
No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

KENNETH KIRKLAND, PETITIONER,

vs.

UNITED STATES, RESPONDENT.

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a combination of parts designed or intended for use as a bomb can qualify as a "destructive device" under 18 U.S.C. § 921(a)(4) and 26 U.S.C. § 5845(f), and hence a firearm under 18 U.S.C. § 922(g)(1) and an unregistered firearm under 26 U.S.C. § 5861(d), when the defendant lacks one of the parts necessary to render the device functional.

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

Kenneth Kirkland petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

I.
OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, which is published at 909 F.3d 1049, is included in the appendix as Appendix 1.

II.
JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 28, 2018. *See* App. A001-10. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254(1).

III.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 922(g) provides, in pertinent part:

> **(g)** It shall be unlawful for any person—
> **(1)** who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
> . . .
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; . . . .

18 U.S.C. § 921(a) provides, in pertinent part:

> **(a)** As used in this chapter —
> . . .
> **(3)** The term "firearm" means (A) . . . or (D) any destructive device. . . .
> **(4)** The term "destructive device" means—
> **(A)** any explosive, incendiary, or poison gas—
> **(i)** bomb,
> **(ii)** grenade,
> **(iii)** rocket having a propellant charge of more than four ounces,
> **(iv)** missile having an explosive or incendiary charge of more than one-quarter ounce,
> **(v)** mine, or
> **(vi)** device similar to any of the devices described in the preceding clauses;
> **(B)** any type of weapon (other than a shotgun or a shotgun shell which the Attorney General finds is generally recognized as particularly suitable for sporting purposes) by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; and
> **(C)** any combination of parts either designed or intended for use in converting any device into any destructive device described in subparagraphs (A) or (B) and from which a destructive device may be readily assembled.

. . .

26 U.S.C. § 5845 provides, in pertinent part:

> For the purposes of this chapter—
> **(a) Firearm.—** The term "firearm" means (1) . . . and (8) a destructive device. . . .
> . . .
> **(f) Destructive device.—** The term "destructive device" means (1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellant charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device; (2) any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun or a shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes; and (3) any combination of parts either designed or intended for use in converting any device into any destructive device as defined in subparagraphs (1) and (2) and from which a destructive device may be readily assembled. . . .

26 U.S.C. § 5861 provides, in pertinent part:

> It shall be unlawful for any person—
> . . .
> **(d)** to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Records; or
> . . .

IV.

STATEMENT OF THE CASE

A. JURISDICTION IN THE COURTS BELOW.

The district court had jurisdiction under 18 U.S.C. § 3231. The court of

appeals had jurisdiction under 28 U.S.C. § 1291.

B. FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED.

While police officers were executing a search warrant at Petitioner's home, they discovered a partially constructed homemade bomb concealed inside a shoebox. App. A003. The device contained a battery box designed to hold eight C-cell batteries, which served as the device's power source; a radio frequency receiver to pick up the radio signal that would detonate the device; a detonator; wires to conduct electricity from the batteries to the detonator; and shotgun shells that served as the explosive main charge. App. A003.

The foregoing were all of the components needed for the device to function except for the eight C-cell batteries. App. A003. An explosives expert testified at trial that all Petitioner had to do to render the device functional was insert batteries into the battery box and connect the detonator to the power source. App. A003-04. The expert testified that process would take "a matter of minutes." App. A004. The batteries were missing, but trial testimony confirmed such batteries "are common household items readily available to an ordinary consumer." App. A007 (internal quotation omitted).

Based on this evidence, a jury convicted Petitioner of being a felon in possession of a destructive device, in violation of 18 U.S.C. § 922(g)(1), and possession of an unregistered destructive device, in violation of 26 U.S.C. §

5861(d).[1] App. A004. Petitioner filed an appeal in which he challenged the sufficiency of the evidence on the ground that the partial device he possessed did not qualify as a "destructive device."[2] App. A004. He argued that a combination of parts which are not actually assembled can qualify as a destructive device only if the government shows the defendant possessed all of the necessary components and that the government did not show that here because there was no evidence Petitioner possessed the eight C-cell batteries. *See* App. A038-43, A098-102. In support of this argument, he pointed to three separate cases from other circuits stating that the defendant must possess all of the necessary components. *See* App. A039 (citing *United States v. Posnjak*, 457 F.2d 1110, 1116 (2d Cir. 1972); *United States v. Malone*, 546 F.2d 1182, 1184 (5th Cir. 1977); and *United States v. Blackburn*, 940 F.2d 107, 110 (4th Cir. 1991)).

The Ninth Circuit rejected Petitioner's argument and affirmed the convictions. It held:

> The statute requires only that the defendant possess a combination of parts from which a functional device "may be readily assembled." As used in this provision, the term "readily" means quickly and easily: the combination of parts possessed by the defendant must be capable of being assembled into a functional device within a short period of time and with little difficulty – measures that may depend on the expertise of the defendant constructing the device.

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[1] The jury also convicted Petitioner of being a felon in possession of several ordinary firearms that were found in the house, also in violation of 18 U.S.C. § 922(g)(1), and being a felon in possession of explosives, in violation of 18 U.S.C. § 842(i)(1).

[2] Petitioner also raised several other claims which the court of appeals resolved in a separate unpublished opinion and which are not the subject of this petition. *See* App. A004.

> That requirement does not categorically exclude situations in which the assembly process entails the acquisition and addition of a new part. Thus, if the defendant lacks a part necessary to render the device functional, the "readily assembled" element can still be met so long as the defendant could acquire the missing part quickly and easily, and so long as the defendant could incorporate the part into the device quickly and easily.

App. A007. The court held this test was satisfied in Petitioner's case because "[t]he testimony at trial confirmed that those batteries are common household items 'readily available to an ordinary consumer.'" App. A007. The court reconciled the cases cited by Petitioner that state a defendant must possess every component, *see supra* p. 5, by creating an exception for the explosive material itself:

> The one exception involves the material necessary to bring a device within the coverage of § 921(a)(4) [or 26 U.S.C. § 5845(f)]. Subsection (A) covers any "explosive, incendiary, or poison gas" bomb, grenade, etc. At least two circuits have held that a conviction may not be sustained under subsection (C), which tracks the coverage of subsection (A), unless the defendant possesses the explosive material necessary to construct an operable explosive weapon. *See United States v. Blackburn*, 940 F.2d 107, 110 (4th Cir. 1991); *United States v. Malone*, 546 F.2d 1182, 1184 (5th Cir. 1977). The same would be true of the incendiary material or poison gas necessary to construct a weapon of that ilk. This exception does not apply here, as Kirkland does not dispute that he possessed the necessary explosive material in the form of a detonator and shotgun shells. (Footnote omitted.)

App. A008-09.

V.

ARGUMENT

A. THE COURT SHOULD GRANT THE PETITION BECAUSE THE LOWER FEDERAL COURTS ARE DIVIDED ON THE QUESTION OF WHETHER A COMBINATION OF PARTS CAN CONSTITUTE A DESTRUCTIVE DEVICE WHEN THE DEFENDANT LACKS ONE OF THE NECESSARY COMPONENTS.

As noted above, the Ninth Circuit in this case held that the "combination of parts" prong of the destructive device definition requires the defendant to possess only the component parts which are not readily available. In so holding, the court followed a Second Circuit opinion in *United States v. Sheehan*, 838 F.3d 109 (2d Cir. 2016). *See* App. A007. In *Sheehan*, the missing component was tape, and the court held the defendant could still be convicted because tape is "an ordinary household item." *Id.* at 125. It explained:

> [T]he only item necessary to convert the device . . . into a fully functional bomb was a piece of adhesive tape to connect the wires to the battery. Such an ordinary household item is not only present in virtually every American household – it was also readily available within the Home Depot outlet where the device was installed. Indeed, Sheehan's own expert acknowledged that there was tape around the device that could have been used to attach one of the wires from the pipe to the top of the battery. The language in *Posnjak* on which Sheehan relies makes sense when read to require that a "combination of parts" cannot be considered a destructive device based on the hypothetical possibility that the parts could be "readily" made into a bomb only if the defendant could obtain some crucial component that he did not possess and could not

> acquire without a "shopping trip." *See, e.g., United States v. Malone*, 546 F.2d 1182, 1184 (5th Cir. 1977) (holding that the defendant could not be convicted for possessing a combination of parts that can be readily assembled into a bomb where the defendant did not possess any explosive material, a key element required for the creation of a bomb). *Posnjak* cannot sensibly be read to require proof that the defendant already owned such a mundane and readily accessible "component" to be used in attaching the functional parts of the device to each other.

Sheehan, 838 F.3d at 125.

Sheehan was not the first court to so hold, moreover. It cited an unpublished Sixth Circuit opinion – *United States v. Crocker*, 260 Fed. Appx. 794 (6th Cir. 2008) (unpublished) – in which the Sixth Circuit similarly held that "this Court does not require showing possession of all commonly available materials when determining whether a destructive device could have been readily assembled." *Crocker*, 260 Fed. Appx. at 797, *quoted in Sheehan*, 838 F.3d at 125. *Crocker* was an extension of a prior published opinion in *United States v. Langan*, 263 F.3d 613 (6th Cir. 2001), in which the court held that "showing possession of pliers was unnecessary to demonstrate a device was readily convertible when pliers could have been used to solder insulated wires to a pager that was part of a detonating mechanism." *Crocker*, 260 Fed. Appx. at 797 (citing *Langan*, 263 F.3d at 626).

Other circuits have stated and reasoned differently, however. Initially, the Second Circuit opinion in *Posnjak* stated, "All of the necessary components 'from which a destructive device may be readily assembled' must be possessed in order to possess a 'destructive device' under subparagraph (3)." *Posnjak*, 457 F.2d at 1116. The Fourth Circuit has stated the same, namely, that "[a] defendant must possess *every* essential part necessary to

construct a destructive device." *Blackburn*, 940 F.2d at 110 (emphasis in original). Finally, the Fifth Circuit in *Malone* held "the defendant cannot be guilty of [possessing a destructive device] because he did not have in his possession all of the component parts from which a destructive device might be readily assembled." *Id.*, 546 F.2d at 1184.

The Ninth Circuit in the present case sought to distinguish *Malone* and *Blackburn* on the ground the missing component was the explosive material itself, characterizing that as "the one exception" to its general rule. App. A008. This ignores the statutory language, however. That language includes "any combination of parts . . . from which a destructive device may be readily assembled." 18 U.S.C. § 921(a)(4); 26 U.S.C. § 5845(f). As *Malone* pointed out, "[t]he words of the statute are 'from which a destructive device may be readily assembled', and not, as the government contends, 'from which a destructive device may be readily assembled with addition of other parts.'" *Id.* at 1184. The statutory language also draws no distinction between explosive parts and other parts.

The Ninth Circuit's effort to reconcile the split in the circuits therefore fails. First, there is the point made in the just-quoted language from *Malone*. Second, there is the complete absence of language drawing a distinction between explosive parts and other parts.

B. THE PETITION SHOULD BE GRANTED BECAUSE IT IS THE POSITION TAKEN BY THE NINTH CIRCUIT IN THE PRESENT CASE WHICH IS IN ERROR.

A second reason to grant the petition is that it is the interpretation of the Ninth Circuit in the present case, not the interpretation of the courts in *Posnjak*, *Malone*, and *Blackburn*, which is erroneous. First, there is the point made in the *Malone* opinion just quoted. To reiterate, "[t]he words of the statute are 'from which a destructive device may be readily assembled', and not, as the government contends, 'from which a destructive device may be readily assembled with addition of other parts.'" *Malone*, 546 F.2d at 1184.

Second, there is contrasting language in another provision of 26 U.S.C. § 5845. The subsection defining "machinegun" includes not just "combination of parts" language like the "combination of parts" language in the "destructive device" subsection, but also additional language targeting individual parts, to wit, "any part designed and intended solely and exclusively . . . for use in converting a weapon into a machinegun." 26 U.S.C. § 5845(b). This additional language in the machinegun subsection triggers the principle that the use of limiting or broadening language in one statutory provision and the failure to use the limiting or broadening language in a second statutory provision evidences an intent that the limitation or broadening not apply to the second provision. *See, e.g., United States v. Johnson*, 529 U.S. 53, 57-58 (2000).

Third, the test created by the Ninth Circuit in its opinion here creates serious line-drawing problems which the Ninth Circuit dismissed too easily. It

reasoned:

> Whether a particular combination of parts may be "readily assembled" into an operable device is an inherently factbound issue that juries will have to resolve on a case-by-case basis. With one exception [for explosive material], no bright-line rules can be drawn declaring which components of a destructive device must be in the defendant's possession in order for a conviction to be sustained. That will depend in every case on both the nature of the parts the defendant has already assembled and the ease with which the defendant could acquire and incorporate any missing parts. At the end of the day, regardless of which components are missing from the device, the ultimate question will be the same: Can the missing parts be obtained quickly and easily, and if so, can they quickly and easily be incorporated to render the device functional?

App. A008.

This may eliminate the line-drawing problem for the courts, but it lets different juries draw the line differently in identical cases. One jury might decide a particular missing component – perhaps not batteries, but something a bit less common – *is* readily available. Another jury might decide the exact same component is *not* readily available. The result will be one defendant being convicted while another defendant who engaged in identical conduct is acquitted.[3]

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[3] The Ninth Circuit's analysis also offered a somewhat result-oriented rationale by complaining that "[r]eading the statute to require possession of *every* necessary component, even a single item that could be readily obtained, would defeat the flexibility Congress sought to build into the statutory scheme and 'would foster easy evasion to thwart the Congressional intent.'" App. A009 (emphasis in original) (quoting *United States v. Shafer*, 445 F.2d 579, 583 (7th Cir. 1971)). It rejected Petitioner's interpretation as "at war with Congress' purpose in enacting the 'combination of parts' provision," which it viewed as "to protect the public from the danger posed by military-style weaponry and 'the street variety of homemade instruments and weapons of

Finally, to the extent the statutory language might leave doubt, there is what this Court has described as the "venerable rule of lenity," *United States v. R.L.C.*, 503 U.S. 291, 305 (1992). This rule requires that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971). The rule, as eloquently put by Judge Friendly and this Court, is "rooted in '"the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should."'" *R.L.C.*, 503 U.S. at 305 (quoting *United States v. Bass*, 404 U.S. 336, 348 (1971), and H. Friendly, *Benchmarks* 209 (1967)). Petitioner and other defendants should not be required to languish in prison based on ambiguous statutory language which applies only if the courts read language into the statute which is not there.[4]

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crime and violence.'" App. A009 (quoting *United States v. Peterson*, 475 F.2d 806, 810 (9th Cir. 1973)).

This reasoning suffers from two flaws. First, varying from statutory language based on assumptions about Congress' purpose can be a dangerous venture. Second, this analysis ignores a competing purpose that Congress had – that lawful explosive materials such as dynamite and shotgun shells not be swept into the statute too easily. *See Posnjak*, 457 F.2d at 1115-16 (discussing limits on inclusion of commercial dynmite).

[4] Applying the rule of lenity does not mean unlawful conduct with explosives will be completely unconstrained, moreover. As the Second Circuit noted in *Posnjak*, there are a multitude of other regulations and statutes governing conduct with explosives. *See id.*, 457 F.2d at 1120-21. The present case is actually a good illustration of this. Vacating Petitioner's destructive device convictions will leave standing two other convictions, including a conviction for being a felon in possession of explosives, *see supra* p. 5 n.1. The only effect on his total sentence will be to eliminate a sentencing guidelines offense level increase for possession of a destructive device. *See* App. A043-44 & n.9, A102-03.

C. THE PETITION SHOULD BE GRANTED BECAUSE THE PRESENT CASE IS AN EXCELLENT VEHICLE FOR RESOLVING THE SPLIT IN THE LOWER COURTS.

Finally, the present case is an excellent vehicle for resolving the conflict in the courts of appeals. On the one hand, the batteries which were missing here are a good example of a common household item which is readily available for purchase in a multitude of places. On the other hand, as the power source for the device, the batteries are a key component. The batteries are not like the tape in *Sheehan* and *Crocker* or the pliers in *Langan*. The present case squarely presents the question of whether a non-explosives component that is nonetheless a critical component must be possessed or must simply be readily obtainable.

VI.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

DATED: January 31, 2019

s/ Carlton F. Gunn
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