

No. 12-381

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**In the Supreme Court of the United States**

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REINALDO BERRIOS, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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DONALD B. VERRILLI, JR.  
*Solicitor General  
Counsel of Record*

LANNY A. BREUER  
*Assistant Attorney General*

JOHN-ALEX ROMANO  
*Attorney*

*Department of Justice  
Washington, D.C. 20530-0001  
SupremeCtBriefs@usdoj.gov  
(202) 514-2217*

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### QUESTION PRESENTED

Section 924(c) of Title 18 subjects to criminal punishment “any person who, during and in relation to any crime of violence or drug trafficking crime \* \* \* uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm.” It further provides that “no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person.” 18 U.S.C. 924(c)(1)(D)(ii). Section 924(j) establishes an aggravated version of the Section 924(c) offense for “[a] person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm.” The question presented is whether a sentence for violation of the aggravated offense also must run consecutively to any other sentence.

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**OPINION BELOW**

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 676 F.3d 118.

**JURISDICTION**

The judgment of the court of appeals was entered on April 10, 2012. A petition for rehearing was denied on June 11, 2012 (Pet. App. 44a-45a). On August 22, 2012, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including October 1, 2012. The petition for a writ of certiorari was filed on September 26, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

Following a jury trial in the District Court of the Virgin Islands, petitioner was convicted of conspiring and attempting to interfere with commerce by robbery,

in violation of 18 U.S.C. 1951(a); carjacking and attempted carjacking, in violation of 18 U.S.C. 2119(1); using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A); causing the death of a person through use of a firearm, in violation of 18 U.S.C. 924(j)(1); first-degree felony murder, in violation of V.I. Code Ann tit. 14, § 922(a)(2) (2012); and unauthorized use of a firearm, in violation of V.I. Code Ann. tit. 14, § 2253(a) (2012). He was sentenced to life imprisonment and consecutive prison terms totaling 70 years on the federal counts and to life imprisonment and a consecutive 15-year prison term on the Virgin Islands counts, with the territorial sentences to run consecutively to the federal sentences. The court of appeals affirmed. Pet. App. 1a-43a.

1. In 2004, petitioner and three co-conspirators attempted to rob a Wendy's fast-food restaurant on St. Croix. Before the attempted robbery, petitioner carjacked a Chevrolet Cavalier at gunpoint. Petitioner and his co-conspirators then fatally shot an off-duty policeman who was moonlighting as a security guard at Wendy's. After blowing out a tire on the Cavalier during the ensuing getaway, the conspirators attempted unsuccessfully to carjack another vehicle and succeeded in carjacking a third (both at gunpoint). Pet. App. 3a-4a.

Petitioner was indicted on counts of conspiring and attempting to interfere with commerce by robbery, in violation of 18 U.S.C. 1951(a) (Counts 1 and 2, respectively); carjacking, in violation of 18 U.S.C. 2119(1) (Counts 3 and 10); attempted carjacking, in violation of 18 U.S.C. 2119(1) (Count 8); using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A) (Counts 4, 9, and 11); causing the death of a person through use of a firearm, in violation of 18 U.S.C.

924(j)(1) (Count 6); first-degree felony murder, in violation of V.I. Code Ann. tit. 14, §§ 922(a)(2) and 11 (2012) (Count 5); and unauthorized use of a firearm, in violation of V.I. Code Ann. tit. 14, §§ 2253(a) and 11 (2012) (Count 7).

After a four-week jury trial, petitioner was convicted on all charges. Pet. App. 5a.

2. a. The statute underlying three of petitioner's firearm convictions, Section 924(c) of Title 18, provides that "any person who, during and in relation to any crime of violence or drug trafficking crime \* \* \*, 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" receive a sentence of "not less than 5 years." 18 U.S.C. 924(c)(1)(A)(i). It sets forth higher mandatory-minimum sentences in a number of circumstances, including if the firearm was brandished (seven years) or discharged (ten years). 18 U.S.C. 924(c)(1)(A)(ii) and (iii); see also 18 U.S.C. 924(c)(1)(B)(i), (ii) and (C). Because the statute specifies no maximum sentence, it authorizes a sentence of up to life imprisonment, as every court of appeals to consider the question has held. See *United States v. Dorsey*, 677 F.3d 944, 956-957 (9th Cir. 2012) (collecting cases), petition for cert. pending, No. 12-6571 (filed Sept. 28, 2012); but see Pet. Br. at 44-47, *Alleyne v. United States*, No. 11-9335 (to be argued Jan. 14, 2013) (arguing that Section 924(c)(1)(A) establishes fixed terms rather than mandatory-minimum sentences).

The "basic purpose" of the offense established in Section 924(c) is to combat the "dangerous combination of drugs and guns" by "seek[ing] to persuade the man who is tempted to commit a Federal felony to leave his gun



at home.” *Muscarello v. United States*, 524 U.S. 125, 132 (1998) (internal quotation marks and citations omitted). It accomplishes that objective by stacking penalties for the possession or use of a firearm in connection with specified offenses on top of any other penalties imposed on the offender. See *Abbott v. United States*, 131 S. Ct. 18, 22 (2010); 18 U.S.C. 924(c)(1)(A) (providing that the penalty for a violation of the provision shall be “in addition to” the punishment provided for the “crime of violence or drug trafficking crime”). To that end, Section 924(c) provides that “no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person.” 18 U.S.C. 924(c)(1)(D)(ii). It therefore displaces the ordinary discretion of a district court to impose sentences either consecutively or concurrently. See 18 U.S.C. 3584(a) (“Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively.”); see also *Setser v. United States*, 132 S. Ct. 1463, 1467 (2012).

Section 924(j) sets forth an aggravated version of the Section 924(c) offense for conduct that also qualifies as a homicide. It provides that:

A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—

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

18 U.S.C. 924(j). To be convicted under Section 924(j), therefore, a person's conduct must meet the elements both of the Section 924(c) core offense and either murder or manslaughter as defined by federal law.

b. In 2007, when petitioner was sentenced, the advisory United States Sentencing Guidelines recommended that he receive a life sentence, C.A. App. 38G, and he was subject to lengthy mandatory-minimum sentences on several counts, *id.* at 240. Petitioner maintained, however, that his convictions for felony murder under territorial law (Count 5) and for causing death through use of a firearm under Section 924(j) (Count 6) were "duplicative of one another" and, therefore, that the Double Jeopardy Clause of the Constitution permitted the district court to sentence him for only one of those offenses. *Ibid.* Each of those counts was based on the murder of the off-duty officer during the attempted robbery of Wendy's. *Id.* at 30-31.<sup>1</sup>

The district court rejected petitioner's argument and sentenced him to consecutive terms of life imprisonment on those counts. C.A. App. 253 ("It is my intent, and I articulate it now, so that there will be no questions about it, [that] the two[] life sentences will run consecutive."). In total, the court sentenced petitioner to (i) life imprisonment on the Section 924(j) count and consecutive prison terms of 70 years on the other federal counts, and (ii) life imprisonment on the Virgin Islands felony murder count and a consecutive prison term of 15 years on the other Virgin Islands count, with the territorial sentences to run consecutively to, and to be served after, the federal sentences. *Id.* at 37-38C, 253-254.

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<sup>1</sup> The predicate crime of violence charged in the Section 924(j) count was the attempted robbery, not the murder. See C.A. App. 31.

3. Petitioner appealed his convictions and sentence. As relevant here, petitioner claimed that his consecutive life sentences for the same murder violated the Double Jeopardy Clause of the Fifth Amendment. Pet. C.A. Br. 7-9. The court of appeals affirmed. Pet. App. 1a-43a.

The court began by explaining that under the Double Jeopardy Clause, a defendant may be punished for the same conduct under both an offense and its lesser-included offense—*i.e.*, an offense that contains no element not required by the greater offense—so long as Congress intended that result. Pet. App. 33a; see *Missouri v. Hunter*, 459 U.S. 359, 366 (1983); see also *Albernaz v. United States*, 450 U.S. 333, 344 (1981) (“Where Congress intended \* \* \* to impose multiple punishments, imposition of such sentences does not violate the Constitution.”). “Accordingly,” the court stated, “a Double Jeopardy challenge must fail if the statutory text clearly reflects a legislative intent to impose multiple sentences on a defendant for a single underlying transaction.” Pet. App. 33a.

The government did not dispute that felony murder in the Virgin Islands is a lesser-included offense of 18 U.S.C. 924(j).<sup>2</sup> It argued, however, that any sentence imposed under Section 924(j) must run consecutively with any other sentence imposed (including a sentence for a lesser-included murder conviction), and, therefore, that Congress clearly intended cumulative punishments. See Gov’t C.A. Br. 146-148 & n.31. The government relied on the consecutive-sentence mandate set forth in Section 924(c)(1)(D)(ii) to support that argument. 18 U.S.C. 924(c)(1)(D)(ii); Gov’t C.A. Br. 146.

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<sup>2</sup> The government also did not dispute that the Virgin Islands and the federal government are considered to be one sovereign for double-jeopardy purposes. See Pet. App. 32a n.14.

After carefully reviewing the language, structure, and purpose of Section 924, the court of appeals held that “under any reasonable interpretation, 18 U.S.C. 924(j) is subject to the consecutive sentence mandate provided in § 924(c)(1)(D)(ii).” Pet. App. 37a. The “consecutive sentences mandate,” it explained, “is the heart of the statutory scheme set forth by subsection (c); its veritable *raison d’être*.” *Ibid.* “Congress’s clear intent [was] to stack punishments for all § 924(c) violations.” *Ibid.* Because Section 924(j) “simply provides an additional circumstance beyond the existence of the predicate [Section 924(c)] offense” that affects “the length of a sentence to be imposed,” the court reasoned, Congress would have had no conceivable reason to permit concurrent sentencing for that offense alone. *Id.* at 36a-38a. “It takes no special insight or leap of logic,” it said, “to conclude that the central reason for Congress’s choice of language in writing subsection (j)—[in] the course of a violation of subsection (c)’—was to ensure that separating out subsection (j) from subsection (c) did not deprive the law of a coherent sentencing scheme, the heart of which is the consecutive sentence mandate.” *Id.* at 37a.

The court of appeals pointed out that “[t]o interpret the text any other way would give rise to an anomalous result: that a defendant convicted under § 924(c) is subject to an additional consecutive sentence only in situations that do not result in a death caused by the use of a firearm.” Pet. App. 38a (internal quotation marks and citation omitted). The court agreed with other circuits “that it is highly ‘unlikely that Congress, which clearly intended to impose additional cumulative punishments for using firearms during violent crimes in cases where no murder occurs, would turn around and not intend to impose cumulative punishments in cases

where there are actual murder victims.’” *Ibid.* (quoting *United States v. Battle*, 289 F.3d 661, 668 (10th Cir.), cert. denied, 537 U.S. 856 (2002), and citing *United States v. Allen*, 247 F.3d 741, 769 (8th Cir. 2001), vacated on other grounds, 536 U.S. 953 (2002)).

The court of appeals rejected petitioner’s argument that, because a violation of Section 924(j) constitutes a separate offense, a sentence for a Section 924(j) conviction is not “imposed \* \* \* under” Section 924(c), as required by the language of the consecutive-sentence mandate. Pet. App. 39a-43a.<sup>3</sup> The court found that the phrase “‘imposed under’ *could* refer to only those sentences literally listed in subsection (c), but that is by no means the only possible definition”; it was “equally plausible that a sentence ‘imposed under’ subsection (c) means ‘subject to regulation by’ subsection (c).” *Id.* at 39a-40a (discussing definition of “under”). But given “the statutory scheme as a whole,” the court concluded, the only coherent reading of the phrase is that it refers to “those sentences imposed *as a consequence* of a subsection (c) offense.” *Id.* at 40a. The court was “persuaded that a subsection (j) sentence qualifies as a sentence ‘imposed under’ subsection (c), even though it is also ‘imposed under’ subsection (j), because they are part and parcel of the same statutory scheme, and jointly provide the legal basis for the sentence.” *Id.* at 42a.

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<sup>3</sup> The court of appeals found it unnecessary to decide whether Section 924(j) defines a separate offense, citing the government’s position that it does. Pet. App. 40a n.17. But the court indicated that characteristics of a Section 924(j) violation, including the defendant’s exposure to life imprisonment and the death penalty, “strongly suggest[ed]” that it sets forth “a discrete offense” rather than a sentencing enhancement. *Ibid.*

“Finding that Congress clearly intended to impose cumulative punishment for a violation of subsection (j) and any other offense,” the court “reject[ed] [petitioner’s] double jeopardy challenge.” Pet. App. 43a.

#### ARGUMENT

Petitioner contends (Pet. 7-16) that this Court’s review is warranted to resolve a conflict over whether consecutive sentencing is required for petitioner’s sentence under Section 924(j) and his sentence for felony murder under Virgin Islands’ law. The court of appeals correctly held that consecutive sentencing was required by statute and therefore did not violate the Double Jeopardy Clause. Petitioner’s contrary interpretation reads the consecutive-sentence mandate without regard to its statutory context and would defeat the facial objectives of Section 924(j).

As a result of the Eleventh Circuit’s decision last year in *United States v. Julian*, 633 F.3d 1250 (2011), a narrow conflict exists over whether the consecutive-sentence mandate applies to a conviction for the aggravated offense under Section 924(j), with five circuits agreeing with the government that sentences under Section 924(j) must run consecutively and the Eleventh Circuit alone holding to the contrary. But this is an unsuitable vehicle to address that question of statutory interpretation, because petitioner will not see any reduction in his term of imprisonment even if this Court reverses the judgment of the court of appeals.

Moreover, the conflict appears to have little or no practical significance. A defendant convicted under Section 924(j) could also be convicted under Section 924(c) as a lesser-included offense, and Section 924(c) both authorizes sentences of up to life imprisonment and unquestionably requires a sentence that runs consecu-

tively to other sentences imposed. Accordingly, defendants in the Eleventh Circuit may be effectively subject to the same punishment as defendants elsewhere for the same conduct. At least until the practical significance of the question presented becomes apparent, this Court need not resolve it.

1. The court of appeals correctly concluded that a sentence for causing death through use of a firearm under Section 924(j) must run consecutively to any other sentence imposed.

a. Section 924(j) sets forth an aggravated version of the offense established under Section 924(c). As relevant here, Section 924(j)(1) provides that “[a] person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall \* \* \* if the killing is murder \* \* \* be punished by death or by imprisonment for any term of years or for life.” 18 U.S.C. 924(j)(1). Thus, in order to obtain a conviction under Section 924(j)(1), the government must prove both that the defendant’s conduct satisfied the elements listed in Section 924(c) and that the defendant murdered a person in the course of the Section 924(c) violation.

Read in light of that statutory context, the provision of Section 924(c) requiring any sentence “imposed on a person under this subsection” to run consecutively with the sentence for any other offense naturally extends to a sentence imposed for violation of the aggravated version of the offense. See 18 U.S.C. 924(c)(1)(D)(ii). A jury must determine that a defendant has violated Section 924(c)’s core offense in order to find him guilty of the aggravated offense. The sentence is therefore “imposed \* \* \* under” Section 924(c) because it is legally

authorized only if the elements set forth in Section 924(c) are proved.

To avoid this straightforward reading of the statute's text, petitioner interprets the phrase "imposed on a person under this subsection" to mean that Section 924(c) must "govern[] the term of imprisonment the district court could impose." Pet. 13. That reading artificially restricts the subsections under which a sentence is "imposed" to those setting forth the minimum and maximum terms of imprisonment for the offense conduct. A punishment, however, is authorized not only by provisions establishing the possible terms of imprisonment but also by provisions establishing the elements of the offense. Here, the elements of the aggravated offense are set forth in both Section 924(c) and Section 924(j). The most natural reading of the consecutive-sentence mandate is that a sentence for violation of the aggravated offense is "imposed \* \* \* under" both Section 924(c) and Section 924(j), because they together identify the facts necessary for imposition of the sentence. See Pet. App. 40a.

Section 924(c), in fact, expressly contemplates that a sentencing range might be set forth in a different statutory provision. Immediately before introducing the elements of the offense, it provides that the minimum sentences listed in Subsection (c)(1)(A) will apply "[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) (emphasis added). That clause indicates that a defendant is "subject to the highest mandatory minimum specified for his conduct in § 924(c), unless another provision of law directed to conduct proscribed by § 924(c) imposes an even greater mandatory minimum." *Abbott v. United States*, 131



S. Ct. 18, 23 (2010). The statute thus contemplates that the commission of the Section 924(c) offense might trigger sentencing provisions found elsewhere in the criminal code.

b. The natural interpretation of the text is reinforced by the “purpose and context of the statute.” *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1330 (2011) (citation omitted). See *Abbott*, 131 S. Ct. at 27 (rejecting a reading of Section 924(c) that “undercut” a Section 924(c) amendment’s “primary objective”). The interpretation of Section 924(j) urged by petitioner would be antithetical to the statute’s facial objectives and create striking anomalies that no reasonable reading of the text can bear.

The obvious purpose of Sections 924(c) and 924(j) is to impose *enhanced* punishments on offenders who commit other crimes while using a firearm. See *Abbott*, 131 S. Ct. at 22; *Muscarello v. United States*, 524 U.S. 125, 132 (1998). A person who has violated Section 924(c), for example, has also committed the predicate crime of violence or drug crime. Likewise, a person who is found guilty of Section 924(j)(1) has necessarily committed murder (as defined by federal law). Permitting district judges to sentence violators of Section 924(j) to a concurrent term of imprisonment would defeat the purpose of the statute to require additional punishment for the use of a firearm in connection with another offense; instead, it would authorize sentences that add nothing to the prison term of the offender.

Petitioner’s reading of Section 924 “would result in sentencing anomalies Congress surely did not intend.” *Abbott*, 131 S. Ct. at 27. It would mean that conviction on the core and lesser offense set forth in Section 924(c) would subject the offender to a mandatory consecutive

sentence, but proof of the aggravated offense—in which it is demonstrated that the defendant committed a homicide—would not. That result “would make little sense in light of the context of the provision and the structure of the statute.” *United States v. Tinklenberg*, 131 S. Ct. 2007, 2018 (2011) (Scalia, J., concurring in part and concurring in the judgment); see Pet. App. 38a; see also *United States v. Battle*, 289 F.3d 661, 668 (10th Cir.), cert. denied, 537 U.S. 856 (2002); *United States v. Allen*, 247 F.3d 741, 769 (8th Cir. 2001), vacated on other grounds, 536 U.S. 953 (2002). Given that Section 924(c) is a lesser-included offense of Section 924(j) and provides for the same maximum term of imprisonment of life (although not the death penalty), under petitioner’s interpretation the government need only charge a Section 924(c) offense in addition to (or in lieu of) a Section 924(j) offense to trigger the consecutive-sentence mandate. The only circumstance in which a defendant would not be subject to a sentence of up to life imprisonment that must be imposed consecutively, therefore, would be where the government neglects to charge the core Section 924(c) offense and relies solely on the aggravated Section 924(j) offense. Congress could not have envisioned a scheme in which the government would have to forgo a Section 924(j) murder conviction in order to be assured of consecutively sentenced terms of imprisonment under Section 924 and the predicate crime of violence.

Take, for example, a person who commits second-degree murder during the commission of a Section 924(c) offense, and therefore is guilty of violating the aggravated offense set forth in Section 924(j)(1), and who is sentenced to 20 years in prison on a lesser-included murder count. Under petitioner’s reading of

the statute, if the government elects to charge him under Section 924(j)(1) and the district judge is inclined to sentence him to 20 years for that offense, he receives *no* additional prison time—“no penalty at all for the conduct that provision makes independently criminal,” *i.e.*, the use of the firearm in the commission of the offense. *Abbott*, 131 S. Ct. at 27. In contrast, if the government charges him under Section 924(c), alleging that a firearm was discharged, he receives *at minimum* an additional ten years on his sentence. See 18 U.S.C. 924(c)(1)(A)(iii).

Indeed, even petitioner concedes that on his view of the statute, the same conduct could be charged under both Section 924(c) and Section 924(j), and the Section 924(c) sentence, which could be as high as life, would have to run consecutively with a separate sentence for murder. See Pet. 16. The only consequence of his position, therefore, would be that the government would be penalized for charging a defendant with only the aggravated offense rather than both the aggravated offense and the lesser-included core offense of Section 924(c). “Congress did not intend such a bizarre result.” *Abbott*, 131 S. Ct. at 27 (citation omitted). Rather, the statute’s function “to persuade the man who is tempted to commit a Federal felony to leave his gun at home,” *Muscarello*, 524 U.S. at 132 (citation omitted), requires, as the text makes clear, consecutive sentencing.

Petitioner fails to offer any sensible explanation for his interpretation of the statutory scheme. He contends, for example, that Congress may have believed that applying the consecutive-sentence mandate was unnecessary because a Section 924(j) defendant “will typically receive a longer sentence” than a defendant sentenced solely under Section 924(c). Pet. 15-16. That explana-

tion is implausible given that the maximum sentence for the manslaughter version of the aggravated offense is significantly shorter than some of the *mandatory minimums* set forth in Section 924(c). See, e.g., 18 U.S.C. 924(c)(1)(B)(ii) (minimum sentence of 30 years for commission of offense with specified weapons). And it does not explain why Congress would have created a statutory structure that impels the government to rely on the core offense rather than the aggravated offense in cases where it does not seek the death penalty.

Petitioner also vaguely contends that applying the consecutive-sentence mandate to Section 924(j) “would potentially have implications” for “other subsections of Section 924 that define discrete firearms offenses, including subsection (o).” Pet. 14. That suggestion is also unfounded. Unlike subsection (j), those other subsections do not require proof of a *violation* of Section 924(c), and they are therefore not aggravated versions of the Section 924(c) offense. As the court of appeals explained with respect to one of those provisions, “§ 924(o) creates a conspiracy offense, which is by nature inchoate, and therefore *does not require* that the defendant actually commit the underlying crime.” Pet. App. 42a-43a.

c. Petitioner finally resorts to the rule of lenity. See Pet. 15. The canon, however, cannot justify an “implausible interpretation of a statute,” *Smith v. United States*, 508 U.S. 223, 240 (1993), and it “is not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of [a statute], such that even after a court has seized every thing from which aid can be derived, it is still left with an ambiguous statute,” *Chapman v. United States*, 500 U.S. 453, 463 (1991) (internal quotation marks, brackets, and citations omit-

ted). For the reasons discussed above, the text and context of the consecutive-sentence mandate make clear that it applies to sentences for the Section 924(j) aggravated offense. The question of statutory interpretation here is “no different from that in many of the criminal cases that confront” the courts, “[y]et[] this Court has never held that the rule of lenity automatically permits a defendant to win.” *Muscarello*, 524 U.S. at 139.

2. Four circuits have joined the Third Circuit in holding that a Section 924(j) sentence must run consecutively to any other sentence imposed (two through non-precedential opinions). See *United States v. Hatten*, No. 06-4240, 2007 WL 1977663, at \*3 (4th Cir. July 5, 2007) (unpublished); *United States v. Dinwiddie*, 618 F.3d 821, 837 (8th Cir. 2010), cert. denied, 131 S. Ct. 1547, and 131 S. Ct. 1586 (2011); *United States v. Staggs*, No. 97-10282, 1998 WL 447943, at \*3 (9th Cir. July 10, 1998) (unpublished); *Battle*, 289 F.3d at 667-669 (10th Cir.). The First Circuit has suggested that it would adopt that view as well. See *United States v. García-Ortiz*, 657 F.3d 25, 31 (1st Cir. 2011) (concluding that consecutive sentence mandate “arguably applies to section 924(j),” citing *Dinwiddie* and *Battle*, and remanding case for resentencing), cert. denied, 132 S. Ct. 1126 (2012). Only the Eleventh Circuit has adopted petitioner’s interpretation of Section 924(j), in an opinion issued just last year. See *Julian*, 633 F.3d at 1252-1257.

This highly limited division of authority does not warrant granting the petition for certiorari. As an initial matter, this case is a poor vehicle to resolve the question presented, because petitioner does not stand to gain any reduction in his term of imprisonment from a favorable decision. In addition, because the Eleventh Circuit’s outlier decision was issued only last year, it is

unclear what, if any, practical impact the division of authority will have for defendants. This Court should refrain from intervening on such a narrow issue absent a showing that the question presented has more than theoretical significance.

a. The resolution of the question presented does not appear to have any practical significance for petitioner. He was sentenced to life imprisonment and consecutive prison terms of 70 years on the federal counts, and to life imprisonment and a consecutive 15-year term on the Virgin Island counts, with the territorial sentences to be served consecutively to the federal sentences. Even if this Court were to adopt petitioner's interpretation of the statute and vacate one of his life sentences, he would still be required to serve a sentence of life imprisonment plus consecutive prison terms of 85 years.<sup>4</sup>

b. Even if this case were a suitable vehicle to address the question presented, review would not be warranted because it is not clear what, if any, practical import the holding of the Eleventh Circuit will have for defendants generally.

i. Now that district judges and prosecutors in the Eleventh Circuit are on notice of that court's interpretation of Section 924(j), the double-jeopardy issue should no longer arise. Because Section 924(c) is a lesser-included offense of the aggravated offense set forth in Section 924(j)(1), any defendant guilty of the latter is also guilty of the former. And the only difference between the maximum punishments available under the two provisions is that Section 924(j)(1) authorizes the death penalty. As the Eleventh Circuit observed in

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<sup>4</sup> The judgments (C.A. App. 37-38, 38E) indicate that petitioner received a special assessment on the Section 924(j) count but not the felony-murder count.

*Julian*, “[t]he main point of section 924(j) is to extend the death penalty to second-degree murders that occur in the course of violations of section 924(c).” 633 F.3d at 1256; see also *ibid.* (noting that “[t]he heading of the section of the Violent Crime Control and Law Enforcement Act of 1994 that added section 924(j) supports this interpretation: ‘Death Penalty for Gun Murders During Federal Crimes of Violence and Drug Trafficking’”). Capital punishment aside, the core offense of Section 924(c) and the aggravated offense of Section 924(j)(1) authorize the same maximum punishment: life imprisonment.

Accordingly, prosecutors in the Eleventh Circuit can always add a Section 924(c) charge for a defendant accused of violating Section 924(j), and if the death penalty is not sought or if the jury does not authorize it, the prosecution may then request that the defendant be sentenced under Section 924(c)—thereby ensuring that no double-jeopardy violation will occur when the defendant is also consecutively sentenced for a separate homicide offense. Although the Sentencing Guidelines provide that non-recidivist violators of Section 924(c) should receive the statutory minimum, see Sentencing Guidelines § 2K2.4(b), they also permit departures up to the statutory maximum “[i]f death resulted,” *id.* § 5K2.1. See, e.g., *United States v. Scheetz*, 293 F.3d 175, 181-182, 189-192 (4th Cir.), cert. denied, 537 U.S. 963, and 537 U.S. 965 (2002). And, of course, the Guidelines are advisory only. *United States v. Booker*, 543 U.S. 220 (2005). A judge will have discretion to impose a larger sentence under Section 924(c) when the offense results in homicide.

Thus, a district judge will be required to stack a Section 924 sentence on top of a sentence for a homicide

conviction so long as the defendant is charged under Section 924(c) in addition to Section 924(j) and the judge sentences under Section 924(c).<sup>5</sup> That fact underscores the unpersuasiveness of the Eleventh Circuit’s interpretation of Section 924, in which the lesser-included offense of Section 924(c) is read to include a more severe sentencing requirement (*i.e.*, consecutive sentencing) than the aggravated offense of Section 924(j). But even accepting that result, it means only that with respect to any argument that consecutive sentences for a predicate offense and a Section 924 offense violate the Double Jeopardy Clause, the position of defendants in the Eleventh Circuit does not appear to differ materially from those in circuits that have construed Section 924(j) to incorporate the consecutive-sentence requirement.

ii. Nor is it clear that the division of authority will have any practical significance outside of the double-jeopardy context—*i.e.*, where no lesser-included offense to the Section 924(j) offense (other than the Section 924(c) offense) is charged and thus under petitioner’s view the district court would have discretion to impose a sentence for the Section 924(j) violation running either consecutively or concurrently. For those defendants who, like petitioner, have been sentenced to terms of life on other counts or on the Section 924(j) count, the decision will have very little practical significance. For offenders who have not been sentenced to life imprisonment on any count (and therefore could receive a longer

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<sup>5</sup> Although both the Eleventh Circuit and petitioner contend that punishment could be imposed on a defendant under both Section 924(c) and Section 924(j) for the same conduct, the government has concluded that Congress did not intend that result. The government will therefore not seek to “double stack” Section 924(c) and Section 924(j) sentences for the same conduct on top of other sentences.



effective term of imprisonment if a Section 924(j) sentence is run consecutively), the Eleventh Circuit's rule is theoretically more favorable. But it is not clear that it will prove more favorable in practice.

First, for the reasons given above, the government could also obtain a conviction under Section 924(c) and therefore ask the district court to sentence such offenders under that provision, triggering the consecutive-sentence mandate. But even aside from that possibility, district judges still retain discretion under 18 U.S.C. 3584 to impose consecutive sentences for Section 924(j) violations, and it is not clear that district judges in the Eleventh Circuit will regularly exercise their discretion to impose concurrent sentences in light of the obvious purpose of Section 924(j) to create enhanced penalties and the incongruity of concurrent sentencing with the statutory scheme.

In short, the gun-committed homicides covered by Section 924(j) are unlikely to result in leniency under any circuit's rule. What is left is petitioner's technical objection to two consecutive life sentences. Especially given that it has been less than two years since the division of authority emerged, this Court should reserve review until any concrete consequences of that conflict become evident. There is no reason for this Court to address what may be an academic question.

**CONCLUSION**

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

DONALD B. VERRILLI, JR.  
*Solicitor General*  
LANNY A. BREUER  
*Assistant Attorney General*  
JOHN-ALEX ROMANO  
*Attorney*

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