

High Court Firearm Case Tests Limits Of Double Jeopardy

By **Sharon Appelbaum** (October 2, 2025)

On Oct. 7, the U.S. Supreme Court is set to hear arguments in *Barrett v. U.S.*, a case that tests the boundaries of the Fifth Amendment's double jeopardy clause in the context of overlapping federal gun statutes.

The case involves several unusual procedural characteristics. First, both the petitioner and the government are aligned in their position that sentencing under both Title 18 of the U.S. Code, Section 924(c)(1), and Title 18 of the U.S. Code, Section 924(j), for the same conduct violates constitutional protections against double punishment.[1]



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To ensure adversarial representation, the Supreme Court appointed Charles L. McCloud, a former Supreme Court law clerk and an attorney at Williams & Connolly LLP, as amicus curiae to defend the decision of the U.S. Court of Appeals for the Second Circuit.[2]

In a further rare twist, the petitioner and the government have agreed to split the petitioner's allotted argument time, ceding the entirety of the respondent's time to the court-appointed amicus.[3]

Beyond these unique features, however, if the Supreme Court fails to uphold constitutional directives disallowing multiple punishments for the same offense, the court's decision could erode a key shield in defense practitioners' arsenals in federal firearms cases that result in death.

The Double Jeopardy Clause

As practitioners well know, the double jeopardy clause of the Fifth Amendment is a constitutional safeguard providing that no "person shall ... be subject for the same offence to be twice put in jeopardy of life or limb." [4] This protection from governmental overreach applies to multiple prosecutions and multiple punishments for the same offense.

While this principle is foundational to the American criminal justice system, there are exceptions to this rule. Courts have upheld dual punishments where prosecutions stem from separate sovereigns, e.g., federal and state governments; where offenses are distinct under the Blockburger test, wherein each offense requires an additional element that the other does not; [5] and where Congress clearly intended to impose cumulative punishments. [6]

The key question in *Barrett* is whether Congress intended to allow cumulative sentencing under two statutes that punish similar, if not identical, conduct with vastly different sentencing frameworks.

Understanding the Statutes at Issue: Sections 924(c) and 924(j)

Section 924(c)(1)(A) criminalizes the use or possession of a firearm in the commission of, or in furtherance of, a crime of violence or drug trafficking. Enacted as part of the Gun Control Act in 1968 and later amended, [7] its tough stance on gun crime was clearly influenced by the events of the 1960s. [8] This provision imposes strict mandatory minimum

sentences and mandates that these sentences run consecutively with every other sentence imposed.[9]

Section 924(j), enacted as part of the Federal Death Penalty Act in 1994, applies when a death results from the use of a firearm during a crime of violence or drug trafficking. Unlike Section 924(c), it allows for more judicial discretion in sentencing, ranging from probation to life imprisonment or death. Importantly, it does not include Section 924(c)'s mandatory consecutive sentencing requirement.[10]

Background of the Case

Dwayne Barrett was convicted of using a firearm during a robbery under Section 924(c) and for "causing death" during that same robbery under Section 924(j), in addition to other offenses.

At sentencing, the U.S. District Court for the Southern District of New York treated Section 924(c) as a lesser included offense of Section 924(j). Following an initial appeal, the case returned to the district court for resentencing. In 2021, the trial court resentenced Barrett to 25 years in prison under Section 924(j), to run consecutively with the other counts for a total of 50 years. But the court declined to sentence under Section 924(c). This was consistent with the prevailing view in several district courts that Section 924(c)(1) was subsumed within Section 924(j) under the Blockburger test.[11]

The Blockburger test is a legal standard, established by the Supreme Court's 1932 decision in *Blockburger v. U.S.*, [12] assessing the elements of each offense in deciding whether two criminal offenses are legally the same for double jeopardy purposes. Under the test, if two offenses arise from the same act or transaction, they are not the same offense as long as each offense includes at least one element that is not required by the other.

The test is statutory and formalistic, addressing only the legal elements of the crimes, rather than the facts or evidence.[13] However, if congressional intent specifies otherwise, then Blockburger does not control.[14]

Barrett again appealed his conviction and sentence. While on appeal, the Supreme Court decided *Lora v. U.S.* in 2023.[15]

In *Lora*, the Supreme Court held that Section 924(j) operates independently of the penalty provisions in Section 924(c) — that a "sentence for a [Section] 924(j) conviction therefore can run either concurrently with or consecutively to another sentence." [16]

The court explained that "subsection (j) references subsection (c). But it does so only with respect to offense elements, not penalties. ... One need not consult subsection (c)'s sentences in order to sentence a subsection (j) defendant." [17]

Crucially, although both the government and petitioner introduced the double jeopardy concern at that time, [18] the Supreme Court declined to rule on the issue since *Lora* had not been convicted under Section 924(c). The court explicitly stated:

We express no position on the Government's view of double jeopardy. ... The Government says someone cannot receive both subsection (c) and subsection (j) sentences for the same conduct. But that aligns with our conclusion here: If a defendant receives a sentence under subsection (j), he does not receive a sentence "imposed ... under [subsection (c)]" that would trigger the consecutive-sentence

mandate. ... Accordingly, the Government's view of double jeopardy can easily be squared with our view that subsection (j) neither incorporates subsection's (c)'s penalties nor triggers the consecutive-sentence mandate.[19]

Thus, Barrett squarely presents the double jeopardy question left open in *Lora*.

In the second Barrett appeal, the Second Circuit cited *Lora* and remanded the case again for resentencing.[20] The Second Circuit found ambiguity in the trial court's understanding of its discretion to sentence consecutively or concurrently under Section 924(j),[21] and error in its failure to sentence under Section 924(c) in addition to Section 924(j).[22]

Barrett filed a petition for certiorari, arguing that following the mandate of the Second Circuit would violate the double jeopardy clause.

Arguments Before the Supreme Court

The petitioner and the government argue that sentencing an individual under both Section 924(c) and Section 924(j) would violate the double jeopardy clause.[23] Applying the Blockburger test, they assert that all elements of Section 924(c) are contained within Section 924(j), making them the same offense.

They also argue that Congress did not express an intent to impose cumulative punishment for the same conduct.[24] Aware that if legislative intent or the face of the statute indicate otherwise, the Blockburger test does not control the double jeopardy inquiry,[25] citing Section 924(j) and how that section does not discuss cumulative sentencing. As Congress had clearly added that language to Section 924(c) decades before, they argue, Congress knew how to add it and thus, its absence speaks for itself.[26]

The National Association of Criminal Defense Lawyers filed an amicus brief in support of the petitioner and reached the same conclusion based on extensive research and analysis of legislative history and commentary from the eras.[27]

In contrast, the court-appointed amicus argues in favor of the Second Circuit's decision. He contends that congressional intent to allow cumulative punishment need not be expressed in "magic words" — that this is a distortion of precedent. [28] He further posits that the structure and purpose of the statutes suggest distinct punishments were intended.[29]

Both sides emphasize the statutes' drafting, but interpret the factors differently: the mandatory versus discretionary sentencing regimes, the temporal gap between enactments, and the physical placement of the provisions within Section 924.

Patterns in Double Jeopardy Jurisprudence

The U.S. Supreme Court often avoids making explicit rulings on double jeopardy questions when a case is not ripe or if the case can be resolved on statutory interpretation grounds, as seen in *Lora v. U.S.* This pattern reflects judicial caution in constitutional rulings that could drastically limit prosecutorial discretion, preferring to interpret statutes narrowly first.

Barrett may break this pattern by directly addressing the constitutional issue head-on because of the limits the government has placed on itself. A decision in favor of cumulative punishments would, in effect, expand prosecutorial power.

The court consistently has relied on Blockburger as the baseline for determining whether

two offenses are the same for double jeopardy purposes. There is often tension between strict Blockburger analyses and deference to legislative intent. This pattern shows the court's inclination to respect legislative design over a purely mechanical Blockburger application. Barrett could clarify how to navigate this tension in the context of firearms statutes.

Recent cases reflect the court's concern with how sentencing outcomes affect fairness and the justice system. For example, in *McElrath v. Georgia* last year, the court emphasized that inconsistent verdicts should not undermine acquittal protections under double jeopardy.[30]

In Barrett, the court will likely consider the real-world impact of allowing or barring stacked sentences on plea bargaining, judicial discretion and sentencing equity.

Practical Implications of Barrett v. U.S.

For prosecutors, a ruling permitting cumulative punishments under both provisions would open the door to more aggressive sentencing strategies. Prosecutors could routinely seek consecutive or stacked sentences, increasing leverage in plea negotiations.

For defense counsel, a ruling allowing cumulative punishments would signal a need to sharpen challenges at multiple stages, as Blockburger will have been weakened. There would be increased pressure on defendants to plead out early, facing likely increases in sentencing exposure.

Early in a case, practitioners should challenge stacking on constitutional or proportionality grounds. At trial, counsel will want to preserve objections and request jury instructions that highlight the potential for impermissible double punishment under the Blockburger framework. During sentencing, defense lawyers must be prepared to argue vigorously against stacked sentences.

Due to the unusual alignment between the government and the petitioner in Barrett — both of whom argue that Section 924(c) is a lesser-included offense of Section 924(j) and that imposing cumulative punishments for the same conduct violates the double jeopardy clause — a refusal to allow multiple punishments appears likely. If this view prevails, the implications would be immediate and significant.

Prosecutors would be barred from seeking separate sentences under both Section 924(c) and Section 924(j) for the same underlying conduct. U.S. attorney's offices may have to choose which subsection to charge based on the facts and intended sentencing outcome, rather than doubling up. Overcharging would become more vulnerable to pretrial challenge.

With the threat of consecutive mandatory sentences off the table, defense counsel would have more leverage in plea negotiations and a greater opportunity to litigate substantive issues pretrial and at trial, allowing effective advocacy through the double jeopardy safeguard.

Judges would no longer be required to impose both a Section 924(c) consecutive sentence and a Section 924(j) term, which could allow for more individualized and equitable sentencing in these cases, as well as more predictability.

The court's reasoning may give doctrinal clarity on how the Blockburger test applies to offenses built directly on earlier statutes by adding elements like death or serious bodily injury. This clarification could affect a wide range of federal statutes beyond firearm-related

offenses.

However, if the court bars cumulative punishment under Section 924(c) and Section 924(j), this will be instructive to Congress to make its intent more explicit in the future. Congress may act to revise the statutes at issue in Barrett with that in mind.

Conclusion

For criminal law practitioners, finding in favor of the petitioner and the government would provide strong constitutional and strategic grounds to challenge duplicative charges at the indictment stage, influence plea posture and contest sentencing outcomes.

Such a ruling would contribute to a clearer framework for courts and practitioners wrestling with overlapping statutes — especially those involving firearms and violent crimes — while its doctrinal footprint could be much wider.

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[1] Brief for Respondent Supporting Petitioner, May 23, 2025, No. 24-5774 at 4 (stating that "the government has long understood that multiple punishments for the same conduct under §§924(c)(1)(A) and (j) are impermissible").

[2] Also known as Luke McCloud, he brings extensive experience, having clerked for Justice Sotomayor, for Justice Kavanaugh when he was a Circuit Court Judge for the U.S. Court of Appeals for the District of Columbia, and for Judge Paul Niemeyer of the U.S. Court of Appeals for the Fourth Circuit. Mr. McCloud has also argued before the Supreme Court in the past. Howe, Amy, Former Clerk Tapped for Fall Double Jeopardy Argument, March 20, 2025, SCOTUSblog; Luke McCloud | Williams & Connolly LLP
- <https://www.wc.com/Attorneys/Luke-McCloud>.

[3] Motion for Respondent of Divided Argument, July 10, 2025, No. 24-5774.

[4] U.S. Constitution, Amend V.

[5] Blockburger v. United States, 284 U.S. 299 (1932).

[6] Missouri v. Hunter, 459 U.S. 359 (1983).

[7] Gun Control Act of 1968, Public Law 90-618, 90th Congress, H.R. 17735, Oct. 22, 1968.

[8] USDOJ: United States Department of Justice Archive - Appendix C, <https://www.justice.gov/archive/opd/AppendixC.htm>.

[9] 18 U.S.C. §924(c).

[10] 18 U.S.C. §924(j).

[11] *United States v. Barrett*, 102 F.4th 60, fn 29 (2nd Cir. 2024) (citing *United States v. Fernandini*, 652 F. App'x 4, 6 (2d Cir. 2015); see also *United States v. Garcia-Ortiz*, 657 F.3d 25, 28 (1st Cir. 2011); *United States v. Palacios*, 982 F.3d 920, 924–25 (4th Cir. 2020); *United States v. Gonzales*, 841 F.3d 339, 357–58 (5th Cir. 2016); *United States v. Wilson*, 579 F. App'x 338, 348 (6th Cir. 2014); *United States v. Cervantes*, No. 16-10508, 2021 WL 2666684, at *7 (9th Cir. June 29, 2021)).

[12] 284 U.S. 299 (1932).

[13] *Id.* at 304.

[14] *Missouri v. Hunter*, 459 U.S. 359, 368 (1983); *Garrett v. United States*, 471 U.S. 773, 779 (1985).

[15] *Lora v. United States*, 599 U.S. 453 (2023).

[16] *Lora* at 455.

[17] *Id.* at 459.

[18] Transcript of Oral Argument in *Lora v. United States*, 599 U.S. 453 (2023) (No. 22-49) at 46-56.

[19] *Lora* at 461-462.

[20] *United States v. Barrett*, 102 F.4th at 87.

[21] *Id.* at 87-88.

[22] *Id.* at 88.

[23] Brief for Petitioner, May 23, 2025, No. 24-5774 at 4.

[24] *Id.* at 33.

[25] *Missouri v. Hunter*, 459 U.S. 359, 368 (1983); *Garrett v. United States*, 471 U.S. 773, 779 (1985).

[26] Brief for Petitioner, May 23 2025, No. 24-5774 at 15; Brief for Respondent Supporting Petitioner, May 23, 2025, No. 24-5774 at 20.

[27] Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner, May 30 2025, No.24-5774 at 4-5; 14.

[28] Brief for Court-Appointed Amicus Curiae in Support of the Judgment Below, July 28, 2025, No. 24-5774, at 11.

[29] *Id.* at 14.

[30] *McElrath v. Georgia*, 601 U.S. 87 (2024).