

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KENNETH GRAHAM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

*On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit*

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the District Court and Third Circuit err by not requiring the Government to meet its burden of proof and prove that a real gun was used in a 18 U.S.C §924(c) conviction where no gun was recovered nor was any specific make, model or type of gun identified by any of the witnesses?

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PETITION FOR WRIT OF CERTIORARI

Kenneth Graham petitions the Court for writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Third Circuit's unpublished opinion and judgment for the appeal and the order denying the petition for rehearing are attached as Appendix A. The district court's judgment is unreported and attached as Appendix B.

JURISDICTION

The judgment and opinion of the Third Circuit was entered on January 30, 2025. See Appendix A. This petition is timely filed pursuant to Supreme Court Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the definition of a firearm in accordance with 18 U.S.C. § 924(c). Specifically, this case relies upon the definition of a firearm in accordance with the holding of the Third Circuit in United States v. Hodge, 820 F.3d 187 (3d. Cir. 2017). The text of 18 U.S.C. § 924(c) and the case United States v. Hodge are contained in Appendix C.

STATEMENT OF THE CASE

This petition arises from the judgment entered by the District Court on October 30, 2023 imposing a sentence of 330 months of imprisonment on Mr. Graham. On August 19, 2021, Mr. Graham was indicted on two counts arising from an alleged January 18, 2021 robbery of a Boost Mobile store: (1) Hobbs Act Robbery in violation of 18 U.S.C. §1951(a) and (2) with the use and carry of a firearm, in violation of 18 U.S.C §924(c)(1)(a)(ii).

Trial commenced on March 13, 2023 continued until March 20, 2023. There was no dispute that no gun was recovered nor was any specific make, model or type ever identified. The jury was also not instructed that a real gun needed to be proven by the Government. During the Government's case-in-chief, two (2) detectives and the victim employee of the Boost Mobile store testified. Detective Felix Lantigua of the East Orange Police Department ("Lantigua") testified that he was working on the date of the robbery with his partner Detective Jessenia Barry. Lantigua testified he reviewed all the surveillance footage gathered throughout the investigation. Lantigua also testified that he arrested Graham the following day. Lantigua testified that no gun was recovered upon a search of Graham's person, vehicle and residence.

Detective Jessenia Barry also testified ("Barry"). Barry testified that upon her review of the surveillance footage, the robbery suspect had a gun and appeared to be "racking" the gun. During cross-examination, Barry testified that no gun was recovered from the scene or upon search of Graham's person, vehicle and residence. Barry acknowledged that the best way to determine if a gun was real or fake was to examine it. Barry further acknowledged that she had no training in replica or imitation weapons and had no experience in her over 100 investigations with replica guns.

Lastly, the victim employee, Daria Martin ("Martin") testified that she also reviewed the security footage from the robbery. Martin indicated that the gun seen in the video was a "real" gun and she knew this because of her experience when she was a kid in the Dominican Republic with her uncles. Martin stated that she was not strong enough to pull the trigger and would mostly sit on the sidelines eating mangos and observe her uncles practice with firearms.

Prior to jury deliberations, Argument regarding the proposed jury instructions was held on March 17, 2023 and included an argument regarding jury instruction Number 33 regarding the "firearm defined." The proposed instructions were largely derived from the Third Circuit Model Jury Instructions. However, defense counsel requested that language be added to this firearm instruction - specifically "it must be established that the firearm was a real one" – consistent with United States v. Hodge, 879 F.3d 184, 195 (3d Cir. 2017). The district court declined to include this requested language and found that Hodge was not applicable. This was an error.

On March 20, 2023, the district court gave jury instructions and the jury proceeded with deliberations. After several hours of deliberation, the jury convicted Mr. Graham on all counts.

Upon appeal, the Third Circuit issued an unpublished Opinion on January 30, 2025, where it affirmed the district court's determination on all issues advanced by Mr. Graham, including on the jury instructions issue.

On February 12, 2025, Mr. Graham filed a petition for re-hearing before original panel and the court *en banc*. On March 20, 2025, the Court entered an Order denying the petition for rehearing.

REASONS FOR GRANTING THE WRIT

This Court's intervention is necessary to resolve the issue of whether the Government must prove beyond a reasonable doubt that the firearm involved in the commission of the offense was in fact a real firearm. Without this Court's intervention, defendants would be unjustly convicted for firearm related offenses without proof of whether a real firearm was in fact used.

A. THE DEFINITION OF A FIREARM AS SET FORTH IN UNITED STATES V. HODGE SHOULD BE APPLICABLE IN ALL JURY INSTRUCTION REGARDING A VIOLATION OF 18 U.S.C. § 924(c)

This Court should grant Mr. Graham's petition for writ of certiorari in order to clearly define the Government's standard of proof when a defendant is charged with using or carrying a firearm during a crime of violence in violation of 18 U.S.C. § 924(c). In order to support a conviction under 18 U.S.C. § 924(c), the Government should be required to prove that a real gun was used in the commission of the offense.

The Third Circuit proposed jury instruction for a firearms offense under 18 U.S.C. § 924(c) provides:

6.18.922A-2 Firearm Offenses - Firearm Defined

The term "firearm" means any weapon which will expel, or is designed to or may readily be converted to expel, a projectile by the action of an explosive. The term includes the frame or receiver of any such weapon [*or any firearm muffler or firearm silencer*]

Third Circuit Model Jury Instructions, Firearm Offenses (18 U.S.C. §§ 922, 924), (2024).

In United States v. Hodge, 820 F.3d 187 (3d. Cir. 2017), the Third Circuit noted that "to prove a violation of 18 U.S.C. § 924(c), a reasonable jury must find that the firearm was a "real" one." 820 F.3d at 194-195.

In the instant matter, Mr. Graham objected to the language in the jury charge defining a firearm and whether the finding of the object defendant possessed was a real firearm may rest upon lay witness testimony. Mr. Graham proposed that the Court should include the following sentence in the jury instruction: "However, it must be established that the firearm was a real one." The inclusion of this language is consistent with Third Circuit caselaw in United States

v. Hodge, 820 F.3d 187 (3d. Cir. 2017). Mr. Graham relied on Hodge for the proposition that the government must establish that a real firearm was used in the offense and the jury instruction should reflect same

However, the district court declined to provide the proposed instruction to the jury submitted by Defendant on the issue of the alleged firearm. The district court found Hodge to be inapplicable and declined Graham's request to strike or amend the proposed jury charge. The district court erred because the only evidence was lay testimony elicited from Darria Martin and two detectives, who all testified to their perception as to whether the gun observed was in fact a real firearm. Without Mr. Graham's proposed amendment to the instruction, the Government was able to circumvent their burden to prove beyond a reasonable doubt that the firearm used was in fact a real one. This result leads to defendants being unjustly convicted based solely on the speculative testimony of lay witnesses as to a firearm. The jury should have been instructed that the government must prove that it was in fact a real firearm. Thus, this Court should intervene and promulgate that in order to convict a defendant on a violation of 18 U.S.C. § 924(c), the Government must prove beyond a reasonable doubt that the firearm used in the commission of the offense was in fact real, in accordance with Hodge.

CONCLUSION AND PRAYER FOR RELIEF

The standard definition of a firearm and what constitutes a "real" firearm must be defined in order to hold the Government to its burden of proving every element of an offense under 18 U.S.C. § 924(c) beyond a reasonable doubt. Absent this Court's intervention, the due process rights of defendants in criminal prosecutions will be violated.

This Court should grant certiorari to review the Third Circuit's judgment refusing to review the Petitioner's argument pertaining to amending the jury instructions regarding the firearm to reflect the requisite burden of proof. This Court should summarily reverse the decision below and remand this case in accordance with this Court's directive, or grant such other relief as justice requires.

Respectfully submitted,



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