. On March 18, 2009, the district court (Peter C. Dorsey, J.) imposed sentence, consisting principally of ten years' incarceration on Count One, and 60 months each on Counts Two and Three, all to run concurrently. Judgment entered the same

day. On March 24, 2009, the government timely filed a notice of appeal. Defendant is currently serving his term of incarceration.

Statement of Facts and Proceedings Relevant to this Appeal

In October and November 2005, while on probation on a previous felony conviction, defendant was found in possession of approximately 75 grams of crack cocaine, as well as a loaded .38 caliber revolver. PSR ¶¶ 12, 32-33. The loaded revolver and the drugs were recovered from a shoe box in defendant's bedroom, along with other items consistent with drug dealing. PSR ¶¶ 12, 15, 32-33. At the time, defendant was also storing a number of other guns for his friend Anthony Rogers, who was then in jail on a federal firearms conviction. PSR ¶¶ 10, 13-15. Defendant knew that the items he was storing for Rogers were firearms, and he knew that Rogers had recently used a gun to commit a murder and an assault in Norwalk. *See* JA33-36.[1] Defendant also knew that Rogers' girlfriend would

[1] Defendant was called by the state as a witness in Rogers' murder trial. On the stand, defendant recanted parts of his statements that inculpated Rogers, but the jury convicted Rogers anyway. At defendant's sentencing, the government submitted a sentencing memo and attachments that provided additional details regarding the Rogers trial, defendant's knowledge that the items he was hiding for Rogers were guns, his knowledge of Rogers' use of guns to commit murder and other violent crimes, and related matters. JA27-136.

periodically stop by and pick up one of the firearms. PSR ¶ 7; JA33-36.[2]

On October 17, 2007, a grand jury returned a three-count indictment charging defendant with:

> (1) possession with intent to distribute 50 grams or more of cocaine base in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A);
>
> (2) possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i); and
>
> (3) possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

JA5; JA11-14.

On October 25, 2007, defendant pleaded guilty to all three counts. JA5. The plea agreement provided that Count One carried a ten-year mandatory minimum, and Count Two carried a mandatory consecutive term of at least five years, for a total effective mandatory minimum term of at least 15 years in jail. JA16-17.

---

[2] The girlfriend, on Rogers' instruction, was selling the firearms. PSR ¶¶ 6-9. She and Rogers believed the customer was a hit man planning to use the guns to commit murder. *Id.* Although defendant knowingly allowed the girlfriend access to the guns, PSR ¶ 7, JA35-36, the government did not claim he knew about the firearms sales.

On March 17, 2009, the government filed its sentencing brief. JA27-32. The government conceded that this Court's recent decision in *Williams*, 558 F.3d at 171-75, rendered inapplicable the mandatory five-year consecutive term of imprisonment for the 18 U.S.C. § 924(c) charge in Count Two. JA29. However, "to preserve its appellate rights, the [g]overnment respectfully object[ed] on the grounds that *Williams* is wrongly decided." JA29.

Even without the mandatory consecutive five-year penalty, the government asked the court to, "as a discretionary matter, impose a sentence that would include such a component." JA29. The government pointed out the seriousness of the offense – defendant possessed the charged gun to facilitate trafficking in crack cocaine, knowingly stored a number of additional guns for a jailed friend who, he knew, had recently used firearms to commit murder and assault and let his friend have access to the stored guns through his girlfriend. JA30. The government argued that "a term of imprisonment greater than the minimum penalty for just the drug trafficking portion of his crimes is called for" to promote the goals of sentencing outlined in § 3553(a). JA30. The government asked for either an upward departure or a non-Guidelines sentence to bring defendant's prison term up to the 180-month sentence originally foreseen by the plea agreement. JA30-31.[3]

---

[3] The Presentence Report ("PSR") calculated defendant's Guidelines imprisonment range as 120-135 months. The PSR (continued...)

The district court sentenced defendant on March 18, 2009. Relying upon this Court's decision in *Williams*, the sentencing court concluded that the mandatory five-year consecutive term of imprisonment for the 18 U.S.C. § 924(c) crime in Count Two was inapplicable because defendant faced a higher mandatory minimum for the drug offense in Count One. JA140; JA144; JA153; JA167. The district court rejected the government's request for a sentence higher than the mandatory minimum on the drug trafficking count, alone, and sentenced defendant to the mandatory minimum of ten years' incarceration for the 21 U.S.C. § 841(b)(1)(A) charge in Count One, and 60 months each on Counts Two and Three, all to run

---

[3] (...continued)
proposed that, in light of *Williams*, a two-level increase to defendant's Guidelines level under U.S.S.G. § 2D1.1(b)(1) should apply for possession of a firearm in connection with the drug trafficking offense charged in Count One. Second Addendum to PSR dated Mar. 17, 2009. In light of defendant's base offense level of 30 on the drug charge, for distribution of at least 50 grams but less than 150 grams of cocaine base, U.S.S.G. § 2D1.1(c)(5), and a three-level downward adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1, the PSR calculated that defendant had a Total Offense Level of 29. PSR ¶¶ 21-30; Second Addendum to PSR dated Mar. 17, 2009. The PSR determined that defendant had a Criminal History Category of III. PSR ¶¶ 32-33. Based upon a Total Offense level of 29 and a Criminal History Category of III, the PSR concluded that defendant faced a Guidelines incarceration range of 120-135 months. Second Addendum to PSR dated Mar. 17, 2009. At sentencing, the district court adopted the PSR's Guidelines calculations. JA144-45.

concurrently. JA167; JA176. Judgment entered the same day. JA9; JA176-78.

On March 24, 2009, the government filed a timely notice of appeal. JA9; JA179.

Summary of Argument

This Court is bound by its decision in *United States v. Williams*, 558 F.3d 166, 171-75, *reh'g denied,* __ F.3d __, No. 07-2436 (2d Cir. June 22, 2009). In light of *Williams*, the district court was not obligated to impose a mandatory five-year consecutive term of imprisonment for the 18 U.S.C. § 924(c) crime in Count Two because defendant faced a higher mandatory minimum for the drug trafficking offense in Count One. However, to preserve its right to seek further review in the event that the Supreme Court were to overrule *Williams*, the government is taking the present appeal on the grounds that *Williams* was wrongly decided. The plain meaning of the text of § 924(c), the legislative history of the provision, the illogical applications of § 924(c) that arise from *Williams*' construction, and the contrary conclusions of every other court of appeals to have addressed this issue all indicate that *Williams* was wrongly decided.

Argument

I. Although *Williams* bound the district court and currently binds this Court, the government respectfully seeks to preserve its appellate rights and objects to the failure to impose the mandatory five-year consecutive term of imprisonment under 18 U.S.C. § 924(c) on the grounds that *Williams* was wrongly decided.

A. Governing law and standard of review

On March 5, 2009, this Court decided *United States v. Williams*, 558 F.3d at 170-75, holding that the statutory minimum consecutive sentence under § 924(c) is inapplicable if the defendant is subject to a longer statutory minimum sentence for a drug trafficking crime that arises from the same criminal transaction or operative set of facts as the firearm crime. *Id.* at 168. The Court reasoned that § 924(c)'s mandatory minimum consecutive sentence does not apply under such circumstances based on language in § 924(c)(1)(A) creating an exception "to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law . . . ." 18 U.S.C. § 924(c)(1)(A).[4] The decision represents an

---

[4] Section 924(c)(1) provides, in pertinent part, as follows:

> (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 . . . drug trafficking crime . . . for

(continued...)

expansion of this Court's ruling in *United States v. Whitley*, 529 F.3d 150, *reh'g denied*, 540 F.3d 87 (2d Cir. 2008), which held that if a defendant is subject to a 15-year mandatory minimum sentence for an illegal gun possession offense in light of the Armed Career Criminal Act, 18 U.S.C. § 924(e), the defendant does not also face a mandatory minimum sentence if also convicted for an offense under § 924(c).

The *Williams* and *Whitley* decisions have created a sharp circuit split on the question of the applicability of the mandatory minimum term of incarceration set forth in § 924(c) where defendant faces a longer mandatory minimum for the underlying crime of violence or drug

---

[4] (...continued)
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; . . . . .
>
> (D) Notwithstanding any other provision of law – . . .
>
> (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.

18 U.S.C. § 924(c)(1).

trafficking crime. Other circuits to have considered the issue have uniformly reached the opposite conclusion. *See, e.g., United States v. Segarra*, __ F.3d __, 2009 WL 2932242, *2 (11th Cir. Sept. 15, 2009) (per curiam); *United States v. Abbott*, 574 F.3d 203, 209-11 (3d Cir. 2009); *United States v. London*, 568 F.3d 553, 564 (5th Cir. 2009), *petition for cert. filed*, No. 09-5844 (Aug. 11, 2009); *United States v. Pulido*, 566 F.3d 52, 65 (1st Cir. 2009) (following holding of *United States v. Parker*, 549 F.3d 5, 11 (1st Cir. 2008), *cert. denied*, __ U.S. __, 129 S.Ct. 1688, 173 L.Ed.2d 1050 (2009)), *petition for cert. filed*, No. 09-5949 (Aug. 14, 2009); *United States v. Easter*, 553 F.3d 519, 525-27 (7th Cir. 2009), *petition for cert. filed*, Nos. 08-9560, 08-10584 (Mar. 26 and May 20, 2009); *United States v. Jolivette*, 257 F.3d 581, 587 (6th Cir. 2001); *United States v. Studifin*, 240 F.3d 415, 423 (4th Cir. 2001); *United States v. Alaniz*, 235 F.3d 386, 389 (8th Cir. 2000).

B. Discussion

The plain meaning of the text of § 924(c), the legislative history of the provision, the illogical applications of § 924(c) that arise from *Williams*' construction of the provision, and the contrary conclusions of every other court of appeals to have addressed this issue all indicate that *Williams* was wrongly decided. The government recognizes that a panel of this Court "is bound by prior decisions of this [C]ourt unless and until the precedents established therein are reversed *en banc* or by the Supreme Court." *United States v. Jass*, 569 F.3d 47, 58 (2d Cir. 2009). However, to preserve its appellate rights,

the government respectfully objects to the failure to apply the mandatory, consecutive five-year term of imprisonment under § 924(c)(1) in this matter on the grounds that *Williams* was wrongly decided.

Both the *Williams* decision, and the *Whitley* decision on which *Williams* is based, fail to comport with the plain meaning of § 924(c). The prefatory clause of § 924(c)(1)(A) provides that a defendant who violates that statute must be sentenced to at least five years of imprisonment "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law." 18 U.S.C. § 924(c)(1)(A). The clause itself does not specify for what offense the "greater minimum sentence" must be "otherwise provided" in order to trigger the exception. *See Parker*, 549 F.3d at 11 ("The except clause . . . does not say 'a greater minimum sentence' *for what*; yet it must have *some* understood referent to be intelligible."). Absent such an explicit referent, the clause is most naturally read to refer to the offense set forth in the language that immediately follows: using, carrying, or possessing a firearm in connection with a crime of violence or a drug trafficking crime. *See United States v. Ressam*, 128 S. Ct. 1858, 1868 (2008) (noting that the plain meaning of a statute is the "most natural reading of the relevant statutory text"); *Easter*, 553 F.3d at 526 ("In the contest between reading the 'except' clause to refer to penalties for the offense in question or to penalties for any offense at all, we believe the former is the most natural.").

In other words, given its most natural reading, the clause means that, when a defendant commits the crime set forth in § 924(c), a minimum consecutive sentence of five years is the punishment, "except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law" for *that* crime — i.e., except to the extent that § 924(c) or any other provision of law provides a greater minimum sentence for using, carrying, or possessing a firearm in connection with a crime of violence or a drug offense. Thus, if a firearm is possessed in furtherance of a drug or violent crime, a five-year consecutive sentence pursuant to § 924(c)(1)(A)(i) must be imposed; *except* that if (as in *Whitley*) the firearm is discharged during the drug trafficking crime, the defendant is instead subject to the ten-year mandatory minimum sentence under § 924(c)(1)(A)(iii); *except* that if the discharged firearm is a machinegun, the defendant is instead subject to a 30-year mandatory minimum sentence under § 924(c)(1)(B)(ii); *except* that if another feature of the § 924(c) offense triggers a greater mandatory minimum penalty for that crime under "any other provision of law," the defendant is instead subject to that higher sentence on the § 924(c) count.

Consistent with ordinary principles of statutory construction, the phrase, "any other provision of law," should be "given . . . precise content by the neighboring words with which it is associated." *United States v. Williams*, 128 S. Ct. 1830, 1839 (2008); *see, e.g.*, *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486-87 (2006). Just as the phrase "this subsection" refers to provisions that

prescribe minimum sentences for the § 924(c) offense, so too the phrase "any other provision of law" should be read to refer to any provisions elsewhere in the United States Code that establish penalties for violating § 924(c)(1)(A). Although there is presently no other statutory provision, apart from § 924(c), containing penalties for using, carrying, or possessing a firearm in connection with a crime of violence or a drug offense, as the Fourth Circuit explained, the "by any other provision of law" phrase "simply reserv[es] the possibility that another statute or provision might impose a greater minimum consecutive sentencing scheme for a 924(c) violation, and [does] not . . . negat[e] the possibility of consecutive sentencing in the circumstances of the present case." *Studifin*, 240 F.3d at 423.

Notwithstanding this Court's stated goal of interpreting the "except" clause according to "what it literally says," *Whitley*, 529 F.3d at 153, the Court itself has departed from a strict reading of the text. Construed without any consideration of context, the "except" clause would eliminate any sentence under § 924(c) whenever the defendant faced a greater mandatory minimum sentence for charges pending in other jurisdictions, for entirely unrelated counts, or for crimes that were the subject of a previous sentencing. The Court, however, deemed "suspect" any such literal or "unbounded" reading of the clause. *Williams*, 558 F.3d at 171-72. The Court therefore crafted a limitation on the "except" clause confining it to those "other provision[s] of law" imposing mandatory minimums for offenses "that arise from the same criminal transaction or operative set of facts" as the § 924(c)

offense. *Williams*, 558 F.3d at 171. That interpolation appears nowhere in the statutory text, and, as the Supreme Court has remarked on numerous occasions, "same transaction" tests (or other similar formulations) are too malleable and uncertain to provide reasonable benchmarks. *See, e.g.*, *United States v. Dixon*, 509 U.S. 688, 711 (1993). This Court's insertion of extra words into the statute was also unnecessary. The "unbounded" reading of the "except" clause the Court believed itself compelled to avoid arose only because the Court failed to observe the limitation inherent in the plain meaning of the phrase – that the clause applies only where another provision prescribes a greater mandatory minimum for the § 924(c) offense.

Moreover, the interpretation adopted by this Court negates the specific language in § 924(c) demonstrating Congress's intent to impose additional, consecutive punishment on defendants who violate the statute. Section 924(c)(1)(A) states that a defendant who carries, uses, or possesses a firearm in connection with a crime of violence or a drug trafficking crime "shall" be sentenced to a minimum prison term "in addition to the punishment provided for such crime of violence or drug trafficking crime[.]" Similarly, § 924(c)(1)(D)(ii) states that, "[n]otwithstanding any other provision of law . . . 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 other term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed." As the Fourth Circuit has

explained, this Court's "construction of § 924(c) simply makes no sense in light of Congress's clear intent in § 924(c) to impose mandatory consecutive sentences, as opposed to choosing between one or the other sentence, and indeed would be patently inconsistent with the intent expressed in § 924(c)(1)(D)(ii) to require mandatory consecutive sentences against those who commit crimes of violence [or drug trafficking crimes] while using or carrying firearms in furtherance of their crimes." *Studifin*, 240 F.3d at 423.[5] As this Court has itself recently observed, these two provisions in § 924(c) underscore Congress' express desire "that the prison term imposed for such a firearm offense must be consecutive to the term

---

[5] This Court's reading of the "except" clause effectively treats § 924(c) as a mere sentencing enhancement that can be displaced if some greater minimum for a different offense also applies. *See Whitley*, 529 F.3d at 151 ("This criminal appeal presents the unusual situation in which the literal meaning of a *sentencing statute* has been disregarded to the detriment of a defendant.") (emphasis added). "But § 924(c) does not define an enhancement, it defines a standalone crime" for using, carrying, or possessing a firearm in connection with a drug or violent offense. *Easter*, 553 F.3d at 526; *see Dean v. United States,* 129 S. Ct. 1849, 1853 (2009) ("The principal paragraph [of § 924(c)] defines a complete offense."); *Harris v. United States*, 536 U.S. 545, 553 (2002). The result required by *Williams* – a § 924(c) conviction for which the defendant effectively receives no sentence – is highly anomalous. As the Seventh Circuit observed, "[a] determination of guilt that yields no sentence is not a judgment of conviction at all." *Easter*, 553 F.3d at 526.

imposed for the underlying offense." *United States v. Chavez*, 549 F.3d 119, 134 (2d Cir. 2008).

The propriety of the interpretation urged by the Government is reinforced by the holdings of other courts. As noted, every other circuit to have considered this issue has concluded that the "except" clause does not preclude application of § 924(c)'s mandatory minimum consecutive sentence where the defendant faces a larger mandatory minimum for the underlying crime of violence or drug trafficking crime. *See Segarra*, __ F.3d __, 2009 WL 2932242 at *2 (11th Cir.); *Abbott*, 574 F.3d at 209-11 (3d Cir.); *London*, 568 F.3d at 564 (5th Cir.); *Pulido*, 566 F.3d at 65 (1st Cir.) (following holding of *Parker*, 549 F.3d at 11 (1st Cir.)); *Easter*, 553 F.3d at 526 (7th Cir.); *Collins*, 205 Fed. Appx. 196, 2006 WL 2921225 (5th Cir.); *United States v. Baldwin*, 41 Fed. Appx. 713, 2002 WL 726485 (6th Cir. April 23, 2002); *Studifin*, 240 F.3d at 423 (4th Cir.); *Jolivette*, 257 F.3d at 587 (6th Cir.); *Alaniz*, 235 F.3d at 389 (8th Cir.). In addition, three of those circuits have specifically held, in conflict with *Whitley*, that the "except" clause refers only to mandatory minimum sentences for the § 924(c) offense, and does not refer to sentences for any other count of conviction, including another firearms-related crime. *See Abbott*, 574 F.3d at 209-11; *Easter*, 553 F.3d at 524-27*; Studifin*, 240 F.3d at 421-24.[6]

---

[6] In *Segarra*, __ F.3d __, 2009 WL 2932242 at *2 (11th Cir.)*, Pulido*, 566 F.3d at 65 (1st Cir.), and *Parker*, 549 F.3d at 11 (1st Cir.), the courts expressly rejected the argument adopted (continued...)

Moreover, the legislative history of the 1998 amendments to § 924(c) enacting the "except" clause further reinforces the government's construction of § 924(c).[7] In December 1995, the Supreme Court, in *Bailey v. United States*, 516 U.S. 137 (1995), restricted the scope of § 924(c), holding that the term "use" in the statute requires "active employment" of the firearm by a defendant. 516 U.S. at 150. The following year, at least three different bills were introduced in the Senate to address *Bailey*'s narrow interpretation of the "use" provision in § 924(c). Senator Jesse Helms, the sponsor of S. 1612 – the only bill under consideration that contained the "except" clause – made clear that the purpose of his bill was to "increase the mandatory – and let me repeat for emphasis – mandatory sentences for violent armed felons." *See Violent and Drug Trafficking Crimes: The Bailey Decision's Effect On Prosecutions Under Section 924(c)*, Hearing Before the Committee on the Judiciary, United States Senate, 104th Cong. (Sept. 18, 1996), at 3-4. None of the three bills was enacted during the 104th Congress in

---

[6] (...continued)
in *Williams*, namely, that the "except" clause displaces a § 924(c) sentence when there is a higher narcotics-related minimum. These cases did not decide, however, whether the "except" clause applies when there is another higher minimum for any firearms offense or, more narrowly, when there is a higher minimum for the § 924(c) offense itself.

[7] A more detailed summary of the relevant legislative history is contained in the government's supplemental brief in the *Williams* appeal, Docket No. 07-2436-cr, filed December 2, 2008, to which the Court is respectfully referred.

1996. In May of 1997, Senator Helms introduced S. 191, which was substantially similar to S. 1612, and which contained the identical version of the "except" clause now found in the statute. In so doing, he reiterated his strong support for mandatory penalties under § 924(c) that "ensure that future criminals possessing guns . . . will serve more time when they possess a gun in furtherance of a violent or drug trafficking crime." *Criminal Use Of Guns: Hearing on S. 191, A Bill To Throttle Criminal Use Of Guns*, Hearing Before The Committee On The Judiciary, United States Senate, 105th Cong. (May 8, 1997), at 3. In October 1998, S. 191 passed the House with certain amendments with which the Senate concurred. The final bill – which included the "except" clause – was signed by the President on November 13, 1998.

The legislative history surrounding Congress' efforts to amend § 924(c) after *Bailey* makes clear that Congress intended to enhance the mandatory consecutive penalties for drug and violent offenses committed with the use of a firearm. Nothing in the legislative history bespeaks an intent to preclude the application of § 924(c) when the mandatory minimum for the predicate narcotics offense exceeds the § 924(c) sentence. *See Easter*, 553 F.3d at 526 ("The purpose of the 1998 amendment . . . that created the 'except' clause was to undo . . . *Bailey* . . . . Congress obviously wanted to expand the reach of § 924(c)(1). We do not agree with the Second Circuit [] that its reading is consistent with that desire.").

Congressional silence on this issue in the intervening decade is also noteworthy. Since the addition of the

"except" clause to § 924(c), every circuit, as well as the Supreme Court, has consistently affirmed the imposition of the mandatory penalties under that statute, even where a greater minimum sentence applies because of the predicate drug count.[8] Yet, Congress has done nothing to suggest that the courts have improperly applied the penalties of § 924(c). If the "except" clause had the meaning that *Williams* adopts – a meaning that differs radically from what courts have thus far applied – one would expect Congress to have intervened to correct the courts' purportedly misguided interpretation of the statute. As this Court recently observed, "Congress, after all, does not 'hide elephants in mouseholes.'" *Pettus v. Morgenthau*, 554 F.3d 293, 297 (2d Cir. 2009) (quoting *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 468 (2001)).

Indeed, one would expect Congress' reaction to have been no less swift and forceful than it was after *Bailey*, where the Senate attempted to pass corrective legislation only three months after the decision. Congress' acquiescence in the face of the courts' longstanding and uniform interpretation of § 924(c) demonstrates that Congress did not intend to give the "except" clause the meaning that *Williams* suggests. *See Evans v. United States*, 504 U.S. 255, 269 (1992) (assuming that congressional silence in response to prevailing

---

[8] *See, e.g., Kimbrough v. United States*, 128 S. Ct. 558, 565 n.1 (2007).

interpretation of statute in lower courts meant acquiescence).[9]

Furthermore, *Williams'* construction of the "except" clause results in illogical applications of § 924(c), all of which underscore the fact that Congress could not have intended the "except" clause to have the meaning that *Williams* adopts. Under *Williams'* reading, defendants convicted of more serious narcotics offenses carrying higher mandatory minimums will escape the mandatory penalties of § 924(c) for their use of a gun during the offense – effectively obtaining a "volume discount" for engaging in even more egregious criminal conduct – whereas defendants convicted of less serious narcotics offenses with lower or no mandatory minimums will receive the consecutive punishment required by the statute. Congress could not have intended such backwards results.

For example, assume Defendant A distributed 500 grams of cocaine, subjecting him to a five-year minimum sentence under 21 U.S.C. § 841(b)(1)(B), and brandished a firearm in furtherance of that offense, subjecting him to a consecutive seven-year minimum sentence. *Williams*

---

[9] *Williams* states that "it is an impermissible stretch to draw" the inference of congressional acquiescence "due to the relatively small number of inconsistent holdings on the issue." *Williams*, 558 F.3d at 173 n.8. To the contrary, it is not the "small number of inconsistent holdings," but rather the uniformly consistent holdings applying § 924(c), even when the narcotics minimum exceeds the § 924(c) minimum, that makes congressional acquiescence noteworthy.

acknowledges that the "except" clause would not apply in this circumstance, as the drug statute would not provide for a "greater minimum sentence." Defendant A would be sentenced, therefore, to a mandatory minimum of 12 years: five years for the drug offense and seven years consecutively for the firearm offense. Now assume that Defendant B distributed five kilograms of cocaine, subjecting him to a ten-year minimum sentence under 21 U.S.C. § 841(b)(1)(A). Under *Williams,* if Defendant B also brandished a gun in furtherance of his drug crime, the "except" clause would apply, and therefore the seven-year consecutive sentence under § 924(c)(1)(A)(ii) would not. *Williams*, 558 F.3d at 174. Thus, Defendant A, who dealt one-tenth the quantity of drugs as Defendant B, would face a longer minimum sentence (12 years) than Defendant B (10 years), even though Defendant B brandished a gun in connection with a more serious drug crime.

In response to disparities of this type, *Williams* relies upon *Whitley's* suggestion that district judges may use their discretionary authority under § 3553(a) to increase the sentence on the underlying offense where the "except" clause nullifies the application of § 924(c). *Williams*, 558 F.3d at 175. *Accord Whitley*, 529 F.3d at 155. However, *Williams'* reliance upon § 3553(a) fails for at least three reasons.

First, *Williams* overlooks the relevant question of what Congress intended the "except" clause to mean in 1998 when enacting the post-*Bailey* amendments. Congress could not have intended for § 3553(a) to ameliorate disparities created by the "except" clause, since it enacted

the clause during a period when judges were not free to use § 3553(a) to vary from the Guidelines. *See Easter*, 553 F.3d at 527 (*Whitley's* reliance on § 3553(a) "is unconvincing because . . . it seems to rest on the sentencing discretion granted to district courts by . . . *Booker*, even though that opinion came seven years after the 'except' clause was added in 1998").

Second, *Whitley's* § 3553(a)-based solution "would invite district courts to tinker with the sentence for one count based on dissatisfaction with the sentence required for another," a practice which this and other circuits have squarely rejected. *Easter*, 553 F.3d at 527. In *Chavez*, this Court recently held that a sentencing judge could not use § 3553(a) to *decrease* a sentence on a narcotics count because of a concern with the length of the sentence on the § 924(c) count. 549 F.3d at 135. To do so would "conflate[] the two punishments and thwart[] the will of Congress that the punishment imposed for violating § 924(c) be 'addition[al]' and 'no[t] . . . concurrent[].'" *Id.* (quoting §§ 924(c)(1)(A) and 924(c)(1)(D)). It logically follows that *Chavez* may similarly foreclose using § 3553(a) to *increase* a sentence on the narcotics count because of a nullified § 924(c) count, as doing so would

likewise "conflate the two punishments." *Id.*[10] As the *Easter* Court bluntly observed:

> In short, the Second Circuit tries to have it both ways. On one hand, *Whitley* holds that Congress intended § 924(c)(1) to require no penalty in certain situations, but, on the other hand, the opinion explains that judges unhappy with that intention may mitigate it by going against Congress' intent and increasing the sentence for another count. That makes no sense and would invite district court judges to act outside their sentencing discretion.

553 F.3d at 519.

Third, *Williams'* reliance upon § 3553(a) fails to address the common situation where a judge seeks to sentence both defendants to the lowest possible sentence

---

[10] Although the district court in this matter imposed a concurrent sentence on the § 924(c) count (specifically, 60 months' incarceration, concurrent to the term of imprisonment on the other counts, JA176), the government respectfully submits that this Court's construction of that clause should properly preclude imposition of *any* sentence on the § 924(c) offense where a longer mandatory minimum applies for another offense. *See* 18 U.S.C. § 924(c)(1) (creating authority for imposition of a sentence only where the "except" clause is inapplicable); *cf. Easter*, 553 F.3d at 525-26 (criticizing the Second Circuit's holding on the grounds that it precludes imposition of any sentence for § 924(c) crimes where the defendant is subject to a greater mandatory minimum term of incarceration for another offense).

allowed by statute. A district court may in its discretion impose a sentence as low as 10 years for Defendant B (who distributed five kilograms of cocaine). By contrast, the court is *required* to sentence Defendant A (who distributed only 500 grams of cocaine) to at least 12 years as a result of the narcotics and § 924(c) mandatory minimums, even though Defendant B is ten times the drug dealer that Defendant A is. Under *Williams'* reasoning, therefore, a less serious narcotics offender would be subject to the strictures of the mandatory minimum required by § 924(c) for his use of a gun, while a more serious narcotics offender would escape the § 924(c) minimum and be sentenced under an advisory set of Guidelines. The government is unaware of any other statute operating in this manner: requiring the imposition of mandatory minimums for less culpable defendants, while exempting the more culpable ones from the application of such statutory penalties.

Conclusion

For the foregoing reasons, although the government acknowledges that *Williams* binds this Court, to preserve its appellate rights, the government respectfully submits that *Williams* was wrongly decided and objects to the failure of the district court to apply the mandatory, consecutive five-year term of imprisonment under § 924(c)(1) in this case.

Dated: October 14, 2009

Respectfully submitted,

NORA R. DANNEHY
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

JAMES R. SMART
ASSISTANT U.S. ATTORNEY

William J. Nardini
Assistant United States Attorney (of counsel)

ADDENDUM

18 U.S.C. § 924(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.