

The Burger Court Opinion Writing Database

Ferri v. Ackerman

444 U.S. 193 (1979)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 3, 1980

Re: (78-6020 - Busic v. United States
(78-6029 - LaRocca v. United States)

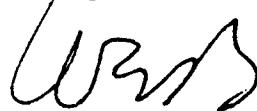
MEMORANDUM TO THE CONFERENCE:

I have concluded that for the long range I am not willing to strain to affirm in these cases. To do so leaves these almost intelligible statutes intact. District Judges will continue to be confused and the existing statutes will spawn cases for the Courts of Appeals -- and for us.

Bad as the result may be, I conclude that I will vote to reverse in Busic as well as in LaRocca to force Congress to mend its own errors -- as we did in Snail Darter.

Lewis advised me informally (no secretary being then available) that he would now vote to reverse in both cases rather than only in LaRocca.

Regards,



✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

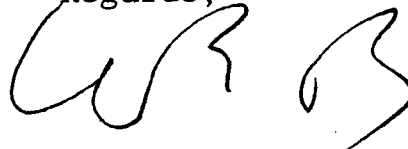
May 14, 1980

Re: (78-6020 - Busic v. United States
(
(78-6029 - LaRocca v. United States

Dear Harry:

I join your concurring opinion as I also
join Bill's opinion for the Court.

Regards,



Mr. Justice Blackmun

Copies to the Conference

Mr. Justice Stewart
Mr. Justice White
✓ Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 4-15-80

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 78-6020 AND 78-6029

Michael M. Busic, Petitioner,

78-6020

v.

United States.

Anthony LaRocca, Jr., Petitioner,

78-6029

v.

United States.

On Writs of Certiorari to
the United States Court
of Appeals for the Third
Circuit.

[April —, 1980]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Section 924 (c) of Title 18 U. S. C. authorizes the imposition of enhanced penalties on a defendant who uses or carries a firearm while committing a federal felony. The question for decision in these cases is whether that section may be applied to a defendant who uses a firearm in the course of a felony that is proscribed by a statute which itself authorizes enhancement if a dangerous weapon is used. We hold that the sentence received by such a defendant may be enhanced only under the enhancement provision in the statute defining the felony he committed and that § 924 (c) does not apply in such a case.

I

Petitioners Anthony LaRocca, Jr. and Michael Busic were tried together on a multicount indictment charging drug, firearms and assault offenses flowing from a narcotics conspiracy and an attempt to rob an undercover agent. The evidence showed that in May 1976 the two arranged a drug buy with an agent of the Drug Enforcement Administration who was to supply \$30,000 in cash. When the agent arrived with the money, LaRocca attempted to rob him at gunpoint. The

Fn 6 deleted
Fns renumbered

STYLISTIC CHANGES THROUGHOUT.

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

Recirculated: MAY 5 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 78-6020 AND 78-6029

Michael M. Busic, Petitioner,
78-6020 v.
United States.

Anthony LaRocca, Jr., Petitioner,
78-6029 v.
United States.

On Writs of Certiorari to
the United States Court
of Appeals for the Third
Circuit.

[April —, 1980]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Section 924 (c) of Title 18 U. S. C. authorizes the imposition of enhanced penalties on a defendant who uses or carries a firearm while committing a federal felony. The question for decision in these cases is whether that section may be applied to a defendant who uses a firearm in the course of a felony that is proscribed by a statute which itself authorizes enhancement if a dangerous weapon is used. We hold that the sentence received by such a defendant may be enhanced only under the enhancement provision in the statute defining the felony he committed and that § 924 (c) does not apply in such a case.

I

Petitioners Anthony LaRocca, Jr. and Michael Busic were tried together on a multicount indictment charging drug, firearms and assault offenses flowing from a narcotics conspiracy and an attempt to rob an undercover agent. The evidence showed that in May 1976 the two arranged a drug buy with an agent of the Drug Enforcement Administration who was to supply \$30,000 in cash. When the agent arrived with the money, LaRocca attempted to rob him at gunpoint. The

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

May 20, 1980

Memorandum

To: The Conference

From: Mr. Justice Brennan

Re: Cases Held for No. 78-6020 - Busic v. United States

Re: United States

1) No. 79-5795 - West v. United States.

Petr was charged in a three-count indictment with bank robbery (in violation of 18 U.S.C. § 2113(a)), killing a bank employee in the course of the bank robbery (in violation of 18 U.S.C. § 2113(e)), and use of a firearm to commit the preceding felonies (in violation of 18 U.S.C. § 924(c)(1)). Following his conviction on all counts he was sentenced to 20 years on the first count, life imprisonment on the second, and ten years on the third -- all sentences to run concurrently. After unsuccessful appeals, he filed a motion to vacate sentence pursuant to 28 U.S.C. § 2255. The District Court, acting pursuant to a magistrate's report, vacated the sentence on count one, reasoning that separate sentences under two subsections of the bank robbery statute were redundant and improper. The Court left in place the concurrent sentences under §§ 2113(e) and 924(c). The Court of Appeals for the Sixth Circuit affirmed, and this petition followed.

Basically, petr relies on Simpson v. United States, 435 U.S. 6, for the proposition that he may not be sentenced concurrently under these two sections. His case differs from Simpson in two important particulars. First, in Simpson the challenged sentences were consecutive, while here they are concurrent. And second, Simpson considered the interplay between the federal firearm enhancement provision, § 924(c), and § 2113(d), which provides for enhanced penalties where a dangerous weapon is used in connection with a bank robbery, while the present case deals with the relationship between § 924(c) and § 2113(e), which does not mention firearms and provides for stiff penalties only where the bankrobber kills or kidnaps someone in the course of the robbery. My own view is that the first distinction is not terribly important -- especially in light of the holding in Busic that if there exists a Simpson-type problem § 924(c) is not available at all. The second distinction is more difficult. Since § 2113 contains an enhancement provision of its own which in a sense merges into § 2113(e), I am inclined to the view that the structure of that statute coupled with the remarks of Representative Poff which are noted in both Simpson and Busic ousts § 924(c) and requires a holding for petr. It could be argued, however, that Simpson and Busic deal only with situations in which a firearm enhancement provision in the

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 30, 1980

Re: No. 78-6020 and 78-6029,
Busic v. United States

Dear Bill,

In due course I shall circulate a
dissenting opinion.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

TO: Mr. Chief Justice
 Mr. Justice Brennan
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Stevens
 Mr. Justice O'Connor
 Mr. Justice Souter
 Mr. Justice Ginsburg
 Mr. Justice Breyer

From: Mr. Justice Stewart

Circulated: 9 MAY 1980

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 78-6020 AND 78-6029

Michael M. Busic, Petitioner,
 78-6020 v.
 United United.
 Anthony LaRocca, Jr., Petitioner,
 78-6029 v.
 United States.

On Writs of Certiorari to
 the United States Court
 of Appeals for the Third
 Circuit.

[May —, 1980]

MR. JUSTICE STEWART, dissenting.

Under 18 U. S. C. § 924 (c), "whoever (1) uses a firearm to commit any [federal] felony . . . , or (2) carries a firearm unlawfully during the commission of any [federal] felony," is subject to a term of imprisonment in addition to that provided for the felony in question. In *Simpson v. United States*, 435 U. S. 6, which involved both § 924 (c)(1) and a felony proscribed by a statute that itself authorizes an enhanced penalty if a dangerous weapon is used, the Court held that Congress did not intend to authorize the imposition of enhanced punishments for a single criminal transaction under both § 924 (c)(1) and the enhancement provision for the predicate felony. The Court today concludes that Congress not only did not intend to authorize the imposition of double enhancement, but also did not intend § 924 (c)(1) to apply at all to a felony proscribed by a statute with its own enhancement provision. I disagree. It is my view that § 924 (c)(1) was intended to apply to all federal felonies, though subject to the limitation in *Simpson* against double enhancement.

Congress enacted § 924 (c) as part of the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213. That legislation, enacted the year in which both Robert Kennedy and Martin

1, 3, 4

To: The Chief Justice
Mr. Justice Brannan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: _____

2nd DRAFT

Recirculated: 12 MAY 1980

SUPREME COURT OF THE UNITED STATES

Nos. 78-6020 AND 78-6029

Michael M. Busic, Petitioner,

78-6020 v.

United United.

Anthony LaRocca, Jr., Petitioner,

78-6029 v.

United States.

On Writs of Certiorari to
the United States Court
of Appeals for the Third
Circuit.

[May —, 1980]

MR. JUSTICE STEWART, with whom MR. JUSTICE STEVENS
joins, dissenting.

Under 18 U. S. C. § 924 (c), "whoever (1) uses a firearm to commit any [federal] felony . . . , or (2) carries a firearm unlawfully during the commission of any [federal] felony," is subject to a term of imprisonment in addition to that provided for the felony in question. In *Simpson v. United States*, 435 U. S. 6, which involved both § 924 (c)(1) and a felony proscribed by a statute that itself authorizes an enhanced penalty if a dangerous weapon is used, the Court held that Congress did not intend to authorize the imposition of enhanced punishments for a single criminal transaction under both § 924 (c)(1) and the enhancement provision for the predicate felony. The Court today concludes that Congress not only did not intend to authorize the imposition of double enhancement, but also did not intend § 924 (c)(1) to apply at all to a felony proscribed by a statute with its own enhancement provision. I disagree. It is my view that § 924 (c)(1) was intended to apply to all federal felonies, though subject to the limitation in *Simpson* against double enhancement.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 16, 1980

Re: 78-6020 - Busic v. United States; and
78-6029 - LaRocca v. United States.

Dear Bill,

Please join me.

Sincerely yours,



Mr. Justice Brennan

Copies to the Conference

cmc

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 24, 1980

Re: Nos. 78-6020 and 78-6029 - Busic v. United
States and LaRocca v. United States

Dear Bill:

Please join me.

Sincerely,



T.M.

Mr. Justice Brennan

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: APR 18 1980

Recirculated: _____

No. 78-6020 - Busic v. United States
No. 78-6029 - LaRocca v. United States

MR. JUSTICE BLACKMUN, concurring.

I join the Court's opinion, holding that the decision in Simpson v. United States, 435 U.S. 6 (1978), leads to the conclusion that 18 U.S.C. § 924(c) is inapplicable where a defendant is charged with committing a substantive federal offense violative of a statute that already provides for enhanced punishment for the use of a firearm.

I do not join any intimation in the Court's opinion, however, that the initial opinion of the Court of Appeals in this case, to the extent that it was grounded on double jeopardy principles, was correct. See ante, at 3-4 and n.6.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Blackmun
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

1st PRINTED DRAFT APR 18 1980

SUPREME COURT OF THE UNITED STATES

Nos. 78-6020 AND 78-6029

Michael M. Busic, Petitioner,

78-6020 v.

United States.

Anthony LaRocca, Jr., Petitioner,

78-6029 v.

United States.

On Writs of Certiorari to
the United States Court
of Appeals for the Third
Circuit.

[April —, 1980]

MR. JUSTICE BLACKMUN, concurring.

I join the Court's opinion, holding that the decision in *Simpson v. United States*, 435 U. S. 6 (1978), leads to the conclusion that 18 U. S. C. § 924 (c) is inapplicable where a defendant is charged with committing a substantive federal offense violative of the statute that already provides for enhanced punishment for the use of a firearm.

I do not join any intimation in the Court's opinion, however, that the initial opinion of the Court of Appeals in this case, to the extent that it was grounded on double jeopardy principles, was correct. See *ante*, at 3-4, and n. 6. The Court of Appeals there rejected the view that Congress did not intend the enhancement provisions of § 924 (c) to apply when the substantive offense charged was 18 U. S. C. § 111. See 587 F. 2d 577, 581-582, and n. 3. The decision in *Simpson*, of course, revealed the error of that holding. But the Court of Appeals went on to hold that regardless of Congress' intent to provide for enhanced punishment in this context, the Double Jeopardy Clause prevented it from doing so, at least in certain cases. See *id.*, at 582-584. I do not subscribe to that view, and write separately only to state, once again, that it is my belief that when defendants are sentenced in a single proceeding, "the question of what punishments are

pp. 142

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Blackmun
Mr. Justice White
Mr. Justice Rehnquist
Mr. Justice Stevens
Mr. Justice Marshall

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: MAY 12 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 78-6020 AND 78-6029

Michael M. Busic, Petitioner,

78-6020 v.

United States.

Anthony LaRocca, Jr., Petitioner,

78-6029 v.

United States.

On Writs of Certiorari to
the United States Court
of Appeals for the Third
Circuit.

[April —, 1980]

MR. JUSTICE BLACKMUN, concurring.

I join the Court's opinion, holding that the decision in *Simpson v. United States*, 435 U. S. 6 (1978), leads to the conclusion that 18 U. S. C. § 924 (c) is inapplicable where a defendant is charged with committing a substantive federal offense violative of a statute that already provides for enhanced punishment for the use of a firearm.

It should be made clear, however, that the Court of Appeals' initial opinion in this case, discussed by the Court, *ante*, at 3-4, reflects the confusion that has existed among lower courts about the meaning of this Court's recent pronouncements respecting the multiple punishments aspect of the Double Jeopardy Clause. See *Whalen v. United States*, — U. S. —, ——— (1980) (BLACKMUN, J., concurring) (slip op., at 2-4). The Court of Appeals there rejected the view that Congress did not intend the enhancement provisions of § 924 (c) to apply when the substantive offense charged was 18 U. S. C. § 111. See 587 F. 2d 577, 581-582, and n. 3. The decision in *Simpson*, of course, revealed the error of that holding. But the Court of Appeals went on to hold that regardless of Congress' intent to provide for enhanced punishment in this context, the Double Jeopardy Clause prevented it from doing so, at least in certain cases. See *id.*, at 582-

Re: 78-6020 Busic

Supreme Court of the United States

Washington, D. C. 20543

Re: 78-6029 La Rocca

CHAMBERS OF

JUSTICE LEWIS F. POWELL, JR.

March 1, 1980

Dear Chief,

I stated at Conference that - in view of the shambles that resulted from the way the votes fell - I would re-examine my position.

I cannot in good conscience change my vote to Reverse in La Rocca.

But I will change my vote in Busic to Reverse also.

The statutes are in a mess and should be re-written.

Sincerely,

Lewis

P.S. I have no Secretary.

hand delivered to C.J. - 3-1-80 @ 3:20 PM.

QJH

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 3, 1980

78-6020 Busic v. United States
78-6029 LaRocca v. United States

Dear Chief:

This will confirm my longhand note that I delivered to you on Saturday.

In view of the shambles that resulted from the way the votes fell on Friday, I stated that I would reexamine my position.

My Conference votes were to reverse in LaRocca and affirm in Busic. I cannot in good conscience change my vote to reverse in LaRocca. But upon further consideration, I have decided that we also should reverse in Busic. In sum, my vote in both of these cases is to reverse.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 24, 1980

78-6020 Basic v. United States
78-6029 LaRocca v. United States

Dear Bill:

Please join me.

Sincerely,

Lewis

Mr. Justice Brennan

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 17, 1980

Re: Nos. 68-6020 and 78-6029 - Busic v. United
States, et al.

Dear Bill:

In due course I will circulate a dissent.

Sincerely,



Mr. Justice Brennan

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

22 APR 1980

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 78-6020 AND 78-6029

Michael M. Busic, Petitioner,
78-6020 v.

United States.

Anthony LaRocca, Jr., Petitioner,
78-6029 v.

United States.

On Writs of Certiorari to
the United States Court
of Appeals for the Third
Circuit.

[April —, 1980]

MR. JUSTICE REHNQUIST, dissenting.

I dissented from this Court's decision in *Simpson v. United States*, 435 U. S. 6 (1978), and continue to believe that case was wrongly decided. Now, as then, I am quite amazed at this Court's ability to say that 18 U. S. C. § 924 (c) "tells us nothing about the way Congress intended to mesh the new enhancement scheme with analogous provisions in pre-existing statutes defining federal crimes[.]" *ante*, at 7, even though that section provides quite clearly that the use of a firearm in the commission of "any felony" shall be punished by up to 10 years' imprisonment "in addition to the punishment provided for the commission of such felony. . . ." Nor do I find any more persuasive the Court's rehash of the legislative history of § 924 (c), including *Simpson's* unwarranted reliance upon the remark of Representative Poff, a remark that the Court today labels "the Poff rule," see *ante*, at 10, n. 15, and that might more properly be labeled "the Poff amendment" (albeit not intended as such by its proponent).

Were *Simpson* demonstrably a case of statutory construction, I could acquiesce to the Court's reading of § 924 (c) in the interest of *stare decisis*. *Simpson*, however, was based to an unstated degree on this Court's assumption that § 924 (c) raised "the prospect of double jeopardy" because it provided

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 9, 1980

Re: 78-6020 and 78-6029 - Busic v. United
States; LaRocca v. United States

Dear Potter:

Please join me.

Respectfully,



Mr. Justice Stewart

Copies to the Conference