No. 09-466

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

LEON WILLIAMS

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

## PETITION FOR A WRIT OF CERTIORARI

ELENA KAGAN
*Solicitor General*
*Counsel of Record*
LANNY A. BREUER
*Assistant Attorney General*
MICHAEL R. DREEBEN
*Deputy Solicitor General*
DAVID A. O'NEIL
*Assistant to the Solicitor General*
JOHN M. PELLETTIERI
*Attorney*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

## QUESTION PRESENTED

Section 924(c) of Title 18 requires specified mandatory consecutive sentences for committing certain weapons offenses in connection with "any crime of violence or drug trafficking crime," "[e]xcept to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law."

The question presented is whether the "except" clause prohibits imposition of a Section 924(c) sentence if the defendant is also subject to a greater mandatory minimum sentence on a different count of conviction charging a different offense for different conduct.

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:

Cases–Continued: Page

Statutes:

# In the Supreme Court of the United States

No. 09-466

UNITED STATES OF AMERICA, PETITIONER

*v.*

LEON WILLIAMS

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

## PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

### OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 558 F.3d 166.

### JURISDICTION

The judgment of the court of appeals was entered on March 5, 2009. A petition for rehearing was denied on June 22, 2009. (App, *infra*, 31a). On September 10, 2009, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including October 20, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISION INVOLVED

Section 924(c) of Title 18 of the United States Code is reproduced in the appendix to this petition. App., *infra*, 32a-35a.

## STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, respondent was convicted of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g); possessing with intent to distribute over 50 grams of crack cocaine in violation of 21 U.S.C. 841(b)(1)(A); and possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). The district court sentenced respondent to a total of 195 months of imprisonment, including a consecutive term of five years on the Section 924(c) conviction, to be followed by five years of supervised release. App., *infra*, 1a, 3a. The court of appeals remanded to the district court for resentencing on the ground that, *inter alia*, the text of Section 924(c) exempted respondent from any separate sentence for his conviction under that statute. *Id.* at 1a-20a.

1. In February 2006, two police officers saw respondent urinating next to a car parked by the side of the road. As the officers approached, they observed in the car multiple cellular phones, wads of cash wrapped in rubber bands, and a plastic bag containing white residue. After arresting respondent and impounding the car, the officers conducted an inventory search, during which they discovered a hidden compartment containing a loaded gun, a gun magazine, bullets, and 180 small bags of powder and crack cocaine. The white residue was later determined to be narcotics, and respondent's

fingerprints were found on the gun magazine. Respondent later admitted that he had been driving the car, which was registered to his sister, and that the cellular phones and cash belonged to him. App., *infra*, 2a-3a.

2. In April 2006, a grand jury sitting in the Southern District of New York indicted respondent on three counts: possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g); possessing with intent to distribute 50 grams or more of crack cocaine, in violation of 21 U.S.C. 841(b)(1)(A); and possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). In October 2006, respondent was tried before a jury, which found him guilty on all three counts. Gov't C.A. Br. 1-2; App., *infra*, 3a.

3. The district court sentenced respondent to a total of 195 months of imprisonment. App., *infra*, 3a. Respondent was subject to two separate mandatory minimum sentences: a ten-year mandatory minimum for the drug trafficking count pursuant to Section 841(b)(1)(A) and a consecutive five-year mandatory minimum for the Section 924(c) count. *Ibid.*; see 18 U.S.C. 924(c)(1)(A) (providing that, except where a greater minimum penalty applies, any person who possesses a firearm in furtherance of a crime of violence or drug trafficking crime shall, "in addition to the punishment provided for such crime of violence or drug trafficking crime," be sentenced to a "term of imprisonment of not less than 5 years"). The district court imposed a 120-month sentence for the felon-in-possession count, a concurrent 135-month sentence for the drug trafficking count, and

the mandatory consecutive five-year term for the Section 924(c) count. App, *infra*, 3a, 22a.[1]

4. The court of appeals affirmed respondent's conviction but vacated his sentence and remanded for resentencing without any separate term of imprisonment for the Section 924(c) conviction. App., *infra*, 1a-20a.

a. After respondent filed an appeal but before oral argument, the court of appeals decided *United States* v. *Whitley*, 529 F.3d 150 (2d Cir. 2008). *Whitley* interpreted the introductory, "except" clause of Section 924(c)(1)(A), which states in relevant part:

> *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 * * * 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

---

[1] The court of appeals incorrectly stated that the district court sentenced respondent on the felon-in-possession count to 130 months, which would have exceeded the statutory maximum of 120 months under 18 U.S.C. 922(g) and 924(a)(2). App., *infra*, 3a.

> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. 924(c)(1)(A) (emphasis added). The defendant in *Whitley* was convicted of three offenses arising from a single robbery: a Hobbs Act violation, which carried no mandatory minimum sentence; a violation of 18 U.S.C. 922(g) for possessing a firearm as a convicted felon, which carried a 15-year mandatory minimum sentence under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e); and a Section 924(c) offense, which carried a ten-year mandatory minimum consecutive sentence because the defendant had discharged the firearm during the robbery, see 18 U.S.C. 924(c)(1)(A)(iii). *Whitley*, 529 F.3d at 151-152.

The Second Circuit construed the introductory language of Section 924(c) to mean that Whitley was exempt from any sentence for his Section 924(c) conviction because he was subject to a greater mandatory minimum sentence under the ACCA. *Whitley*, 529 F.3d at 151. The court adopted what it considered to be a "literal" reading of Section 924(c)'s "except" clause, reasoning that "the ten-year minimum sentence required by subdivision (iii) of that subsection for discharge of a firearm * * * does not apply to [the defendant] because, in the words of th[e] ['except'] clause, 'a greater minimum sentence is otherwise provided by . . . any other provision of law,' namely, [the ACCA], which subjects him to a fifteen-year minimum sentence." *Id.* at 153.

In reaching that conclusion, the court of appeals rejected the government's contention that the "except" clause refers only to mandatory minimum penalties provided for the Section 924(c) offense, and that the court's

contrary construction departs from the statute's plain meaning, conflicts with Congress's evident intent, and would anomalously result in shorter mandatory sentences for more serious offenders. *Whitley*, 529 F.3d at 155. The court noted in *dicta*, however, that the anomalies the government identified "could be overcome if the 'except' clause were limited to higher minimums contained only in firearms offenses, rather than, as it reads, to higher minimums provided 'by any other provision of law.'" *Ibid.*

b. Following the decision in *Whitley*, the court of appeals ordered supplemental briefing and heard argument concerning the effect of that ruling on respondent's sentence. 07-2436 Docket entry (2d Cir. July 16, 2008). The court then held that the reasoning in *Whitley* also applies to a case such as this one, in which the defendant is subject both to a mandatory minimum sentence under Section 924(c) and to a higher mandatory minimum for the predicate crime of violence or drug trafficking crime. App., *infra*, 2a.

The court first rejected the contention that *Whitley* may be limited either to its particular facts—involving multiple mandatory minimum sentences based on the use of a single firearm—or to mandatory minimums arising from firearms offenses more generally. App., *infra*, 6a-7a. In the court's view, the phrase "any other provision of law" in Section 924(c)(1)(A) reaches beyond firearms statutes to the entire "set of crimes for which mandatory minimum sentences apply," including "drug trafficking crimes [and] other violent offenses." *Id.* at 8a-9a. The court reasoned that this conclusion is compelled by the text of the "except" clause, which "means what it literally says." *Id.* at 8a (citation omitted). At the same time, however, the Court cautioned that the

"except" clause is not "unbounded." *Id.* at 9a. The court stated that reading "any other provision of law" literally "to include, for example, provisions under which a defendant was already sentenced for a prior unrelated crime in a previous case, would be suspect." *Id.* at 10a. The court therefore held that application of the "except" clause controls only when the defendant faces a higher mandatory minimum sentence for a different offense "arising from the same criminal transaction or operative set of facts" as the Section 924(c) offense. *Ibid.*

The court acknowledged that Section 924(c)(1) requires that the sentences it prescribes must be in addition to, and may not run concurrently with, any sentence imposed for the predicate crime of violence or drug trafficking crime. App, *infra*, 10a-11a (citing 18 U.S.C. 924(c)(1)(A) (providing that the prescribed penalties are "in addition to the punishment provided for such crime of violence or drug trafficking crime"); 18 U.S.C. 924(c)(1)(D)(ii) (stating 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 term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed"). The court concluded, however, that its interpretation did not violate these provisions. The court reasoned that the introductory clause of Section 924(c) carves out an exception to the "in addition to" requirement: when the "except" clause applies—*i.e.*, when a defendant is subject to a higher minimum sentence for a different offense—the defendant receives no sentence at all under Section 924(c)(1)(A), so the Section 924(c)

"sentence" is not "concurrent" with any other term of imprisonment. App., *infra*, 11a-12a.

The court also acknowledged that its interpretation of Section 924(c) might lead to the anomalous result that a defendant could be subject to a lower total mandatory sentence as a result of committing a more serious predicate drug crime. App., *infra*, 15a-16a. But the court reasoned that any such anomaly may be remedied by the sentencing court in the exercise of its discretion to fashion an appropriate punishment in the particular case. *Id.* at 16a-17a. And the court further concluded that, in any event, it was up to Congress to correct anomalies that result from what the court believed to be a literal reading of the statute. *Id.* at 17a.

Applying this interpretation of the "except" clause, the court held that, because respondent was subject to a ten-year mandatory minimum sentence under Section 841(b)(1)(A), he was exempt from the five-year mandatory minimum under Section 924(c)(1)(A). App., *infra*, 19a-20a. The court therefore remanded for resentencing without any sentence for respondent's Section 924(c) offense. *Ibid.*[2]

5. On April 24, 2009, the government petitioned for rehearing en banc, contending that the decision below is incorrect and noting that it conflicts with the decisions of every other court of appeals to address the issue. The court denied that petition without comment. App., *infra*, 31a.

---

[2] The court of appeals also remanded for the district court to consider its authority to impose a non-guidelines sentence based on the disparity between the crack and powder cocaine offenses. App., *infra*, 19a-20a.

## REASONS FOR GRANTING THE PETITION

In the decision below, the court of appeals extended *United States* v. *Whitley*, 529 F.3d 150 (2d Cir. 2008), to hold broadly that the mandatory minimum penalties prescribed in Section 924(c) do not apply when the defendant also faces a higher mandatory minimum sentence for another count of conviction. Under the Second Circuit's holding, when a defendant is convicted of a drug trafficking crime carrying a ten-year mandatory minimum and a Section 924(c) offense carrying a five-year mandatory minimum, the district court is required to sentence the defendant to zero months of imprisonment on the Section 924(c) offense. That interpretation of Section 924(c) is incorrect and implicates an entrenched conflict among the courts of appeals. Eight other courts of appeals have considered the meaning of the introductory "except" clause of Section 924(c)(1)(A), and all of them have rejected the interpretation adopted in the decision below. Those courts have correctly reasoned that the "except" clause does not displace the penalties of Section 924(c) whenever a defendant also faces a higher minimum sentence for a different offense. Because the meaning of Section 924(c)(1)(A)'s introductory clause is an important question in federal prosecutions and is squarely presented in this case, this Court's review is warranted.

### A. The Court Of Appeals' Interpretation Of Section 924(c)(1)(A) Is Incorrect

The Second Circuit has fundamentally misconstrued the introductory language of Section 924(c)(1)(A). As other courts of appeals to consider the question have concluded, the "except" clause means that a defendant convicted of an offense under Section 924(c)(1)(A) must

be sentenced to the five-year mandatory minimum term set forth in that provision unless another penalty provision elsewhere in Section 924(c) or "the United States Code[] requires a higher minimum sentence for *that* § 924(c)(1) offense." *United States* v. *Easter*, 553 F.3d 519, 526 (7th Cir. 2009) (per curiam), petitions for cert. pending, No. 08-9560 (filed Mar. 26, 2009), and No. 08-10584 (filed May 20, 2009); see pp. 18-19, *infra*. The "except" clause does not mean that a defendant escapes any punishment for a Section 924(c) conviction whenever he is subject to a higher mandatory sentence for a *different* offense. The decision below departs from the plain meaning of Section 924(c)(1)(A), frustrates Congress's intent, and creates anomalies both within the statute and in its practical application.

1. The prefatory clause of Section 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 except clause * * * does not say 'a greater minimum sentence' *for what*; yet it must have *some* understood referent to be intelligible." *United States* v. *Parker*, 549 F.3d 5, 11 (1st Cir. 2008), cert. denied, 129 S. Ct. 1688 (2009). Read naturally, the "understood referent" of the clause is 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, 1860 (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.").

The clause therefore provides that, except to the extent that Section 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, any person who commits that firearms offense is subject to the baseline five-year mandatory minimum term of imprisonment set forth in Section 924(c)(1)(A)(i). Thus, for example, if (as in this case) a firearm is possessed in furtherance of a drug trafficking offense, the defendant is subject to a mandatory consecutive five-year sentence; *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 Section 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 Section 924(c)(1)(B)(ii); *except* that if another feature of the Section 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 Section 924(c) count.

This construction of the "except" clause does not "rewrit[e]" the statute or add any new words, as the court of appeals concluded. App., *infra*, 6a. It simply selects the most natural referent of the "except" clause, which is the basic crime set forth in Section 924(c)(1)(A). And it respects the purpose of that clause to ensure the imposition of the highest possible mandatory penalty for a Section 924(c) offense.

2. The statutory text does not support the court of appeals' contrary interpretation, under which the "ex-

cept" clause eliminates any Section 924(c) sentence whenever the defendant is subject to a higher mandatory minimum for a different crime "arising from the same criminal transaction or operative set of facts" as the Section 924(c) offense. App., *infra*, 10a. The court purported to rest its interpretation on a "literal reading" of the phrase "any other provision of law." *Id.* at 8a-9a. Consistent with ordinary principles of statutory construction, however, that phrase should be "given more 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. *USPS*, 546 U.S. 481, 486-487 (2006). Just as the phrase "this subsection" refers to provisions that prescribe minimum sentences for the Section 924(c) offense, so too the phrase "any other provision of law" should be read to refer to those provisions elsewhere in the United States Code that establish penalties for violating Section 924(c)(1)(A).

The absence of any provision of law outside Section 924(c) that currently prescribes such penalties does not justify the court of appeals' interpretation. As several other courts of appeals have concluded, the "'any other provision of law' language provides a safety valve that would preserve the applicability of any other provisions that could impose an even greater mandatory minimum consecutive sentence for violation of § 924(c)." *United States* v. *Studifin*, 240 F.3d 415, 423 (4th Cir. 2001). That language "simply reserv[es] the possibility that another statute or provision might impose a greater minimum consecutive sentencing scheme for a § 924(c) violation." *Ibid;* see *United States* v. *Abbott*, 574 F.3d 203, 208 (3d Cir. 2009) ("[T]he prefatory clause mentions 'any other provision of law' to allow for additional § 924(c) sentences that may be codified elsewhere in the

future."); *United States* v. *Collins*, 205 Fed. Appx. 196, 197-198 (5th Cir. 2006) (per curiam) (finding "convincing" *Studifin*'s reasoning that "by any other provision of law" provides a "safety valve" for future provisions "that could impose an even greater mandatory minimum consecutive sentence for a violation of § 924(c)") (quoting *Studifin*, 240 F.3d at 423), cert. denied, 551 U.S. 1170 (2007).[3]

Indeed, despite its professed fidelity to interpreting the "except" clause according to "what it literally says," App, *infra*, 8a (quoting *Whitley*, 529 F.3d at 153), the court of appeals itself departed from a strict "literal reading" of the phrase "any other provision of law," *id.* at 9a. Construed without any consideration of context, the "except" clause would eliminate any sentence under Section 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 of appeals, however, deemed "suspect" any such literal or "unbounded" reading of the clause. *Id.* at 9a, 10a. The court therefore limited the "except" clause to those "other provision[s] of law" imposing mandatory minimums for offenses that "aris[e] from the same crim-

[3] For example, suppose Congress were to amend 18 U.S.C. 922(k), which criminalizes possession of a firearm with a defaced serial number, to provide that "if a firearm with a defaced serial number is involved in a violation of Section 924(c)(1)(A), then the penalty for such a violation of Section 924(c)(1)(A) is at least 15 years." The "except" clause would make clear that the penalty for using a firearm with a defaced serial number during a drug or violent crime, in violation of Section 924(c)(1)(A), would be a minimum of 15 years of imprisonment (rather than any lower minimum set forth in Section 924(c) itself), which (under Section 924(c)(1)(D)(ii)) would be consecutive to whatever sentence the defendant received for the Section 922(k) offense.

inal transaction or operative set of facts" as the Section 924(c) offense. *Id.* at 10a. That interpolation appears nowhere in the statutory text, and, as this Court has remarked on numerous occasions, "same transaction" tests (or other similar formulations) are inherently malleable and indeterminate. See, *e.g.*, *United States* v. *Dixon*, 509 U.S. 688, 710-711 (1993). The court's insertion of that test into the statute was also unnecessary. The "unbounded" reading of the "except" clause the court was trying to avoid arose only because the court failed to observe the limitation inherent in the statute itself—that the clause applies only where another provision prescribes a greater mandatory minimum for the Section 924(c) offense.

3. In addition to contravening the plain meaning of the relevant text, the Second Circuit's interpretation of the "except" clause ignores the history of the statute, brings that clause into conflict with other language in Section 924(c), and creates a variety of anomalies that Congress could not have intended.

a. The court of appeals' reading of the "except" clause cannot be squared with the history of Section 924(c)(1)(A). The "except" clause was added to the statute in 1998 as part of a slate of amendments intended both to broaden Section 924(c) in response to this Court's decision in *Bailey* v. *United States*, 516 U.S. 137, 150 (1995) (holding that the term "use" in Section 924(c) requires "active employment" of a firearm), and to stiffen the penalties for violating that law. The amendments accomplished the latter purpose by adding graduated minimum sentences for brandishing and discharging a firearm and for subsequent convictions under the statute. The obvious purpose of the 1998 amendments—including the "except" clause—was thus to *increase* sen-

tences for defendants who use, carry, or possess firearms in connection with other crimes. The Second Circuit's interpretation yields precisely the opposite effect, *eliminating* the Section 924(c) penalties altogether for the most serious offenders who commit predicate crimes carrying high minimum sentences. Nothing in the legislative history of Section 924(c) supports that counterintuitive result.

b. The interpretation adopted by the Second Circuit negates specific language in Section 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, Section 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." The Second Circuit's approach succeeds in preventing these cumulative sentences from occurring. As the Fourth Circuit has explained, the Second Circuit'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 while using or carrying firearms in furtherance of their crimes.

*Studifin*, 240 F.3d at 423.

c. The court of appeals' reading of the "except" clause effectively treats Section 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 [Section] 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 Section 924(c)] defines a complete offense."); *Harris* v. *United States*, 536 U.S. 545, 553 (2002). The result required by the decision below—a Section 924(c) conviction for which the defendant receives no sentence whatsoever—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.

d. The decision below would produce illogical sentencing outcomes. Consider, for example, two defendants possessing cocaine—the first possessing 500 grams and subject to a mandatory minimum sentence of five years under 21 U.S.C. 841(b)(1)(B), and the second possessing five kilograms (ten times the amount) and subject to a mandatory minimum of ten years under 21 U.S.C. 841(b)(1)(A). If the first defendant brandishes a firearm in furtherance of his drug offense, under the

decision below the "except" clause would not apply and the defendant would be subject to two mandatory minimum sentences totaling 12 years: the five-year sentence under 21 U.S.C. 841(b)(1)(B) and a consecutive mandatory minimum sentence of seven years under Section 924(c)(1)(A)(ii). But if the second defendant brandishes a firearm in furtherance of his much more serious drug offense, under the Second Circuit's view the except clause would apply, the seven-year mandatory minimum in Section 924(c)(1)(A)(ii) therefore would disappear, and the defendant would be subject to a single mandatory minimum of ten years under 21 U.S.C. 841(b)(1)(A). Thus, the more serious offender would face a lesser minimum sentence. It is inconceivable that Congress intended such a result. See *Abbott*, 574 F.3d at 209 (discussing this and other sentencing anomalies and concluding that "[w]e are confident that Congress did not intend such a bizarre result").

The court of appeals attempted to rationalize such anomalous outcomes on the ground that, where the "except" clause applies, a district judge may compensate for the elimination of the Section 924(c) sentence by exercising its discretion under 18 U.S.C. 3553(a) to increase the sentence on the underlying offense. App., *infra*, 16a-17a. But Congress added the "except" clause to Section 924(c) in 1998, seven years before this Court ruled in *United States* v. *Booker*, 543 U.S. 220 (2005), that district courts may vary from the Sentencing Guidelines to fashion an appropriate punishment in the particular case. Congress therefore could not have intended to rely on the discretion afforded by Section 3553(a) as a means of correcting anomalies resulting from the "except" clause. See *Abbott*, 574 F.3d at 210 ("Congress could not have intended to create such sentencing dis-

parities with the clairvoyant expectation that seven years later the Supreme Court would grant district judges the discretion to cure such injustices.") (citing *Booker*, *supra*); *Easter*, 553 F.3d at 526-527.

### B. The Decision Below Implicates An Entrenched Conflict Within The Circuits

There is a clear and well defined conflict among the courts of appeals on the question presented. Eight other courts of appeals—the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits—have considered the meaning of the "except" clause, and none has adopted the interpretation underlying the Second Circuit's decisions in this case and in *Whitley*. Contrary to the decision below, all of those courts have rejected a reading of the "except" clause that would eliminate the sentence for a Section 924(c) offense when the defendant is subject to a higher mandatory minimum sentence for the underlying crime of violence or drug trafficking. See *United States* v. *Segarra*, No. 08-17181, 2009 WL 2932242 (11th Cir. Sep. 15, 2009) (per curiam); *Abbott*, 574 F.3d at 208-209; *United States* v. *London*, 568 F.3d 553, 564 (5th Cir. 2009), petition for cert. pending, No. 09-5844 (filed Aug. 11, 2009); *United States* v. *Pulido*, 566 F.3d 52, 65 & n.6 (1st Cir. 2009), petition for cert. pending, No. 09-5949 (filed Aug. 14, 2009); *Easter*, 553 F.3d at 525; *Parker*, 549 F.3d at 10-12; *United States* v. *Jolivette*, 257 F.3d 581, 586-587 (6th Cir. 2001); *Studifin*, 240 F.3d at 421-424; *United States* v. *Alaniz*, 235 F.3d 386, 386-390 (8th Cir. 2000), cert. denied, 533 U.S. 911 (2001). In addition, three of those circuits have held, in conflict with *Whitley*, that the "except" clause refers only to mandatory minimum sentences for the Section 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 209-211*; Easter*, 553 F.3d at 524-527*; Studifin*, 240 F.3d at 421-424.

The government petitioned for en banc review in both *Whitley* and the decision below, alerting the Second Circuit to the unanimous contrary authority in the other courts of appeals. The Second Circuit denied both of those petitions, thereby indicating that it was unwilling to reconsider its interpretation of Section 924(c). This Court's resolution of the circuit conflict is now warranted.

### C. The Question Presented Is Important And Squarely At Issue In This Case

1. The question presented is important to the administration of the federal criminal justice system. Because firearms are commonly used, carried, or possessed in connection with drug trafficking and violent crimes, defendants are frequently charged with violating both Section 924(c) and the statute that defines the predicate offense. In addition, recidivist offenders are often charged under both the ACCA and Section 924(c) when they employ a firearm in connection with another crime. The proper interpretation of the "except" clause determines the minimum sentence in these recurring circumstances. Under the Second Circuit's interpretation, a defendant receives no sentence for the Section 924(c) count if he is subject to a higher mandatory minimum for the ACCA violation or the predicate offense. Under the position adopted by other courts of appeals, by contrast, such a defendant is subject both to the mandatory minimum sentence for the Section 924(c) crime and the mandatory sentence for any other count of conviction. The disagreement between the Second Circuit and the

other courts of appeals therefore yields large disparities in the sentences in a significant number of cases.

2. a. This case squarely presents the issue on which the courts of appeals are divided. Respondent was convicted of violating both 21 U.S.C. 841(b)(1)(A), which carries a mandatory minimum sentence of ten years, and Section 924(c)(1)(A)(i), which requires a consecutive mandatory sentence of at least five years. Based on its interpretation of the "except" clause, the court of appeals ordered the district court to resentence respondent without any separate term of imprisonment for the Section 924(c) offense. The eight other circuits to address the issue would reach a different holding on these facts and would affirm a sentence that included both mandatory minimums.

b. Unlike other pending petitions for a writ of certiorari addressing the meaning of the "except" clause,[4] this case squarely presents that question in a de novo posture. Although respondent did not invoke the "except" clause in the district court or in his initial brief in the court of appeals, the Second Circuit applied a de novo standard of review on the ground that, "if [respondent's] reading of *Whitley* and the 'except' clause are correct, the plain error standard of review would be met." App., *infra*, 4a n.2. That conclusion was based on the government's concession to that effect in *Whitley*, see 529 F.3d at 152 n.1, which in turn rested on controlling Second Circuit decisions holding that plain error review is either "relax[ed]" or inapplicable in certain sentencing contexts. See, *e.g.*, *United States* v. *Sim-*

[4] See *Pulido* v. *United States,* No. 09-5949 (filed Aug. 14, 2009); *London* v. *United States*, No. 09-5844 (filed Aug. 11, 2009); *Lee* v. *United States*, No. 09-5248 (filed July 9, 2009); *McSwain* v. *United States*, No. 08-9560 (filed Mar. 26, 2009).

*mons*, 343 F.3d 72, 80 (2d Cir. 2003); *United States* v. *Sofsky*, 287 F.3d 122, 125 (2d Cir. 2002). Whatever the merit of those cases, because the Second Circuit decided this case under a de novo standard in light of the government's concession, the case comes to this Court on de novo review. Cf. *United States* v. *Gaudin*, 515 U.S. 506 (1995) (deciding issue de novo where government did not assert plain error in seeking a writ of certiorari).

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ELENA KAGAN
*Solicitor General*
LANNY A. BREUER
*Assistant Attorney General*
MICHAEL R. DREEBEN
*Deputy Solicitor General*
DAVID A. O'NEIL
*Assistant to the Solicitor General*
JOHN M. PELLETTIERI
*Attorney*

OCTOBER 2009

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

---

No. 07-2436-cr

UNITED STATES OF AMERICA, APPELLEE

*v.*

LEON WILLIAMS, DEFENDANT-APPELLANT

---

[Decided: Mar. 5, 2009]

---

Before: POOLER and HALL, Circuit Judges, and TRAGER, District Judge.[**]

POOLER, Circuit Judge:

Leon Williams appeals from a June 1, 2007, judgment of conviction and sentence of the United States District Court for the Southern District of New York (Sand, J.). Williams was convicted of a drug trafficking crime which carried a ten-year mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A), and possession of a firearm in furtherance of that drug trafficking crime, an offense which carried a five-year mandatory minimum consecutive sentence "[e]xcept to the extent that a greater minimum sentence is otherwise provided by . . . any other provision of law" under 18 U.S.C. § 924(c)(1)(A)(i). In this opinion, we address whether the district court erred

[**] We thank amicus counsel for the helpful brief and oral argument in this appeal.

in imposing the five-year mandatory minimum consecutive sentence under Section 924(c)(1)(A)(i) even though a greater minimum sentence was provided for the predicate drug trafficking crime. In *United States v. Whitley,* 529 F.3d 150 (2d Cir. 2008), *reh'g denied,* 540 F.3d 87 (2d Cir. 2008), we held that the mandatory minimum sentence under Section 924(c)(1)(A) was inapplicable where the defendant was subject to a longer mandatory minimum sentence for a career criminal firearm possession violation. We now hold that the mandatory minimum sentence under Section 924(c)(1)(A) is also inapplicable where the defendant is subject to a longer mandatory minimum sentence for a drug trafficking offense that is part of the same criminal transaction or set of operative facts as the firearm offense.

We therefore affirm the district court's judgment of conviction and remand to give the district court the opportunity to resentence Williams consistent with our holding that Williams is not subject to the mandatory five-year minimum under Section 924(c)(1)(A). We also conclude that remand is required pursuant to *United States v. Regalado,* 518 F.3d 143 (2d Cir. 2008). We reject Williams's other challenges to his conviction and sentence on appeal.

## BACKGROUND

At trial, the government presented evidence that on the evening of February 27, 2006, two New York City Police Department officers on patrol saw Williams standing next to a parked car on the side of the road, urinating. As the officers approached, they saw that inside the car were multiple cellular phones, wads of cash wrapped in rubber bands, and a plastic bag contain-

ing white residue, later determined to be narcotics. One of the officers also noticed a strange odor which he associated with narcotics. Later that evening, an inventory search of the car revealed a hidden compartment containing a loaded gun, a gun magazine, bullets, and 180 small bags of powder and crack cocaine. Williams's fingerprints were on the gun magazine. At trial, Williams admitted that he had been driving the car, which was registered to his sister, and that the cellular phones and cash, which totaled $1,100, were his.

The jury found Williams guilty of three counts: (1) possessing a firearm after being convicted of a felony, in violation of 18 U.S.C. § 922(g);[1] (2) possessing with intent to distribute over 50 grams of crack cocaine, in violation of 21 U.S.C. §§ 812, 841(a) & 841(b)(1)(A); and (3) possessing a firearm in furtherance of the drug trafficking crime charged in count two, in violation of 18 U.S.C. § 924(c)(1)(A)(i). Williams was sentenced principally to 130 months' imprisonment on count one (felon-in-possession), to run concurrently with a sentence of 135 months' imprisonment on count two (drug trafficking), and an additional consecutive five years' (60 months') imprisonment on count three (possession of a firearm in furtherance of drug trafficking), for a total of 195 months' imprisonment.

The felon-in-possession conviction carried no mandatory minimum sentence. 18 U.S.C. § 922(g). But the drug trafficking conviction carried a mandatory minimum penalty of ten years under 21 U.S.C. § 841(b)(1)(A). Because Section 841(b)(1)(A) is "any other provision of law" that "otherwise provide[s]" "a

[1] Williams had previously been convicted of a felony on May 29, 1997 in New York state court.

greater minimum sentence," 18 U.S.C. § 924(c)(1)(A), Williams argues that the five-year minimum for possession of a firearm under Section 924(c)(1)(A)(i) does not apply. Williams also raises various other challenges to his conviction and sentence.

## DISCUSSION

### I. Section 924(c)

#### A. *United States v. Whitley*

Section 924(c) provides graduated penalties for various types of firearm use. In *United States v. Whitley,* 529 F.3d 150 (2d Cir. 2008), *reh'g denied,* 540 F.3d 87 (2d Cir. 2008), we interpreted the introductory "except" clause of Section 924(c)(1)(A).[2] That subsection provides, in pertinent part:

> *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) . . . 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—

---

[2] Although Williams did not raise this argument below, if his reading of *Whitley* and the "except" clause are correct, the plain error standard of review would be met. *See Whitley,* 529 F.3d at 152 n. 1.

> (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.

18 U.S.C. § 924(c)(1)(A) (emphasis added).

In *Whitley,* the defendant was convicted of three offenses all stemming from the same armed robbery: (1) a Hobbs Act violation, with no mandatory minimum penalty, *see* 18 U.S.C. § 1951; (2) an Armed Career Criminal Act ("ACCA") offense for possession of a firearm after conviction of three prior offenses, for which the minimum penalty was fifteen years, *see* 18 U.S.C. §§ 922(g)(1), 924(e); and (3) a Section 924(c) offense for discharging a firearm in relation to a crime of violence, for which the minimum penalty was a consecutive ten years, *see* 18 U.S.C. § 924(c)(1)(A)(iii). We concluded that the consecutive minimum ten-year penalty under Section 924(c) did not apply because a higher fifteen-year minimum was imposed by the ACCA. *Whitley,* 529 F.3d at 151.

In reaching this conclusion, we rejected the government's argument that the "except" clause relates solely to those firearms offenses specified in Section 924(c). *Id.* at 153. We held that the "except" clause of Section 924(c) "means what it literally says"—that the minimum sentences it requires do not apply where "'a greater minimum sentence is otherwise provided by . . . *any other provision of* law.'" *Id.* (quoting 18 U.S.C. § 924(c)(1)(A)) (emphasis added). "Any other provision of law" includes the ACCA. We rejected the govern-

ment's arguments that this literal interpretation of the "except" clause is "unsupported by the text, design, or the purpose of the statute, would produce illogical and distorted outcomes that Congress clearly did not intend, and has been rejected by other circuits." *Id.* at 155 (citations and quotation marks omitted). We observed that, "other than the decisions that have rewritten the 'except' clause in different ways to escape its plain meaning, we are aware of no decision rejecting the literal meaning of statutory language to the detriment of a criminal defendant." *Id.* at 156; *see also Whitley,* 540 F.3d at 88.

We are, of course, "bound by our own precedent unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or this court *en banc.*" *Nicholas v. Goord,* 430 F.3d 652, 659 (2d Cir. 2005) (quotation marks omitted). We must therefore determine whether the question of statutory interpretation in this case is materially different from the question addressed by *Whitley.* There are two potentially relevant differences—(1) in *Whitley,* the longer mandatory minimum sentence was provided by the ACCA for *firearms*-related conduct, while in this case, it is provided by a non-firearms offense,[3] and (2) in *Whitley,* the long

[3] We noted in *Whitley* "that the Fifth and Eighth Circuits have interpreted the 'except' clause to have a firearms limitation," 529 F.3d at 155-56 (citing *United States v. Collins,* 205 F. App'x 196, 198 (5th Cir. 2006); *United States v. Alaniz,* 235 F.3d 386, 389 (8th Cir. 2000)), and that the Sixth Circuit has cited these cases with approval, *see id.* (citing *United States v. Jolivette,* 257 F.3d 581, 587 (6th Cir. 2001)). We distinguished *Alaniz* and *Collins* by pointing out that the defendants in those cases, like Williams, were convicted of narcotics offenses, while Whitley was convicted of a firearms offense. *Id.* at 157. But we did not

er mandatory minimum sentence under the ACCA was to run *consecutively* with the sentence on the predicate offense, while in this case, the longer mandatory minimum sentence is supplied by that predicate offense. The government now argues that *Whitley* should be limited to its facts-that is, to instances in which a defendant faces two consecutive mandatory minimum sentences for firearm-related conduct resulting from the use of a single gun. The government again argues that its interpretation is required by the statutory text and structure, the legislative history, and to avoid illogical applications of the statute. We conclude that to accept the government's position would contravene the reasoning and result of *Whitley.*

**B. Statutory Text**

"[S]tatutory analysis necessarily begins with the plain meaning of a law's text and, absent ambiguity, will generally end there." *Puello v. BCIS,* 511 F.3d 324, 327 (2d Cir. 2007) (quotation marks omitted); *see also Whitley,* 529 F.3d at 156. The government argues that the clause "[e]xcept to the extent that a greater minimum sentence is otherwise provided by . . . any other provision of law," is ambiguous because it only directs a court where to look for the greater minimum ("any other provision of law"), and does not specify the offense to which the greater minimum sentence may apply. *See* 18 U.S.C. § 924(c)(1)(A). The government urges that we adopt the First Circuit's conclusion that the "except" clause is ambiguous because it "does not say 'a greater minimum sentence' *for what*; yet it has to have *some* understood

---

comment on whether the Fifth and Eighth Circuits correctly read a firearms limitation into the "except" clause.

referent to be intelligible." *United States v. Parker,* 549 F.3d 5, 11 (1st Cir. 2008). The First Circuit rejected the possibilities that the referent could be "any other crime related to this case" or "the underlying drug crime or crime of violence," and held that the "more sensible[ ] referent" is "an additional minimum sentence for an underlying offense *because* of the presence of the firearm." *Id*. The First Circuit reasoned that *Whitley* was distinguishable because the "danger" in *Whitley* was the possibility of double-counting-two mandatory minimum consecutive firearms sentences could have applied for crimes involving the "*same gun.*" *Id*. In *Parker,* as here, the higher mandatory minimum sentence was supplied by a drug crime. *Id*.

But this double-counting distinction finds no support in *Whitley.* We held in *Whitley* that the "except" clause is not ambiguous—it "means what it literally says." 529 F.3d at 158. In *Whitley,* we rejected the "judicial insertion" of the words "consecutive" and "firearm" into the "except" clause. *Id*. at 153, 157-58. We noted that the Supreme Court had recently "condemn[ed] the insertion of words into a statute as 'not faithful to the statutory text,' " in *United States v. Rodriquez,* in which it "rejected the defendant's argument that 'reads [section 924(e)] as referring to 'the maximum term of imprisonment prescribed by law' for a defendant *with no prior convictions that trigger a recidivist enhancement,'* because 'that is not what [section 924(e) ] says.'" 529 F.3d at 157 n. 5 (quoting *United States v. Rodriquez,* ___ U.S. ___, 128 S. Ct. 1783, 1788-89, 170 L. Ed. 2d 719 (2008) (emphasis in original)).

We are not persuaded that the phrase "any other provision of law" is insusceptible to a plain reading.

There is a discrete set of statutory offenses which require mandatory minimum sentences-mostly for narcotics and firearm crimes, but also for murder and other dangerous weapons. *See, e.g.*, 18 U.S.C. § 175c (biological weapons); *id*. § 924 (firearms); id. § 929 (restricted ammunition); *id*. § 1111 (murder); *id*. § 2332g (missile systems); *id*. § 2332h (radiological dispersal devices); 21 U.S.C. §§ 841, 844, 860, 960 (drugs). It is plausible to understand the reference to "any other provision of law" to include this limited set of crimes for which mandatory minimum sentences apply. As amicus counsel point out, there is no indication in the statutory language that Congress intended to be more lenient to defendants with multiple convictions for firearms-related conduct than to defendants convicted of drug trafficking crimes or other violent offenses, or that it intended to draw any distinction among offenses subject to minimum sentences. Amicus Br. at 10.

The statutory scheme supports this literal reading. Section 924 is the "Penalties" section of Chapter 44, "Firearms," of Title 18 of the United States Code. If Congress had intended the "except" clause to refer only to punishments for firearms offenses, it could simply have drafted that clause to read: "except to the extent that a greater minimum sentence is otherwise provided by this *section.*" Instead, Congress chose the more expansive phrase, "this *subsection* [Section 924(a) ] or *any other provision of law.*" 18 U.S.C. 924(c)(1)(A) (emphasis added).

In holding that the "except" clause includes sentences for predicate offenses, we do not hold that the "except" clause is unbounded. The clause carves out an exception to the general rule that "any person who, dur-

ing and in relation to any crime of violence or drug trafficking crime . . . [and] in furtherance of any such crime, possesses a firearm," shall face an additional mandatory consecutive term of imprisonment. 18 U.S.C. § 924(c)(1). Thus, it is natural to read "any other provision of law" to include the penalty for the "crime of violence or drug trafficking crime," so long as the firearm was possessed "during and in relation to" or "in furtherance of" that predicate offense. *Id.* In other words, the "except" clause includes minimum sentences for predicate statutory offenses arising from the same criminal transaction or operative set of facts. An interpretation of "any other provision of law," to include, for example, provisions under which a defendant was already sentenced for a prior unrelated crime in a previous case, would be suspect. In this case, it is undisputed that the firearm possession that subjected Williams to the penalty under Section 924(c) arose from the same criminal transaction as the drug trafficking offense.[4]

The government asserts that other provisions of the statute support its structural argument that Congress intended that courts impose a consecutive, or nonconcurrent, sentence for a Section 924(c) offense without regard to the sentence imposed for the underlying predicate offense. Specifically, the statute states that (1) the graduated penalties set forth in Sections 924(c)(1)(A)(i)(iii) must be applied "*in addition to* the punishment provided for such crime of violence or drug trafficking crime," 18 U.S.C. § 924(c)(1)(A) (emphasis

---

[4] We do not adopt an interpretation of the statute that would limit the scope of the "except" clause to crimes within the same charging instrument. Such an interpretation would elevate the form of the indictment or information over the substance of the offenses.

added); *see Parker,* 549 F.3d at 11 (concluding that this language renders the literal reading of the "except" clause "suspect on its face"); and (2) "*[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 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)(D)(ii) (emphases added). The government points to this Court's recent decision in *United States v. Chavez*, which relied on this language to conclude that Section 924(c) "was plainly designed to impose penalties that are cumulative to the penalties imposed for other crimes." 549 F.3d 119, 134 (2d Cir. 2008).

To be sure, the general rule of Section 924(c) is that its penalties are cumulative. But the "except" clause is an *exception* to that rule. The government would have the rule swallow the exception. In *Whitley,* we rejected the argument that Section 924(c)(1)(D)(ii)'s prohibition on concurrent punishments would be displaced by a literal interpretation of the "except" clause.[5] If the "except" clause is read literally, and another statute provides a higher minimum penalty, the minimum punishments set forth in the subdivisions of Section

[5] The other statutory language cited by the government, which provides that the mandatory minimum sentence for the firearm is to be in addition to any penalty for the predicate "crime of violence or drug trafficking crime," was not at issue in *Whitley* because there, the higher mandatory minimum sentence was provided by the ACCA offense, which was not the predicate "crime of violence or drug trafficking crime" for purposes of the Section 924(c) count. Nonetheless, the same logic of exception applies.

924(c)(1)(A) would never be imposed at all, and thus, there would be no concurrent sentences. *See Whitley,* 529 F.3d at 158.

The government also urges this Court to adopt the Fourth Circuit's reasoning that the statute's reference to "any other provision of law" is a "safety valve" that "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" in which the defendant faces a greater mandatory minimum sentence for a predicate drug-trafficking or crime-of-violence offense. *United States v. Studifin,* 240 F.3d 415, 423 (4th Cir. 2001).[6] The Fourth Circuit based its conclusion on *United States v. Alaniz,* 235 F.3d 386, 389 (8th Cir. 2000), in which the Eighth Circuit held that the "except" clause was added just to make the statute grammatically correct. We rejected that precise line of reasoning in *Whitley,* because we failed to see any grammatical problem with the statute absent the "except" clause, and because the argument could not explain why the statute includes "the broad phrase 'or by any other provision of law.'" 529 F.3d at 154.

---

[6] *Studifin* did not give any example of a statutory provision currently on the books that could increase a sentence for a violation of Section 924(c) but is not codified within that section. This argument must be that the "except" clause allows a greater minimum sentence in the event that Congress one day enacts higher mandatory minimum sentences for Section 924(c) violations in some other section of the Code.

**C. Legislative History**

The government urges that we turn to the legislative history to fill in the purported gap in the statutory language. "Only if we discern ambiguity do we resort first to canons of statutory construction, and, if the meaning remains ambiguous, to legislative history." *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 423 (2d Cir. 2005) (citations omitted). Although we do not find the statutory terms to be ambiguous, were we to conclude that there was ambiguity, we would follow the Supreme Court's directive to "interpret ambiguous criminal statutes in favor of defendants, not prosecutors," rather than attempt to "play the part of a mind reader" divining "Congress's presumptive intent." *United States v. Santos,* ___U.S. ___, 128 S. Ct. 2020, 2026, 2028, 170 L. Ed. 2d 912 (2008). *See also United States v. Granderson,* 511 U.S. 39, 53-54, 114 S. Ct. 1259, 127 L. Ed. 2d 611 (1994) (courts must resolve ambiguities in favor of criminal defendants); *Crandon v. United States,* 494 U.S. 152, 160, 110 S. Ct. 997, 108 L. Ed. 2d 132 (1990) (when construing a criminal statute, courts are "guided by the need for fair warning"); *McNally v. United States,* 483 U.S. 350, 359-60, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987) (when confronted with "two rational readings of a criminal statute, one harsher than the other, [courts] are to choose the harsher only when Congress has spoken in clear and definite language"), *superseded by statute,* 18 U.S.C. § 1346, *as recognized by United States v. Rybicki,* 354 F.3d 124, 134 (2d Cir. 2003) (en banc).

The government argues that if Williams had been sentenced before the "except" clause was added to the statute in 1998, he would have faced both consecutive

mandatory minimum sentences, and because the sponsors of the legislation stated that their general intent was to enhance penalties, Congress could not have intended an interpretation of the statute that would subject a defendant like Williams to only one mandatory minimum sentence. The *Whitley* court ruled that the government's argument that the congressional purpose behind Section 924(c) was to increase sentences was insufficient to void the plain language of the statute. 529 F.3d at 154-55. Although Congress might have intended to enhance firearm penalties, it was not "inconsistent with that purpose for Congress to have provided a series of increased minimum sentences and also to have made a reasoned judgment that where a defendant is exposed to two minimum sentences, some of which were increased by the 1998 amended version, only the higher minimum should apply. Indeed, such a sentencing pattern seems eminently sound." *Id.* at 155.[7] There is no reason to depart from *Whitley*'s reasoning in Williams's case.[8]

---

[7] The government cites one specific statement from the legislative history that might bear on the statutory interpretation question at issue here-a statement that the bill had the "salutary aspect" of "authorizing imposition of stiffer minimum sentences if required under other provisions of law," thus "eliminat[ing] any potential inconsistency with other statutes." Gov't Supp. Br. at 17 (quoting *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. at 38 (May 8, 1997) (Statement of Thomas Hungar, formerly of the Office of the Solicitor General)). To the extent that this vague statement is consistent with the statutory text, it does not compel the government's interpretation of the "except" clause, because it begs the question of the meaning of "potential inconsistency."

[8] The government also argues that congressional acquiescence in decisions by other Circuits affirming the imposition of the mandatory pen-

**D. Anomalous Sentencing Results**

A departure from the plain text of a statute is warranted only in the rare case where the anomalous result rises to the level of a "patent absurdity," *see Hubbard v. United States,* 514 U.S. 695, 703, 115 S. Ct. 1754, 131 L. Ed. 2d 779 (1995) (quotation marks omitted), or has "no basis in reason," *see Whitley,* 540 F.3d at 89 (quotation marks omitted). *See also Clinton v. City of New York,* 524 U.S. 417, 429, 118 S. Ct. 2091, 141 L. Ed. 2d 393 (1998) (applying absurdity doctrine where there was "no plausible reason" supporting a limited plain text reading).

The government argues that Williams's construction of the "except" clause results in illogical distortions of Section 924(c). It provides the example of a defendant who possessed 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, resulting in a mandatory minimum sentence of twelve years. But if that defendant had possessed five kilograms of cocaine—ten times more—he would be subjected only to the ten-year minimum sentence under 21 U.S.C. § 841(b)(1)(A). The low-

---

alties under Section 924(c), even where greater minimum sentences apply for drug trafficking, supports its interpretation of the statute. But it is an impermissible stretch to draw any such inference in this case, due to the relatively small number of inconsistent holdings on the issue. *Cf. Evans v. United States,* 504 U.S. 255, 268-69 n. 22, 112 S. Ct. 1881, 119 L. Ed.2d 57 (1992) (inferring congressional agreement with prevailing and consistent interpretation of statute by at least nine appellate courts over 20 years in high-profile cases involving prosecutions of important officials, for example, the Governor of Oklahoma).

er seven-year minimum for brandishing the firearm would not apply. Thus, a defendant could be subjected to a lower total mandatory minimum sentence for a more severe crime.[9]

*Whitley* made note of this apparent anomaly. 529 F.3d at 156. If *Whitley*'s holding was limited to its facts, and the term "any other provision of law" meant only ACCA offenses, no anomalies would result. This is because the alternative mandatory minimum sentence under the ACCA is fifteen years, a number that would consistently trump the five- to ten-year minimums under Section 924(c)(1)(A)(i)-(iii). *See Whitley,* 529 F.3d at 157-58 (rejecting the Fourth Circuit's analysis in *Studifin* that an anomaly would result from imposing ACCA's minimum sentence in lieu of any higher sentence under Section 924(c)).

However, *Whitley* did not rely on reading an ACCA limitation into the "except" clause to reject the point regarding the potential anomaly. *Whitley*'s primary reasoning is that the anomaly "disappears upon close scrutiny" because "no court would be *required* to sentence the five-kilogram defendant to only the ten-year minimum. That defendant would face a maximum sentence of life. . . . If the 'except' clause subjected more serious drug offenders to a lower *maximum* sentence

[9] The government's brief provides two additional examples that are not anomalies per se, but rather are examples of how Williams's interpretation would result in *disparities* between the minimum sentences that would apply to less and more severe conduct-for example, a ten year minimum for possessing drugs and *brandishing* a gun, but a twenty year minimum for possessing drugs and *discharging* a gun. Similar disparities result directly from *Whitley*'s holding with respect to firearms sentences, and do not render the literal reading of the statute absurd.

than less serious drug offenders, the Government's anomaly argument would have some force." 529 F.3d at 155. Thus, a literal reading of the statute does not render it incoherent. As this Court reinforced in its decision denying the petition for rehearing: "[t]he literal wording leaves no defendant unsentenced. Indeed, . . . it leaves sentencing judges free to impose precisely the same number of years that the Government contends should have been imposed on Whitley, but authorizes them to do so as a matter of discretion, not as a requirement." *Whitley,* 540 F.3d at 89.[10]

In any event, this purported anomaly results from what, in our view, is a plain reading of the statutory text. "If, at the end of the day, Congress believes we have erred in interpreting [the statute], it remains free to correct our mistake." *American Airlines, Inc. v. Wolens,* 513 U.S. 219, 246, 115 S. Ct. 817, 130 L. Ed. 2d 715 (1995) (O'Connor, J., concurring in part and dissenting in part); *see also Clark v. Martinez,* 543 U.S. 371, 386, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005).

---

[10] Moreover, as amicus counsel argues, the United States Sentencing Guidelines themselves resolve the specific anomaly highlighted by the government. Under the Guidelines, the low end of the sentencing range for a defendant convicted of possession of five kilograms of cocaine, assuming no criminal history, would be twelve years and seven months, which is longer than the twelve-year minimum applicable to a defendant in possession of only 500 grams of cocaine. The government's response is that the Guidelines would not help a judge who seeks to sentence both defendants to the lowest possible sentence allowed by the statute. But the hypothetical judge could increase the sentence of the defendant who was not subjected to double mandatory minimum sentences to achieve parity.

**II. Williams's Challenges to his Conviction**

Williams challenges the sufficiency of the evidence underlying his conviction, arguing that there was no evidence demonstrating that he knowingly possessed the crack cocaine and firearm that were recovered from the vehicle. In reviewing the sufficiency of the evidence, we must "view the evidence presented in the light most favorable to the government, and . . . draw all reasonable inferences in its favor." *United States v. Autuori*, 212 F.3d 105, 114 (2d Cir. 2000). The verdict must be sustained if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). The evidence presented at trial was sufficient to permit a rational juror to conclude beyond a reasonable doubt that: Williams possessed the firearm (his fingerprints were on the gun magazine;[11] it was in the car he was driving); Williams possessed the crack cocaine with an intent to distribute (the car had a narcotics odor; the drugs were in the same compartment as the firearm; there were 180 small bags containing over 150 grams of cocaine; he had $1,100 and six cellular phones in the car); and that the gun was used in connection with the firearms offense (the gun and the drugs were found in the same hidden compart-

[11] Williams testified at trial that his fingerprints appeared on the gun magazine because police officers had handed him the gun magazine at the precinct. In rebuttal, two police officers testified that Williams did not touch the weapons at the precinct. The jury certainly could have inferred from the officers's testimony that Williams's fingerprints were on the gun magazine before the arrest and, indeed, that Williams testified falsely in order to conceal his knowledge of what was in the car's hidden compartment.

ment). Thus, we reject Williams's challenge to the sufficiency of the evidence.

Williams also argues that his trial counsel was ineffective for stipulating to the fact that the gun and drugs were found during an inventory search of the car following his arrest. Williams argues that this stipulation was inconsistent with the alleged theory of the defense: to wit, that Williams was framed by the police. We decline to deviate from our "baseline aversion to resolving ineffectiveness claims on direct review" in this case, because the factual record on the issue is not fully developed and resolution of the issue is not beyond doubt. *See United States v. Khedr,* 343 F.3d 96, 99-100 (2d Cir. 2003) (quotation marks omitted). Williams's ineffectiveness claim can be better developed in the district court on a motion under 28 U.S.C. § 2255. *Id.* at 100.

**III. Remand for Resentencing**

Williams also challenges the constitutionality of the crack-to-powder cocaine sentencing ratio, which was integral to the calculation of his base offense levels and sentencing range on the narcotics count under the United States Sentencing Guidelines. The government concedes that the record does not establish whether the district court was cognizant of its ability to impose a non-Guidelines sentence based on the disparity between sentencing for crack and powder cocaine offenses, and that therefore, remand is appropriate pursuant to *United States v. Regalado,* 518 F.3d 143, 149 (2d Cir. 2008).

Therefore, we remand for resentencing pursuant to *Regalado* and consistent with our holding that Williams is not subject to the mandatory consecutive five-year minimum for the firearm conviction under Section

924(c). Upon resentencing, Williams remains subject to the ten-year minimum statutory sentence for his drug trafficking crime, "and the sentencing judge retains authority to select any appropriate sentence, consistent with 18 U.S.C. § 3553(a), whether or not pursuant to the Guidelines, above that minimum." *Whitley,* 529 F.3d at 158 (footnote omitted). In light of our decision to remand, we reject, as premature, Williams's challenge to the substantive reasonability of his sentence.

## CONCLUSION

For the foregoing reasons, we affirm Williams's conviction and remand to the district court for resentencing.

**APPENDIX B**

**APPENDIX C**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

---

Docket Number: 07-2436-cr

UNITED STATES OF AMERICA, APPELLEE

*v.*

LEON WILLIAMS, DEFENDANT-APPELLANT

---

[Filed: June 22, 2009]

---

**ORDER**

---

Appellee United States of America having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

[SEAL OMITTED]

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: FRANK PEREZ
FRANK PEREZ, Deputy Clerk

## APPENDIX D

18 U.S.C. 924(c) provides:

**Penalties**

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

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

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

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler,

the person shall be sentenced to a term of imprisonment of not less than 30 years.

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

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

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

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

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

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

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

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

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

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

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

(ii) if the killing is manslaughter (as defined in Section 1112), be punished as provided in Section 1112.