No. _____

In The

Supreme Court of the United States

CHICOBY SUMMERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 18 U.S.C. § 924(c)(1)(A), a defendant can be convicted of using or carrying a firearm "during and in relation to" a drug crime, or possessing a firearm "in furtherance of" one. The government charged Mr. Summers with the "in furtherance" prong of the statute. At trial, the evidence showed that Mr. Summers possessed a firearm on three days while outside a single residence, where—on different days—narcotics and paraphernalia were recovered. The government contended Mr. Summers' possession was "in furtherance" of a drug crime based on expert testimony that drug dealers rely on guns to protect their drug activity. The Sixth Circuit affirmed the conviction based on its precedent that "in furtherance" is satisfied by showing that a defendant possessed a firearm for protection during a drug conspiracy.

This petition presents the following question:

I. Is a gun's general purpose of "protection" sufficient to establish that its possession is "in furtherance" of a drug crime under 18 U.S.C. § 924(c)(1)(A) when the government offers no evidence that such possession coincides in time, space, and purpose with a drug-related act?

PARTIES TO THE PROCEEDING

Chicoby Summers, petitioner on review, was the defendant-appellant below.

United States of America, respondent on review, was the plaintiff-appellee below.

RELATED CASES

United States v. Summers, 6th Cir. Nos. 25-5006, 25-5007, judgment June 24, 2026 (panel rehearing denied July 10, 2026).

United States v. Summers, W.D. Ken. Nos. 17-cr-000680, 22-cr-00037, judgment January 8, 2025.

United States v. Horton, 6th Cir. No. 24-6073, judgment June 24, 2026 (rehearing and rehearing en banc denied August 11, 2026).

United States v. Horton, W.D. Ken. No. 3:22-cr-00037, judgment November 27, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Chicoby Summers seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

Both the June 24, 2026 opinion of the Sixth Circuit and the July 10, 2026 denial of rehearing are unpublished. The June 24, 2026 opinion is available at *United States v. Horton*, Nos. 24-6073, 25-5006, 25-5007, 2026 WL 1823386 (6th Cir. 2026) and in Petitioner's Appendix ("Pet. App.") at 1a-11a. The July 10 order denying panel rehearing appears in Petitioner's Appendix. *Id.* at 40a. Justice Kavanaugh granted an extension of the time to file the writ of certiorari on September 27, 2026. *Id.* at 42a.

Prior to the trial, the District Court issued an order on pretrial matters, which is available at *United States v. Horton*, No. 3:22-cr-37-RGJ, 2024 WL 3458562 (W.D. Ky. July 18, 2024).

JURISDICTION

The District Court had jurisdiction under 18 U.S.C. § 3231 and the Sixth Circuit under 28 U.S.C. § 1291.

The Sixth Circuit entered its judgment on June 24, 2026. Pet. App. 1a-11a. Mr. Summers timely petitioned for panel rehearing on July 8, 2026, and the Sixth Circuit denied that petition on July 10, 2026. Pet. App. 40a. On September 27, 2026, Justice Kavanaugh extended the time to file this petition for a writ of certiorari to

and including November 9, 2026. Application No. 26A403; Pet. App. 42a. This petition is timely under Rule 13. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

Section 924(c)(1)(A) of Title 18 reads in relevant part:

> 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.

The Second Amendment to the U.S. Constitution reads in relevant part:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

INTRODUCTION

Congress did not, and likely could not, make it a crime merely to possess a gun; it criminalized only possessing a gun *in furtherance of* a drug crime. 18 U.S.C. § 924(c). That phrase asks whether the gun advanced or promoted an underlying drug crime. The question here is whether that standard requires evidence tying the possession of the firearm to specific criminal activity, or whether—as happened in

the case below—it is sufficient to rely on an expert's generalization that traffickers possess guns for protection.

The question has significant consequences given the frequency with which the government deploys this charge and the charge's relationship with the Second Amendment right to bear arms. Section 924(c) produces roughly 2,400 federal convictions every year, and about half are tied to drug trafficking. QuickFacts 18 U.S.C. § 924(c) Firearms Offenses, USSC, http://www.ussc.gov/research/quick-facts. Each carries a mandatory minimum that runs consecutively to the sentence for the underlying offense. 18 U.S.C. § 924(c)(1)(A), (D)(ii). And carrying a firearm is, for most Americans, constitutionally protected conduct. "In furtherance" is therefore the only thing separating a lawful act from a mandatory-minimum felony. Consistent with that importance, when weighing the "in furtherance" language, Congress cautioned: "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." Pet. App. at 75a.

Yet at least two courts of appeals—the Fourth and Sixth—have affirmed convictions based on evidence of possession *during* a crime or criminal conspiracy and the protective purpose of firearms generally. Under the reasoning of these courts, if a drug dealer possesses a firearm at any time during a conspiracy, he is assumed to be doing so for protection of the criminal deeds, which is therefore in furtherance of the underlying drug crime. That reasoning collapses the statute's distinct prongs. Section 924(c) reaches a defendant who "uses or carries" a firearm "during and in

relation to" a predicate offense, which is active conduct with a modest nexus. It separately reaches one who "possesses" a firearm "in furtherance of such offense," which is passive conduct with a more demanding nexus. Treating possession during the crime as sufficient joins the least demanding conduct requirement to the least demanding nexus requirement, contrary to the statute's text.

The Second, Ninth, and Tenth Circuits require more than generalized inferences drawn about the purpose of firearm possession during the conspiracy. They have held that the government cannot carry the burden to show possession of a firearm "in furtherance" by relying on the general purpose for carrying weapons. Without such a requirement, the element would be met "in any case in which a drug trafficker possesses a gun, functionally eliminating any independent role for the possession 'in furtherance' language." *United States v. Rios*, 449 F.3d 1009, 1014 (9th Cir. 2006); *accord United States v. Iiland*, 254 F.3d 1264, 1273-75 (10th Cir. 2001); *United States v. Rosario*, 792 F. App'x 76, 79 (2d Cir. 2019).

This case provides the right vehicle to resolve the split. The government rested its "in furtherance" case against Mr. Summers on two things: (1) three instances of possessing a firearm outside a "stash house," without evidence of drug activity there on any of those occasions and (2) general expert testimony that drug dealers possess firearms for protection. The government submitted no evidence that drug activity occurred at the house on any of the three days in question. The panel nonetheless affirmed, applying circuit precedent that "carrying a gun for protection while being part of a drug trafficking conspiracy violates § 924(c)." Pet. App. 6a.

The record here squarely presents the question dividing the circuits: whether a gun's general purpose of "protection" is sufficient to establish "in furtherance" when the government offers no evidence tying the possession to drug activity. The answer is no. As the House Judiciary Committee explained, "the mere presence of a firearm in an area where a criminal act occurs is not a sufficient basis" for "in furtherance." Pet. App. at 75a.

STATEMENT[1]

A. The Criminalization of Possession of a Firearm In Furtherance of a Drug Crime

The enhancement for possessing a firearm "in furtherance" of certain crimes did not appear in the original sentencing enhancement contained in 18 U.S.C. § 924(c), enacted in 1968. Benjamin J. VanderWerp, *Awful Grammar: Toward a Resolution of 924(c)'s Unit of Prosecution*, 65 Wayne L. Rev. 461, 465 n.22 (2020); *see also Busic v. United States*, 446 U.S. 398, 405 (1980), *superseded by statute as stated in Abbott v. United States*, 562 U.S. 8, 28-29 (2010). Instead, the enhancement captured only those who—"during and in relation to" a felony—"use[d] a firearm to commit any" federal felony or "carrie[d] a firearm unlawfully during the commission of any" federal felony. VanderWerp, 65 Wayne L. Rev. at 463.

[1] In light of the procedural posture of this Petition, Mr. Summers takes all facts in the light most favorable to the government. In doing so, he does not concede that the jury convictions on any count were supported or legally sound, and he reserves his rights to make all arguments in connection with a 28 U.S.C. § 2255 habeas petition.

The "in furtherance" language came thirty years later, following a decision by this Court interpreting the enhancement's term, "use." *Bailey v. United States*, 516 U.S. 137, 150-51 (1995). Specifically, the *Bailey* Court addressed whether a defendant "used" a firearm—thus triggering the enhancement—when driving with narcotics in the front seat and a firearm "inside a bag in the locked car trunk." *Id.* at 151. This Court held he did not, holding that "use" required active employment of the firearm. *Id.* Permitting a firearm in a locked trunk to qualify as "use" would "render 'use' virtually synonymous with 'possession' and ma[d]e 'carry' within the statute superfluous." *Id.*

Given the government's frequent invocation of the § 924(c) sentencing enhancement—resulting in "9,182 defendants sentenced nationwide from 1991 to 1995 under § 924(c)"—Congress blamed *Bailey* for causing a "deluge" of habeas petitions based on "use" of a firearm. Pet. App. 70a.

Both the House and Senate pushed forward bills attempting to address *Bailey*. A 1997 bill, H.R. 424, sought to amend § 924(c) to capture a defendant who "possesses a firearm in furtherance of the crime." Pet. App. at 70a (quoting H.R. 424). The resulting House Judiciary Committee Report ("Committee Report") detailed the government's burden to satisfy that standard:

> 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.

Id. at 75a (emphasis added); *accord United States v. Timmons*, 283 F.3d 1246, 1252 (11th Cir. 2002).

Comparing "in furtherance" to the then-current "during and in relation to" nexus requirement in the statute, the Committee read the former as "a slightly higher standard," which also "encompass[ed] the 'during and in relation to' language." Pet. App. 75a. The Committee also observed that the addition of "in furtherance" might not change the outcome in *Bailey* itself.

> In [*Bailey*], a prosecution expert testified at Mr. Bailey's trial that drug dealers frequently carry a firearm to protect themselves, as well as their drugs and money. Standing on its own, this evidence may be insufficient to meet the "in furtherance of" test. The government would have to show that the firearm located in the trunk of the car advanced or promoted Mr. Bailey's drug dealing activity. 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.

H.R. 424 passed the House but was not ultimately adopted.

The next year, a Senate bill passed with the same "in furtherance" language.[2] Again, the legislature understood the Senate bill's "in furtherance" language required more than mere possession. From the House floor, a congressman assured his peers that the bill "will not affect any person who merely possesses a firearm in the general vicin[ity] of a crime." Pet. App. 61a. Following those remarks, the House passed S. 191.

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[2] The sponsor of H.R. 424, described the Senate bill, S. 191, as "Senator Jesse Helms' companion to my H.R. 424." Pet. App. 63a.

B. Mr. Summers' "In Furtherance" Conviction

On July 29, 2024, a federal jury convicted Mr. Summers and his co-defendant Jerlen Horton of possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A). Pet. App. 30a-31a. The underlying drug crimes included conspiracy to possess with intent to distribute fentanyl, heroin, and cocaine base, Pet. App. 16a-17a, and possession of the same. Pet. App. 18a-29a.

The case against Messrs. Summers and Horton relied on a months-long, resource-intensive surveillance operation, including dozens of law enforcement officers, continuous pole camera footage covering two different houses, traffic stops, trash pulls, and physical surveillance. From approximately mid-September through November 3, 2021, the government surveilled the exteriors of two houses via continuous pole camera monitoring: (1) the Jeffrey Drive house, characterized as a "stash house" where drugs and cash were kept, and (2) the Matt Court house, characterized as a "trap house," where drugs were broken down for distribution.

Pole camera footage and witness testimony placed Mr. Summers outside Jeffrey Drive on fourteen days and Matt Court on six. He did not live at either house. Jeffrey Drive was the residence of a young woman—his friend, Alexis Stewart—and her two small children. Numerous people stayed at the Matt Court house.

Despite weeks of around-the-clock surveillance, the government could point to only three days—October 1, 5, and 9, 2021—when Mr. Summers possessed a firearm. In each instance, Mr. Summers was seen on pole camera footage walking into or out

of the Jeffrey Drive house. There is no evidence of any drug activity or drugs at the Jeffrey Drive house on any of the three days. Nor is there evidence that any firearm Mr. Summers had was loaded or ever outside his waistband. Despite the even longer period of pole camera surveillance at Matt Court, there was no evidence of Mr. Summers carrying a firearm there. And during Mr. Summers' eleven other visits to Jeffrey Drive that were captured on pole camera footage, he was seen unarmed.

On November 3, more than three weeks after Mr. Summers was seen with a firearm, the government executed search warrants at Matt Court and Jeffrey Drive. Mr. Summers was not present. The search of Jeffrey Drive uncovered narcotics and narcotics-related evidence, mostly inside women's clothing or in the vicinity of the master bedroom. At Matt Court—where Mr. Summers was never seen holding a firearm and was not present at the time of the search—the government uncovered narcotics, firearms, and paraphernalia.

At trial, the government called an expert to testify that guns were a tool of the drug trade, used by drug dealers to protect their money and their drugs.

C. The Sixth Circuit Appeal

Mr. Summers appealed his convictions to the Sixth Circuit, which consolidated his challenges with those of Mr. Horton. On June 24, 2026, the Sixth Circuit (Sutton, C.J., McKeague and Bush, JJ.) affirmed in response to Messrs. Summers and Horton's separate appeals in a joint decision. Pet. App. 1a-11a.

Mr. Summers challenged the § 924(c) conviction on the ground that the government presented insufficient evidence that his firearm possession on any of the three days furthered the drug conspiracy, as the statute requires. In rejecting Mr. Summers' challenge, the court concluded:

> Defendants possessed their firearms in furtherance of drug trafficking. They were seen with firearms in their pants pockets and waistbands while at two drug dens. Moreover, defendants were caught disposing of drug precursors at the same properties where they were caught on video carrying the guns. This suggests that those properties were important locations for the drug trafficking conspiracy. Those locations would thus likely be the target of violence from rival traffickers, and most drug traffickers would not call the police to protect their stash of illegal drugs. A rational juror could easily conclude that defendants had firearms on them to protect themselves at those locations.

Pet. App. 5a-6a. The Sixth Circuit concluded: "[w]e struggle to see how Summers can plausibly make that argument while giving the Government the benefit of all possible inferences from the evidence, especially given our recognition that ***carrying a gun for protection while being part of a drug trafficking conspiracy violates § 924(c)***." Pet. App. at 6a (citing *United States v. Maya*, 966 F.3d 493, 500 (6th Cir. 2020)) (emphasis added).

D. Petition for Rehearing

The Sixth Circuit's decision relied on several errors in connection with its "in furtherance" ruling. Accordingly, on July 8, 2026, Mr. Summers timely petitioned for panel rehearing under Federal Rule of Appellate Procedure 40 and Sixth Circuit I.O.P. 40(a).

The petition demonstrated, with citations to the government's own appellate brief and the trial record, that the panel's holding rested on record and legal errors, including by stating that Mr. Summers was seen at Matt Court and Jeffrey Drive with a firearm—when it was only Jeffrey Drive.

The panel denied rehearing in an unreasoned order on July 10, 2026. Pet. App. at 40a.

REASONS FOR GRANTING THE PETITION

When Congress passed the "in furtherance" language in 1998, it understood that "in furtherance" meant something "slightly higher" than "during and in relation to." Pet. App. 75a. Consistent with that notion, appellate courts, when crafting their standards for what it means for possession to further a crime, have required something more than possession itself. The rule statements themselves typically require that the firearm helped forward the crime, through "advancement" or "promotion." *United States v. Mackey*, 265 F.3d 457, 460-61 (6th Cir. 2001); *see, e.g.*, *United States v. Lowe*, 117 F.4th 1253, 1267-68 (10th Cir. 2024).

Mr. Summers comes to this Court because the Sixth Circuit's ruling on his sufficiency challenge to his § 924(c) conviction reflected a legally flawed rationale for what "in furtherance" requires, a pure question of statutory interpretation. *See* Pet. App. at 6a. As reflected by the Sixth Circuit's reasoning, a firearm's protective purpose is enough to satisfy the "in furtherance" nexus. Under the rule applied in the Second, Ninth, and Tenth Circuits, more is required. The conflict is thus over the legal rule, and it determines the outcome.

The Second, Ninth, and Tenth Circuits have it right. By using "in furtherance" as the statute's nexus requirement, Congress permitted convictions for possessing—rather than using or carrying a firearm—only when the government establishes that the firearm advanced the drug crime. Evidence that a firearm has protective qualities and that drug dealers in general often use firearms for those qualities falls far short of establishing the required nexus.

This Court should take up this petition to resolve the split. Courts are giving effect to § 924(c)'s relaxed conduct element while ignoring its heightened nexus, which threatens the Second Amendment by criminalizing mere firearm possession by drug dealers as a class, regardless of whether they have previously been convicted of a felony. Neither the evidence the government put on at trial nor the facts as the panel recited them can establish "in furtherance" without relying on inferences about the protective purpose of firearms generally and drug dealers' typical use of firearms for protection.

This case presents the right opportunity for this Court to weigh in on what it means for a defendant to possess a firearm in furtherance of a drug crime. In doing so, this Court should hold that the "in furtherance" prong asks whether the firearm was possessed to advance or promote the drug crime based on specific facts that show possession coincides in time, space, and purpose with a drug-related act.

A. The Circuits Are Split on When Possession Is "In Furtherance" of a Drug Crime

Following the passage of S. 191, an individual who "possesses a firearm" "in furtherance of" a drug trafficking crime is guilty of violating § 924(c)(1)(A). The § 924(c) sentencing enhancements remain a popular tool among federal prosecutors. In fiscal year 2025, 2,384 convictions (3.57% of the total that year) "involved convictions under 18 U.S.C. § 924(c)." QuickFacts 18 U.S.C. § 924(c) Firearms Offenses, USSC, http://www.ussc.gov/research/quick-facts (last visited Nov. 7, 2026).

Given the high volume of convictions, the circuits have repeatedly grappled with the bounds of "in furtherance." But though the courts purport to apply a generally agreed upon standard, their application of that standard reveals a disagreement as to its meaning. The Second, Ninth, and Tenth Circuits require something beyond inferences from the nature of gun possession and drug crimes alone to sustain a § 924(c) conviction. The Fourth and Sixth have proved willing to confirm convictions when no more than possession and a drug crime are proved, on the basis that jurors can infer from a drug dealer possessing a firearm that she was doing so in furtherance of the crime. In doing so, these circuits are interpreting "in furtherance" not just contrary to the statutory language but in contravention of Congress's expressed intent.

1. The Second, Ninth, and Tenth Circuits

In applying the "in furtherance" requirement, the Ninth Circuit requires evidence of a nexus beyond the act of possession and participation in a conspiracy

itself. In *Rios*, the drug conspiracy defendant resided at a motel suite with his teenage son. 449 F.3d at 1011. In the front room of the suite, the government recovered "approximately one hundred documents related to the conspiracy," such as fake IDs, prescription forms, and a price list for controlled substances. *Id.* At the same time, the government recovered an unloaded sawed-off shotgun under a dresser in the same room. *Id.* "The agents did not find any ammunition at Rios's residence, nor was there any evidence that drugs were found at the residence." *Id*. At trial, the government presented evidence that drug traffickers often use guns for protection and intimidation and that sawed-off shotguns had no sporting purpose. *Id.* at 1014.

The Ninth Circuit held this evidence was insufficient to establish possession "in furtherance" of a crime. After rejecting the notion that the nature of the firearm itself could lead to finding that the firearm was possessed "in furtherance" of a crime, the court rejected the argument that expert testimony that "drug traffickers often use firearms for protection and intimidation in drug trafficking crimes" could close the gap:

> Such testimony could be submitted in *any* case in which a drug trafficker possesses a gun, functionally eliminating any independent role for the possession "in furtherance" language. Had Congress wished to make possession of a gun by a drug trafficker, without more, a crime, it presumably would have done so.

Id. at 1014 (emphasis in original). The remaining evidence—the existence of an unloaded firearm hidden in "a drug-free residence" near conspiracy documents—was insufficient. Nothing in the record reflected "Rios intended to use the firearm to protect the conspiracy documents or to intimidate others into staying away from the

motel room, or otherwise possessed the firearm to further the conspiracy." *Id.* at 1015. Permitting conviction on these facts "would render possession in furtherance and mere possession nearly indistinguishable" such that "[a]ny person involved in a drug conspiracy who happens to have a weapon at home, for whatever purpose, could be convicted under § 924(c)(1)(A)," an outcome at odds with the Committee Report. *Id.* at 1016; *see also United States v. Mann*, 389 F.3d 869, 880 (9th Cir. 2004) (noting that "[m]ere illegality, while sufficient to support a conviction where only possession is required, is insufficient evidence of furtherance" because holding otherwise "would render the 'in furtherance' element mere surplusage").

Like the Ninth, the Tenth Circuit has held fast to the Committee Report's instruction that "in furtherance" means something more than "during and in relation to." *See Iiland*, 254 F.3d 1264. In *Iiland*, a search of the defendant's residence had "uncovered weapons, ammunition and [drug] scales," while a related search of the defendant's "storage unit revealed a substantial amount of powdered cocaine." *Id.* at 1268. As in the case at bar, there was no evidence that the drugs and the firearm were in the same location at the same time. Rather, the facts showed only "that a drug dealer possessed a gun." *Id.* at 1274. The Tenth Circuit reversed, concluding that this was insufficient to connect the gun to the drug transactions:

> There was no evidence that the gun and drugs were ever kept in the same place or that Mr. Iiland ever kept the gun accessible when conducting drug transactions. The fact that drug dealers in general often carry guns for protection is insufficient to show possession in furtherance of drug activity in Mr. Iiland's particular case.

Id. at 1274.

The Second Circuit applied similar reasoning in the unpublished case of *United States v. Rosario*, 792 F. App'x 76, 79 (2d Cir. 2019). There, the evidence reflected:

> Rosario possessed the gun during the time that he was engaged in a drug-trafficking conspiracy; that on May 9, 2017, he stored it in a locked van parked near his home; that the same van had also been parked—perhaps no more than a block away—near the site of his drug-trafficking activity more than a month before; and that his reason for possessing the gun was for protection.

Id. at 78-79. The Second Circuit hewed to its own binding precedent that the government cannot convict under § 924(c)(1)(A) "'by relying on the generalization that any time a drug dealer possesses a gun, that possession is in furtherance, because drug dealers generally use guns to protect themselves and their drugs.'" *Id.* at 79 (quoting *United States v. Snow*, 462 F.3d 55, 62 (2d Cir. 2006)).

2. The Fourth and Sixth Circuits

Though in an unpublished opinion, the Fourth Circuit has proved most explicit in its willingness to find "in furtherance" based on mere possession at any point during a drug conspiracy. In *United States v. Goodwin*, the court affirmed a § 924(c) conviction based purely on three facts: (1) the defendant possessed a firearm, (2) she was involved in a conspiracy, and (3) she possessed the firearm during the conspiracy. *United States v. Goodwin*, 452 F. App'x 239, 247 (4th Cir. 2011). Given the general "dangers facing a street-level drug dealer," the Fourth Circuit held that the jury was entitled to find that "possession of the firearms aided her in this enterprise." *Id.*

In the case at bar, the Sixth Circuit followed the lead of the Fourth. Characterizing the holding from a published case—*United States v. Maya*, 966 F.3d

493 (6th Cir. 2020)—the Sixth Circuit applied its rule that "carrying a gun for protection while being part of a drug trafficking conspiracy violates § 924(c)." Pet. App. at 6a. (citing *Maya*, 966 F.3d at 500). But like the Fourth Circuit, the Sixth Circuit allowed the inference of "protection" to be drawn from the general characteristic of gun possession. The only evidence of an intended use for "protection" was expert testimony about guns generally being used by drug dealers to protect their money and drugs—precisely the kind of evidence rejected by the Ninth and Tenth Circuits as insufficient to create the nexus. *See* Gov't C.A. Br. at 32 (listing the three instances of possession and justifying a conclusion that the guns were "in furtherance" because the expert "testified that guns were a tool of the drug trade, used by drug dealers to protect their money and their drugs"). There was no evidence that the guns coincided in time or place with drug-related activity, simply that Mr. Summers possessed a firearm while in an area in which criminal activity sometimes occurred.

B. The Second, Ninth, and Tenth Circuits' Approach Honors the Statutory Language.

The Fourth and Sixth Circuits' reading is incompatible with the statute's statutory purpose, its text, and canons of construction. To start, as explained in Statement Part A, *supra*, the Committee Report shows Congress intended "in furtherance" to require possession that advanced and promoted the underlying crime, *i.e.*, something more than possession "during and in relation to" a crime. Pet. App. at 75a. Courts have consistently treated the Report as the best guide to what "in

furtherance" requires. *See, e.g.*, *Rios*, 449 F.3d at 1016; *Timmons*, 283 F.3d at 1252. The history thus confirms what the text already shows: the phrase requires more than possession during a crime.

Common usage confirms what the Committee Report said explicitly. "In furtherance of" is purposive language: "furtherance" means "[t]he process of helping something to develop or make progress"—in a word, "advancement." *Furtherance*, Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/furtherance (last visited Nov. 7, 2026); *Furtherance*, Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/furtherance (last visited Nov. 7, 2026). A firearm is thus possessed "in furtherance of" a drug crime only if it is possessed to help that crime make progress—the same "advance or promote" standard the Committee described. Pet. App. 75a.

The phrase carries the same purposive meaning elsewhere in federal criminal law—most notably in the law of conspiracy, the very context in which the government charged Mr. Summers. The general conspiracy statute requires that a conspirator "do any act to effect the object of the conspiracy," 18 U.S.C. § 371, which courts describe as an "overt act in furtherance of the conspiracy," *United States v. Camara*, 908 F.3d 41, 46 (4th Cir. 2018). An act qualifies because it tends to carry the conspiracy's objectives forward, not because it happens to coincide with them. *See Grunewald v. United States*, 353 U.S. 391, 405 (1957). And co-conspirator liability reaches only offenses actually "done in furtherance of the conspiracy"—not those that "did not fall

within the scope of the unlawful project." *Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946).

The Federal Rules of Evidence draw the same distinction, and they draw it expressly. A co-conspirator's statement is admissible against a defendant only if it was made "during and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E). The two requirements are independent: a statement made while the conspiracy is ongoing is not, for that reason alone, made in furtherance of it. Courts—including the Sixth Circuit—thus require that the statement be intended to promote the conspiracy's objectives. *United States v. Clark*, 18 F.3d 1337, 1342 (6th Cir. 1994); *see also United States v. Tille*, 729 F.2d 615, 620 (9th Cir. 1984); *United States v. Cazares*, 521 F.3d 991, 999 (8th Cir. 2008). A co-conspirator's idle remark does not become admissible merely because it was uttered while the conspiracy was afoot. Neither does a firearm become possessed "in furtherance of" a drug conspiracy merely because it was possessed while the conspiracy was ongoing. Congress legislated against the backdrop of this settled usage, and "absent contrary indications, Congress intends to adopt the common law definition of statutory terms." *United States v. Shabani*, 513 U.S. 10, 13 (1994). Read consistently with that usage, § 924(c) demands what conspiracy law has always demanded of the same phrase: proof that the possession advanced or promoted the conspiracy's objectives—not merely that the defendant had a gun during its life.

And if the above were not enough, this Court exercises "restraint in assessing the reach of a federal criminal statute," *United States v. Aguilar*, 515 U.S. 593, 600

(1995), *see Marinello v. United States*, 584 U.S. 1, 2 (2018), and where one reading is "limited" and another "near limitless," it insists on "a careful examination of [the statute's] text and structure," *Dubin v. United States*, 599 U.S. 110, 118 (2023). It also gives effect to every word. *Yates v. United States*, 574 U.S. 528, 543 (2015) (plurality opinion); *Williams v. Taylor*, 529 U.S. 362, 404-05 (2000). If a trafficker's armed presence at any location tied to a conspiracy sufficed, "in furtherance" would add nothing to "possesses."

C. The Fourth and Sixth Circuits' Approach Raises Serious Second Amendment Concerns.

In criminalizing possession *in furtherance* of a crime, Congress relaxed § 924(c)'s existing actus reus (using or carrying a firearm) while simultaneously ratcheting up the then-required nexus (during and in relation to certain crimes). The Court should grant certiorari here to put a stop to appellate courts giving effect to the relaxed conduct element but not the heightened nexus.

The Fourth and Sixth Circuits' approach effectively eliminates the nexus requirement, making possession alone a crime. Their reasoning assumes not only that any drug dealer who possesses a firearm does so for protection, but also that such protection furthers drug trafficking. But firearms are commonly possessed by any number of people for protection. And a drug dealer, like any other person, could easily possess a firearm for personal protection without furthering a drug crime. A drug dealer with a day job as a security officer may possess a firearm in connection with their job; a drug dealer might keep a gun in their waistband while visiting

friends or family in a dangerous neighborhood; or a drug dealer might keep a gun in their home following a string of nearby break-ins. Accordingly, allowing a firearm's purpose of "protection" to amount to "in furtherance" is tantamount to allowing the existence of the firearm itself to satisfy the "in furtherance" requirement.

Not only does this approach contravene the common understanding of "in furtherance" and legislative history supporting the adoption of this standard, but a categorical rule allowing a jury to equate possession *for protection* with possession *in furtherance* offends the Second Amendment. *Cf. United States v. Hemani*, 608 U.S. 772, 794-95 (2026) (holding that the government failed to justify, under the Second Amendment, its categorical theory that it could prosecute a defendant under 18 U.S.C. § 922(g)(3) for possessing a firearm based solely on his regular marijuana use, without any further showing). The Second Amendment's "central objective" is to protect "the fundamental right to self-defense"—again, protection. *Wolford v. Lopez*, 609 U.S. 185, 210 (2026). One way this Court effectuates that objective is by granting all Americans "the right to bear commonly used arms in public subject to certain reasonable, well-defined restrictions." *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 597 U.S. 1, 70 (2022) (holding that a New York law requiring citizens to demonstrate a "special need" to possess a firearm in public beyond ordinary self-defense violated the Second Amendment); *id.* ("Apart from a few late-19th-century outlier jurisdictions, American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense."). In contrast with this Court's recent Second Amendment jurisprudence, the Sixth Circuit construed

§ 924(c) to independently criminalize the mere possession of a firearm for self-defense.

The constitutional quagmire is easily avoided by respecting this Court's jurisprudence that § 924(c) is, at core, "a combination crime" that "punishes the temporal and relational conjunction of two separate acts, on the ground that together they pose an extreme risk of harm." *Rosemond v. United States*, 572 U.S. 65, 75 (2014). *Rosemond*'s characterization of the statute as requiring "temporal and relational conjunction" applied to the entirety of § 924(c), including "during and in relation to." *Id.* "In furtherance" must, then, require some temporal and relational conjunction—not circular reasoning based on the inherent features of firearms.

Because "in furtherance" sits further along the temporal-and-relational continuum than "during and in relation to," it demands a more meaningful temporal and relational link between the possession and the drug offense than the bare minimum. Accordingly, possession can be "in furtherance" of a drug crime only if the possession coincides in time, space, and purpose with a drug-related act.

D. This Case Is the Right Vehicle.

This case is the right one to adopt and apply that rule and clarify what it means for possession to further a drug crime. That is true regardless of whether the Court accepts the Sixth Circuit's erroneous recitation of the facts or relies on the record

itself.[3] Starting with the former, the Sixth Circuit's affirmance mistakenly characterized Mr. Summers as being seen with firearms in his waistband outside the Matt Court and Jeffrey Drive houses and disposing of precursors at those properties. Pet. App. at 6a. From there, the Sixth Circuit inferred that "those properties were important locations for the drug trafficking conspiracy" and "thus likely be the target from rival traffickers, and most drug traffickers would not call the police to protect their stash of illegal drugs." *Id.* The Sixth Circuit did not—and could not—articulate a temporal link between the acts of firearm possession and acts related to drug possession or trafficking. That absence is fatal to the "in furtherance" element.

The picture becomes even starker when the Court considers the actual record evidence. Mr. Summers was witnessed with a firearm in front of one house, not two, and that house was also the residence of a woman and her two small children. He was seen outside that house more often without a firearm than with one, and on the

[3] Although these facts do not change the outcome of the petition for certiorari, the mistakes in the Sixth Circuit's opinion are likely to cause inefficiencies for the district court that handles Mr. Summers' habeas petition. That court will be forced to reconcile the seven-day jury trial transcript with the Sixth Circuit's description of it. Mr. Summers filed a detailed and timely petition for panel rehearing on that basis, identifying multiple inconsistencies, each with clear record citations. The Sixth Circuit denied the petition in an unreasoned order, making it impossible to tell whether the Sixth Circuit considered the errors immaterial to the current appellate issues and left them in the opinion, or concluded that the record supports them. The habeas court will be left to resolve that question itself. To avoid that burden, and to the extent the Court declines to grant plenary review of the question presented, Mr. Summers respectfully requests that the Court grant the petition for review, vacate the judgment denying the petition for panel rehearing, and remand so that the Sixth Circuit may correct or explain the errors identified in Mr. Summers' petition for panel rehearing, for the benefit of both Mr. Summers and the eventual habeas court.

days he was seen with a firearm, the government offered no evidence of any drug-related actus reus by Mr. Summers.[4] Nor did it offer evidence that Mr. Summers used or intended to use a firearm on any of the three days he was seen with one. Instead, the government relied on an expert's generalization that drug dealers carry guns to protect their drugs and money. If these facts can reflect possession of a firearm "in furtherance" of a drug trafficking crime, then "in furtherance" criminalizes people by class: because drug traffickers possess guns in furtherance of drug crimes generally, any drug dealer who possesses a firearm necessarily does so in furtherance of the drug crime.

This Court rejected that categorical reasoning in *Hemani*, where the government claimed it could prosecute an entire class of people—regular marijuana users—for possessing firearms without any individualized showing of dangerousness. 608 U.S. at 786, 794-95. *Hemani* warned that "broad power to designate any group as dangerous" would risk allowing the government to "quickly swallow" the Second Amendment. *Id.* at 793-94 (quoting *Kanter v. Barr*, 919 F.3d 437, 465 (7th Cir. 2019) (Barrett, J., dissenting)). Any reading of § 924(c) to criminalize mere possession based on possessor-status classifications therefore raises a serious constitutional question.

[4] The evidence at trial was insufficient to establish that Mr. Summers disposed of drug precursors, a fact the Sixth Circuit mistakenly relied on in its § 924(c) affirmance. In any event, the day the government argued Mr. Summers had disposed of precursors—September 27—was not a day Mr. Summers was seen with a firearm.

CONCLUSION

For the foregoing reasons, Mr. Summers respectfully asks this Court to grant the petition for a writ of certiorari on the question presented.

Should the Court decline plenary review, Mr. Summers respectfully asks the Court to grant, vacate, and remand the case with instructions to the Sixth Circuit to either correct or explain the basis for the perceived errors identified in Mr. Summers' Petition for Rehearing, for the benefit of both Mr. Summers and the eventual habeas court.

Respectfully submitted,

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Nos. 24-6073/25-5006/5007

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JERLEN HORTON (24-6073) and JACOBY SUMMERS (25-5006/5007), Defendants-Appellants.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY OPINION

Before: SUTTON, Chief Judge; McKEAGUE and BUSH, Circuit Judges.

JOHN K. BUSH, Circuit Judge. In these consolidated appeals, we consider a bevy of challenges that defendants-appellants Jerlen Horton and Chicoby Summers make to their drug-trafficking and firearms convictions. We conclude that the evidence was sufficient to convict, the district court was not required to declare a mistrial, the jury instructions were not plainly erroneous, and any evidentiary errors were harmless. We therefore **AFFIRM**.

I.

In the summer of 2021, law enforcement began investigating Horton, Summers, Alexis Stewart, and several other individuals. The officers surveilled two Louisville properties, one of which was Stewart's home. As is relevant here, officers collected evidence in two ways.

The first was through walk-through searches of the two properties. The searches revealed baggies, rubber bands, scales, bags of drugs, needles, a vacuum sealer, and ledgers. Officers also

discovered firearms, cell phones, and Stewart's clothes during the searches. Located in the clothing were some of the drugs.

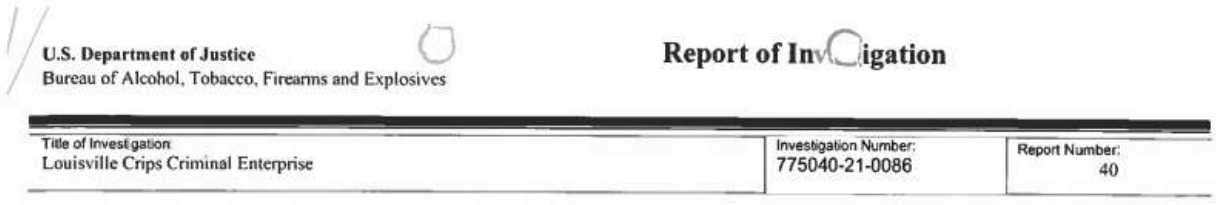
The second type of search was through pole-camera surveillance of the two properties. The pole cameras recorded extensive footage of Horton, Stewart, and Summers entering and exiting the homes, often with a key. In a handful of these videos, Horton and Summers can be seen with a firearm. Additionally, several cars can be seen backing into the driveway of the homes and then quickly leaving. Finally, the pole camera footage depicts Horton throwing drug precursors into a neighbor's dumpster.

Presented with this evidence, a grand jury in the Western District of Kentucky indicted Horton and Summers for (as is relevant to this appeal) possession with intent to distribute narcotics, conspiracy to commit the same, and possession of a firearm in furtherance of drug trafficking. The trial was mostly unremarkable, but three moments warrant additional discussion.

First, the clothing was a significant point of contention. Apparel with the words "Victory Clothing" emblazoned on them were found during the searches, and the jury saw evidence depicting defendants wearing shirts with "Victory Clothing" written on them. Defendants did not want the jury to see those images because they believed the clothes could be linked to the Victory Park Crips (an affiliate of the Crips gang in Louisville's Victory Park neighborhood), and most of the clothes were blue (the color associated with the Crips). The district court excluded any references to gangs at trial under Fed. R. Evid. 404(b) because there was insufficient evidence that either defendant was a gang member. Nonetheless, evidence related to Victory Park was admitted but only to show where defendants lived and their potential connection to the drug dens.

Second, despite the exclusion of any gang-related evidence, the jury still heard and saw two pieces of gang-related evidence. One was a comment from a prosecution witness explaining

that he specialized in gang investigations. The other was a brief instance where an unredacted version of Government's Exhibit 113 was displayed to the jury. At the very top of the exhibit, in small print, the document says "Louisville Crips Criminal Enterprise":



U.S. Department of Justice
Bureau of Alcohol, Tobacco, Firearms and Explosives

Report of Investigation

Title of Investigation	Investigation Number:	Report Number:
Louisville Crips Criminal Enterprise	775040-21-0086	40

Gov't's Exh. 113, *proffered at* R. 133, Tr., PageID 2585. The district court said it "did not see" the words "Louisville Crips Criminal Enterprise" when the exhibit was first published to the jury. R. 133, Tr., PageID 2586.

Defendants twice requested mistrials based on that evidence, but the district court rebuffed them each time. The district court rejected the first request because the witness accused neither defendant of being part of a gang. The district court rejected the second request because the offending evidence "was up for a very brief period of time . . . ." *Id.* at PageID 2587.

Third, the Government did not prosecute Stewart pursuant to a pretrial diversion agreement. The diversion agreement said that Stewart "committed an offense against the United States"—possession with intent to distribute narcotics—and that she would cooperate with the Government in exchange for not being prosecuted. Horton's App'x at 0001–02. But when Horton's counsel asked about the diversion agreement on cross, Stewart denied committing any crimes. When Horton tried to admit a copy of the diversion agreement, the district court refused because the diversion agreement did not include an admission of guilt as to any specific crime.

After a week-long trial, the jury found both Horton and Summers guilty on all relevant counts. Horton was sentenced to a total of 336 months in prison and five years of supervised release. Summers was sentenced to a total of 300 months in prison and five years of supervised release. Both men appealed, and we consolidated the appeals.

II.

Horton and Summers raise several challenges to their convictions. We address below whether (a) the Government sufficiently proved defendants possessed a firearm in furtherance of drug trafficking, (b) a mistrial was warranted over references to gangs, (c) the jury instructions were plainly erroneous, and (d) the challenged evidentiary rulings impacted the outcome of the trial.

A.

To start, we conclude that the Government presented sufficient evidence to convict Horton and Summers of possessing a firearm in furtherance of drug trafficking under 18 U.S.C. § 924(c). "We review a challenge to the sufficiency of the evidence in a criminal case de novo." *United States v. Woods*, 14 F.4th 544, 551 (6th Cir. 2021). We view the facts in the light most favorable to the Government, drawing all reasonable inferences in its favor. *See United States v. Gooding*, 351 F.3d 738, 740–41 (6th Cir. 2003). We must determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Amawi*, 695 F.3d 457, 475 (6th Cir. 2012) (quoting *United States v. Humphrey*, 279 F.3d 372, 378 (6th Cir. 2002)) (emphasis in original). "Circumstantial evidence alone can defeat a sufficiency challenge." *Woods*, 14 F.4th at 551 (cleaned up).

Congress has imposed enhanced mandatory minimum sentences for defendants who "possess[] a firearm" "in furtherance of" "any crime of violence or drug trafficking crime . . . ."

18 U.S.C. § 924(c)(1)(A). To win a guilty verdict, the Government must prove the defendant "(1) possessed a firearm, (2) committed a drug-trafficking crime, and (3) possessed the firearm in furtherance of that crime." *United States v. London*, 175 F.4th 805, 820–21 (6th Cir. 2026).

Defendants briefed only the last element, and a defendant preserves challenges to his conviction on an element-by-element basis, so we will focus our attention on that one.[1] *See id.* at 821. To satisfy that element, the Government must establish "a specific nexus between the gun found and the crime charged." *Id.* More concretely, the Government must prove that the firearm was "possessed for the purpose of aiding or furthering a drug trafficking crime." *Id.* The Government can do this by, among other things, proving that the defendant "own[ed] a gun to protect the drugs, the proceeds of drug sales, or the dealer himself." *United States v. Maya*, 966 F.3d 493, 500 (6th Cir. 2020) (quoting *United States v. Bailey*, 882 F.3d 716, 721 (7th Cir. 2018)) (quotation marks omitted).

Defendants possessed their firearms in furtherance of drug trafficking. They were seen with firearms in their pants pockets and waistbands while at two drug dens. Moreover, defendants were caught disposing of drug precursors at the same properties where they were caught on video carrying the guns. This suggests that those properties were important locations for the drug trafficking conspiracy. Those locations would thus likely be the target of violence from rival traffickers, and most drug traffickers would not call the police to protect their stash of illegal drugs.

[1] In a point heading, Horton says that "the United States did not admit sufficient evidence of guilt against defendant Horton as to several alleged offenses." Horton's Appellant's Br. at 13 (bolding and capitalization altered). But only Count 5 of the Second Superseding Indictment charged Horton with violating § 924(c)(1)(A), and the body of his brief lacks any argument regarding the other charges. Thus, to the extent Horton contests the sufficiency of the evidence on any other counts, we do not consider those arguments because they have not been adequately briefed. *See, e.g.*, *United States v. Lopez-Medina*, 461 F.3d 724, 748 n.6 (6th Cir. 2006).

A rational juror could easily conclude that defendants had firearms on them to protect themselves at those locations.

In arguing against this outcome, defendants distort the evidence and ignore the standard of review. Horton, for example, protests that the Government found "scant[] evidence connecting him to possible drug crimes." Horton's Appellant's Br. at 2 (bolding and capitalization altered). But that ignores the scales, massive quantities of drugs, and ledgers at two properties Horton regularly entered with a key. Summers, for his part, says that he never had a firearm "in connection with drug activity" despite bringing the gun to two drug dens. Summers's Appellant's Br. at 33 (bolding and capitalization altered). We struggle to see how Summers can plausibly make that argument while giving the Government the benefit of all possible inferences from the evidence, especially given our recognition that carrying a gun for protection while being part of a drug trafficking conspiracy violates § 924(c). *See Maya*, 966 F.3d at 500.

We therefore find sufficient evidence to support both defendants' convictions.

B.

We also reject both defendants' requests for a mistrial. We review the denial of a mistrial for an abuse of discretion. *United States v. Howard*, 621 F.3d 433, 458 (6th Cir. 2010). A district court abuses its discretion when it "relies on clearly erroneous findings of fact, uses an erroneous legal standard, or improperly applies the law." *United States v. Elias*, 984 F.3d 516, 520 (6th Cir. 2021) (quoting *United States v. Flowers*, 963 F.3d 492, 497 (6th Cir. 2020)). We may not reverse without "a definite and firm conviction that the trial court committed a clear error of judgment." *Flowers*, 963 F.3d at 497 (quoting *Landrum v. Anderson*, 813 F.3d 330, 334 (6th Cir. 2016)).

"[A] mistrial is a drastic remedy that results in additional expense to the judicial system as well as to all the parties." *United States v. Smith*, 44 F.3d 1259, 1268 (4th Cir. 1995). Because a

mistrial is such a severe remedy, a defendant seeking one must show that the inappropriate testimony was "so clearly improper and prejudicial . . . that the harm could not be erased by any instruction which the court might give." *United States v. Smith*, 601 F.3d 530, 538 (6th Cir. 2010) (quoting *United States v. Rudolph*, 403 F.2d 805, 806 (6th Cir. 1968)). We are therefore less likely to require a mistrial when the impugned evidence is framed to "minimize[]" any prejudice to the defendant, *Howard*, 621 F.3d at 459, or when the impugned evidence constitutes "only a small part of the evidence against [the] defendant," *United States v. Forrest*, 17 F.3d 916, 920 (6th Cir. 1994) (per curiam). Finally, a defendant is not entitled to a mistrial simply because he successfully moved to exclude certain evidence. *See Smith*, 601 F.3d at 538.

The district court did not abuse its discretion in denying the mistrial. To grant such a remedy would be too drastic a response to the jury seeing two inconsequential pieces of evidence. One was a passing comment in a direct examination where an officer said that he specialized in gang investigations to establish his general law enforcement credentials, and the other was a document where the words "Louisville Crips Criminal Enterprise" were printed on the top of the document in small font. Neither defendant gives us a basis for disturbing the district court's factual finding that nobody saw the second piece of evidence, and the impugned evidence comprises barely ten words in a week-long, eight-count drug trafficking trial.

We therefore affirm the denial of the motions for a mistrial.

C.

We next reject Summers's challenge to the district court's instruction on the applicability of § 924(c). Summers concedes that he did not preserve his instructional challenge, so we will review only for plain error. *See United States v. Sims*, 975 F.2d 1225, 1240 (6th Cir. 1992). A

district court does not plainly err unless "binding case law" directly "answers the question presented . . . ." *United States v. Al-Maliki*, 787 F.3d 784, 794 (6th Cir. 2015).

Summers argues that the district court was required to issue a specific unanimity instruction as to the date and time when he carried the firearm in furtherance of drug trafficking. But he does not point to any binding case law saying as much, and we cannot find any.

Under the Sixth Amendment, a defendant may not be convicted of a crime unless the jury "unanimously finds that the Government has proved each element" of the offense beyond a reasonable doubt. *Richardson v. United States*, 526 U.S. 813, 817 (1999). Thus, "the jury must unanimously decide that all facts that constitute 'elements' of a crime occurred, but it does not necessarily need to be unanimous" in deciding what those facts were. *United States v. Hendrickson*, 822 F.3d 812, 822–23 (6th Cir. 2016). Unsurprisingly, we have never held that the jury must unanimously agree on the date and time when the defendant possessed the firearm. That is enough to reject Summers's objection on plain error review. *See Al-Maliki*, 787 F.3d at 794.

But the problem for Summers goes one step further. The mere fact that a jury must unanimously agree on an issue does not mean that the defendant is entitled to a specific unanimity instruction on that issue. Rather, we generally use a three-part test for determining when a specific unanimity instruction is warranted, *see generally United States v. Miller*, 734 F.3d 530, 538 (6th Cir. 2013), and we have never applied that test as part of a holding to a factual scenario similar to the one we have here.

Summers relies heavily on *United States v. Steele*, where we endorsed a district court's decision to "task[] the jury with deciding unanimously on one instance of firearm possession in furtherance of a drug trafficking crime . . . ." 919 F.3d 965, 973 (6th Cir. 2019). This reliance is misplaced. We never said that doing so was *necessary* in that case, and we certainly did not say

that doing so is necessary in all § 924(c) cases like the one before us. True, *Steele* contemplated scenarios where the *Richardson* principle would be inapplicable; if a jury convicts with wildly diverging understandings of the "means," it would "risk[] serious unfairness and lack[] support in history or tradition." *Id.* (quoting *Richardson*, 526 U.S. at 820). But no such scenario obtained in *Steele*, and it does not obtain here, either. So even if *Steele*'s dicta supported Summers's argument, it would be insufficient to establish plain error. *See United States v. Whren*, 111 F.3d 956, 960–61 (D.C. Cir. 1997); *see also Al-Maliki*, 787 F.3d at 794 ("A lack of binding case law that answers the question presented will also preclude our finding of plain error.").

We therefore hold that the district court's jury instructions were not plainly erroneous.

D.

Finally, we reject Horton's and Summers's evidentiary challenges because any claimed error was harmless, and we may not reverse over harmless error. *See United States v. Freeman*, 730 F.3d 590, 595 (6th Cir. 2013).

We start with Horton. He alleges that he should have been allowed to admit a copy of the diversion agreement that Stewart signed with the Government to impeach her credibility when she said that she did not commit any drug offenses. Any error from exclusion of the diversion agreement was harmless.

The colloquy between Stewart and Horton's counsel on the diversion agreement takes up over twenty pages of the trial transcript. During that colloquy, Horton's counsel had the opportunity to ask what the agreement said, and he did so at length. Moreover, the jury saw evidence that Stewart entered and left a drug den, lived at a drug den, and had illegal narcotics in her clothes. The diversion agreement would have been cumulative of all the other evidence showing that Stewart committed drug crimes. Moreover, if the jury sincerely believed, in the face

of all that evidence, that Stewart had not committed drug offenses, then nothing would have convinced it otherwise. Because the diversion agreement would have been cumulative evidence, and because the outcome would not have changed with its admission, any error in excluding the diversion agreement was harmless. *See, e.g.*, *United States v. Agrawal*, 97 F.4th 421, 430 (6th Cir.), *cert. denied*, 145 S. Ct. 258 (2024).

The same is true with Summers. He alleges that the district court should not have admitted evidence of him wearing "Victory Park" clothing, arguing that its admission was substantially more prejudicial than probative. *See* Fed. R. Evid. 403. But the evidence against Summers was so overwhelming that excluding the clothing would not have altered the outcome. *See, e.g.*, *United States v. Hardy*, 643 F.3d 143, 154 (6th Cir. 2011). After all, Summers was caught on video entering two drug dens, often with a key and sometimes carrying a gun. A jury could easily have concluded, based on that evidence alone, that Summers was guilty of all the crimes alleged.

III.

For these reasons, the district court's judgments are **AFFIRMED**.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 24-6073/25-5006/5007

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JERLEN HORTON (24-6073); CHICOBY SUMMERS (25-5006/5007),

Defendants - Appellants.

Before: SUTTON, Chief Judge; McKEAGUE and BUSH, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Kentucky at Louisville.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgments of the district court are AFFIRMED.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

FILED
JAMES J. VILT, JR. - CLERK
JUL 30 2024
U.S. DISTRICT COURT
WEST'N. DIST. KENTUCKY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

UNITED STATES OF AMERICA Plaintiff

v. Criminal Action No. 3:22-cr-37-RGJ

JERLEN HORTON
CHICOBY SUMMERS Defendants

VERDICT FORM

Count 7 (Jerlen Horton):
POSSESSION OF A FIREARM BY A PROHIBITED PERSON

With respect to the charge in Count 7, Possession of a Firearm by a Prohibited Person on or about November 3, 2021, we, the jury, find the defendant, Jerlen Horton:

GUILTY_____ NOT GUILTY ✓

[redacted] 160
Juror No.

Date: 7/30/24

FILED
JAMES J. VILT, JR. - CLERK
JUL 30 2024
U.S. DISTRICT COURT
WEST'N. DIST. KENTUCKY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

UNITED STATES OF AMERICA — Plaintiff

v. — Criminal Action No. 3:22-cr-37-RGJ

JERLEN HORTON
CHICOBY SUMMERS — Defendants

VERDICT FORM

Count 8 (Chicoby Summers):
ESCAPE

With respect to the charge in Count 8, Escape, we, the jury, find the defendant, Chicoby Summers:

GUILTY ✓ NOT GUILTY _____

[redacted] 160
Juror No.

Date: 7/30/24

FILED
JAMES J. VILT, JR. - CLERK
JUL 29 2024
U.S. DISTRICT COURT
WEST'N. DIST. KENTUCKY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

UNITED STATES OF AMERICA
Plaintiff

v.

Criminal Action No. 3:22-cr-37-RGJ

JERLEN HORTON
CHICOBY SUMMERS

Defendants

VERDICT FORM

Count 1 (Jerlen Horton):
CONSPIRACY TO POSSESS WITH INTENT TO DISTRIBUTE CONTROLLED SUBSTANCES

Question 1. With respect to the charge in Count 1, Conspiracy to Possess with Intent to Distribute controlled substances, we, the jury, find the defendant, Jerlen Horton:

GUILTY ✓ NOT GUILTY_____

[redacted] 160
Juror No.

Date: 7/29/24

If you answered guilty in response to Question 1, proceed to Question 1(a).

If you answered not guilty in response to Question 1, skip Question 1(a), and move on to the next count.

Question 1(a). With respect to Count 1, the amount of the mixture or substance containing a detectable amount of fentanyl, heroin, or cocaine base that was attributable to defendant Jerlen Horton, as the result of his own conduct and the conduct of other co-conspirators reasonably foreseeable to him was (indicate answer by checking one line below):

Fentanyl

✓ 400 grams or more of a mixture or substance

_____ 40 grams or more but less than 400 grams of a mixture or substance

_____ less than 40 grams of a mixture or substance

_____ none

Heroin

✓ 100 grams or more of a mixture or substance

_____ less than 100 grams of a mixture or substance

_____ none

Cocaine Base

✓ a mixture or substance containing a detectable amount of cocaine base

_____ none

[redacted]

160
Juror No.

Date: 7/29/24

FILED
JAMES J. VILT, JR. - CLERK
JUL 29 2024
U.S. DISTRICT COURT
WEST'N. DIST. KENTUCKY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

UNITED STATES OF AMERICA
Plaintiff

v.

Criminal Action No. 3:22-cr-37-RGJ

JERLEN HORTON
CHICOBY SUMMERS
Defendants

VERDICT FORM

Count 1 (Chicoby Summers):
CONSPIRACY TO POSSESS WITH INTENT TO DISTRIBUTE CONTROLLED SUBSTANCES

Question 1. With respect to the charge in Count 1, Conspiracy to Possess with Intent to Distribute controlled substances, we, the jury, find the defendant, Chicoby Summers:

GUILTY ✓ NOT GUILTY_____

[redacted] 160
Juror No.

Date: 7/29/24

If you answered guilty in response to Question 1, proceed to Question 1(a).

If you answered not guilty in response to Question 1, skip Question 1(a), and move on to the next count.

Question 1(a). With respect to Count 1, the amount of the mixture or substance containing a detectable amount of fentanyl, heroin, or cocaine base that was attributable to defendant Chicoby Summers, as the result of his own conduct and the conduct of other co-conspirators reasonably foreseeable to him was (indicate answer by checking one line below):

Fentanyl

✓ 400 grams or more of a mixture or substance

_____ 40 grams or more but less than 400 grams of a mixture or substance

_____ less than 40 grams of a mixture or substance

_____ none

Heroin

✓ 100 grams or more of a mixture or substance

_____ less than 100 grams of a mixture or substance

_____ none

Cocaine Base

✓ a mixture or substance containing a detectable amount of cocaine base

_____ none

[redacted] 160
Juror No.

Date: 7/29/24

FILED
JAMES J. VILT, JR. - CLERK
JUL 29 2024
U.S. DISTRICT COURT
WEST'N. DIST. KENTUCKY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

UNITED STATES OF AMERICA
Plaintiff

v.

Criminal Action No. 3:22-cr-37-RGJ

JERLEN HORTON
CHICOBY SUMMERS
Defendants

VERDICT FORM

Count 2 (Jerlen Horton):
POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE

Question 1. With respect to the charge in Count 2, Possession with Intent to Distribute Fentanyl, we, the jury, find the defendant, Jerlen Horton:

GUILTY ✓ NOT GUILTY _____

[redacted] 160
Juror No.

Date: 7/29/24

If you answered guilty in response to Question 1, proceed to Question 1(a).

If you answered not guilty in response to Question 1, skip Question 1(a), and move on to the next count.

Question 1(a). With respect to Count 2, the amount of the mixture or substance containing a detectable amount of fentanyl attributable to Jerlen Horton was (indicate answer by checking one line below):

✓ 400 grams or more of a mixture or substance

_____ 40 grams or more but less than 400 grams of a mixture or substance

_____ less than 40 grams of a mixture or substance

[redacted] 160
uror No.

Date: 7/29/24

FILED
JAMES J. VILT, JR. - CLERK
JUL 29 2024
U.S. DISTRICT COURT
WEST'N. DIST. KENTUCKY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

UNITED STATES OF AMERICA
Plaintiff

v.

Criminal Action No. 3:22-cr-37-RGJ

JERLEN HORTON
CHICOBY SUMMERS
Defendants

VERDICT FORM

Count 2 (Chicoby Summers):
POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE

Question 1. With respect to the charge in Count 2, Possession with Intent to Distribute Fentanyl, we, the jury, find the defendant, Chicoby Summers:

GUILTY ✓ NOT GUILTY _____

[redacted] 160
Juror No.

Date: 7/29/24

If you answered guilty in response to Question 1, proceed to Question 1(a).

If you answered not guilty in response to Question 1, skip Question 1(a), and move on to the next count.

Question 1(a). With respect to Count 2, the amount of the mixture or substance containing a detectable amount of fentanyl attributable to Chicoby Summers was (indicate answer by checking one line below):

✓ 400 grams or more of a mixture or substance

_____ 40 grams or more but less than 400 grams of a mixture or substance

_____ less than 40 grams of a mixture or substance

[redacted] 160
uror No.

Date: 7/29/24

FILED
JAMES J. VILT, JR. - CLERK
JUL 29 2024
U.S. DISTRICT COURT
WEST'N. DIST. KENTUCKY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

UNITED STATES OF AMERICA — Plaintiff

v. — Criminal Action No. 3:22-cr-37-RGJ

JERLEN HORTON
CHICOBY SUMMERS — Defendants

VERDICT FORM

Count 3 (Jerlen Horton):
POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE

Question 1. With respect to the charge in Count 3, Possession with Intent to Distribute Heroin, we, the jury, find the defendant, Jerlen Horton:

GUILTY ✓ NOT GUILTY _____

[redacted] 160
uror No.

Date: 7/29/24

If you answered guilty in response to Question 1, proceed to Question 1(a).

If you answered not guilty in response to Question 1, skip Question 1(a), and move on to the next count.

Question 1(a). With respect to Count 3, the amount of the mixture or substance containing a detectable amount of heroin attributable to Jerlen Horton was (indicate answer by checking one line below):

✓ 100 grams or more of a mixture or substance

_____ less than 100 grams of a mixture or substance

[redacted] 160
Juror No.

Date: 7/29/24

FILED
JAMES J. VILT, JR. - CLERK
JUL 29 2024
U.S. DISTRICT COURT
WEST'N. DIST. KENTUCKY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

UNITED STATES OF AMERICA
Plaintiff

v.

Criminal Action No. 3:22-cr-37-RGJ

JERLEN HORTON
CHICOBY SUMMERS
Defendants

VERDICT FORM

Count 3 (Chicoby Summers):
POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE

Question 1. With respect to the charge in Count 3, Possession with Intent to Distribute Heroin, we, the jury, find the defendant, Chicoby Summers:

GUILTY ✓ NOT GUILTY_____

[redacted] 160
Juror No.

Date: 7/29/24

If you answered guilty in response to Question 1, proceed to Question 1(a).

If you answered not guilty in response to Question 1, skip Question 1(a), and move on to the next count.

Question 1(a). With respect to Count 3, the amount of the mixture or substance containing a detectable amount of heroin attributable to Chicoby Summers was (indicate answer by checking one line below):

✓ 100 grams or more of a mixture or substance

_____ less than 100 grams of a mixture or substance

[redacted] 160
or No.

Date: 7/29/24

FILED
JAMES J. VILT, JR. - CLERK
JUL 29 2024
U.S. DISTRICT COURT
WEST'N. DIST. KENTUCKY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

UNITED STATES OF AMERICA — Plaintiff

v. — Criminal Action No. 3:22-cr-37-RGJ

JERLEN HORTON
CHICOBY SUMMERS — Defendants

VERDICT FORM

Count 4 (Jerlen Horton):
POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE

With respect to the charge in Count 4, Possession with Intent to Distribute Cocaine Base, we, the jury, find the defendant, Jerlen Horton:

GUILTY ✓ NOT GUILTY_____

[redacted] 160
or No.

Date: 7/29/24

If you answered guilty in response to Question 1, proceed to Question 1(a).

If you answered not guilty in response to Question 1, skip Question 1(a), and move on to the next count.

Question 1(a). With respect to Count 4, the amount of the mixture or substance containing a detectable amount of cocaine base attributable to Jerlen Horton was (indicate answer by checking one line below):

✓ a mixture or substance containing a detectable amount of cocaine base

_____ none

[redacted] 160
Juror No.

Date: 7/29/24

FILED
JAMES J. VILT, JR. - CLERK
JUL 29 2024
U.S. DISTRICT COURT
WEST'N. DIST. KENTUCKY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

UNITED STATES OF AMERICA — Plaintiff

v. — Criminal Action No. 3:22-cr-37-RGJ

JERLEN HORTON
CHICOBY SUMMERS — Defendants

VERDICT FORM

Count 4 (Chicoby Summers):
POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE

With respect to the charge in Count 4, Possession with Intent to Distribute Cocaine Base, we, the jury, find the defendant, Chicoby Summers:

GUILTY ✓ NOT GUILTY_____

[redacted] 160
uror No.

Date: 7/29/24

If you answered guilty in response to Question 1, proceed to Question 1(a).

If you answered not guilty in response to Question 1, skip Question 1(a), and move on to the next count.

Question 1(a). With respect to Count 4, the amount of the mixture or substance containing a detectable amount of cocaine base attributable to Chicoby Summers was (indicate answer by checking one line below):

✓ a mixture or substance containing a detectable amount of cocaine base

_____ none

[redacted] 160
uror No.

Date: 7/29/24

FILED
JAMES J. VILT, JR. - CLERK
JUL 29 2024
U.S. DISTRICT COURT
WEST'N. DIST. KENTUCKY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

UNITED STATES OF AMERICA — Plaintiff

v. — Criminal Action No. 3:22-cr-37-RGJ

JERLEN HORTON
CHICOBY SUMMERS — Defendants

VERDICT FORM

Count 5 (Jerlen Horton):
POSSESSION OF A FIREARM IN FURTHERANCE OF A DRUG TRAFFICKING CRIME

With respect to the charge in Count 5, Possession of a Firearm in Furtherance of a Drug Trafficking Crime, we, the jury, find the defendant, Jerlen Horton:

GUILTY ✓ NOT GUILTY_____

[redacted] 160
Juror No.

Date: 7/29/24

FILED
JAMES J. VILT, JR. - CLERK
JUL 29 2024
U.S. DISTRICT COURT
WEST'N. DIST. KENTUCKY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

UNITED STATES OF AMERICA — Plaintiff

v. — Criminal Action No. 3:22-cr-37-RGJ

JERLEN HORTON
CHICOBY SUMMERS — Defendants

VERDICT FORM

Count 6 (Chicoby Summers):
POSSESSION OF A FIREARM IN FURTHERANCE OF A DRUG TRAFFICKING CRIME

With respect to the charge in Count 6, Possession of a Firearm in Furtherance of a Drug Trafficking Crime, we, the jury, find the defendant, Chicoby Summers:

GUILTY ✓ NOT GUILTY _____

[redacted] 160
or No.

Date: 7/29/24

United States District Court

Western District of Kentucky

LOUISVILLE DIVISION

UNITED STATES OF AMERICA
V.
Chicoby Summers

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 3:22-CR-037-RGJ-02
US Marshal No: 18888-033
Counsel for Defendant: **Rob Eggert, Retained**
Counsel for the United States: **Frank E. Dahl, Assistant U.S. Attorney, and Joshua Porter, Assistant U.S. Attorney**
Court Reporter: **April Dowell**
Interpreter: **N/A**

THE DEFENDANT:

☐ Pursuant to plea agreement

☐ Pleaded guilty to count(s)

☐ Pleaded nolo contendere to count(s) which was accepted by the court.

☒ **Was found guilty on Counts 1, 2, 3, 4, 6, and 8 of the Second Superseding Indictment after a plea of not guilty.**

ACCORDINGLY, the Court has adjudicated that the defendant is guilty of the following offense(s):

Title / Section and Nature of Offense	Date Offense Concluded	Count

FOR CONVICTION OFFENSE(S) DETAIL - SEE COUNTS OF CONVICTION ON PAGE 2

The defendant is sentenced as provided in pages 2 through 8 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☒ **Underlying Indictments are dismissed on the motion of the United States.**

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the Court and the United States Attorney of any material change in the defendant's economic circumstances.

12/19/2024
Date of Imposition of Judgment

January 8, 2025

Rebecca Grady Jennings, District Judge
United States District Court

DEFENDANT: **Summers, Chicoby**
CASE NUMBER: **3:22-CR-037-RGJ-02**

COUNTS OF CONVICTION

Title / Section and Nature of Offense	Date Offense Concluded	Count
21:841(a)(1), (b)(1)(A), (b)(1)(B), (b)(1)(C), and 846 CONSPIRACY TO POSSESS WITH INTENT TO DISTRIBUTE CONTROLLED SUBSTANCES	8/22/2023	1ss
21:841(a)(1), (b)(1)(A), and 18:2 POSSESSION WITH INTENT TO DISTRIBUTE FENTANYL; AID AND ABET	11/03/2021	2ss
21:841(a)(1) and (b)(1)(B) and 18:2 POSSESSION WITH INTENT TO DISTRIBUTE HEROIN; AID AND ABET	11/03/2021	3ss
21:841(a)(1) and (b)(1)(C) and 18:2 POSSESSION WITH INTENT TO DISTRIBUTE COCAINE BASE; AID AND ABET	11/03/2021	4ss
18:924(c)(1)(A) POSSESSION OF A FIREARM IN FURTHERANCE OF DRUG TRAFFICKING	11/03/2021	6ss
18:751(a) ESCAPE	11/03/2021	8ss

DEFENDANT: **Summers, Chicoby**
CASE NUMBER: **3:22-CR-037-RGJ-02**

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of **TWO HUNDRED AND FORTY (240) MONTHS AS TO EACH OF COUNTS 1-4 AND SIXTY (60) MONTHS IN CT. 8 IN THE SECOND SUPERSEDING INDICTMENT, TO BE SERVED CONCURRENT WITH EACH OTHER, AND SIXTY (60) MONTHS ON COUNT 6, WHICH SHALL BE SERVED CONSECUTIVE TO THE TERMS IMPOSED ON COUNTS 1-4 & 8, FOR A TOTAL TERM OF THREE HUNDRED (300) MONTHS IMPRISONMENT.**

☒ **The Court makes the following recommendations to the Bureau of Prisons: 1) Defendant be evaluated to participate in a vocation program, specifically for engine maintenance and carpentry skills, 2) Defendant be placed in a facility that is closest to Talladega, Florida, and 3) Defendant be evaluated to participate in RDAP.**

☒ **The defendant is remanded to the custody of the United States Marshal.**

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at A.M. / P.M. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ Before 2:00 p.m. on

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

☐ The defendant shall continue under the terms and conditions of his/her present bond pending surrender to the institution.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ To _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

DEFENDANT: **Summers, Chicoby**
CASE NUMBER: **3:22-CR-037-RGJ-02**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **FIVE (5) YEARS AS TO EACH OF COUNTS 1-4 & 6 AND THREE (3) YEARS AS TO CT. 8 IN THE SECOND SUPERSEDING INDICTMENT, WHICH SHALL BE SERVED CONCURRENTLY FOR A TOTAL TERM OF FIVE (5) YEARS.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse.
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. (check if applicable)
5. ☐ You must cooperate in the collection of DNA as directed by the probation officer.
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense.
7. ☐ You must participate in an approved program for domestic violence.

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: **Summers, Chicoby**
CASE NUMBER: **3:22-CR-037-RGJ-02**

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

DEFENDANT: **Summers, Chicoby**
CASE NUMBER: **3:22-CR-037-RGJ-02**

SPECIAL CONDITIONS OF SUPERVISION

14. The defendant must participate in a substance abuse treatment program as approved by the Probation Office and follow the rules and regulations of that program. The defendant shall contribute to the Probation Office's costs of service rendered based upon his ability to pay as reflected in his monthly cash flow as it relates to the court approved sliding fee scale.
15. The defendant must submit to testing to determine if he has used a prohibited substance. The defendant shall contribute to the Probation Office's costs of service rendered based upon his ability to pay as it relates to the court approved sliding fee scale. The defendant must not attempt to obstruct or tamper with the testing methods.
16. The defendant shall submit his person, property, house, residence, vehicle, papers, computers [as defined in 18 USC 1030(e)(1)], other electronic communications or data storage devices or media, or office to a search conducted by the United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that the defendant has violated a condition of their release and that the areas to be searched may contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions,* available at: www.uscourts.gov.

Upon a finding of a violation of probation or supervised release, I understand that the Court may (1) revoke supervision, (2) extend the term of supervision and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

_____ _____
Defendant Date

_____ _____
U.S. Probation Officer/Designated Witness Date

DEFENDANT: **Summers, Chicoby**
CASE NUMBER: **3:22-CR-037-RGJ-02**

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	**$ 600.00**		

☒ **The fine and the costs of investigation, prosecution, incarceration, and supervision are waived due to the defendant's inability to pay.**

☐ The determination of restitution is deferred until . An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

☒ **Restitution is not an issue in this case.**

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

Criminal debt may be paid by check or money order or may be paid online at www.kywd.uscourts.gov (See Online Payments for Criminal Debt). Your mail-in or online payment must include your case number in the exact format of DKYW322CR000037-002 to ensure proper application to your criminal monetary penalty. If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee	** Total Amount of Loss	Amount of Restitution Ordered	Priority Order Or Percentage Of Payment

☐ If applicable, restitution amount ordered pursuant to plea agreement. . . . . $

☐ The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. 3612(f). All of the payment options on Sheet 5, Part B may be Subject to penalties for default and delinquency pursuant to 18 U.S.C. 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived for the ☐ Fine and/or ☐ Restitution

☐ The interest requirement for the ☐ Fine and/or ☐ Restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

DEFENDANT: **Summers, Chicoby**
CASE NUMBER: **3:22-CR-037-RGJ-02**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☒ **Lump sum payment of $600 balance due**
- ☐ not later than , or
- ☒ **in accordance with C, D, or E below); or**

B ☐ Payment to begin immediately (may be combined with C, D, or E below); or

C ☐ Payment in (E.g. equal, weekly, monthly, quarterly) installments of $
Over a period of (E.g. months or years) year(s) to commence (E.g., 30 or 60 days)
after The date of this judgment, or

D ☐ Payment in (E.g. equal, weekly, monthly, quarterly) installments of $
Over a period of (E.g. months or years) year(s) to commence (E.g., 30 or 60 days)
after Release from imprisonment to a term of supervision; or

E ☒ **Special instructions regarding the payment of criminal monetary penalties:**

Any balance of criminal monetary penalties owed upon incarceration shall be paid in quarterly installments of at least $25 based on earnings from an institution job and/or community resources (other than Federal Prison Industries), or quarterly installments of at least $60 based on earnings from a job in Federal Prison Industries and/or community resources, during the period of incarceration to commence upon arrival at the designated facility.

Upon commencement of the term of supervised release, the probation officer shall review your financial circumstances and recommend a payment schedule on any outstanding balance for approval by the court. Within the first 60 days of release, the probation officer shall submit a recommendation to the court for a payment schedule, for which the court shall retain final approval.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons Inmate Financial Responsibility Program, are to be made to the United States District Court, Gene Snyder Courthouse, 601 West Broadway, Suite 106, Louisville, KY 40202, unless otherwise directed by the Court, the Probation Officer, or the United States Attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ **The defendant shall forfeit the defendant's interest in the following property to the United States: to be addressed by separate order of the Court.**

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Case No. 25-5006/25-5007

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JERLEN HORTON [24-6073]

CHICOBY SUMMERS [25-5006 and 25-5007]

Defendants - Appellants

BEFORE: SUTTON, Chief Circuit Judge; MCKEAGUE, Circuit Judge; BUSH, Circuit Judge;

Upon consideration of the petition for rehearing filed by the Appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT
Kelly L. Stephens, Clerk

Issued: July 10, 2026



Search documents in this case: Search

No. 26A403

Title:	**Chicoby Summers, Applicant** **v.** **United States**
Docketed:	September 24, 2026
Lower Ct:	United States Court of Appeals for the Sixth Circuit
Case Numbers:	(25-5006, 25-5007)

Proceedings and Orders

Sep 22 2026	Application (26A403) to extend the time to file a petition for a writ of certiorari from October 8, 2026 to November 9, 2026, submitted to Justice Kavanaugh. **Main Document** **Proof of Service**
Sep 27 2026	Application (26A403) granted by Justice Kavanaugh extending the time to file until November 9, 2026.

Attorneys

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Party name: United States

United States Code Annotated
Constitution of the United States
Annotated
Amendment II. Keeping and Bearing Arms

U.S.C.A. Const. Amend. II

Amendment II. Keeping and Bearing Arms

Currentness

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Notes of Decisions (1255)

U.S.C.A. Const. Amend. II, USCA CONST Amend. II
Current through P.L. 119-136. Some statute sections may be more current, see credits for details.

End of Document

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KeyCite Red Flag
Unconstitutional or PreemptedUnconstitutional as Applied by United States v. Worster, D.R.I., Feb. 05, 2025

KeyCite Yellow Flag
Proposed Legislation

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 44. Firearms (Refs & Annos)

18 U.S.C.A. § 924

§ 924. Penalties

Effective: June 25, 2022
Currentness

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever--

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(l); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

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(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly--

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922,

shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if--

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct

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that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)--

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both.

(8) Whoever knowingly violates subsection (d) or (g) of section 922 shall be fined under this title, imprisoned for not more than 15 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(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;

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(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.

(B) If the firearm possessed by a person convicted of a violation of this subsection--

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall--

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law--

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

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(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under 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 armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section--

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition--

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

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(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(l), or knowing violation of section 924, 932, or 933, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: *Provided,* That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

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(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are--

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title;

(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(l), 922(n), or 924(b) of this title;

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition; and

(G) any offense under section 932 or 933.

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

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(2) As used in this subsection--

(A) the term "serious drug offense" means--

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(f) In the case of a person who knowingly violates section 922(p), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

(g) Whoever, with the intent to engage in conduct which--

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(1) constitutes an offense listed in section 1961(1),

(2) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46,

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)),

travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h) Whoever knowingly receives or transfers a firearm or ammunition, or attempts or conspires to do so, knowing or having reasonable cause to believe that such firearm or ammunition will be used to commit a felony, a Federal crime of terrorism, or a drug trafficking crime (as such terms are defined in section 932(a)), or a crime under the Arms Export Control Act (22 U.S.C. 2751 et seq.), the Export Control Reform Act of 2018 (50 U.S.C. 4801 et seq.), the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.), or the Foreign Narcotics Kingpin Designation Act (21 U.S.C. 1901 et seq.), shall be fined under this title, imprisoned for not more than 15 years, or both.

(i)(1) A person who knowingly violates section 922(u) shall be fined under this title, imprisoned not more than 10 years, or both.

(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this subsection.

(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall--

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(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

(k)(1) A person who smuggles or knowingly brings into the United States a firearm or ammunition, or attempts or conspires to do so, with intent to engage in or to promote conduct that--

(A) is punishable under the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46; or

(B) constitutes a felony, a Federal crime of terrorism, or a drug trafficking crime (as such terms are defined in section 932(a)),

shall be fined under this title, imprisoned for not more than 15 years, or both.

(2) A person who smuggles or knowingly takes out of the United States a firearm or ammunition, or attempts or conspires to do so, with intent to engage in or to promote conduct that--

(A) would be punishable under the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, if the conduct had occurred within the United States; or

(B) would constitute a felony or a Federal crime of terrorism (as such terms are defined in section 932(a)) for which the person may be prosecuted in a court of the United States, if the conduct had occurred within the United States,

shall be fined under this title, imprisoned for not more than 15 years, or both.

(l) A person who steals any firearm which is moving as, or is a part of, or which has moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

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(m) A person who steals any firearm from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall be fined under this title, imprisoned not more than 10 years, or both.

(n) A person who, with the intent to engage in conduct that constitutes a violation of section 922(a)(1)(A), travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.

(o) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

(p) Penalties relating to secure gun storage or safety device.--

(1) In general.--

(A) Suspension or revocation of license; civil penalties.--With respect to each violation of section 922(z)(1) by a licensed manufacturer, licensed importer, or licensed dealer, the Secretary may, after notice and opportunity for hearing--

(i) suspend for not more than 6 months, or revoke, the license issued to the licensee under this chapter that was used to conduct the firearms transfer; or

(ii) subject the licensee to a civil penalty in an amount equal to not more than $2,500.

(B) Review.--An action of the Secretary under this paragraph may be reviewed only as provided under section 923(f).

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(2) Administrative remedies.--The suspension or revocation of a license or the imposition of a civil penalty under paragraph (1) shall not preclude any administrative remedy that is otherwise available to the Secretary.

CREDIT(S)

(Added Pub.L. 90-351, Title IV, § 902, June 19, 1968, 82 Stat. 233; amended Pub.L. 90-618, Title I, § 102, Oct. 22, 1968, 82 Stat. 1223; Pub.L. 91-644, Title II, § 13, Jan. 2, 1971, 84 Stat. 1889; Pub.L. 98-473, Title II, §§ 223(a), 1005(a), Oct. 12, 1984, 98 Stat. 2028, 2138; Pub.L. 99-308, § 104(a), May 19, 1986, 100 Stat. 456; Pub.L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095; Pub.L. 99-570, Title I, § 1402, Oct. 27, 1986, 100 Stat. 3207-39; Pub.L. 100-649, § 2(b), (f)(2)(B), (D), Nov. 10, 1988, 102 Stat. 3817, 3818; Pub.L. 100-690, Title VI, §§ 6211, 6212, 6451, 6460, 6462, Title VII, §§ 7056, 7060(a), Nov. 18, 1988, 102 Stat. 4359, 4360, 4371, 4373, 4374, 4402, 4403; Pub.L. 101-647, Title XI, § 1101, Title XVII, § 1702(b)(3), Title XXII, §§ 2203(d), 2204(c), Title XXXV, §§ 3526 to 3529, Nov. 29, 1990, 104 Stat. 4829, 4845, 4857, 4924; Pub.L. 103-159, Title I, § 102(c), Title III, § 302(d), Nov. 30, 1993, 107 Stat. 1541, 1545; Pub.L. 103-322, Title VI, § 60013, Title XI, §§ 110102(c), 110103(c), 110105(2), 110201(b), 110401(e), 110503, 110504(a), 110507, 110510, 110515(a), 110517, 110518(a), Title XXXIII, §§ 330002(h), 330003(f)(2), 330011(i), (j), 330016(1)(H), (K), (L), Sept. 13, 1994, 108 Stat. 1973, 1998, 1999, 2000, 2011, 2015, 2016, 2018, 2019, 2020, 2140, 2141, 2145, 2147; Pub.L. 104-294, Title VI, § 603(m)(1), (n) to (p)(1), (q) to (s), Oct. 11, 1996, 110 Stat. 3505; Pub.L. 105-386, § 1(a), Nov. 13, 1998, 112 Stat. 3469; Pub.L. 107-273, Div. B, Title IV, § 4002(d)(1)(E), Div. C, Title I, § 11009(e)(3), Nov. 2, 2002, 116 Stat. 1809, 1821; Pub.L. 108-174, § 1(2), (3), Dec. 9, 2003, 117 Stat. 2481; Pub.L. 109-92, §§ 5(c)(2), 6(b), Oct. 26, 2005, 119 Stat. 2100, 2102; Pub.L. 109-304, § 17(d)(3), Oct. 6, 2006, 120 Stat. 1707; Pub.L. 115-391, Title IV, § 403(a), Dec. 21, 2018, 132 Stat. 5221; Pub.L. 117-159, Div. A, Title II, § 12004(c) to (f), June 25, 2022, 136 Stat. 1329.)

AMENDMENT OF SECTION

<Pub.L. 100-649, § 2(f)(2)(B), (D), Nov. 10, 1988, 102 Stat. 3818, as amended Pub.L. 101-647, Title XXXV, § 3526(b), Nov. 29, 1990, 104 Stat. 4924; Pub.L. 105-277, Div. A, § 101(h) [Title VI, § 649], Oct. 21, 1998, 112 Stat. 2681-528; Pub.L. 108-174, § 1, Dec. 9, 2003, 117 Stat. 2481; Pub.L. 113-57, § 1, Dec. 9, 2013, 127 Stat. 656, provided that, effective on Mar. 8, 2031, subsec. (a)(1) of this section is amended by striking "this subsection, subsection (b), (c), or (f) of this section, or in section 929" and inserting "this chapter"; subsec. (f) of this section is repealed; and subsecs. (g) through (o) of this section are redesignated as subsecs. (f) through (n), respectively.>

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VALIDITY

<The United States Supreme Court has held that the residual clause of the Armed Career Criminal Act (18 U.S.C.A. § 924 (c)(3)(B)), is unconstitutionally vague under due process and separation of powers principles, see United States v. Davis, June 24, 2019, 139 S.Ct. 2319, 204 L.Ed.2d 757; see also United States v. Taylor, No. 20-1459, June 21, 2022, 596 U.S. 845, 142 S.Ct. 2015.>

<The United States Supreme Court has held that the imposition of an increased sentence under the residual clause of the Armed Career Criminal Act (18 U.S.C.A. § 924(e)(2)(B)(ii)), violates the Constitution's guarantee of due process, see Johnson v. U.S., U.S.2015, 576 U.S. 591, 135 S.Ct. 2551, 192 L.Ed.2d 569. >

Notes of Decisions (5098)

O'CONNOR'S COMMENTS

United States Sentencing Guidelines
§§2A1.1-2A1.4 (offenses against the person)

§§2K2.1, 2K2.4 (offenses involving public safety)

See also §4B1.4 (career offenders & criminal livelihood)

18 U.S.C.A. § 924, 18 USCA § 924
Current through P.L. 119-136. Some statute sections may be more current, see credits for details.

End of Document

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144 Cong. Rec. H10329-01, 1998 WL 701303
Congressional Record --- House of Representatives
Proceedings and Debates of the 105th Congress, Second Session
Friday, October 9, 1998

***H10329** THROTTLING CRIMINAL USE OF GUNS

Mr. MCCOLLUM.

Madam Speaker, I move to suspend the rules and pass the Senate bill (S. 191) to throttle criminal use of guns, as amended.

The Clerk read as follows:

S. 191

SECTION 1. AMENDMENT TO TITLE 18, UNITED STATES CODE.

(a) IN GENERAL.-Section 924(c) of title 18, United States Code, is amended-

(1) by striking ”(c)” and all that follows through the end of paragraph (1) and inserting the following:

”(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.

”(B) If the firearm possessed by a person convicted of a violation of this subsection-

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”(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

”(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

”(C) In the case of a second or subsequent conviction under this subsection, the person shall-

”(i) be sentenced to a term of imprisonment of not less than 25 years; and

”(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

”(D) Notwithstanding any other provision of law-

”(i) a court shall not place on probation any person convicted of a violation of this subsection; and

”(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.”; and

(2) by adding at the end the following:

”(4) For purposes of this subsection, the term 'brandish' means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.”.

(b) CONFORMING AMENDMENT.-Section 3559(c)(2)(F)(i) of title 18, United States Code, is amended by inserting ”firearms possession (as described in section 924(c));” after ”firearms use;”.

The SPEAKER pro tempore.

Pursuant to the rule, the gentleman from Florida (Mr. MCCOLLUM) and the gentleman from Virginia (Mr. SCOTT) each will control 20 minutes.

The Chair recognizes the gentleman from Florida (Mr. MCCOLLUM).

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GENERAL LEAVE

Mr. McCOLLUM.

Madam Speaker, I ask unanimous consent that all Members may have 5 legislative days within which to revise and extend their remarks on the Senate bill, S. 191.

The SPEAKER pro tempore.

Is there objection to the request of the gentleman from Florida?

There was no objection.

Mr. McCOLLUM.

Madam Speaker, I yield myself so much time as I may consume.

Madam Speaker, I am proud today to bring S. 191 before the House. With the passage of this legislation, we take an important step in the battle against firearm violence in America. Support of this legislation today offers Members an opportunity to send a clear message to violent predators that the criminal use of guns will not be tolerated.

The Senate passed S. 191 on November 13, 1997, and the House passed its companion legislation, H.R. 424, on February 24 of this year by a vote of 350 to 59.

The version I now bring to the floor represents a compromise between the House and the Senate. This legislation will have a significant impact on the number of violent criminals behind bars, and I am extremely pleased that we are able to come to an agreement before adjournment.

Madam Speaker, criminals who use firearms to commit violent crimes and drug trafficking offenses demonstrate the ultimate indifference to human life. The risks for law enforcement, and the potential for harm to innocent bystanders, are dramatically increased when criminals wield guns.

Criminals who carry guns while committing serious crimes are making a clear and unequivocal statement to the world, I will hurt you or kill you if you get in my way. Such persons should be punished severely, and that is what this legislation will do.

Consider these frightening facts. According to the National Institute of ***H10330** Justice, 37 percent of arrestees in 11 major urban areas admitted to owning a gun. Even more astonishing, and terrifying for the country, is that a shocking 42 percent of admitted drug sellers and 50 percent of

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admitted gang members further confess to using a gun to commit a crime. Madam Speaker, these are just the ones who are willing to admit to such criminal behavior.

S. 191 amends section 924(c) of title 18 of the United States Code. Currently, that section allows for additional time in prison for any person who uses or carries a firearm during and in relation to the commission of a Federal crime of violence or drug trafficking crime.

Section 924(c) is a very significant and frequently used tool for Federal prosecutors. According to the U.S. Sentencing Commission, there were 10,576 defendants sentenced from 1991 to 1996 under this section.

This is an opportunity for the Federal authorities to take somebody who is a known criminal off the streets and lock them up for a considerable period of time by an enhanced penalty provision that all of us should be pleased to have on the books.

But in December of 1995, the Supreme Court significantly limited the effective use of this Federal statute by holding in Bailey versus the United States that in order to receive the penalty enhancement for use of a firearm, the government must demonstrate active employment of the firearm. In so stating, the Supreme Court overturned the Justice Department's long-standing practice of applying this penalty to dangerous criminals whose firearms further or advance their criminal activities.

The impact caused by the Bailey decision was immediate. Federal prosecutors have been less able to utilize this section of the code. Moreover, drug dealers and other bad actors have been successful in having their convictions overturned on the basis of an erroneous jury instruction regarding the ”use” prong of the ”use or carry” test.

This legislation clarifies Congress' intent as to the type of criminal conduct which should trigger the statute's application. The bill strikes the now unworkable ”use or carry” element of the statute, and replaces it with a structure which allows the penalty enhancement for possessing, brandishing, or discharging a firearm during and in relation to a Federal crime of violence or drug trafficking crime.

It is also important to note that this bill will not affect any person who merely possesses a firearm in the general vicinity of a crime, nor will it impact someone who uses a gun in self-defense.

A bill containing nearly identical language to H.R. 424 passed the House in the last Congress, and the gentlewoman from North Carolina (Mrs. MYRICK) introduced the bill that we have taken up before previously this year, H.R. 424, during the first days of the 105th Congress. I am very grateful for her for her continued dedication to ensuring the passage of this legislation.

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Section 924(c) is a critical tool in our fight against gun-toting criminals. Yes, this is a tough bill, but I believe it is exactly what we need in response to the menacing threat of the vicious gun crimes that are committed around the country.

7:10 p.m.

We need to pass this bill. It is, as I said earlier, a compromise with the Senate, it is a good bill, it is a solid bill, it corrects the Bailey problem and will allow law enforcement to once again use this very effective tool for locking up criminals and throwing away the key for a long period of time if they are using a gun, possessing in the course of a crime a gun, or certainly brandishing or discharging that gun.

Mr. Speaker, I reserve the balance of my time.

Mr. SCOTT.
Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, I stand in opposition to the bill, S. 191, which is similar to a piece of legislation, H.R. 424, passed by this body earlier this Congress. That version contained penalties for drug offenders which were 6 times greater than the penalty for rape and 7 times greater than the penalty for voluntary manslaughter. Although the Senate version is not as egregious as that, I still cannot in good conscience vote for a measure containing ridiculous mandatory minimums.

I oppose this legislation for several reasons, the most important of which is the absolutely outrageous mandatory minimum penalties attached to the bill. Five years for possession of a gun, 7 years for brandishing a gun, and 10 years for discharging the gun. This means if someone is convicted of possessing 5 grams of crack and is found to have possessed a gun at the time, he will receive a mandatory 5-year sentence for the crack and another 5 years for the gun, a total of 10 years. If that individual opens a coat to display a gun tucked in under his belt during the course of a drug sale, he will receive a mandatory 7-year sentence in addition to the 5 years for crack, for a total of 12 years.

Let us compare these penalties to the penalties for other crimes. For instance, voluntary manslaughter carries a penalty of 5 years; aggregated assault, less than 2 years; assaulted with intent to murder, less than 31/2 years; rape, under 6 years; kidnapping, approximately 4 years. Does that make sense? Two years for serious assault, 31/2 years for assault with intent to murder, 4 years for kidnapping, 6 years for rape, and 10 years mandatory minimum for possessing a gun in connection with a small-time crack sale where no one is injured. This type of legislation and these ludicrous penalties demonstrate that we have truly run amok when it comes to crime legislation.

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Mr. Speaker, this is why we have a Sentencing Commission. The Sentencing Commission can take the politics out of sentencing and put some common sense in. So I urge my colleagues to demonstrate some common sense and vote against this legislation.

Mr. Speaker, I yield back the balance of my time.

Mr. McCOLLUM.
Mr. Speaker, I yield 2 minutes to the gentlewoman from North Carolina (Mrs. MYRICK), the author of this fine legislation.

Mrs. MYRICK.
Mr. Speaker, I rise in support of S. 191. This is Senator JESSE HELMS' companion to my H.R. 424, which passed the House on February 24 by an overwhelming vote of 350-to-589. As written, the Federal Criminal Code imposes a 5-year mandatory sentence when a felon uses or carries a firearm during the Commission of a violent crime or a drug trafficking offense.

In the 1995 case of Bailey v. United States, though, the Supreme Court interpreted the word ”carry” in the Federal criminal code to mean that a felon must fire or brandish his weapon. This is clearly contrary to Congress's intent, and it has resulted in the early release of hundreds of dangerous criminals.

To put a stop to this mess, S. 191 clarifies that a criminal who possesses a gun while committing a violent crime or a drug crime will face a mandatory sentence. And at the same time, the bill increases the mandatory sentence for such crimes.

Mr. Speaker, I am a strong defender of the second amendment, but no American has a right to go out and use a gun to commit a crime.

Indeed, the National Rifle Association has endorsed S. 191 because they recognize the best way to protect our second amendment rights is to punish those who use their guns to rape or murder or traffic in drugs. The bill also has been endorsed by the Fraternal Order of Police and the Southern States Police Benevolent Association.

The message is clear: Commit a crime while possessing or brandishing a firearm, and you will go to prison for a very long time. We cannot send that message too strongly or too often.

Mr. McCOLLUM.
Mr. Speaker, I yield myself such time as I may consume.

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Mr. Speaker, I just want to point out as we close the debate on this that the minimum mandatory sentence in this bill for possession will be 5 years. The minimum mandatory for brandishing the firearm will be 7 years; the minimum mandatory for discharging the firearm in the commission of another crime will be 10 years. Those are enhancements on top of my underlying sentence for a crime that is committed with a gun, and in the case of a subsequent or second conviction of brandishing or discharging, it is 25 years.

I think it is important to put that on the record, because this is the compromise that is different, considerably different from the House version and different from the Senate version as well. ***H10331**

Mr. Speaker, I urge the adoption of this bill.

Mr. Speaker, I yield back the balance of my time.

The SPEAKER pro tempore (Mrs. EMERSON).

The question is on the motion offered by the gentleman from Florida (Mr. MCCOLLUM) that the House suspend the rules and pass the Senate bill, S. 191, as amended.

The question was taken; and (two-thirds having voted in favor thereof) the rules were suspended and the Senate bill, as amended, was passed.

A motion to reconsider was laid on the table.

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H.R. REP. 105-344, H.R. Rep. No. 344, 105TH Cong., 1ST Sess. 1997, 1997 WL 668339 (Leg.Hist.)

P.L. 105-386, ***1** TO PROVIDE FOR INCREASED MANDATORY MINIMUM SENTENCES FOR CRIMINALS POSSESSING FIREARMS, AND FOR OTHER PURPOSES

HOUSE REPORT NO. **105**–**344**

October 24, 1997

Mr. Hyde, from the Committee on the Judiciary, submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 424]

The Committee on the Judiciary, to whom was referred the bill (H.R. 424) to provide for increased mandatory minimum sentences for criminals possessing firearms, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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***2** The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. MANDATORY PRISON TERMS FOR POSSESSING, BRANDISHING, OR DISCHARGING A FIREARM OR DESTRUCTIVE DEVICE DURING A FEDERAL CRIME THAT IS A CRIME OF VIOLENCE OR A DRUG TRAFFICKING CRIME.

Section 924(c) of title 18, United States Code, is amended–

(1) by redesignating paragraphs (2) and (3) as paragraphs (5) and (6), respectively; and

(2) by striking paragraph (1) and inserting the following:

"(1) A person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which 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–

"(A) possesses a firearm in furtherance of the crime, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 10 years;

"(B) brandishes a firearm, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 15 years; or

"(C) discharges a firearm, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 20 years;

except that if the firearm is a machinegun or destructive device or is equipped with a firearm silencer or firearm muffler, such additional sentence shall be imprisonment for 30 years.

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"(2) In the case of the second or subsequent conviction of a person under this subsection–

"(A) if the conviction is for possession of a firearm as described in paragraph (1), the person shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime involved, be sentenced to imprisonment for not less than 20 years;

"(B) if the conviction is for brandishing a firearm as described in paragraph (1), the person shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime involved, be sentenced to imprisonment for not less than 25 years; or

"(C) if the conviction is for discharging a firearm as described in paragraph (1), the person shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime involved, be sentenced to imprisonment for not less than 30 years;

except that if the firearm is a machinegun or destructive device or is equipped with a firearm silencer or firearm muffler, the person shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime involved, be sentenced to life imprisonment.

"(3) Notwithstanding any other provision of law, the court shall not impose a probationary sentence on any person convicted of a violation of this subsection, nor shall a term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used.

"(4) For purposes of this subsection, the term 'brandish' means, with respect to a firearm, to display all or part of the firearm so as to intimidate or threaten, regardless of whether the firearm is visible.".

PURPOSE AND SUMMARY

H.R. 424, introduced by Representative Sue Myrick (R–NC), would amend S 924(c) of title 18, United States Code. It provides for an increased mandatory penalty for any person who possesses, brandishes or discharges a firearm during and in relation to the commission of a federal crime of violence or drug trafficking crime.

Currently, S 924(c) provides for a mandatory additional term of imprisonment for any person who "uses or carries" a firearm during and in relation to the commission of a federal crime of violence or drug trafficking crime. The term "federal crime of violence" is ***3** defined in S 924(c)(3) of title 18, United States Code.[1] The term "drug trafficking crime" is defined in S 924(c)(2) of title 18, United States Code.[2] Current law provides for a five-year prison sentence for a first

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offense, in addition to any time received for the underlying offense, unless the firearm is a short-arreled rifle, short-barreled shotgun or semiautomatic assault weapon, in which case the term of imprisonment is ten years for a first offense. If the firearm is a machinegun,[3] or a destructive device,[4] or is equipped with a firearm silencer or firearm muffler,[5] then the person shall receive an additional thirty years imprisonment for a first offense. For a second or subsequent offense under current law, the offender is subject to an additional twenty years, and if the firearm is a machine gun, destructive device or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release.

H.R. 424 would strike the "uses or carries" language, and replace it with a graded penalty structure for possessing, brandishing or discharging a firearm during and in relation to a federal crime of violence or drug trafficking crime. If the charge is for possession, however, the government must prove that the firearm was possessed "in furtherance of" the commission of the crime.

H.R. 424 mandates an additional ten years imprisonment for a first offense for any person who possesses a firearm in furtherance of the commission of a crime. If a person brandishes a firearm, during and in relation to the commission of a crime, the additional prison term is fifteen years for a first offense. If the person discharges the firearm, during and in relation to the commission of a crime, the additional prison term is twenty years for a first offense. These increased penalties replace the bifurcated penalties in current law described above for short-barreled rifles, short-barreled shotguns or semiautomatic assault weapons and most other firearms. Additionally, if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or firearm muffler, the additional prison term shall be thirty years.

For a second or subsequent offense under H.R. 424, a person who possess a firearm, in furtherance of a crime, shall receive an additional term of imprisonment of at least twenty years. A person who brandishes a firearm, during and in relation to the commission of a crime, shall receive an additional term of imprisonment of at least twenty-five years. A person who discharges a firearm, during and in relation to the commission of a crime, shall receive an additional term of imprisonment of at least thirty years. If the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to life imprisonment.

***4** H.R. 424 also clarifies that courts may not impose a probationary sentence, nor may any term of imprisonment under S 924(c) run concurrently with any other term of imprisonment. Finally, the legislation defines "brandish" as "to display all or part of a firearm so as to intimidate or threaten, regardless of whether the firearm is visible."

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BACKGROUND AND NEED FOR THE LEGISLATION

As noted above, S 924(c) of title 18, United States Code, currently allows for a penalty enhancement for any person who "uses or carries" a firearm during and in relation to the commission of a federal crime of violence or drug trafficking crime. In the December, 1995, decision Bailey v. United States,[6] the Supreme Court interpreted the "use" prong of S 924(c). The Court held that a penalty increase for "use" of a firearm would only be applicable to persons who "actively employed" the firearm during and in relation to the commission of the crime.[7]

Justice O'Connor, writing for the unanimous Court, explained that the "active employment" interpretation derives from ordinary understanding and dictionary definitions of the word "use." Otherwise, the "use" prong would be interpreted so expansively as to encompass "carry" within its definition. The Court noted that such an outcome could not have been what Congress intended, as courts normally assume that each word in a statute has a particular purpose. Justice O'Connor cited the long-standing cannon of construction that instructs that "a legislature is presumed to have used no superfluous words."[8]

The Supreme Court's limited interpretation of "use" of a firearm overturned two consolidated decisions of the United States Court of Appeals for the District of Columbia Circuit. The court of appeals had crafted an "accessibility and proximity" test to determine "use" under S 924(c). It determined that the enhancement would apply "whenever one puts or keeps the gun in a particular place from which one (or one's agent) can gain access to it if and when needed to facilitate a drug crime."[9] The court of appeals noted that other circuits had adopted a definition which was considerably broader than its previous interpretation, focusing upon whether the "location of the gun was sufficient to permit the jury to conclude that the gun in some way facilitated the predicate * * * offense."[10]

In the Bailey case, the defendant, Roland J. Bailey, was stopped by two Washington, D.C. police officers, after they observed that the car he was driving had neither a front license plate nor an inspection sticker. When Mr. Bailey failed to produce a license, the officers instructed him to get out of the car. As he exited, the officers observed him push something between his seat and the front console. Upon investigation of the passenger compartment, the officers found twenty-seven small plastic bags containing a total of thirty grams of cocaine, and one round of ammunition. After placing ***5** Mr. Bailey under arrest, the officers searched the car and located in the trunk a loaded 9-mm pistol and $3,216 in cash. He was convicted by the jury on all charges, and received two concurrent 51-month sentences, plus a consecutive 60-month term for violation of S 924(c).[11]

The facts of the consolidated case against petitioner Candisha Robinson involved a Metropolitan Police Department controlled drug buy. An undercover officer contacted Ms. Robinson's sister and told her that he wanted to buy crack cocaine. The sister lead him to Ms. Robinson's apartment, where the officer repeated his request to Ms. Robinson. After the sisters allowed him to enter the apartment, he observed them go into the bedroom and retrieve a rock of crack cocaine, which they then sold to him. The next evening, the officer made another controlled buy. After the second buy, police officers executed a search warrant of the apartment. Inside a locked trunk in the bedroom closet, they discovered a .22-caliber Derringer, 10.88 grams of crack cocaine, a marked $20 bill from the first controlled buy, Ms. Robinson's 1990 tax return and a letter from her employer. The jury convicted her of five separate drug charges, and in addition to the prison term for the drug offenses, she received a 60-month term of imprisonment for a violation of S 924(c).[12]

The court of appeals upheld both convictions under the newly crafted "proximity and accessibility" test, concluding that, in order to defeat a challenge upon appeal, the government,

> need only point to evidence that the firearm in question was in proximity to the drugs, drug paraphernalia, or drug proceeds and was accessible to the defendant from the site of the drugs, drug paraphernalia, or drug proceeds involved in his or her predicate drug trafficking offense. Because the government presented such evidence at the trials of both Bailey and Robinson, the judgments of conviction in each case are affirmed.

Thus, the Supreme Court's decision that "use" requires "active employment" has had a significant impact upon federal drug and violent crime prosecutions and convictions across the country. Section 924(c) has been a valuable and frequently used tool of federal prosecutors. According to the United States Sentencing Commission, there were 9,182 defendants sentenced nationwide from 1991 to 1995 under S 924(c). The U.S. Sentencing Commission statistics also indicate that the vast majority of these cases (nearly 75%) in which a S 924(c) enhancement was sought were for drug trafficking and bank robbery. Since the Bailey decision, the number of federal cases involving a S 924(c) enhancement has declined by approximately 17%.

The circuit courts must also now address a deluge of appeals from defendants with previous convictions for "use" of a firearm under S 924(c). Upon appeal, prosecutors in many cases are being ***6** forced to concede that the jury instructions given prior to the Bailey decision were erroneous, and may justify reversal.[13]

H.R. 424 strikes the words uses or carries from S 924(c), and replaces them with a graded penalty structure for possessing, brandishing or discharging a firearm. The word "possession" has a broader meaning than either "uses" or "carries," thus reversing the restrictive effect of the Bailey decision. In order to sustain a conviction for possession under S 924(c), the government must prove

that a firearm was possessed "in furtherance of" the commission of the federal crime of violence or drug trafficking offense.

H.R. 424 clarifies Congress" intent with regard to S 924(c) offenses. The "uses or carries" test is replaced with increased penalties for escalating egregious conduct. For a first offense, a person will receive 10 years for possessing a firearm, 15 years for brandishing a firearm, and 20 years for discharging a firearm. Penalties are higher for second or subsequent offense, or if the firearm is a machinegun or destructive device, or is equipped with a firearm muffler or silencer. Moreover, the Committee does not intended to discriminate between various types of firearms, as current law does, to determine the appropriate number of additional years imprisonment. Regardless of the type of firearm possessed, a defendant will receive a mandatory additional 10 years for a first offense. H.R. 424 is supported by the National Fraternal Order of Police.

HEARINGS

No hearings were held in the 105th Congress on H.R. 424.

COMMITTEE CONSIDERATION

On July 16, 1997, the Subcommittee on Crime met in open session and ordered reported favorably the bill H.R. 424, as amended, by a voice vote, a quorum being present. On September 9, 1997, the Committee met in open session and ordered reported favorably the bill H.R. 424, with amendment, by a recorded vote of 17 to 8, a quorum being present.

VOTE OF THE COMMITTEE

ROLLCALL NO. 1

Date: September 9, 1997.

Subject: H.R. 424, to provide for increased mandatory minimum sentences for criminals possessing firearms, and for other purposes. Amendment offered by Ms. Jackson Lee to the Subcommittee amendment in the nature of a substitute. Defeated 7–16.

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*7 ROLLCALL NO. 2

Date: September 9, 1997.

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Subject: H.R. 424, to provide for increased mandatory minimum sentences for criminals possessing firearms, and for other purposes. Motion to order the previous question on the substitute amendment offered by Mr. Watt to the Subcommittee amendment in the nature of a substitute. Agreed to 17–7.

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

***8** ROLLCALL NO. 3

Date: September 9, 1997.

Subject: H.R. 424, to provide for increased mandatory minimum sentences for criminals possessing firearms, and for other purposes. Motion to report. Agreed to 17–8.

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

***9** COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 424, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

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H.R. 424–A bill to provide for increased mandatory minimum sentences for criminals possessing firearms, and for other purposes

Summary: Enacting H.R. 424 would clarify and increase mandatory minimum prison sentences for the use of a firearm during the commission of federal crimes that are either crimes of violence or drug trafficking crimes. Assuming appropriation of the necessary amounts, CBO estimates that implementing the bill would result in additional costs of about $10 million over the next five years to accommodate more prisoners in federal prisons. Enacting H.R. 424 would not affect direct spending or receipts; therefore, pay-as-you go procedures would not apply. H.R. 424 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act of 1995 (UMRA) and would impose no costs on state, local, or tribal governments.

Current law provides for a mandatory minimum of five years in prison for "using or carrying" a firearm during the commission of a federal crime of violence or drug trafficking crime. Even though the "minimum" sentence is five years, many offenders receive reduced sentences of less than five years for cooperating with federal prosecutors. Under H.R. 424, the mandatory minimum sentence for possessing a firearm during the commission of such crimes would ***10** be 10 years. Brandishing a firearm while committing such offenses would result in a 15-year mandatory minimum sentence, and the discharging of a firearm during the commission of such crimes would result in a 20-year mandatory minimum sentence. These penalties would be in addition to any prison time received for the conviction of the underlying offense, and penalties would be higher for a second offense, or if a machinegun, destructive device, firearm muffler, or firearm silencer is used.

Estimated cost to the Federal Government: CBO estimates that implementing H.R. 424 would increase discretionary spending for prison operating costs by about $10 million over the 1998–2002 period, subject to appropriation of the necessary amounts. The following table summarizes the estimated budgetary impact of the bill.

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The costs of this legislation fall within budget function 750 (administration of justice).

Because this bill would apply to convicted felons who would serve lengthy sentences under current law, CBO expects that the full budgetary effects of H.R. 424 would not be realized until after 30 years when the additional prison population resulting from this bill would reach an estimated 4,500 prisoners and remain steady thereafter. Thus, assuming no significant change in the number of convictions, the cost to the prison system on a long-term basis would total about $40 million annually (in 1997 dollars for operating costs). Furthermore, additional prisons would have to be constructed over the next 30 years to support such an increase in prison population.

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Based on information from the Bureau of Prisons, CBO estimates that added construction costs would likely exceed $340 million (in 1997 dollars over the 30-year period).

Basis of estimate: For purposes of this estimate, CBO assumes that the bill will be enacted within the next few months, and that the necessary funds will be appropriated at or near the beginning of each fiscal year.

According to the U.S. Sentencing Commission, enacting H.R. 424 would increase the average sentence imposed on certain offenders by about 60 months. Additional time served, however, could be less than 60 months because of sentence reductions for good behavior or for cooperating with federal prosecutors. Based on information from the U.S. Sentencing Commission, CBO expects that the prison population would increase by at least 380 prisoners over the next five years, taking into account the fact that some convicted felons ***11** currently receive sentences of less than five years. At an annual cost per prisoner of about $8,700 (at 1997 prices), CBO estimates that the costs to support these additional prisoners would total about $10 million over the 1998–2002 period. This estimate assumes that no additional prisons would be constructed over the next five years to accommodate this increase in prison population. Because the bill would increase a five-year sentence to a sentence of 10 years or more, most of the costs of implementing H.R. 424 would occur after 2002.

Pay-as-you-go considerations: None.

Intergovernmental and private-sector impact: The bill contains no intergovernmental or private-sector mandates as defined in UMRA and would not impose costs on state, local, or tribal governments.

Estimate prepared by: Susanne S. Mehlman.

Estimate approved by: Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to rule XI, clause 2(l)(4) of the Rules of the House of Representatives, the Committee finds the authority for this legislation in Article I, section 8 of the Constitution.

SECTION-BY-SECTION ANALYSIS

Section 1. Mandatory Prison Terms for Possessing, Brandishing, or Discharging a Firearm or Destructive Device During a Federal Crime That is a Crime of Violence or a Drug Trafficking

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Crime.–This section strikes the current language of S 924(c) of title 18, United States Code, which allows for an increased penalty for any person who "uses or carries a firearm," during and in relation to the commission of a federal crime of violence or drug trafficking crime. It replaces the "uses or carries" test with increased penalties for any person who "possesses" "brandishes," or "discharges" a firearm during and in relation to the commission of a federal crime of violence or drug trafficking crime. Possession must also be "in furtherance of the crime." The Committee believes that distinguishing various actions in this manner will result in more appropriate sentences for persons convicted under S 924(c).

The Committee recognizes that the distinction between "in furtherance of" and "during and in relation to" is a subtle one, and may initially prove troublesome for prosecutors. Nevertheless, the Committee believes that "in furtherance of" is a slightly higher standard,[14] and encompasses the "during and in relation to" language.

Both Webster's New International Dictionary and Black's Law Dictionary define "furtherance" as the "act of furthering, helping forward, promotion, advancement, or progress."[15] Most case law interpreting ***12** "in furtherance of" pertains to conspiracy charges.[16] However, the cases and the usual understanding of the words do provide some guidance for interpreting the phrase in this context.[17] 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, reiterated above, provide a good example. The Committee believes that the evidence presented by the government in that case may not have been sufficient to sustain a conviction for possession of a firearm "in furtherance of" the commission of a drug trafficking offense. In that case, a prosecution expert testified at Mr. Bailey's trial that drug dealers frequently carry a firearm to protect themselves, as well as their drugs and money.[18] Standing on its own, this evidence may be insufficient to meet the "in furtherance of" test. The government would have to show that the firearm located in the trunk of the car advanced or promoted Mr. Bailey's drug dealing activity. 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.

To sustain a conviction for brandishing or discharging a firearm, the government must demonstrate that the firearm was used "during and in relation to" the commission of the federal crime of violence or drug trafficking crime. In Smith v. United States,[19] the Supreme Court enunciated what is needed to meet this test. The Court determined that "the phrase 'in relation to' clarifies that the firearm must have some purpose or effect with respect to the drug trafficking

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crime; its presence or involvement cannot be the result of accident or coincidence."[20] The Court further explained that the "language 'allays explicitly the concern that a person could be' punished under S 924(c)(1) for committing a drug trafficking offense * * * even though the firearm's presence is coincidental or entirely 'unrelated' to the crime."[21] The Committee intends to leave undisturbed the body of case law which has interpreted the phrase "during and in relation to" in the context of prosecutions for violations of S 924(c).

H.R. 424 also defines the term "brandish," for purposes of a S 924(c) charge. A person brandishes a firearm if he or she "display[s] all or part of the firearm so as to intimidate or threaten, regardless of whether the firearm is visible." The Committee expects that even when a person displays the outline of a firearm through clothing or other similar shroud the definition of brandish will be satisfied. For example, this would encompass such conduct ***13** as a person pointing a firearm through a coat pocket, so that only the outline of the barrel of the firearm is visible. The Committee intends that the test of whether the firearm intimidated or threatened be an objective one. Thus, unavailability of witnesses or disputes between witness recollections would not preclude prosecutors from bringing a charge for brandishing a firearm under S 924(c).

Under S 924(c)(1)(A), for possession in furtherance of the commission of the crime, a person shall receive, in addition to any penalties for the underlying offense(s), a minimum of ten years imprisonment. Under subsection (c)(1)(B), for brandishing during and in relation to the commission of the crime, a person shall receive, in addition to any other penalties, a minimum of fifteen years imprisonment. Under subsection (c)(1)(C), for discharging a firearm during and in relation to the commission of the crime, a person shall receive, in addition to any other penalties, a minimum of twenty years imprisonment. If the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, the additional sentence shall be at least thirty years for a first offense. The Committee notes that currently, under S 924(j), any person who causes the death of another through the use of a firearm, in the course of a violation of subsection S 924(c), may be punished by death, or by imprisonment for any term of years or for life.

Under S 924(c)(2)(A), for a second or subsequent conviction, a person who possesses a firearm shall receive an additional twenty years imprisonment. Under subsection (c)(2)(B), a person who brandishes shall receive an additional twenty-five years imprisonment, and under subsection (c)(2)(C), a person who discharges shall receive an additional thirty years imprisonment. If the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, such additional sentence shall be life imprisonment.

Under S 924(c)(3), no court may impose a probationary sentence, nor may any term of imprisonment imposed for a violation of S 924(c) run concurrently with any other term of imprisonment. This includes any term of imprisonment imposed for the underlying crimes of violence or drug trafficking offenses in which the firearm was employed.

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AGENCY VIEWS

U.S. Department of Justice,
Office of Legislative Affairs,
Washington, DC.

Hon. Henry Hyde,
Chairman, Committee on the Judiciary, House of Representatives, Washington, DC.

Dear Mr. Chairman: I am writing to convey the views of the Department of Justice on H.R. 424 as reported by the Subcommittee on Crime in anticipation of the consideration of this measure by the full Judiciary Committee.

H.R. 424 is designed to respond to the 1995 decision of the Supreme Court in Bailey v. United States, 116 S. Ct. 501, which narrowly interpreted 18 U.S.C. 924(c), the statute that punishes persons who use or carry a firearm during and in relation to the commission ***14** of a felony crime of violence or drug trafficking offense. Prior to the Court's decision in Bailey, the courts of appeals had generally construed this statute broadly to reach conduct in which, for example, a drug dealer possessed a firearm in connection with his drug activities. In Bailey, however, the Court observed that the statute did not proscribe possession, but rather "use," of a firearm and held accordingly that to violate section 924(c) a person must "actively employ" a firearm.

We believe that, as a matter of policy, the scope generally given to the statute by the courts of appeals before Bailey served better to protect the public safety. Therefore, last Congress and again earlier this year, the Administration proposed a relatively simple amendment to restore the law to its pre-Bailey scope by substituting the word "possesses" for the phrase "uses or carries." See H.R. 810. The Administration bill would also have increased the current mandatory five-year penalty to ten years if the firearm were discharged or were used to cause serious bodily injury (e.g., to pistol whip a victim).

In its current form, H.R. 424 would not restore the statute to its pre-Bailey parameters, and indeed, through its unprecedented requirement that possession of a firearm include the presence of ammunition, it would actually narrow the post-Bailey scope of section 924(c). In addition, the Subcommittee-approved version of H.R. 424 employs a problematic, three-tiered penalty structure that seems both unsound and likely to engender substantial, unnecessary litigation. Consequently, while we appreciate the intent of the Subcommittee to respond to the Bailey decision, we believe the bill is inadequate from the standpoint of protecting public safety and of deterring and punishing violent and drug trafficking crimes involving firearms. We are therefore unable to support H.R. 424 in its present form. A more detailed exposition of our views follows.

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Defining "possess"

Our principal objection to H.R. 424 stems from its proposed narrow definition of the term "possess." The bill provides that "a person is deemed to possess a firearm if the firearm and ammunition for the firearm are proximate and immediately accessible to the person." We believe that defining "possess" is both unnecessary and inappropriate, particularly considering the requirement in section 924(c) that the weapon be possessed "during and in relation to" the underlying crime. See United States v. Smith, 508 U.S. 223, 238 (1993) ("The phrase 'in relation to' thus, at a minimum, clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence."). Moreover, the definition chosen in H.R. 424 is seriously flawed.

No other criminal statute of which we are aware contains a definition of "possess," despite the fact that the term is used in many statutes punishing possession of controlled substances or stolen or counterfeit property, as well as in the statute most closely related here–punishing possession of a firearm by a convicted felon (18 U.S.C. 922(g)). The occurrence of a definition of "possess" in section 924(c) but not in section 922(g) or other statutes concerning possession of drugs would give rise to confusing jury instructions in the ***15** case of a prosecution of an individual under both statutes. Moreover, the term "possess" has long been interpreted by the courts and has given rise to no great difficulty. Therefore, we see no necessity, and much potential for confusion, if in this frequently used statute a definition were to be enacted. We urge its deletion from the bill.

Even if a definition of "possess" were appropriate, the one chosen in H.R. 424 is deeply flawed. The requirement that a firearm be "proximate and immediately accessible" would not, for example, cover the common situation in which a drug dealer keeps a firearm with his drugs or with the proceeds or instrumentalities of his drug business. Such firearms pose a grave danger to undercover law enforcement agents and innocent bystanders, as well as to officers conducting a search. The only time the proposed definition would reach such firearms is when a drug dealer happens to be arrested while immediately adjacent to a firearm. In addition to adequately protecting the public safety, the definition would create an unjust and arbitrary result (dependent on the location of the arrest) not consistent with the purpose of section 924(c), which aims to punish and deter all use of firearms to facilitate drug trafficking and other serious offenses.

At least equally inconsistent with the interest of public safety is the part of the definition of "possess" that would require the presence of ammunition. Such a definition would actually narrow the current scope of section 924(c) as interpreted by Bailey. Moreover, the requirement is fundamentally inconsistent with current law. A "firearm," for purposes of federal prosecution, need not be either loaded or operable. See 18 U.S.C. 921(a)(3); United States v. Gutierrez-Silva, 983 F.2d 123 (8th Cir. 1993); United States v. Yannott, 42 F.3d 999, 1005–7 (6th Cir. 1994), cert. denied, 115 S. Ct. 1172 (1995). This is because the potential for danger arising from an

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unloaded or inoperable weapon is still substantial if either the possessor or others, who may also initiate violence, do not know the weapon cannot fire. In addition, it would be virtually impossible to prove the presence of proximate and immediately accessible ammunition for a firearm observed in a drug dealer's possession during an undercover drug transaction, unless the dealer is arrested during or immediately after the transaction, which might give rise to a needlessly dangerous situation. Adding a requirement to "possession" that ammunition be present is therefore inconsistent, unsound, and unsafe.

The penalty structure

We also have serious concerns about the rather complex three-tiered penalty scheme proposed in H.R. 424. We believe that those who possess firearms during and in relation to felony crimes of violence and drug trafficking crimes must be severely punished, and our proposal would both ensure the appropriate scope of section 924(c) and maintain tough penalties. Under current law, a violation of section 924(c) generally carries a five-year mandatory penalty, although the penalty is increased to 10 years if the firearm is a semiautomatic assault weapon or a gangster-type weapon, such as a sawed-off shotgun. H.R. 424 would double the penalty for possessing a firearm to 10 years; raise it to a mandatory 15 years if ***16** a firearm were brandished; and raise it to a mandatory 20 years if a firearm were discharged. By raising the minimum penalty to 10 years, the proposal eliminates the current distinction between assault weapons and others.

In our view, the existing penalty scheme, which accounts for the different dangers associated with different weapons, is appropriate. Moreover, the novel concept of increasing the penalty for "brandishing" a firearm is problematic. Under the bill, "to brandish" is "to display all or part of the firearm so as to intimidate or threaten, regardless of whether the firearm is visible." Even assuming "display" could be indirect whereas "visible" means "directly visible," a bank robber with a wholly concealed firearm who states, "I have a gun–hand over your money," would presumably be subject to the 10-year penalty, whereas a robber uttering the same words while pointing to a bulge near his shoulder would be subject to the 15-year penalty. We question whether such a dramatic difference in sentence is appropriate for such essentially equivalent offenders. In our view, the separate brandishing category is unsound.

Finally, we recommend that H.R. 424 include, as the Administration's proposal does, a penalty increase for causing serious bodily injury through the use of a firearm. Such an increase is a common and appropriate feature of statues aimed at deterring and punishing violate crimes. We believe it should be incorporated in this bill.

Other issues

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Finally, we note for the Committee's consideration three technical matters. First, 18 U.S.C. 929, a companion statute to 18 U.S.C. 924(c), should be amended in a parallel and conforming fashion to section 924(c). Second, a death penalty for persons who violate section 924(c) and cause death through the use of a firearm has been in place since 1994. See 18 U.S.C. 924(j). Hence, the death penalty language found on page 3, lines 17–18, of H.R. 424 is redundant. Finally, on page 3, line 25, the word "used" should be stricken and replaced with whatever verbs ultimately are adopted for defining the conduct prohibited under section 924(c).

I hope the foregoing is useful to the Committee. Please do not hesitate to communicate with us if the Department may be of further assistance.

Sincerely,

Andrew Fois,
Assistant Attorney General.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

***17** SECTION 924 OF TITLE 18, UNITED STATES CODE

S 924. Penalties

(a) * * *

* * * * * * *

(c)[(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or

firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.] (1) A person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which 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–

(A) possesses a firearm in furtherance of the crime, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 10 years;

(B) brandishes a firearm, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 15 years; or

(C) discharges a firearm, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 20 years;

except that if the firearm is a machinegun or destructive device or is equipped with a firearm silencer or firearm muffler, such additional sentence shall be imprisonment for 30 years.

(2) In the case of the second or subsequent conviction of a person under this subsection–

(A) if the conviction is for possession of a firearm as described in paragraph (1), the person shall, in addition to the sentence ***18** imposed for the crime of violence or drug trafficking crime involved, be sentenced to imprisonment for not less than 20 years;

(B) if the conviction is for brandishing a firearm as described in paragraph (1), the person shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime involved, be sentenced to imprisonment for not less than 25 years; or

(C) if the conviction is for discharging a firearm as described in paragraph (1), the person shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime involved, be sentenced to imprisonment for not less than 30 years;

except that if the firearm is a machinegun or destructive device or is equipped with a firearm silencer or firearm muffler, the person shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime involved, be sentenced to life imprisonment.

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(3) Notwithstanding any other provision of law, the court shall not impose a probationary sentence on any person convicted of a violation of this subsection, nor shall a term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm so as to intimidate or threaten, regardless of whether the firearm is visible.

[(2)] (5) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

[(3)] (6) For purposes of this subsection the term "crime of violence" means an offense that is a felony and–

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

* * * * * * *

***19** DISSENTING VIEWS

We oppose this legislation because of the unduly severe mandatory minimum penalties it includes: 10 years for possession of a gun, 15 years for brandishing a gun and 20 years for discharging a gun, without any evidence that this increase in penalty is necessary or even advisable.

Under the penalty structure imposed by this legislation, if a defendant is convicted of possessing 5 grams of crack and is found to have possessed a gun at the time, he will receive a mandatory 15 year sentence. But if this is not a first drug offense, the defendant will receive a mandatory 25 year sentence.

If the defendant opened his coat to display a gun tucked into his pants during the course of this drug offense, he will receive a mandatory 20 year sentence. But, again, if this is not the defendant's first drug offense, he will receive a mandatory 30 year sentence.

Finally, if the defendant discharged a firearm in the course of the offense–perhaps by simply shooting it into the air–he will receive a mandatory 25 year sentence, 35 years if this is not his first offense.

A comparison between these penalties and the penalties for other violent crimes is instructive. Voluntary manslaughter carries a penalty of five years; aggravated assault, less than two years; assault with intent to murder, less than three and one-half years; criminal sexual abuse, under six years; and kidnapping carries a penalty of approximately four years.

In our view, the fact that a defendant can receive five years for manslaughter, two years for serious assault, three and one-half years for assault with intent to murder, six years for rape and four years for kidnapping, but between 15 and 35 years for possessing a gun in connection with a drug offense where no one is injured defies logic. It is ludicrous for the House to pass a measure requiring some drug offenders to receive a penalty 6 times greater than the penalty for rape and 7 times greater than the penalty for voluntary manslaughter when these defendants haven't caused any bodily injury.

Morevoer, the Department of Justice, which has strongly urged Congress to amend Title 18 section 924(c) of the United States Code ever since the Supreme Court's decision Bailey v. United States,[1] has not requested any change in the penalty structure, and in fact, has sent the Committee a letter declaring the existing penalty structure "appropriate."[2]

The Department of Justice's letter also notes that the penalty structure created by this legislation eliminates the current distinction ***20** between assault weapons and others. This is clearly intentional. Under current law, a violation of section 924(c) generally carries a five year mandatory penalty, although the penalty is increased to ten years if the firearm is a semiautomatic assault weapon or a gangster-type weapon such as a sawed-off shot gun. Ever since the ban on semi-automatic assault weapons was passed into law as part of the 1994 Omnibus Crime Bill,[3] the majority has actively sought ways to diminish the significance and the impact of the ban. The new penalty structure imposed by this legislation is simply another way that the majority is attempting to subvert the assault weapons ban without actually voting to repeal the ban.

Despite these concerns, in a voice vote, the majority opposed an amendment in the nature of a substitute offered by Congressman Scott, and supported by the American Bar Association,[4] which would have left the current penalty structure intact and ordered the United States Sentencing Commission, the body Congress has charged with creating a reasoned and appropriate penalty structure, to study whether the current sentences are adequate and make recommendations to Congress as to whether the penalties need adjustment.

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Because the penalties imposed by this legislation are unduly harsh and because no evidence has been presented suggesting that such harsh penalties are necessary, we dissent from the passage of H.R. 424.

John Conyers, Jr.
Bobby Scott.
Zoe Lofgren.
Maxine Waters.
William D. Delahunt.
Barney Frank.
Melvin L. Watt.
Sheila Jackson Lee.

1 Section 924(c)(3) of title 18, United States Code, defines a "crime of violence" as "an offense that is a felony and–(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

2 Section 924(c)(2) of title 18, United States Code, defines the term "drug trafficking crime" as "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)."

3 See 18 U.S.C. S 921(a)(23).

4 See 18 U.S.C. S 921(a)(4).

5 See 18 U.S.C. S 921(a)(24).

6 Bailey v. United States, 116 S.Ct. 501 (1995).

7 Id. at 506.

8 Id. at 507 (citing Platt v. Union Pacific R. Co., 99 U.S. 48, 58 (1879)).

9 United States v. Bailey, 36 F.3d 106, 115 (D.C. Cir. 1994).

10 Id. at 113; see, e.g., United States v. Crass, 50 F.3d 81 (1st Cir. 1995) (upholding the conviction of defendant who had seventeen bags of cocaine and two pistols on a closet shelf, due to the close proximity of the drugs to the firearms).

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11 United States v. Bailey 36 F.3d at 108–109.

12 Id. at 109.

13 See, e.g., United States v. Wilson, 116 F.3d 1066 (5th Cir. 1997) (conviction under S 924(c) "use" vacated and remanded for retrial on "carry" prong); United States v. Green, 1997 U.S. App. LEXIS 13580 (10th Cir. 1997) (same); United States v. Lin, 101 F.3d 760 (D.C. Cir. 1996) (holding that "under the supervening-decision doctrine * * * Lin's conviction under 18 U.S.C. S 924(c) must be reversed because the trial judge's instruction permitted the jury to return a guilty verdict based on an interpretation of the statute that was subsequently foreclosed by the Supreme Court in Bailey v. United States."); United States v. Turner, 914 F.Supp. 48 (W.D.N.Y.) (post-Bailey, Turner's motion to vacate conviction was granted without opposition from the government).

14 In the Bailey decision itself, the Court of Appeals for the District of Columbia Circuit noted that "Congress expressly retained the 'in relation to' requirement in preference to a more restrictive 'in furtherance of' requirement." (emphasis added). United States v. Bailey, 36 F.3d at 116.

15 Webster's New International Unabridged Dictionary 1022 (2d ed. 1959); Black's Law Dictionary 675 (6th ed. 1990).

16 See Fed. R. Evid. 801 (d)(2)(E).

17 See, e.g., People v. Trilck, 132 N.W.2d 134, 136–137 (1965) (stating that the word furtherance is not an obscure, technical word, but rather a commonplace word understood by an ordinary person as advancement or promotion).

18 United States v. Bailey, 116 S.Ct. at 504.

19 Smith v. United States, 508 U.S. 223 (1993).

20 Id. at 238.

21 Id. (citing United States v. Stewart, 779 F.2d 538, 539 (1995) (Kennedy, J.).

1 116 S. Ct. 501 (1995).

2 Letter from Andrew Fois, Assistant Attorney General for Legislative Affairs, Department of Justice, to Congressman Henry J. Hyde, Chairman, House Judiciary Committee, September 8, 1997.

3 Title XI, Subtitle A, Pub. L. 103–322, Sept. 13, 1994.

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4 Letter from Robert B. Evans, Director of the Government Affairs Office, American Bar Association, to Congressman John Conyers, Jr., Ranking Member, House Judiciary Committee, September 16, 1997.

H.R. REP. 105-344, H.R. Rep. No. 344, 105TH Cong., 1ST Sess. 1997, 1997 WL 668339 (Leg.Hist.)

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