AWFUL GRAMMAR: TOWARD A RESOLUTION OF 924(C)'S UNIT OF PROSECUTION

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I. INTRODUCTION

18 U.S.C. § 924(c) has been a constant source of frustration among courts and commentators, and given its many vague and ambiguous provisions, has operated as a particularly powerful instrument of prosecutorial sentencing discretion. Not least among its troublesome provisions is subsection 924(c)(1)(A), which provides for a mandatory minimum sentence for any defendant found guilty of using or carrying a firearm during and in relation to a crime of violence or drug crime.[1] Although much ink has been spilt over what conduct counts as "using or carrying" a firearm under the statute, as well as over the question whether particular predicate offenses count as "violent crimes" or "drug crimes," federal courts have been quietly laboring over the question of precisely what conduct prosecutors must prove in order to obtain convictions on multiple 924(c) counts where the defendant used or

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1. 18 U.S.C. § 924(c)(1)(A) (2018). Defendants may likewise be punished for "possessing" a firearm "in furtherance of" a violent crime or a drug crime. *Id.*

carried a firearm just once, but managed to commit several qualifying crimes of violence or drug crimes in the process.

How courts answer this question can make an immense difference to a defendant's sentence. Any sentence imposed under 924(c) must run consecutive to any other sentence, including those for other 924(c) violations and for the predicate crimes of violence or drug crimes themselves.[2] For example, a first-time offender convicted of three 924(c) violations corresponding to three crimes of violence would serve, in addition to the sentences imposed for the violent crimes, a minimum of 15 years.[3] If the defendant had previously been convicted under 924(c), he would serve a minimum of 75 years in prison.[4] These sentences may perhaps be appropriate where a defendant has, on at least three separate occasions, wielded a firearm in the commission of a violent crime. However, sentences like these—and others yet more severe—are frequently imposed in cases where the defendant used a firearm just once, but the government was able to charge multiple crimes of violence or drug crimes as a result of that conduct.

One of the more extreme examples of this occurred in a recent case out of the Sixth Circuit, *United States v. Chapman*.[5] The defendant, Chapman, had participated in a retaliatory gang shooting on two separate occasions.[6] However, on both occasions, Chapman (along with others) fired a gun into a house occupied by four individuals.[7] Chapman was subsequently convicted of eight counts of attempt to commit murder in aid of racketeering (one count for each individual in the two homes) and eight corresponding 924(c) violations.[8] For using a firearm just twice, Chapman was sentenced to 183 years in prison to run consecutive to a 30-year sentence for the underlying attempted murder charges.[9] His sentence was upheld on appeal on the ground that the eight 924(c) convictions did not violate double jeopardy because "[e]ach § 924(c) conviction was based upon different underlying convictions."[10]

Such a sentence could be attacked on multiple grounds. One could argue that it is excessive, unjust, cruel and unusual, or that it ignores the rule of lenity, viz. that where it is unclear whether Congress intended

2. 18 U.S.C. § 924(c)(1)(A).
3. 18 U.S.C. § 924(c)(1)(A)(i).
4. 18 U.S.C. § 924(c)(1)(C)(i).
5. United States v. Chapman, 551 F. App'x 850 (6th Cir. 2014).
6. *Id.* at 851.
7. *Id.*
8. *Id.* at 852.
9. *Id.*
10. *Id.* at 854.

such a result, all doubt should be resolved in the defendant's favor.[11] This Note, however, focuses solely on the analytical path that courts have taken in answering whether section 924(c), by its own terms, permits multiple punishments where the defendant has used a firearm just once to commit multiple predicate crimes of violence or drug crimes.

To that end, Part II of this Note sets out the drafting and legislative background of section 924(c). Part III analyzes the relevant caselaw and identifies three different approaches adopted by the federal circuits to resolve the question whether the single use of a firearm to commit multiple predicate offenses can support multiple prosecutions. Part III also critically considers the propriety of these three approaches in light of both the recent passage of the First Step Act of 2018 and a proper reading of the Supreme Court's double jeopardy jurisprudence. Part III.C argues that the only proper approach to determining the number of 924(c) convictions that a prosecutor may rightfully obtain is to determine the statute's allowable unit of prosecution. Part III.C concludes that a proper application of the unit of prosecution analysis prohibits prosecutors from obtaining multiple convictions under 924(c) where the defendant used or carried a firearm only once but as a result was charged with multiple predicate crimes of violence or drug crimes.

II. BACKGROUND

Congress enacted section 924(c) in its original form on June 19, 1968 as part of the Omnibus Crime Control and Safe Streets Act of 1968, which provided that firearms used in violation of the criminal law were subject to seizure and forfeiture.[12] However, in response to a spate of high profile assassinations[13] and growing public support for stricter gun regulation, Congress sought to strengthen the penalty provisions in order to "persuade the man who is tempted to commit a Federal felony to leave his gun at home."[14] To that end, the House adopted a substitute amendment offered by Representative Poff of Virginia on July 19, 1968,[15] which provided that

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11. *See* MONTESQUIEU, THE SPIRIT OF THE LAWS 76 (Anne M. Cohler et al. trans., 2018) ("In republican government, it is in the nature of the constitution for judges to follow the letter of the law. No law can be interpreted to the detriment of a citizen when it is a question of his goods, his honor, or his life.").

12. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 902, 82 Stat. 233.

13. *See* 114 CONG. REC. 22,263 (1968).

14. *Id.* at 22,231.

15. *Id.* at 22,248. Representative Poff's Amendment was offered as a substitute for a similar amendment offered by Representative Casey of Texas. *Id.* at 22,231. They

> Whoever—
>
> (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States,
>
> shall be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than five years nor more than twenty-five years. The execution or imposition of any term of imprisonment imposed under this subsection may not be suspended, and probation may not be granted. Any term of imprisonment imposed under this subsection may not be imposed to run concurrently with any term of imprisonment imposed for the commission of such felony.[16]

Having been offered and adopted on the same day, the legislative history of the Poff Amendment (and, therefore, of section 924(c) itself) is sparse. Congressional hearings and committee reports—typical indicia of legislative intent—simply do not exist.[17] Though the floor debates regarding the Poff Amendment do not expressly reveal Congress's intent with regard to the appropriate unit of prosecution, Representative Poff stated its purpose as bringing home to the would-be felon "that if he uses his gun and is caught and convicted, he is going to jail . . . [and] that if he

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differed principally in that the Poff Amendment would (1) limit the predicate offenses to which a section 924(c) violation could attach to federal felonies (whereas the Casey Amendment brought state and federal robbery, assault, murder, rape, burglary, kidnapping, and homicide statutes within the ambit of section 924(c), which raised federalism and other constitutional concerns); (2) reduce the mandatory sentences from 10 years to one-to-10 years for a first conviction, and from 25 years to five-to-25 years for a second or subsequent conviction; (3) provide that the penalties imposed under the statute could not be suspended, nor probation granted; and (4) require sentencing courts to run the sentence imposed under section 924(c) consecutive to the sentence imposed for the predicate felony.

16. *Id.* at 22,231.

17. *See* Busic v. United States, 446 U.S. 398, 405 (1980) (noting that the legislative history of section 924(c) is limited to "the sparse pages of floor debate" that preceded passage of the Poff Amendment).

does so a second time, he is going to jail for a longer time."[18] The House version of the bill was considered by the Conference Committee[19] and emerged on October 9, 1968 with notable changes to its language:

> Whoever—
>
> > (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or
> >
> > (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States,
>
> shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than five years nor more than 25 years, and, not withstanding any other provision of law, the court shall not suspend the sentence of such person or give him a probationary sentence.[20]

Absent from the Committee version of the bill was any requirement that the sentence imposed for the 924(c) violation be served consecutive to the sentence imposed for the underlying felony. Despite considerable opposition to the updated amendment—including by Representative Poff himself[21]—this version was ultimately passed by both houses on October 22, 1968 and signed into law as part of the Gun Control Act of 1968.[22]

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18. 114 CONG. REC. 22,231 (1968).

19. *Id.* at 30,176.

20. *Id.* at 30,179.

21. *Id.* at 30,579–83, 30,587. The version of the amendment that emerged from the Committee differed from the Poff Amendment in two respects. First, it left the determination whether to impose the minimum sentence provision on first-time offenders to the discretion of sentencing courts. *Id.* at 30,578. Second, it permitted sentencing courts to run a sentence imposed under section 924(c) concurrently with the sentence imposed for the predicate felony. *Id.* Representative Cramer of Florida lamented that leaving it to the discretion of sentencing courts whether to suspend a first-time offender's sentence or to grant him probation "permits one to have the first bite," and that the possibility of avoiding a term of imprisonment for the first conviction would fail to deter "such people as those who assassinated the President, Martin Luther King, and others[.]" *Id.* at 30,579. Representative Poff and others concluded that the changes in the final version eliminated the deterrent effect of the provision altogether because it no longer carried with it the certainty of punishment. *Id.* at 30,580–83.

22. *See* Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1224.

However, Congress quickly amended section 924(c) in January 1971 as part of the Omnibus Crime Control Act of 1970.[23] The amended statute included the text of a bill offered by Senator Mansfield in February 1969, which reintroduced the requirement that any sentence imposed under section 924(c) run consecutive to the underlying felony.[24] Senator Mansfield stated that the amendment would compel the criminal "to serve additional time in prison solely for deciding to use a firearm," and that "in the case of a criminal gun user who employs this weapon of violence a second time[,]" a 25-year sentence must be imposed.[25] Later the same year, Senator Mansfield introduced an amendment that reduced the minimum sentence for second or subsequent convictions from 25 years to two-to-25 years, and clarified that courts remained free to suspend the sentence of a *first-time* offender or to grant him probation.[26] In support of his amendment, Senator Mansfield stated:

> This bill provides for the first time a separate and additional penalty for the mere act of choosing to use or carry a gun in committing a crime under Federal law. If that choice is made more than once, the offender can in no way avoid a prison sentence regardless of the circumstances.[27]

Subsequent amendments over the course of the decades that followed further enhanced the penalties that must be imposed under section 924(c). In 1984, Congress amended the statute to require that any sentence imposed under the statute's provisions run consecutive to "any other term of imprisonment," including the sentence imposed for the underlying offense.[28] Thus, for the first time, in cases where a defendant was convicted of more than one violation of section 924(c), courts were required to run the sentences for each section 924(c) conviction consecutive to one another.[29] Additionally, under the 1984 amendment, the scope of predicate offenses to which a section 924(c) conviction could attach was changed from federal "felonies" to "crimes of

23. Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, § 13, 84 Stat. 1880, 1889–90 (1971).

24. *See* 115 CONG. REC. 2567–68 (1969).

25. *Id.*

26. *Id.* at 34,838.

27. *Id.*

28. Act of Oct. 12, 1984, Pub. L. No. 98-473, § 1005, 98 Stat. 1837, 2138–39.

29. *Cf.* Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, § 13, 84 Stat. 1880, 1889–90 (1971) (providing, "nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission *of such felony*" where "such felony" refers to the underlying predicate offense, not other 924(c) violations) (emphasis added).

violence."[30] The mandatory sentencing ranges were replaced with fixed, mandatory sentences,[31] and the sentencing court's discretion to suspend the sentence of first-time offenders or to grant them probation was eliminated.[32]

Section 924(c) was amended several more times between 1984 and 1998, with each new revision expanding the scope of the statute or enhancing the penalties, or both.[33] Notably, the 1998 reformulation "changed what were once mandatory sentences into mandatory minimum sentences."[34] Thus, the language of the 1998 amendment, which remained unaltered until 2018, provided in relevant part:

> (c)(1)(A) . . . [A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . 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 . . .
>
> (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 . . .
>
> (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

30. § 1005, 98 Stat. at 2138.

31. Prior to the amendment, first-time offenders were required to be sentenced to a term of years within a 1 to 10-year range, and second or subsequent offenders would be sentenced within a 2 to 25-year range. *Id.* Under the new sentencing scheme, first-time and second or subsequent offenders were required to be sentenced to a flat 5 years and 10 years, respectively. § 1005, 98 Stat. at 2138.

32. *Id.* at 2139.

33. Abbot v. United States, 562 U.S. 8, 23–24 & n.6 (2010).

34. *Id.* at 17 (internal citation omitted); An Act to throttle criminal use of guns, Pub. L. No. 105-386, § 1, 112 Stat. 3469 (1998).

> (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.[35]

Although the drafting history of section 924(c) reveals Congress's intent to impose increasingly severe punishments on the criminal who uses, carries, or possesses a firearm in the commission of a crime of violence or a drug crime, courts have found Congressional intent unclear with respect to whether the single use of a firearm to commit multiple, simultaneous predicate crimes of violence or drug crimes can support multiple prosecutions.[36] Is the number of allowable prosecutions equal to the number of underlying crimes of violence or drug crimes regardless of the number of times the defendant used, carried, or possessed a firearm? Or is it equal to the number of times that a defendant used, carried, or possessed a firearm, regardless of how many crimes of violence or drug trafficking crimes he committed while doing so?[37] As courts have noted, application of section 924(c) in these circumstances can be extremely difficult, as evidenced by the "wildly divergent interpretations" of the statute both within and among the circuits.[38]

In light of the various interpretive approaches taken by courts, and given the inconsistent outcomes in cases that require consideration of these questions, some courts and commentators have concluded that section 924(c)(1)(A) is fundamentally ambiguous.[39] In order, then, to avoid imposing draconian sentences like that imposed in *Chapman*, appeal is often made either to the rule of lenity or to the U.S. Constitution's prohibition on cruel and unusual punishments.[40] However, as evidenced by the fact that some courts *have* permitted multiple prosecutions where the defendant has used, carried, or possessed a firearm just once,[41] and given the fact that courts have treated the scope of what is considered "cruel and unusual" as presenting, essentially, a

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35. § 1, 112 Stat. at 3469–70 (codified as amended at 18 U.S.C. § 924(c) (2006)).

36. *See generally* John F. Stinneford, *Dividing Crime, Multiplying Punishments*, 48 U.C. DAVIS L. REV. 1955 (2015).

37. *See infra* Section III.C.

38. United States v. Finley, 245 F.3d 199, 206 (2d Cir. 2001).

39. *See id.*; Stinneford, *supra* note 36, at 1975 (concluding that it would be consistent with the text of 924(c)(1)(A) to treat either the use, carry, or possession of the firearm *or* the predicate offense as the allowable unit of prosecution).

40. *See generally* Stinneford, *supra* note 36.

41. *See infra* Section III.A.1–2.

political question, resort to constitutional and policy arguments are largely ineffective.[42] In any case, resort to these extra-textual arguments may be unnecessary. Through identifying and examining the merits of the various interpretive approaches courts have taken, a resolution of the question emerges.

III. ANALYSIS

Courts have struggled to develop a consistent approach to applying section 924(c)(1) in circumstances where the government charges multiple violations predicated on the single use of a firearm to commit multiple simultaneous—or *near* simultaneous—crimes of violence or drug crimes. Indeed, at least three different approaches are apparent.

A. The Double Jeopardy Approach

1. Origin and Application

Some circuits focus squarely on whether multiple section 924(c) convictions are multiplicitous in violation of the Double Jeopardy Clause of the U.S. Constitution.[43] To that end, courts apply the "same-elements" test announced by the Supreme Court in *Blockburger v. United States*, which held that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." [44]

The Third Circuit in *United States v. Casiano* held that, under *Blockburger*, "it is unquestionable" that as long as the underlying predicate offenses are properly charged as separate crimes, they may serve as separate predicates for section 924(c) convictions, even when they arise out of the same underlying occurrence.[45] The defendants had stolen a van, forcing its owner to lie down in the back as they sped away.[46] Both were convicted of one count of conspiracy to commit carjacking and kidnapping as well as substantive counts of carjacking and kidnapping.[47] In addition, both defendants were convicted of two counts of using a firearm during and in relation to a crime of violence in

42. Stinneford, *supra* note 36, at 1964–82.

43. U.S. CONST. amend. V (providing in relevant part, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb").

44. *See* Blockburger v. United States, 284 U.S. 299, 304 (1932).

45. United States v. Casiano, 113 F.3d 420, 426 (3d Cir. 1997).

46. *Id.* at 423.

47. *Id.*

violation of section 924(c).[48] The court upheld their respective 924(c) convictions, reasoning that section 924(c) "speaks in terms of 'conviction,' not criminal episode,"[49] and that "Congress specifically commanded that the enhancement would apply to 'any' crime of violence without regard to temporal considerations."[50]

Similar approaches can be found in cases out of the Fourth, Eighth, Ninth, and Eleventh Circuits, albeit with some interesting variations among them.[51] For example, finding no ambiguity in section 924(c), the Fourth Circuit in *United States v. Luskin* reasoned that only the Double Jeopardy Clause stands as a limitation on consecutive sentences under section 924(c).[52] Therefore, the *Luskin* court held, "[a]s long as the underlying crimes are not identical under the *Blockburger* analysis, then consecutive section 924(c) sentences are permissible."[53]

2. *Blockburger: The Wrong Double Jeopardy Test*

The fact that the *Blockburger* Court limited the rule to prosecutions of "two distinct statutory provisions" would seem to render the rule inapplicable to the question whether multiple prosecutions are permitted *under the same statutory provision*. This distinction is not merely academic. Courts have long treated the double jeopardy issue as essentially a question of statutory construction, i.e. determining the intent of Congress.[54] With respect to two statutory provisions, when one provision requires proof of a fact that the other does not, it indicates that the statutes are intended to punish different, if overlapping, conduct, and that the legislature intended that punishments be imposed separately for

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48. *Id.*

49. *See infra* Section I.B.2. The *Casiano* court cites Deal v. United States, 508 U.S. 129 (1993) for this proposition. However, as discussed below, *Deal* was concerned with whether the mandatory minimum penalty of 25 years (under the sentence enhancement provision at section 924(c)(1)(C)) applied where a defendant was convicted of multiple 924(c) violations in the same proceeding. Whether *the subsequent convictions themselves* can be sustained when predicated on the single use of a firearm to commit multiple predicate offenses appears to be an entirely different question. For a more in-depth discussion of *Deal*, see *infra* Part II.B.

50. *Casiano*, 113 F.3d at 424–25.

51. *See, e.g.*, United States v. Richards, 721 F. App'x 843 (11th Cir. 2017) (citing United States v. Rahim, 431 F.3d 753 (11th Cir. 2005)); United States v. Sandstrom, 594 F.3d 634 (8th Cir. 2010); United States v. Andrews, 75 F.3d 552 (9th Cir. 1996); United States v. Luskin, 926 F.2d 372 (4th Cir. 1991).

52. *Luskin*, 926 F.2d at 377–78 (discussing the holdings of out-of-circuit cases with approval).

53. *Id.* at 377.

54. *See* Whalen v. United States, 445 U.S. 684, 688 (1980) (collecting cases).

each.[55] Thus, to apply the *Blockburger* rule to a solitary statute like 924(c) appears on its very face to be improper.

Whether "[a] single act may be an offense against two statutes" is fundamentally a different question from whether a single act may be two or three or four offenses against the same statute. The first question requires nothing more than looking to the elements of the criminal statutes themselves and asking, "Does *this statute* require proof of an element not present in the other? If so, does *this other statute* require proof of an element not present in the first?"[56] A single provision is simply not susceptible to such inquiry. Or if it is, the answer is surely, "No."

To hold, as the Eighth Circuit did in *United States v. Sandstrom*, that no double jeopardy problem arises (and therefore Congress intended multiple punishments) because one 924(c) count charges the defendant with using a firearm to commit *this* predicate offense and the other 924(c) count charges the defendant with using a firearm to commit *that* predicate offense impermissibly bootstraps the *Blockburger* analysis as applied to the separate predicate offenses into an entirely separate statute, 924(c), which requires proof of its own additional facts—all the while neglecting entirely to ask whether Congress intended for *that statute* to permit multiple punishments for the same conduct. To answer the latter question, courts must demand more of the government before they conclude that Congress intended the structure of 924(c) to resemble a Matryoshka doll. For these reasons, the *Blockburger* standard utterly fails as a test for whether section 924(c) permits multiple prosecutions for the single use of a firearm to commit multiple predicate offenses.

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55. Blockburger v. United States, 284 U.S. 299, 304 (1932) (quoting Morey v. Commonwealth, 108 Mass. 433, 434 (1871)).

56. *See* Iannelli v. United States, 420 U.S. 770, 785 n.17 (1975) (stressing that application of the *Blockburger* test "focuses on the statutory elements of the offense"). Defendants in *Iannelli* were convicted of both conspiracy to conduct an illegal gambling business and the substantive offense of conducting an illegal gambling business. *Id.* at 771–72. Looking strictly at the elements of those offenses (18 U.S.C. § 371 (2018) and 18 U.S.C. § 1955 (2018), respectively), the court found that the prosecution of both statutes did not violate the double jeopardy clause because conspiracy requires proof of an agreement (which the substantive offense does not) and the substantive offense requires proof that defendants did "conduct, finance, manage, supervise, direct, or own all or part of an illegal gambling business" (which the conspiracy offense does not). *Id.* at 785 n.17 (quoting § 1955) (internal quotation marks omitted).

B. The "Second or Subsequent Conviction" Approach

1. Origin and Application

Although the Supreme Court has never had occasion to decide whether the single use of a firearm to commit multiple, simultaneous predicate offenses can support multiple 924(c) convictions, it came close enough to doing so in *Deal v. United States*[57] that a minority of courts appear to consider *Deal* dispositive.[58] At issue in *Deal* was whether a defendant convicted of multiple counts under section 924(c) in a single proceeding could be sentenced to the enhanced 25-year mandatory minimum under the statute's "second or subsequent conviction" clause.[59]

The defendant had used a firearm to commit six bank robberies on six different occasions over the course of several months.[60] Once caught, he was charged in a single indictment with, among other things, six counts of bank robbery and six counts of corresponding 924(c) violations.[61] Upon conviction, the district court sentenced the defendant to five years on the first count under section 924(c) and 20 years for each additional count for a total of 105 years (in addition to his sentences on the bank robbery charges).[62] On appeal, the defendant argued that the word "conviction" is ambiguous, and could mean either "the return of jury verdicts of guilt or the entry of a final judgment on that verdict."[63] Thus, the defendant argued, the statute is ambiguous and should, under the rule of lenity, be construed in a manner that yields a shorter sentence.[64]

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57. 508 U.S. 129 (1993).

58. *See infra* Section I.C.2.

59. *Deal*, 508 U.S. at 131.

60. *Id.* at 130.

61. *Id.*

62. *Id.* at 131.

63. Brief for Petitioner at 4, Deal v. United States, 508 U.S. 129 (1993) (No. 91-8199). Presumably, under the first possible meaning, the "second or subsequent conviction" enhancement would apply to all 924(c) counts beyond the first, even where they are charged in the same indictment, because the trier of fact necessarily renders a "verdict of guilt" *in time*. Thus, each guilty verdict—and, therefore, each "conviction"—is pronounced "second or subsequent" to the one that came before it. However, under the second possible meaning, the enhanced penalty would apparently not apply because an entry of a final judgment on all counts occurs at a single point in time and, therefore, no one 924(c) conviction comes "second or subsequent" to any other. The defendant is convicted of all 924(c) counts simultaneously.

64. *Id.* at 24. Under the rule of lenity, courts interpret ambiguous statutes in favor of the defendant, not the government. Ladner v. United States, 358 U.S. 169, 177–78 (1958).

However, the Court disagreed, reasoning that in light of the awkward—even impracticable—result that would follow from construing "conviction" to mean "entry of final judgment,"[65] there was "utterly no ambiguity" and, therefore, no occasion to apply the rule of lenity.[66] The majority held that the meaning of "conviction" clearly entails nothing more than a finding of guilt by a judge or jury, and therefore the sentencing enhancement provision may be applied to multiple 924(c) convictions charged in the same indictment.[67]

A minority of circuits find the Supreme Court's decision in *Deal v. United States* dispositive of the question whether the single use of a firearm to commit multiple predicate offenses can support multiple 924(c) convictions. The Ninth Circuit in *United States v. Andrews*, after concluding that the double jeopardy clause poses no barrier to multiple 924(c) convictions even where the predicate offenses occur "virtually simultaneously," held that the "second or subsequent conviction" clause of section 924(c)(1)(A)(i), as construed by the Court in *Deal*, requires the imposition of 25-year consecutive mandatory minimum sentences for each additional section 924(c) violation, regardless of the circumstances.[68]

Similarly, the Third Circuit in *United States v. Casiano* found the Supreme Court's reasoning in *Deal* to be decisive:

> Just as the Supreme Court in *Deal* declined to differentiate between convictions embodied in separate judgments and those embodied in separate charges in the same indictment, so also we cannot distinguish between criminal acts that occur over a period of time and/or affect various victims and those that result from the same course of criminal activity and involve one victim.[69]

The *Casiano* court emphasized that under *Deal*, "'conviction' means 'the finding of guilt by a judge or jury that necessarily precedes the entry

65. *Deal*, 508 U.S. at 132. The Court noted that a "judgment of conviction" entails both the adjudication of guilt and the imposition of a sentence. *Id.* Thus, construing "conviction" to mean "judgment of conviction" would lead to the awkward result that after a second or subsequent "judgment of conviction" was entered (which includes the imposition of a sentence), the statute would require imposition of a 25-year mandatory minimum sentence. *See id.* However, by that point the sentence has already been imposed. *Id.* Thus, under the defendant's construction of "conviction," section 924(c) would dictate the following (impossible) conditional statement: If second or subsequent [judgment of guilt + *sentence*], then impose 25-year mandatory minimum *sentence*.

66. *Id.* at 135.

67. *See id.* at 137.

68. United States v. Andrews, 75 F.3d 552, 558 (9th Cir. 1996).

69. United States v. Casiano, 113 F.3d 420, 425 (3d Cir. 1997).

of a final judgment of conviction,' and . . . more than one 'conviction' can occur in a single proceeding."[70] The defendants attempted to distinguish *Deal* on the facts—noting that the defendant in *Deal* had committed six robberies "*distinct in time* and *with distinct victims*[,]"[71] where here, the defendants had used a gun only once to commit multiple § 924(c)(1) offenses "which occur[ed] at the *same time. within a single criminal episode.* [and] *with a single victim.*"[72] However, the defendant's efforts were unsuccessful, and the *Casiano* court concluded that the enhanced mandatory minimum sentence must be imposed for second or subsequent 924(c) convictions, "notwithstanding a factual nexus between the predicate offenses."[73] In this way, the court, in relying on *Deal*, appeared to view the issue as presenting a sentencing question rather than one concerning the propriety of the convictions themselves.[74]

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70. *Id.* (quoting *Deal*, 508 U.S. at 131–32).

71. Brief for Appellant at 14, United States v. Casiano, 113 F.3d 420 (3d Cir. 1997) (No. 96-1256).

72. *Id.* at 10. Defendants argued further, "No appellate decision exists in which the predicate acts occur simultaneously." *Id.* at 16.

73. *Casiano*, 113 F.3d at 425.

74. There is one point of interest buried in the *Deal* record that touches on the question. In the following exchange at oral argument, Justice Kennedy asked the attorney for the United States, Miguel A. Estrada, what the result would be if a defendant committed two crimes of violence as part of the same criminal episode:

> Kennedy, J.: I suppose, Mr. Estrada, that if a person robs a single bank on a single day and takes both money and Government securities as part of the hold up and there are two counts, that the consecutive sentence rule or the enhanced sentence rule would apply here?
>
> Mr. Estrada: It is generally the case, Justice Kennedy, that if a person is guilty of two crimes of violence that he does as part of the same episode, it is true that two 924(c) crimes could be charged. I don't understand the facts that you gave me as really raising that, because I don't think that the separate taking of the bonds as part of the same bank robbery would necessarily be a separate crime of violence.
>
> Kennedy, J.: Well, suppose there were two counts charged. I certainly think that it would be more serious to take bonds and money than just money. Suppose two counts were charged. What would be the result under this statute?
>
> Mr. Estrada: I am answering yes to your question, Justice Kennedy. If a person, as part of a single criminal episode, is guilty of more than one crime of violence or drug trafficking crime, it is in fact the case under our reading of the statute that if he uses a firearm with respect to each of those crimes and thereby makes more grave each of them, that he would be subject to two separate counts under section 924(c).
>
> Kennedy, J.: Even though it's really one episode.

2. The First Step Act of 2018[75]

In a seemingly rare example of broad bipartisan collaboration and consensus,[76] Congress enacted, and on December 21, 2018 President Trump signed into law, the First Step Act of 2018 (FSA or Act), which included an amendment that sought to, inter alia, clarify the language of section 924(c).[77] Under the FSA, the "second or subsequent conviction" language of section 924(c)(1)(C) was eliminated and replaced with language making it clear that the enhanced 25-year mandatory minimum sentence applies only where a defendant violates 924(c) after a prior 924(c) conviction has become final.[78] Thus, as amended, the statute reads:

> (c)(1)(A) . . . [A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . 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,

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> Mr. Estrada: That is right. And in other circumstances where Congress has thought that type of a circumstance significant, for example in section 924(e), it has expressly stated that the crimes must be, must happen on occasions different from one another. And Congress knows fairly well to write, how to deal with that type of issue if it thinks it should make a difference.

Transcript of Oral Argument at 31–32, Deal v. United States, 508 U.S. 129 (1993) (No. 91-8199).

75. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194. Congress used Senate bill 756, the Save Our Seas Act, as a legislative vehicle for the First Step Act, *see* 164 CONG. REC. D1284-01, 2018 WL 6577324 (Dec. 13, 2018), presumably in order to get the bill to the President's desk before the conclusion of the 2018 legislative session. Thus, the First Step Act—solely targeted at criminal justice reform—is officially "An Act to reauthorize and amend the Marine Debris Act to promote international action to reduce marine debris, and for other purposes." *Id.*

76. *See* C-SPAN, *Word for Word: Pres. Trump Signs Criminal Justice Reform Bills Into Law (C-SPAN)*, YOUTUBE (Dec. 21, 2018), https://www.youtube.com/watch?v=mLjxbGlyuYA [http://web.archive.org/web/20191013222320/https://www.youtube.com/watch?v=mLjxbGlyuYA]; Remarks by President Trump at Signing Ceremony for S.756, The "First Step Act of 2018," The White House, Office of Communications, 2018 WL 67158569, at *2–16 (Dec. 21, 2017). *But see* Tom Cotton, *What's Really in Congress's Justice-Reform Bill*, NAT'L REV. (Nov. 26, 2018, 10:48 AM), https://www.nationalreview.com/2018/11/first-step-criminal-justice-reform-bill-whats-in-it/ [http://web.archive.org/web/20191013222553/https://www.nationalreview.com/2018/11/first-step-criminal-justice-reform-bill-whats-in-it/].

77. First Step Act § 403.

78. *Id.*

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 . . .

(C) In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall—

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

(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.[79]

Whether this new language has any impact on the circuit split regarding whether multiple 924(c) convictions may be predicated on the single use of a firearm to commit multiple, simultaneous offenses remains to be seen. However, to the extent that courts had relied on the "second or subsequent conviction" clause in resolving that question, the continuing validity of those decisions is in doubt.

3. The Death of Deal

Although not stated explicitly in the language of the Act, section 403 of the FSA was almost certainly intended as a direct repudiation of the majority opinion in *Deal*. Courts and commentators had long lamented the draconian sentences that judges were required to impose under the *Deal* Court's interpretation of "second or subsequent conviction," [80]

79. *See id.* (amending 18 U.S.C. § 924(c)(1)(C) (2006)).

80. *See* Rachel E. Moore, *Giving It Another Shot: A Reexamination of the "Second or Subsequent Conviction" Language of the Firearm Possession Sentencing Statute*, 64

especially in cases where the defendant was technically a first-time offender.[81] Prior to *Deal*—and with the exception of only a couple of courts—judges interpreted the "second or subsequent conviction" provision to have no application to multiple 924(c) violations charged in a single indictment, and would either run the sentences concurrently or impose multiple five-year sentences.[82] *Deal* put a definitive end to this practice but was roundly criticized for having done so.[83]

Further evidence of Congress's repudiation of the *Deal* decision can be discerned from the text of the FSA amendment itself. The majority opinion in *Deal* was met with a vigorous dissent written by Justice Stevens and joined by Justices Blackmun and O'Connor.[84] The dissent concluded, on the basis of its reading of the "second or subsequent conviction" provision *in pari materia*, and in light of its meaning as a legal term of art in 1968, that Congress intended "subsequent" to describe "only those offenses committed after a prior conviction has become final."[85] The text of section 403 of the FSA tracks the dissenting opinion almost verbatim.[86]

VAND. L. REV. 1005, 1020–26 (2011) (discussing several district and appellate court opinions evidencing the court's reluctance in applying *Deal*).

81. The defendants were only "technically" first-time offenders in some of these cases insofar as they did not have any prior convictions under the statute. However, many of them had used a gun multiple times to commit multiple offenses on separate occasions—the violations were merely charged within a single indictment. Had the prosecutor chosen to bring each charge separately and obtained convictions in separate trials, then perhaps in each trial after the first, the defendant would technically be a "repeat" offender. However, to the extent that a "first-time offender" simply means one who has yet to have been caught and suffered the deterrent effect of a prison sentence or other punishment, then perhaps it is accurate to think of them as such. *But see* Deal v. United States, 508 U.S. 129, 133–34 (1993).

82. Moore, *supra* note 80, at 1011–16.

83. *Id.* at 1019–26.

84. *Deal*, 508 U.S. at 137 (Stevens, J., dissenting).

85. *Id.* at 138–39. Interestingly, the dissent's construction of "second or subsequent conviction" was not set forth in the petitioner's brief (though it was raised by counsel at oral argument). *Id.* at 134. Furthermore, at oral argument, attorney for petitioner, Dola Jean Young, initially argued that "becomes final" means "after a previous sentence has been served," but seemed ultimately to abandon that position:

> Ms. Young: . . . So for that reason petitioner is asking this Court to construe the statute as imposing a 20-year sentence only if the offense is committed after a previous 5-year sentence has been, has become final. . . .
>
> White, J.: Oh, after, you mean after he had served the 5-year sentence?
>
> Ms. Young: Yes. And that's because of the language "in the case of," because it's referring back to that part in the first clause, that use of a firearm and receiving a 5-year sentence. . . .

Moreover, Congress's conspicuous distinction between "violation" and "conviction" in the FSA amendment, seems to signal its awareness of a key point of contention between the majority and dissenting opinions in *Deal*. The majority undertook a thorough explication of the word "conviction," which, when compared to the word "offense," seemed to vitiate the claim that section 924(c) was intended strictly as a recidivist statute.[87] The dissent, however, decried such an "elaborate exercise in sentence parsing" where common sense clearly shows that Congress intended to apply the enhanced punishment only to violations of 924(c) that occurred after a prior conviction.[88] The FSA amendment appears to resolve this disagreement by clarifying that the enhanced 25-year sentence will be imposed only "in the case of a *violation* . . . that occurs after a prior *conviction*."[89] Because a defendant can no longer receive an enhanced sentence under subsection 924(c)(1)(C) unless the conduct constituting a violation of the statute occurred *after* a prior

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> Souter, J.: If he had been sentenced to the 5-years enhancement and if for some reason he escaped from custody before being sent to prison and committed another bank robbery, wouldn't he be subject to the second enhancement for that even though he had not served the first one?
>
> Ms. Young: . . . if he had been sentenced, he was in prison and he escaped. Then yes, you are correct, then for the bank robbery that occurred after the escape the 20 years would apply. . .
>
> Rehnquist, C.J.: Well, then if the judge, on the basis of the jury's verdict, says with respect to the first count, you know, I sentence you to 5 years, why isn't that then final if you agree with the question that I just asked you? So that when the time comes to impose the sentence on the second count, it is final since there has been not only a finding of guilt but a sentence.
>
> Ms. Young: Then yes, you're correct, then it's final because the sentence has been imposed.

Transcript of Oral Argument at 4, 6, 7, 14, Deal v. United States, 508 U.S. 129 (1993) (No. 91-8199).

86. *See* First Step Act § 403 (amending 18 U.S.C. § 924(c)(1)(C) (2006)) to read, "violation of this subsection that occurs after a prior conviction . . . has become final").

87. *See Deal*, 508 U.S. at 134–35. The majority argues that if "second or subsequent conviction" meant the same thing as "subsequent offense" then the sentence enhancement would not apply to a situation where a defendant is convicted of a crime that he committed in 1992 after having previously been convicted of a crime he committed in 1993, as the latter conviction would be for an offense committed prior—not subsequent—to the previous conviction. *See id.* at 135.

88. *Id.* at 146 (Stevens, J., dissenting).

89. First Step Act § 403.

conviction had become final, Congress clearly intended for the amended provision to apply only to recidivists.

Finally, although not directly set forth by the dissent in *Deal*—nor in the language of the amendment itself—Congress's apparent understanding of the phrase "becomes final" is consistent with the view of the dissenting justices. In contrast to the majority opinion, the *Deal* dissent insisted that section 924(c) was a recidivist provision.[90] The dissent argued that prior to 1987, when "textualism replaced common sense[,]" courts understood that section 924(c)'s sentencing enhancement provision only applied to defendants who, having once been convicted "'failed to learn their lessons from the initial *punishment*' and committed a repeat offense."[91] Congress declined to define the phrase "becomes final" in the FSA amendment, however its intent appears to have been to adopt the dissenters' position:[92] that a conviction becomes final after the sentence imposed is served.[93] According to the Senate Committee on the Judiciary, the purpose of section 403 of the FSA was to clarify that the enhanced 25-year mandatory minimum sentence is reserved for "offenders who have been previously convicted *and served a sentence* for such an offense."[94] Whether courts will countenance this interpretation of "becomes final" remains to be seen, and may depend to some extent on the particular court's approach to statutory construction.[95]

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90. *Compare Deal*, 508 U.S. at 136–37 (majority opinion) (holding that 924(c) "gives no indication that the punishment of those who fail to learn the 'lesson' of prior conviction or of prior punishment is the sole purpose of § 924(c)(1), to the exclusion of other penal goals such as taking repeat offenders off the streets for especially long periods, or simply visiting society's retribution upon repeat offenders more severely"), *with Deal*, 508 U.S. at 141–42 (Stevens, J., dissenting) (arguing that the most "sensible construction" of the statute is as a recidivist provision).

91. *Id.* at 146 (Stevens, J., dissenting) (emphasis added).

92. This was also the initial position of the petitioners in *Deal*, although they ultimately abandoned it at oral argument. *See supra* note 85.

93. *Deal*, 508 U.S. at 146 (Stevens, J., dissenting).

94. *The First Step Act of 2018 (S.3649) – as introduced*, S. COMM. ON THE JUDICIARY (Nov. 15, 2018) (emphasis added), https://www.judiciary.senate.gov/imo/media/doc/S.%203649%20First%20Step%20Act%20Summary%20-%20As%20Introduced.pdf [http://web.archive.org/web/20191228230737/https://www.judiciary.senate.gov/imo/media/doc/S.%203649%20First%20Step%20Act%20Summary%20-%20As%20Introduced.pdf].

95. *See* Clay v. United States, 537 U.S. 522, 527–32 (2003) (discussing the various interpretations of "becomes final," which are largely context-dependent). Practically speaking, however, the precise meaning of "becomes final" would only matter in the rare case that a defendant committed another 924(c) offense before serving out his sentence, i.e., while escaped. Because Congress eliminated parole for federal offenses committed after November 1987, and because section 924(c)(1)(D)(i) expressly prohibits a court

Further, whether section 403 of the FSA and the resulting demise of the *Deal* opinion will have any effect on—let alone resolve—the question whether the single use of a firearm in the commission of multiple, simultaneous predicate offenses can support multiple 924(c) convictions appears to depend upon which federal circuit a prosecution is brought in. As such, the circuit split will likely continue, if somewhat altered.

4. The Continuing Validity of the "Second or Subsequent Conviction" Approach

Under *any* approach to the question, prosecutors will no longer be able to obtain 25-year mandatory minimum sentences by stacking 924(c) violations in a single indictment where one of the resulting convictions would be the defendant's first.[96] However, as explained below, it is only this form of stacking that was definitively ended by the FSA. Prosecutors remain free, subject only to judicial interpretation of the amended statute, to obtain lengthy, consecutive mandatory minimum sentences on the basis of the single use of a firearm to commit multiple predicate offenses.

The effect of the FSA on the question whether the single use of a firearm to commit multiple predicate offenses can support multiple 924(c) convictions is perhaps most uncertain in those circuits that apply the "second or subsequent conviction" approach. To the extent courts have relied on the "second or subsequent conviction" clause of 924(c)(1)(C) in upholding multiple convictions for the single use of a firearm, their rulings would presumably be undermined by the FSA amendment. The statute no longer "speaks in terms of 'conviction'"[97] alone, but clarifies that an enhanced penalty may be assessed only where a violation is committed after a prior conviction.[98] Thus, courts relying on the prior language of 924(c)(1)(C) to provide the analytical basis upon which to uphold these convictions may decide to reverse course entirely. More likely, however, is that these courts will be forced to reconsider the propriety of bringing a sentence enhancement provision to bear on the

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from sentencing a defendant to probation, escape is the only plausible scenario in which a court would have to decide the question.

96. United States v. King, No. 03-CR-249 (BAH), 2019 WL 415818, at *3 & n.6 (D.D.C. Feb. 1, 2019). As of this writing, *King* is one of the few, if not only, cases where a court has considered what effect § 403 of the FSA would have on a defendant's sentence under section 924(c). However, because the defendant in *King* had only been charged with one 924(c) violation, the recent amendment to 924(c)(1)(C) did not apply.

97. United States v. Casiano, 113 F.3d 420, 424 (3d Cir. 1997).

98. *See* 18 U.S.C. § 924(c)(1)(C) (2018).

question whether a *conviction* under the statute was justifiable in the first place.

Of course, whether a sentence enhancement provision applies in a particular case is necessarily posterior to the question whether a conviction for which that sentence is to be imposed is legally sustainable. As such, the "second or subsequent conviction" clause and any judicial decision that purports to interpret it is—and was—quite beside the point. This raises the question, why have courts endeavoring to resolve a question concerning the propriety of a conviction resorted to the language of a penalty provision?

One answer is that at least some courts applying *Deal* and its interpretation of the "second or subsequent conviction" clause did not view the issue as concerning the propriety of a conviction but as a question concerning the propriety of the district court's application of the enhanced penalty provision at sentencing. In other words, because the 924(c) convictions themselves were either assumed proper or held to be proper under the *Blockburger* analysis, the only question was whether the second or subsequent convictions exposed the defendant to an enhanced penalty where there was only a single use of a firearm.[99]

In some cases, courts appear to have been led down this path by the defendant himself. For example, in *United States v. Casiano*, the defendant quite clearly frames the issue in his brief in terms of sentencing, not conviction.[100] The defendant did not argue that his convictions were improper *as such*; only that the offenses, because they occurred simultaneously, could not be treated as "second or subsequent" convictions for purposes of the enhancement provision.[101] Thus, under this formulation of the question, the *Casiano* court was perhaps right to conclude that a factual and temporal nexus between the underlying offenses made no difference in determining the defendant's sentence.[102]

Given the defendant's failure to couch his argument in terms of conviction, the decision in *Casiano* might be dismissed as simply not having precisely addressed whether multiple 924(c) convictions may be predicated on the single use of a firearm to commit multiple crimes of violence or drug crimes. However, at least one subsequent Third Circuit

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99. *See, e.g.*, *Casiano*, 113 F.3d at 436.

100. Brief for Appellant at 2, United States v. Casiano, 113 F.3d 420 (3d Cir. 1997) (No. 96-1256), 1996 WL 33420180, at *2 (stating the issue as follows: "Whether consecutive sentences of five and twenty years for violations of 18 U.S.C. §924(c)(1) could be imposed where there was only one victim and the two guns possessed by appellant's co-defendants were possessed and used in one criminal episode").

101. *Id.* at *10.

102. *See Casiano*, 113 F.3d at 425.

decision relied on the reasoning in *Casiano* when that precise question *was* squarely before the court.

In *United States v. Hodge*, the defendant was charged with, among other things, three 924(c) violations after shooting two men in the course of a robbery.[103] The first count was predicated on the use and discharge of a firearm in the commission of the robbery itself, while the other two counts were predicated on the use and discharge of a firearm in the commission of two attempted murders (one for each victim).[104] On appeal, the defendant challenged his convictions on counts two and three: the 924(c) violation predicated on the robbery and the 924(c) violation predicated on one of the attempted murder charges.[105] He argued that the court should dismiss one of the 924(c) counts because the predicate offenses were both based upon the single use of a firearm, viz. the shooting of the victim who was holding the money.[106] Quoting *Casiano*, the court reasoned that 924(c) could apply to both predicate offenses because "the statute refers to a second or subsequent 'conviction, not criminal episode.'"[107] The court also discussed (without deciding)[108] the allowable unit of prosecution, but concluded that *Casiano* ultimately foreclosed the defendant's argument.[109]

Thus, courts that have relied on *Deal* appear to view cases like *Casiano* and *Hodge* as presenting, fundamentally, a sentencing issue. Now that the "second or subsequent conviction" clause has been replaced with language that unquestionably involves temporal considerations, it is unclear how these courts will treat arguments like those made by the defendants in *Casiano* and *Hodge* going forward.

C. The Unit of Prosecution Approach

Still other circuits—indeed, a majority—noting that the *Blockburger* analysis does not end the inquiry, approach the question by determining the statute's allowable unit of prosecution.[110] In direct contrast to the

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103. 870 F.3d 184, 188 (3d Cir. 2017).

104. *Id.*

105. *Id.* at 196.

106. *Id.*

107. *Id.*

108. However, the court did make clear that it has never held that the unit of prosecution under 924(c) is "each use of the firearm regardless of how many predicate offenses are charged." *Id.*

109. *Id.* at 197.

110. *See, e.g.*, United States v. Cureton, 739 F.3d 1032, 1040 (7th Cir. 2014); United States v. Phipps, 319 F.3d 177, 188 (5th Cir. 2003) (noting that its previous double jeopardy cases did not "address the precise statutory question whether § 924(c)(1)

Third Circuit's holding in *Casiano*, the Fifth Circuit in *United States v. Phipps* held that section 924(c) "does not unambiguously authorize multiple convictions for a single use of a single firearm based on multiple predicate offenses."[111] As in *Casiano*, the defendants used a firearm to steal a vehicle, forcing the vehicle's owner into the backseat.[112] The defendants were each charged with substantive counts of carjacking and kidnapping as well as corresponding violations of section 924(c).[113] The court vacated one of each of the defendants' 924(c) convictions, reasoning that the allowable unit of prosecution under the statute is "the use, carriage, or possession of a firearm during and in relation to a predicate offense" and that "the emphasis is on the use, carriage, or possession of a firearm."[114]

In contrast, the Eighth Circuit in *United States v. Sandstrom*, determined as a matter of first impression, that section 924(c)'s unit of prosecution permitted multiple convictions even where they are predicated solely on the single use of a firearm to commit simultaneous underlying violent crimes.[115] The court reasoned that multiple convictions were proper because "the defendants 'used' the firearm at issue in both counts to commit separate offenses, even though the offenses occurred simultaneously."[116] Each of the defendants' two 924(c) convictions were predicated on the single use of a firearm to kill a man, resulting in the simultaneous violation of two separate criminal statutes.[117] Nevertheless, the court concluded that both 924(c) convictions could be sustained because the defendants "used the firearm during the commission of a crime of violence charged in Count 3 and

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authorizes multiple convictions for a single use of a single firearm based on multiple predicate offenses").

111. *Phipps*, 319 F.3d at 187–88.

112. *Id.* at 180.

113. *Id.* at 181.

114. *Id.* at 185. In determining that emphasis should be placed on the "use, carriage, or possession of a firearm" rather than on the predicate offense, the court relied on the text of section 924(c), in which the conduct of using, carrying, or possessing is the active verb, *id.*, as well as on the legislative history of the Poff and Mansfield amendments, which the court found indicated that the statute was "aimed . . . at the *choice* to use a firearm during and in relation to a predicate offense." *Id.* at 187 (emphasis added).

115. United States v. Sandstrom, 594 F.3d 634, 659 (8th Cir. 2010).

116. *Id.*

117. *Id.* at 656–57. The two predicate offenses were (1) "violating § 245(b)(2)(B) for shooting McCay, resulting in his death . . . because of his race and because he was enjoying the public streets[,]" and (2) "violating §§ 1512(a)(1)(C) and (A)(3)(A) by killing McCay to prevent him from reporting to law enforcement that Sandstrom and Eye interfered with his right to enjoy the public streets." *Id.*

also used the firearm during the commission of a crime of violence charged in Count 5."[118]

However, several courts, contrary to *Casiano*, *Sandstrom*, and *Phipps*, consider the simultaneity of the underlying predicate offenses to be a relevant factor in determining whether multiple prosecutions under section 924(c) are permitted.[119] In *United States v. Finley*, the Second Circuit held that multiple section 924(c) convictions could not be sustained where the predicate offenses were "simultaneous or nearly so [and] consisted of virtually the same conduct with the same criminal motivation."[120] In *Finley*, officers had succeeded in purchasing a quantity of cocaine from the defendant at his home.[121] When they returned to arrest him, they discovered additional quantities of cocaine in a closet as well as a firearm under a pile of clothes in the kitchen.[122] After a jury trial, the defendant was convicted of one count of distributing cocaine, one count of possession with intent to distribute cocaine, and two corresponding counts of possession of a firearm during and in relation to a drug crime in violation of section 924(c).[123] The court vacated one of the section 924(c) convictions, reasoning that "[t]he statute does not clearly manifest an intention to punish a defendant twice" for such conduct, and that "it was not Congress's intention in using the words 'a second or subsequent conviction' to secure the imposition of a second, mandatory 25-year sentence where the two criminal transactions . . . are so inseparably intertwined."[124]

In *United States v. Wilson*, the D.C. Circuit vacated one of the defendant's 924(c) convictions, holding that multiple convictions cannot be sustained where there is "no distinction in time or place" between the firearm uses charged in each count, no matter how many crimes the defendant committed in the process.[125] Wilson had shot and killed a

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118. *Id.* at 659.

119. *Casiano* held that "Congress specifically commanded that the enhancement would apply to 'any' crime of violence without regard to temporal considerations." United States v. Casiano, 113 F.3d 420, 424–25 (3d Cir. 1997). The court in *Phipps* expressed skepticism toward the notion "that § 924(c)(1) does not authorize multiple convictions based on 'continuous' possession of a firearm during 'simultaneous' predicate offenses," finding that such a test "creates more ambiguity than it resolves by importing a temporal concept into § 924(c)(1)." United States v. Phipps, 319 F.3d 177, 188 n.11 (5th Cir. 2003) (discussing the Second Circuit's holding in United States v. Finley, 245 F.3d 199 (2d Cir. 2001)).

120. *Finley*, 245 F.3d at 207.

121. *Id.* at 202.

122. *Id.* at 201–02.

123. *Id.* at 201.

124. *Id.* at 207–08.

125. United States v. Wilson, 160 F.3d 732, 749 (D.C. Cir. 1998).

government witness who was scheduled to testify against his brother in an upcoming robbery trial.[126] He was subsequently convicted of killing a witness in violation of 18 U.S.C. § 1512 and of retaliating against a witness in violation of 18 U.S.C. § 1513.[127] With these offenses serving as the predicate crimes of violence,[128] Wilson was also convicted of two 924(c) violations.[129] On appeal, the government argued that the convictions were proper under *Blockburger* and should therefore be upheld.[130] However, the court reasoned that Congress's intent to punish the *choice* to use a gun in the commission of a crime places a limit on the number of 924(c) convictions that can be brought on the basis of a single firearm use.[131]

After rejecting the reasoning in *Sandstrom* and *Luskin*, the Seventh Circuit held in *United States v. Cureton* that there is no unambiguous intent on the part of Congress to punish a defendant twice where "there was only one use of a firearm along with simultaneously committed predicate offenses."[132] Rather, the purpose of section 924(c) is "to punish the choice to use or possess a firearm in committing a predicate offense, in addition to the punishment otherwise imposed for the predicate crimes."[133]

Similarly, the Sixth Circuit in *United States v. Vichitvongsa* held that "[i]n order for the government to convict a defendant of more than one § 924(c) charge, the defendant must use, carry, or possess a firearm . . . more than once."[134] The court distinguished prior precedent on the ground that in those cases, the defendant's use of a firearm to further multiple predicate offenses was "non-simultaneous"; but that in this case,

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126. *Id.* at 736.

127. *Id.*

128. Brief for Appellee at 74–75, United States v. Wilson, 160 F.3d 732 (D.C. Cir. 1998) (Nos. 97-3076, 97-3077, 97-3129), 1998 WL 35239951.

129. *Wilson*, 160 F.3d at 736.

130. *See* Brief for Appellee, *supra* note 128, at 75 (citing the Sixth Circuit's decision in United States v. Nabors, 901 F.2d 1351 (6th Cir. 1990) for the proposition that multiple punishments under 924(c) do not violate the rule of lenity where "two separate predicate offenses [each requiring proof of a fact not required by the other predicate offense] . . . were charged and proven").

131. *Wilson*, 160 F.3d at 749.

132. United States v. Cureton, 739 F.3d 1032, 1043–44 (7th Cir. 2014).

133. *Id.* at 1045.

134. United States v. Vichitvongsa, 819 F.3d 260, 269 (6th Cir. 2016). This holding calls into question the continuing validity of prior cases. *See, e.g.*, United States v. Nabors, 901 F.2d 1351 (6th Cir. 1990); United States v. Chapman, 551 F. App'x 850 (6th Cir. 2014); *see* United States v. Jackson, 918 F.3d 467 (6th Cir. 2019). *But see Vichitvongsa*, 819 F.3d at 266 (citing *Nabors* as a case involving "multiple uses of one or more firearms in the context of ongoing criminal activity"); United States v. Jackson, 918 F.3d 467 (6th Cir. 2019) (discussing *Nabors* without disapproval).

the defendant "chose to use a firearm once during each robbery to simultaneously further two conspiracies."[135] The *Vichitvongsa* court relied, in part, on the Tenth Circuit's lengthy examination of section 924(c)'s unit of prosecution in *United States v. Rentz*, which held that "each § 924(c)(1)(A) charge must involve *both* an act of using, carrying, or possessing *and* that such an act must come during and in relation to (or in furtherance of) a qualifying crime."[136]

As of this writing, perhaps the most recent decision to address directly whether the single use of a firearm to commit multiple predicate offenses can support multiple convictions also originates in the Sixth Circuit. In *United States v. Jackson*, one of the defendants, Jackson, was convicted of two 924(c) violations predicated on the simultaneous carjacking of two vehicles belonging to victims, Z.N. and G.B, who were walking together after having parked their cars near Z.N.'s house.[137] Jackson and an accomplice approached Z.N. and G.B. with their guns drawn.[138] Jackson focused on one victim and his accomplice on the other.[139] Thus, Jackson's two 924(c) convictions were predicated on the single use of a firearm to accomplish the two, simultaneous carjackings that followed.[140] After surveying existing circuit precedent,[141] and

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135. *Vichitvongsa*, 819 F.3d at 268.

136. *Id.* at 269 (quoting United States v. Rentz, 777 F.3d 1105, 1109–10 (10th Cir. 2015) (internal quotation marks omitted)). The *Rentz* decision is discussed more fully in Part III, Section C.

137. United States v. Jackson, 918 F.3d 467, 474–75 (6th Cir. 2019).

138. *Id.* at 492.

139. *Id.*

140. *Id.* Initially, the government argued that the unit of prosecution for the 924(c) violations was "each individual motor vehicle." *Id.* at 489. At oral argument, the government attempted to distinguish *Jackson* from *Vichitvongsa* (precedent that neither party had briefed) on the ground that the predicate offenses of carjacking involved, among other things, two separate victims. Oral Argument at 32:05, United States v. Jackson, 918 F.3d 467 (6th Cir. 2019) (Nos. 17-3896 & 17-3922), http://www.opn.ca6.uscourts.gov/internet/court_audio/aud2.php?link=recent/07-26-2018%20-%20Thursday/17-3896%20and%2017-3902%20USA%20v%20Kenneth%20Jackson%20Jr%20and%20Antowine%20Palmer.mp3&name=17-3896%20and%2017-3902%20USA%20v%20Kenneth%20Jackson%20Jr%20and%20Antowine%20Palmer [http://web.archive.org/web/20191013222849/http://www.opn.ca6.uscourts.gov/internet/court_audio/aud2.php?link=recent/07-26-2018%20-%20Thursday/17-3896%20and%2017-3902%20USA%20v%20Kenneth%20Jackson%20Jr%20and%20Antowine%20Palmer.mp3&name=17-3896%20and%2017-3902%20USA%20v%20Kenneth%20Jackson%20Jr%20and%20Antowine%20Palmer]. However, subsequent to oral argument, but before the case was decided, the government sent the court a Federal Rule of Appellate Procedure 28(j) letter, arguing that Jackson's 924(c) convictions were predicated on (1) Jackson's own, direct brandishing of a firearm

implicitly disapproving of *Chapman*,[142] the court held that because Jackson had made only "a single choice to 'use, carry, or possess' a firearm" to further "simultaneous carjackings," he could not be convicted as a principal on two separate 924(c) charges.[143]

1. Unit of Prosecution: The Right Double Jeopardy Standard

Courts applying the unit of prosecution standard acknowledge that the mere fact that the predicate crimes of violence or drug crimes are properly charged under the *Blockburger* test does not answer the question whether section 924(c) itself permits multiple prosecutions for the single use of a firearm in the commission of those predicate offenses.[144] Whether Congress intended multiple punishments in that circumstance (i.e. under a single statutory provision) is a question that requires analysis of the statute's allowable unit of prosecution.

However, even if courts were to settle once and for all on the unit of prosecution approach, the question remains what conduct, *exactly*, does 924(c) punish? In other words, what minimum conduct undertaken by a defendant must be proven by prosecutors in order to obtain a conviction under the statute? As the D.C. Circuit noted in *United States v. Anderson*, the government's litigation position with respect to this question has been "rather plastic."[145] The government has variously insisted that courts treat either the number of *uses* of a firearm or the number of *predicate offenses* as the sole unit of prosecution.[146] Either approach can

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and (2) on *aiding and abetting* his accomplice's brandishing of *his* firearm. *Jackson*, 918 F.3d at 493. Presumably, had the government argued this from the start, it might have succeeded in avoiding the question of 924(c)'s allowable unit of prosecution altogether; however, because it neglected to do so, the court held that it was forfeited. *Id.*

141. *Jackson*, 918 F.3d at 489–92.

142. *Id.* at 492.

143. *Id.* at 494.

144. United States v. Rentz, 777 F.3d 1105, 1108–09 (10th Cir. 2015).

145. United States v. Anderson, 59 F.3d 1323, 1331 (D.C. Cir. 1995).

146. In *United States v. Rentz*, the government argued, "The structure of the statute shows that the applicability of § 924(c) does not depend on how many times a person uses, carries, or possesses a firearm, but rather how many offenses he commits with the firearm." Supplemental Brief for Appellant at 9, United States v. Rentz, 777 F.3d 1105 (2015) (No. 12-4169), 2014 WL 3696928, at *9. However, the government's position in *Anderson* was that Congress intended that an unlimited number of 924(c) violations could be tied to a single predicate offense because the statutes purpose is to punish each use of a firearm—the predicate offense serving merely as the "hook" for bringing prosecutions under the statute. *Anderson*, 59 F.3d at 1325. This latter position is not entirely implausible, since Congress surely did need some "hook" upon which it could hang a prohibition against using and carrying firearms. Without it, 924(c) would likely violate the Second Amendment.

be employed in order to obtain multiple 924(c) convictions, depending on the facts of a given case, which may explain why prosecutors appear to waffle on the issue. In cases involving multiple uses of a firearm to commit a single predicate offense, prosecutors seeking the most severe punishment possible have a strong incentive to argue that each use of a firearm serves as the statute's unit of prosecution. This order of analysis treats the use of a firearm as the sole unit of prosecution and recycles the same predicate offense in proving guilt for each subsequent 924(c) count.[147]

Alternatively, in cases involving the single use of a firearm to commit multiple predicate offenses, zealous prosecutors have an incentive to argue that each predicate offense serves as the statute's unit of prosecution. This approach treats the predicate offense as the sole unit of prosecution and recycles the single firearm use in proving guilt for each subsequent count.[148] However, neither approach is sustainable under a close reading of the statute nor even under a cursory exploration of its legislative history.

2. A Closer Look

Perhaps the most thoroughgoing analyses of section 924(c)'s unit of prosecution were conducted by the D.C. Circuit, sitting en banc, in *United States v. Anderson* and by the Tenth Circuit, sitting en banc, in the case of *United States v. Rentz*.[149] *Anderson* and *Rentz* are instructive when read together because they come at the problem in cases involving opposing sets of circumstances: *Anderson* concerned multiple 924(c) convictions where there were multiple uses of a firearm tied to a single predicate offense,[150] while *Rentz* involved multiple 924(c) violations where the single use of a firearm was tied to multiple predicate offenses.[151] Both courts were tasked with determining whether all of the

147. At least two circuits have approved of this interpretation. *See* United States v. Camps, 32 F.3d 102, 107 (4th Cir. 1994) (holding that where a defendant has used a firearm more than once in furtherance of a single predicate offense, he may be prosecuted and convicted for each separate use); United States v. Lucas, 932 F.2d 1210, 1222–23 (8th Cir. 1991) (holding that each separate use constitutes a separate violation of 924(c), even where both uses are related to the same predicate offense).

148. *See* United States v. Sandstrom, 594 F.3d 634 (8th Cir. 2010).

149. United States v. Anderson, 59 F.3d 1323 (D.C. Cir. 1995); United States v. Rentz, 777 F.3d 1105 (2015).

150. *Anderson*, 59 F.3d at 1324.

151. *Rentz*, 777 F.3d at 1107.

defendant's 924(c) convictions could be sustained under the circumstances. Both courts answered in the negative.[152]

In *Anderson*, the court held that only one 924(c) conviction could lie in relation to a single predicate offense.[153] Although Anderson had been charged with multiple drug crimes that might very well have served as predicate offenses for each alleged 924(c) violation, the government predicated all four of his convictions under 924(c) on a single underlying offense: conspiracy to distribute narcotics.[154] On appeal, Anderson argued that 924(c) is a penalty enhancement provision, and therefore in order for the government to obtain an enhanced penalty for the use of a firearm, it must also obtain a conviction for a separate underlying offense.[155]

The government argued that 924(c) is more than merely a sentence enhancing statute (i.e. it does more than merely enhance the penalty applicable to the underlying offense), and therefore an infinite number of 924(c) violations could be tied to any one predicate violent crime or drug crime.[156] Furthermore, the government argued, Congress was not concerned with the underlying crime "per se," but rather included the requirement of an underlying violent crime or drug crime merely in order to provide a "vehicle or 'hook,' upon which [it] federalized the prohibition against the use and carrying of firearms."[157]

The court disagreed with both positions, reasoning that in light of the legislative history as well as the grammatical structure of the statute, which "make[s] out a separate crime," 924(c)(1) has a "hybrid character."[158] A defendant does not violate 924(c) "each time" he uses, carries, or possesses a firearm in the commission of a predicate offense, but rather when he uses, carries, or possesses a firearm "at any time" during the course of committing such an offense.[159] The court noted that the legislative history indicated that Congress was not concerned with *the gun* per se, but with the *combination* of firearms with violent crimes and

152. Although both courts did, in the end, invoke the rule of lenity in support of their respective holdings, both quite clearly did so as a fallback position. Neither court dedicated any substantial portion of its discussion to the affirmative proposition that section 924(c)(1)(A) is ambiguous. *See Anderson*, 59 F.3d at 1333 ("[A]t a very minimum, § 924(c)(1) is ambiguous."); *Rentz*, 777 F.3d at 1113 ("To the extent any ambiguity remains at this point about the meaning of § 924(c)(1)(A) . . . we don't default to the most severe possible interpretation of the statute . . . .").

153. *Anderson*, 59 F.3d at 1334.

154. *Id.* at 1324.

155. *Id.* at 1325.

156. *Id.*

157. *Id.*

158. *Id.* at 1326.

159. *Id.* at 1326–28.

drug crimes.[160] As such, because the government charged Anderson with using a firearm ("at any time") during the course of the narcotics conspiracy, only one 924(c) conviction could be sustained.[161]

The Tenth Circuit in *Rentz* also focused (somewhat famously)[162] on the grammatical structure of section 924(c)(1), stating that "sometimes a law's meaning can be clear even when the grammar's downright awful."[163] The defendant, Rentz, had fired a gun just once, but (to his great misfortune, presumably) struck and injured one victim and struck and killed another.[164] He was subsequently charged and convicted of two crimes of violence (one for each victim) and two corresponding violations of section 924(c) (one for each predicate crime of violence).[165]

In seeking to determine section 924(c)'s allowable unit of prosecution, the court turned first to an analysis of the statute's grammar—and in particular to its verbs, "uses, carries, and possesses."[166] Through an analogy to a statute that makes it a crime "to *kill* someone," the court reasoned that just as one would expect the government to prove that the defendant killed more than one person in order to obtain more than one conviction, one should expect the government to demonstrate that the defendant used, carried, or possessed a firearm more than once in order to obtain more than one conviction under section 924(c).[167] Thus, the court held that "the normal rules of statutory (and sentence) construction" provide some indication that each conviction the government seeks to obtain must involve "a new act" constituting a use, carriage, or possession of a firearm.[168]

However, the court noted, as the *Anderson* court did, that section 924(c) requires more than just that.[169] Indeed, the "during and in relation to any crime of violence or drug trafficking crime" clause indicates

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160. *See id.* at 1327–28.

161. *Id.* at 1334.

162. *See* Michelle Mark, *Neil Gorsuch Once Diagrammed a Sentence in an Opinion – It Says a Lot About His Judicial Style*, BUS. INSIDER (Feb. 2, 2017), https://www.businessinsider.in/neil-gorsuch-once-diagrammed-a-sentence-in-an-opinion--it-says-a-lot-about-his-judicial-style/articleshow/56941073.cms [http://web.archive.org/web/20191013223030/https://www.businessinsider.in/neil-gorsuch-once-diagrammed-a-sentence-in-an-opinion--it-says-a-lot-about-his-judicial-style/articleshow/56941073.cms]; *see also* Lisa Eichhorn, *Old Habits*, 13 LEGAL COMM. & RHETORIC: JALWD 79 (2016).

163. United States v. Rentz, 777 F.3d 1105, 1109 (2015).

164. *Id.* at 1107.

165. *See id.*

166. *Id.* at 1109.

167. *Id.*

168. *Id.*

169. *See id.*

"*which* acts of using, carrying, or possessing [a firearm] Congress sought to punish."[170] Thus, each 924(c) conviction requires "*both* an act of using, carrying, or possessing [a firearm] *and* that such an act must come during and in relation to . . . a qualifying crime."[171]

This conclusion may come as no surprise to the first-year law student who learned early in her criminal law class that criminal statutes contain three components: the *actus reus*, the *mens rea*, and one or more attendant circumstances.[172] Under the *Rentz* court's construction, the *actus reus* is quite clearly "uses, carries, or possesses." The *mens rea* would, under the default rule, be satisfied where the defendant "purposely, knowingly, or recklessly" used, carried, or possessed a firearm.[173] And, finally, section 924(c) contains an attendant circumstance that must exist in order for the defendant's conduct to be culpable, viz. "during and in relation to a crime of violence or drug trafficking crime."[174]

Bringing this basic understanding of the structure of criminal statutes to bear on the question makes the majority opinion in *Rentz* all the more persuasive. As the court explained:

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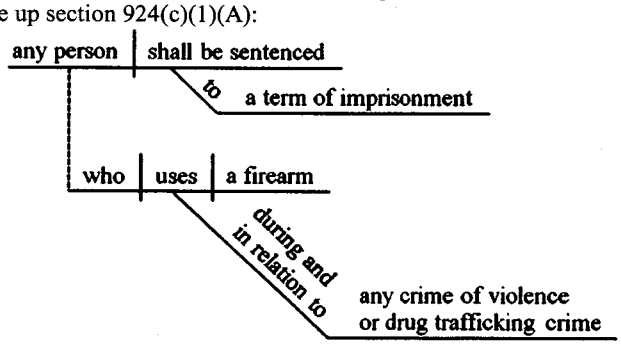
170. *Id.* at 1109 (noting that prohibiting the *act* alone would violate the constitutional right to keep and bear arms). The court provided a helpful diagram that, in its view, demonstrated the grammatical relationship between the various terms and clauses that make up section 924(c)(1)(A):



Id.

171. *Id.* at 1110.

172. *See generally* JOSHUA DRESSLER & STEPHEN P. GARVEY, CRIMINAL LAW: CASES AND MATERIALS 133–85 (7th ed. 2016).

173. *See* MODEL PENAL CODE § 2.02(3) (1962).

174. Importantly, to treat the existence of the predicate offense as anything other than an attendant circumstance—say, as yet another *actus reus* element—could have the potential of creating a genuine *Blockburger* issue. The *act* that supports guilt with respect to the underlying predicate offense is already criminalized under the statute that governs the predicate offense itself. If the act of the predicate offense is also punished under 924(c), then defendants can argue that the two statutes are duplicitous in violation of the double jeopardy clause, because under that construction of the statute, no predicate offense could contain elements that are not contained in section 924(c).

> Under the government's reading, an act of using, carrying, or possessing is part of the government's burden for the first conviction. The statute's verb counts then. But the government would have us ignore that requirement for any additional charges. In later charges our focus would be limited myopically to the sentence's adverbial phrases without even a stolen glance at the verbs those phrases modify. A sort of appearing and then disappearing elemental burden, a world in which verbs vanish but their modifiers float freely and commandingly alone.[175]

In other words, to treat the unit of prosecution as merely equal to however many predicate offenses the government can charge would allow the government to obtain convictions under section 924(c) without being required to prove all of the elements of the crime. For the first count, the government must prove every element, but subsequent counts could be "proven" merely by satisfying the attendant circumstance element. Prosecutors ought not to be absolved of their burden of proof in this way.

IV. CONCLUSION

Although the court's precise reasoning in *Rentz* is less persuasive when applied to circumstances like those in *Anderson*, the two courts concur in the essentials: section 924(c) is a crime distinct from the underlying crime of violence or the drug crime, which necessitates a showing that the defendant is culpable with respect to each element. Further, Congress was clearly concerned with more than *just* the firearm use or *just* the predicate offense. Indeed, as the legislative history demonstrates, Congress was motivated by what it saw as the acute danger posed by criminals who *choose* to commit their crimes with a firearm.[176] As such, criminal culpability should attach only where that acute danger is manifested in the form of a separate use, carry, or possession of a firearm in the commission of a distinct predicate crime of violence or drug crime. Even with the passage of the First Step Act of 2018, the potential penalties that accompany multiple convictions under 924(c) are severe, and as courts have recognized, Congress would have said so more clearly if it intended for prosecutors to seek and obtain

175. *Rentz*, 777 F.3d at 1111.
176. 115 CONG. REC. at 34, 838 (1969).

draconian sentences that have no clear relationship to the defendant's actual culpability.[177]

177. *See, e.g.*, *Rentz*, 777 F.3d at 1111–12 ("[I]f a second conviction doesn't require a second blameworthy choice to use, carry, or possess a firearm in aid of a predicate act, the logic behind the [severity of] the punishment becomes less apparent.").