When Are Defendants Exempt from a Minimum Consecutive Firearm Sentence Under 18 U.S.C. § 924(c)?

CASE AT A GLANCE

Petitioners Kevin Abbott and Carlos Rashad Gould were convicted of narcotics and firearms offenses, including one count each of possessing a firearm during a drug trafficking crime, in violation of 18 U.S.C. § 924(c). Section 924(c)(1)(A) mandates a five-year consecutive sentence for this offense, but exempts defendants "to the extent that a greater minimum sentence is otherwise provided by this subsection or any other law." Petitioners argued that this exception precluded a consecutive sentence because petitioners were subject to a greater minimum sentence on a different count of conviction. The district court disagreed in each case and sentenced petitioners to a prison term of five years on the § 924(c) offense, consecutive to their other mandatory minimum sentences. Petitioners' consecutive sentences were affirmed on appeal. The Supreme Court now must determine whether § 924(c)(1)(A)'s "except" clause applies to petitioners.

Abbott v. United States and Gould v. United States
Docket Nos. 09-479 and 09-7073

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From: The Third Circuit and the Fifth Circuit

by Brooks Holland
Gonzaga University School of Law, Spokane, WA

ISSUE

Did the sentencing court improperly sentence petitioners to a consecutive five-year prison term under 18 U.S.C. § 924(c)(1)(A)(i) when petitioners were subject to a greater minimum sentence on a different count of conviction?

FACTS

Petitioners Kevin Abbott and Carlos Rashad Gould both were arrested for federal drug and firearms offenses. Philadelphia obtained a search warrant to search a house where the police engaged in controlled drug sales. When the police arrived, Abbott fled inside. The police entered the house and arrested Abbott as he tried to escape. Abbott possessed $617 in cash including prerecorded money from controlled purchases, a key to the front door of the house, a small bag of marijuana, and a false driver's license. Inside the house, the police found drugs, drug paraphernalia, and two firearms.

A federal grand jury indicted Abbott for conspiracy to possess a controlled substance with intent to distribute, possession of cocaine base with intent to distribute, possession of a firearm by a convicted felon, and possession of a firearm in furtherance of a drug trafficking crime. Abbott was convicted of all four offenses after a trial.

The district court sentenced Abbott to 180 months on his conviction for firearm possession as a convicted felon, the mandatory minimum sentence under the Armed Career Criminal Act (ACCA). The district court also sentenced Abbott to 120 months on each of the drug counts—both mandatory minimums under the Controlled Substances Act (CSA)—concurrent with the ACCA sentence. The government sought a consecutive five-year sentence on Abbott's § 924(c) conviction. Abbott objected, arguing that, under § 924(c)(1)(A)'s "except" clause, the 15-year minimum sentence under the ACCA exempted him from a consecutive sentence. The district court disagreed and sentenced Abbott to a consecutive five-year term on the § 924(c) offense, for a 240-month total sentence.

The U.S. Court of Appeals for the Third Circuit affirmed Abbott's sentence. *United States v. Abbott,* 574 F.3d 203 (3rd Cir. 2009). The court concluded that "the most cogent interpretation is that the prefatory [except] clause refers only to the other minimum sentences that may be imposed for violations of § 924(c), not separate offenses." Rejecting the Second Circuit's contrary construction in *United States v. Whitley,* 529 F.3d 150 (2nd Cir. 2008), the court noted that its construction would further Congress's intent to broaden liability for firearm possession during drug trafficking and violent crimes, and also would avoid outcomes inconsistent with offender culpability.

Gould was arrested when Wichita Falls, Texas, police executed a search warrant for Gould's house. The police found 29 grams of crack cocaine on Gould, as well as 12 grams of powder cocaine. In the house, the police seized 10 grams of powder cocaine, 61 grams of crack cocaine, marijuana, two firearms, ammunition, drug scales, and money. In a car outside the house, the police seized Gould's social security card, a military flak jacket, two .9mm firearms, a sawed-off shotgun, ammunition, and two grams of crack cocaine.

A federal grand jury indicted Gould on numerous drug and firearm offenses. Gould pleaded guilty to one count of conspiracy to possess 50 grams or more of cocaine base with intent to distribute and one count of possessing a firearm in furtherance of that drug trafficking crime. The district court sentenced Gould to 137 months on the drug count, 17 months more than the 10-year minimum sentence under the CSA. The district court also sentenced Gould to a consecutive five-year prison term on the § 924(c) firearm offense, rejecting Gould's argument that his greater minimum sentence under the CSA exempted him from the consecutive sentence.

The U.S. Court of Appeals for the Fifth Circuit upheld Gould's sentence in a per curiam opinion. *United States v. Gould,* 329 Fed. Appx. 569 (5th Cir. 2009). The court adhered to prior circuit precedent rejecting similar challenges to consecutive sentences under § 924(c)(1)(A). See *United States v. London,* 568 F.3d 553 (5th Cir. 2009); *United States v. Collins,* 205 Fed. Appx. 196 (5th Cir. 2006). These decisions largely tracked the Third Circuit's analysis, concluding that courts should "read the phrase 'any other provision of law' as referring to legal provisions outside the confines of § 924(c) that concern firearm possession in furtherance of a crime of violence or drug-trafficking crime."

Abbott and Gould petitioned for a writ of certiorari to the U.S. Supreme Court. On January 25, 2010, the Court granted the petitions and consolidated the cases.

CASE ANALYSIS

Petitioners' claim requires the Supreme Court to construe a federal statute, 18 U.S.C. § 924(c). The statutory provision at issue, the "except" clause to § 924(c)(1)(A), reads:

> *Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law,* any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime … be sentenced to a term of imprisonment of not less than five years. 18 U.S.C. § 924(c)(1)(A)(i) (emphasis added).

Petitioners' claim, like many statutory construction claims, reads as fairly narrow and technical—pages of briefs analyzing a 22-word clause's text, history, purpose, and consequences. Yet, all the parties emphasize the broader importance of this issue, because the government commonly charges defendants under § 924(c). Petitioners argue for a broad construction of § 924(c)(1)(A)'s except clause to limit the reach of § 924(c). The government advocates for a restrictive reading of this exception that would ensure most defendants serve a consecutive sentence when convicted under § 924(c).

Petitioners both argue that the text of § 924(c)(1)(A) plainly exempts defendants from mandatory consecutive sentences when "any" greater minimum sentence applies. Petitioners emphasize the unrestricted modifier "any" that precedes "other provision of law" to define which minimum sentences will obviate a § 924(c)(1)(A) sentence. According to petitioners, § 924(c)(1)(A) "means what it says and is as broad as its plain language suggests." Abbott thus claims that "any other provision of law" in § 924(c)(1)(A) "means every other law *but* § 924(c)." Gould similarly argues, "[t]he phrase 'any other provision of law' refers to all provisions of law … and not to some subset or class of provisions concerning particular offense types." At face value, petitioners' take on the text of § 924(c)(1)(A) would exempt from its coverage any defendant who is subject to a greater minimum sentence for any offense whatsoever.

In support, petitioners highlight recent Supreme Court precedent where the Court similarly construed parallel statutory language. For example, in *Republic of Iraq v. Beaty,* 129 S. Ct. 2183 (2009), the Court broadly construed the identical phrase, "any other provision of law," in a statute that the President invoked to waive a law that exempted Iraq from sovereign immunity. The Court observed that "the word 'any' (in the phrase 'any other provision of law') has an 'expansive meaning' … giving us no warrant to limit the class of provisions of law that the President may waive." Id. at 2189. In *United States v. Gonzales,* 520 U.S. 1 (1997), the Court considered whether "any other term of imprisonment" in § 924(c)(1)(D)(ii) should be construed to exclude state prison sentences. Finding this statutory language to have plain meaning, the Court construed it to include "any" prison sentence, not solely federal prison sentences.

The government, however, notes that petitioners do not necessarily construe § 924(c)(1)(A) in lockstep. Gould appears to argue broadly that the "except" clause applies if a defendant at sentence is subject to *any* greater minimum sentence on a different count of conviction. Abbott links the "except" clause more explicitly to a greater minimum sentence for any offense arising from the same criminal transaction as the § 924(c) offense, including a predicate drug trafficking or violent crime. Abbott also suggests an alternative, narrower construction: § 924(c) does not apply if a defendant is subject to a greater minimum sentence for possession of the *same firearm* punishable under § 924(c).

The government responds that § 924(c)(1)(A) must be read in context of its surrounding statutory language and structure, its legislative history, and its consequences. The government argues that the "any other provision of law" clause is informed by its "natural referent"—the neighboring language defining a § 924(c) offense itself. Therefore, the "except" clause should be construed to mean:

> [I]f another provision of the United States Code mandates a punishment for using, carrying, or possessing a firearm in connection with a drug trafficking crime or crime of violence, and that minimum sentence is longer than the punishment applicable under Section 924(c), then the longer sentence applies.

Section 924(c)(1)(A) thus does not serve as a robust exception to § 924(c) sentences. Rather, it operates only as a "safety valve" to limit defendants' sentencing exposure to the greatest applicable minimum sentence for a § 924(c) offense, including when that § 924(c) offense is defined outside of § 924(c) in another provision of law.

The government cites three pieces of statutory "evidence" for this reading of the "except" clause. First, § 924(c) provides that its punishment "shall" be imposed "in addition to" any punishment for the predicate offense. Second, § 924(c) further specifies that its punishment will apply even if the predicate offense "provides for an enhanced punishment if committed by the use of a deadly weapon or device." Third, another part of the same statute ensures an additional sentence for § 924(c) offenses:

> Notwithstanding any other provision of law … no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed. 18 U.S.C. § 924(c)(1)(D)(ii).

According to the government, legislative history further confirms this reading of § 924(c). Congress added the "except" clause to § 924(c) as part of a series of amendments passed in 1998. These amendments, the government argues, were intended to ensure additional, cumulative punishment for possessing a firearm during a predicate offense.

Examining several hypothetical cases, the government also asserts that petitioners' construction of § 924(c)(1)(A) would result in several sentencing anomalies that Congress could not have intended. For example, a defendant facing a seven-year minimum sentence under § 924(c) who also is subject to a 10-year minimum sentence for a drug offense would face a lower overall minimum sentence than the same defendant subject only to a five-year minimum drug sentence. Under petitioners' approach, the 10-year minimum drug sentence would exempt that defendant from consecutive sentencing, leaving solely that 10-year minimum sentence. The five-year minimum drug sentence, by contrast, would be stacked on top of the § 924(c) sentence, which would result in a *12-year* minimum sentence.

Notably, Congress added the "except" clause before the Supreme Court decided *United States v. Booker,* 543 U.S. 220 (2005), which declared the Sentencing Guidelines nonmandatory. The government thus observes that Congress could not have expected district courts to fix these sentencing anomalies by varying from then-mandatory Sentencing Guidelines.

Petitioners counter that § 924(c) may be charged as a stand-alone offense that runs consecutive to nothing. Therefore, § 924(c) does not mandate a consecutive sentence in all cases. Petitioners aver that the government's position nevertheless seeks to "have the rule swallow the exception," and inexplicably limits the exception to unknown future statutes punishing § 924(c) offenses that Congress may codify outside of § 924(c). Petitioners also argue that the legislative history supports their position, because when Congress enlarged liability under § 924(c) in 1998, it added the "except" clause in a measured effort to constrain the statute's reach.

Petitioners additionally dispute the government's argument that their position will result in illogical sentencing outcomes. District courts start with mandatory minimum sentences but may sentence more culpable defendants to greater terms of imprisonment. Thus, petitioners argue, the government incorrectly focuses on potentially uneven mandatory minimum sentences, when what matters are the sentences that a court actually imposes. The Sentencing Guidelines specifically address some of the cited culpability variables, petitioners observe. Post-*Booker,* moreover, district courts possess greater discretion to sentence individual defendants appropriately.

Petitioners opine that even if good policy requires corrective action, Congress and not the courts should rewrite the statute to meet policy objectives. Until that time, courts should apply the statute as written.

At a minimum, petitioners urge, the rule of "lenity" should govern. This rule provides that when material ambiguity in a criminal statute cannot be resolved through established methods of construction, the statute should be construed strictly against the government. Petitioners argue that the government's own "interpretative shifts" in construing § 924(c)(1)(A) demonstrate the requisite ambiguity to invoke the rule. The government replies that the rule of lenity does not apply, because "the meaning of the 'except' clause is clear in light of established principles of statute interpretation."

SIGNIFICANCE

This statutory construction case may not offer the sex appeal of other cases on the Supreme Court's docket this term. But the Court's decision will resolve a circuit split on a significant feature of § 924(c), a commonly charged federal offense. As an article in the *Texas Lawyer* recently noted, "If [Petitioners] win at the high court, their cases could shave several years off the prison sentences of countless inmates." John Council, "Gunning for a Mandatory Minimum," *Texas Lawyer* (Feb. 1, 2010). For fiscal year 2008 alone, Abbott's brief pegs the number at 2,778 counts of conviction under § 924(c).

The Supreme Court will need to decide between two competing understandings of § 924(c)(1)(A). Petitioners present this provision as a true minimum sentence, ensuring that defendants subject to it serve at least five years in prison. If another statute does this job, § 924(c)(1)(A) is obviated and no longer applies. The government, by contrast, treats the provision as a sentencing *bonus,* ensuring that defendants subject to it receive at least five additional years in prison, cumulative to any other sentence. The "except" clause applies only if another statute more severely punishes that § 924(c) offense.

The parties' briefs thus present the Supreme Court with four potential constructions of § 924(c)(1)(A)'s except clause. The Court could construe the "except" clause narrowly, as the government advocates, exempting defendants from a mandatory consecutive sentence only if a minimum sentence outside of § 924(c) more severely punishes that § 924(c) offense. According to the parties' briefs, this construction likely would bring only one current law outside of § 924(c) into its except clause: 18 U.S.C. § 3559(c), which provides a life sentence for certain repeat offenders who violate § 924(c). This construction consequently would impact very few cases, and would exclude both Abbott and Gould. Although an aggressively narrow construction of § 924(c)(1)(A), the government's position has been embraced by several circuit courts.

At the other end of the spectrum, the Supreme Court could adopt Gould's broad reading of § 924(c)(1)(A) and hold that *any* greater minimum sentence applicable to a defendant at sentencing triggers the except clause. This position has not been adopted explicitly in the

circuit courts, but it is supported in amicus briefs filed by the National Association of Criminal Defense Lawyers and Families Against Mandatory Minimums.

In between these constructions, the Supreme Court could limit the "except" clause, as Abbott argues, to any greater minimum sentence arising from the same criminal transaction as the § 924(c) offense, including any predicate drug trafficking or violent crime, such as a CSA conviction. A majority of circuit courts have rejected this approach. The second circuit, however, recently embraced this construction, see *United States v. Williams,* 558 F.3d 166 (2nd Cir. 2009), as did the Sixth Circuit. See *United States v. Almany,* 598 F.3d 238 (6th Cir. 2009). This position also is supported by the American Bar Association's amicus brief, which argues against the government practice of "stacking" mandatory minimum sentences against defendants.

Alternatively, the Supreme Court could read the "except" clause to include greater minimum sentences for any *firearm offense* involving the *same firearm* as the § 924(c) offense. Abbott offers this construction as a backstop to prevent what he terms "double counting" of firearms between § 924(c) offenses and other firearm offenses with greater minimum sentences. This question has split the circuit courts fairly evenly. This narrower construction of § 924(c) would favor only Abbott, however, whose § 924(c) sentence ran consecutively to an ACCA sentence for firearm possession. Gould's § 924(c) sentence ran consecutively to a predicate drug trafficking crime under the CSA. Gould thus does not advocate Abbott's alternative construction.

Abbott and *Gould* may produce a Supreme Court opinion full of canons of construction, legislative history, and other wonders of statutory interpretation. The oral argument certainly may offer a challenging technical exercise to the advocates. Yet, the case will merit close attention, because it will resolve an important question of federal sentencing law that has split the circuit courts and ultimately will affect how much time in prison thousands of criminal defendants will serve for possessing a firearm during a drug trafficking or violent crime.

Brooks Holland, assistant professor and Gonzaga Law Foundation Scholar, Gonzaga University School of Law. The author can be reached at bholland@lawschool.gonzaga.edu or 509.313.6120. Laurel Yecny, a law student at Gonzaga, assisted in the preparation of this article.

PREVIEW of United States Supreme Court Cases, pages 24–27.

ATTORNEYS FOR THE PARTIES

For Petitioner Kevin Abbott (Mark T. Stancil, 202.775.4500)

For Petitioner Carlos Rashad Gould (David L. Horan, 214.220.3939)

For Respondent United States (Neal Kumar Katyal, Acting Solicitor General, 202.514.2217)

AMICUS BRIEFS

In Support of Petitioners

American Bar Association (Carolyn B. Lamm, 312.988.5000)

Families Against Mandatory Minimums (Mary Price, 202.822.6700)

National Association of Criminal Defense Lawyers (Miguel A. Estrada, 202.955.8500)