

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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EFRAIN LORA, )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) No. 22-49  
 )  
 ) UNITED STATES, )  
 )  
 ) Respondent. )  
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Pages: 1 through 70

Place: Washington, D.C.

Date: March 28, 2023

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EFRAIN LORA, )

Petitioner, )

v. ) No. 22-49

UNITED STATES, )

Respondent. )

- - - - -

Washington, D.C.

Tuesday, March 28, 2023

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:26 a.m.

APPEARANCES:

LAWRENCE D. ROSENBERG, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

ERICA L. ROSS, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:26 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 22-49, Lora versus United States.

Mr. Rosenberg.

ORAL ARGUMENT OF LAWRENCE D. ROSENBERG

ON BEHALF OF THE PETITIONER

MR. ROSENBERG: Mr. Chief Justice, and may it please the Court:

Subsection 924(j) does not include or incorporate a bar against concurrent sentences.

The government admits that at common law and under sentencing law, the default was to allow judges discretion to sentence concurrently or consecutively. The government also admits that, standing alone, subsection 924(j) does not bar concurrent sentences.

What the government says is that the bar of subsection 924(c)(1)(D)(ii) applies. But that bar specifically applies only to sentences "imposed under this subsection." That is subsection (c), not another subsection, such as subsection (j). And that distinction is compelled by this Court's precedent in Koons

1 Buick.

2           Moreover, there is nothing in the  
3 penalty provision of subsection (j) that refers  
4 to subsection (c). Indeed, Congress enacted  
5 subsection (j) as a new subsection, not as a  
6 part of subsection (c).

7           And it makes sense that there is  
8 discretion under subsection (j). (j)(1)  
9 primarily was concerned with imposing the death  
10 penalty for a murder by the use of a firearm and  
11 doesn't implicate consecutive sentences. And  
12 (j)(2) has a wide variety of conduct from  
13 involuntary manslaughter to voluntary  
14 manslaughter.

15           The government's answer to all of this  
16 is that somehow subsection (c) is wholly  
17 incorporated into subsection (j) by implication.

18           But that can't be right. Nothing in  
19 the text supports that, and it creates  
20 impossibilities. For example, voluntary  
21 manslaughter with a machine gun has a mandatory  
22 minimum penalty under subsection (c) of 30 years  
23 but a maximum penalty of 15 years under  
24 subsection (j). They can't coexist.

25           This Court should hold that subsection

1 (j) means what it says and reverse the court  
2 below.

3 I welcome the Court's questions.

4 JUSTICE THOMAS: What do you do with  
5 the government's argument that seems to suggest  
6 that it's simply an accumulation of the  
7 penalties, an aggregation or an increase of the  
8 penalties under (c)?

9 MR. ROSENBERG: It's not just that,  
10 and the reason is it defines a separate crime,  
11 right? So there are additional elements, the  
12 element of a death, in subsection (j). It's not  
13 just an enhanced penalty provision. It actually  
14 creates a new crime. And if it didn't do that,  
15 you would run into the constitutional problems  
16 we discuss in our brief because you have to have  
17 the additional element of a death proven beyond  
18 a reasonable doubt by the jury.

19 JUSTICE THOMAS: How could this have  
20 been written to come out in the government's  
21 favor from your perspective?

22 MR. ROSENBERG: It could have been  
23 written a lot of ways. So number one is  
24 Congress could have said Section (C) when -- in  
25 (c)(1)(D)(ii). It could have said that the bar

1 applies to this section, not subsection.  
2 Subsection (j) could have referred back to  
3 subsection (c) or (c)(1)(D)(ii) in the penalty  
4 provision, which it didn't do. I suppose there  
5 are other ways that Congress could have written  
6 it as well. I mean, Congress could have  
7 included subsection (j) in subsection (c) at the  
8 outset, and it didn't do that.

9           And it was very important, I think, if  
10 you look at the -- the history, that Congress  
11 really wanted to make a special emphasis in --  
12 in (j) that it was doing something new, right?  
13 It was adding the death penalty for the use of a  
14 firearm. It was adding this really pretty broad  
15 variety of conduct in (j)(2) for manslaughter.  
16 And it -- and -- purposely did not include it in  
17 subsection (c).

18           And so the only, I think, natural  
19 conclusion that we can draw is that Congress did  
20 have a reason for doing it separately, and --  
21 and we believe that the text of that -- of that  
22 subsection really controls here.

23           CHIEF JUSTICE ROBERTS: It -- it's  
24 right, though, isn't it, that a conviction under  
25 subsection 924(j), you can't get one unless you

1 prove beyond a reasonable doubt a violation of  
2 subsection (c)?

3 MR. ROSENBERG: The -- that is true.  
4 The -- the -- the fact -- underlying factual  
5 elements of having a drug trafficking crime or a  
6 crime of violence do have to be proven. I -- I  
7 would just add, though, that it's not the same  
8 thing as actually charging somebody under  
9 subsection (c), right? And so the government in  
10 the ordinary course does not charge under both  
11 subsections. It hypothetically could, but it  
12 usually doesn't. And so it's different from a  
13 situation where a criminal defendant was charged  
14 under (c) and charged under (j) --

15 CHIEF JUSTICE ROBERTS: What is this  
16 -- what is this substantive difference? As  
17 you've -- the government has to prove the (c)  
18 violation beyond a reasonable doubt.

19 MR. ROSENBERG: The substantive  
20 difference is that the defendant isn't convicted  
21 under (c). They --

22 CHIEF JUSTICE ROBERTS: No, I know  
23 that.

24 MR. ROSENBERG: Yeah.

25 CHIEF JUSTICE ROBERTS: That -- I'm



1 not sure that is substantive --

2 MR. ROSENBERG: Okay.

3 CHIEF JUSTICE ROBERTS: -- as opposed  
4 to technical in terms of you're -- you're --  
5 whether you're going to be charged under (c) or  
6 not, if you're charged under (j), you still have  
7 to prove all the elements of (c).

8 MR. ROSENBERG: Well, the factual  
9 elements of the generic (c) crime, not the more  
10 specific ones of the sub- -- sub-crimes, but,  
11 yes --

12 CHIEF JUSTICE ROBERTS: Yeah.

13 MR. ROSENBERG: -- that -- that is  
14 true. That is true. But we don't think it  
15 moves the needle for the government for the  
16 reason I was getting at, is that it's still not  
17 a conviction under (c) because the only --  
18 indictment, charge, conviction, and sentence was  
19 imposed under (j) rather than under (c). But I  
20 think your factual point is absolutely right,  
21 Mr. Chief Justice.

22 JUSTICE ALITO: Perhaps the text of  
23 the provision dooms the government's position,  
24 but they do have -- and that's a -- a question  
25 that we can talk about -- but they do have this

1 argument about what Congress had in mind.

2           Suppose that someone during a drug  
3 trafficking offense shoots somebody and the  
4 person doesn't die, so that's a -- a violation  
5 of (c), right? And that cannot be made  
6 consecutive to the sentence on the drug  
7 trafficking offense -- it -- it cannot be made  
8 concurrent with the sentence on the underlying  
9 drug trafficking offense.

10           MR. ROSENBERG: Under (c).

11           JUSTICE ALITO: Under (c).

12           MR. ROSENBERG: Correct. Right.

13           JUSTICE ALITO: That's correct. But  
14 then, if the person dies and then the charge is  
15 under (j) --

16           MR. ROSENBERG: Yeah.

17           JUSTICE ALITO: -- the sentence could  
18 be made concurrent?

19           MR. ROSENBERG: Well, it depends on  
20 how it's charged, right? If -- if -- you're  
21 saying that the person was injured, charged  
22 under (c), convicted under (c), then later dies?

23           JUSTICE ALITO: No, no.

24           MR. ROSENBERG: Yeah.

25           JUSTICE ALITO: Dies before the case

1 is tried.

2 MR. ROSENBERG: Yeah.

3 JUSTICE ALITO: But, while the person  
4 is lingering in the hospital --

5 MR. ROSENBERG: Yeah.

6 JUSTICE ALITO: -- all the  
7 government -- the government has a potential (c)  
8 conviction --

9 MR. ROSENBERG: Right.

10 JUSTICE ALITO: -- which cannot be  
11 made concurrent.

12 MR. ROSENBERG: Right.

13 JUSTICE ALITO: But, if the person  
14 dies, then it can be made concurrent.

15 MR. ROSENBERG: Right.

16 JUSTICE ALITO: And the government's  
17 argument is this makes no sense. Congress  
18 couldn't have possibly wanted a result like  
19 that.

20 MR. ROSENBERG: Well --

21 JUSTICE ALITO: What's your answer to  
22 that?

23 MR. ROSENBERG: Well, I think the  
24 first answer is that the person could be charged  
25 with the death penalty, right, potentially for

1 that murder. And so then, number one, the  
2 sentence is much more severe, and, number two,  
3 the whole issue of concurrent or -- or  
4 consecutive sentences is irrelevant.

5 So -- so I think that's part of what  
6 may have been going on with Congress, is they --  
7 they put this as a separate subsection,  
8 realizing that the death penalty was kind of a  
9 unique special circumstance.

10 I -- I also think that there are,  
11 particularly in the -- in the involuntary  
12 manslaughter area, and we included a few  
13 examples of this in our brief, where you would  
14 very much like to have discretion in crimes  
15 where there is not much of a mens rea to cause  
16 death, and -- but because death was caused,  
17 there's probably going to be a fairly high or  
18 somewhat higher penalty anyway, and you may not  
19 want to run it concurrently -- or, rather,  
20 consecutively with a gun charge because you may  
21 have somebody in those circumstances who had  
22 little to no mens rea in an involuntary  
23 manslaughter situation going to jail for 20 or  
24 25 or 30 years. And so there is some of that in  
25 there as well.

1           But I think the -- probably the  
2 primary concern was adding the death penalty,  
3 and it didn't make a whole lot of sense to add a  
4 bar on concurrent sentences when you're  
5 introducing the death penalty.

6           JUSTICE KAVANAUGH: They weren't  
7 assuming, though, that all the crimes would be  
8 -- committed under (j) would be death penalty by  
9 any stretch.

10          MR. ROSENBERG: Right. That's  
11 correct.

12          JUSTICE KAVANAUGH: So the -- the --  
13 it would still have effect in all those other  
14 cases that would still be under (j).

15          MR. ROSENBERG: It -- it would, but,  
16 remember, all we're saying is it preserves  
17 discretion. In an appropriate circumstance, a  
18 trial judge absolutely can still sentence  
19 consecutively.

20          JUSTICE KAVANAUGH: Right. I -- I'm  
21 just getting to the point I -- I tend to doubt  
22 Congress really intended your result.

23          MR. ROSENBERG: Well --

24          JUSTICE KAVANAUGH: You -- you -- yeah  
25 -- so I -- I take that heroic effort to explain

1     why Congress might have wanted to get to this  
2     result. I think your better argument for me is  
3     that's just what it says.

4             MR. ROSENBERG: Well, I -- I -- I  
5     would agree with this -- in this respect,  
6     Justice Kavanaugh. I do think the textual  
7     argument is the strongest argument here, and I  
8     think it's really sort of a dispositive argument  
9     because the text says what it says.

10            And it's really not susceptible of the  
11     government's interpretation, particularly not  
12     the position the government took in its brief.  
13     I mean, I suppose there were other ways that you  
14     could potentially try to argue this, but to  
15     argue that subsection (c) is entirely  
16     incorporated into subsection (j), it not only  
17     conflicts in the way I've said, but it violates  
18     that principle that you're not supposed to, I  
19     guess, import elephants through mouse holes.

20            And in the -- the few words that  
21     says -- that -- that sets forth in the prefatory  
22     phrase that, you know, in the course of  
23     violating subsection (c), that means that I  
24     think we counted there's like 700 words of  
25     subsection (c) automatically comes into

1 subsection (j).

2 JUSTICE JACKSON: But, with respect to  
3 the intent, though, I mean, don't you also have  
4 the argument that the statute actually in (j)  
5 increases the maximums, that -- that it -- it --  
6 yes, it doesn't necessarily have or specifically  
7 incorporate the floors that (c) has, but  
8 Congress sometimes also expresses its intentions  
9 with respect to the seriousness of offenses by  
10 making the statutory maximum higher.

11 MR. ROSENBERG: Yes.

12 JUSTICE JACKSON: Isn't that also  
13 what's going on here?

14 MR. ROSENBERG: I think that's  
15 absolutely correct, Justice Jackson, yes, and  
16 that is another element to this.

17 JUSTICE JACKSON: So it doesn't --  
18 it's not necessarily the case that your position  
19 leads to the view that it's sort of nonsensical  
20 because Congress was pointing to a more serious  
21 offense and giving lighter penalties.

22 MR. ROSENBERG: Correct. I think  
23 that's absolutely right. I -- I think it's the  
24 full gamut. And, again, because of that,  
25 because of all of those features of subsection

1 (j), I think that just suggests having the  
2 discretion to modify the sentences where  
3 appropriate, but, again, in -- in many of these  
4 cases, I would think a judge would sentence  
5 consecutively, wouldn't use his or her  
6 discretion to sentence concurrently, but there  
7 are those sort of rare circumstances where that  
8 would occur.

9 And then, of course, the sort of, you  
10 know, elephant in the room, the death penalty  
11 situation, where, obviously, we -- we wouldn't  
12 be having consecutive sentences.

13 JUSTICE ALITO: Can I ask you a -- a  
14 question about section (c)(1)(C), capital C --

15 MR. ROSENBERG: Okay.

16 JUSTICE ALITO: -- which is on 2(a),  
17 the addendum to the -- the SG's brief. And the  
18 provision says, "In the case of a violation of  
19 this subsection that occurs after a prior  
20 conviction under this subsection has become  
21 final, then very stiff mandatory minimums" --  
22 "minimums apply."

23 MR. ROSENBERG: Yeah.

24 JUSTICE ALITO: Okay? So two  
25 situations, and -- and -- and it concerns



1 whether there's first a (c) violation and then a  
2 (j) violation or first a (j) violation and then  
3 a (c) violation.

4           So, in the first situation, there's a  
5 conviction under (c). So this would count  
6 because it is obviously a conviction under (c),  
7 okay, in the case of a violation of this  
8 subsection, which occurs after a prior  
9 conviction under this subsection. So the prior  
10 conviction is under this subsection. So that  
11 counts. And then the (j) conviction would also  
12 count because this would be a conviction that is  
13 "a violation of (c)," right?

14           MR. ROSENBERG: I'm not sure that it  
15 -- that it would. I -- I would say this. I  
16 think that -- that there is some additional  
17 ambiguity in this provision potentially. I  
18 don't think it's necessary to resolve this case.

19           I'm not sure it would, though, because  
20 my point that I was making to the Chief  
21 Justice's question is that we don't think,  
22 although, again, I don't think you need to  
23 decide this, we don't think that a conviction  
24 under (j) is also a conviction under (c), even  
25 though those prefatory elements of (c) do have

1 to be found.

2 And so I think a good criminal defense  
3 lawyer might -- might argue in that circumstance  
4 that it wouldn't apply because the -- the  
5 conviction, at least the conviction under (j)  
6 wouldn't have been a conviction under this  
7 subsection because it wasn't a conviction under  
8 (c).

9 JUSTICE ALITO: Well --

10 MR. ROSENBERG: I don't know if that  
11 answered --

12 JUSTICE ALITO: -- (j) says a person  
13 who in the course of a violation of subsection  
14 (c) --

15 MR. ROSENBERG: Yeah.

16 JUSTICE ALITO: -- causes. So you  
17 don't think that there -- that there would be a  
18 -- a -- this would be in the course of a  
19 violation of subsection (c) under (j)?

20 MR. ROSENBERG: I -- I -- I -- I think  
21 it's arguable, but I think -- I think that there  
22 is also an argument that it isn't because,  
23 unless there was actually a conviction under  
24 (c), I -- I'm not sure that that word  
25 "violation" effectively is perfected until

1 there's actually a conviction under (c).

2 JUSTICE ALITO: But you're reading an  
3 awful lot into the -- the use of "in violation"  
4 as opposed to "under." But, here, you seem to  
5 be reversing course.

6 In any event, if that's -- if it -- if  
7 it is as I described so that --

8 MR. ROSENBERG: Okay.

9 JUSTICE ALITO: -- there would be --  
10 the -- the mandatory minimums would come into  
11 play in that situation, now we reverse the --  
12 the sequence.

13 First, there's a (j) conviction, and  
14 you say that's not under (c), so it doesn't  
15 count. And then it's followed by a (c)  
16 conviction. Well, there would be no mandatory  
17 minimums there.

18 MR. ROSENBERG: Under this provision,  
19 but there would be other mandatory minimums I  
20 understand.

21 JUSTICE ALITO: But not under this  
22 provision.

23 MR. ROSENBERG: That's correct.

24 JUSTICE ALITO: So you have this weird  
25 situation where whether or not the sentence can

1 be consecutive or concurrent depends on the  
2 sequence of the -- of the violations, whether  
3 (c) comes first or (j) comes first.

4 MR. ROSENBERG: Yeah, and that's why I  
5 think my answer is that while I understand where  
6 you're -- you're -- you're coming from, and I do  
7 think the prosecutors could make that argument,  
8 I think there's also room to read the statute to  
9 say that this -- this -- this particular  
10 provision isn't triggered unless you've actually  
11 had a conviction under (c), not just --

12 JUSTICE JACKSON: And doesn't the  
13 prosecution control that? I thought -- I -- I  
14 thought it depended on what was being charged.

15 MR. ROSENBERG: It does. It does.

16 JUSTICE JACKSON: Right. So, if they  
17 charge a (c) -- a -- a (j) violation, although  
18 they might have to prove the predicates from  
19 (c), if the only thing on the table is (j)  
20 because that's the way they've charged it, then  
21 they're stuck with the penalty structure that  
22 attaches to (j), right?

23 MR. ROSENBERG: I agree, yes.

24 JUSTICE JACKSON: And if they charge  
25 it as a (c) -- I mean, they're sort of --

1 they're making the decision upfront as to which  
2 set of penalties they intend to argue for.

3 MR. ROSENBERG: Right. Right. And as  
4 you pointed out, you know, subsection (j) has --  
5 has higher maximums in a variety of ways, and  
6 that may be one reason why the government would  
7 want to prosecute under (j) rather than --

8 JUSTICE JACKSON: Which, surely, the  
9 government knows and then they make a decision,  
10 do we want to make this a (j) or (c), do we want  
11 to charge both? And then, when we get down to  
12 brass tacks in terms of which one, sort of like  
13 a lesser included offense scenario, we then  
14 decide. But it seems like the government has a  
15 lot of control over which one of these penalty  
16 regimes take place in any given case.

17 MR. ROSENBERG: They do.

18 JUSTICE ALITO: Is that your argument?  
19 So that if -- your argument is dependent on the  
20 -- the fact that (c) was not mentioned in the  
21 indictment and is not mentioned in the judgment  
22 of sentence?

23 MR. ROSENBERG: I don't think it --

24 JUSTICE ALITO: So, if it's -- if they  
25 charged in violation of (c) and (j) and that's

1 what the judgment of sentence said, this would  
2 be a different case? Is that your argument? I  
3 didn't understand that to be it -- your  
4 argument.

5 MR. ROSENBERG: Well, I -- let's put  
6 it this way. I don't think it's necessary for  
7 -- to decide the case, but I think, in that  
8 circumstance, you would have to then resolve  
9 this question of whether you actually have to  
10 charge under (c), and we think you would have to  
11 charge under (c) to get the -- the sort of other  
12 benefits of (c).

13 JUSTICE ALITO: I'm not sure I  
14 understand. Maybe --

15 MR. ROSENBERG: So --

16 JUSTICE ALITO: -- I have a block on  
17 this. It -- would you like us to -- to rule --  
18 do you think we should just say the government  
19 decided it wasn't going to mention (c) in the  
20 indictment and it's not in the judgment of  
21 sentence, therefore, that's the end of the case?

22 MR. ROSENBERG: I think that would be  
23 a very reasonable way to decide the case, yes.

24 JUSTICE KAGAN: But you're suggesting  
25 that if the next time around with the next

1 person the government had said (c) and (j), what  
2 would follow?

3 MR. ROSENBERG: I think that's a more  
4 complicated situation. The government says they  
5 can't do it, right? The government says in  
6 their brief steadfastly they think there's a  
7 double jeopardy problem doing it.

8 Our answer is that's not nearly as  
9 clear as the government seems to say, but they  
10 seem to think it. So I think, at that point,  
11 the onus would be on the government to try to  
12 justify why they would be able to do both,  
13 contrary to what they've said, you know, for at  
14 least 10 years apparently.

15 But I do think that's a different  
16 circumstance. It's not this case. And I think,  
17 as Justice Jackson suggested, there are good  
18 reasons to choose either (c) or (j) in an  
19 appropriate case. And that's what the  
20 government has done.

21 But -- - but, hypothetically, you  
22 know, there -- there may be circumstances where  
23 they try to charge under both, and then that  
24 question has to be addressed.

25 JUSTICE SOTOMAYOR: Actually, this

1 issue of which you charge under is up to the  
2 government, and, really, the only time they have  
3 -- they have to make a choice is when they're  
4 seeking the death penalty, correct? Because,  
5 when you think about it, a life sentence is  
6 permissible for virtually all of the crimes that  
7 are being charged that -- that cause a death,  
8 correct?

9 MR. ROSENBERG: Usually, yes. And --  
10 and I think there may be a few rare  
11 circumstances where the maximums elsewhere in  
12 (j) might come into play, but, yes, usually, I  
13 think it's the death penalty is the main reason.

14 JUSTICE SOTOMAYOR: And so the  
15 government can charge even a death under (c) if  
16 it doesn't intend to seek the death penalty?

17 MR. ROSENBERG: It -- it could  
18 potentially try to do that, yes.

19 JUSTICE ALITO: Suppose a person is  
20 charged under (j)(2), a person who in the course  
21 of a violation of subsection (c) causes the  
22 death of a person through the use of a firearm,  
23 shall, if the killing is manslaughter, as  
24 defined in Section 1112, be punished as provided  
25 in that section.



1 MR. ROSENBERG: Yes.

2 JUSTICE ALITO: So, in that situation,  
3 is the person convicted under (j) and 1112 or  
4 just under (j)?

5 MR. ROSENBERG: I think it's just  
6 under (j), but -- but (j) then specifically  
7 incorporates that penalty provision, which gives  
8 the maximums for involuntary manslaughter and  
9 voluntary manslaughter. For voluntary, it's 15  
10 years, and for involuntary, it's eight years.

11 But -- but it -- you wouldn't -- you  
12 wouldn't consider that person to have been  
13 convicted under 1112 because they wouldn't have  
14 been charged, tried, and convicted under 1112.  
15 It would just be (j).

16 JUSTICE ALITO: Do you think it's ever  
17 possible for somebody to be convicted under two  
18 -- under the operation jointly of two separate  
19 provisions?

20 MR. ROSENBERG: Potentially, if it is  
21 clearly charged that way. Maybe in the lesser  
22 included offense instruction situation, but even  
23 there, I think you would have to have a verdict  
24 that made it clear that the defendant was being  
25 convicted under the lesser --

1 JUSTICE ALITO: If it's --

2 MR. ROSENBERG: -- included offense as  
3 well.

4 JUSTICE ALITO: -- if it's charged  
5 that way? I mean, it's very common for somebody  
6 to be -- to be charged with an offense in  
7 violation of 18 U.S.C. Section 2 and another  
8 provision.

9 MR. ROSENBERG: Mm-hmm.

10 JUSTICE ALITO: So there, what --  
11 under what provision is the person convicted?

12 MR. ROSENBERG: If it's charged that  
13 way, I mean, again, it -- it depends on the  
14 actual circumstances of the case, but I -- I  
15 think there you definitely have to have the  
16 charge under the provision you're talking about.

17 Again, I think a criminal defense  
18 attorney would argue that there has to be  
19 something on the verdict form that makes clear  
20 that they're being convicted under both  
21 statutes. But, certainly, it helps if you're  
22 being charged under the statute.

23 Here, they're not charged under (c),  
24 they're not tried under (c), they're not  
25 convicted under (c), so you can't say that this

1 was a sentence imposed under (c).

2 CHIEF JUSTICE ROBERTS: Anything  
3 further? Anything further?

4 Thank you, counsel.

5 Ms. Ross.

6 ORAL ARGUMENT OF ERICA L. ROSS

7 ON BEHALF OF THE RESPONDENT

8 MS. ROSS: Thank you, Mr. Chief  
9 Justice, and may it please the Court:

10 Section 924(j)(1) provides enhanced  
11 federal penalties for the most serious Section  
12 924(c) offenders, those who not only bring a --  
13 a gun to a crime of violence or drug trafficking  
14 crime but actually take it out and use it to  
15 kill someone. In doing so, Section 924(j) does  
16 not eliminate the basic sentencing requirements  
17 of Section 924(c).

18 Under ordinary principles of statutory  
19 interpretation, this Court should harmonize  
20 Sections 924(c) and (j). And under the Court's  
21 Blockburger precedents, the most natural way to  
22 do that is to read Section 924(j) to create an  
23 aggravated version of the same Section 924(c)  
24 offense.

25 In cross-referencing subsection (c),

1 Section 924(j) sweeps in all of subsection (c)'s  
2 provisions. It does not, as my friend suggests,  
3 pick and choose particular factual elements.

4 And Section 924(c) states that its  
5 mandatory minimum sentence shall apply to any  
6 person who engages in the basic offense conduct.  
7 As the questions this morning have indicated,  
8 Petitioner plainly falls within that category.

9 Section 924(j) then incorporates --  
10 then requires that the court consider whether to  
11 add additional punishment for the homicide.  
12 Whatever overall sentence the court chooses, it  
13 is therefore imposed under both Sections 924(c)  
14 and (j), and the consecutive sentencing  
15 requirement applies.

16 Now my friend says that reading --  
17 this reading causes conflict between the  
18 mandatory minimum sentences in Section 924(c)  
19 and Section 924(j)'s incorporation of the  
20 punishments for murder and manslaughter and, in  
21 particular, the involuntary manslaughter  
22 provision he was discussing this morning.

23 But those provisions can be harmonized  
24 in the way I've just described. Indeed, Section  
25 924(c)(5), on page 3a of the Government's

1 appendix, necessarily works this way. It  
2 includes its very own 15-year mandatory minimum  
3 for using armor-piercing ammunition and then  
4 adds on top the same murder and manslaughter  
5 penalties nearly verbatim as Section 924(j).

6 Just as there's no internal  
7 inconsistency in Section 924(c)(5), there's no  
8 internal inconsistency in the government's  
9 reading of Sections 924(c) and (j).

10 I welcome the Court's questions.

11 JUSTICE THOMAS: What do you do with  
12 the language in 924(c) that refers to  
13 sentences -- it says notwithstanding any other  
14 provision of law, no sentence imposed on a  
15 person under this subsection. I -- I -- I would  
16 get -- understand your argument if it said  
17 "section," but "subsection." So how do you  
18 reconcile that with your -- what you just said?

19 MS. ROSS: Sure, Justice Thomas. I  
20 want to first take the "under" piece of that  
21 question and then explain why we think this  
22 section was not a way to write the statute.

23 So, for "under," we think, as this  
24 Court explained in National Association of  
25 Manufacturers, under Zekmelion, it has to take

1 its meaning from context. In that case, the  
2 Court described the word "under" as meaning by  
3 reason of the authority of. We think it's clear  
4 here that Section 924(c) is providing at least  
5 some of the authority for the 924(j) sentence.  
6 It's providing the -- the factual elements, as  
7 my friend explained, although I think we  
8 disagree about precisely which ones. And in our  
9 view, it's providing the mandatory minimum  
10 penalty as well as the consecutive sentencing  
11 requirement itself.

12 And so we do think that a sentence  
13 that is imposed for a violation of subsection  
14 (j), which necessarily requires, as the Chief  
15 Justice was noting, a jury to find the elements  
16 of (c) is imposed under both subsections.

17 JUSTICE KAGAN: Well, but why is that,  
18 Ms. Ross? I mean, suppose that (j) had not said  
19 in the course of a violation of subsection (c)  
20 but just repeated all of subsection (c)'s  
21 language. Then what?

22 MS. ROSS: So I think that would be a  
23 much more difficult case, and my friend would  
24 have a much better argument. I think the  
25 problem with his argument is that what he would

1 like you to do, if you look at page 1a of the  
2 Government's appendix, is look at -- at -- at  
3 paragraph (c)(1)(A), start reading about two --  
4 two-and-a- half lines down where it says "Any  
5 person who," read all the way through there,  
6 stop at the penultimate line of that sort of  
7 lead paragraph where it says "shall" and  
8 incorporate only that bracketed content.

9           That's, of course, not what Section  
10 924(j) says. It refers to subsection (c) as a  
11 whole. It doesn't reference paragraph  
12 (c)(1)(A). It doesn't reference any of the  
13 particular elements.

14           JUSTICE JACKSON: But it also doesn't  
15 say if you're convicted of subsection (c). I  
16 mean, I think that's the problem for your  
17 argument. It says "in the course of a violation  
18 of subsection (c)."

19           And so I don't understand why the  
20 government believes in this case that it's  
21 entitled to the penalty structure that comes  
22 with Section (c) if a person is convicted of (c)  
23 when (j) doesn't say and it could easily have  
24 said any person who's convicted of subsection  
25 (c), et cetera.

1 MS. ROSS: So -- so, Your Honor, I  
2 think it is certainly true that -- that Congress  
3 could have been clearer in this provision. My  
4 point was simply that it also doesn't say what  
5 Petitioner is suggesting.

6 We think the best reading of this  
7 statute is that (c) provides the basic elements  
8 of the offense. It provides the basic  
9 sentences. And then (j) sort of comes in to say  
10 and when there's a death, we're going to add  
11 these other penalties.

12 And I think that's consistent, as I  
13 was saying in my introduction, with how (c)(5)  
14 works. I think it necessarily has to work that  
15 way. And so we think there's -- there's nothing  
16 wrong with sort of taking these provisions as  
17 they come, walking through (c) before you get to  
18 (j).

19 JUSTICE JACKSON: So what do you do  
20 with the fact that (j) was actually enacted at a  
21 different time than (c)?

22 MS. ROSS: So --

23 JUSTICE JACKSON: And that suggests to  
24 me that Congress was careful and thoughtful  
25 about the placement of (j). They could have put



1 it in (c) to accomplish what you've talked  
2 about, but they didn't. And (j) has its own  
3 penalty provision, not specifically  
4 cross-referenced in any way to (c)'s penalty  
5 provisions.

6 So I guess it just sort of seems to me  
7 that the enactment history also undermines the  
8 government's view that (j) is supposed to be  
9 ordering some sort of aggregation of the (c)  
10 penalties.

11 MS. ROSS: Certainly. So we actually  
12 think that the history is quite helpful for us,  
13 and if I could just explain why. I think there  
14 are three really key dates here.

15 The first is that in 1968 Congress  
16 enacted this provision (c) without any  
17 concurrent consecutive requirement. Couple of  
18 years later, it adds the -- the consecutive  
19 sentences bar. And then, in 1994, as Your Honor  
20 noted, Congress added subsection (j).

21 And I think what's really significant  
22 at that time is that when Congress did so and it  
23 cross-referenced subsection (c) as a whole,  
24 subsection (c) was much simpler than it is  
25 today. It involved only three paragraphs,

1 paragraphs (1), (2), and (3). Paragraphs (2)  
2 and (3), as today, defined drug trafficking  
3 crime and crime of violence. Everyone agrees  
4 that those have to come in, that the  
5 cross-reference to -- to (c) and (j) necessarily  
6 includes those.

7           And then, in paragraph (c)(1), it  
8 included all of the substance of the offense.  
9 So it included the base offense elements. It  
10 included certain mandatory minima, for example,  
11 if -- if a particular type of weapon was used.  
12 And it included the bar on consecutive  
13 sentences.

14           And I think it's particularly unlikely  
15 in 1994, when Congress cross-referenced  
16 subsection (c) as a whole, that what it really  
17 meant to do was -- was take subsection (c)(1) --  
18 (c)(2) and (3) and then particular words and  
19 phrases out of (c)(1). I think, when Congress  
20 said subsection (c), it meant subsection (c).

21           JUSTICE JACKSON: But, of course, it  
22 doesn't say subsection (c) as a whole. It just  
23 says a violation of subsection (c). I -- I  
24 appreciate that you keep saying that every time  
25 you talk about subsection (c) as it's referenced

1 in (j), but that's not what it says.

2 MS. ROSS: It's correct that it --  
3 it -- it says a violation of subsection (c), but  
4 if you look at subsection (c) --

5 JUSTICE JACKSON: Which you can commit  
6 without reference to subsection (c)'s cumulative  
7 penalties or any penalty, any of the mandatory  
8 minimums or anything like that, right? It's not  
9 the government's position that you wouldn't have  
10 a violation of subsection (c) without, you know,  
11 the penalty structure.

12 MS. ROSS: I think that's correct,  
13 Your Honor, but I think it's also not true that  
14 Congress was sort of focusing on those elements  
15 in particular. I think another point that was  
16 discussed earlier with respect to -- to what  
17 Congress was doing in this provision was, you  
18 know, the focus on the death penalty.

19 And while I think that that is  
20 obviously something was concerned with --  
21 Congress was concerned with when it added  
22 subsection (j), it's clear that Congress also  
23 knew, as Justice Kavanaugh was pointing out  
24 earlier, that term-of-year sentences would  
25 continue to apply for (j) violations. That's in

1 the language of (j)(1), of course.

2 And we think that it's just completely  
3 implausible that at the time that Congress was  
4 enacting this statute, it meant to keep a  
5 mandatory minimum consecutive sentence, as this  
6 Court explained in Abbott, explained three --  
7 the -- Congress explained three times over that  
8 it's so important that individuals who engage in  
9 that base offense conduct receive that mandatory  
10 minimum consecutive sentence but at the same  
11 time eliminated that when the person actually  
12 takes the gun out and kills someone.

13 JUSTICE SOTOMAYOR: It is correct,  
14 isn't it, that under your theory, subparagraph  
15 (c)(5)(B) is superfluous?

16 MS. ROSS: So, Justice Sotomayor, I  
17 think that's respectfully not quite the right  
18 way to look at it. I think anyone who was  
19 sentenced under Section (c)(5)(B) would have to  
20 be sentenced under Section (c)(5)(A) as well,  
21 and so you sort of have to take (c)(5) as a  
22 whole. And, of course, (c)(5), because it's  
23 providing --

24 JUSTICE SOTOMAYOR: But still, why add  
25 it if how you kill somebody is irrelevant under

1 your view?

2 MS. ROSS: I --

3 JUSTICE SOTOMAYOR: Because they're  
4 all going to get the -- the same sentence, so  
5 why did Congress add (c)(5)(B)?

6 MS. ROSS: I don't think there's a  
7 good explanation in the legislative history,  
8 Justice Sotomayor. I think my best guess is  
9 just for who --

10 JUSTICE SOTOMAYOR: That's because  
11 your reading doesn't treat them separately. You  
12 want us to mesh them together. That's the  
13 reason why. Petitioner's reading gives a  
14 reason. You're absolutely right. If you do it  
15 in this way, you're going to get this minimum.  
16 If you don't do it in this way, you get the  
17 maximum under (j) alone.

18 MS. ROSS: So, if I'm understanding  
19 the question correctly, Justice Sotomayor, I  
20 think the difference Petitioner posits between  
21 (c)(5)(B) and (j) is, you know, everybody agrees  
22 that (c)(5)(B) has its own mandatory minimums --  
23 or excuse me, (c)(5)(A) has its own mandatory  
24 minimum. So then he says the work that (c)(5)  
25 --

1 JUSTICE SOTOMAYOR: No I'm talking  
2 about (c)(5)(B).

3 MS. ROSS: Right. And he says that  
4 the work that (c)(5)(B) is doing is that it is  
5 requiring a consecutive sentence, whereas, under  
6 (j), that's optional.

7 And, respectfully, I just think  
8 there's no indication that Congress was seeking  
9 to distinguish between these provisions in that  
10 way. I think the far better reading is probably  
11 that Congress was just trying to be complete and  
12 make sure that there was no confusion that  
13 the -- the same penalties that apply in (j)  
14 would still apply if you killed someone through  
15 the use of the armor-piercing ammunition.

16 JUSTICE KAGAN: Isn't the truth of the  
17 matter here that Congress just made a mistake?

18 JUSTICE THOMAS: Yeah.

19 MS. ROSS: Your Honor, if you thought  
20 that -- that Congress just made a mistake,  
21 particularly, I -- you know, we haven't really  
22 discussed the Blockburger question, I do want to  
23 get there, but if you thought that Congress made  
24 a mistake such that, you know, the -- the right  
25 result from the language was that this is all

1 one offense, we have to charge (j) or (c), but  
2 when we charge (j), when we recognize what  
3 Congress recognized is a far more serious  
4 offense, then we lose the -- the mandatory  
5 minimum consecutive penalty in (c), you know, I  
6 think that might be a case for an absurdity type  
7 of construction because it is so implausible,  
8 but, of course, we don't think you need to get  
9 there because we think the -- the text and the  
10 structure of -- and the history of this statute  
11 are themselves sufficient to -- to clarify  
12 whatever ambiguity there is here.

13 JUSTICE SOTOMAYOR: Why is it --

14 JUSTICE KAVANAUGH: Do --

15 JUSTICE SOTOMAYOR: -- absurd? You  
16 have a sentence that gives you permission to  
17 impose the death penalty. That's a really big  
18 difference.

19 We do things -- we rule under  
20 absurdity where it makes no sense whatsoever.  
21 The whole purpose of (j) was to give the  
22 prosecutor even more of a weapon, death.

23 MS. ROSS: So a couple of points on  
24 that, Your Honor. I think, obviously, that is a  
25 purpose of (j), but I think, as I was noting,

1 you know, there are inevitably going to be  
2 term-of-year sentences under (j), and in that  
3 instance, I think it is quite implausible. You  
4 don't even need to get to absurdity.

5 I'd point to this Court's decision in  
6 Abbott, where it rejected implausible, bizarre  
7 results under 924(c). It -- it's quite  
8 implausible that Congress intended when you  
9 actually take the gun out and kill someone with  
10 it for a lesser sentence to be possible than  
11 when it's simply in -- in the --

12 JUSTICE KAVANAUGH: But was there a --

13 MS. ROSS: -- defendant's pocket on  
14 that.

15 JUSTICE KAVANAUGH: Keep going, I'm  
16 sorry.

17 MS. ROSS: Oh. On that, I just wanted  
18 to point out, you know, my friend was talking  
19 about it makes sense to have discretion perhaps  
20 in the involuntary manslaughter context. You  
21 know, a few points on that.

22 One is that I think involuntary  
23 manslaughter here is really the tail wagging the  
24 dog. If you look at pages 9 to 10 of  
25 Petitioner's reply brief, where he's talking



1 about this -- you know, most of his examples are  
2 involuntary manslaughter, and then, on page 23,  
3 he's talking about, you know, the physician who  
4 is going to prescribe suicide-inducing drugs and  
5 he brings his gun because he's concerned that  
6 the family is going to violently intervene and  
7 then the gun goes off and it kills the --  
8 the defend -- excuse me, the -- the elderly  
9 patient. I think that's so unlikely that --  
10 that that should not sort of drive the -- the  
11 train here.

12 And I think it's also true that --  
13 that even that doesn't make sense because  
14 Congress, of course, didn't want discretion when  
15 no manslaughter occurred. And so it doesn't  
16 make any sense to say you need it --

17 JUSTICE KAVANAUGH: What --

18 MS. ROSS: -- when you committed the  
19 base conduct but also committed involuntary  
20 manslaughter.

21 JUSTICE KAVANAUGH: -- what I think  
22 Congress was generally concerned and is still  
23 concerned about what it views as light sentences  
24 in cases involving guns, so 924, drug and crimes  
25 of violence where guns are -- are carried or

1 used.

2 But, if you think about 924(j), do you  
3 think Congress was concerned that judges were  
4 imposing light sentences when there was a  
5 killing as well?

6 MS. ROSS: So -- so I think, quite  
7 frankly, Justice Kavanaugh, Congress was  
8 probably concerned that the existing federal  
9 murder statute just wouldn't reach this conduct  
10 because it applies only in the special maritime  
11 and territorial jurisdiction of the United  
12 States. And so that, I think, is why you get  
13 924(j) as an independent provision --

14 JUSTICE KAVANAUGH: Right --

15 MS. ROSS: -- or, excuse me, not an  
16 independent provision --

17 JUSTICE KAVANAUGH: -- but you want to  
18 read in the -- the -- the no -- no concurrent  
19 sentence provision into 924(j), and I -- I  
20 realize I'm reconstructing here, so -- but  
21 Congress could think, okay, there's a problem  
22 with light sentencing in certain kinds of  
23 drug/gun cases, but I'm not sure they would have  
24 thought there's a problem of light sentencing in  
25 cases where there's a killing. But I'm --

1 MS. ROSS: So -- so two points on  
2 that, Your Honor, maybe three. The first, I  
3 guess, which is a nonpoint, is that I don't have  
4 anything specific in the legislative history on  
5 this.

6 The second point, you know, I think  
7 you could probably always say something like  
8 that in mandatory minimum cases. You know, the  
9 -- it's sort of self-evidently serious conduct  
10 and, therefore, maybe you don't need a mandatory  
11 minimum, yet Congress goes ahead and does it.

12 JUSTICE KAVANAUGH: Well --

13 MS. ROSS: And the third point is just  
14 that in 924(c)(5), I think you could make  
15 exactly that argument and, of course, Petitioner  
16 agrees that that falls under (c) and therefore  
17 has the -- the bar on consecutive sentences --  
18 or, excuse me, the bar on concurrent sentences.  
19 And so all we think is that, you know, when you  
20 kill somebody without the armor-piercing  
21 ammunition, the same -- the same rule applies.

22 JUSTICE JACKSON: But I -- can I go  
23 back to the absurdity point? Because I guess  
24 I'm wondering the opposite of what Justice Kagan  
25 said was, which -- which is, isn't the truth of

1 the matter that we have a different Congress in  
2 1994 than we had in 1968 so that, when (j) was  
3 created, perhaps that Congress made a different  
4 policy choice about the determination of  
5 mandatory minimums versus increasing the  
6 maximums, all of that seems perfectly rational  
7 to me as opposed to absurd.

8 So can you speak to that kind of  
9 thought process?

10 MS. ROSS: Certainly. You know, I --  
11 I just want to caution I think we're sort of  
12 pretty far into speculating about what Congress  
13 may or may not have thought. We really don't  
14 have anything on this, I think, from the  
15 relevant period.

16 JUSTICE JACKSON: True, but you made  
17 the absurdity argument, and I -- what that --

18 MS. ROSS: Sure.

19 JUSTICE JACKSON: -- calls upon us to  
20 do is to evaluate the extent to which Congress's  
21 determination is or is not absurd.

22 And what I'm positing is that a  
23 Congress in 1994 that is looking at (j) and the  
24 circumstances that you describe as someone dying  
25 in the context of use-and-carry scenarios could

1 have decided we're not going to put another  
2 mandatory minimum in this.

3           Instead, we're going to offer the  
4 government the death penalty. We're going to  
5 increase -- make it any term of years, which  
6 means that the government can argue at  
7 sentencing consecutiveness. The government can  
8 argue that this should be really much higher  
9 than a 924. We're going to blow the top off of  
10 the maximums, and that's the way we want to  
11 handle this situation. Why is that absurd?

12           MS. ROSS: So -- so I think that's  
13 just not the way this Court has thought about  
14 924(c). If you look at Abbott, I think the  
15 Court could have said precisely that in Abbott.  
16 It was construing the "in addition to" language.

17           JUSTICE JACKSON: I'm asking how the  
18 Court looks at -- not -- at (j), not 924(c).  
19 What -- why is it absurd for a Congress that is  
20 enacting (j) to have had a separate penalty  
21 structure that did not incorporate the mandatory  
22 minimums of (c) but instead took care of that  
23 circumstance through, as the text says here,  
24 giving the death penalty, increasing the  
25 maximums and the like?

1                   MS. ROSS:  Again, I -- you know, I  
2     think it is just fundamentally at odds.  I  
3     think, generally, this Court looks at a statute  
4     as a whole, even when pieces are amended at  
5     different times.  I think that's what the Court  
6     did do in Abbott.  And I think it would not make  
7     sense to say, you know, Congress built on this  
8     by allowing the death penalty but at the same  
9     time thinking that a five-year mandatory  
10    consecutive term was simply too much.  I -- I --  
11    I don't think that sort of holds up as a matter  
12    of logic.

13                   JUSTICE ALITO:  We -- we have sort of  
14    a strange situation here where Petitioner argues  
15    -- invokes the rule of lenity but argues that --  
16    at least this is what I got from the brief --  
17    that it's possible for the government to charge  
18    a (c) violation and a (j) violation separately.  
19    They would be two -- there would be two separate  
20    violations.  And you, on the other side, say,  
21    no, you can't do that.

22                   So could you comment on this?

23                   MS. ROSS:  Absolutely, Justice Alito.  
24    I appreciate the opportunity to do so.

25                   First off, I think you're absolutely

1 correct. I heard my friend this morning say  
2 that, you know, the double jeopardy issue isn't  
3 as clear as we say. In his brief, I think it's  
4 pellucid. I would tell you pages 15, 17, and 22  
5 of the reply brief, where he's quite clear that  
6 he thinks, as Your Honor mentioned, that we can  
7 charge, convict, and get cumulative punishments  
8 on both (c) and (j).

9 Now I think that makes sense if you  
10 think these are standalone punishment provisions  
11 for the reasons I was just describing. It just  
12 makes no sense to think that Congress put the  
13 government in this catch-22 where, on the one  
14 hand, it can, you know, charge what everybody  
15 agrees is the lesser offense in (c), be  
16 guaranteed a mandatory minimum consecutive  
17 sentence, but it has to leave on the shelf this  
18 provision that Congress, clearly concerned about  
19 gun murders in the course of 924(c) violations,  
20 created, or, on the other hand, it can charge  
21 the (j) but lose the mandatory minimum  
22 consecutive sentence.

23 I think that doesn't make sense, and I  
24 think, if you come to a reading where you think  
25 these are separate penalty provisions, that's

1 actually the best evidence that these are, in  
2 fact, separate offenses for Blockburger.

3           We, by contrast, have long taken the  
4 position based on this Court's Blockburger  
5 jurisprudence that these are one offense.  
6 Generally, when you have a greater and a lesser  
7 included offense in the same section of a  
8 statute, we do -- you know, this Court's cases  
9 have treated those as the same offense. And so  
10 we reconcile the statute by saying it's one  
11 offense, and that means that, you know, the (c)  
12 penalties come along with the greater (j)  
13 offense.

14           If the Court disagrees with us on  
15 this -- I think this is extremely important in  
16 practice -- I think it has to or it -- it should  
17 say that these are separate offenses for  
18 purposes of Blockburger because, for the reasons  
19 I was just noting, you know, it really makes no  
20 sense to have one offense, but the government  
21 has to choose one or the other.

22           JUSTICE KAVANAUGH: And then -- and  
23 then --

24           JUSTICE KAGAN: But, if --

25           JUSTICE KAVANAUGH: -- the government,



1 going forward, will charge both.

2 MS. ROSS: That's correct, Justice  
3 Kavanaugh. And, again --

4 JUSTICE KAVANAUGH: So the -- the --  
5 the problem is really retrospective from your  
6 perspective, because, going forward, you'll  
7 charge 924(c) and 924(j) in circumstances like  
8 this?

9 MS. ROSS: That's correct with one  
10 wrinkle. You know, we've talked a little bit  
11 about what 924(j) gets us in terms of the -- or  
12 -- or permits in terms of the death penalty.  
13 924(j) and 924(c) are also different for statute  
14 of limitations purposes. So 924(c) is subject  
15 to the default five-year federal statute of  
16 limitations. 924(j)(1) at least, as a capital  
17 offense, has no statute of limitations. And so  
18 there will be cases, quite frankly, this case  
19 included, in which the government only can go  
20 forward on a (j) count.

21 CHIEF JUSTICE ROBERTS: If that were  
22 the --

23 JUSTICE KAGAN: If the Court were to  
24 --

25 CHIEF JUSTICE ROBERTS: I'm sorry. Go

1 ahead.

2 JUSTICE KAGAN: No, go ahead.

3 CHIEF JUSTICE ROBERTS: Would -- if  
4 you do go with both, aren't you going to be  
5 confronted with the problem that your friend  
6 talked about, which, for the same offense, you  
7 could get one sentence that says to be --  
8 minimum of 30 years and the other one maximum of  
9 15?

10 MS. ROSS: I don't think so, Chief --  
11 Mr. Chief Justice, because I think these --  
12 we're talking about separate counts here. So  
13 he's saying that we can bring, you know, a  
14 three-count indictment, Count 1 is the  
15 underlying crime of violence or drug -- drug  
16 trafficking crime, Count 2 is the (c), and Count  
17 3 is the (j). And so, you know, you would then  
18 have those sentences.

19 And I think, to go to Justice  
20 Kavanaugh's point, you know, that actually -- or  
21 perhaps it -- it may have been Justice Alito's  
22 point -- that actually may not be more lenient  
23 in practice because I think, as in this case,  
24 you know, the -- the court here had a (j) in  
25 front of it. It, as most, if not all, courts of

1 appeals do, read the -- (j) to include the  
2 mandatory minimum on (c), and it said, you know,  
3 I think the (c) five-year mandatory minimum here  
4 is sufficient given the other counts in the  
5 indictment.

6 I think you couldn't do that on  
7 Petitioner's rule if these are separate charges  
8 and separate convictions and separate  
9 punishments because the separate (j) offense  
10 would require its own sentence, and that  
11 sentence would have to be subject to subsection  
12 (c)'s consecutive sentencing requirement in the  
13 sense that it -- it, like all other sentences,  
14 would have to be consecutive to (c).

15 So I think Petitioner's rule actually  
16 is -- is less lenient in a number of cases.

17 JUSTICE KAGAN: If the Court were to  
18 rule for Mr. Lora on the question presented on  
19 the theory that this language in (j), "in the  
20 course of violation of subsection (c)," does not  
21 incorporate all of subsection (c), and the Court  
22 were to leave it at that, and the Court were to  
23 say nothing about the Blockburger question,  
24 which isn't really before us in the same way,  
25 what would the government do? Would the

1 government then say, okay, things have changed,  
2 we're viewing this differently now, we're going  
3 to start charging (c) and (j)?

4 MS. ROSS: So I think we might well  
5 take that course, Justice Kagan, again, because  
6 I think that's sort of the natural consequence  
7 of treating the (j) as not incorporating the (c)  
8 penalties.

9 But I think there's a -- a sort of  
10 on-the-ground practical reason why I would  
11 counsel the Court against doing that, and that's  
12 because a number of courts of appeals have  
13 precedent on the Blockburger question. And so I  
14 think -- and -- and generally holding in line  
15 with the government's view that they're one  
16 offense, but also holding that, you know, (j)  
17 incorporates (c)'s penalties.

18 And so I think, if you dismantle half  
19 of that without dismantling all of it, we could  
20 be in a position where courts of appeals, under  
21 their prior panel rules, might not think that  
22 they could reverse that precedent and would have  
23 to go en banc. And it's just, you know, a -- a  
24 use of judicial resources that I think is  
25 unnecessary. Given that the parties have joined

1 issue on this question, I think it's well  
2 presented in the papers here.

3 JUSTICE KAVANAUGH: Can -- can I just  
4 be very clear? You said you would counsel  
5 against us doing -- and I want to be exactly  
6 sure on what you're counseling us against doing.

7 MS. ROSS: I -- I appreciate it, and I  
8 appreciate the Court's indulgence in my  
9 counseling anything.

10 I -- you know, I -- I think what the  
11 Court should not do is hold that Petitioner is  
12 correct that the (j) -- that (j) does not  
13 include the (c) sentencing provisions but leave  
14 open whether this is one or two offenses for  
15 Blockburger purposes. Obviously, we also think  
16 you shouldn't do that and hold it's one offense  
17 for Blockburger purposes. We think, if you're  
18 going to say, as Mr. Lora argues, that (j) does  
19 not sweep in the (c) penalties, then we think  
20 the Court should also make clear, as Mr. Lora  
21 argues, that, you know, in part, because of  
22 that, given the intertwined relationship between  
23 the two questions, these are separate offenses  
24 for Blockburger --

25 JUSTICE KAVANAUGH: If they don't --

1 JUSTICE JACKSON: But that's not the  
2 Blockburger test. I don't understand. So  
3 you're -- you're suddenly now asking us as a  
4 result of this case to revisit Blockburger and  
5 what it says about when there are separate  
6 offenses?

7 MS. ROSS: No, Justice Jackson. To --

8 JUSTICE JACKSON: So you've already  
9 said that this fails the Blockburger test.  
10 That's the government's view. And I understood  
11 Justice Kagan to be saying, can we not talk  
12 about that in this case, whether it meets the  
13 Blockburger test or not, and still rule in favor  
14 of Mr. Lora? And you're saying no. But I don't  
15 understand why that is.

16 MS. ROSS: Sure. So we take the  
17 Blockburger test as it exists. We think, under  
18 the Blockburger test, we have the better reading  
19 of the statute. We think it's a greater and a  
20 lesser included offense. That's normally one  
21 offense. But the natural consequence of that is  
22 that the -- the penalty provisions of (c) apply  
23 to (j) as well.

24 JUSTICE JACKSON: All right. Can we  
25 disagree with that part of it without revisiting

1 whether it's one or a different offense? You've  
2 said two different things in that. I mean, I  
3 didn't understand Blockburger to speak to the  
4 penalties in this way.

5 MS. ROSS: So I think one of the clues  
6 you might look to in the Blockburger analysis,  
7 and we think the clearest clue in this case if  
8 you come out in Mr. Lora's direction, is whether  
9 it's a standalone penalty scheme or it's  
10 incorporating another provision's penalty. And  
11 I think that is how the two are related.

12 Now, again --

13 JUSTICE JACKSON: And what's your  
14 answer to that question? You say it -- it -- it  
15 satisfies the Blockburger test, meaning that  
16 they are one and the same, like a lesser  
17 included offense, but it also incorporates the  
18 other penalty. Is that your view?

19 MS. ROSS: I -- I might have lost you  
20 there, but I think what we say as our frontline  
21 position -- I -- I want to be clear about this  
22 because I think it's extremely important. Our  
23 frontline position is that these are one offense  
24 for purposes of Blockburger. That is because,  
25 you know, (c) -- (j) cross-references (c),

1 they're in the same section, they're part of the  
2 same -- you know, they're a greater and lesser  
3 included offense, cases like Brown versus Ohio  
4 and Garrett, which strongly suggest they're one  
5 offense.

6           If they're one offense, we think it is  
7 necessarily true that the -- the penalties of  
8 (c) are read into (j) because all (j) is doing  
9 at that point is adding an additional element  
10 and it's increasing the penalty.

11           JUSTICE JACKSON: Is that what  
12 Blockburger says? If they're one offense, then  
13 the penalties of one necessarily get imported  
14 into the other? That's what I'm asking you.

15           MS. ROSS: I don't think that's what  
16 Blockburger --

17           JUSTICE JACKSON: All right. So that  
18 would be --

19           MS. ROSS: -- itself says. I do think  
20 --

21           JUSTICE JACKSON: -- new if we decided  
22 in your favor using the Blockburger standard in  
23 the way you want us to?

24           MS. ROSS: I don't think that's quite  
25 right in the sense that I think subsequent cases



1 in that line look to features of the statute and  
2 sort of their level of interdependent -- the --  
3 the two crimes' level of interdependentness --  
4 or interdependence. And -- and one of those  
5 clues, I think, would be the -- the way that the  
6 penalty provisions interact.

7 JUSTICE SOTOMAYOR: Counsel, I -- I'm  
8 having a whole lot of problem here. You just  
9 started this section on saying that you couldn't  
10 charge 924(c) because it has a five-year  
11 limitation. So we're going to hypothesize that  
12 you could have and, if you did, that you  
13 didn't -- wouldn't have violated the Double  
14 Jeopardy Clause. That's what you want us to do?

15 MS. ROSS: So, Justice Sotomayor --

16 JUSTICE SOTOMAYOR: To hypothesize  
17 that you could have and wouldn't.

18 MS. ROSS: Justice Sotomayor, I think  
19 what we're asking you to -- so -- so let me  
20 rephrase this.

21 I think Petitioner was very clear in  
22 his briefs that there's no anomaly on his  
23 reading. There's no problem with saying that  
24 (j) doesn't incorporate the (c) penalties  
25 because the government can also bring a (c)

1 charge whenever it can bring a (j) charge, with  
2 the exception of statute of limitations  
3 questions, which are sort of on a -- on a  
4 different plane.

5 JUSTICE SOTOMAYOR: Well, that -- that  
6 hurts you too because it makes it different not  
7 just in terms of the maximum but also gives you  
8 a greater statute of limitations than (c) does.  
9 So there's a lot of reasons to treat (j)  
10 differently and separately, because you're  
11 getting two benefits, one, a greater maximum,  
12 and second, a longer statute of limitations.

13 MS. ROSS: I certainly understand  
14 that, Justice Sotomayor. Of course, our  
15 fundamental submission is that -- that Congress,  
16 having given us those things, it's irrational to  
17 think -- didn't think that at least the  
18 mandatory minimum for the base offense --

19 JUSTICE SOTOMAYOR: Well --

20 MS. ROSS: -- was required.

21 JUSTICE SOTOMAYOR: -- we go back to  
22 Justice Jackson's question, if -- we can't know  
23 what Congress was thinking except that it knew  
24 to add armor in (c) and yet it created (j)  
25 separately. And what it did in (j) was to raise

1 a statutory maximum and give you a statute of  
2 limitations benefit.

3 MS. ROSS: Of course, it did the same  
4 things in (c)(5). I think the better  
5 understanding of (c)(5) is probably --

6 JUSTICE SOTOMAYOR: No, it -- it  
7 didn't -- it made a minimum of -- of -- it -- it  
8 didn't. It just added armor-piercing.

9 MS. ROSS: No, (c)-- (c)(5)(B) does  
10 give you a -- a maximum sentence of the death  
11 penalty and therefore --

12 JUSTICE SOTOMAYOR: Yes, so it could  
13 --

14 MS. ROSS: -- would give you the  
15 heightened statute of limitations --

16 JUSTICE SOTOMAYOR: -- have done it  
17 that way too, and it just didn't, so why --

18 MS. ROSS: Well, I think the better  
19 explanation on (c)(5) is probably that  
20 armor-piercing ammunition is sort of -- of a  
21 flavor with the other enhancements that are in  
22 (c) throughout, so machine gun, you know,  
23 different types of weapons, things like that.  
24 And so (c)(5) may have been included there.

25 But, of course, you know, I -- I -- I

1 don't have a -- a legislative history cite for  
2 you on that.

3 JUSTICE SOTOMAYOR: Well, I don't know  
4 what -- what --

5 MS. ROSS: We're all just speculating  
6 about why Congress did what it did here.

7 JUSTICE SOTOMAYOR: Maybe we should  
8 just go back to the language.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 Justice Thomas?

12 JUSTICE THOMAS: You were going to  
13 counsel us on how best to write an opinion if we  
14 came out in favor of Mr. Lora, and I don't think  
15 you quite finished.

16 MS. ROSS: Thank you, Justice Thomas.  
17 So I -- I've tried to explain that I think, if  
18 you hold that (j) -- you don't walk through (c)  
19 first, you don't apply (c)'s "any person who"  
20 language, which we think clearly applies to a  
21 person who violates (j).

22 If you disagree with us on that, then  
23 we think you would be saying that (j)'s penalty  
24 provision -- or, excuse me, (c)'s penalty  
25 provisions are not read into (j), and at that

1 point, I think you would explain, as Mr. Lora  
2 did in his briefs, that the reason that doesn't  
3 create an anomaly where the lesser conduct in  
4 (c) has a greater in this sense penalty of a  
5 consecutive mandatory sentence is that, in fact,  
6 the government is able to charge both (c) and  
7 (j) separately and to obtain cumulative  
8 punishments on each going forward because they  
9 are separate offenses.

10 CHIEF JUSTICE ROBERTS: Justice Alito?

11 JUSTICE ALITO: If we agree with --  
12 excuse me, if we agree with Petitioner, could  
13 someone convicted under (j) be placed on  
14 probation?

15 MS. ROSS: So --

16 JUSTICE ALITO: Would (c) --  
17 (c)(1)(D)(i) apply?

18 MS. ROSS: So, frankly, Justice Alito,  
19 I -- I think the answer depends on the  
20 classification of the manslaughter and the -- or  
21 of (j) as a certain type of felony. I think it  
22 is possible in -- depending on how you sort of  
23 squint at the relevant statutes in an  
24 involuntary manslaughter case perhaps, but I  
25 think it's just sort of untested. I -- I'm not

1 sure the answer to that question.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Sotomayor?

4 Justice Kagan?

5 JUSTICE KAVANAUGH: Just to quickly  
6 summarize your answer to Justice Thomas just now  
7 because I want to be very clear on this.

8 If you lose on your main argument and  
9 they prevail, then you can, you think, charge  
10 both (c) and (j), and you will, presumably, and  
11 you will defend that against any Blockburger or  
12 other kind of argument?

13 MS. ROSS: I -- I think that is likely  
14 the case. You know, I -- I don't want to commit  
15 the Department because it would obviously --

16 JUSTICE KAVANAUGH: Yes.

17 MS. ROSS: -- depend a bit on what the  
18 -- the Court's opinion said.

19 JUSTICE KAVANAUGH: I'm not committing  
20 you on the policy. I'm just saying --

21 MS. ROSS: Right.

22 JUSTICE KAVANAUGH: -- you would have  
23 the authority to, you think, and you may do so  
24 and you would defend that if you lose on the  
25 main submission in this case.

1 MS. ROSS: I thank that's right,  
2 Justice Kavanaugh. Blockburger is, of course, a  
3 rule of legislative intent. It's a presumption.  
4 And so I think depending on what else you think  
5 the legislature intended, we sort of have to  
6 readjust and rethink how we've approached this  
7 question.

8 JUSTICE KAVANAUGH: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice  
10 Barrett?

11 Justice Jackson?

12 JUSTICE JACKSON: So I guess I don't  
13 understand a point about the Blockburger, and  
14 it's a little -- it goes back to what Justice  
15 Kavanaugh just said.

16 I heard you say that Mr. Lora's  
17 position is that (c)'s penalty provisions are  
18 not read in, and the reason why that doesn't  
19 create an anomaly is because they are separate  
20 offenses. That's his view.

21 MS. ROSS: Correct.

22 JUSTICE JACKSON: All right. What if  
23 we agree that the reason why they don't create  
24 an anomaly is, first, because that's -- the text  
25 obviously says -- doesn't say they're read in,

1 but, setting that aside, they don't create an  
2 anomaly because (j) is still broad enough to  
3 allow for the greater penalty because the -- the  
4 government sets this up as a catch-22 that --  
5 that -- and that's really underlying your  
6 Blockburger concern.

7           You said earlier, you know, the  
8 government would have to leave on the shelf the  
9 mandatory minimums in (c) if it picks (j). But  
10 I guess I don't understand why they're not --  
11 why the government perceives itself to be losing  
12 the opportunity for a higher penalty if it picks  
13 (j).

14           You still go to court and you still  
15 say a -- a killing happened in the context of  
16 this carrying -- carrying an offense, and so,  
17 Your Honor, in your discretion to impose the  
18 death penalty or the term of years or whatever,  
19 we argue that you should give this person more  
20 than a person who just would have gotten five  
21 years under the mandatory minimum, and, as  
22 Justice Kavanaugh pointed out, nine times out of  
23 ten you would get it because the court sees a  
24 death in this situation, and (j) permits the  
25 court to impose a higher penalty for that.



1                   So it's not a situation in which, by  
2     picking (j), you somehow are relegated to  
3     smaller or lesser penalties in a way that might  
4     implicate your Blockburger concern.

5                   MS. ROSS:  So -- so, respectfully,  
6     Justice Jackson, of course, on the -- the  
7     frontline textual issue, which I took you to put  
8     to one side, we disagree.

9                   JUSTICE JACKSON:  Yes, yes.

10                  MS. ROSS:  Moving to the anomaly  
11     point, I think the anomaly is sort of at a -- a  
12     finer level of -- of gradation than that.  I  
13     think it's not just, you know, would a -- a  
14     court necessarily reach this result nine times  
15     out of ten.  We hope that's true.  But we think  
16     Congress didn't leave it to that nine times out  
17     of ten for what a judge would --

18                  JUSTICE JACKSON:  But maybe they did  
19     in (j), just not in (c).  I mean, the only  
20     anomaly that you see or that you're pointing to  
21     is the fact that in a (c) situation, Congress  
22     sets a floor and doesn't let the court go below,  
23     and in a (j) situation, it doesn't.  It gives it  
24     a broader range.  It throws off the maximum.  
25     And you have to argue in a (j) situation that,

1 Judge, we -- you should give a much higher  
2 penalty here, which the government would  
3 certainly do, and nine times out of ten the  
4 court would agree.

5 MS. ROSS: Right, but -- but, to go  
6 back to where the Chief Justice started this  
7 morning, you know, the (j) necessarily includes  
8 the (c). Anybody who's convicted of (j) has  
9 been found -- not -- not just violated out in  
10 the world but has been found by a jury or agreed  
11 in a plea agreement that they violated every  
12 element of (c).

13 JUSTICE JACKSON: Isn't -- isn't the  
14 only --

15 MS. ROSS: And to the idea --

16 JUSTICE JACKSON: -- isn't the only  
17 thing that the government is saying is that and,  
18 therefore, it incorporates the -- the -- the  
19 block on the judge's discretion with respect to  
20 the floor? That's your only point, because,  
21 fine, so it incorporates all the elements, but  
22 the only real difference between those two from  
23 the government's perspective is that in a (c)  
24 situation, the court can't go below five years.  
25 In a (j) situation, they could. But, because a

1 (j) situation involves a death, my question is,  
2 under what circumstance is a court actually  
3 going to go below the five years?

4 MS. ROSS: So I think it's not just  
5 the mandatory minimum, it's also, of course, the  
6 mandatory consecutive nature of the sentence. I  
7 think --

8 JUSTICE JACKSON: And if they get  
9 death, it doesn't matter, says your friend on  
10 the other side.

11 MS. ROSS: Sure, but I think Congress  
12 necessarily knew both because of the words of  
13 the statute and because, of course, the  
14 mandatory death penalty had long been held  
15 unconstitutional that there would be term of  
16 years sentences under this provision, and so I  
17 don't think it makes sense to say that Congress  
18 thought, you know, we need to make sure there's  
19 a five-year at -- at a minimum -- and,  
20 obviously, they go up from there -- consecutive  
21 sentence when someone holds the gun in their  
22 pocket.

23 But, if they take it out and kill  
24 someone, you know, all bets are off because  
25 we're going to increase it on the -- the other

1 end. I just don't think that that's the best  
2 reading of the statute.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 Rebuttal, Mr. Rosenberg?

6 REBUTTAL ARGUMENT OF LAWRENCE D. ROSENBERG

7 ON BEHALF OF THE PETITIONER

8 MR. ROSENBERG: I just have five  
9 brief -- excuse me, brief points.

10 First of all, my friend on the  
11 government's side admits that we don't know what  
12 Congress's intent really was. But the  
13 hypotheticals and anomalies are all resolved  
14 effectively by two or three points.

15 One is that discretion still remains  
16 even under our reading, and so, in circumstances  
17 where someone deserves a harsher sentence, a  
18 greater sentence, or consecutive sentences, the  
19 judge can certainly do that. And so I think  
20 that solves a lot of the problems.

21 Secondly, we go back to the plain text  
22 of the statute. It simply doesn't permit the  
23 government's reading. There really is no good  
24 answer to the -- the text that says "imposed  
25 under this subsection."

1           The government talks about the  
2 National Association of Manufacturers case, but  
3 that case actually supports our position. In  
4 that case, the Court said that you couldn't say  
5 that something that was tangential to or took  
6 some meaning from actually arose under a  
7 particular statutory provision. There, it was  
8 Section 1311. And it's the same issue here.

9           Just because subsection (c) mentions  
10 -- excuse me, subsection (j) mentions subsection  
11 (c), it doesn't mean that the authority for the  
12 sentence comes out of subsection (c). In fact,  
13 in the Bifulco case that we cited in our brief,  
14 it -- the -- the Court specifically said that  
15 you -- you arise under a specific subsection or  
16 section when your conviction, trial, and  
17 sentence is based on that subsection.

18           The third point is, in respect to  
19 (c)(5)(B) that Justice Sotomayor asked about, I  
20 agree with -- with the questions that Justice  
21 Sotomayor asked. The -- the point is that the  
22 penalty provision of (c)(5)(B) would be rendered  
23 superfluous entirely of subsection (j)'s penalty  
24 provision under the government's reading.

25           And, more to the point, if the -- if

1 Congress thought that subsection (c) was  
2 incorporated into subsection (j), it never would  
3 have needed to repeat those penalty provisions  
4 in (c)(5). It just doesn't make any sense that  
5 that's what Congress was intending to do.

6 The fourth point is that when Congress  
7 did major body work to this whole section, I  
8 believe in 1998, it left (j) as separate, and it  
9 -- and we included later (c)(5) in (c), not in  
10 (j), and that does suggest a different desire to  
11 treat subsection (j), and we've talked about  
12 that, whether it was to introduce the death  
13 penalty for the other reasons we've -- we've  
14 discussed, Congress has had the intent to keep  
15 (j) separate.

16 And then, finally, with respect to  
17 Blockburger and that thorny nest, I would just  
18 say this. This case, while we certainly did  
19 brief the issue, in part, in the briefs, this  
20 case really doesn't present the Blockburger  
21 question.

22 This is a case where our client could  
23 not have been charged under (c) because of the  
24 statute of limitations concern. The lower court  
25 didn't address Blockburger. And at the end of

1 the day, it's probably best left to another case  
2 to address Blockburger and -- and all of its  
3 significance in this context.

4 What we suggest is simply that the  
5 Court should reverse and hold that subsection  
6 (j) means what it says, that it does not include  
7 the consecutive sentence requirement of  
8 subsection (c), and -- and, in all likelihood,  
9 just leave it at that or -- or any other further  
10 explanation, but I don't think the Blockburger  
11 point is something the Court needs to get into.

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel. The case is submitted.

15 (Whereupon, at 12:28 p.m., the case  
16 was submitted.)

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