

No. _____

In The
Supreme Court of the United States

SHANNON DALE SMITH,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

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Question Presented

18 U.S.C. § 924(c)(1)(A) increases the sentence of “any person who, during and in relation to any crime of violence . . . uses or carries a firearm, or who in furtherance of any such crime possesses a firearm.” Some circuit courts hold the “in furtherance of” language requires a *mens rea* of specific intent for the firearm to further the offense. Others hold knowing possession of a firearm that could further the crime—regardless of the intent to actually further it—is the relevant inquiry.

Does 18 U.S.C. § 924(c)(1)(A) criminalize the defendant’s subjective intent or the firearm’s objective potential.

Rule 29.6 Statement

Petitioner is not a corporate entity.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Shannon Dale Smith respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

Opinion Below

The Fifth Circuit's opinion can be found at *United States v. Smith*, 878 F.3d 498 (5th Cir. 2017). It is attached in the Appendix (Pet. App. 1a). The order denying rehearing is also attached. (Pet. App. 11a).

Statement of Jurisdiction

On December 28, 2017, the Fifth Circuit issued its Opinion. The court denied rehearing on February 5, 2018, and issued its mandate February 14, 2018.

The Court has jurisdiction under 28 U.S.C. § 1254(1).

Relevant Statutory Provision

This case is about the interpretation of 18 U.S.C. § 924(c)(1)(A). The relevant portion of this statute provides,

any person who, during and in relation to any crime of violence or drug trafficking crime . . . 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 . . . [receive certain enhancements to his sentence].

The underlying offense in this case is a crime of violence (as opposed to a drug trafficking crime).

Statement of the Case

A. *Factual History*

After serving in the military, Shannon Smith settled down in a small West Texas town. He was a farmer and a rancher, a family man, and a well-established member of the community. He hunted predators of his cattle. He taught pistol handling at the local 4-H chapter. He was licensed to carry a concealed weapon in the State of Texas, and everywhere he went, he always carried his sidearm. Guns were an integral part of Mr. Smith's life and livelihood.

Mr. Smith fell on hard times; his family's livelihood was at risk. Desperate, he concocted a scheme to threaten a local wealthy man into giving him money. He used a cell phone to call the man in an attempt to extort money from him. The man promptly reached out to local law enforcement, who set up a fake money drop.

The night of the money drop, Mr. Smith and his teenage son (as usual) went hunting—they killed coyotes living on the land where they were about to put their lambs. As part of the excursion, Mr. Smith went to the drop location. He and his son got out of their truck. Mr. Smith had a flashlight in his hand. His hunting rifle was in his truck. He had his usual sidearm holstered at his side.

Police descended on the location. Mr. Smith ran in front of his son saying “don’t shoot, don’t shoot.” Immediately complying with police commands, Mr. Smith laid on the ground. As the police approached (still not making any threatening movements), Mr. Smith informed them about his sidearm. Police seized the gun without incident and arrested Mr. Smith, who confessed to the entire scheme.

Mr. Smith was indicted on two counts: (i) using interstate communications with the intent to extort and (ii) possessing a firearm in furtherance of a crime of violence. He pled guilty to the first but went to trial on the second. At trial, the issue was whether Mr. Smith possessed firearms in furtherance of his communications.

Unexpectedly, the district court departed from the circuit's pattern jury instructions. The pattern instructions simply recite the applicable statute. Mr. Smith accepts those pattern instructions as proper. He objected, however, to the sentence the trial court tagged on to the pattern instructions.

Specifically, the trial court instructed the jury “[i]t is not necessary to prove that the defendant intended to possess the firearm in furtherance of the defendant's commission of the crime charged in Count One.” Mr. Smith objected that the court's addition permitted the jury to disregard his subjective intent in possessing the firearm, which was the entire point of the trial in the first place. His objection was overruled, the jury received the instruction, and it found him guilty. The district court accordingly imposed an additional five years of incarceration on top of the sentence Mr. Smith received for the communications offense. On appeal, Mr. Smith challenged the jury instruction as an incorrect statement of the law.

B. Procedural History

The district court entered Judgment in Mr. Smith's case on June 17, 2016. The Fifth Circuit, after hearing oral arguments, issued its published opinion denying relief on December 28, 2017. Mr. Smith filed a petition for rehearing en banc. The petition was denied February 5, 2018. This Petition follows.

Reasons for Granting the Petition

FEDERAL CIRCUITS ARE SPLIT IN THEIR INTERPRETATIONS OF THE STATUTE

A person “who, in furtherance of [a crime of violence] possess a firearm” commits an independent criminal offense under Title 18 of the United State Code, Section 924(c). 18 U.S.C. § 924(c)(1)(A). Prior to 1998, a defendant violated 18 U.S.C. § 924(c)(1) only if he “use[d] or carrie[d] a firearm” during a crime of violence or drug trafficking. 18 U.S.C. § 924(c)(1) (1994). In 1995, the Court narrowed the traditional application of “use” to “active employment of the firearm by the defendant.” *Bailey v. United States*, 516 U.S. 137, 143, 116 S.Ct. 501, 505, 133 L.Ed.2d 472 (1995). Following *Bailey*, Congress added the above-quoted “in furtherance of” language.

The addition was silent as to *mens rea*, and the circuit courts have struggled with the scienter omission ever since. As the First Circuit observed,

One might expect with such a common criminal offense that the legal framework would be well settled, but, as is so often the case with general statutory terms, it is not. One could argue, in particular, about whether the “in furtherance” requirement refers to subjective purpose or objective potential (or whether either would do). Statutory language, legislative history, model jury instructions and case law do not cleanly resolve the issue.

United States v. Felton, 417 F.3d 97, 104 (1st Cir. 2005). The question of the *mens rea* required by Section 924(c)(1)(A) has long bothered the circuit courts. Some hold the *mens rea* is specific intent . Other circuits have concluded the *mens rea* is knowing possession combined with the firearm’s objective potential for advancing the crime. As explained, the opinion below is uniquely important in this field because it clarifies and deepens the divide.

A. *The circuits agree there must be some mens rea required*

Caselaw from the various circuits makes clear there is a *mens rea* requirement in 18 U.S.C. § 924(c)(1)(A), and it is not strict liability. Merely having a firearm present does not violate the statute. From that point, however, interpretation of the statute becomes scattered.

Interestingly, the divergent approaches all begin at the same place—an opinion out of the Fifth Circuit eighteen years ago. *United States v. Ceballos-Torres* was the first opinion interpreting the statute after the “in furtherance of” provision was added. 218 F.3d 409 (5th Cir. 2000). In that case, the Fifth Circuit set forth eight factors to help determine whether there was a Section 924(c)(1)(A) violation.¹ Courts universally accept those factors as legitimate and instructive.²

The problem, however, goes back to the question of *mens rea*, as the application of some of the *Ceballos-Torres* factors can change depending on whether they are viewed through the lens of specific intent or knowing possession.³ Some of the factors are applicable and useful as to both standards. This crossover can make it difficult to have clarity about what standard the court is using in applying the factors.

¹ Those eight factors are: “the type of drug activity that is being conducted, accessibility of the firearm, the type of the weapon, whether the weapon is stolen, the status of the possession (legitimate or illegal), whether the gun is loaded, proximity to drugs or drug profits, and the time and circumstances under which the gun is found.” *Ceballos-Torres*, 218 F.3d at 414–15.

² In that decision, the court also held “furtherance” means “the act of furthering, advancing, or helping forward.” *Ceballos-Torres*, 218 F.3d at 412. The other circuit courts have likewise adopted this meaning. The problem remains, however with whether to apply this meaning to the firearm (i.e. the firearm furthers the crime) or the defendant (i.e. the defendant possessed the firearm to further the crime).

³ Stated differently, the circuit courts have struggled with whether “in furtherance of” modifies “person” or “firearm.” If the focus of “furtherance” is the person, evidence of that person’s specific intent must be presented and considered. If, on the other hand, the focus of “furtherance” is the firearm, the only relevant evidence is the firearm’s potential (regardless of the person’s intent).

As a general rule, the circuits concluding the *mens rea* is knowing possession accept the *Ceballos-Torres* factors and do little additional analysis. The courts concluding the *mens rea* is specific intent, however, accept the *Ceballos-Torres* factors but add their own factors on top to specifically account for a specific intent requirement.

The circuit split is discussed at length below. For the Court's convenience, the following table is a summary of the circuit courts' positions and each one's foundational case on the issue:

Consider defendant's specific intent	Have unclear positions on the <i>mens rea</i> required	Never consider defendant's specific intent
First <i>United States v. Felton</i> , 417 F.3d 97 (1st Cir. 2005)	Sixth <i>United States v. Mackey</i> , 265 F.3d 457 (6th Cir. 2001)	Third <i>United States v. Sparrow</i> , 371 F.3d 851 (3d Cir. 2004)
Eighth <i>United States v. Kent</i> , 531 F.3d 642 (8th Cir. 2008)	Second <i>United States v. Lewter</i> , 402 F.3d 319, 322 (2d Cir. 2005)	Fourth <i>United States v. Lomax</i> , 293 F.3d 701 (4th Cir. 2002)
Ninth <i>United States v. Krouse</i> , 370 F.3d 965, 967 (9th Cir. 2004)	Eleventh <i>United States v. Timmons</i> , 283 F.3d 1246 (11th Cir. 2002)	Fifth <i>United States v. Smith</i> , 878 F.3d 498 (5th Cir. 2017) *instant case*
Tenth <i>United States v. Basham</i> , 268 F.3d 1199 (10th Cir. 2001)		Seventh <i>United States v. Castillo</i> , 406 F.3d 806 (7th Cir. 2005)
		D.C. Circuit <i>United States v. Wahl</i> , 290 F.3d 370 (DC Cir. 2002)

B. Four circuits hold the mens rea is specific intent

The First, Eighth, Ninth, and Tenth Circuits hold possession in furtherance of the offense requires a showing of specific intent. They require evidence speaking to *why* the defendant possessed the firearm and if it was with the intention of furthering his crime.

1. *The Tenth Circuit candidly admits to divergent interpretations of the mens rea requirement between it and the Fifth Circuit*

The “in furtherance of” language was added to Section 924(c)(1)(A) in 1998. The foundational *Ceballos-Torres* opinion came out in 2000. Just one year later, the Tenth Circuit was among the first to consider and adopt the factors created in that opinion. *United States v. Basham*, 268 F.3d 1199, 1207 (10th Cir. 2001). The adoption of *Ceballos-Torres*, however, was with a large caveat.

There are three distinct Section 924(c)(1)(A) violations: (i) using or (ii) carrying a firearm during and in relation to a crime of violence or drug trafficking crime and (iii) possessing a firearm in furtherance of such a crime. *See* 18 U.S.C. § 924(c)(1)(A). The “use” and “carry” provisions existed long before the “possession in furtherance” provision was added. Well-established caselaw had long held the *mens rea* for the “use” and “carry” provisions was knowing. *See United States v. Santeramo*, 45 F.3d 622, 623 (2d Cir. 1995).

According to the Tenth Circuit, in *Ceballos-Torres* the Fifth Circuit broadened (or lowered), the *mens rea* required for “possession in furtherance.” *Basham*, 268 F.3d at 1207. The court observed that the Fifth Circuit’s opinion appeared to read a *mens rea* of something less than knowing into the “possession in furtherance” statute. *Id.*

The Tenth Circuit disagreed with this interpretation. *Id.* Instead, it interpreted the “possession in furtherance” statute as creating “*an even higher standard* than that required for the ‘use’ and ‘carry’ prongs, and to require a direct connection between the firearm and the drug offense.” *Id.* (citing *United States v. Iiland*, 254 F.3d 1264 (10th Cir. 2001)) (emphasis added).

Simply put, the two courts read the amendment differently as to the *mens rea* required relative to that required for the use and carry clauses. One said the *mens rea* went up. The other said it went down. They had opposite interpretations.

The Tenth Circuit realized this divergence at the time. Speaking about the *mens rea* interpretations, it candidly admitted “[t]here is some tension between the opinion in *Ceballos-Torres* and this court’s [prior] holding . . . regarding the scope of the amendment to § 924.” *Id.* Ultimately, the court found the *Ceballos-Torres* factors helpful and so accepted them. It did so, however, expressly stating, “a firearm that is kept available for use if needed during a drug transaction is ‘possessed in furtherance of’ drug trafficking . . . as long as such possession ‘in furtherance of’ *is the intent* of the drug trafficker.” *Id.* at 1208 (emphasis added).

2. *The Ninth Circuit has also disagreed with the Fifth Circuit’s interpretation and has intentionally diverged from it*

When the Ninth Circuit was confronted with how to interpret the “in furtherance of” statute, it started like the others—by looking at congressional intent and with the *Ceballos-Torres* factors. The court accepted those factors as valid considerations. *United States v. Krouse*, 370 F.3d 965, 967 (9th Cir. 2004). At the same time, however, it found those factors to be incomplete.

Specifically, the Ninth Circuit noted that “the Fifth Circuit’s guidance is less helpful in closer, and more common, cases . . . the *Ceballos-Torres* factors do not help distinguish possession for the promotion of drug trafficking from possession for other, perhaps legitimate, purposes.” *Id.* Thus, the Ninth Circuit recognized the *Ceballos-Torres* factors only consider the objective possibility of the firearms. *See id.* They disregard the defendant’s subjective intent. This, the Ninth Circuit held, was not an accurate interpretation of the statute, and it lead to an incomplete application of the provision. *See id.*

The Ninth Circuit understood the point of contention between how it and its sister court interpreted the statute. Against this backdrop of disagreement, the court explicitly read a *mens rea* of specific intent into Section 924(c)(1)(A).

A conviction for possession of a firearm “in furtherance of” a drug trafficking offense or crime of violence under § 924(c) requires proof that the defendant possessed the weapon to promote or facilitate the underlying crime. In other words, this element of § 924(c) *turns on the intent* of the defendant.

Id. (citations omitted) (emphasis added).

3. *The Eighth Circuit likewise reads “in furtherance of” to require a mens rea of specific intent*

When it was confronted with the “in furtherance of” statute, the Eighth Circuit of course looked to and accepted the *Ceballos-Torres* factors. *United States v. Hamilton*, 332 F.3d 1144, 1149 (8th Cir. 2003). Unlike the Ninth Circuit, the Eighth Circuit never overtly commented on the completeness of these factors. It nevertheless tacitly added its own factors taking specific intent into its considerations.

For example, in *Hamilton*, the court looked to testimony from the defendant's nephew that the defendant kept firearms for protection during commission of the underlying crimes. *Id.* at 1150. The court additionally relied on evidence indicating the defendant used the firearm to recover drugs he thought were stolen and to intimidate people. *Id.* at 1149. Essentially, the Eighth Circuit looked for evidence answering the question: “*why* did the defendant possess the firearms?”—a question not necessarily covered by the *Ceballos-Torres* factors.

The Eighth Circuit would later make an even clearer statement on its position:

“In furtherance of” is not a factual requirement that the firearm advance the crime, but rather a requirement that the person possess the gun with the *intent* of advancing the crime. The statute authorizes conviction where the defendant intended the firearm to advance or further the crime, but it did not actually do so.

United States v. Kent, 531 F.3d 642, 654 (8th Cir. 2008) (emphasis in original).

4. *The First Circuit also looks for evidence of specific intent*

The First Circuit has not overtly created a split with the Fifth Circuit, as did the Ninth and Tenth. It is more like the Eighth Circuit in that it created a split, but it did so quietly. Like all the others, when the First Circuit interpreted the “in furtherance of” provision, it started at the *Ceballos-Torres* factors. Of course, it accepted those factors. In doing so, however, it also added its own additional factors speaking to specific intent.

Felton was the first time the First Circuit was confronted with the provision. By that time, it had the benefit of the interpretations from the Fifth, Ninth, and Tenth Circuits. It took the path of the latter two.

Specifically, in *Felton*, the court “start[ed] with the objective evidence” and went through the *Ceballos-Torres* factors. 417 F.3d at 105. After performing that analysis, it continued, “[a]dditional evidence as to the defendants’ subjective intent supports the view that both [defendants] anticipated the use of a firearm in furtherance of the crime.” *Id.* One of the defendant’s admitted the firearm was for protection from people who would interfere with the crime. *Id.* The defendant acquired the firearm immediately before the beginning of the underlying crime, again evincing a subjective intent to use the gun to further that crime. *Id.*

The court would continue to highlight the importance of the defendant’s subjective intent in that circuit. A little over five months after the Eighth Circuit issued its opinion in *Kent* (discussed above), the First Circuit joined back in the chorus, reiterating it “evaluated ‘in furtherance of’ evidence from objective and subjective standpoints.” *United States v. Sherman*, 551 F.3d 45, 50 (1st Cir. 2008).

C. Three circuits have taken contradictory stances

The Second, Sixth, and Eleventh Circuit Courts have taken positions on their interpretation of the “in furtherance of” statute that are difficult to reconcile.

1. *The Sixth Circuit acknowledges the increased scienter requirement of the “possession in furtherance” provision, but nevertheless focuses on the firearm’s objective potential*

When it first interpreted Section 924(c)(1)(A), the Sixth Circuit observed, “Congress intended the ‘in furtherance of’ limitation to be a higher standard than ‘during and in relation to,’ which continues to modify the use and carry prongs of the statute.” *United States v. Mackey*, 265 F.3d 457, 461 (6th Cir. 2001).

As discussed above, the use and carry provisions had a well-established *mens rea* of knowing at the time Congress added the “in furtherance of” clause. *See Santeramo*, 45 F.3d at 623. If “in furtherance of” imposes a *mens rea* higher than knowing, one might conclude it must therefore demand a showing of specific intent. Indeed, this was the exact reasoning employed by the Tenth Circuit when it made the same observation about congressional motivations before holding the provision had a *mens rea* of specific intent. *Basham*, 268 F.3d at 1207.

Despite this same observation, however, the Sixth Circuit reached a different conclusion. It veered off the path taken by the Tenth Circuit and instead went to the Fifth Circuit’s *Ceballos-Torres* factors, at which point it found its analysis satisfactory. The court ultimately held that the issue was whether “the purpose of the firearm” was to further the crime. *Mackey*, 263 F.3d at 462-63.

2. *The Second Circuit focuses its analysis on the firearm’s objective potential, but in a later case it affirmed a conviction based upon evidence of the defendant’s subjective intent*

As with all the other circuits, the Second Circuit looks to a number of different factors in determining whether the defendant violated the possession “in furtherance of” prohibition. *United States v. Lewter*, 402 F.3d 319, 322 (2d Cir. 2005) (citing *Ceballos-Torres*, 218 F.3d at 414-15). This circuit applies those factors without considering the defendant’s intent, looking only to the firearm’s objective potential. *United States v. Snow*, 462 F.3d 55, 62 (2d Cir. 2006) (quoting *Lewter*, 402 F.3d at 322) (“[T]he ultimate question is whether the firearm ‘afforded some advantage (actual or potential, real or contingent) relevant to the vicissitudes of [the crime].’”)

That said, the this circuit has on at least one occasion, in an unpublished case and with very little analysis, affirmed a conviction in consideration of the defendant's subjective intent. In that case, the court cited the above-quoted language from *Lewter*. *United States v. Williams*, 642 Fed. Appx. 12, 14 (2d Cir. 2016), *cert. denied sub nom. Tingman v. United States*, 137 S. Ct. 2115, 198 L. Ed. 2d 196 (2017). It then went on, however, to affirm the conviction based upon testimony from co-defendants that the firearms were for everyone's protection during the course of committing the underlying crime. *Id.* In that case, the defendant's subjective intent did matter.

As discussed in the section above, the Eighth and First Circuits have both relied upon this kind of subjective-intent testimony. *See Felton*, 417 F.3d at 105; *Hamilton*, 332 F.3d at 1150. In those circuits, specific intent matters. In the Second, it does not—at least the court has said that it does not. Yet, the Second Circuit in *Tingman* relied on testimony akin to that necessary in the Eighth and First Circuits in affirming the conviction.

3. *The Eleventh Circuit's language focuses on the firearm, but its application considers intent*

When the Eleventh Circuit was faced with the new “in furtherance of” addition, it too looked to the legislative environment at the time of the amendment. *United States v. Timmons*, 283 F.3d 1246, 1253 (11th Cir. 2002). It also then discussed and accepted the *Ceballos-Torres* factors. *See* 218 F.3d at 141-15. Ultimately, the court held a violation was established if there was evidence the firearm “helped, furthered, promoted, or advanced the drug trafficking.” *Timmons*, 283 F.3d at 1252.

The difficulty is in how the circuit applies this language. For example, in *Timmons* the court affirmed the Section 924(c)(1)(A) conviction because the firearms were found in close proximity to various drugs and to ammunition. *Id.* Given the specific facts of that case, it was reasonable to conclude *both* (i) the firearms could have advanced the crime *and* (ii) the defendant intended the firearms to advance his crime. Similar evidence can inform a determination with both standards. Indeed, if knowing possession is a lesser standard than specific intent, evidence of specific intent would by definition support the knowing possession determination. Because the same evidence can inform both discussions, this court never appears to have been squarely faced with which standard controls.

Language from a later case muddied the waters more. In a similar case, the defendant was found in possession of a large amount of drugs, with a loaded gun nearby. *United States v. Maxwell*, 141 Fed. Appx. 878, 883 (11th Cir. 2005). The court upheld the conviction, expressly holding “the jury could have concluded that [the defendant’s] *intention* was to use the gun, if necessary, to protect the drugs and himself while he transported them.” *Id.* (emphasis added).

D. *Five circuits hold the mens rea is knowing possession of a firearm that could further the crime*

The Third, Fourth, Fifth, Seventh, and D.C. Circuits have held possession in furtherance of the offense requires a showing of knowing possession of a firearm that could potentially further the crime.

1. *The Third Circuit only requires satisfaction of some of the Ceballos-Torres factors, with no consideration of the defendant's subjective intent*

The Third Circuit has taken perhaps the broadest reading of the “possession in furtherance” clause. When it first analyzed the issue, the court accepted the *Ceballos-Torres* factors. It held a case satisfying at least some of the factors was proper under the statute. *United States v. Sparrow*, 371 F.3d 851, 854 (3d Cir. 2004).

In that case, the defendant was found guilty of violating the statute by trafficking drugs out of a convenience store that had a firearm stored away in a secret compartment. *Id.* at 853. The compartment with the gun was underneath floor tiles, and police were only able to access it after taking a crowbar to it. *Id.* The court acknowledged the firearm was far from immediately accessible. *Id.* It found the inaccessibility of the weapon non-determinative, however, because the gun was loaded, in close proximity to drugs, and illegally possessed. *Id.* at 854. Evidence met three of the eight *Ceballos-Torres* factors, all of which had nothing to do with the defendant’s subjective intent. *See id.*; *Ceballos-Torres*, 218 F.2d at 414-15. The court found that evidence sufficient to support the conviction. *Sparrow*, 371 F.2d at 854.

The court reaffirmed this approach just two years after *Sparrow*, when it again held there was enough of a connection to the firearm and the drug trafficking to satisfy the possession “in furtherance of” conviction. *United States v. Bobb*, 471 F.3d 491, 496 (3d Cir. 2006). The evidence met “many” of the *Ceballos-Torres* factors, and the conviction was affirmed without any consideration given to the defendant’s subjective intent behind his possession. *Id.*

2. *The Fourth Circuit wholly adopted the Fifth Circuit’s interpretation and application of the “in furtherance of” provision*

When the Fourth Circuit was tasked with interpreting the “in furtherance of” provision, it started with the legislative history behind the amendment. The court held, “[b]y adding the ‘possession in furtherance of’ language, Congress meant to broaden the reach of the statute.” *United States v. Lomax*, 293 F.3d 701, 704 (4th Cir. 2002) (emphasis added). This conclusion was also reached by the Fifth Circuit when it first interpreted the statute. *See Ceballos-Torres*, 218 F.3d at 413. Indeed, the Fourth Circuit cited *Ceballos-Torres* in making this holding. *Lomax*, 293 F.3d at 704.

But this conclusion is the opposite of that reached by the Tenth Circuit in *Iiland*, discussed above. *See* 254 F.3d at 1272. When the Fourth Circuit decided *Lomax*, it recognized that its position was the opposite of that taken by the Tenth Circuit just the year before in *Iiland*. *See Lomax*, 293 F.3d at 705 (including a citation to *Iiland* as a “but see”). It did not, however, discuss why it disagreed with its sister court’s understanding of congressional intent and meaning of the statute. When the Tenth Circuit later expressly acknowledged the “tension” between how it and the Fifth Circuit interpreted the amendment, it left *Lomax* out of the discussion. *See Basham*, 268 F.3d at 1207.

The Fourth Circuit aligned itself with the Fifth Circuit’s fundamental interpretation of the provision. Consequently, its ultimate understanding of the statute was unsurprisingly similar to the Fifth Circuit’s law: “§ 924(c) requires the government to present evidence indicating that the possession of a firearm furthered, advanced, or helped forward a drug trafficking crime.” *Lomax*, 293 F.3d at 705.

3. *The Seventh and D.C. Circuits overtly state the firearm’s potential controls*

The Seventh Circuit has also crafted its 924(c)(1)(A) framework focusing on the firearm’s potential with no regard for the defendant’s own intent: “if the gun at issue did advance the drug crime, the very purpose of the statute, as well as its language and legislative history, suggests that the gun was intended to be within § 924(c)(1)(A)’s ambit.”⁴ *United States v. Castillo*, 406 F.3d 806, 813-19 (7th Cir. 2005). The court went on to affirm the possession in furtherance of conviction in that case because the firearm was found in close proximity to drugs and therefore could have been used to protect the defendant’s drug trafficking business. *Id.* at 817.

The D.C. Circuit has created a two-step approach in Section 924(c)(1)(A) cases that is clearer than any other circuit. *United States v. Wahl*, 290 F.3d 370, 375-76 (D.C. Cir. 2002). First, the evidence must support that the defendant knowingly possessed the firearm. *Id.* at 375. Second, the evidence must establish the weapon promoted or facilitated the crime. *Id.* (citing *Ceballos-Torres*, 218 F.3d at 414).

In determining this second prong—whether the weapon promoted the crime—the D.C. Circuit has consistently looked to the firearm’s objective potential without considering the defendant’s intent. *Id.*; *United States v. Gaston*, 357 F.3d 77, 83 (D.C. Cir. 2004).

⁴ Curiously, the Seventh Circuit evaluated many of the opinions discussed in the instant Petition and concluded the courts were all in agreement. *Castillo*, 406 F.3d at 813. It is difficult to reconcile this statement with the language from those courts. As detailed above, while the opinions referenced by the Seventh Circuit contained an acceptance of the *Ceballos-Torres* factors, some of them clearly disagreed with the factors’ limitations and apparent disregard of the defendant’s subjective intent. The courts have not all “come to fundamentally the same conclusion.” *See id.*

4. *The Fifth Circuit has now come full circle by clearly holding in the instant case that the mens rea of the “in furtherance of” statute is less than specific intent*

Eighteen years after the foundational *Ceballos-Torres* decision, Mr. Smith’s case was the first time the Fifth Circuit delved back into the framework it had created. Before the instant case, the court had never spoken on whether it viewed its own famous factors through the lens of specific intent or knowing possession of a firearm that could further the crime.

At trial and on appeal, Mr. Smith has consistently maintained that he had his sidearm on him at the time of his arrest out of habit and that the hunting rifles in the truck were for his agricultural work. All the evidence in the case supported his assertion—he never intended to use the firearms to further his communications. The entire trial was about *why* he possessed those firearms.

Moreover, this challenge was not in the form of a legal sufficiency challenge (which is traditionally the context in which this issue has arisen). Instead, it was a challenge to a jury instruction the district court added on its own and different from the pattern instructions.⁵ Therefore, the posture of the arguments permitted a pure, *de novo* review of the issue. It squarely asked the court how it interpreted the *mens rea* of the “in furtherance of” statute and the *Ceballos-Torres* factors that it created so long ago.

⁵ That controversial instruction was “[i]t is not necessary to prove that the defendant intended to possess the firearm in furtherance of the defendant’s commission of the crime charged in Count One.” The court instructed the jury by reciting the traditional pattern instruction. It then added the challenged sentence at the end of the pattern instructions.

The court did not favor its reader with any discussion or analysis of the different cases that were all built upon *Ceballos-Torres*.⁶ It treated the matter in short order, noting “[s]ignificant for Smith’s case is *Ceballos-Torres*’s application of ‘in furtherance’ as an evaluation of various circumstantial factors to answer the factual question of whether the weapon actually advanced the crime. At no point did the court examine the defendant’s intended use for the weapon.” *Smith*, 878 F.3d at 502. Accordingly, the court below held the *Ceballos-Torres* factors (read objectively) were, alone, sufficient. Additional consideration of the defendant’s subjective intent is unnecessary. The firearm’s objective potential controls.

In issuing this holding, the Fifth Circuit has now made the circuit divide indisputable and complete. The circuit courts have passed on this issue. They have come to different, sometimes opposite conclusions from each other. And this divide exists on a statute that averages 2,000 convictions each year.⁷ The circuit courts and The People need this Court’s intervention, guidance, and interpretation.

Conclusion and Prayer

For these reasons, Petitioner Shannon Smith asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

⁶ The court below does not engage in any analysis of how its opinion diverges, impacts, or even interacts with the decisions of its sister circuits. This is not, however, a reflection of insufficient analysis and arguments on the point. The other circuit opinions and the possible impact of the court’s ruling was greatly discussed both in briefing and throughout oral arguments by both Mr. Smith and the Government.

⁷ In fiscal year 2017 *alone* there were 1,976 people convicted of violating 18 U.S.C. § 924(c), accounting for 2.9% of all federal convictions. U.S. Sentencing Comm’n, Quick Facts: Section 924(c) Offenders (Aug. 2017), *available at* <https://www.ussc.gov/research/quick-facts/section-924c-firearms>.

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Respectfully submitted,



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