

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

SKIP EARNEST RALPH LOMAX,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

- I. Did the court below err in finding that the firearms-trafficking enhancement applied when Mr. Lomax did not know that that confidential informant purchasing the firearms was a convicted felon or that his use of the firearms would be unlawful.

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

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PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

On December 12, 2018, the court of appeals entered its opinion and judgment affirming the judgment of the district court sentencing Skip Earnest Ralph Lomax to concurrent sentences of 151 months' imprisonment for a controlled substance offense and 120 months' imprisonment for weapons charges. *United States v. Lomax*, 910 F.3d 1068 (8th Cir. 2018). A copy of the opinion is attached at Appendix ("App.") A.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 2018. A petition for en banc or panel rehearing was timely filed on January 16, 2019. On February 14, 2019, an order was entered denying the petition for rehearing. *See* App. B. This petition is timely submitted. Jurisdiction to review the judgment of the court of appeals is conferred upon this Court by 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The Petitioner refers this Honorable Court to the following statutory provisions:

18 U.S.C. § 922(g)(1):

(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; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

26 U.S.C. § 5861(d):

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 record—

STATEMENT OF THE CASE

1. Skip Earnest Ralph Lomax pleaded guilty to distributing methamphetamine in violation of 21 U.S.C. § 841(a)(1), being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), and for possessing a firearm and destructive device that was not registered with the National Firearms Registration and Transfer Record (“NFRTR”) in violation of 26 U.S.C. §§ 5841, 5861(d) and 5871. He was sentenced to 151 months in prison for distributing methamphetamine after the district court applied the firearms-trafficking enhancement under U.S.S.G. § 2K2.1(b)(5). He was also sentenced to 120 months’ imprisonment on the remaining counts, with all terms to run concurrently. The district court found that Mr. Lomax transferred two or more firearms, which included a grenade, to a confidential informant (“source”) when he knew or had reason to believe the source’s “possession or receipt of the firearm would be unlawful.” *See* U.S.S.G. § 2K2.1, cmt. n.13(A)(ii)(I).

Mr. Lomax argued on appeal that the district court committed procedural error by incorrectly designating him as a trafficker of firearms because he did not know nor did he have reason to believe that the source’s possession was unlawful as defined under the United States Sentencing Guidelines § 2K2.1, cmt. n.13(B). He asserted that the commentary to the guideline requires that he be aware that the individual purchasing the firearms has a prior criminal conviction for certain crimes or be aware that the individual intended to use or dispose of the firearms unlawfully. Nothing in the record speaks to Mr. Lomax’s knowledge of the source’s criminal history or his unlawful intent with regard to the grenade or other firearms. Therefore, he argued

that because the full range of conduct proven by the Government did not show that he knew that the source's possession of the firearms would be unlawful, the enhancement is inapplicable. If the Court had agreed with him, Mr. Lomax's guideline range would have been significantly lower—97 to 121 months' imprisonment rather than 151 to 188 months.

2. At the sentencing hearing, the Government presented the testimony of Federal Bureau of Investigations Agent Micah Sexton to prove that the purchaser of the grenade was a felon. Agent Sexton contended that the source had been a convicted felon for “quite a while.” The Government argued that while it did not know the extent of Mr. Lomax’s knowledge at the time he sold firearms to the source, the source was a convicted felon who could not legally purchase firearms. The district commented that people should not possess grenades and concluded that the four-level enhancement for trafficking firearms under § 2K2.1(b)(5) was appropriate.

3. Mr. Lomax appealed his sentence to the Eighth Circuit Court of Appeals. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, which gives it jurisdiction over all final decisions of the district courts of the United States. The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231.

4. In a 2-1 opinion, the Eighth Circuit upheld the firearms-trafficking enhancement under a different rationale than the one articulated by the district court, concluding that the facts presented “satisf[ied] the unlawful use prong.” *Lomax*, 910 F.3d at 1070; App. A. The court went on to conclude that, based on the

circumstances surrounding the sale of the firearm and hand grenade, Mr. Lomax “had reason to believe that the source intended to use the weapons unlawfully.” *Id.* The court determined that because neither the firearm nor grenade were registered under the NFRTR, as required by law, it rendered possession of the weapon by both Mr. Lomax and the source unlawful. *Id.* (citing 26 U.S.C. § 5861(d); *United States v. Pepper*, 747 F.3d 520, 525 (8th Cir. 2014)). The court reasoned that Mr. Lomax “had reason to believe that the [source], whose mere possession of the weapon was unlawful, also intended to use the weapons unlawfully” based on the clandestine nature of the sale, in which Mr. Lomax and the source met in their vehicles in the middle of an open field to exchange \$1000 in cash for an unregistered, military-style weapon. *Id.*

5. In her dissenting opinion, Judge Kelly recognized that the firearms-trafficking enhancement is narrowly tailored. *Id.* It is applicable if the defendant “knew or had reason to believe that [his] conduct would result in the transport, transfer, or disposal of a firearm to” one of two types of individuals: “(I) [an individual] whose possession or receipt of the firearm would be unlawful; or (II) [an individual] who intended to use or dispose of the firearm unlawfully.” *Id.* (citing U.S.S.G. § 2K2.1 cmt. n.13(A)(ii)). Judge Kelly noted that the panel majority relied on the use prong of the statute because the firearms were unregistered. However, she opined that a purchaser’s desire to possess an unregistered firearm does not necessarily reveal that he intends to use the firearm unlawfully. *Id.* at 1071.

Mr. Lomax filed a timely petition for rehearing that was denied on February 14, 2019. App. 6A. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

This case presents the important issue of whether a district court has an obligation to correctly determine whether the firearms-trafficking enhancement under § 2K2.1(b)(5) of the guidelines applies to a defendant who is neither aware of the purchaser's status as a felon nor aware that the purchaser intends to use the weapon unlawfully. Although the Government could not prove either scenario, the Eighth Circuit summarily concluded that Mr. Lomax was a trafficker of firearms. Based in its determination that the clandestine nature of the sale revealed circumstances that satisfied the use prong of § 2K2.1, cmt. n. 13(A)(ii). The nature of the sale does not necessarily show that Mr. Lomax was aware that the source's use of the weapons would be unlawful.

Certiorari is warranted to correct a misapplication of the guideline enhancement for firearms trafficking.

I. This Court should resolve the important issue of whether the firearms-trafficking enhancement applied when Mr. Lomax did not know that that confidential informant purchasing the firearms was a convicted felon or that his use of the firearms would be unlawful.

In a 2-1 published decision, a panel majority of the Eighth Circuit upheld the district court's judgment sentencing Appellant Skip Earnest Ralph Lomax to concurrent sentences of 151 and 120 months in prison after finding that he qualified for the four-level enhancement for firearms trafficking under U.S.S.G § 2K2.1(b)(5) based upon the sale of two unregistered firearms to a known felon whose use would be unlawful. Mr. Lomax maintains that the Government failed to prove that he knew

the purchaser of the weapons was a felon or that he had any reason to believe that the source would use the weapons unlawfully.

Mr. Lomax asserts that enhancement is proper “[i]f the defendant engaged in the trafficking of firearms.” U.S.S.G. § 2K2.1(b)(5). A defendant engaged in the trafficking of firearms if he:

(A)

- (i) transported, transferred, or otherwise disposed of two or more firearms to another individual, or received two or more firearms with the intent to transport, transfer, or otherwise dispose of firearms to another individual; and
- (ii) knew or had reason to believe that such conduct would result in the transport, transfer, or disposal of a firearm to an individual--
 - (I) whose possession or receipt of the firearm would be unlawful; or
 - (II) who intended to use or dispose of the firearm unlawfully.

U.S.S.G. § 2K2.1, cmt. n.13(A).

The panel majority found that Mr. Lomax’s conduct satisfied subpart (II) of the enhancement because he had reason to believe the source intended to use the weapons unlawfully for two reasons. *Lomax*, 910 F.3d at 1070. First, it determined that two of the firearms were unregistered with the NFRTR pursuant to 26 U.S.C. § 5861(d). *Id.* Second, it ruled that the clandestine nature of the transaction, in which Mr. Lomax and the source met in an open field for the sale of dangerous, military-style weapons, gave Mr. Lomax reason to believe the source intended to use the weapons unlawfully. *Id.* However, the Government never identified the illicit use

that Mr. Lomax believed the source would make of the firearms, and therefore, the facts are insufficient “to show that Lomax had reason to believe that the purchaser intended to ‘use’ the firearms in some unlawful manner, as opposed to merely possess them.” *Id.* at 1072 (Kelly, J., dissenting).

The panel majority’s decision sets a precedent that will allow any activity that would satisfy unlawful possession under subpart (I) of the enhancement to also constitute unlawful “use” under subpart (II). It also allows the district court to apply the enhancement even if the Government fails to show the illicit use that Mr. Lomax believed the source would make of the firearms. This case accordingly presents a question of exceptional importance that merits review.

In her dissenting opinion, Judge Kelly reasoned that “a purchaser’s desire to *possess* an unregistered firearm is not sufficient to infer that the purchaser “intend[s] to *use* . . . the firearm unlawfully.” *Id.* at 1071. Judge Kelly points out that use and possess are not interchangeable, otherwise, any activity that satisfied unlawful possession in subpart (I) would also satisfy use in subpart (II). *Id.* (citing *Bailey v. United States*, 516 U.S. 137, 143 (1995) (deciding that use must connote more than mere possession of a firearm)). This Court in *Bailey* found that use of a firearm required that it be actively deployed. 516 U.S. at 147. In *Bailey*, this Court reasoned that “‘use’ impl[ies] action and implementation.” 516 U.S. 137, 145. Like the trafficking enhancement, 18 U.S.C. § 924(c)(1) employs the term “use” in close proximity to other terms that would be rendered superfluous if “use” encompassed mere possession. *Id.* at 145–46. “Use” of a firearm requires the firearm to be “actively

employed.” *Id.* at 147. The distinction between “use” and “possession” applies with equal force in § 2K2.1. *See also* U.S.S.G. § 2A4.1, cmt. n.2 (“A dangerous weapon was used’ means that a firearm was discharged, or a ‘firearm’ or ‘dangerous weapon’ was ‘otherwise used’ (as defined in [§ 1B1.1]).”); U.S.S.G. § 1B1.1, cmt. n.1(I) (2016) (““Otherwise used’ with reference to a dangerous weapon (including a firearm) means that the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or other dangerous weapon.”).

“Use” and “possess” have different meanings. “Use” means “to put into action or service” or to “employ” the object in question, *Use*, Merriam-Webster’s Collegiate Dictionary (11th ed. 2012), which is distinct from mere possession. “Use” and “possess” appear in § 2K2.1 multiple times; inclusion of both terms would be unnecessary if they were interchangeable. *See, e.g.*, U.S.S.G. § 2K2.1(b)(6)(B) (“If the defendant . . . used or possessed”); U.S.S.G. § 2K2.1(c)(1) (“If the defendant used or possessed”). Otherwise subpart (I) of the enhancement is rendered superfluous. The possession of a firearm by a person with almost any felony conviction—not just one of the listed types that trigger application of subpart (I)—is unlawful. *See* 18 U.S.C. § 922(g)(1). If any unlawful possession can trigger the “use” prong, then any activity that would satisfy subpart (I) would also constitute unlawful “use” under subpart (II).

Lomax, 910 F.3d at 1071.

The Government must present some evidence about what the defendant knew regarding the purchaser’s plans for the firearm. Here, the Government never identified what illicit use Mr. Lomax might believe the source would make of the firearms, making application of the enhancement improper. *United States v. Harris*, 719 F. App’x 946, 950 (11th Cir. 2018) (per curiam); *see also United States v. Green*, 360 F. App’x 521, 525 (5th Cir. 2010) (per curiam) (vacating sentence where “[t]he record is silent about what [the defendant] knew, or had reason to believe, with

regard to [the purchasers'] plans for the guns"). Although the lower court characterized the sale as "clandestine," the facts underlying that characterization are not sufficient to show that Mr. Lomax had reason to believe that the source intended unlawful use of the firearms, as opposed to merely intending to possess them.

Mr. Lomax asserts that the panel majority's ruling is in error and urges the Court to hear his case because his guideline range was significantly increased due to this error.

CONCLUSION

For all of the foregoing reasons, Petitioner Skip Earnest Ralph Lomax respectfully requests that this Court grant the petition for a writ of certiorari, and accept this case for review.

DATED: this 13th day of May, 2019.

Respectfully submitted,

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