No.

In the Supreme Court of the United States

REINALDO BERRIOS, PETITIONER

v.

UNITED STATES OF AMERICA;
GOVERNMENT OF THE VIRGIN ISLANDS

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 18 U.S.C. 924(c)(1)(D)(ii), which provides that "no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person," is triggered when a defendant is convicted and sentenced under 18 U.S.C. 924(j).

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PETITION FOR A WRIT OF CERTIORARI

Reinaldo Berrios respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-43a) is reported at 676 F.3d 118. The court of appeals' order denying rehearing (App., *infra*, 44a-45a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 2012. A petition for rehearing was denied on June 11, 2012 (App., *infra*, 44a-45a). On August 22, 2012, Justice Alito extended the time within which to file a pe-

tition for a writ of certiorari to and including October 1, 2012. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 924 of Title 18 of the United States Code is reproduced at App., *infra*, 46a-57a.

STATEMENT

This case presents a clear and expressly recognized circuit conflict on a question of statutory interpretation: specifically, whether the provision of 18 U.S.C. 924(c) prohibiting concurrent sentencing—a provision that, by its terms, is triggered by a "term of imprisonment imposed * * * under this subsection"—is triggered when a defendant is convicted and sentenced under 18 U.S.C. 924(j). The Third Circuit held that it is, with the result that it upheld the imposition of consecutive life sentences on petitioner for violations of Section 924(j) and Virgin Islands law. In so holding, the Third Circuit sided with the Eighth and Tenth Circuits and expressly rejected the Eleventh Circuit's contrary interpretation. Because the Third Circuit's decision deepens the preexisting circuit conflict and is incorrect, the petition for certiorari should be granted.

1. One of the most frequently invoked federal criminal statutes, 18 U.S.C. 924 defines a variety of firearms-related offenses. Of relevance here, Section 924(c) prohibits using or carrying a firearm during or in relation to any crime of violence or drug-trafficking crime (or possessing a firearm in furtherance of such a crime). That basic offense carries a mandatory minimum term of imprisonment of five years, see 18 U.S.C. 924(c)(1)(A)(i); other provisions in subsection (c) set forth sentencing factors or distinct offenses that correspond with higher mandatory minimum terms. See, *e.g.*, 18 U.S.C. 924(c)(1)

(A)(ii) (minimum term of seven years if the firearm is brandished); 18 U.S.C. 924(c)(1)(B)(ii) (minimum term of 30 years if the firearm is a machinegun or destructive device).

Most pertinent for present purposes, Section 924(c) contains a prohibition on concurrent sentencing. It provides that "no term of imprisonment imposed on a person *under this subsection* shall run concurrently with any other term of imprisonment imposed on the person." 18 U.S.C. 924(c)(1)(D)(ii) (emphasis added). The question presented in this case is whether that provision is triggered when a defendant is convicted and sentenced under Section 924(j). That subsection prohibits "caus-[ing] the death of a person through the use of a firearm" in the course of violating Section 924(c). Where the killing constitutes a murder as defined by federal law, Section 924(j) authorizes the imposition of the death penalty or any term of imprisonment.

2. On May 31, 2006, a grand jury in the District of the Virgin Islands returned an indictment charging petitioner and three other individuals with various offenses arising from an alleged attempted armed robbery that led to the death of a security guard. Of relevance here, petitioner was charged with causing the death of a person through the use of a firearm, in violation of 18 U.S.C. 924(j)(1), and first-degree felony murder, in violation of Section 922(a)(2) of Title 14 of the Virgin Islands Code.[1]

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[1] The Virgin Islands is an unincorporated territory of the United States. Petitioner was charged with the federal and Virgin Islands offenses in a single indictment; the United States District Court for the District of the Virgin Islands, an Article IV territorial court, had concurrent jurisdiction over the Virgin Islands offense. See 48 U.S.C. 1612(c). For double jeopardy purposes, it is well established that the federal and Virgin Islands governments constitute a single

A jury found petitioner guilty on all counts. App., *infra*, 5a-6a.

Petitioner contended that he could not be sentenced on both the Section 924(j) and the felony-murder counts, on the ground that it would impose multiple punishments for a single offense in violation of the Double Jeopardy Clause of the Fifth Amendment. See, *e.g.*, Pet. C.A. Br. 7-9; Pet. Objections to Revised PSR 1 (May 21, 2007). Because it was undisputed that the Section 924(j) and the felony-murder counts involved a single offense for double jeopardy purposes, see *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), the dispositive inquiry was whether Congress authorized the imposition of multiple punishments for that offense—specifically, by mandating consecutive sentencing in Section 924(c)(1)(D)(ii) for cases involving Section 924(j) violations. App., *infra*, 32a-34a.

The district court rejected petitioner's double jeopardy claim and sentenced him on both the Section 924(j) and felony-murder counts. Petitioner was sentenced to life imprisonment on each count, to be served consecutively, as well as terms of years on the remaining counts. App., *infra*, 6a, 32a.

3. The court of appeals affirmed. App., *infra*, 1a-43a. As is relevant here, the court of appeals held that Section 924(c)(1)(D)(ii) is triggered when a defendant is convicted and sentenced under Section 924(j)—and, on that basis, rejected petitioner's double jeopardy claim. *Id.* at 32a-43a.

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sovereign. See, *e.g.*, *United States* v. *Wheeler*, 435 U.S. 313, 321 (1978); *Government of the Virgin Islands* v. *Dowling*, 633 F.2d 660, 668-671 (3d Cir. 1980).

At the outset, the court of appeals noted that the question whether "Congress * * * intended § 924(j) to incorporate subsection (c)'s consecutive sentence mandate" was "a question which has divided our sister circuits." App., *infra*, 33a. "Because statutory interpretation * * * is a holistic endeavor," the court reasoned, it would "not look merely to a particular clause in which general words may be used," but instead would "take in connection with it the whole statute." *Id.* at 34a (citation omitted). The court acknowledged that the critical language triggering Section 924(c)(1)(D)(ii)—a "term of imprisonment imposed * * * under this subsection"—"*could* refer to only those sentences literally listed in subsection (c)." *Id.* at 39a. But the court concluded that, "in light of the statutory scheme as a whole, it is apparent that the phrase serves a functional—as opposed to literal—purpose." *Id.* at 40a.

The court of appeals explained that, "like the rest of subsection (c), [subsection (j)] simply provides an additional circumstance beyond the existence of the predicate offense—namely, where a subsection (c) violation results in the death of a person—that governs the length of a sentence to be imposed." App., *infra*, 36a. "Understood in the context of the statutory scheme," the court continued, "[subsection (j)] effectively functions as an extension of subsection (c)'s statutory core." *Ibid.*

Notably, the court of appeals concluded that Section 924(c)(1)(D)(ii) is triggered when a defendant is sentenced under Section 924(j) despite the government's concession that subsection (j) establishes a distinct offense from those in subsection (c). App., *infra*, 37a. The court observed that the Eighth and Tenth Circuits—the two circuits to have previously held that Section 924(c)(1)(D)(ii) is applicable—had both relied on the premise that subsection (j) merely set forth additional

sentencing factors, rather than establishing a distinct offense. *Id.* at 40a. Although the Third Circuit rejected that premise, it ultimately agreed with the Eighth and Tenth Circuits' holding as to the reach of Section 924(c)(1)(D)(ii). *Id.* at 38a. The court reasoned that "a subsection (j) sentence qualifies as a sentence 'imposed under' subsection (c), even though it is *also* 'imposed under' subsection (j), because they are part and parcel of the same statutory scheme[] and jointly provide the legal basis for the sentence." *Id.* at 42a (emphasis added).

The court of appeals suggested that "[t]o interpret the text any other way would give rise to an anomalous result": namely, that "a defendant convicted under § 924(c) [would be] subject to an additional consecutive sentence only in situations that do not result in a death caused by use of a firearm." App., *infra*, 38a (citation omitted). It was "highly unlikely," according to the court of appeals, that Congress intended petitioner's proposed construction. See *ibid.* (internal quotation marks and citation omitted).

In adopting its interpretation of Section 924(c)(1)(D)(ii), the court of appeals acknowledged that the Eleventh Circuit had adopted the contrary interpretation in *United States* v. *Julian*, 633 F.3d 1250 (2011), but it "f[ound] the Eleventh Circuit's reasoning * * * unpersuasive." App., *infra*, 42a. In particular, the court rejected the Eleventh Circuit's reliance on the proposition that Section 924(c)(1)(D)(ii) is not triggered when a defendant is convicted and sentenced under Section 924(o), which prohibits conspiring to commit an offense under Section 924(c). *Id.* at 42a-43a.

The court of appeals thus held that "[a] defendant who violates subsection (j) by definition violates subsection (c), and therefore is subject to the [consecutive sentence] mandate, regardless of whether § 924(j) consti-

tutes a discrete criminal offense from § 924(c)." App., *infra*, 43a. According to the court of appeals, "when Congress required proof of a § 924(c) violation before imposing the penalties listed under § 924(j), it intended to include a subsection (j) penalty within the scope of those sentences 'imposed under' subsection (c)." *Ibid.*

4. Petitioner filed a *pro se* petition for rehearing, which was denied without recorded dissent. App., *infra*, 44a-45a.

REASONS FOR GRANTING THE PETITION

This case presents a circuit conflict regarding the correct interpretation of 18 U.S.C. 924(c)(1)(D)(ii), which prohibits concurrent sentencing for certain federal firearms offenses. In the decision below, the Third Circuit expressly recognized that conflict and held that Section 924(c)(1)(D)(ii) is triggered when a defendant is convicted and sentenced under 18 U.S.C. 924(j). The Third Circuit's decision deepens the preexisting circuit conflict, and it cannot be justified under familiar principles of statutory interpretation. The question presented, moreover, is not only important in its own right; it has constitutional implications where, as here, the government is seeking to impose multiple punishments for a single offense—which, absent statutory authorization, the Double Jeopardy Clause prohibits. This Court should grant the petition for certiorari to resolve the circuit conflict and reverse the Third Circuit's deeply flawed decision.

A. The Decision Below Deepens A Circuit Conflict Concerning The Correct Interpretation Of 18 U.S.C. 924 (c)(1)(D)(ii)

The Third Circuit correctly recognized that the question whether Section 924(c)(1)(D)(ii) is triggered when a defendant is convicted and sentenced under Section 924(j) is one that "has divided [its] sister circuits." App.,

infra, 33a. The Third Circuit's decision in this case deepens the preexisting circuit conflict, and that conflict warrants the Court's review.

1. As the Third Circuit expressly noted (App., *infra*, 33a-34a), the first two courts of appeals to have considered the issue in published opinions—the Eighth and Tenth Circuits—held that Section 924(c)(1)(D)(ii) is triggered when a defendant is convicted and sentenced under Section 924(j). See *United States* v. *Dinwiddie*, 618 F.3d 821, 837 (8th Cir. 2010), cert. denied, 131 S. Ct. 1586 (2011); *United States* v. *Battle*, 289 F.3d 661, 665-669 (10th Cir.), cert. denied, 537 U.S. 856 (2002). Those courts rejected arguments materially identical to petitioner's here.

Both the Eighth and Tenth Circuits heavily relied on the premise that subsection (j) "does not set forth a discrete crime" from subsection (c), but instead merely sets forth additional sentencing factors for a subsection (c) offense. *Battle*, 289 F.3d at 667; accord *Dinwiddie*, 618 F.3d at 837. In so doing, both courts cited the Eighth Circuit's earlier decision in *United States* v. *Allen*, 247 F.3d 741 (2001), vacated on other grounds, 536 U.S. 953 (2002)—a decision that did not specifically involve the interpretation of the consecutive-sentencing mandate in Section 924(c)(1)(D)(ii), but more generally addressed the interplay between Section 924(c) and Section 924(j). See *id.* at 768-769. In concluding that subsection (j) merely sets forth additional sentencing factors, the Eighth Circuit noted that subsection (j) expressly refers to subsection (c) and that "each subsection of the statute is designed for the same purpose": namely, "to impose steeper penalties on those criminals who use firearms when engaging in crimes of violence." *Id.* at 769.

The Eighth and Tenth Circuits further reasoned that a narrower interpretation of Section 924(c)(1)(D)(ii)

would "lead to [an] odd result," because "a defendant convicted under § 924(c) [would be] subject to an additional consecutive sentence only in situations that do not result in a death caused by use of the firearm." *Dinwiddie*, 618 F.3d at 837 (citing *Allen*, 247 F.3d at 769); *Battle*, 289 F.3d at 668 (same). In *Allen*, the Eighth Circuit suggested that it was "unlikely" that "Congress, which clearly intended to impose additional cumulative punishments for using firearms during violent crimes in cases where no murder occurs, would turn around and not intend to impose cumulative punishments in cases where there are actual murder victims." 247 F.3d at 769.[2]

2. By contrast, as the Third Circuit expressly recognized (App., *infra*, 34a), the Eleventh Circuit held, after extended analysis, that Section 924(c)(1)(D)(ii) is not triggered when a defendant is convicted and sentenced under Section 924(j). See *United States* v. *Julian*, 633 F.3d 1250, 1252-1257 (2011). In so holding, the Eleventh Circuit stated that it was "unpersuaded by the decisions of the Eighth and Tenth Circuits that sentences imposed under [S]ection 924(j) must run consecutively based on [S]ection 924(c)(1)(D)(ii)." *Id.* at 1257.

The Eleventh Circuit first determined that "[the defendant's] interpretation is supported by the plain language of * * * [S]ection 924(c)(1)(D)(ii)." 633 F.3d at 1253. The court noted that Section 924(c)(1)(D)(ii) is triggered only by a "term of imprisonment imposed

[2] Two other courts of appeals have held in unpublished opinions that Section 924(c)(1)(D)(ii) is triggered when a defendant is convicted and sentenced under Section 924(j). See *United States* v. *Hatten*, No. 06-4240, 2007 WL 1977663, at *3 (4th Cir. July 5, 2007); *United States* v. *Staggs*, No. 97-10282, 152 F.3d 931 (table), 1998 WL 447943, at *3 (9th Cir. July 10, 1998).

* * * under this subsection." *Ibid.* The court reasoned that "Section 924(j), not [S]ection 924(c), provided [the defendant's] sentence." *Ibid.* The court added that such an interpretation was consistent with the interpretation given by other courts that had considered the question whether Section 924(c)(1)(D)(ii) is triggered when a defendant is convicted and sentenced under Section 924(o), which prohibits conspiring to commit an offense under Section 924(c). *Ibid.*

The Eleventh Circuit then proceeded to "reject" the conclusion of the Eighth and Tenth Circuits that "[S]ection 924(j) is a sentencing factor for [S]ection 924(c) and not a distinct offense." 633 F.3d at 1257. The court reasoned that "Congress placed the punishment for homicides that occur in the course of violations of [S]ection 924(c) in the separate [S]ection 924(j)." *Id.* at 1254. In addition, Section 924(j) "defines a crime and is followed by subsections that provide sentences." *Ibid.* The Eleventh Circuit concluded that Section 924(j) "establish[es], as an element of a separate offense, a fact—a resultant homicide—that could subject a defendant to the ultimate punishment: the death penalty." *Id.* at 1255.

The Eleventh Circuit also rejected the government's argument that a contrary interpretation was necessary to "avoid the anomaly that a criminal would have to receive a consecutive sentence for any violation of [S]ection 924(c) except for those violations that cause death." 633 F.3d at 1256. The court explained that the "main point" of Section 924(j) was to "extend the death penalty to second-degree murders that occur in the course of violations of [S]ection 924(c)," not to permit consecutive sentencing on top of a sentence for a Section 924(j) violation. *Ibid.* And the court noted that, where a defendant is separately charged and convicted under Section 924(c)

and Section 924(j) for the same conduct, nothing would prevent a court from imposing the Section 924(c) sentence, then running the Section 924(j) sentence consecutively on top of *that* sentence. *Ibid.*

3. In the decision below, the Third Circuit considered the Eleventh Circuit's interpretation of Section 924(c)(1)(D)(ii), but ultimately rejected its reasoning as "unpersuasive." App., *infra*, 42a. And while the Third Circuit adopted the contrary interpretation of the Eighth and Tenth Circuits, it added further complexity to the preexisting conflict by "declin[ing] to follow the Eighth and Tenth Circuits in concluding that subsection (j) merely sets forth sentencing elements to be applied to a subsection (c) offense." *Id.* at 46a. The Third Circuit nevertheless adopted those courts' interpretation on the novel ground that "a subsection (j) sentence qualifies as a sentence 'imposed under' subsection (c), even though it is *also* 'imposed under' subsection (j), because they are part and parcel of the same statutory scheme[] and jointly provide the legal basis for the sentence." *Id.* at 42a (emphasis added). There can therefore be no doubt that a circuit conflict exists on the correct interpretation of Section 924(c)(1)(D)(ii)—a conflict that the Third Circuit's decision only exacerbates.

4. This case is an especially suitable vehicle for the Court to resolve the circuit conflict concerning the interpretation of Section 924(c)(1)(D)(ii), because the resolution of that conflict has constitutional implications here. At sentencing, petitioner did not simply argue that he could not be sentenced *consecutively* on the Section 924(j) and felony-murder counts; he argued that he could not be sentenced on one of those counts *at all*, on the ground that sentencing him on both counts would violate the Double Jeopardy Clause's prohibition on multiple punishments for a single offense. See, *e.g.*, Pet. C.A. Br.

7-9; Pet. Objections to Revised PSR 1 (May 21, 2007). It is undisputed, moreover, that the question whether Section 924(c)(1)(D)(ii) mandates consecutive sentencing in cases involving violations of Section 924(j) is dispositive of petitioner's double jeopardy claim here. See App., *infra*, 32a-34a. That is because Section 924(c)(1)(D)(ii) serves as the only potential source for the "clear indication of * * * legislative intent" necessary to permit the imposition of multiple punishments for what concededly constitutes a single offense for double jeopardy purposes. *Albernaz* v. *United States*, 450 U.S. 333, 340 (1981). This case therefore presents the Court with an excellent opportunity to address, and resolve, a recurring interpretive question involving an important provision of federal criminal law.

B. The Decision Below Is Erroneous

The Third Circuit erred in holding that Section 924(c)(1)(D)(ii) is triggered when a defendant is convicted and sentenced under Section 924(j). That error warrants this Court's review and correction.

1. As the Court has repeatedly noted, "in any case of statutory construction, our analysis begins with the language of the statute," and, "where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999) (internal quotation marks and citation omitted). That basic principle of statutory construction resolves this case. Section 924(c)(1)(D)(ii) provides that "no term of imprisonment imposed on a person *under this subsection* shall run concurrently with any other term of imprisonment imposed on the person" (emphasis added). As the Court has explained, "Congress ordinarily adheres to a hierarchical scheme in subdividing statutory sections," and the word "subsection" is generally used to refer to a

subdivision preceded by a lower-case letter. *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U.S. 50, 60-61 (2004). So here, Section 924(c)(1)(D)(ii) is triggered only by a "term of imprisonment imposed * * * under this subsection": *viz.*, under subsection (c). The foregoing understanding is reinforced by Section 924(c)'s numerous other references to "this subsection"—all of which unambiguously refer to subsection (c). See 18 U.S.C. 924(c)(1)(A), 924(c)(1)(B), 924(c)(1)(C), 924(c)(1)(D)(i), 924(c)(2), 924(c)(3), 924(c)(4).

Particularly in light of the government's concession that subsection (j) establishes a distinct offense from those in subsection (c), it is clear that petitioner's term of imprisonment was imposed under subsection (j), not subsection (c). Petitioner was charged with, and convicted of, a violation of subsection (j). See App., *infra*, 5a; C.A. App. 31 (indictment); *id.* at 38-B (judgment). And subsection (j) governed the term of imprisonment the district court could impose, by specifying that the court could impose any term of imprisonment up to life. Because "Section 924(j), not [S]ection 924(c), provided [petitioner's] sentence," *Julian*, 633 F.3d at 1253, Section 924(c)(1)(D)(ii) was inapplicable, and the district court's decision to sentence petitioner on both the Section 924(j) and felony-murder counts was improper.

Notably, when Congress amended Section 924 in 1994 to add what is now subsection (j), Congress expressly chose to create a "new subsection" "at the end" of the section, rather than to locate the provision within subsection (c). See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 60013, 108 Stat. 1973. In addition, Congress chose not to include a similar provision to Section 924(c)(1)(D)(ii) in subsection (j) itself, or to broaden the provision that is now Section 924(c)(1)(D)(ii) so that it could be triggered by a term of

imprisonment imposed under subsection (j). Nor did Congress address the issue when it codified Section 924(c)(1)(D)(ii) in its present form in 1998. See Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1, 112 Stat. 3470. Adopting a more expansive reading of Section 924(c)(1)(D)(ii) would therefore contravene the well-established principle of statutory interpretation that, where Congress includes particular language in one provision of a statute but omits it in another, "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted). And adopting a more expansive reading would potentially have implications not only for defendants who are convicted and sentenced under subsection (j), but also for defendants who are convicted and sentenced under the numerous other subsections of Section 924 that define discrete firearms offenses, including subsection (o). See *Julian*, 633 F.3d at 1253.

2. The court of appeals' justifications for disregarding what it pejoratively described as the "literal" interpretation of Section 924(c)(1)(D)(ii), see App., *infra*, 40a, are unpersuasive.

a. The court of appeals asserted that "a subsection (j) sentence qualifies as a sentence 'imposed under' subsection (c), even though it is *also* 'imposed under' subsection (j), because they are part and parcel of the same statutory scheme[] and jointly provide the legal basis for the sentence." App., *infra*, 42a (emphasis added). That assertion, however, cannot comfortably be reconciled with the government's concession that subsection (j) establishes a distinct offense from those in subsection (c), or with the court's own rejection of the proposition that "subsection (j) merely sets forth sentencing elements to be applied to a subsection (c) offense." *Id.* at 40a.

Although it is true that subsection (j) prohibits "caus[ing] the death of a person through the use of a firearm" in the course of violating subsection (c)—and thereby incorporates the elements of a subsection (c) offense—it does not follow that a defendant convicted and sentenced under subsection (j) has his term of imprisonment imposed under subsection (c) *as well as* subsection (j). And even if Section 924(c)(1)(D)(ii) were somehow susceptible to that construction, it would at a minimum contravene the rule of lenity, which "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980).

b. The court of appeals additionally asserted that it would be an "anomalous result" if "a defendant convicted under § 924(c) [were] subject to an additional consecutive sentence only in situations that do not result in a death caused by use of a firearm." App., *infra*, 38a (citation omitted). As a preliminary matter, because Section 924(j) establishes a distinct offense, petitioner was not convicted under Section 924(c). But more broadly, given the plain meaning of Section 924(c)(1)(D)(ii), the relevant inquiry here is whether it would be *absurd*, not merely "anomalous," to construe that provision as not being triggered when a defendant is convicted and sentenced under subsection (j). See, *e.g.*, *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 565-566 (2005) (concluding that an omission that "may seem odd" is "not absurd").

There is nothing absurd, or even anomalous, about such a construction. In amending the statute to add what is now subsection (j), Congress could readily have concluded that, because a defendant who is convicted and sentenced under that subsection will typically receive a longer sentence than a defendant who is convicted and

sentenced under subsection (c), it was simply unnecessary to require any sentences for other offenses to run consecutively. And any "anomaly" would be further mitigated to the extent that, where a defendant is separately charged and convicted under Section 924(c) and Section 924(j) for the same conduct, a court has the authority to impose a Section 924(c) sentence, then run a Section 924(j) sentence consecutively on top of *that* sentence. See *Julian*, 633 F.3d at 1256. In its decision, the court of appeals cited no legislative history or other authority to support its hypothesis that Congress intended the statute to operate in the manner it suggested; instead, the court simply asserted, without elaboration, that it was "highly unlikely" Congress intended petitioner's construction. App., *infra*, at 38a (internal quotation marks and citation omitted). Such pure speculation provides no basis to override the plain meaning of the statutory text.

* * * * *

In short, the court of appeals' avowedly "functional" analysis was entirely unmoored from the statutory text and reflects a mode of interpretation that this Court has long since abjured. The Court should grant review to resolve the circuit conflict on the interpretation of Section 924(c)(1)(D)(ii), and correct the deeply flawed approach and outcome of the court of appeals' decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2012

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 07-2818, 07-2887, 07-2888 and 07-2904

UNITED STATES OF AMERICA;
GOVERNMENT OF THE VIRGIN ISLANDS

v.

REINALDO BERRIOS,
Appellant in 07-2818

UNITED STATES OF AMERICA;
GOVERNMENT OF THE VIRGIN ISLANDS

v.

ANGEL RODRIGUEZ,
Appellant in 07-2887

UNITED STATES OF AMERICA;
GOVERNMENT OF THE VIRGIN ISLANDS

v.

FELIX CRUZ,
Appellant in 07-2888

UNITED STATES OF AMERICA;
GOVERNMENT OF THE VIRGIN ISLANDS

v.

TROY MOORE,
Appellant in 07-2904

On Appeal from the District Court
of the Virgin Islands–Appellate Division
Division of St. Croix
(D.C. Nos. 1-04-cr-00105-001, 1-04-cr-00105-003,
1-04-cr-00105-004 and 1-04-cr-00105-002)
District Judge: Honorable Raymond L. Finch

Nos. 07-2818, 07-2887 and 07-2904
Argued December 6, 2011

No. 07-2888
Submitted December 6, 2011

(Filed: April 10, 2012)

OPINION OF THE COURT

Before: FISHER, GREENAWAY, JR. and ROTH, Circuit Judges.

FISHER, Circuit Judge.

Reinaldo Berrios, Felix Cruz, Troy Moore, and Angel Rodriguez (together, "the defendants") appeal from judgments of conviction and sentence in the U.S. District Court for the District of the Virgin Islands arising out of a series of carjackings, an attempted robbery, and the murder of a security guard. Between them, the defen-

dants have raised a number of arguments on appeal, including evidentiary errors, prosecutorial misconduct, faulty jury instructions, sufficiency of the evidence, and double jeopardy. We address the various contentions in turn, but focus our discussion on two principal issues: clarifying our jurisprudence under the Confrontation Clause and its relationship to the Federal Rules of Evidence, and resolving a question of statutory interpretation under 18 U.S.C. § 924(c) and (j) with double jeopardy implications. After thorough consideration of the arguments presented by both sides, we will affirm.

I.

A. Factual History

On April 17, 2004, at 9:45 p.m., Lydia Caines was speaking on her cell phone in her car, a tan Chevy Cavalier, when a masked man exited a white Suzuki Sidekick with tinted windows and stuck a gun against the car's window. Caines dropped her phone and relinquished her vehicle, and both her car and the Sidekick were driven away. Law enforcement learned that the Sidekick was owned by Reinaldo Berrios, who had been seen driving it earlier in the evening when he was ticketed by a traffic cop and later in the evening when he spoke to a police officer. On April 18, Caines's phone was used to make calls to the family of Angel Rodriguez and to a friend of Troy Moore.

An hour later, three masked gunmen attempted to rob a Wendy's Restaurant, which Berrios had discussed with a friend earlier that day. An off-duty police officer, Cuthbert Chapman, was working as a security guard for the Wendy's at the time; when he attempted to stop the robbery, the would-be robbers shot him repeatedly, and he died nine days later from his wounds. Before leaving,

one of the robbers yelled, "Troy, let we go," meaning, "Troy, let's go." After the shooting, the robbers fled; two of them got into a champagne-colored Chevy Cavalier, which was being driven by an individual who had not entered the Wendy's. The Cavalier crashed, severely damaging one of the wheels, and the occupants abandoned it. When it was recovered, law enforcement determined that it was the stolen Cavalier, although the license plate had been switched and a side-view mirror was missing. A mask, similar to the ones worn by the robbers, was found close to the vehicle. Threads found in the Chevy Cavalier were matched to the material of a jacket retrieved from Felix Cruz's room, and a fingerprint from Rodriguez was lifted off of the license plate.

Around 11:00 p.m., shortly after the Wendy's robbery and shooting, Shariska Peterson was confronted by three masked men as she was walking to her Honda Accord. As the men demanded the keys to her car, one of them pointed a gun at her head. Instead, Peterson threw them into the high grass in her yard, prompting one of the men to say, "You should not have done that," and then the three ran away. Peterson saw a fourth man join them as they left. Soon thereafter, four masked men stole Rita Division's Toyota Echo, which she had left running while she was locking up the gate at the high school where she worked. One of the men ordered her at gunpoint to stay away from the car. Her car was recovered a few days later; the original license plate for Caines's Chevy Cavalier and its missing side-view mirror were found nearby.

In July of 2004, a federal judge in the District Court of Puerto Rico approved a Title III surveillance application, pursuant to 18 U.S.C. §§ 2510 *et seq.*, to monitor conversations in a detention center in Guaynabo, Puerto Rico, as part of an unrelated investigation into criminal

activity in which Berrios and Moore were involved (the "Title III recording"); both Berrios and Moore were in the detention center at the time. Surveillance was performed both through video and sound recording. Authorities intercepted a conversation between Berrios and Moore in a recreational yard at the detention facility during which they discussed, in detail, the Wendy's shooting and getaway, and their respective roles in it. The defendants identified Rodriguez (by nickname) as the getaway driver, and blamed him for blowing out a tire and crashing the getaway car. During the conversation, Moore also threatened to kill an individual who worked at a store with his girlfriend and was getting "regularly question[ed]" by the police.

B. Trial and Procedural History

On May 31, 2006, a federal grand jury in the District of the Virgin Islands returned a third superseding indictment charging each defendant with conspiracy and attempt to interfere with commerce by robbery, both in violation of 18 U.S.C. § 1951(a) (Counts 1 and 2, respectively); carjacking and attempted carjacking, both in violation of 18 U.S.C. § 2919(1) (Counts 3 and 10, and Count 8, respectively); using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A) (Counts 4, 9 and 11); causing the death of a person through use of a firearm, in violation of 18 U.S.C. § 924(j)(1) (Count 6); first-degree felony murder, in violation of 14 V.I.C. §§ 922(a)(2) and 11 (Count 5); and unauthorized use of a firearm, in violation of 14 V.I.C. §§ 2253(a) and 11 (Count 7). On February 6, 2007, after a four-week trial, the jury found the defendants guilty on all charges. On July 8, the District Court entered judgments of acquittal on Counts Three (carjacking) and Four (use of a firearm during the carjacking) for the

Caines incident, as to Moore, Rodriguez and Cruz, but otherwise denied defendants' motions for judgments of acquittal and a new trial. Berrios was sentenced to life imprisonment and consecutive prison terms totaling 70 years on the federal counts, and to life imprisonment and a consecutive prison term of 15 years on the Virgin Islands counts, with local sentences to run consecutively to the federal sentences. Rodriguez, Cruz and Moore were sentenced to life imprisonment on the federal counts, and to life imprisonment and a consecutive 15-year prison term on the Virgin Islands counts, with local sentences to run consecutively to federal sentences. Each defendant was fined $50,000 for Count 7. The defendants filed timely notices of appeal.

II.

The District Court had jurisdiction pursuant to 48 U.S.C. § 1612(a) and (c). We have jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

III.

The defendants raise six categories of error, which we address in turn:

A. Title III Evidence

B. Rule 404(b) Evidence

C. Sufficiency of the Evidence

D. Prosecutorial Misconduct

E. Jury Instructions

F. Double Jeopardy

After careful review, we find that none of the arguments raised by the defendants has merit.

A. Title III Evidence

The Title III recording of the conversation between Berrios and Moore formed the cornerstone of the prosecution's case against Rodriguez, Cruz, and Moore, and these three defendants challenge admission of the recording on several grounds. Rodriguez and Cruz challenge the recording as a violation of their rights under the Confrontation Clause of the Sixth Amendment, and in the alternative, as inadmissible hearsay under the Federal Rules of Evidence. Moore contends that the Title III application was facially deficient, and therefore the recording should have been suppressed. Due to the confusion exhibited by the parties as to the proper scope of the Confrontation Clause, we will first clarify our Confrontation Clause jurisprudence with regards to testimonial versus nontestimonial statements, before proceeding to the admissibility of the recording against the three defendants. We exercise "plenary review over Confrontation Clause challenges," *United States v. Lore*, 430 F.3d 190, 208 (3d Cir. 2005), but review a nonconstitutional challenge to the admission of hearsay for abuse of discretion. *United States v. Riley*, 621 F.3d 312, 337 (3d Cir. 2010).

1. Confrontation Clause Challenges

The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. Until recently, the scope of the Confrontation Clause had been governed by the "indicia of reliability" test laid out by Justice Blackmun in *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980). Under *Roberts*, an absent witness's hearsay statement could be introduced against a criminal defendant only if the witness was unavailable at trial and the

statement bore certain "indicia of reliability," either by "fall[ing] within a firmly rooted hearsay exception" or by showing "particularized guarantees of trustworthiness." *Id.* at 66. In *Crawford v. Washington*, 541 U.S. 36, 51 (2004), however, the Supreme Court observed that, at its core, the Confrontation Clause is concerned with "testimonial" hearsay. Abrogating *Roberts*, the *Crawford* Court adopted a per se rule that where *testimonial* hearsay is concerned and the declarant is absent from trial, the Confrontation Clause requires that the witness be unavailable and that the defendant have had a prior opportunity for cross-examination. *Id.* at 59, 68.

In subsequent decisions, the Court overruled *Roberts* in its entirety, holding without qualification that the Confrontation Clause protects the defendant *only* against the introduction of testimonial hearsay statements, and that admissibility of nontestimonial hearsay is governed solely by the rules of evidence. *See Davis v. Washington*, 547 U.S. 813, 823-24 (2006) (holding that, under *Crawford*, the Confrontation Clause protects only against admission of testimonial hearsay, because "a limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its 'core,' but its perimeter"); *Michigan v. Bryant*, 131 S. Ct. 1143, 1152-53 (2011) (confirming that *Crawford* limits the reach of the Confrontation Clause to testimonial statements); *Whorton v. Bocking*, 549 U.S. 406, 419-20 (2007) ("Under *Crawford*, . . . the Confrontation Clause has no application to [out-of-court nontestimonial statements] and therefore permits their admission even if they lack indicia of reliability.").

We initially interpreted the *Crawford* decision to overrule *Roberts* only insofar as testimonial statements were concerned, but continued to apply the Confrontation Clause to nontestimonial hearsay through the *Ro-*

berts indicia of reliability test. *See United States v. Hendricks*, 395 F.3d 173, 179 (3d Cir. 2005) ("[U]nless a particular hearsay statement qualifies as 'testimonial,' *Crawford* is inapplicable and *Roberts* still controls."). To date, we have yet to circumscribe the Confrontation Clause to its core concern with testimonial hearsay, but have rather maintained that "nontestimonial statements do not violate the Confrontation Clause and are admissible as long as 'they are subject to a firmly rooted hearsay exception or bear an adequate indicia of reliability.'" *United States v. Jimenez*, 513 F.3d 62, 77 (3d Cir. 2008) (quoting *Albrecht v. Horn*, 485 F.3d 103, 134 (3d Cir. 2007)). To avoid needless confusion, we now expressly follow the Supreme Court's Confrontation Clause jurisprudence as laid out in the trilogy of *Davis*, *Whorton*, and *Bryant*: where nontestimonial hearsay is concerned, the Confrontation Clause has no role to play in determining the admissibility of a declarant's statement.[1] Accordingly, the "indicia of reliability" test of *Roberts* is no

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[1] In light of intervening Supreme Court opinions, we are not bound by the cited panel decisions. *See Reich v. D.M. Savia Co.*, 90 F.3d 854, 858 (3d Cir. 1996) ("Although a panel of this court is bound by, and lacks authority to overrule, a published decision of a prior panel,. . . a panel may reevaluate a precedent in light of intervening authority. . . ."). Moreover, *Jimenez* and *Albrecht* failed to cite the recently issued Supreme Court decisions that we now conclude govern the present case, and "[w]hile we strive to maintain a consistent body of jurisprudence, we also recognize the overriding principle that '[a]s an inferior court in the federal hierarchy, we are, of course, compelled to apply the law announced by the Supreme Court as we find it on the date of our decision.'" *United States v. Tann*, 577 F.3d 533, 541 (3d Cir. 2009) (quoting *United States v. City of Philadelphia*, 644 F.2d 187, 192 n.3 (3d Cir. 1980)). Thus, we "'should not countenance the continued application in this circuit of a rule which is patently inconsistent with the Supreme Court's pronouncements.'" *Id.* (quoting *Cox v. Dravo Corp.*, 517 F.2d 620, 627 (3d Cir. 1975)).

longer an appropriate vehicle for challenging admission of nontestimonial hearsay.[2]

Thus, our Confrontation Clause inquiry is twofold. First, a court should determine whether the contested statement[3] by an out-of-court declarant qualifies as testimonial under *Davis* and its progeny. Second, the court should apply the appropriate safeguard. If the absent witness's statement is testimonial, then the Confrontation Clause requires "unavailability and a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 68. If the statement is nontestimonial, then admissibility is go-

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[2] To say that *Roberts* is no longer applicable means, as a practical matter, that a challenge to the admission of nontestimonial hearsay previously within the scope of the Confrontation Clause has no constitutional foundation. For purposes of appellate review, this will require the application of a different standard of harmless error. *See United States v. Diallo*, 575 F.3d 252, 264 (3d Cir. 2009). However, it should not detract in any way from the scrutiny that nontestimonial hearsay receives under the rules of evidence. As the *Roberts* Court observed, "hearsay rules and the Confrontation Clause are generally designed to protect similar values, and stem from the same roots." 448 U.S. at 66 (internal marks and citations omitted). As admissibility under *Roberts* relied in part on the existence of a relevant "firmly rooted hearsay exception," it will often be the case that evidence courts would deem inadmissible under *Roberts* is also inadmissible under the rules of evidence. *See*, *e.g.*, *United States v. Mussare*, 405 F.3d 161, 168-69 (3d Cir. 2005) (determining admissibility under *Bruton* based on satisfaction of Federal Rule of Evidence 804(b)(3)).

[3] In scrutinizing a contested statement, we note that a trial court should consider not only whether the statement as a whole qualifies as testimonial, but also whether portions of the statement may qualify as testimonial, and therefore require redaction of otherwise admissible evidence. *See Davis v. Washington*, 547 U.S. 813, 829 (2006) (scrutinizing portions of contested statement separately to determine testimonial nature).

verned *solely* by the rules of evidence. *Davis*, 547 U.S. at 823.

Applying this two-part test to the Title III recording at issue here, we have little hesitation in concluding that the recorded conversation was not testimonial, and thus not subject to Confrontation Clause scrutiny. Although we lack an authoritative definition of "testimonial," in *Hendricks*, 395 F.3d at 180-81, we addressed the admissibility of similar Title III recordings of conversations between various nontestifying defendants and third parties. After comparing these recordings to the examples which the Supreme Court stated were definitively testimonial, such as "prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and police interrogations," we reasoned that a "surreptitious" Title III recording neither qualified as "*ex parte* in-court testimony or its functional equivalent," nor formalized "extrajudicial statements." *Id.* Cognizant that "a witness 'who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not,'" *id.* (quoting *Crawford*, 541 U.S. at 51), we concluded that "the surreptitiously monitored conversations and statements contained in the Title III recordings [we]re not 'testimonial' for purposes of *Crawford*."[4] *Id.*

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[4] Intervening Supreme Court cases have exclusively addressed which "interrogations by law enforcement officers fall squarely within [the] class of testimonial hearsay," *Michigan v. Bryant*, 131 S. Ct. 1143, 1153 (2011) (quoting *Davis*, 547 U.S. at 826), and have done nothing to sway us from this understanding. In *Davis*, the Court considered whether statements about domestic violence to law enforcement personnel during a 911 call or at a crime scene qualified as testimonial for Confrontation Clause purposes, 547 U.S. at 823, 829-30, and *Bryant* differed only insofar as the contested statements concerned a nondomestic dispute. 131 S. Ct. at 1156. The *Bryant* and *Davis* Courts held that statements for which "the

It is likewise clear that, in the present case, the contested statements bear none of the characteristics exhibited by testimonial statements. There is no indication that Berrios and Moore held the objective of incriminating any of the defendants at trial when their prison yard conversation was recorded; there is no indication that they were aware of being overheard; and there is no indication that their conversation consisted of anything but "casual remark[s] to an acquaintance." *Crawford*, 541 U.S. at 51. Nor do we think that a surreptitious recording falls within the category of "abuses" which, historically, the Framers were concerned about eradicating from the government's investigative practices. *See id.* Consequently, we reject any suggestion that, in this circumstance, the Title III recording was testimonial,[5] and

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primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution" are testimonial, but those made to enable police to meet an ongoing emergency are not. *Davis*, 547 U.S. at 822.

[5] Of course, it is possible that participants in a recorded conversation might be aware that they are being recorded, and intentionally incriminate another individual. By no means are we establishing a categorical rule: simply because we have found *some* Title III recordings to be nontestimonial does not mean that *no* Title III recordings can qualify as such. Rather, each statement should be scrutinized on its own terms to determine whether it exhibits the characteristics of a testimonial statement. *See Bryant*, 131 S. Ct. at 1156 ("To determine whether the 'primary purpose' of an interrogation is 'to enable police assistance to meet an ongoing emergency,' which would render resulting statements nontestimonial, we objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties." (quoting *Davis*, 547 U.S. at 822)). There may be some instances, such as where the primary purpose of the declarant's interlocutor was to elicit a testimonial statement, such that even if the declarant's purpose was innocent, the conversation as a whole would be testimonial. Nevertheless, we are not presented with such a situation here.

therefore that the Confrontation Clause affords protection against the introduction of such evidence at the defendants' trial.

Our conclusion that the contested statements were nontestimonial under *Davis* compels us to reject the challenges levied by Rodriguez and Cruz under *Bruton v. United States*, 391 U.S. 123 (1968). In *Bruton*, the Court held that the Confrontation Clause bars the use of the confession of a nontestifying criminal defendant in a joint trial to the extent that it directly inculpates a co-defendant, though it might be otherwise admissible against the confessing defendant. *Id.* at 126. "We have interpreted *Bruton* expansively, holding that it applies not only to custodial confessions, but also when the statements of the non-testifying co-defendant were made to family or friends, and are otherwise inadmissible hearsay." *United States v. Mussare*, 405 F.3d 161, 168 (3d Cir. 2005) (citing *Monachelli v. Graterford*, 884 F.2d 749, 753 (3d Cir. 1989), and *United States v. Ruff*, 717 F.2d 855, 857-58 (3d Cir. 1983)). However, because *Bruton* is no more than a by-product of the Confrontation Clause, the Court's holdings in *Davis* and *Crawford* likewise limit *Bruton* to testimonial statements. *See, e.g.*, *United States v. Wilson*, 605 F.3d 985, 1017 (D.C. Cir. 2010) (holding that alleged *Bruton* claim did not violate the Confrontation Clause because the statements were not testimonial). Any protection provided by *Bruton* is therefore only afforded to the same extent as the Confrontation Clause, which requires that the challenged statement qualify as testimonial. To the extent that we have held otherwise, we no longer follow those holdings. *See Monachelli*, 884 F.2d at 753 (holding that *Bruton* applies to statements "made in a non-custodial setting to family and friends"); *Ruff*, 717 F.2d at 857-58 (same). And because, as discussed above, we have found the Title III recordings not to constitute testimonial

hearsay, *Bruton* provides no solace for Rodriguez or Cruz.

2. Challenges under the Federal Rules of Evidence

Following the two-step framework articulated above, having determined that the challenged recording is non-testimonial and therefore that the Confrontation Clause challenges are not viable, we move next to the admissibility of the Title III recording against Cruz and Rodriguez under the Federal Rules of Evidence. We may affirm the District Court on any ground supported by the record. *Mussare*, 405 F.3d at 168.

Rodriguez contends that the Title III recording was inadmissible hearsay as to him, but we agree with the government that the recording was admissible under Rule 804(b)(3) as a statement against penal interest. Although we are sensitive to the possibility that self-serving incriminating statements uttered by a non-testifying co-defendant may be inherently untrustworthy, "[w]here statements inculpate both the speaker and the defendant challenging their admission, the statements are admissible so long as they were 'self-inculpatory' and not simply self-serving attempts to deflect criminal liability." *Id.* at 168 (quoting *United States v. Moses*, 148 F.3d 277, 281 (3d Cir. 1998)). In *Mussare*, we considered the admission of similar braggadocio by a non-testifying codefendant, who had boasted to a witness that he and the defendant had performed the illegal acts underlying the criminal charges. *Id.* We found that because the co-defendant did not attempt to "deflect liability," but rather "took credit" for it, the statements were not inadmissible hearsay. *Id.*[6]

[6] In *Mussare*, 405 F.3d at 168-69, we went on to determine admissibility under *Bruton*, which, as discussed in the preceding section,

Mussare squarely governs here. In the Title III recording, Berrios and Moore unequivocally incriminate themselves in the carjackings and the Wendy's murder. Rather than attempting to "deflect liability" to Rodriguez, they take full credit for the Wendy's murder, bragging about shooting the security guard, and mentioning Rodriguez only to complain that he crashed the getaway car. In no way was the recorded conversation "self-serving," and therefore we will uphold the District Court's ruling as to its admissibility against Rodriguez.

Cruz's challenge is equally straightforward because Berrios and Moore never blame Cruz for any criminal conduct, or even mention him by name. Moreover, Moore's threat to kill a man who worked with his girlfriend, and who was evidently talking to the police, did not clearly refer to Cruz, as Cruz himself concedes (and the government never attempted to argue that it did). Thus, Cruz cannot contend that Berrios or Moore attempted to deflect any criminal liability in his direction during their conversation. *See Mussare*, 405 F.3d at 168. Rather, the challenged statements are entirely self-inculpatory, and consequently admissible against Cruz under Rule 804(b)(3). *See id.*

3. Sufficiency of the Title III Application

Moore offers a curious argument that the Title III application submitted by the investigating prosecutor was facially deficient because the prosecutor was not admitted to practice in Puerto Rico, the jurisdiction where the warrant was obtained. We find that this argument was waived under Federal Rule of Criminal Procedure 12.

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is no longer applicable in this situation.

"[U]nder Rule 12, a suppression argument raised for the first time on appeal is waived (*i.e.*, completely barred) absent good cause," including when the defendant filed a suppression motion but failed to include the specific issues raised on appeal. *United States v. Rose*, 538 F.3d 175, 177, 182 (3d Cir. 2008). *Rose* concerned evidence which the defendant sought to suppress under the Fourth Amendment on the grounds that the warrant was facially deficient, *id.* at 176-77, but in light of the expansive language of Rule 12(b)(3)(C), which applies broadly to "a motion to suppress," we find it equally appropriate to apply this waiver rule in the Title III context. *See*, *e.g.*, *United States v. Kincaide*, 145 F.3d 771, 778 (6th Cir. 1998) (holding that failure to seek suppression of Title III wiretap evidence waived claim on appeal under Rule 12); *United States v. Torres*, 908 F.2d 1417, 1424 (9th Cir. 1990) (same). Thus, although Moore submitted a pre-trial motion to suppress the wiretap evidence, that motion preserved only those arguments which he specifically raised, and he did not raise this purported deficiency. Nor can Moore offer any argument as to why he was unable to make a proper motion, or contend that he was unaware of this potential basis for suppression, as would warrant a waiver exception under 18 U.S.C. § 2518(10)(a): his co-defendant, Berrios, moved for a new trial based on the purported deficiency in the Title III application, which Moore did not join. The argument was accordingly waived under Rule 12, and because the plain error doctrine is inapplicable, *see Rose*, 538 F.3d at 177, we do not reach its dubious merits.

B. Other Acts Evidence

Berrios challenges the government's introduction at trial of statements he made in response to police questioning regarding loose ammunition in his home, as well

as photographs of the ammunition, under Federal Rule of Evidence 404(b). We review the admission of evidence under Rule 404(b) for abuse of discretion. *United States v. Butch*, 256 F.3d 171, 175 (3d Cir. 2001). The government contends that this evidence demonstrated consciousness of guilt as part of a pattern of exculpatory statements he made to the police during the investigation of the Wendy's shooting. We disagree, but the error was harmless.

1. Admissibility under Rule 404(b)

Extrinsic bad acts evidence may not be introduced "to prove a person's character in order to show that on a particular occasion the person acted in accordance with that character." Fed. R. Evid. 404(b). Berrios correctly observes that his unlawful possession of ammunition constitutes such a bad act, and contends that the government introduced it for the improper purpose of showing his violent tendencies.

We have acknowledged that false exculpatory statements may be introduced as evidence of the defendant's consciousness of guilt of the underlying charges, even where such conduct may itself violate the law. *See United States v. Kemp*, 500 F.3d 257, 296 (3d Cir. 2007); *United States v. Levy*, 865 F.2d 551, 558 (3d Cir. 1989). For example, in *Kemp*, we rejected a Rule 404(b) challenge to the use of false grand jury testimony, which the government used to disprove the defendant's "alibi" that he was, in essence, too wealthy to have committed the charged money laundering offenses. 500 F.3d at 296-97. Despite the defendant's contention that the government was attempting to show that he was lying on the stand because he had lied in the grand jury, we found that, as a false exculpatory statement, this evidence properly demonstrated consciousness of guilt. *Id.* Similarly, in *Levy*,

we found that a defendant's attempt to conceal his or her identity after committing a crime was admissible to show consciousness of guilt, even where the defendant's use of false identities may have violated "international travelling statutes." *Levy*, 865 F.2d at 558.

The government hangs its hat on the contention that Berrios's statements qualify under the consciousness of guilt exception to Rule 404(b) because they are, generally speaking, exculpatory, and were made during the investigation of the Wendy's shooting. Thus, the government calls this part of a "pattern" of false exculpatory statements, the entirety of which is relevant to show consciousness of guilt. We disagree. Although the statements concerned a collection of unused ammunition which garnered attention during an investigation of the charged offenses, the connection between this statement and consciousness of guilt is simply too attenuated. In both *Kemp* and *Levy*, the false exculpatory statements were directly related to the charged offense, thereby falling squarely within the kind of conduct traditionally demonstrating consciousness of guilt. However, neither *Levy* nor *Kemp* suggests that a false exculpatory statement made to deflect criminal liability for *unrelated* conduct may also be introduced for such purposes, and we decline to hold so here. Indeed, such an expansive interpretation of the consciousness of guilt exception would effectively eviscerate the rule itself: any time that the government sought to introduce other bad acts evidence, it could circumvent Rule 404(b) by admitting the defendant's false exculpatory statements about that conduct.

We have said that "[t]o show a proper purpose, the government must clearly articulate how that evidence fits into a chain of logical inferences without adverting to a mere propensity to commit crime now based on the commission of crime then." *Kemp*, 500 F.3d at 296 (in-

ternal quotations omitted). The government has failed to do so, and therefore, as the District Court recognized in its post-trial opinion, the evidence should have been excluded under Rule 404(b).

2. Harmless Error

Nevertheless, the District Court correctly concluded that the purported error was harmless because "the jury learned that no similar ammunition was found at Wendy's" and the "alleged falsehood was cumulative to other false and contradictory statements that Berrios made during the same interrogation that bore directly on his consciousness of guilt concerning the Wendy's incident." Where evidence is improperly admitted, reversal is not required where it is "highly probable that the error did not contribute to the judgment." *United States v. Cross*, 308 F.3d 308, 326 (3d Cir. 2002) (internal quotation omitted). "Under the highly probable standard, . . . there is no need to disprove every reasonable possibility of prejudice," and "we can affirm for any reason supported by the record." *Id.* (internal marks and quotations omitted). In the present case, we may comfortably conclude that the harmless error standard is satisfied.

First and foremost, the evidence against Berrios was so overwhelming that any improper inferences the jury might have drawn from the ammunition evidence were marginal, at most. *See id.* Second, the jury learned that none of the ammunition found at Berrios's home resembled the ammunition found at the Wendy's, so would not likely have conflated the two. Third, minimal prejudice would have resulted from the jury's consideration of the ammunition evidence in light of the court's instructions not to base its verdict on any uncharged acts and, as is oft repeated, "juries are presumed to follow their instructions." *Id.* (quoting *Zafiro v. United States*, 506

U.S. 534, 541 (1993)). And fourth, the government presented other statements from the same conversation which properly demonstrated consciousness of guilt of the charged offense, so any inference that the jury might have improperly drawn from this evidence was cumulative of the balance of other consciousness of guilt evidence. *See id.* Thus, the District Court was correct in determining that a new trial was not warranted on this basis.

C. Sufficiency of the Evidence

Cruz, Rodriguez and Moore renew their sufficiency of the evidence challenges previously made in post-trial motions. We exercise plenary review over a district court's denial of a motion for judgment of acquittal based on the sufficiency of the evidence. *United States v. Starnes*, 583 F.3d 196, 206 (3d Cir. 2009). The verdict must be sustained if "any rational trier of fact could have found proof of guilt beyond a reasonable doubt based on the available evidence." *United States v. Silveus*, 542 F.3d 993, 1002 (3d Cir. 2008). We review for plain error where the defendant failed to make a timely motion for judgment of acquittal. *United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005). Making all reasonable inferences in favor of the government as the verdict winner, *Starnes*, 583 F.3d at 206, we find these challenges meritless.

1. Cruz

Cruz submits that the government failed to prove beyond a reasonable doubt that he was one of the perpetrators of the charged crimes. Cruz moved for judgment of acquittal at the close of trial under Rule 29. The District Court correctly denied the motion as to Cruz's involvement in all but the Caines carjacking because,

based on physical evidence, witness testimony, and post-offense conduct, a reasonable jury could have found him to be a participant in the robbery, shooting and carjackings beyond a reasonable doubt. *Silveus*, 542 F.3d at 1002.

First, Cruz was tied to the crimes through fibers found in the Chevy Cavalier which matched a dark blue Nike jacket recovered from his room. The government's expert testified that it was "very unlikely" that fibers consistent with a garment would not originate from that garment, particularly given the "over 80 billion tons of fibers produced each year." Additionally, the jury could reasonably infer that the jacket belonged to Cruz because, when told to dress, he put on pants from the room where the jacket was found. Second, witnesses placed Cruz in the company of the other conspirators shortly before the attempted robbery. Angel Ayala testified that at around 7 p.m., Cruz and Rodriguez had talked with him about holding a gun and that they were wearing black and blue sweaters with blue hoods. Tyiasha Moore likewise testified that Rodriguez, Cruz and Berrios were gathered around a gun, all wearing dark clothing, one floor away from Moore, at around 10:15 p.m. that night. And third, Armando Cruz, a government witness, confronted Cruz several times about the Wendy's shooting. Cruz never denied his involvement in the crime until the third conversation, at which point Armando believed he had grown suspicious about Armando's assistance in the investigation. Making all reasonable inferences in favor of the government as the verdict winner, *Starnes*, 583 F.3d at 206, Cruz cannot show that no reasonable jury could have convicted him on the totality of the evidence.

2. Rodriguez

Rodriguez contends that the evidence was insufficient as a matter of law to convict him of the charges. However, the tape of Berrios and Moore identifying Rodriguez as the getaway driver for the Wendy's robbery and as an accomplice in the carjackings was properly admitted, and he rightly concedes that if the recording was admissible against him, the evidence was sufficient for a conviction. Rodriguez also argues that a jury could not find him guilty of attempting to carjack Peterson's car because none of the defendants harmed her in any way after she threw her keys into her yard. However, the specific intent element of carjacking is assessed at the time the defendant "demanded or took control over the car." *See Holloway v. United States*, 526 U.S. 1, 8 (1999). Therefore, the fact that Peterson was not harmed does not negate the jury's assessment of Rodriguez's intent *at the time* the carjackers demanded the keys. Indeed, Peterson testified that they ran away when neighborhood dogs began to bark, which suggests that the defendants may very well have changed their minds during the carjacking. Drawing all reasonable inferences in favor of the verdict, Rodriguez cannot prevail merely because the victim escaped unharmed.

3. Moore

Moore argues that the evidence was insufficient to prove that he was an accomplice in the Wendy's robbery and carjackings, but concedes that if the recording of his conversation with Berrios was properly admitted, his sufficiency of the evidence argument must fail. We reject his challenge accordingly.

D. Prosecutorial Misconduct

Several of the defendants have appealed on the grounds of prosecutorial misconduct. Cruz submits that the prosecution improperly vouched for a government witness, and, along with Rodriguez and Moore, contends that prosecutorial conduct during closing requires reversal.

1. Vouching

Cruz argues that Detective Matthews vouched for witnesses Tyiasha Moore and Angel Ayala by testifying that their grand jury testimony was consistent with their prior statements, and by confirming that he told them to tell the truth at the grand jury proceeding. We review an unpreserved vouching claim for plain error. *See United States v. Harris*, 471 F.3d 507, 512 (3d Cir. 2006). If petitioner preserved the claim, we review for abuse of discretion. *United States v. Vitillo*, 490 F.3d 314, 325 (3d Cir. 2007).

"Vouching constitutes an assurance by the prosecuting attorney of the credibility of a Government witness through personal knowledge or by other information outside of the testimony before the jury." *United States v. Walker*, 155 F.3d 180, 184 (3d Cir. 1998) (citations omitted). Such conduct threatens to "convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant," thereby "jeopardiz[ing] the defendant's right to be tried solely on the basis of the evidence presented to the jury," and "induc[ing] the jury to trust the Government's judgment rather than its own view of the evidence." *Id.* For a prosecutor's conduct to constitute vouching, (1) "the prosecutor must assure the jury that the testimony of a Government witness is credible," and

(2) "this assurance [must be] based on either the prosecutor's personal knowledge, or other information not contained in the record." *Id.* at 187.

The government is not immunized from this attack merely because the challenged vouching occurred through the use of witness testimony. Although "vouching most often occurs during summation, . . . [it] may occur at any point during trial," including witness examination, when the elicited testimony satisfies the two criteria for vouching. *Vitillo*, 490 F.3d at 328. In *Vitillo*, for example, prosecutors referred to their presence at the defendant's interview by using the pronoun "we" when examining a government agent about what the defendant had admitted to the government. *Id.* at 329. We concluded that, through their questions, the prosecutors effectively "assured the jury that [the witness's] testimony was credible based on their personal observations of [his] interrogation of [the defendant]." *Id.* As such, it constituted improper vouching. *Id.*

In this case, however, the concerns underlying the vouching prohibition were not implicated by the examination of Detective Matthews. Although the government elicited Matthews's testimony to assure the jury that Tyiasha Moore and Angel Ayala were credible, it did not do so based on information outside of the record. Moreover, the jury could not glean anything about the prosecutor's personal knowledge of the grand jury proceedings. Thus, at no point did the prosecutor imply that the jury should disregard the evidence in favor of the government's undisclosed knowledge or judgment. *See Walker*, 155 F.3d at 184.

Moreover, where the purported vouching is a "reasonable response to allegations of [impropriety]" by the defense, it is not improper. *United States v. Weatherly*, 525 F.3d 265, 272 (3d Cir. 2008); *see also United States v.*

Gentles, 619 F.3d 75, 84-85 (1st Cir. 2010). For instance, in *Weatherly*, we allowed the prosecutor a "brief and appropriate response" during closing to the defense's "speculation and attacks on the credibility of government witnesses." *Id.* The examination of Detective Matthews was also such a response. The defense had elicited testimony that Moore had testified at the grand jury under coercive conditions. It was eminently appropriate for the prosecution to respond by introducing testimony to rehabilitate. *Cf. United States v. Harris*, 471 F.3d 507, 512 (3d Cir. 2006). We reject Cruz's argument accordingly.

2. Closing Argument

Cruz, Moore and Rodriguez also challenge the fairness of the trial on the grounds that prosecutorial misconduct during closing jeopardized their right to a fair trial. The alleged misconduct includes the reading of a poem commemorating the victim, Officer Chapman,[7] as well as the use of an enlarged photograph of the victim and brief references to Rodriguez's presence in jail. We review a district court's rulings on contemporaneous objections to closing arguments for abuse of discretion. *United States v. Lore*, 430 F.3d 190, 210 (3d Cir. 2005). Any non-contemporaneous objections are reviewed for plain error. *United States v. Lee*, 612 F.3d 170, 193 (3d

[7] The poem read at trial consisted of the following: "To Officer Chapman, I bid you farewell, a man and a hero I never knew well. Like those before him, he answered the call, out gunned and out flanked, he was destined to fall. But the job he chose never promised long life, just respect from others whom he protected from strife. He went without fear into that night. Against crime and evil he fought the good fight. On an April night he did all that he could. He sacrificed his life to fight bad with good. In the face of a gun he showed steely nerve, and he kept his promise to protect and to serve."

Cir. 2010). A nonconstitutional error "requires reversal unless the error is harmless." *Id.* at 194.

We agree that the closing was rife with misconduct, and to a degree that should not be tolerated by a district court. The reading of a commemorative poem could truly serve no purpose other than to appeal to the emotions and sympathies of the jury, *see Viereck v. United States*, 318 U.S. 236, 247-48 & n.3 (1943); a criminal trial may prove cathartic for a victim's friends and family, but the courtroom is not an appropriate forum for a memorial. If, as the government contends, the poem merely reiterated evidence that had been elicited at trial, then the government can simply discuss that evidence with the jury. The same goes for the puzzle of Officer Chapman's face, which the government submits was meant to show the jury how disparate pieces of evidence fit together. Visual aids can often help in conveying difficult concepts to a jury, particularly in a factually complex case such as this. *See*, *e.g.*, *United States v. De Peri*, 778 F.2d 963, 979 (3d Cir. 1985) (approving use of a chart to diagram relationships). But if that were truly the sole purpose behind the puzzle imagery, there was no such conceivable purpose in using an enlarged photograph of the victim's face as the puzzle image. Considered jointly with the poem, the purpose of the government's conduct is transparent and its justifications are not credible; such conduct should not have been allowed in court.[8]

Nevertheless, a "'criminal conviction is not to be lightly overturned on the basis of a prosecutor's [conduct] standing alone . . . .'" *Lee*, 612 F.3d at 194 (quoting

[8] The Government also concedes that the references to Rodriguez's presence in jail, both in mentioning his shackles and his prison letters to his girlfriend, were error. However, because these were minor incidents, we focus our analysis on the more troubling instances of misconduct.

United States v. Young, 470 U.S. 1, 11 (1985)). Rather, "we 'must examine the prosecutor's offensive actions in context and in light of the entire trial, assessing the severity of the conduct, the effect of the curative instructions, and the quantum of evidence against the defendant[s].'" *Id.* (quoting *Moore v. Morton*, 255 F.3d 95, 107 (3d Cir. 2001)); *United States v. Gambone*, 314 F.3d 163, 179 (3d Cir. 2003). "A prosecutor's [conduct] can create reversible error if [it] 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Lee*, 612 F.3d at 194 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

In the present case, when examined in context and in light of the entire trial, the prosecutor's conduct does not merit reversal. First, the objectionable poem was a mere ten lines out of over seventy-five pages of closing argument by the prosecution and thousands of pages of trial transcript; we have found prejudice to be minimal from similarly brief comments. *See Gambone*, 314 F.3d at 180 (finding no prejudice where comments took up less than half a page out of 3200 pages of trial transcript); *United States v. Zehrbach*, 47 F.3d 1252, 1267 (3d Cir. 1995) (finding no prejudice where comments were two sentences in a forty-page closing argument). The same applies to the photograph of Officer Chapman, which had already been presented as evidence to the jury in its original form and, in the context of the entire trial, was displayed during an equally brief period of time.[9] Second, instructions by the judge, though not issued directly in response to the poem, sufficiently removed any lingering prejudice. *See United States v.*

[9] The government conceded at oral argument that its stance on this issue might be different if the photograph and poem were presented simultaneously, but because that was not the case, we see no need to address that possibility.

Wood, 486 F.3d 781, 789 (3d Cir. 2007) (finding opening and closing jury instructions to consider only the evidence, which did not include argument by counsel, sufficient, even without issuing an express curative instruction for the challenged comment); *Gambone*, 314 F.3d at 180 (same). As in *Wood*, the judge in this case instructed the jury repeatedly to base its judgment on the evidence, not on sympathy or bias,[10] and that arguments by counsel do not constitute evidence. These instructions were likewise an adequate response to the possibility that the improper commentary would lead the jury astray in its deliberations. Moreover, the jury was already aware of the nature of the crime and the identity of the victim, and therefore would have been exposed to the passion and sympathy elicited by the poem throughout the trial. *See Duvall v. Reynolds*, 139 F.3d 768, 795 (10th Cir. 1998). Finally, the jury was presented with ample evidence on which it could convict the defendants, *see Wood*, 486 F.3d at 789, and, as the District Court noted, the poem itself was "interlaced" with evidence adduced at trial. *See Gambone*, 314 F.3d at 179 (reaffirming prior holdings "that probative evidence on the same issue as improper remarks may mitigate prejudice stemming from those remarks"). However prejudicial the photo and poem may seem in isolation, when viewed in context of the entire trial, prejudice was minimal and reversal is not warranted.

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[10] Specifically, the District Court instructed the jury that it was "to perform [its] duties without sympathy, without bias, and without prejudice to any party," because "[o]ur system of law does not permit jurors to be governed or affected by bias, sympathy or prejudice." The District Court also emphasized that "[u]nder no circumstances . . . should [the jury's] deliberations be affected or diverted by any appeals to bias, passion, or prejudice, nor influenced by any pity or sympathy in favor of either side."

E. Jury Instructions

In its charge on the specific intent element of carjacking,[11] the District Court instructed the jury that "whether the Defendant 'intended to cause death or serious bodily harm' is to be judged objectively from the conduct of the Defendant as disclosed by the evidence, and from what one in the position of the alleged victim might reasonably conclude." Berrios contends that by emphasizing the perspective of the victim, these instructions established a subjective standard allowing the jury to find the intent element satisfied based only on an "empty threat" or "intimidating bluff," thereby "render[ing] superfluous the statute's 'by force and violence or intimidation' element." *Holloway v. United States*, 526 U.S. 1, 11 (1999). We exercise plenary review in determining "whether the jury instructions stated the proper legal standard." *United States v. Leahy*, 445 F.3d 634, 643 (3d Cir. 2006) (citation omitted). We review the particular wording of the instructions for abuse of discretion. *Id.* (citation omitted). Although an "an empty threat, or intimidating bluff . . . is not enough to satisfy [carjacking's] specific intent element," *Holloway*, 526 U.S. at 11, when read in the context of the charge as a whole, the jury instructions were proper.

Jury instructions "'may not be evaluated in artificial isolation,'" but rather "'must be evaluated in the context

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[11] The four elements of carjacking, as instructed by the District Court, were: (1) "That the Defendant took a motor vehicle from the person or presence of another"; (2) "That the Defendant did so by force or violence, or by intimidation"; (3) "That the motor vehicle previously had been transported, shipped, or received in interstate or foreign commerce"; and (4) "That the Defendant intended to cause death or serious bodily harm when the Defendant took the vehicle." This accords with circuit practice. *See United States v. Applewhaite*, 195 F.3d 679, 684-85 (3d Cir. 1999).

of the overall charge.'" *United States v. Williams*, 344 F.3d 365, 377 (3d Cir. 2003) (quoting *United States v. Goldblatt*, 813 F.2d 619, 623 (3d Cir. 1987)). Thus, an instruction that appears erroneous on its own may be remedied by the balance of the court's instructions. *See id.* In *Williams*, for example, the defendant contested the use of the word "emboldening" in jury instructions on the "carry" and "possession" prongs of a § 924(c) violation. *Id.* We found no error, because the stray term was "included as part of a thorough instruction that sufficiently tracked language used by the Supreme Court." *Id.* at 377-78. Likewise, in *United States v. Khorozian*, 333 F.3d 498, 508 (3d Cir. 2003), we rejected the defendant's contention that an intent instruction for bank fraud "emasculated" the specific intent requirement. Although the challenged statement, "taken out of context," did "not employ the exact language" from our established definition of intent, the instruction as a whole "communicate[ed] to the jury that it must find that [the defendant] possessed the specific intent to defraud . . . ." *Id.*

At the outset, of course, it is apparent that the challenged clause did not set forth a "subjective standard," as Berrios contends, but rather an objective reasonable person standard. Objective standards are often defined as what a reasonable person under the circumstances would believe or understand. *See*, *e.g.*, *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2402 (2011) ("By limiting analysis to the objective circumstances of the interrogation, and asking how a reasonable person in the suspect's position would understand his freedom . . . to leave, the objective test [for custody under *Miranda*] avoids burdening police with the task of anticipating the idiosyncrasies of every individual suspect and divining how those particular traits affect each person's subjective state of mind."); *United States v. Mendenhall*, 446 U.S. 544, 554

(1980) (holding that "seizure" for Fourth Amendment purposes objectively occurs when "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave"). And despite Berrios's contentions otherwise, a "reasonable person in the victim's position" standard is distinguishable from the victim's subjective belief: even where a victim who is easily intimidated might be subjectively fearful, a jury employing this standard must discern whether a reasonable person in that position would find the defendant possessed the requisite intent.

Even if a juror might mistake the challenged clause as a subjective standard, the instructions as a whole tracked the correct standard for specific intent. We have said that a defendant's specific intent is to be judged "[b]ased upon the totality of *all* the surrounding facts and circumstances," *United States v. Anderson*, 108 F.3d 478, 485 (3d Cir. 1997) (applying specific intent standard for carjacking) (emphasis added); *see Polsky v. Patton*, 890 F.2d 647, 650 (3d Cir. 1989) (discussing intent standard for third degree murder), and not "by the secret motive of the actor, or some undisclosed purpose merely to frighten, not to hurt." *United States v. Guilbert*, 692 F.3d 1340, 1344 (11th Cir. 1982) (quoting *Shaffer v. United States*, 308 F.2d 654, 655 (5th Cir. 1962)). The instructions here invited the jury to consider the facts in precisely this way: "objectively from the conduct of the Defendant as disclosed by the evidence, and from what one in the position of the alleged victim might reasonably conclude." The clause which Berrios highlights, read in context, does no more than provide one of the evidentiary factors the jury could consider in reaching its verdict. The fact that the clause appears in the second half of the sentence, connected by an "and," confirms its role as a descriptive example rather than a discrete instruction which contradicts the initial one. *See United States*

v. Gordon, 290 F.3d 539, 545 (3d Cir. 2003) ("[A] defect in a charge may result in legal error if the rest of the instruction contains language that merely contradicts and does not explain the defective language in the instruction."). Thus, read as a whole, the instruction did not direct the jury to rely on the victim's subjective perception, and therefore, did not run the risk of allowing a conviction based on empty threats or bluffs.

F. Double Jeopardy

Berrios was convicted under Virgin Islands law for first-degree (felony) murder, 14 V.I.C. § 922(a)(2),[12] and under federal law, 18 U.S.C. § 924(j)(1),[13] both premised on the killing of Officer Chapman. He was sentenced to consecutive terms of life imprisonment, which he challenges as a violation of the Fifth Amendment's Double Jeopardy Clause.[14] Our review is plenary. *See United States v. Bishop*, 66 F.3d 569, 573 (3d Cir. 1995).

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[12] The text of § 922(a)(2), in relevant part, defines first degree murder as "(a) All murder which . . . (2) is committed in the perpetration or attempt to perpetrate arson, burglary, kidnapping, rape, robbery or mayhem, assault in the first degree, assault in the second degree, assault in the third degree and larceny."

[13] The text of § 924(j)(1) provides, in relevant part: "A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and (2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section."

[14] "The Virgin Islands and the federal government are considered one sovereignty for the purposes of determining whether an individual may be punished under both Virgin Islands and United States statutes for a similar offense growing out of the same occurrence." *Gov't of the V.I. v. Braithwaite*, 782 F.2d 399, 406 (3d Cir. 1986).

"With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366 (1983). "Where Congress intended . . . to impose multiple punishments, imposition of such sentences does not violate the Constitution." *Albernaz v. United States*, 450 U.S. 333, 344 (1981). Accordingly, a Double Jeopardy challenge must fail if the statutory text clearly reflects a legislative intent to impose multiple sentences on a defendant for a single underlying transaction. *See id.* at 344 & n.3; *Bishop*, 66 F.3d at 573-74. If, after inspection, Congress's intent remains unclear, cumulative sentencing poses no double jeopardy problem only if "each provision requires proof of a fact which the other does not," thereby satisfying *Blockburger v. United States*, 284 U.S. 299 (1932). *Bishop*, 66 F.3d at 573 (quoting *Blockburger*, 284 U.S. at 304). However, "[b]ecause the [*Blockburger*] rule 'serves as a means of discerning congressional purpose[, it] should not be controlling where, for example, there is a clear indication of contrary legislative intent.'" *United States v. Conley*, 37 F.3d 970, 975-76 (3d Cir. 1994) (third alteration in original) (quoting *Albernaz*, 450 U.S. at 340).

The parties agree that, because felony murder in the Virgin Islands is a lesser included offense of 18 U.S.C. § 924(j), *Blockburger* is not satisfied. The question we are faced with is whether, by expressly requiring a § 924(c) violation before imposing a § 924(j) penalty, Congress also intended § 924(j) to incorporate subsection (c)'s consecutive sentence mandate, § 924(c)(1)(D)(ii). This is a question which has divided our sister circuits. *Compare United States v. Dinwiddie*, 618 F.3d 821, 837 (8th Cir. 2010) (holding that consecutive sentence provision under § 924(c) applies to sentences imposed under

§ 924(j)), *and United States v. Battle*, 289 F.3d 661, 665-69 (10th Cir. 2002) (same), *with United States v. Julian*, 633 F.3d 1250, 1252-57 (11th Cir. 2011) (holding that § 924(j) defines a distinct offense from § 924(c) and is not subject to consecutive sentence mandate). We conclude that Congress did so intend, and will therefore deny Berrios's double jeopardy challenge.

1. The Statutory Scheme

As is customary in cases of statutory interpretation, "our inquiry begins with the language of the statute and focuses on Congress'[s] intent." *United States v. Abbott*, 574 F.3d 203, 206 (3d Cir. 2009). "Because statutory interpretation . . . is a holistic endeavor," we do "not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute." *United States v. Cooper*, 396 F.3d 308, 313 (3d Cir. 2005) (internal marks and quotations omitted).

The text of 18 U.S.C. § 924(j) reads as follows:

> "A person who, *in the course of a violation of subsection (c)*, causes the death of a person through the use of a firearm, shall—
>
> (1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life, and
>
> (2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section."

18 U.S.C. § 924(j) (emphasis added). By virtue of the subsection (c) cross-reference, we will begin, counter-intuitively, with § 924(c).

We have explored the mechanics of 18 U.S.C. § 924(c) more fully elsewhere, *see Abbott*, 574 F.3d at 206-08; *Bishop*, 66 F.3d at 573-75, but briefly revisit it here. In its prefatory clause, subsection (c) begins by identifying a core set of predicate offenses, crimes of violence and drug trafficking crimes, which fall within its scope. *See* § 924(c)(1)(A). The prefatory clause then provides that a defendant who commits a predicate offense while using, carrying or possessing a firearm, is subject to a mandatory punishment "in addition to" the sentence for that predicate offense. *Id.* Subsection (c) also makes clear that "no term of imprisonment imposed on a person under . . . subsection [(c)] shall run concurrently with *any other term of imprisonment* imposed on the person . . . ."[15] § 924(c)(1)(D)(ii) (emphasis added) (the "consecutive sentence mandate"). The Supreme Court–along with every Court of Appeals to address the question, including our own–has unequivocally held that "[w]hen a defendant violates § 924(c), his sentencing enhancement under that statute *must run consecutively to all other prison terms*." *United States v. Gonzales*, 520 U.S. 1, 9-10 (1997) (emphasis added); *see*, *e.g.*, *Bishop*, 66 F.3d at 574-75 ("'[T]he legislative intent to impose a consecutive

[15] Although the scope of § 924(c)(1)(D)(ii) substantially overlaps with that of subsection (c)'s prefatory clause, § 924(c)(1)(A), the consecutive sentence mandate applies to "*any other term of imprisonment imposed*," thereby reaching more broadly than the language of the prefatory clause, which only mandates the imposition of penalties in addition to the *predicate* offense. In recognition of this, the government implicitly concedes that where, as here, Berrios challenges the § 924(j) sentence based on a conviction for felony murder which was *not* the charged predicate offense, only the consecutive sentence mandate is controlling. Nevertheless, we can see no reason for Congress to differentiate between the extension of the prefatory clause to subsection (j) and the extension of the consecutive sentence mandate, because both are essential to the sentencing scheme.

sentence for the violation of section 924(c) is plain from the language of that provision . . . .'" (quoting *United States v. Mohammed*, 27 F.3d 815, 819-20 (2d Cir. 1994))).

The remainder of subsection (c) then provides a length for the additional mandatory sentence, the severity of which depends on factors delineated in that subsection or elsewhere. *See Abbott*, 574 F.3d at 206-08 (holding that mandatory minimum sentences provided in other provisions of law may apply to increase a subsection (c) punishment). The provisions of subsection (c) provide for greater sentence lengths based upon, for example, actual discharge of the weapon, § 924(c)(1)(A)(iii), or the use of a machinegun, § 924(c)(1)(B)(ii). This structure extends to § 924 (j): like the rest of subsection (c), § 924(j) simply provides an additional circumstance beyond the existence of the predicate offense–namely, where a subsection (c) violation results in the death of a person–that governs the length of a sentence to be imposed. *See* 18 U.S.C. § 924(j) (varying sentence lengths depending on whether death results from murder or manslaughter). Understood in the context of the statutory scheme, section 924(j) effectively functions as an extension of subsection (c)'s statutory core. And in light of the subsection (c) cross-reference, Congress's intent to treat it as such is clear. With the statutory scheme firmly in mind, we turn to the double jeopardy issue.

2. The Consecutive Sentence Mandate

Berrios's principal argument is that § 924(j) lacks any indication that a sentence is to be stacked on top of his other offenses, and therefore the requisite congressional intent is not present. He also observes that the consecutive sentence mandate exclusively applies to a penalty "imposed under" subsection (c), *see* 18 U.S.C.

§ 924(c)(1)(D)(ii), and contends that a sentence imposed pursuant to a subsection (j) conviction is not "imposed under" subsection (c) because, following the Eleventh Circuit's reasoning in *Julian*, 633 F.3d at 1252-57, subsection (j) constitutes a separate offense. Although the government concedes that § 924(j) establishes a discrete crime from § 924(c), this has no bearing on our decision: we are persuaded that under any reasonable interpretation, 18 U.S.C. 924(j) is subject to the consecutive sentence mandate provided in § 924(c)(1)(D)(ii).

First, in light of Congress's clear intent to stack punishments for all § 924(c) violations, we agree with the Tenth Circuit that "[t]he failure to repeat the prohibition against concurrent sentences set forth in § 924(c)(1)(D)(ii) does not demonstrate that Congress has determined that the penalty set forth in § 924(j) should not be imposed 'in addition to'" any other term of imprisonment. *Battle*, 289 F.3d at 668. After all, the consecutive sentence mandate is the heart of the statutory scheme set forth by subsection (c); its veritable *raison d'être*. *See Gonzales*, 520 U.S. at 9-10. It takes no special insight or leap of logic to conclude that the central reason for Congress's choice of language in writing subsection (j)—"during the course of a violation of subsection (c)"—was to ensure that separating out subsection (j) from subsection (c) did not deprive the law of a coherent sentencing scheme, the heart of which is the consecutive sentence mandate.[16] As we have said before,

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[16] We find unpersuasive the Eleventh Circuit's reasoning in *Julian*, 633 F.3d at 1255-56, that the contrary interpretation is necessary to avoid rendering superfluous the language of § 924(c)(5), because otherwise, "no difference [would] exist[] between the sentences that these two provisions prescribe[]." In fact, there is a patently obvious difference: § 924(j) requires the death of a person "through the use of a *firearm*," (emphasis added), whereas § 924(c)(5) is based on the use, carrying, or possession of "*armor*

"[o]nce Congress has clearly stated an intention to stack punishments as it did in section 924(c), 'it need not reiterate that intent in any subsequent statutes that fall within the previously defined class.'" *Bishop*, 66 F.3d at 575 (quoting *United States v. Singleton*, 16 F.3d 1419, 1428 (5th Cir. 1994)).

To interpret the text any other way would give rise to an anomalous result: that "a defendant convicted under § 924(c) is subject to an additional consecutive sentence only in situations that do not result in a death caused by use of a firearm." *Allen*, 247 F.3d at 769; *Battle*, 289 F.3d at 668 (quoting *Allen*, 247 F.3d at 769). We agree with the Eighth and Tenth Circuits that it is highly "unlikely that Congress, which clearly intended to impose additional cumulative punishments for using firearms during violent crimes in cases where no murder occurs, would turn around and not intend to impose cumulative punishments in cases where there are actual murder victims." *Battle*, 289 F.3d at 668 (quoting *Allen*, 247 F.3d at 769). In light of the statutory scheme and purpose shared by subsection (c) and subsection (j), we simply cannot impute a contradictory intent to Congress without some underlying rationale.

This reading is supported by our prior interpretation of § 924(c)'s prefatory clause, which instructs that the penalties enumerated in subsection (c) apply "in addition to the punishment provided" for the predicate crime of violence or drug trafficking offense, "except to the extent that a greater minimum sentence is otherwise provided by this subsection *or by any other provision of law*." 18 U.S.C. § 924(c)(1)(A) (emphasis added); *see Abbott*, 574 F.3d at 206-08. As we discussed in *Abbott*, the prefatory

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piercing ammunition," (emphasis added), which is, of course, not a firearm.

clause's mandatory sentencing scheme is not limited to subsection (c), because "[i]n referring to alternative minimum sentences, the prefatory clause mentions 'any other provision of law' to allow for additional § 924(c) sentences *that may be codified elsewhere in the future* . . . ." 574 F.3d at 208 (emphasis added). The clause thereby "provides a safety valve that would preserve the applicability of any other provisions that could impose an even greater mandatory minimum consecutive sentence for a violation of § 924(c)." *United States v. Studifin*, 240 F.3d 415, 423 (4th Cir. 2001).

Although *Abbott* did not place subsection (j) squarely before us at that time, we think that subsection (j) was the unambiguous target of this safety valve. Accordingly, if Congress wanted to increase the mandatory minimum for a violation of subsection (c) resulting in the death of a person, it could do so in subsection (j) without rewriting the entire statute. *Cf. Bishop*, 66 F.3d at 575. Thus, Congress's intent in imposing cumulative punishment on a defendant for both a § 924(c) violation and a predicate offense was not constrained to those penalties provided solely by that subsection. Rather, the consecutive sentence scheme is intended to impose additional punishments for *any* violation of subsection (c), whether the penalties for such violations are provided in that subsection or elsewhere.

Second, we think that Berrios's interpretation of sentences "imposed under" subsection (c) to exclude subsection (j) lacks a firm textual basis and is unduly restrictive in light of the statutory scheme. Of course, "imposed under" *could* refer to only those sentences literally listed in subsection (c), but that is by no means the only possible definition. For instance, Webster's defines "under" as, in part, "subject to regulation by," s*ee* Webster's Third Int'l Dictionary (1989), and so it is equally plausi-

ble that a sentence "imposed under" subsection (c) means "subject to regulation by" subsection (c), a definition under which subsection (j) would clearly qualify. But in light of the statutory scheme as a whole, it is apparent that the phrase serves a functional—as opposed to literal—purpose, by identifying those sentences imposed *as a consequence of* a subsection (c) offense: in other words, those sentences handed down for a subsection (c) violation.

Although we decline to follow the Eighth and Tenth Circuits in concluding that subsection (j) merely sets forth sentencing elements to be applied to a subsection (c) offense, *see Battle*, 289 F.3d at 666; *Allen*, 247 F.3d at 769, such a determination is not dispositive.[17] The sen-

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[17] We acknowledge that our resolution of this issue would be more straightforward were we to follow the Eighth and Tenth Circuits in holding that § 924(j) merely provides an "enhancement" for a § 924(c) offense. *See Battle*, 289 F.3d at 666; *Allen*, 247 F.3d at 769. Nevertheless, we are persuaded that such a reading would be inconsistent with the Supreme Court's analysis of § 924(c) enhancements and offenses in *Castillo v. United States*, 530 U.S. 120, 124-31 (2000), and *Harris v. United States*, 536 U.S. 545, 552-56 (2002), as well as *Jones v. United States*, 526 U.S. 227, 233-52 (1999)—cases which the Eighth and Tenth Circuits did not address.

In *Castillo*, the Court held that a then-current provision enhancing the mandatory minimum sentence for use of a machinegun during a § 924(c)(1) violation constituted an element of a separate crime rather than a sentencing factor. 530 U.S. at 124-31. The Court reasoned that the use of a machinegun reflected a "great" variation, "both in degree and in kind," from a generic § 924(c) offense, and was unlike "traditional sentencing factors" relating to offender characteristics, such as recidivism. *Id.* at 126. The Court also acknowledged that "treating facts that lead to an increase in the maximum sentence as a sentencing factor would give rise to significant constitutional questions." *Id.* at 124 (citing *Jones*, 526 U.S. at 239-52). Conversely, in *Harris*, 536 U.S. at 556, the Court held that the provisions of § 924(c) increasing the penalty for brandishing or discharging a firearm were sentencing factors, not elements. Those

tencing scheme embodied by subsection (c) does not distinguish between an increased sentence provided as a function of a sentencing factor, as in § 924(c)(1)(A)(iii), *see Harris v. United States*, 536 U.S. 545, 552-54 (2002), or an element of a separate offense, as in § 924(c)(1)(B)(ii), *see Castillo v. United States*, 530 U.S. 120, 125-26 (2000). Nor do we think that, where an of-

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provisions did "not repeat the elements from the principal paragraph" setting forth the offense, raised the minimum sentences in incremental steps, and were premised on "paradigmatic sentencing factor[s]." *Id.* at 552-54.

These cases, in conjunction with *Jones*, 526 U.S. at 251-52, where the Court held that "death" constituted an element of an aggravated carjacking offense under 18 U.S.C. § 2119(3), guide us here. We think that the death of a person—a fact more serious than the use of a machinegun in *Castillo*—introduces a "great" variation in degree and in kind from other subsection (c) offenses, and cannot be considered a "traditional sentencing factor." *See* 530 U.S. at 124; *Jones*, 526 U.S. at 233, 243-44. Additionally, just as the significant step up in the mandatory minimum for machinegun use—25 years—would have posed "significant constitutional questions" if premised on a sentencing factor, *Castillo*, 530 U.S. at 124, exposure to life imprisonment and the death penalty in § 924(j) would as well. *See Jones*, 526 U.S. at 233, 239-52. In sum, these characteristics, in addition to locating § 924(j) in a wholly separate subsection rather than integrating it into § 924(c), strongly suggest that Congress intended the death of a person to be considered an element of a discrete offense—an offense provided by § 924(j).

Nevertheless, we do not think that this is the proper case to decide the question. First, the government expressly stated at argument that it considered § 924(j) to constitute a separate offense and, consistent with this view, specifically charged a § 924(j) offense in Count Six of the indictment. Second, in its instructions to the jury, the District Court included the death of a person as an element of the § 924(j) offense, thereby obviating any possibility that the exposure to an increased maximum sentence compromised due process, which would be the central issue implicated by our decision. *See Jones*, 526 U.S. at 232.

fense is defined jointly by two statutory provisions, a sentence can only be "imposed under" one of them. Rather, we are persuaded that a subsection (j) sentence qualifies as a sentence "imposed under" subsection (c), even though it is also "imposed under" subsection (j), because they are part and parcel of the same statutory scheme, and jointly provide the legal basis for the sentence. Simply put, because a § 924(j) sentence is imposed on a defendant for violating subsection (c), such a sentence is "imposed under" subsection (c).[18]

We find the Eleventh Circuit's reasoning to the contrary unpersuasive. *See Julian*, 633 F.3d at 1253. In concluding that a subsection (j) penalty is not "imposed under" subsection (c) because subsection (j) "provided [defendant's] sentence," the Eleventh Circuit looked to "decisions of our sister circuits that have declined to read section 924(o), which punishes 'conspir[acies] to commit an offense under subsection (c),' as requiring consecutive sentences." *Id.* But neither *United States v. Clay*, 579 F.3d 919, 933 (8th Cir. 2009), nor *United States v. Stubbs*, 279 F.3d 402, 405-09 (6th Cir. 2002), *overruled on other grounds by United States v. Helton*, 349 F.3d 295, 299 (6th Cir. 2003), the two cases on which *Julian* relies, are analogous. In those cases, the defendant was *charged and convicted* of a § 924(o) offense, but *sentenced* under § 924(c), thereby posing a severe problem under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *See Stubbs*, 279 F.3d at 408-09. Here, on the other hand, as in *Julian*, the defendant was convicted and sentenced under the same provision, § 924(j), thereby implicating none of the concerns underlying those decisions. Moreover, § 924(o)'s relationship to § 924(c) is easily distinguishable from that of § 924(j): § 924(o) creates a con-

[18] This is also consistent with the indictment, which charged Berrios with a violation of § 924(c) along with a violation of § 924(j).

spiracy offense, which is by nature inchoate, and therefore *does not require* that the defendant actually commit the underlying crime. *See Iannelli v. United States*, 420 U.S. 770, 777 (1975). In that regard, a § 924(o) sentence, *unlike § 924(j)*, is in no way dependent on a § 924(c) *violation*, and therefore provides no guidance for our analysis here.

Based on our reading of the statutory scheme, we conclude that Congress intended a defendant who violates subsection (c) to be subject to enhanced sentences by virtue of the consecutive sentence mandate. A defendant who violates subsection (j) by definition violates subsection (c), and therefore is subject to the mandate, regardless of whether § 924(j) constitutes a discrete criminal offense from § 924(c). And when Congress required proof of a § 924(c) violation before imposing the penalties listed under § 924(j), it intended to include a subsection (j) penalty within the scope of those sentences "imposed under" subsection (c). Finding that Congress clearly intended to impose cumulative punishment for a violation of subsection (j) and any other offense, *see Albernaz*, 450 U.S. at 344, we reject Berrios's double jeopardy challenge accordingly.

IV.

For the foregoing reasons, we will affirm the judgments of conviction and sentence.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-2818

UNITED STATES OF AMERICA;
GOVERNMENT OF THE VIRGIN ISLANDS

v.

REINALDO BERRIOS,
Appellant

On Appeal from the District Court
of the Virgin Islands—Appellate Division
Division of St. Croix
(D.C. No. 1-04-cr-00105-001)
District Judge: Honorable Raymond L. Finch

Present: McKEE, *Chief Judge,* SLOVITER, SCIRICA, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE and ROTH,* *Circuit Judges.*

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by Appellant having been submitted to all judges who participated in the de-

*Judge Roth's vote is limited to panel rehearing only.

cision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is hereby DENIED.

BY THE COURT:
/s/ D. Michael Fisher
Circuit Judge

Dated: June 11, 2012

APPENDIX C

STATUTORY PROVISION INVOLVED

Section 924 of Title 18 of the United States Code provides:

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever—

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(l); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly—

(A) makes any false statement or representation with respect to the information required by the provisions of

this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922,

shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if—

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a ju-

venile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)—

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

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

who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

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

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

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

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

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

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

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

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

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

(D) Notwithstanding any other provision of law—

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

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other

term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

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

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

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

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

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

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

addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

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

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

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

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

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(l), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: *Provided,* That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or

relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are—

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title;

(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(l), 922(n), or 924(b) of this title; and

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

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

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(f) In the case of a person who knowingly violates section 922(p), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

(g) Whoever, with the intent to engage in conduct which—

(1) constitutes an offense listed in section 1961(1),

(2) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46,

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)),

travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(i)(1) A person who knowingly violates section 922(u) shall be fined under this title, imprisoned not more than 10 years, or both.

(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this subsection.

(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—

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

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

(k) A person who, with intent to engage in or to promote conduct that—

(1) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;

(2) violates any law of a State relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802); or

(3) constitutes a crime of violence (as defined in subsection (c)(3)),

smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

(l) A person who steals any firearm which is moving as, or is a part of, or which has moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(m) A person who steals any firearm from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall be fined under this title, imprisoned not more than 10 years, or both.

(n) A person who, with the intent to engage in conduct that constitutes a violation of section 922(a)(1)(A),

travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.

(o) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

(p) Penalties relating to secure gun storage or safety device.—

(1) In general.—

(A) Suspension or revocation of license; civil penalties.—With respect to each violation of section 922(z)(1) by a licensed manufacturer, licensed importer, or licensed dealer, the Secretary may, after notice and opportunity for hearing—

(i) suspend for not more than 6 months, or revoke, the license issued to the licensee under this chapter that was used to conduct the firearms transfer; or

(ii) subject the licensee to a civil penalty in an amount equal to not more than $2,500.

(B) Review.—An action of the Secretary under this paragraph may be reviewed only as provided under section 923(f).

(2) Administrative remedies.—The suspension or revocation of a license or the imposition of a civil penalty under paragraph (1) shall not preclude any administrative remedy that is otherwise available to the Secretary.