No. 25-_____

IN THE UNITED STATES SUPREME COURT

Mark Ellis
Petitioner,

v.

United States of America,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. DUE PROCESS REQUIRES SUFFICIENT EVIDENCE TO ALLOW A RATIONAL JURY TO FIND GUILT BEYOND A REASONABLE DOUBT. WHERE THE EVIDENCE THAT A FIREARM WAS POSSESSED IN FURTHERANCE OF A DRUG TRAFFICKING CRIME WAS BASED ON SPECULATION AND CONJECTURE INSTEAD OF RATIONAL INFERENCES, MUST THE CONVICTION FOR COUNT 4 BE VACATED?

PARTIES

All parties in the Sixth Circuit proceeding are identified in the caption.

Petitioner is an individual and no corporation has an interest in this case

RELATED PROCEEDINGS

Middle District of Tennessee, #3:22-70, *United States v Mark Ellis,* Judgment date – March 18, 2024.

Sixth Circuit Court of Appeals #24-5283, *United States v. Mark Ellis*, Judgment date – April 10, 2025.

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CITATION OF REPORTS OF OPINIONS

United States v. Mark Ellis, Sixth Circuit #24-5283, 2025 WL 1081760 (unpublished).

United States v. Mark Ellis, Middle District of Tennessee, #3:22-70, none.

STATEMENT OF JURISDICTION

The United States Supreme Court has jurisdiction over this petition pursuant to U.S. Const. art. III, § 2, cl. 2 and 28 U.S.C. §1254(1). The judgment to be reviewed in this petition was entered by the Sixth Circuit Court of Appeals on April 10, 2025. No petitions for rehearing were filed and no extensions of time to file have been requested or granted.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V:

> *No person shall be* held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be *deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation.

18 U.S.C. §924(c)(1)(A):

> (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;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

STATEMENT OF THE CASE

On January 25, 2022, a team of officers from the Clarksville, Tennessee Police department utilized a confidential informant (CI) in an attempt to conduct a controlled purchase of heroin from Mr. Ellis. Jury Trial, Vol. 2, R.205, PageID##1031-1032. The CI met with the officers and she was searched as well as her car. She was issued money the serial numbers of which had been recorded by the police. In this case, she was given $260.00 in cash. *Id*, PageID##1033-1036. Of that money, $160.00 was purportedly to pay a pre-existing debt to Mr. Ellis and the balance was to be used to purchase one gram of heroin. *Id*, PageID#1036.

After the search and provision of money, the CI entered her own vehicle and was followed to an intersection near Mr. Ellis' dwelling at 219 Mark Spitz Drive. Other officers were stationary in vehicles near Mr. Ellis' dwelling. *Id*, PageID#1037. The CI was equipped with a device that captured both audio and video during her interaction with Mr. Ellis. *Id*, PageID#1033. The officer on surveillance was approximately 300 feet from the driveway of the 219 Mark Spitz Drive residence in a vehicle. *Id,* PageID#1115. The CI arrived first and Mr. Ellis then arrived in a Chrysler 300 about five minutes later. *Id*, PageID#1118. After the Chrysler backed into the driveway, Mr. Ellis' wife, Yennifer Angeles, exited the passenger side and went into the dwelling. *Id,* PageID##1118-1119. The officer could not see through the front windshield very clearly and could only identify the driver by race and

gender. He could also see the top of the steering wheel. *Id*, PageID#1119. The CI entered the passenger side of the Chrysler. After about seven minutes, Angeles came out of the dwelling and approached the driver's door. She was there approximately one minute. She then returned to the dwelling. Approximately one minute after Angeles left the driver's door, the CI left the Chrysler and returned to her own vehicle. *Id*, PageID##1119-1120. Officer Gibbons maintained his surveillance and testified that the Chrysler remained in the driveway for about an hour and then pulled away. Mr. Ellis never left the vehicle. Angeles went from the dwelling to the Chrysler about three times during this one hour. *Id*, PageID##1121-1122. The Chrysler returned to Mark Spitz Drive after being gone about five minutes. Approximately 15 minutes after it parked, Mr. Ellis exited the Chrysler and walked into the dwelling. Ms. Angeles had previously left the area in a different vehicle. *Id,* PageID##1127-1129.

The moving police team including Officer Smith picked up surveillance of the CI after she left Mark Spitz Drive and followed her to a meeting spot. There she was again searched and found to have no additional money. She left a package in the seat of her car which Officer Smith retrieved and logged into evidence. It was a baggie that contained a purple chunky substance. *Id*, PageID#1043-1045; Petitioner's Appendix, pp. 58-60.

The substance was later tested by the Tennessee Bureau of Investigation laboratory and determined to contain .097 grams of heroin, fentanyl, and 4-ANPP which is a precursor of fentanyl. *Id,* PageID##1098-1101.[1] A quantitative analysis was not performed.[2]

Officer Gibbons stayed in his surveillance position until other officers obtained a search warrant for 219 Mark Spitz Drive later the same day. *Id*, PageID#1131. Officer Gilboy from Clarksville Police assisted with the execution of the search warrant. Inside the dwelling was an older male and female with another older male in a back bedroom that appeared to be disabled or handicapped. Inside this same back bedroom, Officer Gilboy recovered a jacket and pair of pants, a scale and spoon with residue from a jacket pocket, and a bag within a handbag containing multiple pre-packaged bags of powder. *Id*, PageID##1170-1182. Also within the bag were items of mail addressed to Mr. Ellis. *Id*, PageID#1185. During a bench conference discussion, Mr. Ellis' counsel informed the court that the mail found at Mark Spitz Drive was to Mr. Ellis but the address was different. Jury Trial 3, R.206, PageID#1245; Pet. App'x, p. 21. Testing of the substance inside the handbag by the

[1] The transcript shows the ".097" quantity which would be less than one-tenth of a gram. The report and/or the witness might have said or meant ".97" but the actual amount for purposes of this count and this appeal are not at issue.

[2] In contrast, the DEA Laboratory Operations Manual would mandate purity testing of all purchased exhibits containing heroin and/or fentanyl. DEA, LOM-7500 – Analysis of Drug Evidence, Section 7526 Quantitative Analysis, pp. 111-113.

TBI resulted in a finding of heroin and fentanyl in an amount of 445.83 grams. Jury Trial 2, R.205, PageID##1205-1211.

Based upon jail calls from Mr. Ellis in the early morning hours of January 26, 2022 and interviewing Ms. Angeles, officers obtained a search warrant for 375 S. Lancaster Road in Clarksville. Jury Trial 3, R.206, PageID##1248-1258. Officers were also aware that a tether being worn by Mr. Ellis placed him in the area of 375 Lancaster Road. *Id*, PageID##1258-1259.[3] The Lancaster Road address belonged to Ella Webb who is Mr. Ellis' aunt. *Id*, PageID#1259. At this location, a receipt for men's clothing and a notebook with numbers was located. A Versace sunglasses box was recovered that contained a digital scale and multiple bags of powder the same color (purple) and consistency as that found at Mark Spitz Drive. *Id*, PageID##1260-1265. Mr. Ellis' fingerprints were not obtained from any of the seized items. Ms. Angeles' fingerprints were on the Versace sunglasses box. *Id*, PageID##1270-1272.

The suspected controlled substances from Lancaster Road were also sent to the TBI laboratory. The actual analyst did not testify but her supervisor and the report reviewer testified to her report and findings (without objection). Two items from Lancaster were tested. One item weighed 21.06 grams and contained tramadol and

[3] The jury was not informed that the location data came from a tether as it was referred to as a law enforcement database.

fentanyl. The other item weighed 4.52 grams and contained heroin, fentanyl, and 4-ANPP. Jury Trial 2, R.205, PageID##1220-1225.

PROCEEDINGS BELOW

The District Court for the Middle District of Tennessee had jurisdiction over this case pursuant to 18 U.S.C. §3231.

Mr. Ellis and his then wife, Yennifer Angeles, were indicated on February 28, 2022 in a six-count indictment alleging:

Count 1 – from an unknown date through January 26, 2022 the two conspired to distribute and possess with intent to distribute a mixture containing a detectable amount of fentanyl;

Count 2 – on January 25, 2022, Mr. Ellis possessed with intent to distribute 400 grams or more of a mixture containing a detectable amount of fentanyl;

Count 3 – on January 25, 2022, Mr. Ellis possessed with intent to distribute a mixture containing a detectable amount of fentanyl;

Count 4 – On January 25, 2022, Mr. Ellis possessed a firearm in furtherance of a drug trafficking crime to wit, distribution or possession with intent to distribute a controlled substance;

Count 5 – On January 25, 2022, Mr. Ellis possessed a firearm while being a convicted felon; and

Count 6 – On January 26, 2022, Mr. Ellis possessed with intent to distribute 40 grams or more of a mixture containing a detectable amount of fentanyl.

Mr. Ellis first appeared on February 2, 2022 on a two-count complaint and was detained. See Indictment, R.17, PageID##29-31; Pet. App'x, pp. 50-52. On December 20, 2022, an ex parte hearing occurred where Mr. Ellis complained about his appointed trial counsel. His request for new counsel was granted. Transcript, R.203, PageID#12; Order, R.55, PageID#104.

On March 27, 2023, the pretrial conference began with an ex parte session where Mr. Ellis again complained about his attorney, Mr. Drake. This concluded with the trial court deciding to appoint a second lawyer but refusing to remove Mr. Drake. Pretrial Conference Transcript, 3/27/2023, Volume 1-B, R.214, PageID##2055, 2063; Order, R.100, PageID#351. In the public portion of the pretrial, several motions were addressed. The first motion involved the government's motion in limine to preclude the defense from making incorrect arguments about drug weight. Motion in Limine, R.80, PageID##198-201. This was the beginning of several discussions concerning the "detectable amount of fentanyl" in an entire mixture of other substances. *Id*, Volume 1-A, R.215, Page ID##2078-2080. The motion was granted after the trial court explained to Mr. Ellis the statute and how it had been interpreted. *Id*; Order, R.101, PageID#355. A motion by the defense to suppress evidence of other acts was denied as moot. Motion to Suppress, R.73,

PageID##182-183; Pretrial Conference Transcript, Volume 1-A, R.215, PageID#2080; Order, R.101, PageID#354.

The next motion was a motion in limine by Mr. Ellis to suppress evidence of the arrests of an unindicated person. Motion in Limine, R.74, PageID##184-185. This motion was denied as moot. Pretrial Conference Transcript, Volume 1-A, R.215, PageID#2080. The next motion was a motion in limine by Mr. Ellis to suppress testimony of a co-defendant implicating him. Motion in Limine, R.75, PageID##187-188. That motion was taken under advisement pending trial developments. Pretrial Conference Transcript, R.215, PageID#2080. The next motion was a motion in limine by Mr. Ellis to suppress the video of the alleged controlled purchase of January 25, 2022 by the CI. Motion in Limine, R.81, PageID##202-203. This motion was also taken under advisement. Pretrial Conference Transcript, R.215, PageID#2081. A lengthy discussion again occurred about the drug quantities. *Id*, PageID##2084-2093. The details of this discussion are set forth below in the argument section.

On April 11, 2022, a motion to continue was before the trial court. Motion to Continue, R.213. The crux of the motion was to allow the defense time to utilize a local court rule that authorized independent testing of controlled substances. This again revolved around the "detectable amount" in a mixture language in the statute. During this hearing, the government informed the trial court that the laboratory

scientist that tested the Lancaster Road substance was not available and her supervisor would be providing the testimony. *Id*, PageID##1984-1985. The government agreed to make the scientists available for interviews by the defense. *Id*. The trial court did allow for the independent testing but denied the motion to continue the May trial date. *Id*, PageID##1988-1992.

The matter went to trial on May 1, 2, and 3, 2023 with the jury returning guilty verdicts on all six counts. In the course of the trial, discussions were had about whether Count 4 (924c) properly included predicate conduct in both Counts 2 and 3. Ultimately, the government agreed to limit the application of Count 4 only to Count 3. The defense request to remove it entirely is explained in more detail below in the argument section.

Sentencing occurred on March 15, 2024. Mr. Ellis was sentenced as follows:

Count 1 (conspiracy), Count 2 PWID, Count 3, PWID, Count 5 (felon in possession), and Count 6 PWID – 240 months all concurrent with each other;

Count 4 (use of firearm in furtherance of drug trafficking) – 60 months consecutive to all other counts. Judgment, R.191, PageID#659; Pet. App'x, pp. 3-11.

Mr. Ellis timely filed his Notice of Appeal on March 25, 2024. The Sixth Circuit Court of Appeals had jurisdiction of the appeal pursuant to 28 U.S.C. §1291, F.R.A.P. 3 and 4(b)(1)(A).

REASONS FOR GRANTING THE WRIT

I. DUE PROCESS REQUIRES SUFFICIENT EVIDENCE TO ALLOW A RATIONAL JURY TO FIND GUILT BEYOND A REASONABLE DOUBT. WHERE THE EVIDENCE THAT A FIREARM WAS POSSESSED IN FURTHERANCE OF A DRUG TRAFFICKING CRIME WAS BASED ON SPECULATION AND CONJECTURE INSTEAD OF RATIONAL INFERENCES, THE CONVICTION FOR COUNT 4 MUST BE VACATED.

A. Reasons for granting the writ.

Most Circuit Courts of Appeal have adopted a multi-factored approach using a non-exhaustive list of factors that yield a disparity of results. The Sixth Circuit has emphasized the factor of accessibility in at least one published case and it has been noted but rejected by other circuits.

B. The offense at issue: 18 U.S.C. §924(c)(1)(A).

The offense at issue in the indictment is identified as 18 U.S.C. §924(c)(1)(A). That statute prohibits 1) using or carrying a firearm during or in relation to a drug trafficking crime and 2) possession of a firearm in furtherance of a drug trafficking crime. Paragraph 924(c)(1)(D) is the provision that mandates a consecutive sentence for the predicate offense.

As indicted, Count 4 stated the predicate offense as "possession with intent to distribute a controlled substance" and did not specify another count in particular. Indictment, R.17, PageID#30; Pet. App'x, p. 52. The confidential informant did not testify at trial. Officer Smith was allowed to testify to both visual and audio portions from the recording device worn by the CI. His testimony is not precise as to whether

he is testifying from what he saw on the recording, what the CI told him, or the observations of Officer Gibbons. Nonetheless, it was established that Mr. Ellis was in his Chrysler 300 backed into the driveway at 219 Mark Spitz Drive. Yennifer Angeles exited the passenger side and went into the dwelling. The CI entered the front passenger seat. On the video, a person appeared at the driver's window and a purple colored substance was seen in the CI's hand. The money exchange is also on the video. The money was left on the passenger seat. Jury Trial 2, R.205, PageID##1040-1041; Pet. App'x, pp. 55-56. After the exchange, the CI made a comment about a firearm and referred to it as a "9." Officer Smith also testified that Mr. Ellis made statements about where he obtained the firearm but the content was not part of the testimony. Jury Trial, Vol. 2, R.205, PageID#1043; Pet. App'x, p. 58. The recording was identified as Government Exhibit 1 and was admitted over objection. *Id*, PageID##1046-1047; Pet. App'x, p. 61.

Government Exhibits 54 through 60 were still shots from the video. These were also the subject of an objection which was overruled. *Id*, PageID##1051-1056; Pet. App'x, pp. 66-71. Exhibit 54 was a still of the money in the CI's hand. Exhibit 55 was a still of the Ziploc bag containing a purple substance that was in the evidence envelope which made up Exhibit 2. Exhibit 56 was a still that showed the back of the handle of the firearm. *Id,* PageID##1057-1059; Pet. App'x, pp. 72-74.

The government then attempted to inquire of Officer Smith from his experience whether drug dealers frequently carry firearms and for what purposes. Numerous objections were made most of which were sustained. The Assistant United States Attorney nonetheless pursued the topic until the District Court instructed him to move on. *Id*, PageID##1060-1062; Pet. App'x, pp. 75-77.

Exhibit 57 was a still which was a closer up view of Exhibit 56. *Id*, PageID#1062; Pet. App'x, p. 77. This was the particular problem that trial defense counsel raised. His concern was the fact that still shots from a video and especially those that are enhanced by enlargement created an unfair impression that the weapon was much more visible than it was in real time with the naked eye. The objection was particularly appropriate since the issue was going to be whether the firearm "furthered" the underlying offense. *Id,* PageID#1052; Pet. App'x, p. 67. Exhibit 58 was a still of the money on the passenger seat. *Id*, PageID#1063; Pet. App'x, p. 78. Exhibit 59 was a still showing the passenger seat moments later with no money present. *Id*, PageID##1065; Pet. App'x, p. 80. Exhibit 60 was a still showing Mr. Ellis still in the vehicle with the money now in the console of the vehicle. *Id*, PageID#1066; Pet. App'x, p. 81. The trial court then gave an instruction to the jury about how they were entitled to be the judges of not only testimony but also whether documents presented were actually what its proponent claimed. *Id*, PageID##1066-1067; Pet. App'x, pp. 81-82.

An agent from ATFE testified that he arrived at the scene after the search warrant was executed but local officers were still present. He observed the firearm "around" the driver's seat. Jury Trial 2, R.205, PageID#1153. He further said that there was nothing of interest in the console and nothing of interest in the passenger seat. *Id*, PageID#1150. He also testified that it was loaded and the magazine was in place. *Id*, PageID##1158-1159.

Officer Gilboy testified to his search of the home on Mark Spitz Drive in particular a bedroom where the controlled substances were found. He did not mention anything about finding firearms, ammunition, or other items related to the seized firearm or any other firearm. *Id*, PageID##1168-1197.

Officer Smith was recalled to talk about the search of the Lancaster Road residence. He described the location and seizure of the Versace sunglasses box, a scale, and controlled substances. He did not claim that any firearms or ammunition were located at Lancaster Road. Jury Trial 3, R.206, PageID##1248-1277.

On the third day of trial, the lawyers and the trial court were discussing the draft jury instructions. Mr. Ellis objected to Count 4 being based on the predicate offense alleged in Count 2 (substances found inside the Mark Spitz Drive address. Jury Trial 3, R.206, PageID##1237-1246; Pet. App'x, pp. 13-22. After the government rested and the jury was excused, Mr. Ellis orally moved pursuant to Fed.R.Crim.P. 29 for a judgment of acquittal on all counts. *Id*, PageID##1277-1278;

Pet. App'x, pp. 23-24. This argument specifically included both Counts 2 (grandmother's house) and 3 (the transaction inside the car). *Id*, PageID##1278-1287; Pet. App'x, pp. 24-33. The trial court denied the objection as to Count 3 definitively as it still pondered Count 2. *Id*, PageID#1288; Pet. App'x, p. 34. This resulted in an agreement by the government to limit the scope of Count 4 to Count 3. *Id*, PageID##1289-1290; Pet. App'x, pp. 35-36. This limitation was in fact provided to the jury. *Id*, PageID#1347; Peet. App'x, p. 37. At the conclusion of the instructions after the jury was excused, Mr. Ellis renewed his oral Rule 29 motion which was again denied. *Id*, PageID#1366; Pet. App'x, p. 38.

C. The Courts of Appeals approaches.

This Court addressed 18 U.S.C. §924(c)(1) in ***Bailey v. United States***, 516 U.S. 137, 147, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995). The ***Bailey*** case discussed the multifactor approach as well as an "accessibility and proximity" test that had been utilized by the Courts of Appeals. *Id*, at 141. This Court said "[w]e agree with petitioners, and hold that §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." *Id*., 143. Accordingly, the government's evidentiary burden to establish "use" under this statute was clarified and mere possession was insufficient.

In ***United States v. O'Brien***, 560 U.S. 218, 130 S.Ct. 2169, 176 L.Ed.2d 979 (2010), this Court recognized that Congress addressed the holding in ***Bailey*** by adding "possess" to the principal paragraph of §941(c)(1) and also added mandatory minimum sentences for the primary offense, brandishing, and discharging a firearm. ***O'Brien***, *supra*, at 232-233. But the actual phrase that added "possession" also required that it be possessed "in furtherance of any such crime."

In the instant case, the case of ***United States v. Mackey***, 265 F.3d 457 (6th Cir. 2001) was discussed in the trial court. The challenge by the defense in ***Mackey*** was that the facts did not support the "in furtherance of" language. The ***Mackey*** panel began with defining the word furtherance: "The term 'furtherance' should be understood in its ordinary or natural meaning, which, according to the dictionary, is 'a helping forward: advancement, promotion.' Webster's Third New International Dictionary (1981). In other words, the weapon must promote or facilitate the crime." ***Mackey***, *supra*, at 460-461.

Mr. Cooper (defense co-counsel) argued a phrase from the ***Mackey*** opinion that was taken from a Judiciary Committee report. The first sentence of that same excerpt is important but was not advanced to the trial court. The full excerpt is:

> .... 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.

Mackey, *supra*, at 461, citing H.R.Rep. No. 105-344 (1997), 1997 WL 668339, at *11-12 (footnotes omitted) (emphasis added). At trial, the government urged speculation that the gun was present to frustrate a robbery of the "$50,000.00" worth of drugs in the house. But Count 2 was not the predicate offense. The predicate offense was limited to Count 3 based on the government's request. The confidential informant was the first to mention the firearm. Mr. Ellis did not display it, touch it, or mention it until she did. His response was simply identifying it by a short-hand name.

It must be remembered that ***Mackey*** viewed possessing a weapon in furtherance of a crime to be a higher standard than "during or in relation to." ***Mackey***, *supra*, at 461; see also ***United States v. Iiland***, 254 F.3d 1264, 1274 (10th Cir. 2001).

Further explanation in ***Mackey*** again looked at the Judiciary Committee result which discussed how, as in ***Bailey***, a gun locked in the trunk of a car in which a drug transaction occurs might be insufficient under the proper "in furtherance of test." ***Mackey***, *supra*, at 462. That excerpt ended by saying "The Committee believes that one way to clearly satisfy the 'in furtherance of' test would be additional witness testimony connecting Mr. Bailey more specifically with the firearm." Mr. Ellis is not relying on the Committee report or analysis at all. It is important because the Sixth Circuit in ***Mackey*** viewed this as being indicative of Congressional intent to set a

higher bar for the government when possession was at issue. ***Mackey***, *supra*, at 462. Trial defense counsel repeatedly elicited testimony from Officer Smith that the weapon and the ammunition were never checked for fingerprints. The police had every opportunity to provide that "additional nexus" and never attempted to do so.

The ***Mackey*** opinion set out the following concepts for the Sixth Circuit:

a. The 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 conviction under statute prohibiting possession of a firearm in furtherance of a drug trafficking crime.

b. For the possession of a firearm to be in furtherance of a drug trafficking crime, and thus violate the statute prohibiting such possession, the firearm must be strategically located so that it is quickly and easily available for use.

c. The Sixth Circuit factors relevant to a determination of whether a weapon was possessed in furtherance of a drug trafficking crime were: whether the gun was loaded, the type of weapon, the legality of its possession, the type of drug activity conducted, and the time and circumstances under which the firearm was found. ***Mackey***, supra, at 461.

In ***United States v. Combs***, 369 F.3d 925 (6th Cir. 2004), the Sixth Circuit definitively held that 18 U.S.C. §924(c) criminalizes two distinct offenses. *Id*, at 933. In explaining the government's requirements, the Sixth Circuit said that the "in

furtherance of" language requires the "government to prove a defendant used the firearm with greater participation in the commission of the crime or that *the firearm's presence in the vicinity of the crime was something more than mere chance or coincidence*." *Id* (emphasis added).

In ***United States v. King***, 632 F.3d 646 (10th Cir. 2011), the Tenth Circuit chose not to adopt what it termed as a threshold requirement established in ***Mackey*** that the firearm "must be strategically located so that it is quickly and easily available for us." ***King,*** *supra*, at 657-658. That circuit adopted a more "flexible" approach in which the accessibility is but one factor. The District of Columbia Circuit in ***United States v. Wahl***, 290 F.3d 370 (D C Cir. 2002) agreed with the Fifth Circuit[4] as to the "flexible" approach and only agreed with the Sixth Circuit as to the application of a non-exhaustive list of evidentiary factors. The D. C. Circuit stopped short of agreeing with ***Mackey*** that furtherance required quick and easy accessibility. ***Wahl***, *supra*, at 376.

In ***United States v. Charles***, 469 F.3d 402 (5th Cir. 2006), the Fifth Circuit rejected the threshold requirement from ***Mackey***. By using the "flexible" factors, the Fifth Circuit upheld a conviction for 924(c) where a disassembled firearm found in a storage unit with no evidence of trafficking at the time of seizure (or at any time) existed. The storage unit did have controlled substances present but no other

[4] ***United States v. Ceballos-Torres***, 218 F.3d 409, 414 (5th Cir. 2000).

evidence was presented to establish the nexus between the firearms and trafficking. ***Charles***, *supra,* at 406-407.

The Fourth Circuit approved a jury instruction that provided the jury with a list of factors that it could consider to determine whether the firearm furthered the drug transaction. The factors are similar to those utilized by other circuits and discussed in ***Bailey***. That instruction concluded with "[t]he possession is in furtherance if the purpose of the firearm is to protect or embolden the defendant." ***United States v. Askew***, 98 F.4th 116, 120-121 (4th Cir. 2024). In ***Askew***, however, evidence was also introduced to show that defendant's conversations with others where guns and drugs were discussed either at the same time or his contacts overlapped in the two types of activity. Searches turned up substantial quantities of firearms and drugs in both his apartment and storage unit.

As of 2008, the First Circuit stated that "[t]he 'in furtherance of' element does not have a settled, inelastic, definition." ***United States v. Marin***, 523 F.3d 24, 27 (1st Cir. 2008). That statement was repeated as of 2022 in ***United States v. Ramirez-Frechel***, 23 F.4th 69, 74 (1st Cir. 2022). The First Circuit also used a multifactored analysis and those factors again tracked the factors used by other circuits. The evidence was sufficient in ***Ramirez-Frechel*** because the sale included both drugs and guns. The First Circuit believed that this met the requirement that the firearm forwarded, promoted, or advanced the drug sale. *Id*, at 74-75. Because the sale

involved both drugs and guns, the First Circuit held that one advanced the other. *Id*., 75.

The Seventh Circuit opinion in ***United States v. Bailey***, 882 F.3d 716 (7th Cir. 2018) was relied on by the First Circuit because ***United States v. Bailey*** also involved the sale of a gun contemporaneous with the sale of marihuana. The Seventh Circuit acknowledged that this Court had previously held that "use" of a firearm during and in relation to drug trafficking" can be established when guns are exchanged for drugs. *Id*, at 721 (citing ***Smith v. United States***, 508 U.S. 223, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993)). The ***Bailey*** panel also explained that the multifactored analysis was used to determine the sufficiency of evidence for an "in furtherance of" challenge. *Id*.

In ***United States v. Arline***, 835 F.3d 277 (2d Cir. 2016), a defendant (Simmons) was convicted of possessing a firearm in furtherance of a drug crime without establishing a connection to a specific drug transaction. *Id*, at 282. The underlying drug charge was a narcotics conspiracy that lasted for approximately five years. The Second Circuit believed that evidence showing possession of multiple firearms on separate occasions supported the conviction (as well as a separate §924(c)(1) conviction for an overlapping racketeering conspiracy).

Without guidance from this Court, the higher standards inferred from the "in furtherance of language" are not being honored. The multifactored analysis from

determining "use" has now spilled over to "in furtherance of" and results in convictions being upheld based on the same lower standards rejected in ***Bailey*** by this Court.

D. Specific problems presented in the instant case.

This brings the discussion to the government's improper closing argument. At the beginning of the third day of trial, the attorneys and Court were discussing jury instructions. The trial court suggested a potential inference that the firearm would not be left in the car overnight. Jury Trial 3, R.206, PageID#1241; Pet. App'x, p. 17. After some witness testimony, the issue was discussed again outside the presence of the jury. The trial court had just realized that its previous inference about the circumstances suggesting the firearm would not be left in the car might not be appropriate. *Id*, PageID#1280; Pet. App'x, p. 26. The Assistant U.S. Attorney argued that there was a good inference about a potential robbery because "it's $50,000 worth of merchandise." The government then agreed to have only Count 3 (the deal in the car) serve as the predicate and closing arguments began shortly thereafter.

The following argument was then made by the Assistant U.S. Attorney:

> Let's do some quick math. Mr. Ellis sold one gram of fentanyl for $100 to the confidential informant. And you heard that testimony. He has 445 grams in his grandparents' house. That's almost $50,000 of drugs.
> MR. DRAKE: I object.
> THE COURT: Do you want to approach?
> MR. DRAKE: Yes.
> (Bench conference outside the hearing of the jury.)

MR. DRAKE: I don't normally object to closing, but that's absolutely not in evidence. There's no – except for -- except for the government saying, "Oh, well, this is how much it is." But there was no proof of that -- of the value at all.

MR. MCGUIRE: Your Honor, the deal was for $100 for a gram. That came in very clearly. I'm making an inference, if he sold it at the same rate. It's argument. This is a waste of time.

THE COURT: Go ahead, Mr. Drake.

MR. DRAKE: There was never any total. There was never -- there was never any total. There was never any total. This is the first time we've heard this.

THE COURT: What?

MR. DRAKE: First time we've heard this.

THE COURT: Well, he's right about that amount. I guess why is this necessary to the charges?

MR. MCGUIRE: It just shows -- because I think they're going to -- it will be necessary, I think, in my rebuttal, Your Honor, because they're going to argue it's all Yennifer's. We will argue it's improbable she would have left $50,000 --

THE COURT: And it was in the opening. I'll allow it.

(In open court.)

MR. MCGUIRE: Almost $50,000 of drugs in the grandparents' house.

Ladies and gentlemen, we know that the defendant put on social media that he's all about the money. He's not going to leave $50,000 of drugs to someone else. Those are his drugs. He might be having Yennifer Angeles do some work for him, but let there be no mistake: If she wants to spend $20 on gas, she's got to ask him about it.

Jury Trial, Vol. 3, R.206, PageID##1308-1309; Pet. App'x, pp. 84-85.

During the bench conference, the Assistant U.S. Attorney suggested that the value of the drugs would support an inference that the firearm was connected to the drugs in the house but then decided against asking for that count to be a predicate for Count 4. Then a few minutes later before the jury, the Assistant U.S. Attorney argued that the value suggested that Mr. Ellis would not trust Ms. Angeles with

$50,000.00 worth of drugs in anticipation of an argument by the defense that the drugs were all under the control of Ms. Angeles.

The trial court's comment about "it was in the opening" is not a reason to allow improper argument. During the government's opening statement, a comment was made about the position of the firearm in relation to Mr. Ellis' leg and that sentence closed with "probably for his protection, because drug dealing can be a dangerous business." Jury Trial, Vol. 2, R.205, PageID#1015. The amount of the sale in the car was mentioned as being one gram but the amount of money paid for it was not specified during opening statement. *Id*, PageID##1013-1014. If the trial court was using "it" as a reference to the defense theory that Ms. Angeles was responsible for the drugs, then that is borne out by the record. But to make an unequivocal claim that the value of the drugs in the grandmother's house was valued at $50,000.00 is simply not supported by any factual information in the record or reasonable inferences from the facts presented.

The government tried mightily to get evidence in the record of a connection between firearms and drugs. The proper foundation of reliable data was not provided and the officer's training and experience were not adequate to provide a proper alternate foundation. The trial court repeatedly sustained objections to the government's improper questions and answers. Jury Trial, Vol. 2, R.205, PageID##1060-1062; Pet. App'x, pp. 75-77.

Retail and wholesale processes (even illegal ones) use volume discounts.[5] But before that discussion, the government's hyperbole is misleading in the sense that it is inferring a retail value instead of a replacement value. There was no evidence as to how much such a quantity costs when purchased especially in the ½ kilogram range. On the other hand, were there multiple purchases of 50, 100, or 200 gram quantities and then they were combined? Another variable is the condition of the heroin when purchased such as whether it did or did not contain fentanyl when purchased. If it did not, what value does the fentanyl have either at purchase or in terms of inflating the single gram price of heroin. These are all realistic conditions of the business of "dealing" that are all discarded in favor of speculation and conjecture in claiming a value of $100.00 per gram. Another factor that could be in the record but is omitted is whether the CI was a favored customer who received discounts or a disfavored customer who paid full price and perhaps even a premium.

"Prosecutors should put forth only 'proper arguments based on the evidence in the record.' " ***United States v. Davis***, 514 F.3d 596, 613 (6th Cir.2008) (quoting ***Broom v. Mitchell***, 441 F.3d 392, 412 (6th Cir. 2006)). In the context of the actual closing argument (as opposed to the previous argument about which predicate

[5] See ***United States v. Rios***, 830 F.3d 403, 426 (6th Cir. 2016) which provides an example of a drug organization utilizing this practice. See also, ***United States v. Bashara***, 27 F.3d 1174, 1183 (6th Cir. 1994), superseded on other grounds by statute as recognized in ***United States v. Caseslorente***, 220 F.3d 727, 734 (6th Cir. 2000).

offense to use), the claim of a value of $50,000.00 actually presents two problems. First, the inference that a single gram was sold for $100 therefore 445 grams are worth $50,000.00 rests on extremely thin grounds. But then to build on this inference an inference that the firearm was in furtherance of the drug trafficking crime breaks through that thin ground and fails to be a permissible inference. "Inference on inference" is permissible but each step has to be reasonable.

It is improper for a prosecutor, during closing arguments, to bring to the attention of the jury any "purported facts that are not in evidence and are prejudicial." ***United States v. Wiedyk***, 71 F.3d 602, 610 (6th Cir.1995) (citing ***United States v. Leon,*** 534 F.2d 667, 679 (6th Cir.1976)). The "value" of the seized substances is a purported fact with a vast amount of speculation and conjecture required to sustain it. It was an impermissible substitute for the trial court's rejection of the efforts to make the connection between trafficking and firearms through an unqualified witness. But because there was absolutely no testimony that Mr. Ellis had been robbed, robberies of drug dealers were known to occur in the area, or robberies occurred in a reasonable temporal span. There was no evidence of discussions either through documented conversations, intelligence information or otherwise concerning robberies, to support stretching the histrionic $50,000.00 claim to furthering prevention of a robbery. Indeed, preventing a (phantom) robbery is an

overarching concept which places a weapon at any particular or random transaction in the realm of coincidence.

The actual facts in the record establish nothing more than mere presence of the firearm in the car. The misleading and conjectural characteristics of the false value of $50,000.00 render the error far beyond harmless as there was nothing else to make the connection. Removing the improper argument from consideration renders the evidence for Count 4 insufficient and Mr. Ellis is entitled to having that conviction vacated.

E. The Sixth Circuit's decision in the instant case.

The Sixth Circuit bifurcated the government's improper arguments about the value of the drugs from its factored analysis to avoid addressing those improper arguments directly. In discussing the factor of the type of drug activity involved, the Sixth Circuit said that it could be inferred a gun would be more useful in a hand-to-hand transaction such as the one in Mr. Ellis' case. *United States v. Ellis*, slip op, at 5; Pet. App'x, p. 44. The Sixth Circuit claimed that the government's argument about value was only related to whether he would have left Ms. Angeles (the co-defendant) in charge of such a substantial amount of drugs. *Id*, slip op at 6; Pet. App'x, p. 45. This overlooks the reality that the government's closing argument flows in a continuous summation of evidence and suggested inferences. It is not compartmentalized.

Use of the factored analysis in the instant case and applying a hyper-technical reading of the closing argument allowed the Sixth Circuit to find support for the "in furtherance of" element. This was error because the presence of the firearm in this particular case was merely a coincidence. This erroneous result can be cured in this case and future cases with guidance from this Court.

CONCLUSION

The lack of guidance from this Court needs to be cured to prevent the Circuit Courts of Appeals from falling back into a lower standard for the "in furtherance of" language in 18 U.S.C. §941(c)(1). Convictions are being upheld on a vast array of facts based on inconsistent applications or a wide variety of factors. In Mr. Ellis' particular case, the lack of factual sufficiency was compounded by improper argument by the Assistant United States Attorney.

RELIEF REQUESTED

WHEREFORE, Mr. Ellis respectfully requests this Honorable Court grant this Petition, reverse the rulings of the Circuit and District Court and direct dismissal of Count IV as well as resentencing.

Respectfully submitted,

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