No. 09-479, 09-7073

In The
Supreme Court of the United States

KEVIN ABBOTT,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

CARLOS RASHAD GOULD,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writs Of Certiorari To The United States Courts Of Appeals For The Third And Fifth Circuits

BRIEF FOR FAMILIES AGAINST MANDATORY MINIMUMS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Families Against Mandatory Minimums (FAMM) is a national nonprofit organization whose primary mission is to promote fair and proportionate sentencing policies by challenging excessive penalties required by inflexible mandatory minimum sentencing laws. FAMM also works to illuminate the human face of sentencing as it advocates for state and federal sentencing reform.

FAMM's interest lies in ensuring that courts construe and apply mandatory minimum sentencing laws in a manner consistent with statutory and constitutional principles. Through education and selected amicus filings in important cases, FAMM works toward realizing its vision of a nation in which sentencing is individualized, humane, and *s*ufficient, but not greater than necessary, to impose just punishment, secure public safety, and support the successful rehabilitation and reentry of offenders.

Properly understood and applied, the "except" clause of 18 U.S.C. § 924(c) represents a step in that direction. FAMM files this brief because it believes that the decisions of the Third and Fifth Circuits in

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. Consent letters have been lodged with the Clerk of the Court.

these cases are contrary to the correct interpretation of this statute, good public policy, and the welfare of its members. Those members include Percy Dillon and Mandy Martinson, whose stories are recounted within. Both Dillon and Martinson were sentenced to a mandatory five-year prison term under Section 924(c) over and above the mandatory minimum term applicable by virtue of their drug trafficking convictions under 18 U.S.C. § 841. Unless this Court reverses the decisions below, and if Mr. Dillon does not win his case in this Court,[2] both he and Ms. Martinson, and others like them, will spend a far longer time in prison than is fair or necessary based in part on the Government's flawed understanding of Section 924(c).

INTRODUCTION AND SUMMARY OF ARGUMENT

At issue in this case is the proper interpretation of 18 U.S.C. § 924(c)(1)(A) (2006). Section 924(c)(1)(A) provides, in pertinent part:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime

[2] *See Dillon* v. *United States*, No. 09-6338 (U.S. argued Mar. 30, 2010).

> (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime be sentenced to a term of imprisonment of not less than 5 years.[3]

As Petitioners rightly argue, the plain language of this "except" clause makes the minimum and consecutive features of this penalty non-mandatory if a longer mandatory minimum is imposed at the same sentencing. Abbott Br. 13-36; Gould Br. 7-15. By its terms, Section 924(c) unambiguously declares that the mandatory minimum sentences it authorizes for specified gun offenses do not apply when "a greater minimum sentence is otherwise provided . . . by any other provision of law." Both Petitioners received "greater minimum sentences . . . otherwise provided . . . by any other provision of law." Hence, the "except" clause exempts them from a second but lesser mandatory minimum sentence under Section 924(c). This Court consistently ends its analysis with a

[3] When Section 924(c)(1)(A) refers to "this subsection" it means the whole of Section 924(c) and its many paragraphs and subparagraphs, including paragraph (c)(5), which contains an "except" clause identical to the one in (c)(1)(A).

statute's plain language when that language is clear, *Badaracco* v. *Comm'r*, 464 U.S. 386, 392 (1984) (noting that where "provisions appear to be unambiguous on their face," their "clear language" controls), unless it "would produce an absurd and unjust result which Congress could not have intended," that is, one that is supported by "no plausible reason." *Clinton* v. *City of New York*, 524 U.S. 417, 429 (1998) (internal quotation marks omitted); Gould Br. 7. Petitioners also rightly argue that, unless "the Government's position is unambiguously correct, [this Court] appl[ies] the rule of lenity" to resolve doubts in favor of defendants. *United States* v. *Granderson*, 511 U.S. 39, 54 (1994); Abbott Br. 37; Gould Br. 37.

In the face of such arguments, the Government contends that Petitioner's interpretation of the "except" clause is anomalous, illogical, and clearly incorrect. *See* Petition for a Writ of Certiorari at 16-17, *United States* v. *Williams*, No. 09-466 (filed Oct. 20, 2009). This brief addresses the good – and certainly plausible – reasons that Congress would have had for amending Section 924(c)(1)(A) in 1998 to limit its applicability to cases in which a longer mandatory minimum does not also apply. These reasons lend additional support to Petitioners' ample plain-language arguments. They also confirm that the Government's position cannot be unambiguously correct and that therefore, at least, the rule of lenity applies.

Congress had at least two good reasons for moderating the severity of the statute's punishments when it extended its application to one who "possesses a firearm . . . in furtherance" of a crime of violence or drug trafficking crime in 1998. *First*, by 1998 empirical studies had established that it is the relative certainty of detection and penalty rather than the increased severity of punishment that effectively deters crime. All people – especially potential criminal offenders – discount possible future punishment. Studies of state laws similar to Section 924(c) had by 1998 found that additional enhancements have no discernible impact on the rate of violent crime. Congress was aware of these studies, explicitly discussed the concept reflected in them, and as a result had enacted laws ameliorating other mandatory minimum sentences in the 1990s. Hardly absurd, Petitioners' construction of the "except" clause is entirely consistent with an emerging consensus that severe and rigid sentencing approaches were producing anomalous results, leading Congress to take its first halting steps toward sentencing reform.

Second, while Congress indisputably favors incarcerating dangerous persons, it cannot be presumed to embrace the draconian regime that the Government advocates. By 1998, studies had shown that people become dramatically less likely to commit crimes – including weapons violations – as they grow older. It is consistent with prior congressional action, and certainly plausible, that Congress wanted to

ensure that Section 924(c) did not "result in unnecessarily extensive incarceration of people who may have reached an age where they would no longer be dangerous." S. Rep. No. 566-618, at 77 (1983).

If this Court does find the statute's language to be unclear, it ought to apply the rule of lenity and resolve the issue in favor of Petitioners. This brief presents plausible reasons for the "except" clause's limit on multiple mandatory minimums. These reasons, based on empirical data, literature, and congressional action, create sufficient doubts about the Government's position to justify lenity.

ARGUMENT

I. THE "EXCEPT" CLAUSE REFLECTS AN EMERGING CONSENSUS THAT CERTAINTY OF PUNISHMENT, RATHER THAN SEVERITY, DETERS CRIME

By its language, Section 924(c)(1)'s "except" clause plausibly reflects congressional choice. At the same time it was making sure that those convicted of possessing a gun in furtherance of a crime would serve a substantial mandatory sentence, Congress may reasonably have chosen, in 1998, to mitigate Section 924(c)(1)'s rigor by creating an exception where another longer mandatory minimum already applied. Cognizant of case studies and empirical data, and consistent with its own stated concerns regarding the severity of mandatory minimums, Congress may

have purposefully included the "except" to ensure that people did not face significantly longer sentences than needed to achieve Congress's real purpose: deterrence.

Congress originally enacted 18 U.S.C. § 924(c)(1) in 1968, to deter potential criminals from using firearms when committing federal crimes. In the floor debate over passage of the Gun Control Act of 1968, Representative Richard Poff explained that the purpose of the Section 924(c)(1) amendment to the bill was to persuade an offender to "leave his gun at home." 114 Cong. Rec. at 22,231. The amendment carried a one-year mandatory minimum sentence. 18 U.S.C. § 924(c)(1) (1970). The 1998 amendments that created the "except" clause at issue were primarily a response to *Bailey* v. *United States*, 516 U.S. 137 (1995), in which this Court held that mere possession of a firearm could not be punished as "use" of a firearm, which the statute proscribed. The amendments extended Section 924(c)'s penalties to possession in furtherance of a drug-trafficking or violent crime, and added longer graduated mandatory minimum sentences of five, seven, or ten years, depending on whether the firearm was possessed, used, or carried in the commission of the crime, or was brandished or discharged. 18 U.S.C. § 924(c)(1) (2006). Congress explained that the amendment sent a signal: "If you possess a gun in any way to further your violent criminal behavior, you get *a minimum of five years* in the slammer." *Criminal Use of Guns: Hearing on S. 191 Before the S. Comm. on the*

Judiciary, 105th Cong. (1997) (statement of Sen. Helms) (emphasis added), *available at* 1997 WL 235726.

While Congress indisputably wanted to ensure that those who used a gun in committing the designated crimes would spend "a minimum of five years in the slammer," there is no reason that Congress would have favored imposing that mandatory minimum on top of another harsher one. By 1998, National Academy of Sciences studies had repeatedly found that crimes are deterred by perceived certainty of detection and penalty rather than increased severity of punishment. In light of these studies, Congress could have been expected to respond reasonably by including the "except" clause in Section 924(c) to ensure that people did not face significantly harsher punishments than needed to deter.[4]

A. It Is the Certainty of Punishment, Not the Severity, that Deters Crime

As one commentator has noted, "Imaginable increases in severity of punishments do not yield significant (if any) marginal deterrent effects. Three National Academy of Sciences panels, all appointed

[4] Thus, for example, the reference to mandatory minimums "otherwise provided by this subsection" served to modify and partially overrule this Court's decision in *Deal* v. *United States*, 508 U.S. 129 (1993).

by Republican presidents, reached that conclusion, as has every major survey of the evidence. This is also the belief, in my experience, of most experienced judges and prosecutors." Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime & Just. 1, 28-29 (2006) (citing National Academy of Sciences reports from 1978, 1986, and 1993). By 1998, empirical studies had revealed this sociological truth – increases in penalties for crimes have little deterrent impact "in many situations where officials place great faith in such increases." Franklin E. Zimring & Gordon J. Hawkins, *Deterrence: The Legal Threat in Crime Control* 203 (1973) (discussing prior studies); *see generally* Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 Crime & Just. 65 (2009) (reviewing pre-1998 research). Numerous studies before 1998 had shown that it is the certainty rather than the severity of punishment that is most effective in deterring a criminal act. *See, e.g.*, Jeffrey Grogger, *Certainty vs. Severity of Punishment*, 29 Econ. Inquiry 297, 297, 308 (1991) (finding that greater certainty of being held accountable resulted in large deterrent effects, while an increase in the severity of punishment had an insignificant effect); Philip J. Cook, *Research in Criminal Deterrence: Laying the Groundwork for the Second Decade*, 2 Crime & Just. 211, 231 (1980) (concluding same based on economic analysis); Charles H. Logan, *General Deterrent Effects of Imprisonment*, 51 Soc. Forces 64, 64 (1972) (finding same).

One explanation for the negligible role that severity of punishment plays in deterrence is the phenomenon of discounting. Simply stated, "each added year in a criminal sentence has a decreasing marginal deterrent effect on crime because criminals (like other people) discount harms that await them far in[to] the future." Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 Geo. L.J. 1509, 1525 n.92 (2009) (summarizing earlier research). Indeed, most criminals are more focused on the present than the average person. A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. Leg. Stud. 1, 4 (1999) (citing James Q. Wilson & Richard J. Herrnstein, *Crime and Human Nature* 416-21 (1985)). Because they tend to care more about short-term consequences and less about long-term risks than the average person, those charged with crimes are even less likely to be deterred by longer prison sentences. Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 Marq. L. Rev. 213, 221 (2007) (summarizing earlier research).

What the studies cited above confirm, is that by the time Congress enacted the "except" clause in 1998, the importance of certainty as opposed to severity had become far clearer. Congress, reflecting the larger shift in understanding, could reasonably have taken into account the diminishing returns of increased severity in deciding to include the "except" clause.

B. Empirical Studies of Similar State Laws Show that Firearms Enhancements Have Little or No Deterrent Effect

The understanding of the relative efficacy of certainty and severity in deterring crime evolved between 1968 and 1998 in the specific context of state law sentencing enhancements for firearm possession similar to the mandatory sentence required in Section 924(c)(1). Between 1968 and 1998, a number of empirical studies assessed the impact of these statutes on crime. These studies consistently found that enhanced sentences tied to gun possession or use in the commission of a crime have little or no deterrent effect.

An expansive study undertaken in 1995 analyzed data from almost every state in an effort to determine the effectiveness of sentencing enhancements for firearm possession in felony commissions. Thomas B. Marvel & Carlisle E. Moody, *The Impact of Enhanced Prison Terms for Felonies Committed with Guns*, 33 Criminology 247 (1995). After analyzing almost twenty years of data, most of the enhancement statutes were shown to have had no measurable impact on gun-related crimes.[5]

This result replicated the results of two more detailed studies from the early 1980s of the impact of

[5] The study showed decreases in certain violent crimes in a few states, which were offset by increases in crime in other states. *Id.* at 275.

mandatory consecutive sentence enhancements on violent crime rates in Michigan and Florida. In 1977, Michigan enacted a felony firearm statute, known as the Gun Law, that was very similar to Section 924(c)(1). *See* Mich. Comp. Laws. § 750.227b (1977). It provided a two-year mandatory consecutive sentence enhancement for any felony committed while possessing a firearm. In 1983, a study assessed the impact of the Gun Law on violent crime rates in Detroit, a city in which the Gun Law was both highly publicized and vigorously enforced. Colin Loftin et al., *Mandatory Sentencing and Firearms Violence: Evaluating an Alternative to Gun Control*, 17 Law & Soc'y Rev. 287 (1983). Looking at crime data for the years 1976 through 1978, the study found that the Gun Law had had no discernible effect on the number or rate of violent crimes committed in Detroit. *Id.* at 309.

Two of the authors of the Michigan study next turned their attention to the Florida felony firearm law. Colin Loftin & David McDowall, *The Deterrent Effects of the Florida Felony Firearm Law*, 75 J. Crim. L. & Criminology 250 (1984). Enacted in 1975, the statute imposed a three-year mandatory minimum for any felony committed while possessing a firearm. Fla. Stat. § 775.087(2) (1976). Similar to the Michigan study, the Florida statute was found to have no measurable effect on violent crime deterrence. Loftin & McDowall, *supra*, at 258. The authors, after interviewing incarcerated felons, gave two reasons for the law's ineffectiveness. First, offenders discounted

the additional firearm sentence on top of the already substantial punishment for the underlying felony conviction, so they subjectively perceived no increase in severity. Second, the firearm enhancement did not offset the benefit to the offender that the gun provided for both protection and commission of the crime. *Id.* at 258-59.

C. The "Except" Clause Reflects Congress's Shift in Attitude Towards Increased Severity of Mandatory Minimum Sentences

Both this Court and Congress often look to the states as laboratories for development of the law. Congress's inclusion of the "except" clause in Section 924(c)(1) is consistent with the general deterrence literature and experience under similar state laws. Thus, even as it expanded the length of minimum prison terms for gun crimes, Congress drew the line at piling that minimum on top of another higher one.

This explanation for the "except" clause is borne out by evidence that key members of Congress and Congress itself were signaling the beginning of a shift in attitude toward mandatory minimums. For example, in 1993, Senator Orrin Hatch, at that time the Ranking Republican Member of the Senate Judiciary Committee, wrote a law review article questioning the efficacy and fairness of mandatory minimums, as well as their value in deterring crime. Orrin G. Hatch, *The Role of Congress in Sentencing:*

The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System, 28 Wake Forest L. Rev. 185 (1993). The following year, the Federal Judicial Center published a report seriously questioning the deterrent impact that mandatory minimums had on crime. Barbara S. Vincent & Paul J. Hofer, *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings* (Fed. Jud. Ctr. 1994). Finally, in 1994, Congress created a safety valve in mandatory minimum sentencing for drug cases, allowing a sentence below the minimum if the defendant was a low-level participant with little or no criminal history, did not use a weapon, was involved in a violence-free crime, and told the government the truth about her involvement in the offense. *See* 18 U.S.C. § 3553(f) (2006). While Congress stopped short of creating a safety valve specifically for gun crimes, it nonetheless tried to strike a balance between the desire for some certainty and the unreasonable severity of multiple mandatory minimums.

The "except" clause, in other words, is best understood, along with the safety valve, as an early step in the direction of sentencing reform. It appears to reflect Congress's growing awareness that its prior hard-line approaches were not achieving the policy ends it desired. It can be read – as the plain language suggests it should be – as an effort to address some of the excessive severity that has in the years since been generally recognized as a mistake.

D. Congress Plausibly Decided Not to Achieve Marginal Penological Benefits at the Expense of Extraordinary Harm to Individuals

In the face of overwhelming evidence of the limited efficacy of high mandatory minimums, Congress could reasonably determine that the social and personal costs were too great to embrace a policy of stacking mandatory minimum sentences.

The stories of Percy Dillon and Mandy Martinson exemplify the devastating effects of multiple mandatory minimums on individuals of limited criminal culpability. At 23 years old, Dillon was convicted of drug trafficking offenses as well as a weapons violation under Section 924(c). *See* Joint Appendix at 15, 49, *Dillon* v. *United States*, No. 09-6338 (U.S. Jan. 25, 2010), *available at* 2010 WL 326557. Bound by the Sentencing Guidelines, the district court sentenced Dillon at the low end of his range to 322 months (twenty-six years, ten months), which included a sixty-month consecutive sentence for the firearms offense. *Id.* at 21, 49.

When sentencing Dillon, the judge lamented the severity of those sentences, stating, "I don't say to you that these penalties are fair. I don't think they are fair. I think they are entirely too high for the crime you have committed even though it is a serious crime." *Id.* at 13, 50. In public comments made shortly after the sentencing, the judge said that he did not believe Dillon was likely to benefit from more

than five years in prison. *Id.* at 62.[6] Dillon has now completed seventeen years in prison. If his sentence had not included a 60-month firearms enhancement, he would now be serving his term of supervised release, without regard to the outcome of his case in this Court.[7]

Martinson was a 26-year-old dental hygienist with no prior criminal record and a history of drug abuse when she was convicted of assisting her live-in boyfriend with his drug-trafficking business, and of possessing the gun he had bought her for protection. *See United States* v. *Martinson*, No. 04-3018 (N.D. Iowa Feb. 20, 2005), *aff'd,* 419 F.3d 749 (8th Cir. 2005). Noting that she had been involved in selling drugs for only a brief period, that her involvement had been "due to her drug dependency," and that she had been "largely subject to [her boyfriend's] direction and control," the judge sentenced her to the "lowest possible sentence that the law will allow me to enter."

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[6] When Dillon's own case came before this Court, Justice Kennedy noted that executive clemency, the traditional fail-safe mechanism for unduly long prison terms, has been essentially unavailable in the federal system in recent years. Transcript of Oral Argument at 39, *Dillon v. United States*, No. 09-6338 (U.S. Mar. 30, 2010).

[7] In June 2008, Dillon's sentence was reduced to 22.5 years as a result of the retroactive application of the two-level reduction in the crack guidelines enacted by Congress on November 1, 2007. See S. Ct. App. 30, 31, 37-41. If the Section 924(c) enhancement had not applied to him, Dillon would have been eligible for immediate release at that time. As it is, he is not projected for release until January 2013.

Sent. Tr. at 19, 21. Even so, because of the consecutive five-year term under Section 924(c), Martinson is now serving a 15-year prison sentence.[8]

Both Dillon and Martinson exemplify the type of person who would likely have discounted the risk of mandatory-minimum sentencing, as discussed above. Dillon was a first felony offender at the time he was sent to prison for almost 27 years, and the immaturity noted by the sentencing judge undoubtedly contributed to his reckless disregard for his future. Martinson – as someone who had never even been arrested before, and who was abusing drugs and dependent on her boyfriend – would also likely have been focused on the short-term risks rather than the long-term consequences of her actions. There is no reason to believe that her behavior would have been different if she had known that accepting the gun from her boyfriend would add at least five years to any sentence she might receive for assisting his drug business. Their cases illustrate why the "except" clause was an entirely rational, if modest, reform measure, to give courts the option of exempting people like Dillon and Martinson from an additional penalty under Section 924(c).

[8] Martinson filed a petition for commutation of sentence with the Department of Justice in May 2010.

II. THE "EXCEPT" CLAUSE REFLECTS A CONGRESSIONAL UNDERSTANDING THAT MULTIPLE MANDATORY SENTENCES ARE UNNECESSARY DUE TO THE AGE-CRIME CURVE

In 2009, more than sixteen years into his prison sentence, Percy Dillon turned forty. He is now over eighty percent less likely to commit a weapons offense than he was during his teenage years; seventy-five percent less likely than he was during his early twenties; and half as likely as he was during his years approaching thirty. But, under the Government's reading, over and above a lengthy sentence for his crack offense, he was required to serve five extra years under Section 924(c).

Consistent with empirical studies and its own previous sentencing reform efforts, Congress could have been expected to consider the age-crime curve in choosing to moderate the expansion of Section 924(c)(1)'s penalties. The "except" clause reasonably reflects Congress's desire to ensure that people like Dillon and Martinson do not remain in prison when they are well beyond the age that they are likely to pose a threat to anyone.

A. People Become Dramatically Less Likely to Commit Crimes as They Age

National arrest and population data demonstrate that people like Dillon and Martinson become significantly less prone to committing crimes as they age. In

the year 2000, for instance, FBI arrest statistics show that a person's likelihood of being arrested for a weapons offense declines by 60% between the late teenage years and the late twenties and by another 50% between the late twenties and late thirties. FBI, *Crime in the United States – 2003*, at 226 tbl.38, *available at* http://www.fbi.gov/ucr/03cius.htm; U.S. Census Bureau, Total Population by Age, Race, and Hispanic or Latino Origin for the United States: 2000, at tbl.1, http://www.census.gov/population/www/cen2000/briefs/phc-t9/index.html.

This statistical trend is known as the age-crime curve (due to the shape of its graphical depiction), and it is remarkably consistent across time, locations, crimes, and demographic subgroups. Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 Am. J. Soc. 552, 554-62 (1983). The age-crime curve is also consistent with the arrest rates of groups that have an above-average likelihood of committing crimes in general, such as recidivist offenders. *See* Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1994*, at 7 tbl.8 (2002) (finding that recidivism gradually decreases with age, with prisoners released in their mid-forties being 45% less likely to be rearrested for a crime than those released in their late teenage years), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1134.

B. The Age-Crime Curve Has Been Studied Extensively, and Congress Has Relied on this Research in Passing Sentencing Reforms

This strong correlation between age and crime has been studied for centuries. *See* Daniel M. Blonigen, *Explaining the Relationship Between Age and Crime: Contributions from the Developmental Literature on Personality*, 30 Clinical Psychol. Rev. 89, 90 (2010) (citing F.G.P. Neison, *Contributions to Vital Statistics* (1857); A. Quetelet, *Research on the Propensity for Crime at Different Ages* (1831)). Improved data-collection methods spawned studies that examined this correlation over large periods of time and across cultures. A predictable curve emerged, in which one's propensity for criminal actions decreased significantly after young adulthood. *See, e.g.*, Hirschi & Gottfredson, *supra*. These studies created extraordinary interest in the age-crime curve, and later scholars explored its contours, limits, and applicability to varied offenses. *See, e.g.*, Alfred Blumstein, *Violence Certainly Is the Problem – And Especially with Hand Guns*, 69 U. Colo. L. Rev. 945 (1998); David P. Farrington, *Age and Crime*, 7 Crime & Just. 189 (1986); Darrell J. Steffensmeier et al., *Age and the Distribution of Crime*, 94 Am. J. Soc. 803 (1989).

As early as the 1980s, Congress was taking account of the age-crime curve in its sentencing laws. When the Career Criminal Life Sentence Act of 1981 was originally proposed, for example, it mandated life

imprisonment for career offenders. S. 1688, 97th Cong. § 2. The bill was subsequently amended (and then enacted as the Armed Career Criminal Act) to instead impose a fifteen-year mandatory sentence. 18 U.S.C. § 924(e) (2006). This sentence reduction was based in part on "the criminal studies" that "generally show a rapid fall off in the rate of offenses committed by career criminals once they reach [the] general age range of thirty or forty years old." S. Rep. No. 566-618, at 77 (1983).

Similarly, during the floor debates over the Violent Crime Control and Law Enforcement Act of 1993, 42 U.S.C. § 13704 (2006), Senators discussed a Bureau of Justice study that demonstrated how "recidivism rates are linked . . . closely with an offender's age." 139 Cong. Rec. S14974 (Nov. 4, 1993) (statement of Sen. Dorgan, referencing Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1983*, at 7 tbl.8 (1989), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1135). And Congress frequently receives reports from the congressionally created U.S. Sentencing Commission on the relationship between age and crime. *See, e.g.*, U.S. Sentencing Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 28 ex. 9 (2004) (finding that recidivism rates decrease with age), *available at* http://ussc.gov/publicat/Recidivism_General.pdf.

C. The "Except" Clause Is Consistent With Congressional Intent to Avoid Needlessly Incarcerating People Who Have Aged Out of Their Risk of Committing a Weapons Offense

The "except" clause is consistent with Congress's continued concern that mandatory sentences should not "result in unnecessarily extensive incarceration of people who may have reached an age where they would no longer be dangerous." S. Rep. No. 566-618, at 77 (1983).

The Government's reading of the "except" clause keeps people like Dillon and Martinson in prison far beyond the age at which they could be considered dangerous. Keeping individuals in prison beyond their thirties and into their forties is associated with only an additional 1% reduction in weapons-violation rates by age group. *See* FBI, *supra*; U.S. Census Bureau, *supra*. Yet in drug cases in which people are sentenced in their mid-twenties – as were Dillon and Martinson – adding Section 924(c) sentences of five or more years on top of ten-year underlying sentences will routinely keep them incarcerated into their forties. *See* 21 U.S.C. § 841(a)(1), (b)(1)(A) (2006) (prescribing ten-year mandatory minimum sentence for a wide variety of drug distribution crimes).

The "except" clause thus reasonably limits the application of multiple mandatory minimum sentences to protect against excessive incarceration, and preserve resources, when people have aged out of

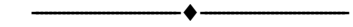
their risk of committing a weapons violation. It is consistent with Congress's growing awareness of the futility and waste of keeping people behind bars after they are no longer dangerous.

For example, in 1995, Congress passed a mandatory minimum sentence of life in prison for persons convicted of certain felonies. *See* 18 U.S.C. § 3559 (2006). Simultaneously, Congress passed a sentence reduction provision giving the Bureau of Prisons the authority to move the sentencing court to reduce the term of persons sentenced under Section 3559 if "the defendant is at least 70 years of age, has served at least 30 years in prison . . . and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community. . . ." 18 U.S.C. § 3582(c)(1)(A)(ii) (2006). In passing the exception, Congress implicitly recognized that any tendency toward dangerousness decreases over time, and that under such circumstances further incarceration may be unwarranted. Section 924(c) reflects and serves the same policy.

III. EVEN IF THE STATUTE WERE UNCLEAR, THE RULE OF LENITY WOULD REQUIRE PETITIONERS' READING OF THE "EXCEPT" CLAUSE

Congress thus had quite good – and certainly plausible – reasons to revise Section 924(c)(1)(A) to limit the imposition of multiple mandatory minimum

sentences, and the plain language of the statute should control. Even if this Court finds the language ambiguous, however, it should nonetheless adopt Petitioners' reading under the rule of lenity. This rule requires this Court "to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment." *Bell* v. *United States*, 349 U.S. 81, 83 (1955). Construction of any sentencing statute, including this one, is not properly based on an "assumption that Congress' sole objective was to increase the penalties . . . to the maximum extent possible." *Busic* v. *United States*, 446 U.S. 398, 408-09 (1980) (discussing earlier version of § 924(c)). Petitioners' position must prevail unless "the Government's position is unambiguously correct." *Granderson*, 511 U.S. at 54. In light of the plausible congressional reasons for limiting the application of multiple mandatory sentences – reasons that are based on a wealth of empirical data, literature, and congressional action – the Government's position is certainly not unambiguously correct.



CONCLUSION

The "except" clause of Section 924(c) should be read as its plain language demands: its mandatory enhancement does not apply wherever any other statute to be employed at the sentencing provides a greater mandatory minimum sentence. Congress took a step in the right direction toward sentencing reform in creating this limitation, and it had good reasons for

doing so. Even if this Court views the "except" clause as unclear, these reasons preclude finding the Government's position to be unambiguously correct.

For the foregoing reasons, as well as the reasons stated in the Briefs for Petitioners, the judgments of the courts of appeals should be reversed.

Respectfully submitted,

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