

No. 18-5314

IN THE SUPREME COURT OF THE UNITED STATES

SHANNON DALE SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a defendant who knowingly possessed a firearm in circumstances where the firearm furthered a crime of violence has violated 18 U.S.C. 924(c)(1)(A), which applies to "any person * * * who, in furtherance of [a crime of violence], possesses a firearm."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 878 F.3d 498. The order of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 2017. A petition for rehearing was denied on February 5, 2018 (Pet. App. 10a-11a). The petition for a writ of certiorari was filed on May 7, 2018 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a partial guilty plea to one count and a jury trial on the other in the United States District Court for the Northern District of Texas, petitioner was convicted of making threatening communications in interstate commerce with intent to extort, in violation of 18 U.S.C. 875(b), and possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c) (1) (A). He was sentenced to 147 months of imprisonment, to be followed by three years of supervised release. C.A. ROA 234-236. The court of appeals affirmed. Pet. App. 1a-9a.

1. In October 2015, petitioner placed an anonymous call to Nathan Boardman, an 81-year-old resident of Crosbyton, Texas. Pet. App. 2a. Petitioner told Boardman that he was "being watched" and directed him to a note on the door of his home. Ibid. The note instructed Boardman to "place \$525,000 in cash or gold coins in a duffel bag, and await further instructions." Ibid. The note warned that Boardman, his wife, and his granddaughter "were being watched" and that "someone would be taken" if Boardman called the police. Ibid. Boardman reported the threat to a friend, a retired state trooper, who contacted law enforcement. Ibid.

Two days later, petitioner made several additional threatening calls to Boardman, including one that "graphically threaten[ed] Boardman's granddaughter." Pet. App. 2a. During the fourth call of the day, petitioner instructed Boardman to leave the duffel bag filled with money by a barn. Ibid. A later call

threatened that "there would be hell to pay" if a GPS tracker or a dye pack were included in the bag. Ibid.

That evening, law enforcement officers drove Boardman's car to the drop site and placed a duffel bag at the barn, in keeping with petitioner's instructions. Pet. App. 2a. Six officers patrolled the area while others conducted aerial surveillance. Ibid. Petitioner approached the barn in his truck, exited with his 14-year-old son, and shined a spotlight near the drop location. Ibid. The officers then arrested them. Ibid.

Petitioner "informed the officers that he was armed." Pet. App. 2a. Officers found a Glock .40 caliber semi-automatic pistol on petitioner and two more firearms in his truck. Ibid. Petitioner initially claimed that he was "hunting coyotes and an owl with his son," but "later confessed to the extortion" and admitted that "he was at the barn to see whether Boardman had left the money." Ibid.

2. A grand jury charged petitioner with making threatening communications in interstate commerce with intent to extort, in violation of 18 U.S.C. 875(b), and possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c). Pet. App. 3a. Petitioner pleaded guilty to the extortion count, but proceeded to trial on the Section 924(c) count. Ibid.

As relevant here, Section 924(c)(1)(A) applies to "any person * * * who, in furtherance of [a crime of violence], possesses a firearm." 18 U.S.C. 924(c)(1)(A). Petitioner did not

dispute that extortion constitutes a crime of violence for purposes of Section 924(c). C.A. ROA 521. Petitioner also “accept[ed] * * * as proper” the Fifth Circuit’s pattern jury instruction for Section 924(c)(1) offenses. Pet. 3. That instruction provides in relevant part that “[t]o prove the defendant possessed a firearm ‘in furtherance’ [of a crime of violence], the government must prove that the defendant possessed a firearm that furthers, advances, or helps forward the crime of violence.” 5th Cir. *Pattern Jury Instructions (Criminal Cases)* § 2.44 (2015); see Pet. App. 3a; C.A. ROA 522.

At the charging conference, the government requested that the district court add a sentence to the Fifth Circuit pattern jury instruction stating that “[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.” Pet. App. 3a; see C.A. ROA 507-510. Petitioner objected to the inclusion of the additional sentence. Pet. App. 4a; see C.A. ROA 508. Petitioner contended that the additional sentence was improper because, in his view, “a defendant must have the specific intent that the firearm further the crime” and “the government’s addition” of the sentence “made the possession offense a strict-liability crime.” Pet. App. 4a. The district court overruled the objection and gave the pattern instruction followed by the government’s requested additional sentence. Id. at 3a. The jury found petitioner guilty. Ibid.

3. The court of appeals affirmed. The court observed that it had previously "upheld the pattern instructions as a correct statement of the law." Pet. App. 4a. It also "reaffirm[ed] that in this context "possession in furtherance" is a "possession that furthers, advances, or helps forward a" crime of violence. Ibid. The court admonished that the extra sentence requested by the government in the jury instruction "unnecessarily confused the issue and should not have been included." Ibid. The court determined, however, that the sentence "did not ultimately misstate the law and is therefore not reversible error," rejecting petitioner's contention that Section 924(c)(1)(A) requires that a defendant must have the "specific intent that the firearm further the crime." Ibid. The court "emphasize[d] * * * that an additional sentence or other statement such as the one at issue here should not be used in this circuit." Ibid.

The court of appeals concluded that the "requirement" for a conviction under the possession-in-furtherance clause of Section 924(c)(1)(A) "is knowing possession with a nexus linking the defendant and the firearm to the offense," not specific intent. Pet. App. 6a-7a. The court explained that its prior decision in United States v. Ceballos-Torres, 218 F.3d 409 (5th Cir. 2000), cert. denied, 531 U.S. 1102 (2001), had interpreted the "possession-in-furtherance" clause of Section 924(c)(1)(A) to present "the factual question of whether the weapon actually advanced the crime," rather than a question about "the defendant's

intended use for the weapon.” Pet. App. 5a-6a. The court observed that, under Ceballos-Torres, the government must show evidence that a defendant’s “possession actually furthered the [crime].” Id. at 5a (quoting Ceballos-Torres, 218 F.3d at 414) (brackets in original). “To determine actual furtherance,” the court noted, Ceballos-Torres “laid out several factors that it deemed helpful, but not exclusive, to distinguish innocent from criminal possession,” including “accessibility of the firearm, the type of weapon, whether the weapon is stolen, the status of possession (legitimate or illegal), whether the gun is loaded, * * * and the time and circumstances under which the gun is found.” Id. at 6a (quoting Ceballos-Torres, 218 F.3d at 414-415).

The court of appeals also rejected, on plain error review, petitioner’s challenge to the sufficiency of the evidence. Pet. App. 7a-9a. The court noted that the government “presented specific facts linking Smith to the firearms and the firearms to the extortion.” Id. at 9a.

ARGUMENT

Petitioner seeks (Pet. 4-19) review of whether 18 U.S.C. 924(c) (1) (A)’s prohibition on possessing a firearm “in furtherance of” an underlying crime contains a specific-intent requirement. The court of appeals correctly determined that a defendant who knowingly possesses a firearm that furthers the predicate crime violates Section 924(c) (1) (A). No court of appeals has squarely adopted a contrary holding, and the difference between the approach

of the decision below and petitioner's suggested approach is unlikely to have much practical import. Review in this particular case is especially unwarranted because petitioner "accepts" (Pet. 3) the pattern jury instruction that represents the law of the Fifth Circuit going forward and has preserved a challenge only to a single sentence in the jury instructions at his own trial that courts in the Fifth Circuit have been directed to no longer use. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly determined that Section 924(c)(1)(A) required the government to prove only that petitioner knowingly possessed a firearm and that the firearm furthered his crime of violence, not that he possessed the firearm with specific intent to further the crime of violence. See Pet. App. 4a-7a.

a. The correctness of the court of appeals' decision follows directly from the language of Section 924(c)(1)(A). That provision applies to "any person who, during and in relation to any crime of violence or drug trafficking crime * * * , uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm." 18 U.S.C. 924(c)(1)(A). Petitioner was charged with possessing a firearm "in furtherance of" a crime of violence (his extortion offense). Ibid. The ordinary meaning of "furtherance" is the "act of furthering, or helping forward; promotion; advancement; progress." Webster's New International Dictionary of the English Language 1022 (2d ed. 1958) (emphasis added); Black's Law Dictionary 675 (6th ed. 1990) (similar); see

Bailey v. United States, 516 U.S. 137, 145 (1995) (consulting dictionary definitions in determining the meaning of other terms in Section 924(c)(1)(A)). Those definitions confirm that the statute's reference to possession "in furtherance of" a crime refers to particular actions or facts about the defendant's firearms possession, not to his intent or mental state. See Dean v. United States, 556 U.S. 568, 573-574 (2009). The Fifth Circuit pattern jury instruction requiring that "the government must prove that the defendant possessed a firearm that furthers, advances, or helps forward the crime of violence" reflects that ordinary meaning. Pet. App. 3a & n.1 (citation omitted); see United States v. Harris, 740 F.3d 956, 965 & n.5 (5th Cir.) (upholding pattern instruction), cert. denied, 135 S. Ct. 54 (2014).

Section 924(c)(1)(A)'s structure reinforces the absence of the specific-intent requirement that petitioner posits. The section provides for enhanced penalties if a firearm is "brandished," 18 U.S.C. 924(c)(1)(A)(ii), or "discharged," 18 U.S.C. 924(c)(1)(A)(iii). Congress explicitly adopted an intent requirement for the former enhancement, defining "brandish" as "to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person." 18 U.S.C. 924(c)(4) (emphasis added); see Dean, 556 U.S. at 572. As this Court has recognized in declining to infer an intent requirement into the latter enhancement, that Congress "expressly included an intent requirement" for purposes of Section

924(c)(1)(A)(ii), while excluding such a requirement in Section 924(c)(1)(A)(iii), strongly indicates that Congress did not mean to impose one where it was silent on the subject. Dean, 556 U.S. at 572; see Bailey, 516 U.S. at 150 (observing that Section 924(d)(1) references a firearm “‘intended to be used’” but that Congress “chose not to include” such an intent requirement in Section 924(c)(1)) (citation omitted). That logic applies with full force to contravene a claim that specific intent is required to show possession of a firearm in furtherance of a crime.

The history of the possession-in-furtherance provision confirms that it does not include a specific-intent requirement. In Bailey v. United States, supra, this Court interpreted the then-extant version of Section 924(c)(1)(A), which applied to a person who “uses” or “carries” a firearm “during and in relation to any crime of violence.” 516 U.S. at 142 (citation omitted). The Court concluded that a conviction required the government to “show that the defendant actively employed the firearm during and in relation to the predicate crime.” Id. at 150. The Court did not hold, however, that Section 924(c)(1)(A) imposed an additional requirement that a defendant subjectively intend to use the firearm during and in relation to the predicate crime. Indeed, the Court had stated in a previous case that the “‘in relation to’” requirement “at a minimum, clarifies that the firearm must have some purpose or effect with respect to” the underlying crime. Smith v. United States, 508 U.S. 223, 238 (1993) (emphasis added).

Accordingly, as petitioner recognizes, at the time of the Court's decision in Bailey, "[w]ell-established caselaw had long held that the mens rea for the 'use' and 'carry' provisions was knowing," not specific intent. Pet. 7 (citing United States v. Santeramo, 45 F.3d 622, 624 (2d Cir. 1995) (per curiam)).

In response to Bailey, Congress amended Section 924(c)(1)(A) to cover not only active employment of a firearm during and in relation to a crime of violence, but also possession "in furtherance of any such crime." Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1, 112 Stat. 3469; see H.R. Rep. No. 344, 105th Cong., 1st Sess. 4-6 (1997) (House Report) (explaining that amendment responded to Bailey). Neither the text nor the legislative history of the amended statute indicates that Congress departed from the "[w]ell-established caselaw," Pet. 7, that applied a knowledge requirement -- not an intent requirement -- to the acts proscribed by Section 924(c)(1)(A). See Lorillard v. Pons, 434 U.S. 575, 581 (1978) (explaining that Congress generally adopts existing case law when it reenacts statutory language). Indeed, the House Report accompanying the amendment cited dictionaries that define "furtherance" as the "act of furthering, helping forward, promotion, advancement, or progress" without any reference to intent. House Report 11 (emphasis added; citation omitted). In discussing the facts of Bailey, the Report noted that satisfying the new "in furtherance of" clause would require the government "to show that the firearm located in the trunk of the car advanced

or promoted Mr. Bailey's drug dealing activity." Id. at 12 (emphasis added). The House Report did not refer to Bailey's specific intent.

b. Petitioner offers no meaningful argument for why the decision below is incorrect or why Section 924(c)(1)(A) requires "that a defendant must have the specific intent that the firearm further the crime." Pet. App. 4a. Petitioner suggests that an intent element is necessary to avoid making "the possession offense a strict-liability crime." Ibid. But the interpretation adopted by the courts below does not impose strict liability. The district court required that petitioner "knowingly" possessed the firearm and that the firearm "further[ed], advance[d], or help[ed] forward the crime of violence." C.A. ROA 522. And the court of appeals emphasized that "the mens rea" for the offense as so defined "is more than strict liability." Pet. App. 5a. For example, "a drug dealer whose only firearms are unloaded antiques mounted on the wall does not possess those firearms 'in furtherance'" of his crime. Ibid. (quoting United States v. Ceballos-Torres, 218 F.3d 409, 415 (5th Cir. 2000), cert. denied, 531 U.S. 1102 (2001)).

The court of appeals' interpretation follows from this Court's broader jurisprudence regarding mens rea requirements in federal criminal statutes. This Court has explained that courts "read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'"
Elonis v. United States, 135 S. Ct. 2001, 2010 (2015) (citation

omitted). That is what the court of appeals did in construing the "in furtherance of" requirement to require conduct that would "distinguish innocent from criminal possession." Pet. App. 6a. Moreover, as this Court has explained, Section 924(c)(1)(A) proscribes only conduct undertaken in connection with "unlawful acts" -- namely, a crime of violence or drug-trafficking offense. Dean, 556 U.S. at 575. A defendant who possesses a firearm "in furtherance of" such criminal activity, 18 U.S.C. 924(c)(1)(A), cannot reasonably be viewed as engaged in "otherwise innocent conduct," Elonis, 135 S. Ct. at 2010 (citation omitted); see Dean, 556 U.S. at 575-576.

2. Petitioner asserts (Pet. 4-19) that review is warranted because the courts of appeals are divided on whether Section 924(c)(1)(A) requires proof that the defendant possessed the firearm with specific intent to further the predicate crime. No such division exists. As petitioner recognizes (Pet. 5), other circuits have generally looked to the very Fifth Circuit precedent on which the decision below relied, United States v. Ceballos-Torres, supra, to supply the factors for determining whether a defendant possessed a firearm in furtherance of an underlying crime for purposes of Section 924(c)(1)(A). And no court of appeals other than the Fifth Circuit has squarely addressed in a precedential opinion whether the government must prove the defendant's specific intent that the firearm further the predicate crime of violence.

a. Contrary to petitioner's contention (Pet. 7-11), the First, Eighth, Ninth, and Tenth Circuits have not held that Section 924(c)(1)(A)'s "in furtherance of" provisions imposes a specific-intent requirement.

Petitioner errs in asserting (Pet. 10) that the First Circuit "split * * * quietly" from the Fifth Circuit by considering "its own additional factors speaking to specific intent." The First Circuit decision that petitioner cites expressly declined to resolve "whether the 'in furtherance' requirement refers to subjective purpose or objective potential (or whether either would do)," observing that "in most cases[,] the result will be the same." United States v. Felton, 417 F.3d 97, 104-105 (2005), cert. denied, 547 U.S. 1048 (2006); accord, e.g., United States v. Marin, 523 F.3d 24, 27 (1st Cir. 2008) (rejecting defendant's sufficiency challenge after analyzing the same evidence "from both subjective and objective standpoints").

Petitioner similarly errs in asserting (Pet. 9) that the Eighth Circuit "tacitly" takes "specific intent into" consideration. The Eighth Circuit decision that petitioner cites upheld jury instructions that included no specific-intent element. See United States v. Kent, 531 F.3d 642, 654 (2008) (upholding instruction that "[t]he phrase 'possess in furtherance of' means the firearm must have some purpose or effect with respect to [the drug offense]" and that the "firearm must facilitate or have the potential to facilitate the offense") (emphasis added). The court

referred to the "intent" of the person possessing the firearm only in a single sentence, in the course of explaining that Section 924(c)(1)(A) covers not only cases where a defendant knowingly possessed a firearm that in fact furthered the underlying crime but also where a defendant possessed a "firearm to advance or further the crime, but it did not actually do so." Ibid. (emphasis added).¹

The Ninth Circuit similarly made a passing reference to "the intent of the defendant" in affirming a conviction under Section 924(c)(1)(A). United States v. Krouse, 370 F.3d 965, 967, cert. denied, 543 U.S. 988 (2004). But contrary to petitioner's assertion, the court did not "explicitly read a mens rea of" specific intent, of the sort petitioner posits, into the statute. Pet. 9. Rather, the Ninth Circuit "h[e]ld that sufficient evidence supports a conviction under § 924(c) when facts in evidence reveal a nexus between the guns discovered and the underlying offense" -- a holding that includes no reference to specific intent. Krouse, 370 F.3d at 968. The Ninth Circuit, moreover, relied on the Fourth Circuit's determination that "[Section] 924(c) requires

¹ Petitioner also cites (Pet. 9) United States v. Hamilton, 332 F.3d 1144 (8th Cir. 2003). There, the Eighth Circuit rejected a sufficiency-of-the-evidence challenge based in part on evidence that the defendant possessed the firearm "for protection." Id. at 1150. But the fact that the defendant's subjective intent that the firearm further the underlying offense is germane to whether the firearm in fact furthered the underlying offense does not mean that subjective intent is itself a required element of the offense.

the government to present evidence indicating that the possession of a firearm furthered, advanced, or helped forward, a drug trafficking crime," id. at 967 (quoting United States v. Lomax, 293 F.3d 701, 705 (4th Cir.), cert. denied, 537 U.S. 1031 (2002)) (brackets in original) -- a decision that petitioner recognizes (Pet. 16) did not impose a specific-intent requirement.

Finally, contrary to petitioner's contention (Pet. 7-8), the Tenth Circuit's decision in United States v. Basham, 268 F.3d 1199 (2001), cert. denied, 535 U.S. 945 (2002), does not conflict with the decision below. The Tenth Circuit in Basham considered a defendant's contention that the district court had "erroneously broadened the language of the offense" in Section 924(c)(1)(A) by including the factors outlined by the Fifth Circuit in Ceballos-Torres. Id. at 1206. The court rejected that contention and approvingly cited the Fifth Circuit's holding in Ceballos-Torres that Section 924(c)(1)(A) requires a showing that a defendant's "possession actually furthered the drug trafficking offense." Id. at 1207 (quoting Ceballos-Torres, 218 F.3d at 414). Although the Tenth Circuit's decision later referred to the required finding as a finding of "intent," id. at 1208, the defendant in the case had not argued for a specific-intent requirement, so the question presented here was not directly at issue, and the court had no

occasion to consider (or resolve) whether instructions like those here would have been sufficient.²

b. Petitioner asserts that the Second, Sixth, and Eleventh Circuits have adopted "contradictory stances" on the mens rea required in connection with the "'in furtherance of'" element of the offense. Pet. 11 (emphasis omitted). See also Pet. 6, 11-14. To the extent petitioner asks this Court to resolve asserted intra-circuit disagreement, such a request does not warrant review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam). In any event, none of the decisions petitioner cites (Pet. 11-14) addressed the specific-intent question he identifies in the petition. See United States v. Lewter, 402 F.3d 319, 322 (2d Cir. 2005) (stating that "'in furtherance' means that the gun afforded some advantage * * * relevant to the vicissitudes of drug trafficking," without discussing whether specific intent is required); United States v. Mackey, 265 F.3d 457, 461 (6th Cir. 2001) (stating that "Congress intended the 'in furtherance of' limitation to be a higher standard than 'during and in relation to,'" but not discussing whether specific intent is required), cert. denied, 534 U.S. 1097 (2002); United States v. Timmons, 283

² Petitioner observes that the Tenth Circuit in Basham noted "some tension" with the Fifth Circuit's decision in Ceballos-Torres. Pet. 7 (citation omitted). But that tension relates only to possible distinctions in the courts' respective understanding of the relationship between the "possession in furtherance of" and the "use in relation to" provisions of the statute, not to any matter related to specific intent. See Basham, 268 F.3d at 1207-1208.

F.3d 1246, 1253 (11th Cir.) (stating that “the prosecution [must] establish that the firearm helped, furthered, promoted, or advanced the drug trafficking” without discussing whether specific intent is required), cert. denied, 537 U.S. 1004 (2002).

3. Even if the circuits were in conflict about whether Section 924(c)(1)(A)’s “in furtherance of” provision imposes a specific-intent requirement, further review in this case would be unwarranted.

First, the difference between petitioner’s position and the court of appeals’ approach is slight and has little practical impact. “In any criminal case * * * the factfinder can draw inferences about a defendant’s intent based on all the facts and circumstances of a crime’s commission.” Rosemond v. United States, 572 U.S. 65, 78-79 n.9 (2014). If a defendant possessed a firearm that had the effect of furthering a crime of violence, a jury can, and very likely will, infer that the defendant intended that effect. As lower courts have recognized, adoption of petitioner’s position would thus be unlikely to make a difference in actual litigated cases. See Felton, 417 F.3d at 105 (“In practice, the same evidence tends to be relevant whether the ultimate test is objective furtherance or a subjective purpose to further. Similarly, in most cases the result will be the same, whichever ultimate test is used.”) (footnote omitted).

Indeed, adopting petitioner’s approach would likely not have changed the result in his own case. Petitioner abandoned his

initial claim that “he was hunting coyotes and an owl” -- the ostensible purpose for possessing the firearms -- and “later confessed to the extortion and [admitted] that he was at the barn to see whether Boardman had left the money.” Pet. App. 2a. As the court of appeals observed, “[t]he gun was loaded, was on Smith’s person, was not a gun he used to hunt, and was being carried as he approached the drop location.” Id. at 9a. Even if a specific-intent requirement applied, those facts would allow “a jury to infer that a firearm is possessed for protection of the profits of the crime.” Ibid.

Second, petitioner (Pet. 3) “accepts * * * as proper” the Fifth Circuit’s pattern jury instruction, which represents the law of the Fifth Circuit on this issue going forward and a challenge to which this Court has previously declined to review. See Harris v. United States, 135 S. Ct. 54 (2014) (No. 13-9686). Petitioner objected only to the additional sentence that the district court added to the pattern jury instructions in this case. Pet. App. 4a; see C.A. ROA 508. The Fifth Circuit made clear that the additional sentence, although not reversible error, “should not be used in this circuit.” Pet. App. 4a. Petitioner thus disputes a single sentence that will no longer be used by courts in the Fifth Circuit and that he does not allege is used by courts in any other circuit. That narrow, case-specific objection does not warrant this Court’s review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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