Giving It Another Shot: A Reexamination of the "Second or Subsequent Conviction" Language of the Firearm Possession Sentencing Statute

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I. INTRODUCTION

The effects of the current interpretation of the federal firearm possession sentencing statute are severe, often mandating the imposition of de facto life sentences for first-time offenders. For

example, suppose a twenty-three-year-old first-time offender was found guilty in a federal district court of robbing $500 from two financial institutions in two days and carrying a single firearm during the robbery spree.[1] Under the Federal Sentencing Guidelines, this first-time offender would be subject to a sentence ranging between forty-one and fifty-one months for each robbery.[2] Thus, for the substantive offenses, the sentence would total eighty-two to 102 months, or six years and ten months to eight years and six months.

But because the offender was found to have been carrying a firearm, he could also be convicted of two counts of possessing a firearm in furtherance of a crime of violence, and thus subject to additional, mandatory sentences.[3] Under the current interpretation of 18 U.S.C. § 924(c) ("§ 924(c)"), the offender would be subject to a five-year sentence for the first firearm possession count in accordance with § 924(c)(1)(A) and a twenty-five-year sentence for the second firearm possession count in the same proceeding in accordance with § 924(c)(1)(C). Added together and without any adjustments by the trial judge, the total sentence for this hypothetical crime spree ranges from thirty-six years and ten months to thirty-eight years and six months. Serving his full sentence, the twenty-three-year-old first-time offender would thus be in prison until he is around sixty years old. Furthermore, the Comprehensive Crime Control Act of 1984 abolished parole in the federal prison system, so federal inmates must now serve at least eighty-five percent of their sentences.[4]

As the above hypothetical scenario reveals, criminal sentencing in federal courts is shaped by both the advisory Federal Sentencing Guidelines ("Sentencing Guidelines" or "Guidelines"), created by the

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1. This is a federal crime pursuant to 18 U.S.C. § 2113. This hypothetical is based on the author's observation of the sentencing of Darryl Taylor on June 11, 2009, in the United States District Court for the Southern District of Indiana.

2. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, sentencing tbl. (2009). Under the Federal Sentencing Guidelines, the baseline offense level for robbery of a federal institution is twenty-two. *Id.* § 2B3.1. With no prior convictions or sentences, the offender has a criminal history level of zero, *id.* § 4A1.1, which falls under Level I in the federal guidelines' Sentencing Table, *id.* ch. 5, pt. A, sentencing tbl.

3. 18 U.S.C. § 924(c) (2006).

4. *See* United States v. Angelos, 345 F. Supp. 2d 1227, 1232 (D. Utah 2004), *aff'd*, 433 F.3d 738 (10th Cir. 2006) (noting that the federal system allows no parole and limits good-time reductions to approximately fifteen percent of the sentence); PETER B. HOFFMAN, U.S. PAROLE COMM'N, HISTORY OF THE FEDERAL PAROLE SYSTEM 26 (2003), *available at* http://www.justice.gov/uspc/history.pdf (noting that the Comprehensive Crime Control Act eliminated parole and provided for good-time reductions limited to about fifteen percent of the sentence).

United States Sentencing Commission,[5] and by mandatory statutory provisions, passed by Congress.[6] In this example, § 924(c)(1)(A) mandates a minimum five-year sentence for the possession of a firearm during the commission of a violent crime or drug trafficking offense, and § 924(c)(1)(C) mandates a minimum twenty-five-year sentence for possession of a firearm in the case of a "a second or subsequent conviction."[7]

Since the passage of § 924(c) as part of the Gun Control Act of 1968, federal courts have applied two competing interpretations of the "second or subsequent conviction" language. The first interpretation understands "conviction" as a finding of guilt and imposition of a sentence. As such, the heightened sentence for a "second or subsequent conviction" would apply only to § 924(c) counts in a separate, later indictment; in the first indictment, courts would impose consecutive five-year sentences for multiple § 924(c) counts.[8] This first interpretation understands § 924(c)(1)(C) to be a purely recidivist provision. The second interpretation finds "conviction" to mean only a finding of guilt, such that the heightened sentence for a "second or subsequent conviction" applies to multiple § 924(c) counts in a single indictment.[9]

In 1993, the Supreme Court adopted the latter interpretation in *Deal v. United States*, construing "conviction" to mean simply a finding of guilt by judge or jury,[10] rather than both the finding of guilt and imposition of the sentence. This interpretation allows for the imposition of the enhanced § 924(c)(1)(C) sentence in a single

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5. U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 (2009). Congress established the United States Sentencing Commission and delegated authority to the Commission to create federal sentencing guidelines. 28 U.S.C. § 991 (2006). In 2005, the Supreme Court held that application of the Federal Sentencing Guidelines must be advisory rather than mandatory and that the mandatory provision of the federal sentencing statute must be excised. United States v. Booker, 543 U.S. 220, 245 (2005).

6. *E.g.*, 18 U.S.C. § 924(c) (2006).

7. *Id.*

8. *See, e.g.*, United States v. Jim, 865 F.2d 211, 212 (9th Cir 1989) (affirming the imposition of three consecutive five-year sentences for three § 924(c) violations in a single indictment).

9. *See, e.g.*, United States v. Bennett, 908 F.2d 189, 194 (7th Cir. 1990) (applying the enhanced sentence for a "second or subsequent conviction" to a second § 924(c) violation charged in a single indictment).

10. 508 U.S. 129, 132 (1993). The *Deal* Court distinguished Federal Rule of Criminal Procedure 32(b)(1)—the predecessor to current rule 32(k)(1)—which stated that a "judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence." *Id.* (quoting former FED. R. CRIM. P. 32(b)(1) (1988) (repealed 1994)). The Court implied that if a "judgment of conviction" meant both "adjudication and sentence," then "conviction" could not also mean "adjudication and sentence." *Id.*

prosecution in which an offender is convicted of two or more § 924(c) counts. In practical terms, a defendant will receive the twenty-five-year sentence whenever he is found guilty of more than one § 924(c) count, even in the same prosecution.

Prior to the *Deal* decision in 1993, however, many federal courts accepted § 924(c)(1)(C) as a purely recidivist provision, declining to apply the enhanced "second or subsequent conviction" sentence to multiple firearm charges in the same indictment.[11] This meant an offender would be sentenced under § 924(c)(1)(C) only if the offender committed a § 924(c) offense, was convicted, served the sentence, and committed a subsequent § 924(c) violation. Under this interpretation, the hypothetical offender described above would receive two five-year sentences for the two firearm possession counts, producing a total sentence between sixteen years and ten months and eighteen years and six months for the robbery spree. The offender would be out of prison around age forty instead of age sixty.

This twenty-year difference based on alternate interpretations of "second or subsequent conviction" is a dramatic disparity with potentially life-altering consequences for the offenders sentenced under § 924(c). In the seventeen years since the *Deal* decision, its harsher interpretation has been widely implemented by the lower courts, often with reluctance and criticism, and has had unfair and devastating impacts on § 924(c) offenders.[12] Because of its severe effects, the results of the interpretation in *Deal* should not be implemented lightly. Today's political climate is less harsh toward criminal punishment than when *Deal* was decided, as evidenced by the parallel trends of increased criticism of mandatory minimum sentences[13] and increased judicial discretion in sentencing.

11. *See, e.g.*, United States v. Luskin, 926 F.2d 372, 373–74, 378 (4th Cir. 1991) (affirming three consecutive five-year sentences for three counts of carrying a firearm in relation to a crime of violence in violation of § 924(c)); United States v. Jim, 865 F.2d 211, 212 (9th Cir. 1989) (affirming three consecutive five-year sentences for three violations of § 924(c)); United States v. Fontanilla, 849 F.2d 1257, 1258–59 (9th Cir. 1988) (affirming two consecutive five-year sentences for two § 924(c) violations); United States v. Godwin, 758 F. Supp. 281, 282 (E.D. Pa. 1991) (finding that two § 924(c) firearm counts stemming from multiple robberies during a single two-week robbery spree did not merit an enhanced sentence under § 924(c)(1)(C)).

12. First-time offenders can receive sentences for multiple § 924(c) counts in a single indictment that "far exceed[ ]" sentences for "aircraft hijacking, second degree murder, espionage, kidnapping, aggravated assault, and rape." Paul Cassell, U.S. Dist. Judge for the Dist. of Utah, Statement on Behalf of the Judicial Conference of the United States Before the House Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security (June 2007), *in* 19 FED. SENT'G. REP. 344, 344 (2007).

13. *See* Eva S. Nilsen, *Indecent Standards: The Case of* U.S. Versus Weldon Angelos, 11 ROGER WILLIAMS U. L. REV. 537, 554 (2006) ("It is fair to say that today's social and political

This Note argues for a reexamination of the interpretation of § 924(c)(1)(C) by either Congress or the Supreme Court. Part II provides the background of the passage of § 924(c) and its application both prior to and in *Deal v. United States*. The lack of legislative history surrounding the statute helps explain the origin of the competing lines of interpretation and supports the need to employ interpretive mechanisms to understand and apply § 924(c)(1)(C). Part III assesses the *Deal* decision and its subsequent criticism, analyzing the decision's interpretation and implications in light of the theories and tools of statutory interpretation, the purposes of criminal punishment, and the tension between mandatory minimums and increased judicial discretion in sentencing. Part IV calls for either Congress or the Supreme Court to reevaluate *Deal*'s interpretation of the "second or subsequent conviction" language of § 924(c)(1)(C). In order to clarify the statute as a recidivist provision and prevent egregiously unjust sentences, Congress should specify that a "second or subsequent conviction" refers to an offense committed after an indictment and conviction for a previous § 924(c) violation. Alternatively, the Supreme Court should overturn the *Deal* decision, finding the enhanced sentence for a "second or subsequent conviction" to apply only to true recidivists, not to those who commit multiple § 924(c) offenses in a single episode. And if an explicit change by Congress or the Supreme Court to the interpretation of § 924(c) is untenable, Congress should revise its understanding and application of mandatory minimum sentences to allow for more equitable sentencing of § 924(c) offenders.

II. BACKGROUND: THE DEAL WITH *DEAL*

A. Enacting and Amending 18 U.S.C. § 924(c)

Congress enacted § 924(c) as part of the Gun Control Act of 1968.[14] The provision was initially offered on July 17, 1968 as an amendment to the Gun Control Act on the House floor.[15]

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climate is different, and less harsh toward crime and punishment, than that of the previous two decades. Public opinion has softened with the knowledge that extraordinarily long prison sentences for so many people have exacted unwarranted financial and human costs.").

14. Gun Control Act of 1968, Pub. L. No. 90–618, 82 Stat. 1213 (codified as amended in scattered sections of 18 U.S.C.).

15. United States v. Melville, 309 F. Supp. 774, 777 (S.D.N.Y. 1970) (citing 114 CONG. REC. 22,231 (1968)). Representative Casey offered the original version of the amendment. *Id.* Representative Poff offered a revised version of the amendment in the House on July 19, 1968. Christopher L. Robbins, Note, *Double-Barreled Prosecution: Linking Multiple Section 924(c)*

Representatives Casey of Texas and Poff of Virginia offered different amended versions, and the House ultimately passed the Poff amendment.[16] After some modifications, the House's version of the bill came out of the Conference Committee, and both chambers later passed that version.[17]

The statute's passage was hurried, resulting in sparse legislative history with only a few generic statements explaining the intent behind § 924(c). The House debate does not reveal Congress's understanding of "second or subsequent conviction," but rather includes only broad statements about the overall purposes of the Act. These statements can reasonably support § 924(c) both as a harsh penalty for the use of guns in committing violent or drug trafficking crimes and as a recidivist provision, applying the enhanced sentence for a "second or subsequent conviction" only if the offender commits the second § 924(c) violation after conviction for the first offense. Representative Poff, one of the statute's sponsors, stated that the purpose of the mandatory sentences was "[t]o persuade the man who is tempted to commit a federal felony to leave his gun at home."[18] Regarding the enhanced sentence of § 924(c)(1)(C), Poff stated in ambiguous terms that "[an offender] should further understand that if he does so a second time, he is going to jail for a longer time."[19] Representative Rogers echoed this general explanation, stating that "[a]ny person who commits a crime and uses a gun will know that he cannot get out of serving a penalty in jail. . . . And if he does it a second time, there will be a stronger penalty."[20] Both of these statements indicate that § 924(c) was intended to deter offenders from committing a crime with a gun "a second time," which does not clearly reveal how "second or subsequent offense" should be interpreted.

The Conference Committee report only contains information as to which portions of the House and Senate versions were adopted.[21] There are no committee hearings or reports expanding on the

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Violations to a Single Predicate Offense, 49 VAND. L. REV. 1577, 1580 n.12 (1996) (citing 114 CONG. REC. 22,231 (1968)). Senator Dominick sponsored the Senate amendment. *Id.* at 1580 n.14 (citing 114 CONG. REC. 27,142 (1968)).

16. George P. Apostolides, *18 U.S.C. § 924(c)(1)—The Court's Construction of "Use" and "Second or Subsequent Conviction"*, 84 J. CRIM. L. & CRIMINOLOGY 1006, 1008 (1994).

17. *Id.*

18. United States v. Jones, 965 F.2d 1507, 1520 (8th Cir. 1992) (quoting 114 CONG. REC. 22,231 (1968)).

19. *Id.*

20. *Id.* (quoting 114 CONG. REC. 22,237 (1968)).

21. H.R. REP. NO. 90–1956, at 5 (1968) (Conf. Rep.), *reprinted in* 1968 U.S.C.C.A.N. 4426, 4431.

purposes and interpretations of the statute and its language. Further, no definition of "second or subsequent conviction" was given when the statute was passed.

The current version of the statute reads, in pertinent part:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime . . . be sentenced to a term of imprisonment of not less than 5 years. . . . In the case of a second or subsequent conviction under this subsection, the person shall . . . be sentenced to a term of imprisonment of not less than 25 years . . . .[22]

*B. Pre-*Deal *Application of 18 U.S.C. § 924(c)*

The Supreme Court first addressed § 924(c) in 1978 in *Simpson v. United States*.[23] In that case, multiple offenders were found guilty of committing two bank robberies less than two months apart and of using firearms to commit the offenses.[24] The offenders received a separate jury trial for each bank robbery.[25] The defendants received ten years' imprisonment for each § 924(c) violation.[26] While it did not directly discuss the interpretation of "second or subsequent conviction," the Court did not take issue with the district court's imposition of two consecutive ten-year sentences for the firearms counts, the maximum first-time offender sentence under § 924(c)(1)(A), rather than finding the second firearm count to be a "second or subsequent conviction" meriting the heightened sentence of § 924(c)(1)(C).[27] The fact that the Court did not object to the lower court's § 924(c) sentencing implies that the federal courts correctly understood § 924(c)(1)(C) to be a purely recidivist provision,[28] meaning that the courts did not intend for enhanced sentences under § 924(c)(1)(C) to apply if a defendant had not yet served his first sentence. Justice Stewart echoed this sentiment two years later in his dissent in *Busic v. United States*, remarking that § 924(c) has "stiff

22. 18 U.S.C. § 924(c)(1)(A), (C) (2006).

23. 435 U.S. 6 (1978).

24. *Id.* at 8–9.

25. *Id.* at 9.

26. *Id.*

27. The Court ultimately held that a § 924(c) sentence is improper in cases in which an offender is also sentenced under § 2113(d), a bank-robbery statute with an increased penalty for the use of a firearm. *Id.* at 16.

28. *Id.* at 9.

sanctions for first offenders and even stiffer sanctions for recidivists."[29]

An alternative understanding of § 924(c)(1)(C)'s "second or subsequent conviction" provision did not appear until nineteen years after the statute's enactment, in the Eleventh Circuit case of *United States v. Rawlings*.[30] In *Rawlings*, the defendant was convicted of using a firearm to rob two separate banks within the span of three weeks.[31] The district court originally sentenced the offender to two consecutive five-year sentences for the two § 924(c) violations, in accordance with § 924(c)(1)(A). The judge changed the sentence, however, after the government filed a memorandum requesting an enhanced sentence for the second count.[32] The Eleventh Circuit affirmed the application of the enhanced sentence provision of § 924(c)(1)(C) to multiple counts of carrying a firearm during a violent or drug trafficking crime charged in the same indictment.[33] The court in *Rawlings* thus interpreted the "second or subsequent conviction" provision to include multiple § 924(c) convictions in a single proceeding, allowing the enhanced sentence to be imposed for a § 924(c) violation committed prior to another § 924(c) conviction. The court reasoned that the alternate interpretation "could defeat Congress's intent to punish severely those who use firearms during crimes of violence" and that such an interpretation might encourage prosecutors to bring separate § 924(c) offenses in separate indictments, allowing for the increased sentence while increasing courts' caseloads.[34]

This line of reasoning trickled into other circuits, interpreting "second or subsequent conviction" to mean merely a finding of guilt prior to sentencing.[35] Three years after *Rawlings*, the Eighth Circuit in *United States v. Foote* adopted the *Rawlings* line of reasoning, applying the enhanced sentence for a "second or subsequent conviction" to a second count of possession of a firearm in the commission of a drug trafficking offense.[36] In doing so, the court

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29. 446 U.S. 398, 416 (1980) (Stewart, J., dissenting).

30. 821 F.2d 1543 (11th Cir. 1987).

31. *Id.* at 1544.

32. *Id.* at 1544–45.

33. *Id.* at 1546.

34. *Id.* at 1546–47.

35. *See, e.g.*, United States v. Bennett, 908 F.2d 189, 194 (7th Cir. 1990) (adopting the reasoning of the Eleventh Circuit in *Rawlings*); United States v. Foote, 898 F.2d 659, 668 (8th Cir. 1990) (same).

36. 898 F.2d at 668.

affirmed the imposition of the enhanced sentence for a second § 924(c) count in a single indictment. Referring to *Rawlings*, the court found that "while the term 'subsequent' means 'following in time, order, or place,' and implies that the second conviction must occur on a later date than the first conviction, the term 'second' merely means 'another or additional conviction,' and may apply to two convictions contained in the same indictment."[37] That same year, the Seventh Circuit also adopted this interpretation in *United States v. Bennett*, holding that "an offender is to receive an enhanced penalty for each offense which is either 'second or subsequent,' regardless of whether the offenses are charged in the same or in separate indictments."[38] Finding *Rawlings* and *Foote* persuasive and the text of § 924(c) "clear and unambiguous," the appellate court affirmed the enhanced sentences.[39]

During this same period of time, however, many courts were continuing to apply multiple five-year sentences for multiple § 924(c) convictions in a single indictment for first-time § 924(c) offenders. In *United States v. Fontanilla*, the Ninth Circuit, finding two separate underlying offenses, affirmed the imposition of two consecutive five-year sentences for two § 924(c) convictions in a single prosecution.[40] The Ninth Circuit again upheld multiple five-year sentences for multiple § 924(c) violations in *United States v. Jim*.[41] The Sixth Circuit in *United States v. Henry* stated that the government could charge two separate counts under § 924(c) "because two separate predicate offenses were charged," and the court affirmed the imposition of two consecutive five-year sentences for the two § 924(c) counts.[42] The next year, that same court applied *Henry* in *United*

37. *Id.* (quoting *Rawlings*, 821 F.2d at 1545).

38. 908 F.2d at 194. The two defendants in *Bennett* were found guilty by the jury of committing a series of five bank robberies in Illinois. *Id.* at 192. The jury found one defendant guilty of four counts of violating § 924(c); the other defendant was found guilty of five counts of violating § 924(c). *Id.* The district court sentenced the defendants to five years' imprisonment for the first § 924(c) convictions and applied the enhanced sentence, ten years at the time, for each additional § 924(c) conviction in the case. *Id.* The § 924(c) counts totaled thirty-five years of one defendant's thirty-eight year and four month sentence, and forty-five years of the other defendant's fifty-year prison sentence. *Id.*

39. *Id.* at 194. Note that under the current sentences set out in the statute, the defendants would be sentenced to eighty and 105 years on the § 924(c) charges alone.

40. 849 F.2d 1257, 1258–59 (9th Cir. 1988).

41. 865 F.2d 211, 212 (9th Cir. 1988) (affirming three consecutive five-year sentences for three counts of use of a firearm in commission of a crime of violence relating to three counts of assault on a federal officer with a deadly weapon).

42. 878 F.2d 937, 938, 942 (6th Cir. 1989). The court ultimately vacated one of the § 924(c) counts, finding that the government failed to adequately connect the firearm to a separate drug trafficking offense. *Id.* at 945.

States v. Nabors, holding two separate predicate offenses were proven, thus finding proper the two consecutive five-year sentences for defendant's two § 924(c) convictions.[43] The Fourth Circuit also applied § 924(c) as a recidivist statute, affirming three consecutive five-year sentences for three § 924(c) violations by a first-time offender in *United States v. Luskin*.[44] Nor did the Tenth Circuit challenge the trial judge's imposition of two consecutive five-year sentences in *United States v. Chalan*, though the court ultimately vacated the second § 924(c) count on other grounds.[45]

Based on these disparate outcomes, it is clear that as of 1993, the federal courts were far from resolute in their interpretations of § 924(c). Some district and appellate courts explicitly acknowledged the reasonableness of competing strands of interpretation, recognizing that "§ 924(c)(1) is, at best, hard to follow in simple English . . . ."[46] and that "[t]he statute is not a model of clarity."[47] In *United States v. Godwin*, the Eastern District of Pennsylvania applied the recidivist interpretation of the statute,[48] but recognized contrary decisions[49] and confusion as to the statute's proper application.[50] The court stated, "It is unclear whether ['second or subsequent conviction'] means a second time as a recidivist or a second time offender who has not faced deterrence by a prior sentence."[51] The twenty-seven-year-old defendant in *Godwin* committed a series of robberies within two weeks.[52] The judge seemed to consider application of the enhanced sentences under § 924(c)(1)(C) to be unnecessarily harsh, arguing that "[i]f the sentence of 157 months in prison and three years supervised release does not solve the problem . . . , it is difficult to see how

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43. 901 F.2d 1351, 1357–59 (6th Cir. 1990) ("Nabor's two convictions under § 924(c)(1) do not each require the same proof of facts; the two predicate offenses are distinct and require proof of facts not required by the other predicate.").

44. 926 F.2d 372, 373, 375, 380 (4th Cir. 1991).

45. 812 F.2d 1302, 1315 (10th Cir. 1987). The court, however, ultimately found that the defendant committed only one "crime of violence" and therefore only one § 924(c) violation. *Id.* at 1317 ("Chalan committed only a single 'crime of violence' for purposes of double jeopardy. The conviction and sentence on the second section 924(c) charge must be vacated.") (footnote omitted).

46. *Nabors*, 901 F.2d at 1358.

47. United States v. Godwin, 758 F. Supp. 281, 283 (E.D. Pa. 1991).

48. *Id.* at 282 ("To the extent that I have discretion, I exercise it not to impose the [enhanced § 924(c) sentence].").

49. *Id.* (acknowledging the Ninth Circuit's holding in *Rawlings*).

50. *Id.* at 283.

51. *Id.*

52. *Id.* at 282.

another 15 years [due to an enhanced sentence under § 924(c)(1)(C)] at the taxpayers' expense would help."[53]

The tension caused by the competing strands of interpretation was also emphasized by the Eighth Circuit in *United States v. Jones* and by the Tenth Circuit in *United States v. Abreu*, both decided less than one year before *Deal v. United States*.[54] In *Abreu*, the Tenth Circuit specifically held that the "second or subsequent conviction" sentence did not apply to multiple § 924(c) counts in a single indictment.[55] Recognizing that its position differed from that of other circuits, the court found that "we simply cannot agree with those courts that the language and legislative history unambiguously demand the harsh construction those courts impose."[56] And while precedent required the Eighth Circuit to uphold the defendants' sentences in *Jones*, the court voiced concerns as to the effects of the Eighth Circuit's previous interpretation of § 924(c).[57] One of the defendants in *Jones*, twenty-four-year-old James Roulette, received a five-year sentence for one count of violating § 924(c) and the enhanced sentence, twenty years at the time of the case, for a second § 924(c) count.[58] The appellate court noted that the total sentence of forty-four years and seven months "amounts to practically a life sentence"[59] and suggested that Roulette's sentence be reheard to reconsider the line of interpretation previously adopted by the Eighth Circuit in *Foote*, as this interpretation had led to "harsh" sentences.[60]

The *Jones* court acknowledged that § 924(c) "might reasonably be read to require that an offender be convicted of his first offense before he commits the offense resulting in his 'second conviction.' "[61] The court stated that "because [§ 924(c)] is ambiguous . . . [it] should be construed in favor of a defendant" and a "defendant should not be penalized for a 'second conviction' unless he has already experienced a

53. *Id.*

54. United States v. Jones, 965 F.2d 1507, 1518 (8th Cir. 1992); United States v. Abreu, 962 F.2d 1447, 1449–50 (10th Cir. 1992).

55. 962 F.2d at 1453–54.

56. *Id.* at 1453. The court found that the statutory language was ambiguous, that the legislative history was unclear with respect to the "second or subsequent conviction" phrase, that the rule of lenity applied, and that this interpretation was consistent with other subsequent offender statutes, which generally did not apply sentence enhancements to multiple counts in a single indictment. *Id.*

57. 965 F.2d at 1518.

58. *Id.*

59. *Id.*

60. *Id.* at 1518–19.

61. *Id.* at 1518.

first conviction when he committed the second offense."[62] Looking at the ordinary meanings of "second," "subsequent," and "conviction," the court reasoned that § 924(c)(1)(C) "does not unambiguously lend itself to the interpretation given . . . in *Foote* and several other circuits."[63] The Eighth Circuit contended that the sparse legislative history "illustrates that Congress did not closely examine other parts of the federal criminal code before it acted," allowing for § 924(c) to be interpreted like criminal statutes with similar language, which require that the second offense be committed after a prior conviction for an enhanced sentence to apply.[64] The court concluded that "punishing first offenders with twenty-five-year sentences does not deter crime as much as it ruins lives."[65] These cases immediately preceding *Deal* illustrate that in the six years after the *Rawlings* decision, district and appellate courts were by no means well settled on the proper interpretation of § 924(c).

C. The Supreme Court Steps In

In May 1993, the Supreme Court addressed this interpretive split in *Deal v. United States*, siding with the *Rawlings* line of reasoning.[66] The majority opinion, written by Justice Scalia, held that it is "unambiguous that 'conviction' refers to the finding of guilt by a judge or jury that necessarily precedes the entry of a final judgment of conviction."[67] But like the lower courts, the Supreme Court Justices also had a split in interpretation. Justice Stevens, joined by Justices Blackmun and O'Connor, issued a strong dissenting opinion, contending that the "second or subsequent conviction" language "clearly is intended to refer to a conviction for an offense committed after an earlier conviction has become final."[68]

At trial in the United States District Court for the Southern District of Texas, a jury found defendant Thomas Deal guilty of committing six armed bank robberies in the Houston area over the course of four months in 1990.[69] He was convicted of six counts of bank robbery, six counts of carrying a firearm in relation to a crime of

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62. *Id.* at 1519.
63. *Id.* at 1520.
64. *Id.* at 1521.
65. *Id.*
66. 508 U.S. 129, 132 (1993).
67. *Id.*
68. *Id.* at 141–42 (Stevens, J., dissenting).
69. *Id.* at 130 (majority opinion).

violence, and one count of being a felon in possession of a firearm.[70] The district court imposed a five-year sentence for the first § 924(c) count and five consecutive twenty-year sentences for each of the five remaining § 924(c) counts,[71] for a total sentence of 105 years for the firearm counts alone. The Fifth Circuit affirmed this sentence.[72]

The Supreme Court also upheld the district court's interpretation and application of § 924(c),[73] finding "conviction" to mean "a finding of guilt" preceding sentencing rather than a "final judgment," which includes both a finding of guilt and sentencing.[74] In reaching this conclusion, the majority relied on a plain language argument and a public policy argument, refused to apply the rule of lenity, and critiqued the dissent. The majority acknowledged that "conviction" can mean both "the finding of guilt" (which precedes sentencing) or "final judgment" (which includes both the finding of guilt and imposition of a sentence),[75] but found the plain language reading of "conviction" to mean the former.[76] The majority looked to the wording of the following section, § 924(c)(1)(D), as support for this interpretation of "conviction," finding that both provisions are "obviously meant to control the terms of a sentence *yet to be imposed*."[77] In terms of public policy, the majority expressed concern that a contrary interpretation would create disparate sentencing based on the prosecutor's choice to include multiple § 924(c) counts in a single indictment or to charge and try the offender separately for each violation in order to receive the enhanced second-time offender sentence, a much more costly procedure, both in terms of time and money.[78]

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70. *Id.*

71. *Id.* at 131.

72. United States v. Deal, 954 F.2d 262, 263 (5th Cir. 1992).

73. *Deal*, 508 U.S. at 137.

74. *Id.* at 133 n.1.

75. *Id.* at 131.

76. *Id.* at 132.

77. *Id.* at 133. The content of § 924(c)(1)(D) at the time of the opinion read as follows: "Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection." *Id.* (quoting 18 U.S.C. § 924(c)(1)(D) (1993) (amended 1998)). The current version of § 924(c)(1)(D) contains similar language. 18 U.S.C. § 924(c)(1)(D) (2006).

78. *Deal*, 508 U.S. at 133–34 ("[P]etitioner's reading would give a prosecutor unreviewable discretion either to impose or to waive the enhanced sentencing provisions of § 924(c)(1) by opting to charge and try the defendant either in separate prosecutions or under a multicount indictment.").

Finding no ambiguity in the wording of the statute, the majority declined to apply the rule of lenity.[79] The majority did not find Deal's sentence to be "glaringly unjust," reasoning that an offender should not be subject to multiple first-time offender sentences "simply because he managed to evade detection, prosecution, and conviction for the first five offenses and was ultimately tried for all six in a single proceeding."[80] The majority also rejected the dissent's argument that "subsequent offense" and "second or subsequent conviction" convey analogous meanings, arguing that equating the two phrases "requires a degree of verbal know-nothingism that would render government by legislation quite impossible."[81]

Justice Stevens's dissent, on the other hand, found "second or subsequent conviction" to unambiguously mean both the finding of guilt and imposition of a sentence, therefore applying § 924(c) as a recidivist statute.[82] The dissenting opinion asserted that, based on its text, § 924(c) applies to recidivists only, and in the alternative, any textual ambiguity requires application of the rule of lenity.[83] Looking at the text of the statute, the dissent found the phrases "second or subsequent offense" and "second or subsequent conviction" to have analogous meanings in this case,[84] pointing out that "Congress sometimes uses slightly different language to convey the same message."[85] Since Congress did not define "second or subsequent conviction" in § 924(c) or during its passage, the dissent looked to the application of other, similarly worded repeat offender statutes at the time of § 924(c)'s enactment, finding a "long-established usage of the word 'subsequent' to distinguish between first offenders and recidivists."[86] The lack of legislative history combined with this common understanding at the time of § 924(c)'s passage, the dissent reasoned, evidences Congress's intent to employ this familiar interpretation.[87]

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79. *Id.* at 137.

80. *Id.*

81. *Id.* at 135.

82. *Id.* at 141–42 (Stevens, J., dissenting).

83. *Id.* at 141–43.

84. *Id.* at 137–38 ("Congress uses the terms 'subsequent offense,' 'second or subsequent offense,' and 'second or subsequent conviction' in various sections of the Criminal Code, all to authorize enhanced sentences *for repeat offenders*.") (emphasis added).

85. *Id.* at 137.

86. *Id.* at 138 (citing as an example United States v. Cooper, 580 F.2d 259, 261 (7th Cir. 1978)).

87. *Id.* at 139 ("[I]t is hardly surprising that Congressman Poff, who proposed the floor amendment that became § 924(c), felt it unnecessary to elaborate further.").

The dissent then called attention to the fact that this understanding of "second or subsequent conviction" as a recidivist provision was in fact consistently applied in reported cases by the federal courts after the statute's passage.[88] The dissent emphasized that the majority's adopted interpretation did not surface until 1987, nineteen years after the statute's passage,[89] which does not comport with the majority's characterization of this interpretation as having "utterly no ambiguity."[90] This alternative interpretation, the dissent stated, replaced common sense based on historical context with strict textualism, requiring "an elaborate exercise in sentence parsing."[91] Like the majority, the dissent found the meaning of § 924(c)(1)(C) unambiguous,[92] but arrived at an opposite interpretation: "Like its many counterparts in the Criminal Code, the phrase clearly is intended to refer to a conviction for an offense committed after an earlier conviction has become final; it is, in short, a recidivist provision."[93] Arguing in the alternative, the dissent contended that if ambiguity was found in the language of § 924(c), the rule of lenity should be applied, resulting in the same recidivist interpretation.[94]

III. ANALYSIS: WHAT'S THE BIG *DEAL*?

The *Deal* decision has not been accepted and applied by the lower courts without criticism, and the subsequent application of § 924(c) has resulted in many unjustly long prison sentences for first-time offenders.[95] Section 924(c) requires reexamination in light of lower courts' criticism of the staggering consequences of *Deal*, the tools

88. *Id.* at 139–41.

89. *Id.* at 140–41 (referring to the Eleventh Circuit's holding in United States v. Rawlings, 821 F.2d 1543 (11th Cir. 1987), and concluding that it is "quite likely that until 1987, the Government read the 'second or subsequent' section of § 924(c) as a straightforward recidivist provision").

90. *Id.* at 142 n.6 (citing *id.* at 135 (majority opinion)).

91. *Id.* at 146.

92. *Id.* at 141 ("I would find no ambiguity in the phrase 'subsequent conviction' as used in § 924(c).").

93. *Id.* at 141–42.

94. *Id.* at 143 ("[T]his equivocation on the part of those charged with enforcing § 924(c), combined with the understanding of repeat offender provisions current when § 924(c) was enacted, render the construction of § 924(c) sufficiently uncertain that the rule of lenity should apply.").

95. *E.g.*, United States v. Jefferson, 302 F. Supp. 2d 1295, 1301–03 (M.D. Ala. 2004) ("This court is aware that the sentence it must give Jefferson is unjust . . . . However, this court is bound by the Supreme Court's holding that the term 'subsequent conviction,' as used in [§ 924(c)], means a finding of guilt by a judge or jury . . . .").

of statutory construction, the purposes of criminal punishment, and the trend toward increased judicial sentencing discretion. These analyses all support an understanding of "second or subsequent conviction" as a reference to an offense committed after a previous conviction and indicate that either Congress should rewrite § 924(c)(1)(C) to clarify it as a true recidivist provision or the Supreme Court should overturn *Deal*.

A. The Deal *Decision and Its Criticism*

The Court's 1993 ruling in *United States v. Deal* is binding on all lower federal courts, but several lower courts have voiced reluctance and discomfort with following this precedent, including courts in the Second, Third, Ninth, Tenth, and Eleventh Circuits. This discomfort evidences a need for either Congress or the Supreme Court to address the potentially unjust results of the *Deal* holding for many offenders. Applying the Supreme Court's interpretation of § 924(c) has led to severe and unjust sentences for offenders, as the precedent requires imposition of the enhanced sentence without providing notice to the offender of the much larger penalty for multiple § 924(c) counts.

The most open criticism of the *Deal* decision has been made at the district court level by the judges forced to impose the enhanced mandatory minimum sentence. In *United States v. Angelos*, Judge Paul Cassell of the District of Utah articulated at the beginning of the opinion that "to sentence Mr. Angelos to prison for the rest of his life [due to the required imposition of fifty-five years' imprisonment for three § 924(c) counts] is unjust, cruel, and even irrational."[96] Judge Cassell expressly called on both President George W. Bush to commute the sentence to "no more than 18 years in prison" and Congress to amend § 924(c) "so that its harsh provisions for 25-year multiple sentences apply only to true recidivist . . . offenders."[97]

The defendant, twenty-four-year-old first-time offender Weldon Angelos, was convicted of three § 924(c) counts related to two $350 controlled buys of marijuana from a government agent and handguns found in his home pursuant to a search warrant.[98] The Guidelines' sentence for all but the § 924(c) counts—thirteen other counts for the

96. 345 F. Supp. 2d 1227, 1230 (D. Utah 2004), *aff'd*, 433 F.3d 738 (10th Cir. 2006).

97. *Id.* at 1230–31.

98. *Id.* at 1231–32. A controlled buy is the purchase of controlled substances made by an informant or undercover police officer while under the observation and control of police officers.

drug deals and related offenses—totaled seventy-eight to ninety-seven months, or six years and six months to eight years and one month.[99]

Criticizing the current interpretation of § 924(c) as "blindly draw[ing] no distinction between recidivists and first-time offenders,"[100] the district judge "reluctantly" concluded that, because of *Deal*, the court must impose a fifty-five-year sentence for the three § 924(c) counts—five years for the first count and twenty-five years each for the second and third counts.[101] The court emphasized that "[i]f Angelos serves his full 61 1/2-year sentence, he will be 85 years old upon release" and that "the earliest possible release date for Mr. Angelos [is] at 77 years of age" because of a fifteen percent reduction for good behavior.[102]

To emphasize the severity of the interpretation, the district court compared Angelos's mandatory sentence with those of other federal crimes, finding that "the classifications created by § 924(c) are simply irrational."[103] The comparisons showed that the defendant's § 924(c) sentence alone is longer than sentences for offenders convicted of "three aircraft hijackings, three second-degree murders, three kidnappings, or three rapes," even though Angelos's offenses were certainly less serious than even a single count of any of these crimes.[104]

The court found that the Sentencing Guidelines were at odds with the mandatory minimum of § 924(c), pointing out that the maximum sentence increase under the Guidelines for three counts of possessing a firearm in relation to a drug offense is two years, as opposed to the fifty-five-year enhancement under § 924(c)(1)(C).[105] The opinion emphasized that § 924(c) requires punishment "far beyond" that recommended by the United States Sentencing Commission, an

99. *Id.* at 1232.

100. *Id.* at 1250.

101. *Id.* at 1230.

102. *Id.* at 1239.

103. *Id.* at 1244.

104. *Id.* at 1246. The three § 924(c) counts mandate a sentence of 660 months, while a three-time aircraft hijacker's sentence under the Guidelines, for example, would total 405 months; the sentence of a terrorist who detonates three bombs in public places with intent to kill—293 months; a kidnapper of three persons—210 months; a rapist of three ten-year-old children—188 months; and a racist who attacks three minorities with intent to kill—151 months. Though it is arguable that Congress's policy intent was to utilize severe sentences for crimes with firearms as a tool to deter crime, the ultimate sentencing result for § 924(c) offenders can be unjust when compared to the sentences for these other crimes.

105. *Id.* at 1241.

expert sentencing agency established by Congress to provide annually amended guideline sentence ranges for federal criminal offenses.[106]

Due to its disagreement and discomfort with the current interpretation of § 924(c), the court ultimately sentenced Angelos to fifty-five years and one day, "the minimum that the law allows."[107] The Tenth Circuit affirmed the sentence,[108] and the Supreme Court denied Angelos's petition for a writ of certiorari.[109] Angelos's attorneys petitioned President George W. Bush for a sentence reduction,[110] but the President took no action.

In *United States v. Jefferson*, the Middle District of Alabama also found that imposing an enhanced sentence under § 924(c) was "unjust."[111] Defendant Wendell Jefferson was convicted of six offenses, including two drug trafficking offenses and two § 924(c) offenses.[112] After three months of investigation, police found cocaine when they searched Jefferson's car, which was parked outside of his wife's business, and found a firearm inside his wife's business along with cocaine residue.[113] In addition, police searched Jefferson's home, finding both cocaine and firearms there.[114] After ordering a recess from sentencing to research whether the second § 924(c) count should trigger the enhanced sentence for a "second or subsequent conviction,"[115] the district court reluctantly held that, due the Supreme Court's decision in *Deal*,[116] the second count required application of the enhanced § 924(c)(1)(C) sentence. This application of *Deal* resulted in a thirty-year sentence for the firearm possession charges alone.[117]

Though the two violations of § 924(c) were committed concurrently, the court found that *Deal* demanded that one be

106. *Id.* at 1240, 1243.

107. *Id.* at 1230.

108. United States v. Angelos, 433 F.3d 738, 754 (10th Cir. 2006).

109. Angelos v. United States, 549 U.S. 1077, 1077 (2006).

110. *Convicted Drug Dealer Asks for Presidential Clemency*, SALT LAKE TRIB., Jan. 15, 2009.

111. 302 F. Supp. 2d 1295, 1302 (M.D. Ala. 2004).

112. *Id.* at 1296 (pleading guilty to two counts of possession of a firearm in furtherance of a drug trafficking offense, two counts of felon in possession of a firearm, and two counts of possession of a controlled substance with intent to distribute).

113. *Id.* at 1297.

114. *Id.*

115. *Id.* at 1296.

116. *Id.* at 1298.

117. *Id.* at 1297.

punished more severely than the other.[118] The district court emphasized that this decision had "serious consequences for Jefferson" and that a "tension . . . exists between the court's obligation to apply the law and its inability, in this case, to defend the justness of the result."[119] The court asserted that the current application of this sentencing statute failed to "bear a rational relationship to the defendant's crime."[120] "The underlying policy rationale for applying the enhanced sentences in *Deal* [the increased culpability of an offender who commits multiple offenses because he is not caught] simply does not make sense when applied to Jefferson's case," the court reasoned, because Jefferson's offenses were simultaneous.[121] The court pointed out that although he is less blameworthy than an individual storing many drugs and firearms in one location or an individual who uses firearms multiple times in relation to one underlying conspiracy, he must serve a longer sentence than those individuals merely because he stored his firearms in different locations.[122]

In a similar post-*Deal* case, the Middle District of Alabama was again loath to impose the enhanced sentence for a second § 924(c) count.[123] In *United States v. Washington*, a twenty-two-year-old defendant with no criminal history was sentenced to more than forty years in prison; thirty of these years were for two counts of violating § 924(c).[124] The district court emphasized the harshness of this sentence:

> If [the defendant] gets time off for good conduct, he will be in prison until he is in his late 50s and, if he serves the entire sentence, until he is 62. . . . [F]rom the point of view of a 22-year old, 40 years is essentially a life sentence. Society generally reserves such harsh sentences for its most dangerous or incorrigible offenders, such as murderers and career offenders. . . .[125]

Appellate courts have voiced similar reluctance to applying *Deal*. In 1996, three years after *Deal*, the Ninth Circuit in *United*

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118. *Id.* ("[T]his court holds that it is required to treat one of Jefferson's § 924(c) convictions as subsequent to the other, and therefore apply an enhanced sentence, even though the two violations were committed simultaneously.").

119. *Id.*

120. *Id.* at 1302.

121. *Id.* at 1301.

122. *Id.* at 1301–02.

123. United States v. Washington, 301 F. Supp. 2d 1306, 1306–07 (M.D. Ala. 2004) ("[T]he court had no choice but to sentence Washington to 30 years on these two counts, for a total term of more than 40 years.").

124. *Id.* at 1306–07, 1309.

125. *Id.* at 1308–09.

States v. Andrews commented that "[a]lthough there is much force to [defendant's] policy argument, it does not permit us to avoid the import of the Supreme Court's unambiguous definition of 'second or subsequent conviction' in *Deal*."[126] The defendant had argued that *Deal* was distinguishable "because in *Deal* the underlying predicate offenses occurred over a long period of time," while in the present case "the underlying predicate offenses occurred virtually simultaneously."[127] A jury found the defendant guilty of second-degree murder, aiding and abetting second-degree murder, two counts of attempted voluntary manslaughter, and four counts of use of a firearm in relation to a crime of violence, all stemming from a single criminal episode.[128] The defendant reasoned that the current application of the enhanced penalty for repeat offenders "makes no sense . . . where there was no time for [the offender] to reflect and understand the consequences of enhanced penalties for the 'subsequent' offenses."[129] The Ninth Circuit agreed with the defendant's argument but affirmed the district court's sentence, holding that *Deal*'s interpretations "require" the rejection of the defendant's arguments and the imposition of enhanced sentences for the second, third, and fourth § 924(c) counts.[130]

The Third Circuit in *United States v. Casiano* was also forced to apply the twenty-five-year sentence of § 924(c)(1)(C), even though the subsequent offense was part of a single criminal episode.[131] The defendants pled guilty to carjacking, kidnapping, and two counts of possession of a firearm in relation to a violent crime.[132] The defendants challenged the imposition of an enhanced sentence for the second § 924(c) count, arguing that the carjacking and kidnapping constitute a single, continuous episode of criminal conduct and therefore the second § 924(c) offense should not constitute a "second or subsequent conviction" triggering the enhanced twenty-five-year sentence.[133] The Third Circuit upheld the sentence, holding that "[a]lthough there may be some force in defendants' argument that the enhanced penalty under § 924(c)(1) serves little purpose in a case

126. 75 F.3d 552, 558 (9th Cir. 1996).

127. *Id.*

128. *Id.* at 554–55.

129. *Id.* at 558.

130. *Id.*

131. 113 F.3d 420, 425 (3d Cir. 1997).

132. *Id.* at 423.

133. *Id.* at 424.

where the predicate acts occur simultaneously,"[134] "the language and reasoning of *Deal* ineluctably require rejection of this argument."[135] Thus, the court applied the *Deal* interpretation of "conviction" as a finding of guilt, even though "there [was] not time for defendants to reflect and understand the consequences of a 'second' conviction."[136]

The Second Circuit, too, has voiced apprehension about the potentially drastic outcomes resulting from the *Deal* interpretation of § 924(c). In *United States v. Zhou*, the Second Circuit was required under *Deal* to affirm the application of the enhanced sentence of § 924(c)(1)(C) to multiple § 924(c) counts in a single indictment relating to a single crime spree.[137] While the defendants only raised an issue with the interpretation of § 924(c) to preserve it for further review at the Supreme Court level, conceding that the appellate court must apply *Deal*,[138] the Second Circuit openly noted that "the potentially staggering implications of the *Deal* holding are well-illustrated in the case."[139]

The criticisms in these cases reveal the lower courts' continuing discomfort with the current interpretation and resulting application of § 924(c). The Supreme Court's interpretation of this mandatory sentencing provision has required judges to impose unduly severe prison sentences on offenders with multiple § 924(c) counts in a single prosecution, relegating first-time offenders to de facto life sentences while three-time rapists, for example, receive only 121 months' imprisonment.[140] Some of these post-*Deal* cases have not only voiced their disagreement with the Supreme Court's interpretation of "second or subsequent conviction," but have gone so far as to urge either that Congress clarify this section of the statute as a recidivist provision or that the Supreme Court reconsider the current binding definition of "conviction" in the ambiguous context of § 924(c).[141] This

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134. *Id.* at 426.

135. *Id.* at 425.

136. *Id.* at 426.

137. 428 F.3d 361, 368–69 (2d Cir. 2005). A jury found the defendants guilty of a series of robberies and related crimes over a six-month period. *Id.* at 368. Following *Deal*'s definition of "conviction," the district court imposed three consecutive twenty-five-year sentences for the second, third, and fourth counts of § 924(c) violations. *Id.* at 369 n.5.

138. *Id.* at 369 n.6.

139. *Id.* at 369 n.5.

140. *See* United States v. Angelos, 345 F. Supp. 2d 1227, 1246 tbl.2 (D. Utah 2004), *aff'd*, 433 F.3d 738 (10th Cir. 2006) (listing the Federal Sentencing Guidelines' sentence for federal crimes committed three times).

141. *E.g.*, *id.* at 1230–31; United States v. Jefferson, 302 F. Supp. 2d 1295, 1301–03 (M.D. Ala. 2004) ("This court believes the statutory language is ambiguous, at best, as to Congress's intent. If this were a matter of first impression, this court would be guided by the rule of

ongoing reluctance by the district and appellate courts demonstrates a need for either Congress or the Supreme Court to address the unjust results of the *Deal* holding for many offenders.

B. Theories and Tools of Statutory Interpretation

Courts have a variety of theories and tools on hand when interpreting the meaning of a statute. Three main theories exist: textualism, intentionalism, and purposivism.[142] These theories each support the interpretation of § 924(c) as a purely recidivist statute, requiring the enhanced § 924(c)(1)(C) sentence only for offenses committed after a previous conviction. Moreover, if none of these interpretive theories is found to provide a clear answer as to the proper interpretation of "second or subsequent conviction," then courts should employ the rule of lenity. The rule of lenity, a tool of statutory construction "regularly affirmed" by the Supreme Court for decades,[143] also supports a recidivist interpretation of § 924(c)(1)(C).

Intentionalism focuses on both the statute's language and its legislative history, while purposivism looks to the broader social purpose that Congress sought to achieve through the statute, often applying it to unforeseen contemporary circumstances.[144] Textualism, on the other hand, seeks to ascertain a statute's meaning not through the writers' intent, but through the words of the statute itself.[145] These different theories of statutory interpretation can and have been used to try to elucidate the meaning of the text of § 924(c). The rule of lenity, as stated by the Supreme Court in *United States v. Bass*, finds that "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant."[146] Courts have applied the rule of lenity to criminal sentencing, including § 924(c).[147]

1. Textualism

The majority opinion in *Deal*, written by Justice Scalia, found the "second or subsequent conviction" language of § 924(c) to have

lenity. . . . If application of the Supreme Court's holding produces anomalous and objectionable results, Congress may always amend the statute or the Supreme Court may reconsider.").

142. Bradford C. Mank, *Legal Context: Reading Statutes in Light of Prevailing Precedent*, 34 ARIZ. ST. L.J. 815, 818 (2002).

143. Apostolides, *supra* note 16, at 1016.

144. Mank, *supra* note 142, at 818–19.

145. *Id.* at 819.

146. 404 U.S. 336, 348 (1971).

147. Apostolides, *supra* note 16, at 1016–17.

"utterly no ambiguity,"[148] basing the holding on the text of the statute. However, the discord between the majority and dissenting opinions, as well as among lower federal courts prior to *Deal*, provides a sound argument for ambiguity, and the majority's textualist tools are therefore arguably flawed.

Both the majority and dissent determined that the statutory text provided an unambiguous interpretation of "second or subsequent conviction," but with opposite outcomes. This result directly opposes the notion that the text of the statute clearly shows the meaning of "second or subsequent conviction," because if the meaning were clear, then the Court would not have been so sharply divided. Lower courts' clashing interpretations of § 924(c)(1)(C)'s "second or subsequent conviction" from at least 1987[149] to 1993[150] further evince this interpretive uncertainty.

The *Deal* majority looked narrowly to the "context of § 924(c)(1)" itself and found that "if 'conviction' in § 924(c)(1) meant 'judgment of conviction,' the provision would be incoherent" because the statute would prescribe a sentence longer than one already imposed.[151] The majority also found a distinction between "offense" and "conviction," arguing that § 924(c) "does not use the term 'offense,' so it cannot possibly be said that it requires a criminal act after the first conviction. What it requires is a *conviction* after the first conviction."[152]

The *Deal* majority briefly employed another popular textualist technique[153] by looking to dictionary definitions of the statute's key words to determine their plain meanings.[154] But the majority acknowledged that "conviction" can be defined either as "the finding of guilt" or "the entry of a final judgment on that finding."[155] Many dictionaries exist, and each typically has multiple definitions for a

148. Deal v. United States, 508 U.S. 129, 135 (1993).

149. This is the year of the Eleventh Circuit's *Rawlings* decision, interpreting "conviction" to mean a finding of guilt, not final judgment, in the context of § 924(c)(1)(C). 821 F.2d 1543, 1545 (11th Cir. 1987).

150. This is the year of the Supreme Court's *Deal* decision. 508 U.S. 129 (1993).

151. *Id.* at 132.

152. *Id.* at 135.

153. Mank, *supra* note 142, at 828 ("Textualists often use the dictionary as the principal means for understanding the so-called 'ordinary' meaning of statutory terms."); Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1437 (1994) (observing that "courts have long used dictionaries to aid in their interpretive endeavors" and "[i]n recent years, the Court has come to rely on dictionaries to an unprecedented degree").

154. *Deal*, 508 U.S. at 131–32 (citing Webster's New International Dictionary and Black's Law Dictionary).

155. *Id.* at 131.

term, undermining the argument that a particular definition in a particular dictionary provides the "ordinary meaning" of a term.[156] The Supreme Court has failed to consistently cite one dictionary or to give justifications for the dictionary used,[157] further weakening the persuasiveness of the results generated by this technique. In addition, dictionaries cannot take into account the statute's context.[158] Thus, the use of a dictionary definition to determine the ordinary meaning of a "conviction" is insufficient both in theory and in practice.

2. Intentionalism and Purposivism

Courts often look to the legislative history of a statute to help clarify its intent and purpose, hoping to shed light on the proper construction and application of its terms. With regard to § 924(c), however, the legislative history accompanying the text of the statute is both deficient and vague.[159] Congress did not elaborate on the intended interpretation of § 924(c)(1)(C)'s enhanced sentence for a "second or subsequent conviction." As evidenced by the federal courts' later split in interpretation,[160] the relevant legislative history is less than clear when seeking to understand the meaning of the "second or subsequent conviction" language of § 924(c)(1)(C).

As the statute's text and legislative history do not clearly evince the meaning of "second or subsequent conviction," another salient method for attempting to uncover Congress's purpose and intent behind the words in § 924(c) is to look to the broader context in which the statute was enacted.[161] As the Supreme Court explained in

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156. Note, *supra* note 153, at 1445 ("There are a wide variety of dictionaries from which to choose, and all of them usually provide several entries for each word. . . . If multiple definitions are available, which one best fits the way an ordinary person would interpret the term?").

157. *Id.* at 1448.

158. *Id.* at 1449–50.

159. The Congressmen pushing for the adoption of § 924(c) only commented, for example, that the statute was meant "[t]o persuade the man who is tempted to commit a federal felony to leave his gun at home," United States v. Jones, 965 F.2d 1507, 1520 (quoting 114 CONG. REC. 22,231 (1968)), and that the statute should be implemented so "[a]ny person who commits a crime and uses a gun will know that he cannot get out of serving a penalty in jail," *id.* (quoting 114 CONG. REC. 22,237 (1968)).

160. *See, e.g.*, United States v. Fontanilla, 849 F.2d 1257, 1258 (9th Cir. 1988) (affirming the application multiple concurrent § 924(c)(1)(A) sentences for multiple § 924(c) convictions in a single indictment and implicitly defining "conviction" as final judgment); United States v. Rawlings, 821 F.2d 1543, 1545 (11th Cir. 1987) (defining "conviction" as a finding of guilt preceding final judgment and allowing for a second § 924(c) count in a single indictment to trigger the enhanced sentence of § 924(c)(1)(C)).

161. Mank, *supra* note 142, at 830 ("Most modern commentators maintain that words do not have a single, clear meaning, but rather that a word's meaning changes based on context.").

National Labor Relations Board v. Amax Coal Co., "[w]here Congress uses terms that have accumulated settled meaning . . . , a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms."[162] This is accomplished by looking at the meaning of the terms at the time the statute was enacted.[163] In this case, the interpretation of other repeat offender statutes is highly relevant. Around the time of the passage of the Gun Control Act of 1968, the federal circuit courts interpreted statutes imposing enhanced sentences for second or subsequent offenses as recidivist statutes, applying the increased penalties for offenses only committed after conviction for the first offense.[164] As far back as 1922, the Third Circuit interpreted repeat offender statutes with enhanced penalties for "a second or subsequent offense" to mean that a second offense could only occur after conviction for a first offense.[165]

Closer to the statute's date of enactment, the First Circuit interpreted a statute requiring enhanced sentences for second and subsequent narcotics law violations to apply only to narcotics offenses occurring after conviction of a prior narcotics offense, not to two or more narcotics offenses in a single prosecution.[166] In deciding the case, the court looked to judicial interpretation of other repeat offender sentencing statutes, observing that "[m]ost subsequent offender statutes have been construed . . . so that any offense committed subsequent to a conviction calls for the increased penalty."[167]

The Seventh Circuit similarly construed a repeat offender statute after the passage of § 924(c).[168] The statute at issue criminalized robbery of a postal worker of mail or money, imposing an enhanced sentence for a "subsequent offense."[169] To determine the applicability of the enhanced sentence provision, the court looked to the legislative history of the statute, finding that the enacting

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162. 453 U.S. 322, 329 (1981) (citation omitted).

163. *See* Perrin v. United States, 444 U.S. 37, 42 (1979) (looking to the development and evolution of the common law definition to define the term "bribery").

164. *See, e.g.*, United States v. Cooper, 580 F.2d 259, 263 (7th Cir. 1978) ("[W]e hold that the twenty-five year sentence . . . for a second offense applies only to an offense occurring subsequent to conviction for a first offense."); Gonzalez v. United States, 224 F.2d 431, 435 (1st Cir. 1955) ("[W]e hold that the subsequent offender provision of the Act of November 2, 1951, applies only to narcotics offenders who commit subsequent offenses after convictions.").

165. Singer v. United States, 278 F. 415, 419–20 (3d Cir. 1922).

166. *Gonzalez*, 224 F.2d at 433–35.

167. *Id.* at 434.

168. *Cooper*, 580 F.2d at 263.

169. *Id.* at 260 n.2 (citing 18 U.S.C. § 2114).

senators "equated 'offense' with 'convicted' of an offense, and that this apparently was clearly understood, since other senators participating in the debate . . . gave no contrary indication."[170] Thus, the Seventh Circuit found that the enhanced sentence for a "subsequent offense" only applied to an offense committed after conviction of the first offense under the statute.[171]

Though these repeat offender statutes were worded in terms of "offenses" rather than "convictions," both have been understood in terms of convictions. Given this general understanding of repeat offender statutes, both before and after the passage of § 924(c), it is unsurprising that no further elaboration was given as to the meaning of "second or subsequent conviction" during the passage of, or in the text of, § 924(c). As articulated by the Supreme Court in *Morissette v. United States*, when the legislature includes terms that have been interpreted consistently in the past, it presumably adopts this well-known meaning "unless otherwise instructed."[172] The Court continued, "[A]bsence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them."[173] The enacting legislator's articulated purpose of § 924(c)(1)(C) is the same as that of other enhanced sentences for repeat offenders: "if he does so a second time, he is going to jail for a longer time."[174] Thus, a reasonable inference in light of the consistent history of interpretation of repeat offender statutes, coupled with a lack of legislative history accompanying this statute, is to interpret "second or subsequent conviction" in § 924(c) in the same way as the settled usage of "second offense" in other repeat offender statutes.

3. The Rule of Lenity

When ambiguity is present in a criminal statute's text, courts may employ the rule of lenity,[175] which calls for ambiguous criminal statutes to be construed leniently toward defendants.[176] In practice, when following the rule of lenity, "the Court will not interpret a

170. *Id.* at 263.

171. *Id.*

172. 342 U.S. 246, 263 (1952).

173. *Id.*

174. United States v. Jones, 965 F.2d 1507, 1520 (8th Cir. 1992) (quoting 114 CONG. REC. 22,231 (1968)).

175. *See, e.g.*, Deal v. United States, 508 U.S. 129, 143 (1993) (Stevens, J., dissenting) (arguing that § 924(c) is sufficiently ambiguous to invoke the rule of lenity).

176. Simpson v. United States, 435 U.S. 6, 15 (1978) (citing Ladner v. United States, 358 U.S. 169, 178 (1958)).

federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended."[177] The Supreme Court in *United States v. Bass* identified two rationales behind the rule of lenity.[178] First, " 'a fair warning should be given [to offenders] . . . of what the law intends to do if a certain line is passed.' "[179] Second, "because of the seriousness of criminal penalties, . . . legislatures and not courts should define criminal activity."[180]

Prior to *Deal* the Supreme Court and appellate courts had applied the rule of lenity to § 924(c)(1).[181] The Supreme Court articulated a standard for determining when courts should employ the rule of lenity three years before deciding *Deal*.[182] In *Moskal v. United States*, the Court found that a statute is ambiguous, and the rule of lenity therefore applies, when "reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute."[183]

Looking to the language and structure of the statute, "[a]n analysis of the textual arguments made by the majority and the dissent . . . reveals that the language of § 924(c) is ambiguous under *Moskal*'s 'reasonable doubt' standard."[184] The majority examined "second or subsequent conviction" within the context of § 924(c) itself, while the dissent looked outside of the statute, interpreting the language in light of repeat offender statutes. Because neither of these techniques is invalid, the "reasonable doubt" standard is met.[185] As explained above, the legislative history is sparse and fails to address the meaning behind "second or subsequent conviction."[186] Thus, the legislative history does not resolve the "reasonable doubt" about the statute's intended scope, and the rule of lenity should apply. Finally, public policy considerations "do not clearly dictate either a broad or narrow reading of the statute."[187] Thus, the meaning of "second or

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177. *Ladner*, 358 U.S. at 178.

178. 404 U.S. 336, 348 (1971).

179. *Id.* (quoting McBoyle v. United States, 283 U.S. 25, 27 (1931)).

180. *Id.*

181. Apostolides, *supra* note 16, at 1017.

182. Moskal v. United States, 498 U.S. 103, 108 (1990).

183. *Id.* (citing Bifulco v. United States, 447 U.S. 381, 387 (1980)) (emphasis in original).

184. Apostolides, *supra* note 16, at 1032.

185. *Id.*

186. *See supra* Part II.A.

187. *See* Apostolides, *supra* note 16, at 1038–39 (finding the public policy interests in favor of the *Deal* majority's construction of "second or subsequent conviction" to be an interest in

subsequent conviction" should be found to be ambiguous, and courts should apply the rule of lenity.

Employing the rule of lenity in this case, "conviction" should mean both the finding of guilt and sentencing, so that a first-time offender with multiple § 924(c) counts would be sentenced to multiple § 924(c)(1)(A) sentences. The rule of lenity would prevent understanding "conviction" as only a finding of guilt, which results in a single § 924(c)(1)(A) sentence for a criminal defendant and enhanced § 924(c)(1)(C) sentences for additional counts in a single prosecution, because this latter interpretation leads to much longer sentences and the rule of lenity requires ambiguous statutes to be construed leniently toward defendants.

These interpretive theories and tools all suggest that the language of § 924(c)(1)(C) was intended to, and should be understood as, an enhanced sentence provision applicable to recidivists—those who commit and are convicted of another violation only *after* conviction for a first offense.

C. Purposes of Criminal Punishment

None of the prevailing purposes of criminal punishment supports *Deal*'s interpretation of § 924(c). Just as there are many perspectives on how to interpret a statute, there are many perspectives on how to shape the type and length of punishment for an offense. These include retribution, deterrence, incapacitation, and rehabilitation.[188] Congress has articulated each of these theories of punishment as a relevant consideration in shaping a criminal sentence, instructing courts to consider the need "to provide just punishment for the offense," "to afford adequate deterrence to criminal conduct," "to protect the public from further crimes of the defendant," and "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."[189]

"being 'tough on crime' " and an interest in judicial economy, and finding the public policy interests in favor of the dissent's construction to be an interest in all people having "a clear understanding of the probable legal response to their acts" and an interest in placing the power to define criminal offenses in the legislature).

188. *See* PAUL H. ROBINSON, CRIMINAL LAW: CASE STUDIES & CONTROVERSIES 87–91 (2d ed. 2008) (explaining the criteria of the retribution, deterrence, rehabilitation, and incapacitation justifications for criminal punishment).

189. 18 U.S.C. § 3553(a)(2) (2006).

1. Retribution

Retribution is not justly served by applying the twenty-five-year enhanced sentence of § 924(c)(1)(C) to non-recidivists. The retributive approach, also called the "just deserts" theory, seeks just punishment by sentencing offenders proportionately to the seriousness of their actual criminal behavior.[190] This approach is society-oriented, as the seriousness of the offense is shaped by society's perceptions of dangerousness and justice.[191] It is true that a repeated offense can seem more reprehensible than a first violation was,[192] especially if the offender has consciously "managed to evade detection, prosecution, and conviction" for previous offenses for a period of time, which was a concern of the *Deal* majority.[193] Sentencing guidelines and statutes recognize this increased blameworthiness by imposing increased sentences for repeat offenders.[194] As Professor Paul Robinson observed, "[H]abitual-offender statutes commonly double, triple, or quadruple the punishment imposed upon a repeat offender" for the offender " 'thumbing his nose' at the system."[195]

But Congress has imposed an even higher ratio in § 924(c), mandating a sentence five times greater than that for a first-time firearm possession violation.[196] While repeating a § 924(c) offense may justify some increased punishment, it does not seem to single-handedly justify a sentence five times longer than that of the first offense.[197] Robinson finds that "a nose-thumbing increase can hardly justify the doubling, tripling, or quadrupling of the punishments."[198] Increasing the sentence five-fold is even more egregious and undeserved.

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190. ROBINSON, *supra* note 188, at 90.

191. *Id.*

192. *See* Paul H. Robinson, *Criminal Law Scholarship: Three Illusions*, 2 THEORETICAL INQUIRIES L. 287, 313 (2001) ("By committing another offense after having been previously convicted, an offender might be seen as 'thumbing his nose' at the system, and such nose-thumbing may justify some incremental punishment over what a first offense would deserve.").

193. Deal v. United States, 508 U.S. 129, 137 (1993).

194. *See* Gonzalez v. United States, 224 F.2d 431, 433 (1st Cir. 1955) ("[T]he Supreme Court has recognized the . . . retribution theor[y] of punishment as [a] primary reason[ ] for imposing greater penalties on the repeater.").

195. Robinson, *supra* note 192, at 313.

196. *See* 18 U.S.C. § 924(c) (2006) (requiring a sentence of at least five years for the first violation and a sentence of at least twenty-five years for a "second or subsequent conviction").

197. *See* Robinson, *supra* note 192, at 314 ("[T]he nose-thumbing is only one of many characteristics of the second [offense] that influences its blameworthiness.").

198. *Id.* at 313.

Some criminal law scholars find that recidivism should not enhance an offender's sentence at all, as it is undeserved punishment. Professor Stephen Morse argues, "Recidivism does not make the last crime worse and more culpable in itself than if it had been the agent's first offense. It simply indicates that the agent is a worse and more dangerous person, but . . . it is not a crime to be a bad, dangerous agent."[199] A repeat offender has already been fully punished for prior offenses, as sentences were imposed and served by the offender for those offenses.[200] Morse contends that "[e]nhanced sentencing for recidivists is a form of pure preventative detention" and thus "retributively unfair."[201] Robinson echoes this sentiment, finding that in the case of repeat offenders, the "initial portion of an imprisonment sentence may well be deserved, but is followed by a purely preventative detention portion that cannot be justified as deserved punishment."[202] Furthermore, in the eyes of the victim, the seriousness of an offense stems from the offender's conduct in that instance, not from the fact that the offender had engaged in the conduct before,[203] nor from multiple violations in a single criminal episode.

In addition, a multiple, single-episode offender is generally considered less blameworthy than a recidivist who has served a punishment, knows the consequences of another offense, and nonetheless chooses to violate § 924(c) again. Under the statute's interpretation in *Deal*, however, these two types of offenders would receive the same punishment for an additional § 924(c) violation. The application of the enhanced sentence to multiple § 924(c) counts in a single indictment can easily turn punishment into "essentially a life sentence," which is normally set aside for the most serious and dangerous crimes.[204] From a retributivist's perspective, therefore, the current application of § 924(c)(1)(C) is grossly disproportionate to the seriousness and blameworthiness of the conduct at issue.

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199. Stephen J. Morse, *Preventative Confinement of Dangerous Offenders*, 32 J.L. MED. & ETHICS, Spring 2004, at 56, 66.

200. *Id.*

201. *Id.*

202. Robinson, *supra* note 192, at 313.

203. *See id.* at 314 ("The victim, for example, is offended by the robbery itself, not by the fact that it was a second-timer who performed it.").

204. United States v. Jefferson, 302 F. Supp. 2d 1295, 1302 (M.D. Ala. 2004) (quoting United States v. Washington, 301 F. Supp. 2d 1306, 1309 (M.D. Ala. 2004)).

2. Deterrence

The deterrence theory of punishment also fails to support the interpretation of § 924(c) as set forth in *Deal*. Deterrence theory seeks to impose sentences that will deter both the individual offender and potential offenders from committing the offense in the future,[205] in this case possession of a firearm during a violent crime or drug trafficking offense. To effectively deter future criminal behavior, a potential offender must have notice of the consequences of criminal offenses. The public, however, generally does not know the specific consequences of certain criminal behavior. For example, it is not generally commonly known that possession of a firearm in relation to a drug trafficking crime or a crime of violence is a separate offense punishable by between five and twenty-five years. Imposing the enhanced § 924(c)(1)(C) sentence for multiple § 924(c) counts in a single indictment does not provide notice to an offender of the severe enhancement for carrying a firearm in relation to a drug crime or crime of violence. In contrast, applying the enhanced sentence only for offenses committed after a previous § 924(c) conviction would provide an offender with clear notice that a future § 924(c) offense will carry a heavier punishment.

While a long sentence for possession or use of a firearm during a crime could deter future behavior by the offender or other potential offenders, the *Deal* dissent reasoned that "punishing first offenders with twenty-five-year sentences does not deter crime as much as it ruins lives."[206] Imposition of the enhanced § 924(c)(1)(C) sentence often creates de facto life sentences, giving no opportunity for the offender to be deterred in the future. Given the possible severity of the enhanced sentence under § 924(c) and the public's general lack of knowledge as to the specific provisions of criminal statutes, deterring future criminal behavior of the individual offender might be more effective if the enhanced sentence is applied to offenders who commit the "second or subsequent" violation only after a previous conviction. As the *Deal* dissent explains:

> If, after arrest and conviction, a first offender is warned that he will face a mandatory [enhanced] sentence if he commits the same crime again, then the offender will know of the penalty. Having already served at least five years in prison, he will have a strong incentive to stay out of trouble. Discouraging recidivism by people who have already

205. ROBINSON, *supra* note 188, at 88.

206. Deal v. United States, 508 U.S. 129, 146 n.10 (1993) (Stevens, J., dissenting) (citing United States v. Jones, 965 F.2d 1507, 1521 (8th Cir. 1992)).

> been in prison and been released serves a far more valuable purpose than deterring offenders who have yet to be arrested and have no knowledge of the law's penalties.[207]

Thus, even the deterrence theory of punishment can find the application of enhanced sentences for multiple § 924(c) counts in a single indictment to be troublesome and ineffective. As a recidivist provision, however, it would enable the offender to have notice of the increased penalties for a subsequent violation of § 924(c) and to have the opportunity to be deterred from committing future offenses.

3. Incapacitation

Incapacitation theory is more nuanced than simply seeking to imprison all offenders for the longest time possible under the law, and as such, this theory also runs counter to § 924(c) as interpreted in *Deal*. Punishment focused on incapacitation seeks to keep dangerous persons away from society to prevent the commission of further offenses.[208] While at first glance this rationale seems to support the imposition of severe sentences to keep criminals locked away, the theory dictates that the dangerousness of the offender, as established by the conviction or convictions, determines the appropriate length of incapacitation.[209] The conduct of an offender possessing a firearm who commits two offenses is not necessarily more dangerous than, for example, an offender who committed a single offense with multiple firearms. The first offender, however, would receive a thirty-year sentence on the firearm counts, while the second offender, though carrying more firearms, would receive only a five-year sentence.

Similarly, an offender who commits an offense after conviction of a prior offense is more dangerous than an offender who commits multiple offenses before indictment and conviction, as the first offender has notice of the increased penalty for his actions and commits an offense anyway, ignoring known consequences and demonstrating a disregard for the law. Under the current interpretation of § 924(c), however, both offenders would receive the enhanced sentence for the later offenses. Similar to the retribution theory's criticism of the current understanding of § 924(c), imposing the enhanced sentence on all § 924(c) counts other than the first count can be seen as incapacitating an offender for a disproportionately longer period of time than corresponds to the dangerousness of his conduct.

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207. *Id.*

208. ROBINSON, *supra* note 188, at 89.

209. *Id.*

4. Rehabilitation

Mandating twenty-five-year sentences for multiple § 924(c) counts irrespective of the context or actual criminal conduct clearly contradicts the rehabilitation rationale for punishment in many cases. The rehabilitation theory seeks to keep an offender imprisoned for the amount of time necessary to take away his inclination to engage in criminal conduct and become a productive member of society.[210] From this perspective, the Middle District of Alabama criticized the current interpretation of § 924(c), contending that "locking a young man away for his entire adult life does not serve a rehabilitative . . . function, as such a long sentence removes the incentive for reform and the hope that the prisoner will go on to live a productive life."[211] This pessimistic perspective stems from the reality that even a young offender with no criminal history will have the equivalent of a life sentence if convicted of multiple § 924(c) violations, even if in a single indictment. The First Circuit took a similar position regarding subsequent offender statutes long before the *Deal* decision when it concluded that "if reformation and retribution are the primary purposes of the legislation, such ends would be served best by applying the statutes only to those offenders who have been convicted prior to the commission of the subsequent offense."[212]

The current binding interpretation of § 924(c) creates unjust results in application, as de facto life sentences are imposed on less serious offenders. Under any theory of criminal punishment, the imposition of the enhanced sentence to multiple § 924(c) counts in a single indictment can lead to unjust and harmful results for criminal defendants.

D. Mandatory Minimums and Judicial Sentencing Discretion

The interpretation of § 924(c) in *Deal* runs counter to the current movement against mandatory minimums and toward judicial discretion in criminal sentencing. The Supreme Court's 2005 decision in *United States v. Booker*—which removed both the mandatory status of the Federal Sentencing Guidelines Manual and the de novo appellate review of sentencing departing from the Guidelines'

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210. *Id.* at 87, 90.

211. United States v. Washington, 301 F. Supp. 2d 1306, 1309 (M.D. Ala. 2004).

212. Gonzalez v. United States, 224 F.2d 431, 434 (1st Cir. 1955).

range[213]—indicates a move back toward increased discretion of federal district court judges in sentencing criminal offenders.

In 1984, after over two centuries of unlimited judicial discretion in criminal sentencing, Congress enacted the Sentencing Reform Act of 1984, which created the United States Sentencing Commission to promulgate a Federal Sentencing Guidelines Manual with ranges of sentences based on the type of offense and the type of offender.[214] The federal statute asserted that the sentence ranges set in the Guidelines were mandatory unless there was a sufficient aggravating or mitigating circumstance not taken into account in the formation of the Guidelines.[215] The Sentencing Guidelines were drafted to create more uniformity in sentencing. [216]

The mandatory Guidelines were in place in 1993 when the Supreme Court handed down the *Deal* decision. But in 2005, the previously uncontested mandatory nature of the Federal Sentencing Guidelines was overturned.[217] In *United States v. Booker*, the Supreme Court found that the mandatory sentencing system violated the Sixth Amendment right to jury trial.[218] The Court excised the portion of the law directing courts to treat the Federal Sentencing Guidelines as mandatory, giving the Guidelines an advisory status.[219] Though the sentencing court must still calculate and consider the applicable Guidelines sentence range,[220] it can now "tailor the sentence" outside of the Guidelines range to accommodate the particular conduct and characteristics of a case.[221] In addition, the *Booker* Court changed the standard of review for appellate judges from de novo to unreasonableness review.[222] This decision has allowed for increased judicial discretion in tailoring a sentence to fit the offender's actual conduct.

This judicial discretion was bolstered two years later by *Gall v. United States*, in which the Supreme Court called for an abuse of discretion standard of review for all sentences, whether within, above,

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213. 543 U.S. 220, 245, 261–62 (2005).

214. Christine M. Zeivel, Note, *Ex-Post-*Booker*: Retroactive Application of Federal Sentencing Guidelines*, 83 CHI.-KENT L. REV. 395, 399–400 (2008).

215. 18 U.S.C. § 3553(b)(1) (2006).

216. *Booker*, 543 U.S. at 253.

217. *Id.* at 245.

218. Zeivel, *supra* note 214, at 396–97.

219. *Booker*, 543 U.S. at 245.

220. *Id.* at 259; *see also* 18 U.S.C. § 3553(a) (2006).

221. *Booker*, 543 U.S. at 245–46.

222. *Id.* at 261–62.

or below the applicable Guidelines range.[223] Thus, district judges can impose a sentence within or outside of the range with less concern about being overturned on appeal.

These Supreme Court decisions show a movement toward increased judicial discretion in sentencing criminal offenders, and this movement has had practical effects on sentencing: "Since the United States Supreme Court's decision in *United States v. Booker*, the percentage of federal sentences falling within the range recommended by the federal sentencing guidelines has decreased."[224] In the year following *Booker*, both the number of non-government-sponsored below-range departures and the number of upward departures from the Sentencing Guidelines more than doubled.[225] This discretion allows judges to sentence offenders to terms in proportion to their criminal conduct.

The *Deal* decision—applying the mandatory twenty-five-year sentence of § 924(c)(1)(C) to all § 924(c) counts after the first count—stands in stark contrast to the increased sentencing discretion given to district court judges after *Booker*. Though not a part of the Sentencing Guidelines, § 924(c) is part of the overall federal sentencing scheme. While *Booker* gives judges discretion to prevent similar sentences for dissimilar offenders, "unwarranted uniformity arises from blanket application of mandatory minimum penalty statutes to a wide variety of cases of differing seriousness and culpability."[226] Thus, even if a judge finds that the actual conduct of an offender convicted of two § 924(c) counts is less serious than that of an offender sentenced to less than thirty years, under the current interpretation of § 924(c), the judge cannot craft the sentence to reflect this judgment. Instead, the judge is forced to sentence the offender to thirty years' imprisonment for the firearms counts alone.

This tension between *Deal* and *Booker* reflects a larger tension between mandatory minimum sentences and the advisory Sentencing Guidelines. Critics of mandatory minimums argue that "[a] mandatory minimum deprives judges of the flexibility to tailor punishment to the particular facts of the case and can result in an unduly harsh sentence."[227] As Judge Cassell describes, "Mandatory minimum

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223. 552 U.S. 38, 41 (2007).

224. Paul J. Hofer, *Immediate and Long-Term Effects of* United States v. Booker*: More Discretion, More Disparity, or Better Reasoned Sentences?*, 38 ARIZ. ST. L.J. 425, 425 (2006).

225. *Id.* at 433.

226. *Id.* at 445.

227. Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 1 (2010).

sentences mean one-size-fits-all injustice."[228] Harsh mandatory minimums can "harm crime victims," "misdirect [federal] resources," and "bring the [criminal justice] system into disrepute in the eyes of the public."[229] Mandatory minimums can "harm crime victims" by sending a distorted message, emphasizing the portion of the offense covered by the sentencing statute (possession of a firearm) and deemphasizing the substantive criminal offense (for example, drug trafficking or a crime of violence).[230] Mandatory minimums can also "misdirect [federal] funds" by incarcerating offenders for de facto life sentences, which can cost the government more than $1,000,000, rather than conserving federal funds and providing an opportunity for the threat of harsher punishment for a subsequent offense to deter offenders.[231] Furthermore, mandatory minimums can "bring the system into disrepute in the eyes of the public" because public support of mandatory minimums is declining, which may cause juries to acquit offenders due to their perception that justice is not being served by imposing harsh mandatory minimum sentences.[232]

Both the number and type of critics of mandatory minimums have grown; the Judicial Conference of the United States, legal scholars, federal judges at the district court, appellate court, and Supreme Court levels, members of Congress, and the general public have all expressed reservations about the wisdom and necessity of mandatory minimum sentences in practice.[233] A reduction in crime rates is one of the central arguments in support of mandatory minimum sentences, but studies have found that mandatory minimums do not, in fact, have this effect.[234]

Though counterintuitive at first, increased judicial discretion can advance the goal of increased uniformity in sentencing, while mandatory minimums can increase disparity in sentencing by rigidly applying the same sentences to dissimilar offenders without distinction.[235] Allowing for judicial discretion to consider the particular seriousness and culpability of an offender reduces the disparity that

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228. Cassell, *supra* note 12, at 344.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*; *see also id.* at 346 (reporting that studies have found that "support [for mandatory minimum sentences] decreases significantly when people are asked to apply mandatory sentences to specific cases").

233. *Id.* at 345–46.

234. *Id.* at 346; Nilsen, *supra* note 13, at 556 (reporting that "[a] recent study shows no connection between mandatory sentencing and the reduction of crime").

235. Hofer, *supra* note 224, at 442–47.

results from blanket application of a sentencing scheme.[236] Thus, giving district court judges more discretion allows them to depart from the Guidelines range or "reject a plea-bargained sentence if [the judge] determines . . . that the sentence does not adequately reflect the seriousness of the defendant's actual conduct."[237] Proponents of judicial sentencing discretion find that "being able to customize sentences can increase fairness in the judicial process."[238] It is district judges who hear the facts of the case during the actual trial, and it is district judges who have experience sentencing criminal defendants. Accordingly, district judges are likely in the best position to impose similar sentences on individuals who have engaged in similar real, criminal conduct.[239] In this way, this movement toward increased judicial discretion allows for more equitable sentencing of criminal offenders.

The mandatory sentencing add-ons imposed by § 924(c), especially in the event of multiple § 924(c) counts in the indictment, often force the imposition of an unjustly harsh sentence, counter to the long-term sentencing trend giving discretion to judges to tailor sentences to the actual culpable behavior of an offender. The blanket application of this mandatory minimum thus forces judges to treat different cases similarly, in direct opposition to the current sentencing movement advocating judicial discretion.

IV. SOLUTION: LET'S MAKE A *DEAL*

Under the current interpretation, multiple § 924(c) counts mandate the equivalent of a life sentence. This sentence is disproportionately severe, as the actions of these offenders almost certainly do not match the seriousness of other offenses meriting a life sentence, such as murder.[240] Due to the lack of support in subsequent case law, statutory construction, purposes of punishment, and sentencing trends, the Court's holding in *Deal*—defining "second or subsequent conviction" as a finding of guilt preceding sentencing and thus applying the enhanced sentence to multiple § 924(c) counts in a

236. *Id.* at 444–45.

237. United States v. Booker, 543 U.S. 220, 252 (2005).

238. Amir Efrati, *Looser Rules on Sentencing Stir Concerns About Equity*, WALL ST. J., Nov. 5, 2009, at A15.

239. *See Booker*, 543 U.S. at 250 (highlighting the need "to base punishment upon . . . the *real conduct* that underlies the crime of conviction" for less sentencing disparity to occur).

240. U.S. SENTENCING GUIDELINES MANUAL § 2A1.1 (2009) (assigning a base offense level of forty-three for first-degree murder, which equates to a life sentence in the Guidelines' Sentencing Table).

single indictment—must be reevaluated. "Second or subsequent conviction" must be understood to apply only to § 924(c) offenses occurring after a previous § 924(c) indictment and conviction. There are two main avenues from which to readdress this precedent: Congress or the Supreme Court.

A. Congress

Congress has the power to amend the wording of § 924(c) to clarify the proper application of the statute if it finds the current application of the statute to create objectionable outcomes for offenders. The statutorily mandated sentence grudgingly imposed by the Middle District of Alabama in *United States v. Jefferson* is a clear example of the disagreeable result of the statute's present interpretation.[241] In response, Congress could articulate that § 924(c)(1)(C) is to be understood as a purely recidivist provision, or affirm the *Deal* majority's interpretation that the enhanced sentence can apply to multiple § 924(c) counts in a single indictment. Alternatively, Congress could add language to express a different understanding of the applicability of the enhanced sentence.

Based on the post-*Deal* criticism, the context of the statute's enactment, and the purposes of punishment, Congress should amend § 924(c)(1)(C) to express that the enhanced sentence for a "second or subsequent conviction" applies only to offenses committed after previous conviction of a § 924(c) violation. This interpretation would prevent de facto life sentences for first-time offenders facing multiple § 924(c) counts in a single proceeding. After the indictment and conviction, a defendant has notice that possession of a firearm in relation to a drug trafficking crime or crime of violence is an additional criminal offense.

This interpretation is more in accord with the purposes of punishment. Conviction of a § 924(c) offense would provide sufficient notice, and therefore deterrence, to an offender that another § 924(c) violation will result in a harsher sentence. This application of § 924(c)(1)(C) is in line with both the retribution and incapacitation theories of criminal punishment, as it would incapacitate the most blameworthy and dangerous recidivists for a longer period of time.[242]

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241. 302 F. Supp. 2d 1295, 1302, 1303 (M.D. Ala. 2004). Jefferson was convicted of two drug trafficking offenses and two § 924(c) offenses. *Id.* at 1296. The court imposed the enhanced sentence for the second § 924(c) count, even though the offenses were committed concurrently. *Id.* at 1297. For further description of the case, see *supra* notes 111–22 and accompanying text.

242. *See supra* notes 188, 190, 208 and accompanying text.

Furthermore, the statute was originally enacted during a period in which similar-sounding provisions were understood as applying to recidivists,[243] and the "second or subsequent conviction" language should be understood as such.

This congressional clarification would remove any ambiguity in the statutory language, therefore eliminating the need to employ many of the tools of statutory interpretation in the first place. The plain meaning of the statute would be clear.

B. Supreme Court

If a case involving multiple § 924(c) counts is appealed to the Supreme Court, the Court could grant a petition for a writ of certiorari and reconsider its interpretation of § 924(c)(1)(C) in *Deal*. Overturning this precedent will present a difficult task, however. As the Supreme Court itself has articulated, "the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction."[244] For the Supreme Court to overturn a statutory construction decision, the Court must find that (1) subsequent changes in the law "have removed or weakened the conceptual underpinnings from the prior decision," (2) subsequent law "has rendered the decision irreconcilable with competing legal doctrines or policies," (3) there exists "inherent confusion created by an unworkable decision," or (4) the holding "poses a direct obstacle to the realization of important objectives embodied in other laws."[245] The Supreme Court would need to find one or more of these special justifications present to overturn its decision in *Deal*, as stare decisis does not take into account whether the interpretation was correct when initially decided.[246]

There is a strong argument for overturning this precedent due to conflicting sentencing policies and goals articulated in subsequent case law. In this instance, the 2005 *Booker* decision and subsequent sentencing practices have weakened the broad conceptual framework into which the statute fits. The mandatory sentence imposed by § 924(c)(1)(C) and its inflexible application conflicts with the advisory status of the Federal Sentencing Guidelines. Sentencing judges now have discretion to move outside of the Guidelines' range to craft an

243. *See supra* note 164 and accompanying text.

244. Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989).

245. *Id.* at 173 (citations omitted).

246. *Id.* at 175 n.1.

appropriate punishment for the defendant's conduct. Thirty mandatory years for two § 924(c) counts, rather than ten years, can easily frustrate the judge's overall aim to "impose a sentence sufficient, *but not greater than necessary*" to punish the criminal behavior.[247] Even though § 924(c) is not part of the Sentencing Guidelines, the statute works in tandem with the Guidelines in composing a sentence. The interpretation of § 924(c)(1)(C)'s mandatory enhanced sentences has obstructed district court judges from their overall goal to fashion a reasonable and just sentence for criminal behavior. In this sense, the advisory status of the Sentencing Guidelines and the current interpretation of the mandatory statutory § 924(c) sentences are irreconcilable policies, calling for the Supreme Court to reconsider its holding in *Deal*.

In a similar fashion, *Deal* poses a direct obstacle to realization of sentencing discretion embodied in subsequent case law. The post-*Booker* increase in sentencing discretion allows trial court judges to impose sentences that they find to be reasonable based on the offender's actual conduct. Federal district court judges are in the best position to determine the relative severity and blameworthiness of a defendant's action, as they deal almost daily with suspected and convicted criminal offenders, whether in plea proceedings, trials, sentencing proceedings, or other matters before the court. Requiring the imposition of de facto life sentences for offenders with multiple § 924(c) counts eliminates this discretion in many cases, forcing trial judges to impose unjustly severe sentences.

Because the interpretation of § 924(c)(1)(C) under *Deal* directly conflicts with the current goals and policies in criminal sentencing as established in subsequent case law, the Supreme Court should revisit and overturn the holding in *Deal*. The Court should hold that "second or subsequent conviction" refers to the finding of guilt and sentencing, thus employing § 924(c)(1)(C) as a recidivist provision. The enhanced sentence, therefore, would apply only to offenders who commit a § 924(c) violation after a previous § 924(c) indictment and conviction.

C. Mandatory Minimum Sentence Reforms

Judge Cassell, who in *United States v. Angelos* reluctantly sentenced a first-time offender to fifty-five years for three § 924(c) counts, has proposed alternative reforms to both the interpretation in *Deal* and the recidivist interpretation of § 924(c)'s mandatory

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247. 18 U.S.C. § 3553(a) (2006) (emphasis added).

minimum sentence for a "second or subsequent conviction."[248] One alternative is for Congress to completely abolish mandatory minimum sentences and instead impose sentences based solely on the advisory Federal Sentencing Guidelines.[249] If not a total repeal, Congress could also limit the scope of mandatory minimum sentences, reserving them for only the most serious and dangerous offenses.[250] If Congress did not want to repeal any part of its sentencing statutes, an alternative would be to pass a sentencing statute allowing district judges to depart from mandatory minimums to impose a sentence proportionate to the offender's role in the offense, the seriousness of the offense, and other relevant circumstances.[251] This course of action would give the district judge discretion to "impose a sentence below a mandatory minimum when[, for example,] a defendant has limited involvement in an offense."[252] This would be especially beneficial in situations in which the Guidelines' advisory sentence range and the mandatory minimum sentence differ significantly.

Judge Cassell observed that "the two [current sentencing] systems are 'structurally and functionally at odds.' "[253] He found the above reforms to be preferable to the current dual federal sentencing system because "the Sentencing Commission's Guidelines form a rational backbone for any sentencing system" and with deference to the Guidelines, "the public could have confidence whenever a judge imposed a sentence that it was consistent with that called for by the nation's expert sentencing agency," the Sentencing Commission.[254] Amending the scope or application of mandatory minimums in any of the ways suggested by Judge Cassell would also give more deference to district judges to impose a sentence tailored to the particular offender, rather than require them to apply a mandatory statute regardless of the character of the offender and the context of the offense. Due to the sheer number of sentencing hearings, district judges have more experience and expertise than Congress with crafting sentences for criminal defendants. Thus, giving more deference and discretion to the Sentencing Commission and district

248. *See* Cassell, *supra* note 12, at 348–49 (describing alternatives to unstacking § 924(c) mandatory penalties).

249. *Id.* at 348.

250. *Id.* at 348–49.

251. *Id.*

252. *Id.* at 348.

253. *Id.* at 349 (citation omitted).

254. *Id.*

judges would allow for more equitable and consistent sentencing of offenders.

V. CONCLUSION

The *Deal* majority contended that the definition and application of an enhanced sentence for a "second or subsequent conviction" under § 924(c) is "unambiguous."[255] However, the prior line of cases interpreting "conviction" as a finding of guilt and sentencing,[256] *Deal's* highly critical dissent,[257] and the subsequent criticism in its application[258] all cast doubt on this "unambiguous" interpretation. The theories and tools of statutory interpretation, the purposes of criminal punishment, and the movement toward increased judicial discretion in sentencing all further undermine the majority's assertion that "second or subsequent conviction" should include multiple counts alleged in a single indictment. A reinterpretation should allow for a sentence proportionate to the blameworthiness of the conduct of the hypothetical offender and provide him with a greater chance of rehabilitation and the opportunity to lead a crime-free life upon release. If Congress revises, or the Supreme Court reinterprets, the language or interpretation of § 924(c) in the way suggested in this Note, defendants like the hypothetical offender described in the Introduction will be shielded from the mandatory imposition of a de facto life sentence for actions that, comparatively, do not merit such a severe punishment.

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255. Deal v. United States, 508 U.S. 129, 132 (1993).

256. *E.g.*, United States v. Luskin, 926 F.2d 372 (4th Cir. 1991).

257. *Deal*, 508 U.S. at 137–46 (Stevens, J., dissenting).

258. *E.g.*, United States v. Jefferson, 302 F. Supp. 2d 1295, 1297–1303 (M.D. Ala. 2004).

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