No.:

In the Supreme Court of the United States

Phillip Blough
Petitioner,

v.

The United States of America
Respondent.

On Petition for Writ of Certiorari to the U.S Court of Appeals for the Sixth Circuit

Petition for a Writ of Certiorari

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Question Presented for Review

A common-sense extension of the right to a trial by jury is the right to a jury informed of relevant and non-confusing jury instructions. Here, the trial court read the jury an instruction non germane to the case at bar, that hinted at further criminal conduct. Should this Court hear this cause?

Parties to the Proceeding and Rule 26.9 Statement

Petitioner and defendant-appellant below, Phillip Blough, is an individual person and United States domiciliary. The respondent, here, and the plaintiff-appellee below is the U.S. Pursuant to S.Ct.R. 26.9, both parties, the U.S. and Phillip Blough are non-corporate entities, and have no corporate disclosures to make.

List of Related Proceedings

There are no proceedings that qualify as "related proceedings" under Rule 14 of this Court's rules of practice.

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Petition for a Writ of Certiorari

Petitioner Phillip Blough petitions for a writ of certiorari to review the decision of the U.S. Court of Appeals for the Sixth Circuit, affirming the Northern District of Ohio's order convicting and sentencing him for various charges described below.

Opinions Below

The Sixth Circuit's Decision decision dated October 26, 2020 is unreported and reproduced in Appendix A.

Jurisdiction

This Court's jurisdiction rests on 28 U.S. Code § 1254, allowing a writ to issue relative to the final decision of a U.S. Court of Appeals.

Constitutional and Statutory Provisions

This Cause turns on the right to a trial by jury, who received proper and accurate jury instructions. The argument merits Sixth Amendment analysis.

Reasons for Granting the Writ of Certiorari

Procedural Posture and Factual Background

This cause involves Phillip Blough, who was young, wrapped up in a drug collective, and who had a few rural firearms, unrelated to the drug collective. On January 17, 2018, the federal government filed an Indictment against Blough. [R.E. 10, Page ID #45.] The Indictment presented that Blough committed a violation of 18 U.S.C. 924 (c)(1)(A)(i),

Possession of Firearms in Furtherance of Drug Trafficking Crime, among other charges. [R.E. 10, Page ID #90.] Blough took the matter to a trial, the jury convening on November 5, 2018.

The trial turned largely on testimony from state and federal law enforcement. At that trial, Special Agent Brindza of the FBI testified that he was involved in a wiretapping operation that targeted Karla Hernandez-Salazar, a suspected drug trafficker in the Canton area. [R.E. 325, Transcript of Jury Trial, PageID# 2612.] Through the wiretap investigation, Agent Brindza learned that Blough, was in contact with Hernandez-Salazar. [Id. at 2616.] The wiretap yielded information about text messages between Blough and Hernandez-Salazar where they discussed Blough buying cocaine from Hernandez-Salazar. [Id. at 176.] According to testimony from Heather Blohm, a Medway Drug Enforcement Agency officer, Blough and Hernandez-Salazar texted back and fourth on October 11, 2017. [Id. at 2635.] Officer Blohm also viewed a pole camera that was posted outside of Hernandez-Salazar's residence, and in reviewing those videos she observed Blough pull into the driveway of the residence, get out of his car, and leave promptly. [Id. at 2653-54.] Agent Josh Hunt, of the Medway Drug Enforcement Agency, testified that his role in the investigation into Blough was to conduct physical surveillance of Blough as he went to Massillon to Hernandez-Salazar's residence. [R.E. 325 PageID# 2673.] This portion of the investigation yielded no firearms evidence.

Law enforcement secured and executed a

search warrant based on their observations, locating drugs and firearms. In addition to physical surveillance, Agent Hunt executed a search warrant at Blough's residence, a bucolic sustinance farm that Blough shared with his father, south of Canton, in the rural Village of Smithville, Wayne County, Ohio. [Id. at 2693-94.] As a result of the search warrant, agents located cocaine and several firearms in Blough's bedroom. [Id. at 2703.] Agents also located a surveillance camera that pointed inside of Blough's bedroom. [Id. at 2703.] Agent Hunt agreed that people who reside in Wayne County owned guns for hunting and personal protection. [R.E. 326 PageID# 2742.]

Blough was a low man on the totem pole of this drug collective, and his firearms showed a zero connection to the collective, let alone a connection beyond a reasonable doubt. Agent Hunt agreed that Blough was, in fact, on the lowest level of 13 individuals indicted from the investigation. [Id. at 2749.] Hunt further indicated that Blough was cooperative at the time the search warrant was executed at his residence, indicating to officers where the drugs and firearms were located. [Id. at 2753-58.] While the agents were at Blough's residence, they learned that he would be fronted the drugs he sold because he did not have money to pay for them. [Id. at 2765.] Finally, when the authorities detained Blough, he did not have a firearm on his person. [Id. at 2769.] Agent Troutman, of the FBI task force, was involved in the search warrant at Blough's residence. [RE. 326, PageID# 2771.] During the search warrant, Agent Troutman

collected and photographed the firearms that were located, including a shotgun and a rifle located outside of the bedroom. [Id. at 2774.] The authorities found a handgun in a dresser drawer, in a separate drawer from where they found cocaine. [Id. at 2778, 2780.] Another handgun and a rifle, authorities located in the bedroom closet along with a handgun (in a holster) was under a mattress. [Id. at 2783, 2786.] In addition to the guns and the cocaine, the authorities found and seized $1,000.00 in cash. [Id. at 2791.]

During cross-examination, Agent Troutman indicated that Blogh's firearms were hunting and sport pieces, common to rural households. Agent Banbury of the Ohio Department of Wildlife testified for the government, and he agreed an individual could own and use the firearms located at Blough's residence on private property. [Id. at 2862.] Furthermore, Banbury stated that the weapons located at Blough's residence could be used to hunt groundhogs or other wildlife on private property. [Id. at 2864.] Blough called one witness in his defense. Bruce Blough, Phillip Blough's father, testified that his son lived with him in Smithville at his home. He proffered that they lived on an 8-acre parcel of property, and that he had a large garden where he grew vegetables. [R.E. 326, PageID# 2873.] Mr. Blough had issues with groundhogs over the years eating the vegetables that he planted. [Id. at 2873.] According to Mr. Blough, Phillips Blough had to keep all his guns in his room, as Bruce Blough did not like guns laying around the house. Mr. Blough proffered that he engaged in target shooting with his son once,

but that Phillip Blough would often sport shoot with his girlfriend. [Id. at 2877-78.] Mr. Blough further stated that his son would attempt to shoot groundhogs that threatened their garden. [Id. at 2879.] According to Mr. Blough, Phillip Blough's dog stayed inside his room when he was not at home, and Phillip Blough installed the camera so he could talk to his dog and keep an eye on him. [Id. at 2881-84.]

The Jury found Phillip Blough guilty on November 7, 2018 of all counts contained in the indictment. [R.E. 238-243.] On February 20, 2019, the Court sentenced Blough to a term of seventy-six (76) months in prison. [R.E. 328, PageID# 55.] Thereafter, Blough took appeal on March 6, 2019. [R.E. 309.] The U.S. Court of Appeals for the Sixth Circuit affirmed the conviction and sentence on October 26, 2020.

This petition follows, urging this Court to assume jurisdiction.

Law & Discussion

Standard of Review: Looking to the points of law within the Sixth Circuit, Courts review a district court's jury instructions for abuse of discretion. *United States v. Prince*, 214 F.3d 740, 761 (6th Cir.2000). A court may reverse on the grounds of an improper jury instruction "...only if the instructions, viewed as a whole, were confusing, misleading, or prejudicial." *United States v. Harrod*, 168 F.3d 887, 892 (6th Cir.1999).

Issue and Summary of Argument: A common-sense extension of the right to a trial by jury is the right to a jury informed of relevant and non-confusing jury instructions. Here, the trial court read the jury an instruction non germane to the case at bar, that hinted at further criminal conduct. More than that, however, Blough posits that the present standard for determining the validity of jury instructions has no constitutional basis and is in rather pressing need of same. Should this Court hear this cause?

Argument

The issue, here, is whether the District Court erred in granting the Government's request for a non-pattern jury instruction. This turns on four words: "in the furtherance of" relative to Blough's firearms and the drug collective. At the conclusion of the presentation of evidence, the District Court gave comprehensive jury instructions for all counts charged in the Indictment. With respect to the term

"in furtherance of," the District Court gave the following factors for the jury to consider: (1) whether the firearm was strategically located so that it was quickly and easily available for use, (2) whether the firearm was loaded, (3) the type of weapon, (4) whether possession of the firearm was legal, (5) the type of drug trafficking crime, and (6) the time and circumstances under which the firearm was found. [R.E. 327, PageID# 2944.] These instructions were taken verbatim from the Sixth Circuit Pattern Jury Instructions. But the District Court then deviated from the pattern instructions, stating, "You may also consider whether the defendant possessed a firearm for protection against robbery in the context of an ongoing narcotics distribution operation." [Id. at 2944-45. Blough objected to this final instruction prior to it being read to the jury. [Id. at 2919.] The instruction was misleading, confusing, and prejudicial, and as stated above, a reviewing court may reverse if the jury instructions, viewed as a whole, were misleading, confusing, or prejudicial. *Harrod*, infra. Blough further contends that the addition of a non-pattern jury instruction, regarding the possession of a firearm used to protect against a robbery, was prejudicial and should have been excluded.

In the case below, the government based its argument on three holdings—*Kelsor*, *Swafford*, and *Couch*—all of which hit wide of the mark when it comes to their application to Blough's case, the issue of the nexus between drug trafficking and firearms under 18 U.S.C. Sec. 924(c), and whether a jury instruction allowing a fear of robbery to establish

that nexus is appropriate. *Kelsor*, infra, dealt with a fact pattern in which a defendant, among other things, offered illegally to sell a firearm to settle a drug debt. *Swafford* infra involved the issue of expert testimony from a police officer as to the "in the furtherance of" nexus and found the nexus test satisfied in part where Swafford, the defendant, could not lawfully own a gun. *Couch* involved a firearm in an area in which the defendant dealt drugs. All three deal with circumstances over and beyond Blough's case, that is: firearms in a rural residence not tied to or present during any particular drug transaction, let alone any enterprise.

United States v. Kelsor, 665 F.3d 684 (6th Cir. 2011) provided the following instructive principle of law and nexus between firearm and robbery upon which the government and the defense agreed below. According to the Court, "[i]n the context of § 924(c), the term *in furtherance of* means that the weapon must promote or facilitate the crime." *Kelsor* at 692, internal quotations omitted, italics added, quoting *United States v. Mackey*, 265 F.3d 457, 461 (6th Cir. 2001), some internal quotations omitted. The Court further explained that "...possession of a firearm on the same premises as a drug transaction would not, without a showing of a connection between the two, sustain a § 924(c) conviction." Id., citations omitted. So "[i]n order for the possession to be in furtherance of a drug crime, the firearm must be strategically located so that it is quickly and easily available for use." Id., citations omitted. And both parties, here, agree that "[o]ther relevant factors include whether the gun was loaded, the type of weapon, the legality

of its possession, the type of drug activity conducted, and the time and circumstances under which the firearm was found." Id., quotations and citations omitted.

Applying the above principles, the Court addressing *Kelsor* found as follows: "[i]n this case, there was ample evidence from which a rational trier of fact could conclude that defendant possessed the firearms in furtherance of the drug offenses, and that the firearm's presence in the vicinity of the crime was something more than mere chance or coincidence." Id., quotations omittted, quoting *United States v. Combs*, 369 F.3d 925, 933 (6th Cir. 2004). The Court based its holding on the following facts:

> Defendant was arrested at the Kossuth address, which had been leased by him and was his primary residence until October 2007. After he and Bankston began living at the Hamilton address, they still went to the Kossuth address every day to engage in heroin distribution activities and would close up shop in the evening. Collins and Woodson testified that defendant told them that he kept the firearms in case someone tried to rob

him. Woodson also feared being robbed, and began sleeping with the Rexio revolver after defendant and Bankston began staying at the Hamilton address. In fact, agents found the Rexio revolver on the bed. The Hi Point semiautomatic pistol was found on the top shelf of the living room closet, which was the same closet where agents found the 16 grams of heroin, a scale, and packaging materials. Bankston testified that the firearms would be at the card table while they prepared heroin for distribution, usually right next to defendant, and that she saw both defendant and Woodson handle the firearms.

By way of foundation, Wood testified that on one occasion when he and Coon drove to Columbus to obtain heroin from defendant, Coon had a silver and black .380

> caliber handgun with him. When they got there, Coon got out of the car with money and the handgun and returned to the car with the heroin and without the handgun. Then, over defense counsel's continuing objection, Wood testified as follows:
>
> Q: At any point in time, sir, did Mr. Coon explain to you why he brought that .380 with him?
>
> A: Yes he did.
>
> Q: What did he tell you?
>
> A: He was short on his money, his part of the money, and he had asked Ron [Kelsor] if he would take the gun in exchange for the rest of the money that he owed for the heroin.

United States v. Kelsor, 665 F.3d at 693-694, internal quotations omitted. There really cannot be a greater nexus than an arms-length transaction—not present in Blough's case.

United States v. Swafford does not deal with a nexus instruction, dealing more with the appropriateness of expert testimony to establish nexus. The only issue concerning jury instructions in *Swafford* came up as so:

> Agent Ledford testified on behalf of the government as an expert in the area of methamphetamine investigations. Properly qualified expert testimony is generally admissible if it will assist the trier of fact to understand the evidence or to determine a fact in issue. Our court regularly allows qualified law enforcement personnel to testify on characteristics of criminal activity, as long as appropriate cautionary instructions are given, since knowledge of such activity is generally beyond the understanding of the average layman.
>
> The recognized role of police officers as experts in cases such as this one requires that we find no

> error in the admission of Agent Ledford's testimony.

United States v. Swafford, 385 F.3d 1026, 1030 (6th Cir.2004), citing *United States v. Thomas*, 99 Fed. Appx. 665, 668-69 (6th Cir. 2004); *United States v. Bender*, 265 F.3d 464, 472 (6th Cir. 2001); Fed. R. Evid. 702.

The *Swafford* Court applied the nexus test above, and found that the following facts satisfied the test:

> In the present case, Swafford's .45 caliber pistol was strategically located so that it was quickly and easily available for use. The gun was found loaded, with its handle pointing up, within arm's reach of the bed where Swafford was lying. It can hold a large number of rounds, and because it is semiautomatic, it can fire these rounds in rapid succession. Agent Frank Ledford of the Drug Enforcement Administration testified that such weapons play a role in drug distribution, as dealers carry them for protection and intimidation purposes.

> Because Swafford had been convicted of a prior felony, his possession of the gun was unlawful. Finally, the gun was discovered as the officers executed a search warrant looking for drugs, which they ultimately found. Thus, each of the Mackey factors points to the conclusion that this weapon was possessed in furtherance of the drug offenses.

Swafford, 385 F.3d at 1029. *Swafford*, of course, differs substantially from the cause here insofar as (a) the dispositive issue concerning jury instructions is different from that in Blough's case and (b) in Swafford's being unable to own a gun being part of the gross factors that satisfied the nexus test.

United States v. Couch, 367 F.3d 557 (6th Cir.2004) does not provide an apt analogy either. *Couch* starts off with the same principle as the other cases supra, stating "[i]n order to prove that a defendant has violated section 924(c), the United States must prove that the firearm was possessed to advance or promote the commission of the underlying crime." *Couch*, 367 F.3d at 561, citing *United States v. Mackey*, 265 F.3d at 461; H.R. Rep. No. 105-344 (1997), 1997 WL 668339, at *11-12. Likewise, the *Couch* court uses the same nexus test and language from *Mackey.* But more beneficial to

the defense case, here, Couch went on to note, "...possession of a firearm in the same premises as the drug trafficking activities alone is insufficient to support a conviction under section 924(c)[.]" Id. The Court, however, identified that "...a jury can reasonably infer that firearms which are strategically located so as to provide defense or deterrence in furtherance of the drug trafficking are used in furtherance of a drug trafficking crime." Id.

The Couch court found the above test satisfied when it found the following facts:

> In this case, as discussed, a loaded assault riffle was in plain view at the location where the officers arrested Couch. Moreover, the police located an additional eleven guns in Couch's garage—the area where Couch's drug transactions were known to occur and where the officers located over 200 additional pills. Furthermore, the officers testified that at least one of the particular firearms discovered—the Smith & Wesson handgun—is commonly associated with drug trafficking crimes. Considering the foregoing, we conclude that any

> rational trier of fact could have concluded that the United States proved the elements of the crime beyond a reasonable doubt.

Couch, 367 F.3d at 561.

This fact pattern differs remarkably from Blough's. For among other reasons, Couch's drug collection screams "major trafficker" where Blough had barely above retail amounts. Couch's gun collection was likewise remarkable, compared to the few hunting and sport weapons that Blough kept. Moreover, Couch's fact pattern involves guns in the location at which Couch engaged in drug transactions—this fact not being part of Blough's case. At trial, there was no evidence introduced that Appellant Blough ever carried a firearm while transporting drugs. Further, there was no evidence that Blough ever engaged in violence or utilized the firearms to threaten or intimidate anyone. In addition, there was minimal evidence that serious drug trafficking was occurring where Blough's guns were stored. In the instant case, the District Court erred in granting the Government's request for the additional jury instruction regarding whether the firearms were possessed to prevent a robbery. Granting the instruction put impermissible weight on that factor to the detriment of Blough and gave extra weight to a factor that was not even given to the jury in the *Kelsor* case that the Government relied upon. In summary, the granting of the additional jury instruction, over Blough's objection, was confusing and prejudicial to him. As a result,

the conviction should be vacated and remanded for a new trial.

Looking to a basis for jurisdiction, here, one should note that the genealogy of *Kelsor* among the Sixth Circuit's jury instruction jurisprudence, does not have a solid constitutional root. Kelsor draws its conclusion from United *States v.* Harrod, 168 F.3d 887, 892 (6th Cir. 1999), back of which are two civil decisions: *Beard v. Norwegian Caribbean Lines*, 900 F.2d 71 (6th Cir. 1990) and *Kitchen v. Chippewa Valley Schools*, 825 F.2d 1004 (6th Cir. 1987), both of which cite the confusing, misleading, and prejudicial standard. Prior to that is another civil matter, *DSG Corp. v. Anderson*, 754 F.2d 678, 679 (6th Cir. 1985), which likewise does not posit a constitutional basis. Notably, *DSG* was a diversity case decided under Kentucky law, it does not mention a U.S. Constitutonal root, let alone one rooted in Sixth Amendment criminal rights, and as such one can conclude that the Kelsor genealogy begins without a Sixth Amendment progenitor.

This Court has jurisprudence on the issue from the first half of the 20th Century, but the case on point does not provide a Constitutional root. In the matter of *Bihn v. United States,* 328 U.S. 633 (1946), this Court addressed the following circumstances: Defendant-Bihn and another were convicted of conspiracy to violate the statute and regulations governing the rationing of gasoline pursuant to 18 U.S.C. § 88. Bihn's charge alleged that he stole gasoline ration coupons from a bank, transferred them to the co-conspirator, and the two shared the proceeds from the sales. Bihn appealed from his

conviction, and the circuit court sustained his conviction. The Court held that there was no direct evidence that defendant had stolen the coupons, only evidence from which such an inference could be drawn. Based on that evidence, the trial court instructed that it was not the jury's duty to find out who stole the coupons. The Court reversed defendant's conviction and determined that the portion of the charge constituted reversible error. The Court held that although the charge was not misleading or confusing to lawyers, the probabilities of confusion to a jury were likely and the charge was prejudicially erroneous. Notably, though, the decision came based on the then Harmless Error statute, 28 U.S.C.S. § 391, but not on a particular aspect of the Jury Trial right of the Sixth Amendment.

Indeed, going back prior to the framing of the Constitution, jury instructions receive little if any mention. Blackstone's Commentaries, which the Sixth Amendment later patterned with regard to indictments, presentments, and the right to a trial by jury (note, in Blackstone and the Sixth Amendment, the subjects appear in similar order), Blackstone does not mention charging or instruction a jury other than reading the articles of an indictment to a grand jury. See, William Blackstone, Commentaries, 4:298 – 307, stating "This grand jury are previously instructed in the articles of their enquiry, by a charge from the judge who presides upon the bench."

At this point, the constitutionality of jury instructions and an appropriate test for determining

jury instructions seems an open question. And the defense, here, does not suggest that "confusing, misleading, and prejudicial" are not good considerations—only that in a case such as this one, they may not go to the core of the confusion, that being reading of a charge, an element of which having nothing to do with the evidence. So to the current standard, for now, the defense might suggest adding the concept of prejudically "non germane" or prejudically "in-apropos"—that is, a court should not read a jury instruction that has less than a tenuous connection to the evidence in the cause—this matter had nothing to do with defending a robbery, as the District Court's instruction suggested—or is otherwise prejudicially "non germane" to or "in-apropos" of the core evidence of the case.

Conclusion

Based on the lack of constitutional authority on the issue and the existing test yielding bad results, the Petitioner urges this Court to assume jurisdiction over this cause and to hear it on its merits.

Respectfully Submitted,

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