



# When Can You Be Convicted of a Crime That Is Not a Crime?

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A panel of the United States Court of Appeals for the Tenth Circuit (Tenth Circuit) recently [upheld](#) the murder conviction of a defendant who the court conceded had been “convicted of a crime that is not a crime.” The case, *United States v. Melgar-Cabrera*, is the product of extradition and an underappreciated landmark Supreme Court decision, *Apprendi v. New Jersey*.

*Melgar-Cabrera* [began](#) when the defendant and two cohorts robbed a Denny’s restaurant and killed a waitress. They were charged with three offenses: (1) robbery in violation of the Hobbs Act, 18 U.S.C. § [1951](#); (2) using a firearm in relation to a crime of violence, 18 U.S.C. § [924\(c\)](#); and (3) murder committed during the Section 924(c) firearms offense, 18 U.S.C. § [924\(j\)](#). Before he could be tried, the defendant fled to El Salvador. Salvadoran authorities agreed to his extradition, but only under the Hobbs Act and the murder charges. They denied extradition on the Section 924(c) firearms charge.

Upon his return, the defendant was tried, convicted, and [sentenced](#) to life imprisonment for murder under Section [924\(j\)](#). Section 924(j) provides: “A person who, in the course of a violation of subsection (c), causes the death of a person through the use of firearm shall – (1) if the killing is a murder . . . be punished by death or by imprisonment for any term of years or for life; and (2) if the killing manslaughter . . . be punished” by imprisonment for not more than 15 years.

The Tenth Circuit panel [discovered](#) a problem on appeal. In *United States v. Battle*, the Tenth Circuit had held previously that Section 924(j) is not a separate crime. Instead the court said in *Battle*, Section 924(j) merely supplies possible sentencing factors in Section 924(c) firearms cases. Yet, *Melgar-Cabrera* was not convicted of a Section 924(c) crime; he was convicted of a Section 924(j) noncrime. How could his conviction be affirmed? But it was.

The Tenth Circuit panel [began](#) by pointing out that its *Battle* decision stood on shaky grounds. It had failed to fully take into account *Apprendi* and its progeny, decisions that called into question treating facts properly left to the jury as sentencing factors decided by the trial court judge. That failure made *Battle*’s

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position untenable in the mind of the Tenth Circuit panel. The panel, however, faced a further obstacle. A circuit court panel is ordinarily bound by circuit precedent until released by a decision *en banc*, that is, by a decision in which all the active judges in the circuit take part. The panel overcame the *en banc* requirement with a footnote: “This opinion has been circulated to all active members of this court, and it is our unanimous decision to overturn the conclusion articulated in *Battle* that 18 U.S.C. § 924(j) is a sentencing factor rather than a discrete crime.”

Thus freed of the shackles of *Battle* and having concluded that the robbery constituted a crime of violence for purposes of the Section 924(c) elements of the Section 924(j) crime, the panel [affirmed](#) Melgar-Carbrrera’s conviction for a crime which at time of conviction the Tenth Circuit did not consider a crime.