

Justices' Double Jeopardy Ruling May Limit Charge-Stacking

By **David Tarras** (January 26, 2026)

In *Barrett v. U.S.*, the U.S. Supreme Court unanimously held on Jan. 14 that the double jeopardy clause of the U.S. Constitution bars separate convictions under Title 18 of the U.S. Code, Sections 924(c)(1)(A)(i) and 924(j), when both counts arise from the same act.[1]

The court concluded that Congress did not clearly authorize cumulative punishment for those provisions and that, absent such authorization, multiple convictions violate settled double jeopardy principles.[2]



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The court's analysis proceeded in two steps. First, it applied the familiar *Blockburger* test, discussed more below, and confirmed that Section 924(c) is a lesser-included offense of Section 924(j), because every violation of Section 924(j) necessarily includes all elements of Section 924(c), plus the additional element of causing death.[3] That conclusion triggered the presumption that Congress did not intend to permit multiple convictions for the same offense.[4]

Second, the court examined whether Congress had clearly displaced that presumption. It held that Congress had not done so. The court emphasized that Congress has repeatedly demonstrated its ability to authorize cumulative punishment explicitly, including by using express "in addition to" language elsewhere in Section 924.[5]

The absence of comparable language governing the relationship between Section 924(c) and Section 924(j) was therefore decisive.[6] Structural arguments based on sentencing schemes and penalty severity could not be substituted for a clear statement of congressional intent.[7]

On its face, *Barrett* is a statutory interpretation case concerning overlapping federal firearm statutes. In substance, however, the decision carries broader implications for how courts evaluate charge-stacking across the federal criminal code. The court reaffirmed that when Congress enacts overlapping criminal provisions, prosecutors are generally required to choose among them, rather than combine them, unless Congress has unmistakably indicated otherwise.[8]

For criminal defense practitioners, *Barrett* arrives amid heightened concern about federal charge-stacking, mandatory minimum leverage and aggressive charging practices. That concern has been sharpened by the U.S. Department of Justice's renewed emphasis on charging "the most serious readily provable offense" under Attorney General Pam Bondi's February 2025 charging memorandum.[9]

While *Barrett* does not restrict prosecutorial discretion in selecting charges, it places meaningful constitutional and structural limits on the accumulation of overlapping convictions.[10]

Procedural Background

Barrett arose from a single armed robbery in which a firearm was used and a victim was

killed. Based on that one episode, federal prosecutors charged Dwayne Barrett with Hobbs Act robbery and two overlapping firearm offenses: (1) using or carrying a firearm during a crime of violence under Section 924(c)(1)(A)(i), and (2) causing death through the use of a firearm during that same crime under Section 924(j).

Both firearm counts were predicated on the same act — namely, the same use of the same gun during the same robbery that resulted in a single death.[11]

After trial, Barrett was convicted on all counts. At sentencing and on appeal, however, the relationship between Section 924(c) and Section 924(j) became dispositive.

The U.S. District Court for the Southern District of New York treated Section 924(c) as a lesser-included offense of Section 924(j) and declined to impose separate punishment for both. On further appeal, the U.S. Court of Appeals for the Second Circuit disagreed in May 2024. Although it acknowledged that Section 924(c) is a lesser-included offense of Section 924(j) under the Supreme Court's 1932 decision in *Blockburger v. U.S.*, the Second Circuit held that Congress had nevertheless authorized cumulative convictions based on the statutes' differing penalty structures.[12].

The Blockburger Framework and the Parties' Positions

Under *Blockburger*, courts determine whether two statutory offenses are the same for double jeopardy purposes by asking whether each requires proof of a fact the other does not.[13] If one offense requires only a subset of the elements of the other, it is a lesser-included offense, and multiple convictions are presumptively barred, absent a clear statement from Congress authorizing cumulative punishment.[14]

Before the Supreme Court, Barrett argued that Section 924(c) is plainly a lesser-included offense of Section 924(j). Every Section 924(j) violation necessarily requires proof of a Section 924(c) violation, plus the additional element that death resulted.[15]

Because Congress did not clearly authorize cumulative convictions for those provisions, Barrett contended that imposing both convictions for a single act violated settled double jeopardy principles.[16]

Notably, the federal government agreed. The government took the position that Section 924(j) functions as an alternative penalty provision for fatal Section 924(c) violations, not as an additional offense layered on top of Section 924(c). Because both parties urged reversal of the Second Circuit's judgment, the Supreme Court appointed an *amicus curiae* to defend that judgment.[17]

The Court's Holding: A Menu, Not A Buffet

Writing for the court, Justice Ketanji Brown Jackson held that Section 924(c) is a lesser-included offense of Section 924(j) under the *Blockburger* test. Because Section 924(j) incorporates all elements of Section 924(c) and adds only the additional element of causing death, the two provisions constitute the same offense for double jeopardy purposes.[18]

The court reiterated that the double jeopardy clause prohibits multiple convictions for the same offense unless Congress has clearly expressed an intent to authorize cumulative punishment.[19] That principle applies even where Congress has enacted separate statutory provisions or different penalty schemes.[20]

In rejecting the amicus' arguments, the court emphasized statutory structure and congressional drafting practice. Congress has repeatedly demonstrated that it knows how to authorize cumulative punishment when it intends to do so, including by using express "in addition to" language elsewhere in Section 924.[21] The absence of comparable language governing the relationship between Section 924(c) and Section 924(j) was therefore dispositive.[22]

The court explained that where overlapping offenses contain independent penalty schemes but share elements, Congress has placed before prosecutors a choice, rather than an invitation to stack charges. As the court stated, such statutes present "a menu, not a buffet." [23]

Justice Gorsuch's Concurrence and a Warning on Charge-Stacking

Although the court resolved *Barrett* on statutory interpretation grounds, Justice Neil Gorsuch's concurrence in part directly addressed the constitutional foundations of double jeopardy doctrine.[24]

Justice Gorsuch questioned the doctrinal distinction between successive and simultaneous prosecutions, observing that if the Constitution prohibits multiple convictions in separate proceedings, it is difficult to justify permitting the same result in a single prosecution.[25] He criticized the court's tendency to treat *Blockburger* primarily as a rule of statutory construction rather than as a constitutional safeguard.[26]

And perhaps most significantly, Justice Gorsuch situated *Barrett* within the modern reality of federal criminal practice. He observed that early federal criminal codes were relatively limited in scope, while contemporary federal law contains a proliferation of overlapping offenses. That proliferation, he warned, creates incentives for prosecutors to bring multiple overlapping charges to increase leverage and ensure at least some convictions.[27]

Justice Gorsuch characterized this dynamic as a structural threat to constitutional protections, rather than a mere byproduct of sentencing policy. In doing so, he framed the double jeopardy clause as a limitation on the government's ability to multiply criminal liability through creative charging.[28]

Justice Gorsuch's concurrence signals a potential recalibration of double jeopardy jurisprudence that could extend beyond the statutes at issue in *Barrett*. Under current doctrine, courts often uphold cumulative convictions where Congress has clearly authorized them, even if the offenses overlap under *Blockburger*. [30] Justice Gorsuch questioned whether that approach is consistent with the Constitution's text and history.[31]

If that skepticism gains traction, courts may scrutinize overlapping charges more closely in the future, even where Congress has spoken more clearly than it did in Section 924. In particular, cumulative convictions may face greater resistance where one offense fully subsumes another or where multiple statutes punish the same conduct through marginal variations.[32]

The concurrence aligns with a broader trend in the court's recent criminal jurisprudence, in which justices have expressed concern about overcriminalization and unchecked prosecutorial discretion.[33]

For defense practitioners, the concurrence provides a road map for advancing arguments that were previously viewed as premature. Although not binding, Justice Gorsuch's

reasoning can support motions to dismiss duplicative counts, objections to charge-stacking and appellate challenges grounded in constitutional structure rather than statutory nuance.[34]

Tension With Current DOJ Charging Priorities

The implications of Barrett are particularly salient in light of current DOJ charging policy. Bondi's February 2025 memorandum instructs prosecutors, absent unusual circumstances, to charge the most serious readily provable offense.[35] In practice, that guidance has often resulted in charging multiple overlapping statutes to preserve mandatory minimums or maximize sentencing exposure.[36]

Barrett undermines the assumption that such overlapping charges may coexist. Where one charged offense is a lesser-included version of another, cumulative convictions are prohibited unless Congress has unmistakably authorized them.[37]

This limitation applies not only to firearms cases, but also to prosecutions involving violent crime, racketeering, immigration offenses and terrorism-related statutes, where overlapping provisions are common.[38]

Prosecutors may still select among available charges. What they may not do after Barrett is treat overlapping statutes as additive leverage.[39]

Practical Implications for Defense Counsel Beyond Section 924

Defense counsel should resist treating Barrett as a narrow firearms decision. Its reasoning applies broadly wherever overlapping statutes criminalize the same conduct.[40]

First, Barrett strengthens pretrial motions to dismiss duplicative counts where one offense is a lesser-included version of another.[41] Courts may no longer defer those issues to sentencing.[42]

Second, the court reaffirmed that double jeopardy violations attach to convictions themselves, even where sentences run concurrently.[43]

Third, Justice Gorsuch's concurrence provides constitutional grounding for arguments against charge-stacking as a systemic practice, particularly where overlapping statutes are used to inflate plea leverage.[44]

Lastly, Barrett may affect plea negotiations. Prosecutors may no longer credibly threaten stacked convictions where the statutory scheme does not clearly permit them.[45]

Barrett does not restrict prosecutors from charging serious crimes aggressively. It does, however, reaffirm that constitutional limits apply even in complex statutory schemes.[46] Justice Gorsuch's concurrence suggests that those limits may be enforced more rigorously in future cases.[47] His critique of overcriminalization and charge-stacking reflects concerns increasingly voiced across the court.[48]

For defense practitioners, Barrett represents more than a win in a firearms case. It is an invitation to challenge duplicative indictments earlier, press double jeopardy arguments more forcefully and remind courts that when Congress offers prosecutors a menu, they must choose.[49]

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[1] Barrett v. United States, 607 U.S. ___, slip op. at 5-6 (2026).

[2] Id. at 8-9.

[3] Id. at 8.

[4] Whalen v. United States, 445 U.S. 684, 691-92 (1980).

[5] Barrett, 607 U.S. ___, slip op. at 11-13.

[6] Id. at 13-14.

[7] Id. at 14-15.

[8] Id. at 15-19.

[9] Memorandum from the Attorney General, U.S. Dep't of Justice, General Policy Regarding Charging, Plea Negotiations, and Sentencing (Feb. 5, 2025).

[10] Ball v. United States, 470 U.S. 856, 861-65 (1985).

[11] Barrett, 607 U.S. ___, slip op. at 2-3.

[12] Id. at 3-5.

[13] Blockburger v. United States, 284 U.S. 299, 304 (1932).

[14] Whalen, 445 U.S. at 691-92.

[15] Barrett, 607 U.S. ___, slip op. at 8.

[16] Id. at 8-14.

[17] Id. at 5.

[18] Id. at 8-10.

[19] Whalen, 445 U.S. at 691-92.

[20] Ball, 470 U.S. at 861-65.

[21] Barrett, 607 U.S. ___, slip op. at 11-13.

[22] Id. at 13-14.

[23] *Id.* at 16-17.

[24] *Id.* (Gorsuch, J., concurring in part).

[25] *Id.* at 2 (Gorsuch, J., concurring in part).

[26] *Id.* at 3-4 (Gorsuch, J., concurring in part).

[27] *Id.* at 4 (Gorsuch, J., concurring in part).

[28] *Id.* at 4-5 (Gorsuch, J., concurring in part).

[29] *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983).

[30] *Barrett*, 607 U.S. ___, slip op. at 3-5 (Gorsuch, J., concurring in part).

[31] *Rutledge v. United States*, 517 U.S. 292, 297-307 (1996).

[32] *United States v. Davis*, 588 U.S. 445 (2019).

[33] *Barrett*, 607 U.S. ___, slip op. at 4-5 (Gorsuch, J., concurring in part).

[34] *Id.*

[35] Bondi Memorandum, *supra* n. 9.

[36] *Id.*

[37] *Barrett*, 607 U.S. ___, slip op. at 10-14.

[38] *Id.* at 4-5 (Gorsuch, J., concurring in part).

[39] *Id.* at 16-17.

[40] *Id.* at 15-19.

[41] *Rutledge*, 517 U.S. at 302-03.

[42] *Barrett*, 607 U.S. ___, slip op. at 10-14.

[43] *Ball*, 470 U.S. at 864-65.

[44] *Barrett*, 607 U.S. ___, slip op. at 4-5 (Gorsuch, J., concurring in part).

[45] *Id.* at 15-19.

[46] *Id.* at 8-15.

[47] *Id.* at 5 (Gorsuch, J., concurring in part).

[48] *Davis*, 588 U.S. 445.

[49] Barrett, 607 U.S. ____, slip op. at 16-17.