

IN THE SUPREME COURT OF THE UNITED STATES

EDUARDO OCEGUEDA-RUIZ,
aka Miguel Cuenca-Sepulveda,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

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QUESTION PRESENTED FOR REVIEW

1. Does a person possess a firearm in furtherance of a drug trafficking crime, within the meaning of 18 U.S.C. § 924(c)(1)(A), when the person receives a firearm in a trade for drugs?

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

Petitioner, EDUARDO OCEGUEDA-RUIZ (hereinafter Ocegueda-Ruiz) respectfully prays that a writ of certiorari issue to review the order denying petition for initial hearing *en banc* and order granting the United States' motion for summary affirmance from the United States Court of Appeals for the Ninth Circuit entered on September 16, 2022.

OPINION BELOW

On September 16, 2022, the Ninth Circuit entered an order denying petition for initial hearing *en banc* and granting summary affirmance of Ocegueda-Ruiz's conviction for possession of a firearm in furtherance of a drug trafficking crime pursuant to 18 U.S.C. § 924(c)(1)(A). The

order is attached in the Appendix (App.) at page 1.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

STATUTORY PROVISIONS

The following relevant statutes are set out in full in the Appendix: 18 U.S.C. § 922, App. 2-23; 18 U.S.C. § 924, App. 24-32; 18 U.S.C. § 2315, App. 33-34; 18 U.S.C. § 2252A, 35-39; and 26 U.S.C. § 5861, App. 40-41.

STATEMENT OF THE CASE

Ocegueda-Ruiz was convicted and sentenced for possessing firearms in furtherance of drug trafficking crimes in violation of 18 U.S.C. § 924(c)(1)(A).¹ Section 924(c)(1)(A) states, in pertinent part: “any person who ..., in furtherance of [a drug trafficking] crime, possesses a firearm, shall, in addition to the punishment provided for such ... drug trafficking crime ...be sentenced to a term of imprisonment....”² App. 26.

¹ The underlying drug trafficking crimes were conspiracy to possess with intent to distribute and to distribute methamphetamine in Count 1, and possession with intent to distribute methamphetamine in Count 5 in violation of 21 U.S.C. §§ 841(a)(1) and 846. The conviction for possessing firearms in furtherance of those drug trafficking crimes is Count 20. The jury also convicted Ocegueda-Ruiz for felon in possession of a firearm and for illegal alien in possession of a firearm in Counts 21 and 22 in violation of 18 U.S.C. § 922(g). Neither the underlying drug trafficking convictions nor the other firearm convictions are involved in this petition.

² Section 924(c)(1)(A) provides for increasing consecutive terms of imprisonment depending on the presence of certain aggravating factors. *See*, 18 U.S.C. § 924(c)(1)(A)(i)-(iii), (B)(i)-(ii) and (C)(i)-(ii). App. 26. A five year consecutive term of imprisonment is the standard sentence under subparagraph (i) for possession of a firearm in furtherance of a drug trafficking crime. *Id.* Oceguedo-Ruiz was sentenced to the five-year (60 months) term of imprisonment under subparagraph (i), consecutive to a sentence of 150 months of imprisonment on his convictions for the underlying drug trafficking crimes. The district court also imposed 120

The § 924(c)(1)(A) charge resulted from a drug deal on September 26, 2014, in Butte, Montana. Ocegueda-Ruiz received a Springfield 9 millimeter semi-automatic pistol and a Springfield .40 caliber semi-automatic pistol from Martin Leland. In exchange, Ocegueda-Ruiz gave Leland four ounces of methamphetamine. Ocegueda-Ruiz was arrested shortly after the exchange.

In *Smith v. United States*, 508 U.S. 223 (1993), the Court held that providing a gun as payment for drugs constitutes a “use” of the firearm during and in relation to a drug trafficking offense under § 924(c)(1). *Id.* at 241. The Court later held that the converse does not constitute a “use” of the firearm in violation of § 924(c)(1)(A). *Watson v. United States*, 552 U.S. 74, 83 (2007). *Watson* held that “a person does not ‘use’ a firearm under § 924(c)(1)(A) when he receives it in trade for drugs.” *Id.*

In *Watson*, the Government expressed confidence, regardless of the Court’s holding, that *Watson* “could have been charged” with possession of a firearm in furtherance of a drug trafficking crime after Congress amended § 924(c)(1)(A) to include the crime of possession of a firearm in furtherance of a drug trafficking due to the Court’s decision in *Bailey v. United States*, 516 U.S. 137 (1995).³ *Watson*, 552 U.S. at 83 (quoting *United States v. Cox*, 324 F.3d 77, 83 n. 2 (2d Cir. 2003) (“For defendants charged under § 924(c) after [the post-*Bailey*] amendment,

months in prison for the other firearm convictions, to run concurrent with the 150 month sentence for the drug trafficking convictions.

³ *Bailey* held that “use” of a firearm under § 924(c)(1) requires “evidence sufficient to show an *active employment* of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense.” *Bailey*, 516 U.S. at 143 (emphasis in original). In other words, “‘use’ must connote more than mere possession of a firearm by a person who commits a drug trafficking offense.” *Id.*

trading drugs for a gun will probably result in ... possession [in furtherance of a drug trafficking crime]”)) (quotations in original).⁴ *Watson*, 552 U.S. at 83. The Court responded, stating, “[t]his may or may not prevail, and we do not speak to it,” thus, leaving the question presented here unresolved by the Court. *Id.*

The Ninth Circuit and all other circuits that have addressed the question presented here hold that a person’s receipt of firearms in trade for drugs constitutes a possession of the firearms in furtherance of a drug trafficking crime, and therefore, fits within the possession offense defined in § 924(c)(1)(A).⁵ On appeal, Ocegueda-Ruiz conceded that the Ninth Circuit’s panel decision in *Mahan* foreclosed any challenge to his § 924(c)(1)(A) conviction. *Mahan*, 586 F.3d

⁴ The Court noted that [i]n 1998, Congress responded to *Bailey* by amending § 924(c)(1). The amendment included who, “in furtherance of any [crime of violence or drug trafficking] crime, possesses a firearm.” 18 U.S.C. § 924(c)(1)(A). App. 26. The amendment did not touch the “use” prong of § 924(c)(1)(A). *Watson*, 552 U.S. at 77 n. 3.

⁵ See, *United States v. Mahan*, 586 F.3d 1185, 1189 (9th Cir. 2009), *cert. denied*, 562 U.S. 872 (2010) (“When a defendant accepts a gun as payment for his drugs, his sale-and thus his crime-is incomplete until he receives possession of the firearm. We fail to see how possession that completes a drug trafficking offense is not possession ‘in furtherance of’ a drug trafficking offense.”) (citing *United States v. Sterling*, 555 F.3d 452, 458 (5th Cir.), *cert. denied*, 556 U.S. 1253 (2009); *United States v. Dolliver*, 228 Fed.Appx. 2, 3 (1st Cir. 2007); *United States v. Luke-Sanchez*, 483 F.3d 703, 706 (10th Cir. 2007); *United States v. Boyd*, 209 Fed.Appx. 285, 290 (4th Cir. 2006); and *United States v. Frederick*, 406 F.3d 754, 764 (6th Cir. 2005)). *Mahan*, 586 F.3d at 1188. The Ninth Circuit wrote: “In light of the unanimity and clarity of our sister circuits’ precedent, we decline *Mahan*’s invitation to create a circuit split, and hold that a defendant who accepts firearms in exchange for drugs possesses the firearms “‘in furtherance of’ a drug trafficking offense.” *Id.* at 1189. See also, *United States v. Doody*, 600 F.3d 752, 756 (7th Cir.), *cert. denied*, 561 U.S. 1036 (2010) (receiving a firearm in exchange of drugs constitutes possession in furtherance of a drug trafficking crime); *United States v. Gardner*, 602 F.3d 97, 103 (2d Cir.), *cert. denied*, 560 U.S. 949 (2010) (“We join our sister circuits in concluding that when a defendant acquires a firearm using drugs as payment, he possesses that firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A).”); *United States v. Gurka*, 605 F.3d 40, 45-46 (1st Cir.), *cert. denied*, 562 U.S. 942 (2010) (same); *United States v. Miranda*, 666 F.3d 1280, 1284 (11th Cir.), *cert. denied*, 566 1002 (2012) (same); *United States v. Trotter*, 601 Fed.Appx. 721, 725 (10th Cir.2015) (same).

at 1189 (“a defendant that accepts firearms in exchange for drugs possesses the firearms ‘in furtherance of’ a drug trafficking crime.”). Nonetheless, Ocegueda-Ruiz urged the Ninth Circuit to revisit *Mahan* and hold that a drug dealer’s receipt of firearms in a trade for drugs does not constitute possession of the firearms in furtherance of a drug trafficking crime.

The Government moved for summary affirmance in light of *Mahan*. Ocegueda-Ruiz responded by filing a petition for initial hearing *en banc*, again urging a full court of the Ninth Circuit to revisit the holding in *Mahan*. The Ninth Circuit denied an initial hearing *en banc* and granted the Government’s motion for summary affirmance based on the *Mahan* decision. App 1.

Most circuit decisions that address this question give very little, to no, analysis to support the conclusion that receipt of firearms in trade for drugs constitutes possession of the firearms in furtherance of a drug trafficking crime. For example, the Ninth Circuit specifically addressed the Court’s decisions in *Watson* and *Smith*, stating,

Mahan cites a pair of Supreme Court opinions. He compares *Watson v. United States*, 552 U.S. 74, 128 S.Ct. 579, 169 L.Ed.2d 472 (2007), where the Court held that a defendant does not “use” a gun when he receives it in trade for drugs, to *Smith v. United States*, 508 U.S. 223, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993), where the Court held that a defendant does use a gun if he trades it to “purchase” drugs. *Watson*, however, interpreted only section 924(c)’s “use” prong. The government did not charge Mahan under section 924(c)’s “use” prong, however. Instead, it charged him under section 924(c)’s “in furtherance of” prong. Therefore, *Watson*’s holding does not control. Indeed, *Watson* expressly declined to discuss whether receiving guns in exchange for drugs violates the “in furtherance of” prong of section 924(c). Thus, these Supreme Court decisions shed no light on whether Mahan’s conduct falls within the “in furtherance of” prong of section 924(c).

Mahan, 586 F.3d at 1189.

Mahan rested its rationale on the Sixth Circuit's *Frederick* decision. *Id.* at 1188-89

(quoting *Frederick* 406 F.3d at 764). *Frederick* stated:

As a matter of logic, a defendant's willingness to accept possession of a gun as consideration for some drugs he wishes to sell does "promote or facilitate" that illegal sale. If the defendant did not accept possession of the gun, and instead insisted on being paid fully in cash for his drugs, some drug sales-and therefore some drug trafficking crimes-would not take place.

Id. As developed more fully below, *Mahan* and *Frederick* conflate receipt of a firearm with possession of the firearm.

Likewise, the Tenth Circuit in *Luke-Sanchez* reasoned that "[b]ut for the [the defendant's acceptance of pistols as payment], the crime of drug trafficking would not have occurred...." 483 F.3d at 706. The court stated that "the pistols were akin to a form of currency used to pay for illegal drugs all of which further and promote drug trafficking....[-] [a]ccordingly, the nexus between the drugs and the guns used to pay for them is sufficient, as a matter of law, to meet the 'in furtherance' prong of § 924(c)" *Id.* Based on *Frederick* and *Luke-Sanchez*, the Fifth Circuit in *Sterling* assumed without deciding that when a person receives firearms in trade for drugs, such conduct constitutes possession of the firearm in furtherance of a drug trafficking crime. *Sterling*, 555 F.3d at 458.⁶

The Second Circuit joined the other circuits "in concluding that when a defendant acquires a firearm using drugs as payment, he possesses that firearm in furtherance of a drug

⁶ In two unpublished opinions, the First Circuit and the Fourth Circuit followed the consensus in the circuits holding that receiving firearms in trade for drugs constitutes possession of the firearms in furtherance of a drug trafficking crime. *Dolliver*, 228 Fed.Appx. at 2; and *Boyd*, 209 Fed.Appx. at 290 ("Gillis's willingness to accept possession of firearms as payment for crack cocaine furthered and advanced the conspiracy to distribute crack cocaine because it facilitated transactions that might not have otherwise occurred.").

trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A).” *Gardner*, 602 F.3d at 103. *Gardner* reasoned, “[w]hether a person who acquires a gun with drugs does so in order to obtain the gun (as *Gardner* and *Gladden* did) or to sell drugs, that person furthers the sale of the drugs by possessing the gun because, in either case, but for the possession of the gun, the sale of drugs would not have occurred.” *Id.*

The First Circuit’s decision in *Gurka* followed the “growing consensus” among the circuit courts that bartering drugs for firearms constituted possession in furtherance.” 605 F.3d at 45 (quoting *Doliver*, 228 Fed.Appx. at 2). The First Circuit wrote:

To the extent that *Watson* has any bearing on *Gurka*’s claims, it is in the Supreme Court’s emphasis on the normal meaning of words, *see* 552 U.S. at 79, 128 S.Ct. 579, which only reinforces our conclusion. *Gurka*’s possession of the gun “furthered” the drug crime with which he is charged by the ordinary understanding of the term. “[W]hile it is not natural to say that a person who trades drugs for guns ‘uses’ the guns in the transaction, it is natural to say that a person who trades drugs for guns ‘possesses’ the guns ‘in furtherance of’ the transaction.” *Gardner*, 602 F.3d at 102-03.

Gurka, 605 F.3d at 45.

None of these circuit decisions address Congress’s historical practice of creating distinct crimes that differentiate the unlawful receipt of an item from unlawful possession of the same item. *See, e.g. Ball v. United States*, 470 U.S. 856, 859 (1985) (“It is clear that a convicted felon may be prosecuted simultaneously” for receipt of a firearm and for possession of “the same firearm,” “where a single act is relied upon to establish ... unlawful receipt and ... unlawful possession of the same firearm.”). For example, 18 U.S.C. § 922(g) makes it unlawful for certain listed persons to “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.” 18 U.S.C.A. § 922(g)(1)-(9) (emphasis added).

The circuit decisions place emphasis on the “in furtherance of” language, as opposed to the possession element of the offense. *See, Frederick*, 406 F.3d at 764 (“acquisition of a firearm for drugs is a sufficient ‘specific nexus’ between drugs and the guns to constitute possession ‘in furtherance of’ the drug sale.”); *Luke-Sanchez*, 483 F.3d at 706 (“the nexus between the drugs and the guns used to pay for them is sufficient, as a matter of law, to meet “the ‘in furtherance’ prong of § 924(c).”); *Sterling*, 555 F.3d at 458 (same); *Mahan*, 586 F.3d at 1187-90 (referring repeatedly to “the ‘in furtherance’ prong.”); *Doody*, 600 F.3d at 755 (“We have not previously addressed the question, but we have considered the ‘in furtherance’ prong of § 924(c) in other situations.”)

The only circuit decision that touches on Congress’s distinction between unlawful receipt crimes and unlawful possession crimes is the Seventh Circuit in *Doody*. There, the defendant argued “Congress intended to distinguish ‘possession’ from ‘receipt’” crimes. 600 F.3d at 755-56. The defendant maintained that “Congress must use the word “receipt” and not “possession,” to criminalize accepting a gun for drugs.” *Id.*

The Seventh Circuit concluded that such “distinction makes no difference here.” *Id.* at 756 The court reasoned, “[a]fter receiving the gun, Doody possessed it ... [a]nd unless Doody had been willing to take possession of the gun in exchange for drugs, the transaction could not have taken place.” *Id.* Therefore, the Seventh Circuit held that Doody’s *eventual* possession furthered his drug trafficking crime.” *Id.* (emphasis added).

While the circuits are unanimous in holding that persons who receive firearms in trade for

drugs “possesses” the firearms in furtherance of a drug trafficking crime, these circuit decisions should be examined. It is requested that the Court examine these circuit decisions and take this opportunity to resolve the question presented.

REASONS FOR GRANTING THE WRIT

1. Resolution of the question of whether a person possess a firearm in furtherance of a drug trafficking crime, within the meaning of 18 U.S.C. § 924(c)(1)(A), when the person receives a firearm in a trade for drugs is an important federal question that has not been, but should be, resolved by the Court. Resolution of the question would lay to rest lingering uncertainty on the breath and application of § 924(c)(1)(A) and ensure that criminal defendants who are subjected to lengthy terms of imprisonment are imprisoned only when Congress has clearly defined what conduct falls within the statute’s reach.

a. Congress has historically distinguished crimes involving unlawful receipt of an item from crimes involving unlawful possession of an item.

Section 924(c)(1)(A) prohibits a person “who, in furtherance of” a drug trafficking crime, “possesses a firearm.” 18 U.S.C. § 924(c)(1)(A); App 26. Section 924(c)(1)(A) does not prohibit a person “who, in furtherance of” a drug trafficking crime, “receives a firearm.” *Id.*

Congress has routinely distinguished the act of “receipt” from an act of “possession” in defining firearm offenses. As previously indicated, Section 922 of Title 18, contains several provisions that target unlawful “receipt” and unlawful “possession” of a firearm. App. 2-23.

Under § 922(a)(1)(A) and (B) it is unlawful for “any person,” except for licensed manufacturers or dealers, “to engage in the business of importing, manufacturing, or dealing in firearms or in the course of such business ... to ... *receive* any firearm in interstate or foreign

commerce.” App. 2 (emphasis added). Under § 922(a)(3), a person may not “*receive*” a firearm “in the State where he resides ... by such person outside that State...” App. 3 (emphasis added). Under § 922(a)(9) it is unlawful for “any person ... who does not reside in any State to *receive* any firearms...” App. 4 (emphasis added).

Subsection 922(g) lists persons who may not “*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...” App. 7-8 (emphasis added). Under subsection (h) it is unlawful for an employee who has knowledge of an employer’s disqualification from firearm possession “(1) to *receive, possess* or transport any firearm ... in or affecting interstate or foreign commerce; or (2) to *receive* any firearm ... which has been transported in interstate or foreign commerce.” App. 8 (emphasis added). Subsection 922(j) makes it unlawful, in part, for any person “to *receive* [or] *possess* ... any stolen firearm...” *Id.* (emphasis added).

Other subsections within § 922 of Title 18 prohibit receiving a firearm and prohibit possessing a firearm. *See*, 18 U.S.C. § 922(k) (knowingly *receive* a firearm with obliterated serial number, or to *possess or receive* a firearm with obliterated serial number previously shipped in interstate commerce); § 922(l) (“knowingly *receive* a firearm which has been imported or brought into the United States ... in violation of” this chapter; App. 8; § 922(n) (to *receive* a firearm while under indictment), § 922(p) (to *possess or receive* any firearm with certain parts removed), App. 9; § 922(q)(2)(A) (to *possess* a firearm that moved in or affects interstate commerce in a school zone). App. 11. (Emphasis added).

Likewise, Chapter 53 of Title 26 of the Internal Revenue Code contains federal firearm crimes that include alternative means of committing the offenses for unlawfully receiving

firearms and unlawfully possessing firearms. Under Chapter 53, § 5861 of Title 26, it is unlawful for “any person” ... “(b) to *receive* or *possess* a firearm transferred to him in violation of this chapter;” “(c) to *receive* or *possess* a firearm made in violation of this chapter;” “(d) to *receive* or *possess* a firearm not registered to him in the National Firearms Registration and Transfer Record;” “(h) to *receive* or *possess* a firearm having the serial number or other identification required by this chapter obliterated, removed, changed, or altered;” “(i) to *receive* or *possess* a firearm which is not identified by serial number as required by this chapter;” “(j) to ... *receive* any firearm in interstate commerce which has not been registered as required....;” or “(k) to *receive* or *possess* a firearm which has been imported or brought into the United States in violation of section 5844.” 26 U.S.C. § 5861; App. 40.

These statutory provisions demonstrate that Congress is well aware of the difference between an unlawful receipt of a firearm from an unlawful possession of the firearm. Congress has drawn a distinction between the unlawful receipt from the unlawful possession of an item for other federal criminal offenses.

Section 2315 of Title 18 makes it unlawful for a person to “*receive[]*, *possess[]* ... or dispose[] of any” stolen property “which have crossed a State of United States boundary after being stolen....” 18 U.S.C. § 2315 (emphasis added); App. 33. Under that section, it is unlawful for a person to “*receive[]*, *possess[]* ... or dispose[] of any falsely made, forged, altered, or counterfeited securities or tax stamps or accepts” such as security for a loan, “moving, or which are part of, or which constitutes interstate for foreign commerce...” *Id.* (emphasis added). It is also unlawful to “*receive[]*, *possess[]* ... or dispose[] of any veteran’s memorial object which has crossed a States or United States boundary after being stolen....” *Id.* (emphasis added); *see also*,

18 U.S.C. § 2252A(a)(2) (prohibiting a person from *receiving* of child pornography that has been mailed or shipped in interstate or foreign commerce); and 18 U.S.C. § 2252A(a)(4)(B) (prohibiting a person from *possessing* child pornography that has been mailed or shipped or transported using any means of interstate or foreign commerce). (Emphasis added); App. 35-36.

The Court's decisions in *Ball* resolved a conflict among the circuits regarding the punishment that could be imposed upon a defendant convicted under two different statutes. 470 U.S. at 857-58. One statute outlawed receipt of a firearm by a convicted felon and the other outlawed possession of a firearm by a convicted felon. *Id.*⁷ *Ball* held "that a convicted felon may be prosecuted simultaneously for" unlawfully receiving and unlawful possession "of the same firearm." *Id.* at 859. The Court reiterated that "each substantive statute, in conjunction with its own sentencing provisions, operates independently of each other." *Id.* at 860 (quoting *United States v. Batchelder*, 442 U.S. 114, 118 (1979)). *Ball* held that a defendant convicted under both statutes whose possession of a "firearm is incidental to receiving it" could not be punished twice for those offenses. *Id.* at 861-64.

The distinction between *Ball* and this case is that Congress only outlawed a person's possession of a firearm in furtherance of a drug trafficking offense in § 924(c)(1)(A). In *Ball*, Congress outlawed receipt and possession of the firearm by a convicted felon. Thus, Congress's practice of distinguishing receipt conduct from possession conduct supports the notion that § 924(c)(1)(A) is not violated when a person receives a firearm in an exchange for drugs. Congress could have easily drafted § 924(c)(1)(A) to include, who, "in furtherance of" a drug

⁷ Former 18 U.S.C. § 922(h) (prohibiting receipt of a firearm by a convicted felon); and former 18 U.S.C.A. App. § 1202(a)(1) (prohibiting possession of a firearm by a convicted felon).

trafficking crime “receives or possesses a firearm” shall be punished accordingly.

The reasoning in the several circuit decisions begins to break down when the focus is turned to the word “possesses” rather than placing the emphasis on the “in furtherance of” language of § 924(c)(1)(A). *Watson* and *Smith* make this clear.

b. The circuit decisions ignore the structure of § 924(a)(1)(A) in relation to the Court’s decisions in *Watson* and *Smith*.

Both *Smith* and *Watson* addressed questions of whether the defendant’s conduct constituted a “use” of a firearm during and in relation to a drug trafficking crime. *Watson* noted that this is the “‘use’ prong of § 924(c)(1). *Watson*, 552 U.S. at 77 n. 3.

Smith held that under this use prong a person “uses” a firearm during and in relation to a drug trafficking crime when trading a firearm to receive drugs. *Smith*, 508 U.S. at 240-41. *Watson*, on the other hand, held that a person does not “use” a firearm during and in relation to a drug trafficking crime when trading drugs to receive a firearm. *Watson*, 552 U.S. at 83.

The circuit decisions primarily focus on the “in furtherance of” element of the offense, referring to it as the “‘in furtherance of’ prong.” See, *Frederick*, 406 F.3d at 764 (“acquisition of a firearm for drugs is a sufficient ‘specific nexus’ between drugs and the guns to constitute possession ‘in furtherance of’ the drug sale.”); *Luke-Sanchez*, 483 F.3d at 706 (“the nexus between the drugs and the guns used to pay for them is sufficient, as a matter of law, to meet ‘the ‘in furtherance’ prong of § 924(c).”); *Sterling*, 555 F.3d at 458 (same); *Mahan*, 586 F.3d at 1187-88 (same); *Doody*, 600 F.3d at 755 (same). *Watson*, however, observed that the 1998 amendment to § 924(c)(1) was a “new possession prong.” *Id.* at 83.⁸

⁸ It is clear from the structure of § 924(c)(1)(A) that it has three prongs. It has a “uses” prong, a “carries” prong, and a “possesses” prong. 18 U.S.C. § 924(c)(1)(A). Each prong has

Shifting the focus away from an “in furtherance of prong” to the “possession prong” of § 924(a)(1)(1) changes the analytical framework.

- c. Dictionary definitions and ordinary language demonstrate that the circuit decisions were wrongly decided.

To support the conclusion that a drug dealer’s receipt of a firearm in trade for drugs constitutes possession in furtherance of a drug trafficking crime, the circuit decisions often rely on two-word phrases. For example, the Seventh Circuit concluded that the drug dealer was willing to “take possession” or have “eventual possession” of a firearm in exchange of drugs. *Doody*, 600 F.3d at 756. Similarly, the Sixth Circuit described the drugs dealer’s willingness to “accept possession” of firearms as sufficient to constitute possession in furtherance of a drug trafficking crime. *Frederick*, 406 F.3d at 764; *see also Mahan*, 586 F.3d at 1188-89 (“accepts possession” and “receives possession”); *Boyd*, 285 Fed.Appx. at 290 (“We conclude that *accepting possession* of firearms as payment for crack is possession in furtherance of a drug trafficking crime.”) (emphasis added).

Section 924(c)(1)(A) speaks only in terms of the person who “possesses” a firearm in furtherance of the drug crime, and not in terms of who ultimately acquires, receives or accepts possession of a firearm in trade for drugs. 18 U.S.C. § 924(c)(1)(A). This is a meaningful distinction.

First, both *Smith* and *Watson* rely on ordinary language to support their respective conclusions. The Court, when interpreting § 924(c)(1) has “rested primarily on the ‘ordinary or

qualifying language regarding the statutes reach. A person violates that section if he/she “uses” or “carries” the firearm during and in relation to a drug trafficking crime. A person violates the “possesses” prong if the firearm is possessed “in furtherance of” the drug trafficking crime. *Id.*

natural meaning' of the verb in context.” *Watson*, 552 U.S. at 76 (quoting *Smith*, 508 U.S. at 228; and *Bailey*, 516 U.S. at 145).

In *Smith*, the Court “looked for ‘everyday meaning’ ... revealed in phraseology that strikes the ear as ‘both reasonable and normal.’” *Watson*, 552 U.S. at 79 (quoting *Smith*, 508 U.S. at 230. Here, like the word “uses” at issue in *Watson* and *Smith*, § 924(c)(1)(A) does not define the word “possesses.”

Previous decisions by the Court, however, define possession. “Possession” “covers both ‘actual’ and ‘constructive’ possession alike.” *Henderson v. United States*, 575 U.S. 622, 626 (2015) (citing *National Safe Deposit Co. v. Stead*, 232 U.S. 58, 67 (1914)). “Actual possession exists when a person has direct physical control over a thing.” *Henderson*, 575 U.S. at 626. “Constructive possession is established when a person, though lacking such physical custody, still has the power and intent to exercise control over the object.” *Id.*

A drug dealer who possesses drugs in anticipation of receiving firearms in consideration of giving the drugs to another has neither actual possession nor constructive possession of the firearms anticipated to be received from the drug buyer. Furthermore, the drug dealer does not possess the firearms until the exchange is complete. Thus, the dealer’s “eventual possession” of a firearm is not what furthers the drug exchange, it is the buyers current possession by bringing the firearms to the exchange that furthers the drug trafficking crime.

Section 924(c)(1)(A) focuses on who “possesses” the firearms in the present. It does not speak in terms of who acquires possession. This too supports the proposition that the person who brings the firearms to the exchange is the only person who furthers the drug trafficking activity.

Dictionary definitions offer additional support. The online Merriam-Webster Dictionary

defines the verb to “possess” as “to have and to hold” or “to seize and take control of: take into one’s possession.”⁹ App. 45. Black’s Law Dictionary defines “possess” as “to have in one’s actual and physical control; to have exclusive detention and control of; to have and hold as property; and to have just right to; be master of; to own or be entitled to.” *Black’s Law Dictionary* 1046 (5th ed. 1979).

The online Merriam-Webster Dictionary defines “receive” as “to come into possession of: acquire receive a gift.” App. 46. Black’s Law Dictionary defines receive as “[t]o take into possession and control; accept custody of; collect.”

The definitions of “possess” and “receive” describe two different ideas that overlap. Thus, when a person “possesses” a firearm as required under § 924(c)(1)(A), that section speaks of possession in the present and not in terms of a subsequent taking or accepting of possession. The various definitions establish that a person must “receive” a firearm in order to possess it. Again, while this may seem as splitting hairs, Congress has routinely done so when enacting firearm offenses that involve both receiving and possessing firearms and other federal offenses. *See, supra*, at 9-12.

Natural and ordinary language in a “drugs-for-guns” exchange also support the conclusion that receiving firearms in exchange for drugs does not fall within the “possesses” prong in § 924(c)(1)(A). For example, a friend of the drug dealer may ask, “hey, what did you get for those drugs?” The drug dealer in ordinary and natural conversation would likely say, “I

⁹ <https://www.merriam-webster.com/dictionary>.

got these two guns.”¹⁰ Or, the drug dealer would normally say, in ordinary and natural language, “I received two pistols.”

It is not normal, natural or ordinary for a drug dealer to respond, “I accepted possession of a firearm.” Nor would it be normal, natural or ordinary for the drug dealer to respond, “I obtained eventual possession of these guns.” Normal, natural and ordinary language cuts against the circuit decisions.¹¹

d. The circuit decisions run contrary to *Watson* where the Court instructs that a violation of § 924(c)(1)(A) requires that the person who may be prosecuted under that section must be clearly identifiable in advance” of the commission of the crime.

In *Smith* and *Watson*, the Court addressed the interplay between § 924(c)(1)(A) and the forfeiture provisions in 18 U.S.C. 924(d)(1).¹² In *Smith*, § 924(d)(1) aided the Court’s conclusion that a person who gives a firearm to a drug dealer in receipt of drugs “uses” the firearm during and in relation to the drug trafficking crime. *Smith*, 508 U.S. at 233-37. *Smith* determined that the structure of Congress’s 1986 version of § 924(d)(1) dictated that the “use” of a firearm included using the firearm in trade to obtain drugs (“a gun-for-drugs trade”). *Id.* at 236-37.

¹⁰ Merriam-Webster defines “get” or “got” as “to gain possession of [-] *got* a bicycle: to receive as a return.” App. 44. Black’s Law Dictionary defines “get” as “[t]o receive; gain possession of; obtain...” *Black’s Law Dictionary*, 619 (5th ed. 1979).

¹¹ If the same conversation took place in a legal contractual setting, one may inquire of the drug dealer, “and what did you receive in consideration for distributing those controlled substances?” The drug dealer would normally and naturally respond, “I received two firearms, a pistol and a rifle, in consideration of those drugs.” The drug dealer would not likely respond, “I accepted possession of two firearms, a pistol and a rifle, for the drugs.”

¹² Section 924(d)(1) lays out circumstances allowing for firearms to be seized and forfeited. *Smith* observed that the definition of “uses” in § 924(d)(1) included a firearms use as a weapon and a firearm’s “use as an item of trade or barter.” *Id.* at 236. As a result, *Smith* concluded that “use” under both § 924(c)(1) and § 924(d)(1) must be applied consistently.

Watson, on the other hand, concluded that the language and structure of § 924(d)(1) did not support the conclusion that a drugs-for-guns trade violated the “uses” prong in § 924(c)(1)(A). In doing so, the Court stated:

The Government overreads *Smith*. While the neighboring provision [§ 924(d)(1)] indicates that a firearm is “used” nonoffensively, and supports the conclusion that a gun can be “used” in barter, beyond that point its illumination fails. This is so because the utility of § 924(d)(1) is limited by its generality and its passive voice; it tells us a gun can be “used” in a receipt crime, but not whether both parties to a transfer use the gun, or only one, or which one. The nearby subsection (c)(1)(A), however, requires just such a specific identification. It provides that a person who uses a gun in the circumstances described commits a crime, whose perpetrator must be clearly identifiable in advance.

Watson, 552 U.S. at 81. The same is true under the “possesses” prong of § 924(c)(1)(A).

Section 924(d)(1) allows for seizure and forfeiture of a firearm for “any possession thereof any firearm or ammunition ... [for a] knowing violation of section 924.” 18 U.S.C. § 924(d)(1); App. 27. It is clear that Congress used “any possession” in the general sense. In other words, since receiving a firearm leads to an eventual possession of the firearm, such eventual possession would fall within the broader use of the phrase “any possession.” 18 U.S.C. § 924(d)(1). Thus, a drug dealer’s eventual possession of a firearm makes that firearm subject to seizure and forfeiture under § 924(d)(1).

Section 924(c)(1)(A), on the other hand, is more specific. It limits liability to a person who “possesses” a firearm that furthers a drug trafficking crime. 18 U.S.C. § 924(c)(1)(A).

Relying on *Watson*’s reasoning under the “uses prong” and replacit it with the word “possesses,” § 924(d)(1) “tells us a gun can be [*possessed*] in a receipt crime, but not whether both parties to a transfer [*possess*] the gun, or only one, or which one.” *Watson*, 552 U.S. at 81

(emphasis added). Following *Watson*, § 924(c)(1)(A) would also require specific identification of who possessed the firearm in furtherance of the drug trafficking crime, “a person who [possesses] a gun in the circumstances described commits a crime, whose perpetrator must be clearly identifiable in advance.” *Id.*

Under *Watson*, the plain meaning of the word “possesses” in § 924(c)(1)(A) dictates that the buyer who is exchanging a gun to obtain drugs “possesses” the gun to further the trade, not the drug dealer who “possesses” the drugs in anticipation of receiving the gun for the drugs. The buyer is the only person “clearly identifiable in advance.” *Watson*, 553 U.S. at 81.

Again, Congress could have easily included a prohibition on a person who “receives” a firearm in furtherance of a drug trafficking offense in § 924(c)(1)(A). It has not done so. The lower courts are certainly not at liberty to expand the reach of a criminal statute. *See e.g.*, *Morissette v. United States*, 342 U.S. 246, 249-50 (1952) (“The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute.”).

e. Any ambiguity in interpreting the “possesses” prong of § 924(c)(1)(A) that would include both the buyer’s current possession and the dealer’s receipt of a firearm in a gun-for-drugs trade “should be resolved in favor of lenity.”

Section 924(c)(1)(A) targets those who in furtherance of a drug trafficking crime “possesses” a firearm. The reach of the statute clearly applies to the buyer who possesses a firearm to obtain drugs and brings the firearms as payment for the drugs. Whether the reach of § 924(c)(1)(A) includes the drug dealers who receives the gun in trade for drugs is not clear.

As set out above, Congress has routinely drawn a distinction between crimes involving

receiving an item of contraband and crimes involving possessing contraband. *See, supra*, p. at 9-12. Furthermore, § 924(c)(1)(A) speaks of present possession (one who possesses), and does not include a possession that flows when one receives a firearm.

Once an exchange has been completed, the dealer's taking possession of the firearm does not further the drug trafficking crime. The drug trafficking crime is complete upon receipt of the firearm, and not the dealer's continued possession of the firearm after the exchange.

Furthermore, *Watson* is clear that the person who violates § 924(a)(1)(A) "must be clearly identifiable in advance." *Watson*, 552 U.S. at 81. The only person in a gun-for-drugs trade who can be identified in advance as one who "possesses" a firearm is the buyer who is using the firearm to finance the trade.

Since it is unclear whether the word "possesses" encompasses one who "receives" a firearm, this "ambiguity concerning the ambit of [§ 924(c)(1)(A)] should be resolved in favor of lenity." *United States v. Bass*, 404 U.S. 336, 347 (1971) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). A key principal behind the rule of lenity is that "a fair warning should be given the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *Bass*, 404 U.S. at 348 (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)). This principal is consistent with *Watson* where the Court determined that § 924(c)(1)(A) requires "specific identification" of the person who violates the statute and the "the perpetrator must be clearly identifiable in advance." *Watson*, 552 U.S. at 81.

A second principle embraced by the rule of lenity stems from "the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *Bass*, 404 U.S. at 348.

“This policy embodies ‘the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.’” *Id.* (quotations in original) (citation omitted).

“[E]xistence of some statutory ambiguity ... is not sufficient to warrant application of the rule, for most statutes are ambiguous so some degree.” *Muscarello v. United States*, 524 U.S. 125, 138 (1998). “‘The rule of lenity applies only if, “after seizing everything from which aid can be derived,” ... we can make “no more than a guess as to what Congress intended.”’” *Id.* (quoting *United States v. Wells*, 519 U.S. 482, 499 (1997) (quoting *Reno v. Koray*, 515 U.S. 50, 65 (1995), in turn quoting *Smith*, 508 U.S. at 239, and *Ladner v. United States*, 358 U.S. 169, 178 (1958)). And, “[t]o invoke the rule,” there must be a “‘grievous ambiguity or uncertainty’” in the statute.” *Muscarello*, 524 U.S. at 138-39 (quoting *Staples v. United States*, 511 U.S. 600, 619 n. 17 (1994) (quoting *Chapman v. United States*, 500 U.S. 453, 463 (1991))).

Here, there is “grievous ambiguity or uncertainty” in § 924(a)(1)(A). Due to Congress’s historical practice of defining crimes involving receipt, distinctly and separately from crimes involving possession, it cannot be said § 924(a)(1)(A) includes one who “receives” a firearm as one who “possesses” a firearm to further a drug trafficking crime. The structure and language of the “possesses prong” of § 924(c)(1)(A) does nothing to resolve this ambiguity. Again, Congress could have easily included one who “receives” a firearm in furtherance of a drug trafficking crime, just as it has done repeatedly over the years in other statutes.

f. This case provides the Court with an ideal vehicle to resolve the question of whether a drug dealer “possesses” a firearm in furtherance of a drug trafficking crime when the drug dealer receives the firearm in a trade for drugs.

While the federal courts of appeals unanimously hold that when a drug dealer receives a firearm as payment for drugs, the drug dealer “possesses” the firearm in furtherance of a drug

trafficking crime, the Court should take to opportunity to resolve the question here presented. As evidenced by the number of circuit decisions that have addressed this issue, and as evidenced by this more recent case, federal prosecutions will persist under the theory that a gun-for-drugs trade is prohibited under the current structure and language of § 924(c)(1)(A). The Court is the final arbiter for such an important federal question.

Resolution of the question in a manner contrary to the unanimous circuit court decisions will prevent others from receiving lengthy terms of imprisonment on conduct that is not clearly defined in § 924(c)(1)(A). Resolution of the question contrary to the unanimous circuit court decisions would also place the onus on Congress to enact clear and unambiguous legislation. Such legislation could easily include a provision that states, who, in furtherance of a drug trafficking crime, *receives* or *possesses* a firearm, violates § 924(c)(1)(A). Finally, resolution of the question consistent with the unanimous circuit court decisions would lay to rest persistent doubt about the correct application of § 924(c)(1)(A) in relation to the “possesses prong.”

As is stands now, the unanimous circuit decisions appear to expand the meaning of the term “possesses” by using such phrases as “take possession,” “eventual possession,” *Doody*, 600 F.3d at 756, “accepts possession,” *Frederick*, 406 F.3d at 764, or “receives possession,” *Mahan*, 586 F.3d at 1189, as conduct included in the “possesses prong” of § 924(c)(1)(A). These phrases are simply describing what Congress has historically prohibited, separate and apart from possession; and that is, the unlawful receipt of an item such as a firearm. *See, supra*, at p. _.

If, as *Watson* instructs, “specific identification” of the person who violates that section “must be clearly identifiable in advance,” then § 924(c)(1)(A) does not clearly identify in advance the drug dealer who possesses drugs to receive a firearm within the “possesses prong” of

the statute. The drug buyer who possesses a firearm to be exchanged for drugs is the only person to the “guns-for-drugs” trade that is identifiable in advance. *Watson*, 552 U.S. at 81.¹³

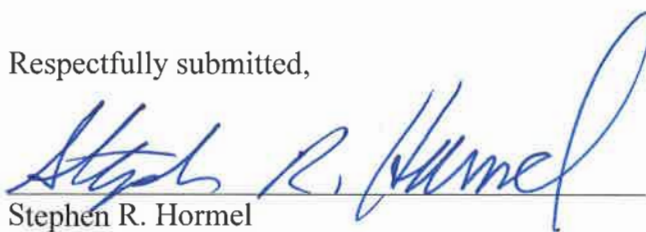
Using ordinary language and the looking to natural meaning supports the conclusion that one who “receives” firearm in furtherance of a drug trafficking crime is not the same as one who “possesses” the firearm to further the crime. When ordinary conversational language is used to describe the gun-for-drug trade, the drug dealer receives the gun possessed by buyer in consideration of providing drugs to the buyer. This case presents an excellent vehicle to resolve this question, an important question of federal law that should be resolved by the Court, regardless of the unanimous decisions from the federal courts of appeals.

CONCLUSION

Based on the foregoing, it is requested that this Court grant this petition for writ of certiorari and resolve the question of whether a drug dealer’s receipt of a firearm as payment for drugs violates the “possession prong” of 18 U.S.C. § 924(c)(1)(A).

Dated this 12th day of December, 2022.

Respectfully submitted,



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¹³ Consequently, under *Smith*, the buyer also “uses” the firearm during an in relation to a drug trafficking crime. 508 U.S. at 241. This result, however, does nothing to advance the idea that the drug dealer is identifiable in advance as one who “possesses” a firearm under § 924(c)(1)(A). *Watson*, 552 at 81.