No. 24-____

IN THE

Supreme Court of the United States

JEROD ASKEW,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a jury instruction under 18 U.S.C. § 924(c), Possession of a Firearm in Furtherance of a Drug Trafficking Crime, requires reference to "mere presence" and allows for the jury to draw inferences from improper legal premises.

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

U.S. District Court for the Eastern District of Virginia
United States v. Askew, **No. 2:21cr8 (March21, 2023)**

Fourth Circuit Court of Appeals
United States v. Askew, **No. 23-4222 (April 10, 2024)**

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jerod Askew respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Fourth Circuit, Pet. App. 1a, is available at 98 F.4th 116. The Fourth Circuit's order denying rehearing *en banc*, Pet. App. B, is unpublished.

JURISDICTION

The Fourth Circuit entered judgment on April 10, 2024, Pet. App. 1a, and denied petitioner's timely petition for rehearing *en banc* on May 7, 2024, Pet. App. 2a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 924(c) of Title 18 provides in relevant part:

> (c)(1)(A)Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—(i) be sentenced to a term of imprisonment of not less than 5 years

The penalty for violating Section 924(c) is a mandatory minimum 5 years in prison.

INTRODUCTION

Petitioner Jerod Askew was convicted of two counts of possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924 (c) based on jury instructions that failed to inform the jury that the mere presence of a firearm with drugs was insufficient to convict the defendant under this statute. The jury was also provided with an in improper inference in the instruction that essentially provided for a necessary finding of guilt by the jury if a firearm was found with distribution quantities of controlled substances, instructing the jury that drug dealing was necessarily dangerous and violent – even when the drug was marijuana.

STATEMENT OF THE CASE

Background

Jerod Askew was a former star football player who had no felony convictions on his criminal record before the situation that led to these charges; he was legally permitted to possess firearms. JA 1362-1365. The convictions for the firearm offenses (Counts 5 and 10) drew mandatory minimum penalties for Mr. Askew of ten years (five years each), consecutive to the 78 months he received for the drug convictions, for a total of 16 ½ years of federal time to serve for his offenses. JA 1186-1188. There was no evidence presented at trial that he was in possession of any firearms when he conducted drug transactions, and the

gun relevant to Count 10 was found tucked away in a secure safe in a locked secure storage facility near some marijuana. There was no evidence presented at trial that Mr. Askew made any statements tying the guns to the drugs, and no non-expert witnesses presented evidence of any actual nexus between this gun and the marijuana found there. This gun was not even merely present with the charged marijuana in the storage facility. The gun and drugs were found in very different places – in separate containers – the gun was not at all accessible.

Mr. Askew was indicted by a grand jury on April 22, 2021, under a Superseding Indictment, on the charges of conspiracy to distribute controlled substances in violation of 21 U.S.C. § 846 (Count 1), distribution of 100 grams or more of heroin in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C) and 18 U.S.C. §2 (Counts 2 and 3), possession with intent to distribute heroin in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B) and 18 U.S.C. § 2 (Count 4), possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c) (Counts 5 – heroin - and 10 – marijuana in storage unit), possession with intent to distribute of cocaine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C) and 18 U.S.C. § 2 (Count 6), possession with intent to distribute of crack cocaine in violation of 21 U.S.C. §841(a)(1) and (b)(1)(C) and 18 U.S.C. § 2 (Count 7), and 2 counts of possession with intent to distribute marijuana in violation of 21 U.S.C. §841(a)(1) and (b)(1)(D) and 18 U.S.C. § 2 (Counts 8 – residence - and

Count 9 – storage unit). JA 25-33.[1] All of the offenses were alleged to have been committed on March 24, 2020 except for Counts 2 and 3 which were alleged to have been committed on February 28, 2020 and March 19, 2021, respectively. Counts 2 and 3 were ultimately dismissed before trial (on September 15, 2022) due to the non-appearance of a government witness. All of the evidence in support of the offense conduct presented at trial was alleged to have been obtained on March 24, 2020, pursuant to the execution of search warrants and the stop and arrest of the defendant in his vehicle.

Detective Edward Filio of the Virginia Beach Police Department testified that he assisted in conducting the search of the storage unit on March 24, 2020. JA 861 (picture of storage unit). The storage unit was in a secure facility, requiring a keypad to enter the facility, and there were locked doors on the storage units. JA 865, JA 866, and JA 867. Detective Filio identified pictures of the search, and items recovered from the search, that was conducted that day.

[1] The original Indictment, filed on March 4, 2021, charged Mr. Askew with the following offenses: possession with intent to distribute 100 grams or more of heroin in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B) and 18 U.S.C. § 2 (Count 1); possession of a firearm during a drug trafficking crime, in violation of 18 U.S.C. § 924(c) (Count 2); possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C) and 18 U.S.C. § 2 (Count 3); possession with intent to distribute crack cocaine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C) and 18 U.S.C. § 2 (Count 4); and 2 counts of possession with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(D) and 18 U.S.C. § 2 (Count 5 – residence - and Count 6 – storage unit). The addition of Count 10 in the Superseding Indictment added an additional 5 years mandatory minimum consecutive sentence upon a finding of guilt, and was presented as a trial penalty due to the defendant exercising his right to proceed to trial and challenge the government's evidence. JA 20-24.

Inside a closed red cooler found in the storage unit was a garbage bag containing marijuana (56 Ounces – JA 864). *See also* JA 442, JA 862. The red cooler was tucked behind many other objects on the floor of the storage unit. JA 861. There was also drug paraphernalia found in the storage unit. JA 445.

A locked safe was found in the storage unit. JA 458-459, JA 861 and JA 862. It is unclear from the trial testimony and exhibits where within the storage unit the safe was found. The safe contained a loaded firearm (Cobray) and what was reported to be marijuana in a glass jar. JA 458; JA 894, JA 868. The safe was closed, but Detective Filio was able to open the safe when he found it in the storage unit, evidently by prying it open. JA 458, JA 895, JA 896 (pry marks are visible in pictures of the safe). From the picture of the interior of the safe in evidence (JA 896), the firearm within the safe was located under other things, and was not easily accessible, once the safe was opened. It is unclear from the record if the substances alleged to be marijuana found in the glass jar in the safe were ever weighed or tested by a laboratory. A gun box for a Glock firearm was also found in the storage locker. JA 461.

Detective Joe Milewczik, from the Chesapeake Police Department, was the government's drug and gun expert. He opined that the circumstances surrounding the drugs and other items seized were consistent with the intent to distribute, and offered his opinion on the relationship between drugs and guns.

JA 588-597. Early in his testimony, he said that “[a] firearm is pretty much a tool of the trade” of drug distribution, and “is used to protect yourself from robbery but also to protect the assets.” JA 590.

Later in his testimony, he restated his previous testimony, by commenting that “firearms are a very significant tool of the trade.” JA 595. He further testified that “[d]rug dealers possess firearms, number one, for personal protection when you have a large amount of extremely valuable drugs, or you have a large amount of cash . . . you need those firearms to protect yourself.” JA 595. He said that drug dealers are often targets of robberies because they carry drugs and cash. JA 595-596.

District Court’s Formal Instructions to the Jury

The government submitted its proposed jury instructions to the district court pretrial. JA 34-116. For Counts 5 and 10, these instructions included the definition of the term “in furtherance of” a drug trafficking crime (proposed instruction 61-JA 114), and an instruction to impose an inference of guilt based on the evidence presented (proposed instruction 62-JA 115). Neither of these proposed instructions included any reference to the mere presence of the firearms with the controlled substances.

The government’s proposed instruction 61 read as follows:

<u>“IN FURTHERANCE OF A DRUG TRAFFICKING CRIME” – DEFINED</u>

“IN FURTHERANCE OF” MEANS THE ACT OF FURTHERING, ADVANCING, OR HELPING FORWARD. THEREFORE, AS TO COUNTS FIVE AND TEN, THE GOVERNMENT MUST PROVE THAT THE POSSESSION OF A FIREARM FURTHERED, ADVANCED, OR HELPED FORWARD THE DRUG TRAFFICKING CRIME.

FOR DRUG TRAFFICKING CRIMES, FACTORS THAT THE JURY MAY CONSIDER IN MAKING THIS DETERMINATION MAY INCLUDE THE FOLLOWING: THE TYPE OF DRUG ACTIVITY THAT WAS BEING CONDUCTED, ACCESSIBILITY OF THE FIREARM, THE TYPE OF FIREARM, WHETHER THE FIREARM WAS STOLEN, THE STATUS OF THE POSSESSION (WHETHER IT WAS LEGITIMATE OR ILLEGAL), WHETHER THE FIREARM WAS LOADED, THE PROXIMITY OF THE FIREARM TO EITHER DRUGS OR DRUG PROFITS, THE TIME AND CIRCUMSTANCES UNDER WHICH THE FIREARM WAS FOUND, WHETHER THE FIREARM PROVIDED A DEFENSE AGAINST THE THEFT OF DRUGS, AND/OR REDUCED THE PROBABILITY THAT SUCH A THEFT MIGHT BE ATTEMPTED. THE POSSESSION IS IN FURTHERANCE IF THE PURPOSE OF THE FIREARM IS TO PROTECT OR EMBOLDEN THE DEFENDANT.

AUTHORITY: Eric Wm. Ruschky, *Pattern Jury Instructions for Federal Criminal Cases, District of South Carolina*, 21 U.S.C. § 924(c) (2018 Online Edition) (modified); *see United States v. Sullivan*, 455 F.3d 248, 250 (4th Cir. 2006); *United States v. Lomax*, 293 F.3d 701, 705 (4th Cir. 2002).

JA 114. The government’s proposed jury instruction No. 62 stated the following:

“IN FURTHERANCE OF” A DRUG TRAFFICKING CRIME – INFERENCE

DISTRIBUTION OF DRUGS, AND THE COMMON SENSE RECOGNITION THAT DRUG DEALING IS A DANGEROUS AND VIOLENT ENTERPRISE, SUPPORT AN INFERENCE THAT A DEFENDANT’S POSSESSION OF A FIREARM WAS TO FACILITATE DRUG DEALING.

AUTHORITY: *United States v. Brockington*, 849 F.2d 872, 876 (4th Cir. 1988), *abrogated on other grounds by Bailey v. United States*, 516 U.S. 137 (1995).

JA 115. Mr. Sacks, the defendant’s trial attorney, raised objections to the proposed instructions by the government.

Mr. Sacks first took issue with the instruction proffered by the government as to the essential elements of the 18 U.S.C. § 924(c) offense, stating that the instruction should involve three elements rather than two. JA 613-614. Properly stated, according to Mr. Sacks, the elements should be that (1) the defendant committed a drug trafficking offense; (2) that he knowingly possessed a firearm; and (3) that the possession of the firearm was in furtherance of the commission of a drug trafficking crime. *Id.* The proffered instruction only included two elements. The district court made the proposed change to the proffered instruction. JA 615.

Moving to the definition of “in furtherance of a drug trafficking crime,” proposed instruction 61 (58 in the district court’s instructions – JA 617), Mr. Sacks pointed out to the district court that the instruction constituted

"argument," and not a "principle of law." JA 617. He also noted that he did not think that "the evidence in the case supported" the instruction. JA 617. Mr. Sacks made clear that he was not objecting "to the argument" by the government, but to the extent that "putting in a principle of law elevates it to the point that's beyond what the evidence supports and really puts an argument into an instruction." JA 617.

The district court's answer to that was to modify proffered instruction 62, not 61, which stated that the "distribution of drugs, and the common sense recognition that drug dealing is a dangerous and violent enterprise, support an inference that a defendant's possession of a firearm was to facilitate drug dealing." JA 617-618. The court commented that, to remedy the instruction, rather than put the language in a "direct statement," the court would add language, "*may support*" an inference, to the instruction. JA 618. The district court noted that this construction of the "in furtherance" instruction is "supported by the testimony, it may support an inference." JA 618. The court never addressed Mr. Sacks' concerns with elevating argument to a principle of law regarding the definition of an "in furtherance" crime.

The "in furtherance of" definition instruction actually provided by the district court to the jury read as follows:

> "In furtherance of" means the act of furthering, advancing, or helping forward. Therefore, as to counts five and ten, the government must prove that the possession of a firearm furthered, advanced, or helped forward the drug trafficking crime.
>
> For drug trafficking crimes, factors that the jury may consider in making the determination include the following: The type of drug activity that was being conducted, the accessibility of the firearm, the type of firearm, whether the firearm was stolen, the status of the possession, whether it was legitimate or illegal, whether the firearm was loaded, the proximity of the firearm to either drugs or drug profits, the time and circumstances under which the firearm was found, whether the firearm provided a defense against the theft of drugs and/or reduced the probability that such theft might be attempted. The possession is in furtherance if the purpose of the firearm is to protect or embolden the defendant.
>
> Distribution of drugs and the common sense recognition that drug dealing is a dangerous and violent enterprise may support an inference that the defendant's possession of a firearm was to facilitate drug dealing.

JA 767-768.

The district court failed to make any corrections or changes to the instruction that defense counsel characterized as "argument and not a principle of law," even though several of the "arguments" presented in the instruction were inapplicable to Mr. Askew's case. No changes were made to the district court's statement to the jury instructing them that there is a "common sense recognition" that "drug dealing is a dangerous and violent enterprise."

This was the last instruction presented to the jury during the district court's charge.

The jury found Mr. Askew guilty of all charges. JA 1024-1027.

Fourth Circuit's Three-Judge Panel Opinion

The Fourth Circuit improperly denied relief for Mr. Askew, failing to apply lawful instructions under the 18 U.S.C. § 924(c) firearm in furtherance charges.

After summarizing the evidence and testimony presented at trial, the Fourth Circuit explained the "in furtherance of" jury instruction at issue in this case. Opin. at 5. The court reviewed the instruction provided by the district court and, contrary to Mr. Askew's position, found that "the district court adequately instructed the jury regarding the elements of the offense." Opin. at 7. Even though one of the charges the under 18 U.S.C. § 924(c), Count 10, involved the predicate charge of possession with intent to distribute ***marijuana***, and a gun that was completely inaccessible, the Fourth Circuit concluded that the specific instruction to the jury, "the common sense recognition that drug dealing is a dangerous and violent enterprise," was approved by the Fourth Circuit. Opin. at 7. This was over Mr. Askew's argument that such a premise for a conviction constituted a "false legal premise," especially when Mr. Askew was not legally prohibited from possessing firearms.

The Fourth Circuit discussed how the jury was instructed in other places, in the panoply of jury instructions, about the use of their common sense and "common knowledge of the natural tendencies and inclinations of human beings." Opin. at 8. The Fourth Circuit found that the jury was "not force-fed a false legal premise. Rather, it was encouraged to use its own perceptions about defendant's activities and to draw its own conclusions," calling the view that drug dealing is violent and dangerous a "permissive inference." Opin. at 8. The Fourth Circuit then went on to dismiss Mr. Askew's argument that a "mere presence" instruction should have been provided to the jury to give context to the meaning of "in furtherance of" with regard to Counts 5 and 10. Opin. at 9. The court found that, in the absence of a "mere presence" instruction, it was "highly unlikely that the jury would have changed its mind had it been offered this redundant clarification." Opin. at 10.

Mr. Askew takes issue with these findings.

REASONS FOR GRANTING THE WRIT

The decision of the Fourth Circuit approving an inference of guilt under the "in furtherance" prong of 18 U.S.C. § 924(c), that the presence of a legally possessed firearm in the vicinity of a distribution quantity of controlled substances, to include marijuana, is permissible, should be rejected by this Court. The Fourth Circuit approved such an instruction even in the absence

of a "mere presence" directive. These findings should be vacated and an instruction consistent with "in furtherance" instructions given throughout the country, and even in the same federal district, should be required in a case such as this. The instructions of law provided to the jury in this case created, essentially, a strict liability standard based on an inference of guilt, premised on an invalid legal conclusion, that all drug dealing is violent and dangerous, including marijuana, with no specific consideration for "mere presence."

No model instructions or Circuit Court criminal jury instructions allow such an inference to be drawn under 18 U.S.C. § 924(c). The absence of a specific "mere presence" instruction is significant because the jury can believe that a firearm's presence could be coincidental or unrelated to the offense, yet still be compelled to find the defendant guilty.

The due process clause of the Fourteenth Amendment requires the government to prove beyond a reasonable doubt every element of the crime with which a defendant is charged. *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *United States v. Gaudin,* 515 U.S. 506, 510, 522–23, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). Accordingly, a criminal conviction violates due process when the trial court fails to instruct the jury on an element that the prosecution must prove beyond a reasonable doubt. *Gaudin,* 515 U.S. at 522–23, 115 S.Ct. 2310. In *Gaudin,* for instance, the defendant was charged with making

false statements under 18 U.S.C. § 1001, a statute that contains "materiality" as an element of the offense. *Gaudin,* 515 U.S. at 509, 115 S.Ct. 2310. At trial, the district court informed the jury that "[t]he issue of materiality ... is not submitted to you for your decision. . . . You are instructed that the statements charged in the indictment are material statements." *Id.* The Court of Appeals reversed the defendant's conviction, and the Supreme Court affirmed. *Id.* at 522–23, 115 S.Ct. 2310. "The Constitution," it wrote in an opinion by Justice Scalia, "gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged. The trial judge's refusal to allow the jury to pass on the 'materiality' of Gaudin's false statements infringed that right." *Id.*

Similarly, in this case, presenting the government's "in furtherance of" argument and inference as a principle of law in the instructions to the jury infringed on Mr. Askew's right to have the jury determine his guilt as to the elements of the charges under Counts 5 and 10 beyond a reasonable doubt. The district court essentially force-fed the jury a guilty verdict on those counts by erroneously instructing the jury that Mr. Askew's drug dealing was – as a matter of law - violent and dangerous, and by allowing the jury to draw an improper inference from that erroneous instruction. This included a separate charge in Count 10, which involved only marijuana. The misstatement of the law,

instructing the jury that all drug dealing is necessarily violent and dangerous, presented a misguided path for the jury to find Mr. Askew guilty, when the evidence under Count 10 did not support such a finding.

Imagine these scenarios: police stop a vehicle and a lawfully possessed shotgun is in the back of a car. A few ounces of marijuana are located in the locked glove box. Under the instructions approved by the Fourth Circuit, there is now an inference that the jury can draw that the possession with intent to distribute marijuana was inherently dangerous and violent, and that a five-year mandatory minimum sentence can be imposed on the driver of the vehicle.

A college woman is confronted by her resident assistant about some ADHD pills she finds in her dorm room and ends up calling the police. Upon finding these pills, the resident assistant determines that the student was going to share these pills with her roommates at exam time. The student had a lawfully possessed handgun by her bedside table because there had been a rash of sexual assaults on campus. She is now subject to a mandatory five years in prison for the gun that was possessed near the pills that were going to be distributed, because the distribution of controlled substances is necessarily "violent and dangerous." Such an instruction can lead to absurd and unintended consequences.

There was no evidence presented in this case that firearms were present during drug transactions, or that Mr. Askew carried firearms with him when he engaged in drug trafficking. The only evidence upon which the jury could have "actually rested its verdict" on Count 10 was that the firearm was in the same storage facility as the marijuana – and not even in the same container. *See Sullivan,* 508 U.S. at 279. Mr. Askew's rights were violated, the district court abused its discretion by providing this definition of "in furtherance of" to the jury, and the Fourth Circuit allowed these erroneous instructions to stand.

Erroneous Instruction of Law and Inference

Section 924(c) provides in relevant part:

> [A]ny person who, ... in furtherance of any such [crime of violence or drug trafficking] crime, possesses a firearm, shall, in addition to the punishment provided for such crime ... (i) be sentenced to a term of imprisonment of not less than 5 years[.]

18 U.S.C. § 924(c)(1)(A).

The instruction provided by the district court included the following:

> Distribution of drugs and the common sense recognition that drug dealing is a dangerous and violent enterprise may support an inference that the defendant's possession of a firearm was to facilitate drug dealing.

JA (696-697). This instruction erroneously compelled that the jury find, as a matter of law, that all drug dealing is dangerous and violent – not **often** violent,

as provided in the case law – but always violent. This was clearly erroneous and extremely prejudicial to Mr. Askew, especially in light of the nature of the evidence in this case.

The case law from the Fourth Circuit addressing this point references that "drug dealing is a dangerous and ***often*** violent enterprise." *United States v. Brockington*, 849 F.2d 872, 876 (4th Cir. 1988) (emphasis added) (acknowledging that there is a "common sense recognition that drug dealing is a dangerous and often violent enterprise," but not using it in an instruction to create an inference of guilt). This language was applied to a case involving the construction of 18 U.S.C. § 924(c), but did not involve a charge of possession of a firearm in furtherance of a drug trafficking crime, but rather, using and carrying a firearm during and in relation to a drug trafficking crime. This erroneous statement governing the "in furtherance of" element of the offense, was followed by an inference that the jury could draw from this misstatement of the law – that Mr. Askew's possession of a firearm was to facilitate – or further, his drug dealing. JA 768. This is because the instruction that drug dealing is necessarily violent, compels the conclusion that a gun found in the presence of drugs will necessarily be connected to the violence inherent in drug dealing and would compel the jury to draw the required nexus between the firearms and the drug trafficking.

The "in furtherance" instruction to the jury at trial read as follows:

> For drug trafficking crimes, factors that the jury may consider in making the determination include the following: The type of drug activity that was being conducted, the accessibility of the firearm, the type of firearm, whether the firearm was stolen, the status of the possession, whether it was legitimate or illegal, whether the firearm was loaded, the proximity of the firearm to either drugs or drug profits, the time and circumstances under which the firearm was found, whether the firearm provided a defense against the theft of drugs and/or reduced the probability that such theft might be attempted. The possession is in furtherance if the purpose of the firearm is to protect or embolden the defendant.

JA 768. In *Lomax*, the case cited by the government in its request for the argumentative "in furtherance" instruction (JA 114), the Fourth Circuit found that, "[w]hen making this factual determination, the fact finder is free to consider the numerous ways in which a firearm might further or advance drug trafficking." *United States v. Lomax*, 293 F.3d 701, 705 (4th Cir. 2002). The Fourth Circuit did not condone the use of these argumentative factors "to consider" in a jury instruction. Nor did the Fourth Circuit in *Lomax* – or any other case – allow the jury to draw an inference of guilt from the consideration of these factors. The *Lomax* factors were premised on sufficiency of the evidence in a bench trial, not on jury instructions.

The *Lomax* factors articulated by the Fourth Circuit were drawn from a 5th Cir. decision, *United States v. Ceballos-Torres*, 218 F.3d 409 (5th Cir. 2000).

In *Ceballos-Torres*, the Fifth Circuit made clear that, in determining whether the possession of a firearm helped or advanced the drug trafficking crime, these were merely suggestions, and that the list "might include" those factors. *Ceballos-Torres*, 218 F.3d at 414-415 ("the type of drug activity that is being conducted, accessibility of the firearm, the type of the weapon, whether the weapon is stolen, the status of the possession (legitimate or illegal), whether the gun is loaded, proximity to drugs or drug profits, and the time and circumstances under which the gun is found."). The Fifth Circuit did not find or articulate that these factors should be included in a jury instruction, nor did the court find that a jury should draw any inferences of guilt from these factors. In fact, the Fifth Circuit in *Ceballos-Torres* pointed to factors that would suggest that the firearm was ***not*** possessed in furtherance of drug trafficking.[2] The Fifth Circuit in *Ceballos-Torres* also did not make the finding that these factors should be included in jury instructions or that any inference of guilt could be drawn by a jury based on these factors.

[2] In *Ceballos-Torres*, the Fifth Circuit pointed out that "a drug dealer whose only firearms are unloaded antiques mounted on the wall does not possess those firearms 'in furtherance' of drug trafficking. Nor will a drug trafficker who engages in target shooting or in hunting game likely violate the law by keeping a pistol for that purpose that is otherwise locked and inaccessible." *Id.* at 415.

The instructions offered in this case created a lower standard of proof for possession of a firearm "in furtherance of" drug trafficking than instructions used to prove the "during and in relation to" standard as applied to the "use or carry" component of 18 U.S.C. § 924(c), a separate and distinct means of charging an offense under this statute.[3] By definition, the "during and in relation to" instruction should set forth a lower standard of proof than the "in furtherance of" instruction. *See United States v. Alverio-Melendez*, 640 F.3d 412, 422 (1st Cir. 2011) ("This circuit has noted before that 'the 'in furtherance of' element of a firearm possession charge imposes a 'slightly higher standard' of liability than the nexus element corresponding to the different charges of using or carrying a firearm, which need only occur 'during and in relation to' the underlying crime.'"); *United States v. Combs*, 369 F.3d 925, 933 (6th Cir. 2004) ("Then to further confuse matters, when the court defined the 'during and in relation to' standard of participation, it employed a definition more akin to this

[3] In *Smith v. United States*, 508 U.S. 223, 227–28 (1993), the Supreme Court found that, "Section 924(c)(1) requires the imposition of specified penalties if the defendant, 'during and in relation to any crime of violence or drug trafficking crime[,] uses or carries a firearm.' By its terms, the statute requires the prosecution to make two showings. First, the prosecution must demonstrate that the defendant 'use[d] or carrie[d] a firearm.' Second, it must prove that the use or carrying was 'during and in relation to' a 'crime of violence or drug trafficking crime.'"

circuit's definition of 'in furtherance of.'") ; *United States v. Savoires*, 430 F.3d376, 2005 WL 3179886 (6th Cir. 2005) ("Significantly, the 'in furtherance of' element of the § 924(c) 'possession' offense constitutes 'a higher standard of participation' than 'during and in relation to.'); *United States v. Rush-Richardson*, 574 F.3d 906, 911 (8th Cir. 2009) ("our case law has 'determined that 'in furtherance of' is a slightly higher level of participation than 'during and in relation to.'"). The standard for "in furtherance of" must be more stringent than that for "use and carry" to justify the imposition of such a strict mandatory minimum sentence and to satisfy the strictures of *Bailey v. United States*, 516 U.S. 137 (1995). The panel did not address this argument in its decision.

The instructions in this case created an inference that could not and should not have been drawn from the evidence presented at trial. Although it can be argued that an instruction which creates a permissive inference does not shift the burden of proof, it does nonetheless violate due process unless the evidence at trial demonstrated "with substantial assurance" that the inferred fact was "more likely than not to flow from the proved fact on which it is made to depend." *Ulster County v. Allen,* 442 U.S. 140, 166 & n. 28, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979) (quoting *Leary v. United States,* 395 U.S. 6, 36, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969). The places where the guns and drugs were found can by no means demonstrate with substantial assurance that the possession of

the firearms were "more likely than not" in furtherance of drug trafficking than for any number of other legitimate purposes, to include personal or family protection, collection, or investment. Mr. Askew could legally possess those firearms; he was not a prohibited person. The erroneous "in furtherance" instruction to the jury so prejudiced Mr. Askew as to require reversal of the convictions for Counts 5 and 10.

The Fourth Circuit's decision should be reversed.

The District Court Should Have Provided a Mere Presence Instruction

As virtually every circuit that has addressed the issue has noted, the natural meaning of "in furtherance of" is "furthering, advancing or helping forward." "The negative implication of this definition is that the ***mere presence*** of a weapon at the scene of a drug crime, *without more*, is insufficient to prove that the gun was possessed 'in furtherance of' the drug crime." *Castillo*, 406 F.3d at 814 (emphasis added); *see also Mackey*, 265 F.3d at 462 ("[T]he 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."). Understanding "in furtherance of" in this manner fits not only the phrase's natural meaning, the starting point of all inquiries into statutory construction, but it also is supported by the statute's legislative history and its purpose. *See*

Bailey, 516 U.S. at 145 (beginning with the "ordinary and natural" meaning of "use" in § 924(c) and then moving on to "consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme").

The report by the House Committee on the Judiciary that addressed the bill to amend § 924 explained "in furtherance of" in these terms:

> The government must clearly show that a firearm was possessed to advance or promote the commission of the underlying offense. The mere presence of a firearm in an area where a criminal act occurs is not a sufficient basis for imposing this particular mandatory sentence. Rather, the government must illustrate through specific facts, which tie the defendant to the firearm, that the firearm was possessed to advance or promote the criminal activity. The facts of the Bailey decision ...provide a good example.

H.R.Rep. No. 105-344 (1997), *see also United States v. Castillo*, 406 F.3d 806, 813-14 (7th Cir. 2005); *Ceballos-Torres*, 218 F.3d at 414 (the definition of "in furtherance" "inherently requires more than 'mere presence' of the firearm at the scene;" in considering the House Committee Report, "we understand [the Report] to reemphasize that 'mere presence' is not enough.").

Based on the district court's instruction, and the inference provided within the instruction, the jury was led to believe that the mere presence of a firearm at the scene of the drug trafficking offense ***is*** sufficient to support a conviction for possession of a firearm in furtherance of a drug trafficking crime.

The legislative intent for the "in furtherance language" was for there to be clear and definitive evidence tying the gun to the drug or other illegal activity. Mr. Askew submits that every circuit court that has addressed the issue, has rendered legal rulings on the application of §924(c) that tack very closely to this central principal - that significant evidence of the connection between the gun and the drug offense must be elicited before there can be a conviction, and that the mere presence of firearms with drugs does not satisfy the strict standard.[4]

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[4] *See United States v. Grace*, 367 F.3d 29, 35 (1st Cir. 2004) ("The government must clearly show that a firearm was possessed to advance or promote the commission of the underlying offense. The mere presence of a firearm in an area where a criminal act occurs is not a sufficient basis for imposing this particular mandatory sentence. Rather, the government must illustrate through specific facts, which tie the defendant to the firearm, that the firearm was possessed to advance or promote the criminal activity."); *United States v. Lewis*, 62 F.4th 733, 745 (2d Cir. 2023) ("the mere presence of a weapon at the scene of a drug crime, without more, is insufficient to prove that the gun was possessed 'in furtherance of' the drug crime. . . . The Government must show a 'specific nexus between the charged firearm and the charged drug selling operation' to allow the jury to conclude that the firearm played some part in furthering the crime."); *United States v. Sparrow*, 371 F.3d 851, 853 (3d Cir. 2004) ("Under § 924(c), the 'mere presence' of a gun is not enough. 'What is instead required is evidence more specific to the particular defendant, showing that his or her possession actually furthered the drug trafficking offense,'" *citing to Ceballos-Torres*); *United States v. Ceballos-Torres*, 218 F.3d 409, 414 (5th Cir.), *amended on rehg in part*, 226 F.3d 651 (5th Cir. 2000) ("'[M]ere presence' is not enough. The 'mere presence' test is one based on generality-anytime a drug dealer possesses a gun, that possession is in furtherance, because drug dealers generally use guns to protect themselves and their drugs. What is instead required is evidence more specific to the particular defendant, showing that his or her possession actually furthered the drug trafficking offense."); *United States v. Lawrence,* 308 F.3d 623, 630 (6th Cir. 2002) (same quote as *Grace* from First Circuit); *United States v. Johnson*, 916 F.3d 579, 589 (7th Cir. 2019) ("the mere presence of a firearm in a home or location where drugs are sold is not itself sufficient to prove the 'in furtherance of' prong of the statute and that there must be some nexus or connection between the firearm and the drug-selling operation."); *United States v. Hamilton*, 332 F.3d 1144, 1149 (8th Cir. 2003); *United States v. Kent*, 531 F.3d 642, 654 (8th Cir. 2008) (The

The instruction presented by the district court in this case, and affirmed by the Fourth Circuit, was inconsistent with the legal standard to be applied to the "in furtherance of" element for 18 U.S.C. § 924(c) from every other federal circuit.

The instruction in this case veers so far from this principal that the jury is essentially left with a strict liability standard. No other court in the country has condoned the use of an "in furtherance" instruction that so reduces the burden of proof upon the government and prejudices the defendant to such an extreme. This court must correct this problem and reverse the convictions.

Eighth Circuit found that the evidence is insufficient for a finding of guilt if "the firearm's presence is coincidental or entirely 'unrelated' to the crime. Instead, the gun at least must 'facilitat[e], or ha[ve] the potential of facilitating,' the drug trafficking offense," citing to *Smith v. United States*, 508 U.S. 223, 238 (1993)); *United States v. Mann*, 389 F.3d 869, 879 (9th Cir. 2004) ("we cautioned that '[e]vidence that a defendant merely possessed a firearm at a drug trafficking crime scene, without proof that the weapon furthered an independent drug trafficking offense, is insufficient to support a conviction under § 924(c).'"); *United States v. Basham*, 268 F.3d 1199, 1206-08 (10th Cir. 2001) ("Mere presence of a firearm at the scene is not enough to find possession in furtherance of a drug trafficking crime, because the firearm's presence may be coincidental or entirely unrelated to the underlying crime" provided in the jury instruction); *United States v. Bustos*, 177 F. App'x 905, 907 (11th Cir. 2006) (the following was jury instruction was presented: "It is enough that a firearm was present at the drug trafficking scene, that the firearm could have been used to protect or facilitate the operation, and the presence of the firearm was in some way connected with the drug trafficking offense. Mere presence of a firearm at the scene is not enough to find that defendant carried the firearm during and in relation to a drug trafficking crime, because the firearm's presence may be coincidental or entirely unrelated to the underlying crime."); *United States v. Wahl*, 290 F.3d 370, 376 (D.C.Cir. 2002) (the court noted that it was "essential that the firearm be 'strategically located so that it is quickly and easily available for use'").

The United States Attorney's Office for the Eastern District of Virginia recently proposed a jury instruction in an 18 U.S.C. § 924(c) "in furtherance" case that included the mere presence language. It did not include the inference provided in Mr. Askew's case, nor did it instruct the jury regarding the inference based on argument of a "common sense recognition that drug dealing is a dangerous and [often] violent enterprise." *See* JA 697. It was premised on a Model Criminal Jury Instruction which stated the following:

> Possession "in furtherance of" means for the purpose of assisting in, promoting, accomplishing, advancing, or achieving the goal or objective of the crime charged in Count One of the Superseding Indictment.
>
> Mere presence of a firearm at the scene is not enough to find possession in furtherance of a drug trafficking crime. The firearm's presence may be coincidental or entirely unrelated to the underlying crime. Some factors that may help you determine whether possession of a firearm furthers a drug trafficking crime include, but are not limited to: the type of criminal activity that is being conducted; accessibility of the firearm; the type of firearm; whether the firearm is stolen; whether the defendant possesses the firearm legally or illegally; whether the firearm is loaded; the time and circumstances under which the firearm is found; and proximity to drugs or drug profits.

United States v. Myrick, Case No. 3:22cr148 (HEH), ECF No. 61 at 51, E.D.Va., Richmond Division, March 15, 2023. The proffered instruction in *Myrick* by the same United States Attorney's Office that proffered the instruction in this case referred to the Third Circuit Model Jury Instruction 6.18.924A-1 (2021) ("Mere

presence of a firearm at the scene is not enough to find possession in furtherance of a (crime of violence) (drug trafficking crime). The firearm's presence may be coincidental or entirely unrelated to the underlying crime."). *See also* District of South Carolina Pattern Jury Instructions for Federal Criminal Cases at 178-79 which provides that: "The mere accidental or coincidental presence of a firearm at the scene of a drug trafficking offense is not enough to establish that it was possessed in furtherance of the drug offense." https://www.govinfo.gov/content/pkg/USCOURTS-ca4-16-04226/pdf/USCOURTS -ca4- 16-04226-0.pdf. *See also* Seventh Circuit Pattern Criminal Jury Instruction, p. 387, https://www.ca7.uscourts.gov/ pattern-jury-instructions/Bauer_pattern_criminal_jury_instructions_2022updates. pdf ("The mere presence of a firearm at the scene of a crime is insufficient to establish that the firearm was possessed 'in furtherance of' the crime. There must be a connection between the firearm and the crime."); Ninth Circuit Model Criminal Jury Instruction 14.23, https://www.ce9.uscourts.gov/jury-instructions/ node/1196 ("The phrase 'in furtherance of' means that the defendant possessed the firearm with the subjective intent of promoting or facilitating the crime of [*specify crime*]."); Tenth Circuit Model Criminal Jury Instruction 2.45.1,

https://www.ca10.

uscourts.gov/sites/ca10/files/documents/downloads/Jury%20Instructions%2020 21%20revised%207-14-23.pdf. ("Mere presence of a firearm at the scene is not enough to find possession in furtherance of a [drug trafficking crime] [crime of violence], because the firearm's presence may be coincidental or entirely unrelated to the underlying crime.").

The proffered instruction from the Richmond federal court in *Myrick* did not include the reference to: "whether the firearm provided a defense against the theft of drugs and/or reduced the probability that such theft might be attempted. The possession is in furtherance if the purpose of the firearm is to protect or embolden the defendant." More significantly, it did not call upon the jury to draw an inference from an erroneous statement of law regarding the violence of drug dealing.

Through the panel's decision in this case, the Fourth Circuit has affirmed a very different standard for a jury's consideration in 18 U.S.C. § 924(c) cases than any other Circuit. This result should be reversed by this Court.

CONCLUSION

For the reasons given above, the Court should grant the petition for a writ of certiorari, vacate the judgment below, and remand for further consideration.

Respectfully submitted,

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July 29, 2024

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-4222

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JEROD MONTREL ASKEW

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Rebecca Beach Smith, Senior District Judge. (2:21−cr−00008−RBS−DEM−1)

Argued: January 26, 2024 Decided: April 10, 2024

Before WILKINSON, NIEMEYER, and BENJAMIN, Circuit Judges.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Niemeyer and Judge Benjamin joined.

ARGUED: Robert James Wagner, ROBERT J. WAGNER PLC, Richmond, Virginia, for Appellant. Jacqueline Romy Bechara, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee. **ON BRIEF:** Jessica D. Aber, United States Attorney, Aidan Taft Grano-Mickelsen, Assistant United States Attorney, Matthew Heck, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia, for Appellee.

WILKINSON, Circuit Judge:

Following a jury trial, Jerod Montrel Askew was convicted of various crimes related to drug trafficking, including two counts of possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c). He now appeals his convictions on various grounds. First, he asserts that the jury instructions for the firearm-related charges were erroneous and prejudicial. Second, he contends that the evidence was insufficient to support a guilty verdict for the firearm-related convictions. Next, he claims that the district court abused its discretion in offering a *sua sponte* jury instruction about the legality of the search warrants underpinning the investigation. Finally, he argues that the district court abused its discretion in denying his motion for a mistrial after the prosecution referred to his invocation of the right to counsel during closing arguments. After carefully reviewing each claim, we affirm Askew's conviction.

I.

A.

Law enforcement began investigating Askew for suspected drug trafficking in early 2020. Police first employed visual and electronic surveillance, tracking Askew to the turf of known narcotics distributors. Based on the information gleaned from surveillance, the police obtained search warrants for Askew's vehicle and apartment. With the warrants secured, police pulled Askew over while he was driving his Jeep and prompted their K-9 detection dog to sniff the car. The dog alerted to the center console, inside of which officers discovered a loaded firearm and a crumpled, empty plastic baggie. Askew told the police

that "there was probably marijuana in it earlier." J.A. 305. Police recovered the firearm, the baggie, and two cellphones from the vehicle.

While the traffic stop was ongoing, a different squad of officers executed the search warrant at Askew's apartment. By all indications, the apartment appeared to be the nerve center for a drug trafficking enterprise. There police found a noteworthy collection of drugs and drug paraphernalia: copious quantities of heroin, cocaine, and marijuana, in addition to packaging supplies, cutting materials, scales, sifters, and blending equipment. Police also discovered six firearms, some of them loaded; over $11,000 in cash hidden in a trashcan; multiple cellphones; and a storage unit rental agreement in Askew's name. Upon these findings, Askew was placed under arrest and transported to the storage unit listed on the rental agreement, accompanied by a new search warrant for that property.

The storage unit contained more investigatory fruits. Law enforcement discovered multiple bags of marijuana, as well as various tools which could be used to package and distribute the drug, including a kilo press form, a sifter, and cutting agents. There were also various baggies containing cocaine residue. Within a safe, police found more marijuana, cash, a loaded firearm, and firearm magazines. All of this evidence would be collected and used by the government in its case-in-chief in the trial to come.

B.

Askew ultimately proceeded to trial on eight charges, including one count of conspiracy to distribute narcotics in violation of 21 U.S.C. §§ 841, 846; five counts of possession with intent to distribute in violation of 21 U.S.C. § 841; and two counts of possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C.

§ 924(c).[1] Along with the physical evidence recovered from Askew's apartment and storage unit, the prosecution presented evidence from the cellphones found in Askew's vehicle. Data extractions revealed several text conversations between Askew and his contacts in the drug industry, where they discussed selling and trading narcotics and firearms. Two of the firearms discussed in these text conversations matched the descriptions of those recovered from the searches. The prosecution also discussed its electronic surveillance of Askew and testified that his patterns of movement were consistent with drug dealing. Additionally, the prosecution offered a police detective as an expert witness in drug distribution and firearms, who testified that firearms are considered "a tool of the trade" in drug trafficking, "not only to protect yourself from robbery but also to protect the assets." J.A. 590.

After a three-day trial, the jury returned verdicts of guilty on all counts. Askew moved for a new trial as well as for a judgment of acquittal, both of which the district court denied. He was sentenced to a total term of 198 months of imprisonment and five years of supervised release. Askew timely appealed.

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[1] The specific counts were as follows: (1) Conspiracy to distribute heroin, cocaine, cocaine base, and marijuana, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1), 846; (2) Possession with intent to distribute 100 grams or more of heroin, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B); (3) Possession of a firearm in furtherance of a drug trafficking crime (heroin), in violation of 18 U.S.C. § 924(c)(1)(A)(i); (4) Possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C); (5) Possession with intent to distribute cocaine base, in violation of 21 U.S.C. § 841(a)(1), 841(b)(1)(C); (6) and (7) Possession with intent to distribute marijuana, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(D); (8) Possession of a firearm in furtherance of a drug trafficking crime (marijuana), in violation of 18 U.S.C. § 924(c)(1)(A)(i).

II.

A.

Askew first claims that the jury instructions for his firearm-related charges were worded in such a way as to compel the jury to find him guilty. We begin by recounting what the jury was told about the firearm-related charges.

Askew's convictions were for possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c). The court informed the jury that the government had to prove three elements beyond a reasonable doubt in order to sustain its burden of proof on this charge: (1) that Askew "committed the drug trafficking crime of possession with intent to distribute"; (2) that he "knowingly possessed a firearm"; and (3) that his "possession of a firearm was in furtherance of the commission of a drug trafficking crime." J.A. 765. It is this third element, the "in-furtherance-of" element, at issue in this appeal.

The court defined the relevant terms of this element as follows: "The word 'possess' means to own or to exert control over something." J.A. 766. "The term 'knowingly' . . . means that he was conscious and aware of his actions, realized what he was doing or what was happening around him, and he did not act because of ignorance, mistake, or accident." J.A. 742. And the phrase "'[i]n furtherance of' means the act of furthering, advancing, or helping forward," meaning "the government must prove that the possession of a firearm furthered, advanced, or helped forward the drug trafficking crime." J.A. 767.

The court then discussed how the jury could reach the conclusion that the firearms were used in furtherance of the drug trafficking crimes:

> For drug trafficking crimes, factors that the jury may consider in making the determination include the following: The type of drug activity that was being conducted, the accessibility of the firearm, the type of firearm, whether the firearm was stolen, the status of the possession, whether it was legitimate or illegal, whether the firearm was loaded, the proximity of the firearm to either drugs or drug profits, the time and circumstances under which the firearm was found, whether the firearm provided a defense against the theft of drugs and/or reduced the probability that such theft might be attempted. The possession is in furtherance if the purpose of the firearm is to protect or embolden the defendant.
>
> Distribution of drugs and the common sense recognition that drug dealing is a dangerous and violent enterprise may support an inference that the defendant's possession of a firearm was to facilitate drug dealing.

J.A. 767–78.

Askew challenges the last paragraph of these instructions. He argues that this portion of the charge compelled the jury to find that "a gun found in the presence of drugs will necessarily be connected to the violence inherent in drug dealing" and thus conclude that "the mere presence of firearms in the general vicinity of controlled substances" satisfied the in-furtherance-of element. Appellant's Opening Br. 29–31.

We disagree. When reviewing the propriety of jury instructions, we inquire "whether the instructions construed as a whole, and in light of the whole record, adequately informed the jury of the controlling legal principles without misleading or confusing the jury to the prejudice of the objecting party." *Noel v. Artson*, 641 F.3d 580, 586 (4th Cir. 2011). Further, "we accept at the outset the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 146–47 (1973). Such an approach "recognize[s] that a judgment of conviction is commonly the culmination of a

trial which includes the testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge." *Id.* at 147. In other words, "not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction." *Id.*

Here, the jury was repeatedly informed that it needed to find that the firearms furthered, advanced, or helped forward the drug trafficking counts, in precise conformity with the way this court has interpreted the in-furtherance-of element. *See United States v. Lomax*, 293 F.3d 701, 705 (4th Cir. 2002). The jurors were supplied with a range of factors to consider that this court has endorsed for making that exact determination. *See id.* We have little problem, then, in concluding that "the district court adequately instructed the jury regarding the elements of the offense." *United States v. Wilson*, 198 F.3d 467, 469 (4th Cir. 1999).

Nonetheless, Askew asserts that the jury instructions were defective in that they outright compelled the jury to find Askew guilty of the charge. This obligation, he claims, came from a false legal premise. The court's reference to "the common sense recognition that drug dealing is a dangerous and violent enterprise" led inexorably, in Askew's view, to a mandatory conclusion—that the firearm was used in furtherance of the drug trafficking crimes.

We are not so convinced. There is no false legal premise in these instructions. Jurors were told that the dangerous and violent nature of drug dealing was "a common sense recognition." But the jurors were then advised that the province of common sense was fully

their own. In other portions of the charge, the court informed the jury that it could draw "such reasonable inferences as you feel are justified in light of your experience and common sense." J.A. 731. Jurors were "expected to use [their] good sense in considering and evaluating the evidence in the case" and to "give such evidence a reasonable and fair construction in the light of [their] common knowledge of the natural tendencies and inclinations of human beings." J.A. 729. They were told "several times" that they were "the sole judges of the facts of this case." J.A. 736.

It is difficult to imagine that jurors, repeatedly told that they were in control of their own common sense, would believe that the court somehow wrested that very control from them. Such a result would defy the nature of common sense—something not to be prescribed from above, but instinctively formed within each juror. Common sense is among the distinctive contributions that jurors bring to criminal justice, and the instructions left it fully intact. The jury was thus not force-fed a false legal premise. Rather, it was encouraged to use its own perceptions about the defendant's activities and to draw its own conclusions.

The language to which Askew now objects was at most a permissive inference, which the jury was free to accept or reject at will. *See Cnty. Ct. v. Allen*, 442 U.S. 140, 157 (1979). Such inferences "suggest[] to the jury a possible conclusion to be drawn if the State proves predicate facts, but do[] not require the jury to draw that conclusion." *Francis v. Franklin*, 471 U.S. 307, 314 (1985), *holding modified on other grounds by Boyde v. California*, 494 U.S. 370 (1990). Viewing the instructions as a whole, which we are required to do, we discern nothing approaching reversible error here.

B.

Askew also contends that the instructions were erroneous and prejudicial because they were incomplete. He asserts that the district court erred in failing to *sua sponte* provide the jury with two clarifying instructions. First, he claims that the district court should have informed the jury that the mere presence of firearms at the scene of a drug crime, without further evidence, was insufficient to show that the firearms were possessed in furtherance of the drug trafficking crimes. Second, he posits that the district court should have told the jury that Askew had a constitutional right under the Second Amendment to possess firearms for his own protection, given he was a legal possessor of firearms at the time of his arrest. Because Askew failed to raise these claims below, our review is for plain error. Such review, of course, erects a demonstrable hurdle for Askew to overcome. *See Greer v. United States*, 593 U.S. 503, 508 (2021).

It is a hurdle that Askew cannot surmount. First, Askew's "mere presence" instruction was unnecessary. The jury was already well-informed that the government needed to prove something more than bare proximity to drugs in order to demonstrate that the firearms were used in furtherance of trafficking. The district court emphasized to the jury that the government had to show that Askew had knowing ownership or control over the firearms, which he then used to further, advance, or help forward his drug trafficking crimes. There is no "reasonable probability" that the jury could have convicted Askew of this offense while also believing that the mere presence of the firearms near the narcotics sufficed to prove the government's case. *Id.* at 504. "To whatever extent [Askew's] proposed instruction is relevant, the district court's charge to the jury—taken as a whole—

sufficiently accounted for it." *United States v. Passaro*, 577 F.3d 207, 222 (4th Cir. 2009). Thus, it is highly unlikely that the jury would have changed its mind had it been offered this redundant clarification.

As for Askew's proposed Second Amendment instruction, it is unclear how the knowledge that Askew, prior to this conviction, could legally possess firearms would alter the jurors' calculus. While Askew may have had a right to possess firearms, he had no right to possess them in furtherance of his drug dealings. Indeed, a government witness testified that drug dealers employ guns for personal protection in order to help forward their trafficking enterprises. *See* J.A. 595 ("Drug dealers possess firearms, number one, for personal protection[.] [W]hen you have a large amount of extremely valuable drugs, or you have a large amount of cash . . . you need those firearms to protect yourself."). The instruction, then, would have been irrelevant to the whole purpose of Askew's possession, and there is not a reasonable probability that its issuance would have led to an acquittal.

For the foregoing reasons, we see no error in the totality of the district court's instructions.

III.

Askew next argues that there was insufficient evidence to support his convictions on the firearm-related charges. This court will sustain a jury's verdict when there is substantial evidence, construed in the light most favorable to the government, to support it. *United States v. Mathis*, 932 F.3d 242, 258 (4th Cir. 2019). A reviewing court "assume[s] that the jury resolved all contradictions in the testimony in favor of the government" and will "reverse a conviction on insufficiency grounds only when the prosecution's failure is

clear." *United States v. Moye*, 454 F.3d 390, 394 (4th Cir. 2006) (en banc) (internal quotation marks omitted).

Askew contends that the government was only able to demonstrate that the firearms were present and proximate to the narcotics, not that they were used to further or advance the drug trafficking activities. But this seriously understates the array of evidence the government presented to tie the guns to the drugs, and the reasonable inferences the jury could have made in light of that presentation.

Law enforcement testified to the results of data extractions performed on Askew's cell phones. These text message conversations revealed that Askew carried firearms with him for protection during his drug transactions. *See, e.g.*, J.A. 526 ("Mr. Askew . . . [is] talking about the firearm. Doesn't want anyone to know he's back out here selling drugs and has a gun."). The evidence clearly showed that Askew's drug contacts overlapped with his gun contacts, with Askew's dealers offering him unlicensed firearms and Askew promising the dealers more work or drugs in return. Time and time again, the jury saw that in Askew's drug trafficking business, guns and drugs went hand in hand. *See* J.A. 526 ("So he's asking if he's going to give him the gun, and he will give him a Q, which is slang for a quarter . . . ounce."); 530 ("So they are negotiating on the price for a firearm. Askew responds, 'I give you [drugs] when I get it.'"); 536 ("So he's going to trade narcotics for the firearm."). These examples were buttressed by expert testimony that, in general, "firearms are a very significant tool of the [drug] trade." J.A. 595.

Moreover, the jury was presented with evidence of a substantial quantity of drugs, drug paraphernalia, cash, and firearms scattered throughout Askew's apartment and storage

unit. The evidence in its totality painted a picture of a sophisticated drug trafficking enterprise of which every component was a vital tool. Not only was it reasonable to see the apartment and storage unit as hubs for narcotics distribution, but it was also reasonable to conclude that any drug-related devices located there were helping to forward the business. *See United States v. Moore*, 769 F.3d 264, 270 (4th Cir. 2014) (holding substantial evidence supported § 924(c) conviction where a distribution-level quantity of narcotics, a large amount of cash, and drug distribution equipment were found in the same apartment as firearms); *United States v. Penniegraft*, 641 F.3d 566, 574 (4th Cir. 2011) (same). Just as a juror could have reasonably concluded that any scale or sifter was employed by Askew to advance his drug trafficking business, so too could that juror have concluded that the firearms present furthered the same mission.

The question of whether the possession of a firearm furthered, advanced, or helped forward a drug trafficking crime "is ultimately a factual question." *Lomax*, 293 F.3d at 705. Askew has not made the case for upsetting the jury's factual conclusion.

IV.

Askew next claims that the district court abused its discretion in offering a *sua sponte* jury instruction about the propriety of the search warrants issued.

The challenged *sua sponte* instruction was the result of trial testimony that the district court found troublesome and potentially misleading. During cross examination of a government witness, defense counsel sought to undermine the proposition that Askew had knowledge of the narcotics found in his apartment, as many of them were inside a zipped suitcase. Defense counsel asked the witness, "In your line of work, you heard the

phrase something in plain view?" J.A. 414. The witness responded affirmatively. Defense counsel continued, "As far as you can tell, the drug evidence was not in plain view because it was inside a piece of luggage?" J.A. 414. At this point, the court interrupted and excused the jury.

Outside the presence of the jury, the district court expressed its concerns with defense counsel's line of questioning, telling him that his mention of plain view was misleading because the doctrine was not at issue in the case. Thus, it cautioned, defense counsel's questioning about whether the drugs were in plain view could give the jury the impression the search was illegal, though its legality had not been challenged. Defense counsel explained he was merely trying to get at Askew's lack of knowledge, and that his questions had "nothing to do with the search doctrine." J.A. 417. The court advised defense counsel that he could make that point without using obviously legal language.

The court brought the jury back and the cross-examination continued. Defense counsel was able to question the witness about Askew's knowledge while avoiding the phrase "plain view." Court thereafter adjourned for the day. The next morning, the court addressed the legality of the government's searches in a *sua sponte* instruction to the jury:

> One thing that I would tell you as you start today, that as a matter of law the search warrants in this case were properly issued by a judge of proper jurisdiction, and they were properly executed by law enforcement. There are no legal issues involving the search warrants in this case. We may proceed.

J.A. 437–38.

Askew challenges this comment on appeal, contending it lacked a legal foundation and that it biased the jury by placing an imprimatur on the government's case and calling into question the competence of defense counsel.

We review the district court's decision to give a jury instruction for abuse of discretion. *Passaro*, 577 F.3d at 221. In doing so, we "give space to the trial's court's discretion, asking only whether the judge ran out of bounds." *United States v. Smith*, 21 F.4th 122, 136 (4th Cir. 2021). The choice is "entitled to substantial deference, because a district court is much closer than a court of appeals to the pulse of the trial." *United States v. Russell*, 971 F.3d 1098, 1104 (4th Cir. 1992) (internal quotation marks omitted).

We find no abuse of discretion here. The district court worried that the case might skitter off into a debate over plain view search doctrine. It appropriately sought to head off any confusion by issuing a short and sweet corrective. Trials by their very nature can be subject to detrimental detours, and the job of a trial judge is to keep a case on track. "[T]he decision whether to issue a[] clarification" is thus "left to the sound discretion of the district court." *United States v. Smith*, 62 F.3d 641, 646 (4th Cir. 1995); *see also United States v. Muse*, 83 F.3d 672, 677 (4th Cir. 1996) (holding that it was "within the court's discretion" for it to "instruct[] the jurors that . . . an extraneous consideration was not their concern."); *United States v. Shirley*, 435 F.2d 1076, 1078 (7th Cir. 1970) (affirming liberty of trial judge to "giv[e] a supplemental or modified instruction designed to prevent the jury from becoming confused and deciding the case on a false basis.").

Here the corrective instruction was minimally invasive, intentionally tailored to reduce any perceived endorsement or criticism of one side or the other. The district court

intervened without signaling any disapproval of defense counsel, merely asking the jury to step out for a moment. The corrective was not even issued until the next morning, and then only briefly and casually. Its accuracy as a statement of law was apparent, and Askew's challenge to the comment is unavailing.

V.

We turn finally to Askew's contention that he was entitled to a new trial because the prosecution referred to his invocation of the right to counsel during closing argument.

A.

The portion of the prosecution's closing argument being challenged on appeal relates back to testimony from earlier in the trial. The detective who initiated the traffic stop of Askew testified that, after Askew was pulled over, he was read his *Miranda* rights and informed he was under investigation for drug trafficking, to which Askew replied they "must have the wrong person." J.A. 333. However, when Askew was told that law enforcement had been tracking his whereabouts, his "eyes got big, he broke eye contact and looked away . . . and immediately asked for his lawyer." J.A. 333. Defense counsel did not object to this testimony when it was brought out at trial. Instead, on cross-examination, defense counsel doubled down on the point, asking the witness, "And Mr. Askew, after he said you must have the wrong person, when you questioned him further, he said he would like to talk to an attorney, correct?" J.A. 350.

This testimony laid the groundwork for portions of the parties' closing arguments. During closing, defense counsel opined to the jury that Askew was "polite and respectful" to the police, which is "not the normal behavior" for someone who is guilty of drug

trafficking. J.A. 694. Defense counsel emphasized that "when they confront[ed] [Askew] and said we are investigating [him] for drug dealing, he said, 'You got the wrong man.' That's what he said. That's what you'd expect somebody who is innocent to say to police." J.A. 694–95.

The prosecution picked up on this thread in its rebuttal argument, noting that denial of guilt is "an obvious thing to say" whether one is guilty or innocent. J.A. 718. But the prosecution noted how Askew's demeanor changed when law enforcement informed him that he had been surveilled: "that is when he got nervous, that's when he asked for an attorney." J.A. 718. At that point in the closing argument, defense counsel interrupted the prosecution, and the jury was excused. Defense counsel then moved for a mistrial, asserting that the government violated Askew's due process rights by commenting on his "exercise of his right to remain silent and to ask for an attorney." J.A. 719.

The district court denied the motion, finding that the prosecutor's "stray reference" to Askew's use of his *Miranda* rights did not amount to an impermissible "argument that the jury should use Defendant's Constitutional right to remain silent as evidence of his guilt." J.A. 1082–83. Thus, no due process violation had occurred.

B.

Askew challenges the district court's determination on appeal, asserting that the prosecution's reference to his invocation of the right to counsel violated his due process rights and entitled him to a new trial. We review a district court's denial of a motion for a mistrial for abuse of discretion. *United States v. Wallace*, 515 F.3d 327, 330 (4th Cir. 2008).

As established by the Supreme Court in *Doyle v. Ohio*, the Due Process Clause guarantees that defendants who invoke their constitutional rights to silence and counsel will not have that invocation used against them at trial. *See* 426 U.S. 610, 619 (1976); *Wainwright v. Greenfield*, 474 U.S. 284, 295 n.13 (1986). Such protection comes from the "implicit promise[]" in *Miranda* warnings "that any exercise of those rights will not be penalized." *Wainwright*, 474 U.S. at 292.

This does not mean, however, that every fleeting reference to those invocations constitutes a *per se* due process violation. Instead, *Doyle* and its progeny protect against a very specific danger: that the government will *exploit* the defendant's invocation of his right by using it as evidence of his guilt or unreliability at trial. *See Noland v. French*, 134 F.3d 208, 216 (4th Cir. 1998) (holding that *Greenfield* "does not impose a prima facie bar against any mention whatsoever of a defendant's right to request counsel, but instead guards against the exploitation of that constitutional right by the prosecutor."). So long as the allusion to the invocation was "not designed to draw meaning from silence," the defendant's rights have not been violated. *Anderson v. Charles*, 447 U.S. 404, 409 (1980). The fact that some matter may naturally surface in the course of a trial narrative does not answer the important question of whether the government sought to take impermissible advantage of it.

We conclude that the prosecution's brief remark here did not amount to impermissible exploitation. As an initial matter, the prosecution was not alluding to anything that had not already been revealed and unobjected to during trial testimony. Indeed, defense counsel himself had referenced the invocation during cross-examination.

Moreover, during closing argument, the prosecution only mentioned the invocation in rebuttal, after defense counsel characterized Askew's interaction with law enforcement as entirely innocuous. In large part, then, the prosecution was simply contesting Askew's behavior towards police and providing a clarification on the "narrative[] . . . regarding [Askew's] apprehension and arrest." *Noland*, 134 F.3d at 216; *see also United States v. Meredith*, 824 F.2d 1418, 1429 (4th Cir. 1987) (noting that "defense counsel appears to have invited the prosecutor's comment by his own remarks" and that "[w]hen defense counsel opens the door in this way, we allow the prosecutor broad latitude in response."). Further, the prosecution did not linger on the point or encourage the jury to draw an inference of guilt from the invocation, instead segueing directly into its next line of argument. Thus, because the "testimony only made passing reference to *Miranda*, and the prosecutor did not specifically exploit [Askew's] exercise of his *Miranda* rights," we find no Due Process violation. *Id.* at 216–17.

The prosecution's remark in no event warrants a new trial. We have long been cautioned not to allow the smallest part of a proceeding to supplant the larger whole. *See Johnson v. United States*, 318 U.S. 189, 202 (1943) (Frankfurter, J., concurring). The contested remark was one-off and cursory. Indeed, the entirety of the comment comprises one line in a 425-page transcript. If this remark is not deemed "isolated," it is hard to imagine what would be. *United States v. Mitchell*, 1 F.3d 235, 241 (4th Cir. 1993).

VI.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

FILED: May 7, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-4222
(2:21-cr-00008-RBS-DEM-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JEROD MONTREL ASKEW

Defendant - Appellant

O R D E R

The court denies the petition for rehearing and rehearing en banc and denies the motion to exceed length limitations. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge Niemeyer, and Judge Benjamin.

For the Court

/s/ Nwamaka Anowi, Clerk