

ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: JOHN ANGUS SMITH, Petitioner v. UNITED STATES

CASE NO: 91-8674

PLACE: Washington, D.C.

DATE: Tuesday, March 23, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN ANGUS SMITH, :
Petitioner :
v. : No. 91-8674
UNITED STATES :
- - - - - X

Washington, D.C.
Tuesday, March 23, 1993

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:09 a.m.

APPEARANCES:

GARY KOLLIN, ESQ., Ft. Lauderdale, Florida; on behalf of
the Petitioner.
THOMAS G. HUNGAR, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of the Respondent.

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1 PROCEEDINGS

2 (11:09 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 91-8674, John Angus Smith v. the United
5 States.

6 Mr. Kollin, you may proceed whenever you're
7 ready.

8 ORAL ARGUMENT OF GARY KOLLIN

9 ON BEHALF OF THE PETITIONER

10 MR. KOLLIN: Mr. Chief Justice, and may it
11 please the Court:

12 John Angus Smith was convicted of a violation of
13 title 18, United States Code, 924(c), when he possessed a
14 firearm and offered it as an item in trade for barter for
15 a small quantity of drugs. As a result of his conviction,
16 he received 30 years minimum sentence, consecutive to the
17 terms he received on his other counts.

18 The issue today is whether the offering of a
19 firearm solely as an item of barter violates 18 United
20 States Code 924(c) for the use of a firearm during and in
21 relation to a Federal drug trafficking crime.

22 At the outset, it is important to realize that
23 this statute provides two different methods by which it
24 could be violated: first, by the use of a firearm during
25 and in relation to the Federal drug trafficking crime; and

1 the second way is by carrying the firearm during and in
2 relation to the Federal drug trafficking crime.

3 John Angus Smith was only charged with the use
4 prong of the statute.

5 We submit that --

6 QUESTION: I guess he could have been charged
7 with carrying it.

8 MR. KOLLIN: That is correct, Justice. However,
9 the Government elected, for whatever reasons they chose,
10 to only charge him with the use prong. In fact, this was
11 the third superseding indictment in regard to this matter,
12 and in each one he was only charged with the use prong.
13 So, they had three times to change that election.

14 QUESTION: If you had been charged with
15 carrying, I don't suppose -- and you had been -- your
16 client had been convicted, I don't suppose you would be
17 here.

18 MR. KOLLIN: That is probably correct, Justice.

19 QUESTION: You wouldn't have much of a case
20 about coverage, would you?

21 MR. KOLLIN: That is probably true, but the
22 Government did choose to and elected to charge him with
23 use, and that is the reason why we're here today and what
24 he is charged with.

25 QUESTION: You wouldn't argue that use or carry

1 means carry for the purpose of using?

2 MR. KOLLIN: Well --

3 QUESTION: Really? I'm surprised.

4 MR. KOLLIN: -- Justice Scalia --

5 QUESTION: Well, that's all right.

6 MR. KOLLIN: -- I'm prepared to argue that, and

7 --

8 QUESTION: Yes, I think you would.

9 MR. KOLLIN: Because what I want to say here is
10 that if we accept the Government's suggestion of the
11 definition of use, this all-encompassing definition, or
12 the lower courts', then the word use would always swallow
13 up and encompass the word carry. There could never be a
14 situation where someone could use a firearm under their
15 definition or under the definition of the majority of the
16 lower courts where one would not be also carrying. I
17 mean, if you would carry it, you always would use it. And
18 the principles -- I cannot think of a situation under
19 their definition where it could not occur.

20 QUESTION: Anything you're carrying, you're
21 using? I don't know.

22 MR. KOLLIN: Under their definition, it's to
23 possess with the intent to facilitate the crime, to
24 possess and the presumption of intention. So, under their
25 definition, any time that one is carrying the firearm, one

1 is always using it in regard to the statute.

2 And the basic axiomatic rules of construction of
3 this Court is that we should never render a term in a
4 statute to be superfluous and that each word should be
5 given effect. And if we don't narrow the definition of
6 the word use to the definition that we have suggested
7 here, that is, to define that use means the actual use in
8 the active connotation -- according to the active
9 connotation of the word use, then the word carry would
10 have no definition.

11 QUESTION: I mean, we really haven't
12 accomplished a whole lot if carry means what you say it
13 means. Really, I mean, it may be important to this case,
14 but use and carry covers everything in the world then.

15 The dispute between you and the Government is
16 that the Government says use carries everything in the
17 world, and you say, no, it's only use or carry that covers
18 everything in the world. So, for later cases, this
19 dispute is really not very important I suppose.

20 QUESTION: With due respect, Justice, I
21 disagree. And the reason I would disagree is because the
22 decisions that are cited by the Government in its brief
23 and some of the decisions that I cite in our brief is that
24 there are situations that -- where somebody has a firearm
25 that is located proximally to where drugs are being held,

1 and those people have been convicted of use, people who
2 have been convicted of use who have firearms that are
3 totally inoperable, that do not have firing pins, do not
4 have ammunition, that are located in remote locations.
5 Those people have also been convicted of use under their
6 definition and the majority of the lower courts'.

7 In fact, in Justice White's -- in Justice
8 Thomas' dissent in *Mewks v. United States*, that was their
9 concern that this definition of the word use is -- becomes
10 an all-encompassing definition and it means possession and
11 presumes the intent to use.

12 So, not only is this important to the case of
13 John Angus Smith, but it is important to countless others
14 who may possess firearms and not have a use.

15 Moreover, with this definition that the
16 Government encourages here, both in the lower courts and
17 from this Court, it also encourages the lower courts to
18 engage in psycho journeys into the defendants' minds to
19 try and determine their intent, and it requires situation-
20 by-situation, case-by-case analyses --

21 QUESTION: What do you say use means in the
22 statute?

23 MR. KOLLIN: It means actual use.

24 QUESTION: Okay, but to say use means actual use
25 doesn't help at all.

1 MR. KOLLIN: Okay. Well, it means to use it, to
2 brandish it, to fire it as an offensive weapon.

3 QUESTION: Well, then you're saying that --
4 you're really putting quite a narrow construction on the
5 phrase. One doesn't ordinarily think of the kind of drug
6 transactions that the statute is -- don't you think of
7 them as being more consensual than involving somebody
8 sticking somebody up and getting drugs from them?

9 MR. KOLLIN: Well, also but it's an offensive
10 weapon to protect themselves or -- as a weapon in the
11 normal connotation of the way the item is used.

12 As an example, Mr. Chief Justice, let's say a
13 carpenter is carrying a hammer on his side, on his belt.
14 And an individual would go up to the carpenter and say may
15 I borrow the hammer. Am I -- are you using it? The
16 carpenter, while he would be carrying the hammer, would
17 say no, I'm not using it now. You may borrow it.

18 Secondly, if the carpenter goes ahead and trades
19 that hammer for a board, similar to John Angus Smith
20 trading the gun for drugs, we would not say the carpenter
21 used the hammer under a normal way of speaking or normal
22 connotation. We would say the carpenter traded the
23 hammer.

24 And so, in regard to this statute, I believe
25 that --

1 QUESTION: You could say the carpenter used the
2 hammer to obtain what he traded it for.

3 MR. KOLLIN: Yes, but I don't think that's the
4 normal connotation of the word use.

5 I think similarly to this situation is the
6 problem this Court faced in Public Citizen v. Department
7 of Justice. In that case, the Court said that the word
8 utilized -- it's a very similar word I think to the word
9 uses -- is a wooly verb, its contours left undefined by
10 the statute itself, and went through its analysis.

11 And I think similarly the word use here has a
12 certain manner of uncertainty to it, and when it has this
13 manner of uncertainty and ambiguity to it, then we must
14 resort -- well, then we have the -- we look to the
15 legislative history and also we can look to the rule of
16 lenity. And in looking to the legislative history in
17 regard to this statute, I think that the legislative
18 history supports the position of the petitioner in regard
19 to this matter.

20 The original statute -- well, the -- as this
21 Court has noted in the cases of Simpson and Basic, the
22 legislative history in regard to the statute was rather
23 sparse. And in this particular case, as presented in our
24 brief, the original bill in regard to adding this -- these
25 provisions of 924(c) was added on the floor by

1 Representative Casey, and in his words, he said that
2 without the words -- word carry in it, that it would apply
3 to the actual use of the firearm.

4 And then Representative Poff later proposed an
5 amendment, also on the floor -- and I noted in both
6 situations there was a quorum present -- that
7 Representative Poff said that his amendment to the Casey
8 proposal was not in derogation of that.

9 And so, therefore, in conjunction with the fact
10 that the Senate proposal of Senator Dominick was not
11 accepted, which was instead of using -- instead of having
12 the words use or carry, they had the word armed, that we
13 must distinguish between use or carry, and in that
14 situation looking at this legislative history, we see that
15 the meaning of the word would not encompass the word --
16 would go to its actual use in its normal capacity.

17 In our brief, we also present what I presented
18 as the pawn ticket hypothetical -- and that's at page 15
19 -- in which we have an individual who takes a gun and
20 several weeks before he decides to engage in any type of
21 drug activity, takes the gun and pawns it at a pawn shop.
22 Later on, he decides to become involved in -- excuse me --
23 a drug trafficking event, and then trades the pawn ticket
24 for the drugs.

25 The Government acknowledges at footnote 20 that

1 perhaps this does not fall within the normal understanding
2 of the word use, and I could submit to you that there
3 could be countless other situations like that, for
4 instance, a bill of lading for gun parts that could be
5 assembled into guns that could be traded, or for instance,
6 other situations where an individual brings -- is bringing
7 home a quantity of drugs in a large box, and for some
8 reason, the door keeps swinging shut, and there is a gun
9 lying there that had no part in the transaction. There
10 was no intent of being used in regard to the case, and
11 takes that gun and places it as a door stop. And
12 technically under the wording of this statute, that is
13 being used during and in relation to the Federal drug
14 trafficking crime.

15 So, the statute itself presents an ambiguity and
16 uncertainty as to the meaning of the word use. And
17 accordingly, we have the right to look at the legislative
18 history, which I presented, and also to the rule of
19 lenity.

20 QUESTION: Section 924(g) prohibits the transfer
21 of a firearm that's going to be used in drug transfer --
22 in drug trafficking. I take it that under your view if
23 someone transfers a firearm to a person, knowing that the
24 transferee is going to use it to trade drugs -- to trade
25 for drugs, there's no liability under (g).

1 MR. KOLLIN: To be quite truthful, Justice, I
2 have not explored the -- those aspects of section (g).

3 QUESTION: Well, your word -- definition of the
4 word use is such that it has to be somehow used in order
5 to protect the person and not for a trade. So, I take it
6 under your interpretation, the word use has to be given
7 the same definition so that if people trade firearms,
8 knowing that the firearms will be used by the transferees
9 to be traded for drugs, there's no violation of under (g).
10 It has to be.

11 MR. KOLLIN: I don't know the exact wording of
12 section (g) --

13 QUESTION: It says whoever knowingly transfers a
14 firearm, knowing that such firearm will be used to commit
15 a crime of drug trafficking.

16 MR. KOLLIN: Well, I think that the issue there
17 is transfer, and the later aspect is used --

18 QUESTION: No. Let's assume that the transfer
19 element of my hypothetical is satisfied. Under your
20 definition, there is no use of the firearm even though he
21 is -- the transferor knows that it's going to be used to
22 trade for drugs. It's not being used under your theory.

23 MR. KOLLIN: That is correct, but it could be
24 the person could possibly charge with carrying the firearm
25 under the other prong of the statute.

1 QUESTION: Well, doesn't the word carrying carry
2 -- strike that.

3 (Laughter.)

4 QUESTION: Doesn't the word carrying suggest
5 even more strongly than the word use in this context an
6 offensive or protective purpose? I mean, carrying is not
7 a broader term than use, which is what your answer to
8 Justice Kennedy seemed to assume.

9 MR. KOLLIN: Well, I think that one of the
10 courts have held that carrying is a very narrow -- the
11 lower courts have held that carry is a very narrow
12 definition and use has a very -- has lost its active
13 connotation. But I think carry means to possess in
14 transit or possess and transport.

15 QUESTION: But doesn't it also, for purposes of
16 this statute in your judgment at least, require a -- an
17 offensive or protective purpose when it is carried --

18 MR. KOLLIN: Not under the definition that I've
19 suggested.

20 QUESTION: Well, how about the definition that
21 you would like us to assume in deciding this case? Do you
22 think carrying has no protective or offensive purpose?

23 MR. KOLLIN: I think generally yes, Justice. I
24 think generally carry does have that offensive type
25 purpose.

1 QUESTION: Should we construe the statute to
2 import that requirement of an offensive or protective
3 purpose when we use -- when the statute uses the word
4 carry?

5 MR. KOLLIN: I don't think that is necessary in
6 regard to reaching the decision in regards -- in this
7 case.

8 QUESTION: Well, if we don't do that, didn't
9 your client carry the weapon in relation to the barter
10 that he later engaged in? If we don't adopt that
11 particular construction in this case, don't you lose under
12 the word carry?

13 MR. KOLLIN: No, Justice, because --

14 QUESTION: Oh, he was discharged. I see.

15 MR. KOLLIN: He was discharged under the use
16 prong.

17 QUESTION: But you would lose if he had been
18 charged with carry if you adopt the broad definition that
19 you're considering.

20 MR. KOLLIN: I think that was the same question
21 Justice White asked earlier which I agreed with, but for
22 whatever reasons, in three superseding indictments the
23 Government chose to only charge John Angus Smith with the
24 use of the firearm during and in relation to the Federal
25 drug trafficking crime.

1 QUESTION: Mr. Kollin, surely a court that's
2 going to use language reasonably enough so that it
3 interprets using a gun to mean what you say it means,
4 using it in a crime, would also not be so unreasonable as
5 to interpret the phrase carry a gun to mean a longshoreman
6 who's -- who has on his shoulder a crate full of weapons
7 that he's taking off the ship. I mean, if we're
8 reasonable for the one, don't you think we should be
9 reasonable for the other too?

10 MR. KOLLIN: I agree, Justice, that that
11 requires that reasonableness. In fact, that was suggested
12 in the footnote in the 1984 passage of the bill in which
13 they talked about a firearm merely carried during a
14 pugilistic barroom fight.

15 QUESTION: You can say in some sense, of course,
16 that the longshoreman carrying this crate is carrying a
17 gun, but that's not what you mean when you say are you
18 carrying a gun. Or when the policeman in -- you know,
19 arrests the person and searches and says are you carrying,
20 I mean, he's not saying are you lifting. He's talking
21 about whether you have a gun on your person with the
22 intent of using it.

23 QUESTION: Of course, I suppose the longshoreman
24 also has to be also be carrying some drugs, or the statute
25 doesn't apply.

1 (Laughter.)

2 MR. KOLLIN: That's true, Justice.

3 QUESTION: I was just curious about your
4 legislative history point. The ambiguity in using is does
5 the use by means for barter purposes constitute use, and
6 the -- you turn us to the legislative history, and
7 Congressman Casey said I mean actually use a gun. Well,
8 actually use really isn't any different from use. I'm not
9 sure why that clears up the ambiguity that gets you to
10 look at that.

11 MR. KOLLIN: Well, if there is an ambiguity --

12 QUESTION: Yes, and then I look at it and I see
13 actually used. That's got the same ambiguity. I'm
14 actually using it when I hand it to you in exchange for
15 some prohibited substances, am I not?

16 MR. KOLLIN: Well, that goes to my -- to the
17 next point is the rule of lenity.

18 QUESTION: Well, I know, but that -- I'm just
19 confining on the legislative -- my question really is I
20 don't see why your legislative history argument advances
21 us at all. It seems to me it just gets us to where we
22 started, namely, what do you mean by use.

23 MR. KOLLIN: Well, I think it goes to -- well, I
24 -- perhaps my interpretation of actual use means use an
25 offensive weapon.

1 QUESTION: Yes, I know, but the Congressman
2 didn't say that. He didn't say anything about offensive
3 weapons or protective purpose. He just says actual use,
4 and it seems to me if a barter is a use, it's also an
5 actual use. I mean, you know, I'm just saying I'm not
6 sure your argument gets us anywhere.

7 QUESTION: Well, if your argument is it's
8 ambiguous -- if use is ambiguous, the two words actual use
9 is even more ambiguous.

10 (Laughter.)

11 QUESTION: Don't you think?

12 MR. KOLLIN: I agree that that is an argument to
13 be made in regards --

14 QUESTION: Mr. Kollin, doesn't the language in
15 the statute, use in relation to a drug trafficking crime,
16 clarify it? It's use in relation to the drug crime.

17 MR. KOLLIN: Well, I think that was --

18 QUESTION: It's not just use per se. It's in
19 relation to the crime, and I suppose bartering it for
20 drugs could be said to be in relation to the drug crime.

21 MR. KOLLIN: That was the argument that was made
22 in the Phelps case that was -- the decision the Ninth
23 Circuit turned on, which -- but they said that a firearm
24 that is traded in barter is not used in relation to the
25 Federal drug trafficking crime, and that's the decision

1 they ruled upon. We are not abandoning that position, but
2 we feel that with regard to the definition of the word
3 use, it presents the ambiguity.

4 Moreover, if we turn to the next point, which is
5 the rule of lenity, then we have -- where's there's
6 ambiguity exists, then you -- the decisions are that we
7 adopt a construction most favorable to the accused. And
8 if we adopt that construction most favorable to the
9 accused, then in this situation the -- we would find that
10 there is no violation on the part of John Angus Smith for
11 bartering the firearm for the drugs.

12 QUESTION: Well, in our Moskal opinion, Mr.
13 Kollin, we said that a statute isn't ambiguous for
14 purposes of the rule of lenity just because it's possible
15 to articulate a more narrow construction.

16 MR. KOLLIN: I understand that, but I think that
17 in this particular case it is ambiguous, and I think that
18 --

19 QUESTION: But aren't you saying it's ambiguous
20 simply because it's possible to articulate a more narrow
21 construction?

22 MR. KOLLIN: No. I'm saying it's ambiguous
23 because without narrowing the construction, we nullify the
24 word carry, and that the decisions of this Court have held
25 that we should never make a word superfluous in a statute,

1 and we should give each word effect.

2 There is a minority opinion in regard to the
3 Moskal situation. Judge Scalia's position is once there
4 is an ambiguity, you don't --

5 QUESTION: Yes. That didn't prevail.

6 MR. KOLLIN: I understand that.

7 (Laughter.)

8 QUESTION: You could just -- you can say that --
9 you can accept the fact that carrying doesn't mean use,
10 but that doesn't mean that bartering it for drugs is not
11 using it.

12 MR. KOLLIN: Well, it's our position --

13 QUESTION: You're doing more than carrying a gun
14 if you take it out of your pocket and trade it off for
15 some drugs.

16 MR. KOLLIN: Well, in the situation of our
17 hypothetical, Justice White, in which somebody trades the
18 pawn ticket --

19 QUESTION: Would they -- would the Government
20 really have been describing what happened if it said this
21 fellow was carrying a gun in connection with a drug thing?
22 What happened was that he was -- he bartered, he traded
23 the gun off.

24 MR. KOLLIN: Yes.

25 QUESTION: Well, that's more than carrying it,

1 isn't it?

2 MR. KOLLIN: But -- well --

3 QUESTION: That's actually using it.

4 (Laughter.)

5 MR. KOLLIN: Well, I think it's different than
6 -- I think that's different than carrying. I don't think
7 it's actual use because I think we think of the word use
8 in the normal connotation of that item's utilization.

9 QUESTION: Well, it's different from shooting
10 somebody. That's right. But he has certainly got his
11 money's worth out of that gun.

12 (Laughter.)

13 MR. KOLLIN: Well, never ever traded it. So, he
14 didn't get to the situation.

15 Not only does this definition establish the
16 ruling for John Angus Smith, but it established a bright
17 line for the lower courts because as we -- as I talked
18 about, that the lower courts have been going through this
19 case-by-case, situation-by-situation analysis to try and
20 determine the intent of the person who possesses that
21 firearm, has gone to situations with -- endeavoring to
22 presume an intent in the person's mind in regard to that
23 possession. And it avoids that case-by-case situation
24 analysis, and it reduces the burdens to the lower court by
25 not having to go through those things, but determines a

1 bright line which somebody either uses it or not uses it
2 and what carry means under these situations.

3 I also submit that it's consistent with the
4 congressional history with regard to this matter.

5 QUESTION: I'm not sure you're -- let me just
6 challenge you on your bright line argument. It seems to
7 me one -- if we hold that bartering a gun for a -- drugs
8 is use, that's -- there's nothing fuzzy about that
9 holding. There may be some fuzziness out in other cases
10 about intent, but there's no doubt about intent in the
11 facts of this case if barter constitutes use.

12 MR. KOLLIN: If barter constitutes use --

13 QUESTION: That's a very clear -- that's at
14 least one area of -- that the statute covers that
15 everybody would understand. You can't trade a gun for
16 drugs --

17 MR. KOLLIN: That's correct.

18 QUESTION: -- without getting an enhanced
19 penalty.

20 MR. KOLLIN: But it still -- as you said,
21 Justice Stevens, it still creates a fuzziness that was
22 mentioned in the dissent -- the denial of certiorari in
23 Mewks and the volume of cases that keep on reaching this
24 Court about -- in petitions for certiorari in regard to
25 what use is and whether --

1 QUESTION: You think we can fashion a definition
2 of use that won't have any borderline gray areas that will
3 produce litigation?

4 MR. KOLLIN: I don't think that's true with
5 regard to anything in the law.

6 QUESTION: You would suggest that the fuzziness
7 would be in the reasoning, not in the holding I take it.

8 MR. KOLLIN: I'm sorry. I didn't hear.

9 QUESTION: I shouldn't have said that. I said
10 you would suggest that the fuzziness would have been in
11 the reasoning, not in the holding. That's the one bright
12 line rule.

13 Strike the question.

14 (Laughter.)

15 MR. KOLLIN: Well, I think that the holding
16 would establish the bright line, and I think -- I do
17 submit that I think that the congressional history is
18 consistent with the point that we make that actual use
19 refers to something more than just bartering or trading.
20 In the instant case, John Angus Smith did not actually use
21 a firearm in the context intended by Congress as an
22 offensive weapon. This Court should determine that his
23 conduct of trying to trade the firearm for drugs did not
24 violate the use prong of the statute because he did not
25 actually use the firearm in its normal capacity as an

1 offensive weapon.

2 I'd like to reserve the remainder --

3 QUESTION: Mr. Kollin, could I ask you just one
4 question? Let's assume that your client was successful
5 and was not arrested, and a friend approached him the next
6 day and asked him what happened to his Mack 10. Could he
7 reasonably respond I used it to obtain cocaine?

8 MR. KOLLIN: Not in the context that the statute
9 prescribes. I think that --

10 QUESTION: But could he respond to his friend I
11 used it to obtain cocaine, and would that be a reasonably
12 understandable response?

13 MR. KOLLIN: I do not believe that's how someone
14 would normally say it. I think they would say I traded
15 the firearm for the drugs.

16 QUESTION: If he did say that, might not
17 somebody -- if he did say that to you, wouldn't you think
18 that what he meant was he stuck it in somebody's face in
19 order to compel the person to give him the cocaine? He
20 said I used the gun to get some cocaine.

21 MR. KOLLIN: I think that would be a very
22 reasonable interpretation.

23 QUESTION: Thank you, Mr. Kollin.

24 QUESTION: With your carpenter, if he traded his
25 hammer for the board, and he was asked what happened to

1 his hammer, and he reasonably -- he said I used it to
2 obtain this board, would one reasonably think that he used
3 it to hammer someone's head to obtain the board?

4 (Laughter.)

5 MR. KOLLIN: No. I think he -- somebody could
6 reasonably interpret that he pulled the board off a wall
7 by pulling out the nails.

8 QUESTION: I pass on this round, Mr. --

9 (Laughter.)

10 QUESTION: Mr. Hungar, we'll hear from you.

11 ORAL ARGUMENT OF THOMAS G. HUNGAR

12 ON BEHALF OF THE RESPONDENT

13 MR. HUNGAR: Thank you, Mr. Chief Justice, and
14 may it please the Court:

15 On its face, the language of section 924(c)
16 encompasses the use of a firearm as a medium of exchange
17 to buy illegal drugs. If I purchase illegal drugs with a
18 \$100 bill, I have used that \$100 bill to buy drugs. By
19 the same token, if I --

20 QUESTION: Yes, but there is this difference.
21 The purpose of manufacturing and printing \$100 bills is to
22 use them as a medium of exchange. The purpose of
23 manufacturing and selling guns is not to use them as a
24 medium of exchange. Couldn't one define use to be use for
25 the purpose that the item was created for?

1 MR. HUNGAR: No, Your Honor. The word use does
2 not imply use for a -- for the particular purpose the item
3 was created for. It implies any use.

4 QUESTION: Well, that's the question in the
5 case, of course.

6 MR. HUNGAR: Well, the definition of the word
7 use encompasses all uses. If I use a gun to pound a nail
8 into the wall, that's not the purpose for which guns are
9 designed, but I would say in common parlance I used the
10 gun to pound the nail into the wall.

11 QUESTION: But, Mr. Hungar, maybe our problem is
12 that we're focusing on the word use, and words are not
13 used one at a time. They're used in phrases. Hence,
14 there -- you know, there is a maxim of construction,
15 notiatum ex sociates. You know the word from the company
16 of words in which it's used. And here we say it says use
17 a gun.

18 If you had to answer a questionnaire as to
19 whether you used drugs and you were a pharmacist -- that
20 was your profession -- would you have to answer yes? Of
21 course, you wouldn't, would you?

22 MR. HUNGAR: Well, it would depend on the
23 purpose of the questionnaire.

24 QUESTION: Well, because the phrase use drugs
25 means something even though the word use by itself can

1 mean a lot of things. And when you say use a gun, did he
2 use a gun, I don't think it means did he use it to scratch
3 his head.

4 (Laughter.)

5 QUESTION: Or did he use it to pry the door
6 open? It means he used a gun as a gun. Gee, I --

7 MR. HUNGAR: With respect, Your Honor --

8 QUESTION: At least if you're working with the
9 doctrine of the rule of lenity, it seems to me you have to
10 take that into consideration.

11 MR. HUNGAR: To the contrary, Your Honor. The
12 rule of lenity is particularly inappropriate I think to
13 apply in this case because the conduct at issue here falls
14 within the literal definition of the words use, within the
15 literal meaning of the words use. This isn't a case in
16 which we're arguing for something other than the actual
17 definition of the words use. Petitioner had fair notice
18 that if he used a gun in relation to a crime, he was
19 running risks of being incarcerated for a very long time,
20 and that's exactly what he did. This isn't the case for
21 the rule of lenity at all.

22 The definition of the word use is very broad.
23 It means to employ, to carry out a purpose or action by
24 means of, to make instrumental to an end. Congress chose
25 not to use specific narrow words like fire, shoot, or

1 brandish in order to limit the types of uses that would be
2 covered by the statute. Instead, Congress used sweeping
3 language which suggests that it didn't intend the courts
4 to draw fine distinctions among the various ways in which
5 criminals can employ firearms in furtherance of their
6 criminal conduct.

7 QUESTION: Why didn't the Government avoid all
8 this ambiguity and cause this split in the circuits? Why
9 didn't you just indict him for carrying the gun in
10 connection with a drug crime?

11 MR. HUNGAR: I don't know why he wasn't indicted
12 for carrying in this case, Your Honor, but I would point
13 out that that would not have alleviated the split in the
14 circuits because what the Ninth Circuit held in the Phelps
15 case is that -- they conceded in the Phelps case that the
16 defendant there had used the gun by trying to trade it for
17 drugs, but what they said was that that use was not in
18 relation to the drug trafficking crime. So, they went off
19 on the in relation to prong which, of course, applies to
20 the carrying of the firearm.

21 QUESTION: Well, but you wouldn't have had much
22 problem indicting -- convicting this person for carrying,
23 would you?

24 MR. HUNGAR: Well, again, Your Honor, in the
25 Ninth Circuit --

1 QUESTION: Well, would or not?

2 MR. HUNGAR: -- we would. In the Ninth Circuit,
3 under the rule of the Phelps case we could not convict him
4 for carrying in relation to an offense because what the
5 Ninth Circuit in Phelps said was that trading of a firearm
6 --

7 QUESTION: Well, I know, but --

8 MR. HUNGAR: -- for drugs is not in relation to.

9 QUESTION: I know, but it didn't help you any to
10 use "use" either, did it?

11 MR. HUNGAR: Well, it did until the Court
12 granted cert, Your Honor.

13 (Laughter.)

14 QUESTION: Yes, but it shouldn't have. But if
15 you won in the Eleventh Circuit on the "use" theory, you
16 certainly could have won it on the "carrying" theory.

17 MR. HUNGAR: Yes, Your Honor.

18 QUESTION: And we wouldn't -- you wouldn't be
19 here.

20 MR. HUNGAR: Well, I think we might well be here
21 because petitioner could have argued that by holding that
22 the carrying of a firearm for the purpose of trading it
23 for drugs is in relation to a drug offense, that would
24 have created a direct, square conflict with what the
25 Phelps case said in the Ninth Circuit, which is that the

1 trading of a gun for drugs is not in relation to a drug
2 offense. We think that --

3 QUESTION: But the issue would certainly be
4 different here.

5 MR. HUNGAR: It would be different, yes, Your
6 Honor.

7 QUESTION: Yes.

8 QUESTION: Mr. Hungar, in subsection (d), the
9 statute refers to any firearm or ammunition involved in or
10 used in any knowing violation. Under your definition in
11 your interpretation of the statute, is there a difference
12 in involved in and use?

13 MR. HUNGAR: I'm not sure, Your Honor. If that
14 statute doesn't have an in relation to requirement, there
15 might be -- involved in might be broader than in relation
16 to, although I wouldn't think it would be.

17 QUESTION: I cannot offhand think of a
18 difference of involved and use under your interpretation,
19 and it seems to me that under your interpretation, at
20 least it renders involved in in (d) superfluous.

21 MR. HUNGAR: Well, use implies some active -- I
22 mean, some active use, not to be redundant, but something
23 could be involved in an offense without having been used
24 by the particular defendant. Use implies, on the part of
25 the defendant charged, some ability to guide the destiny

1 of the gun, if you will, to control the gun, at least in
2 the sense of constructive possession as Justice Thomas'
3 opinion for the D.C. circuit in the Long case said.

4 "Involved in" would not necessarily imply that.

5 In any event, it may be that in that statute
6 Congress was simply -- again, similarly to what it was
7 trying to do here, was using multiple words to ensure that
8 the statute would given its full scope and construed
9 broadly in order to get at the full range of conduct that
10 Congress wanted to proscribe.

11 Petitioner argues that our interpretation of the
12 word "uses" renders the word "carries" superfluous. We
13 disagree with that. There are certainly cases in which a
14 defendant could carry a gun without using it in relation
15 to the crime. For example, a member of a bank robbery
16 conspiracy who goes to the store and buys a gun and brings
17 it back and then turns it over to the member of the
18 conspiracy who's actually going to rob the bank. That
19 individual has not used the gun in any way, but he has
20 certainly carried it during and in relation to the bank
21 robbery conspiracy.

22 QUESTION: Well, why hasn't he used it to
23 facilitate the bank robbery?

24 MR. HUNGAR: Because he hasn't used it in any
25 way.

1 QUESTION: Sure, he has. He handed it over to
2 somebody and said, here, you can use this in the robbery.
3 He's using it to perform his act of facilitation.

4 MR. HUNGAR: Well, I don't think that we would
5 say that the mere carrying of a gun without more is the
6 use of a gun. The use implies --

7 QUESTION: Because it would just be absurdly
8 broad, wouldn't it?

9 MR. HUNGAR: Because I don't think that's how we
10 would use the word use in common parlance. If you were
11 using --

12 QUESTION: If you want to start referring to
13 common parlance, it seems to me you're getting into --
14 onto pretty thin ice because a minute ago you were saying,
15 no, look, we're going to use use in the literal dictionary
16 definition. That's not common parlance.

17 MR. HUNGAR: Well, I think when we speak of
18 common parlance, we speak of the way words are ordinarily
19 used which is I think the way the dictionary defines them.

20 QUESTION: And doesn't the dictionary frequently
21 contain definitions which are at least possible uses of
22 the word, but which do not reflect common, everyday usage?

23 MR. HUNGAR: Yes, but the dictionary definition
24 of the word use and the common parlance use of the word
25 use means to employ something, to carry out some purpose.

1 It doesn't mean to employ something only in a manner for
2 which it is designed.

3 QUESTION: Yes, but as Justice Scalia suggested
4 to you, when you say use a gun, in common parlance it
5 doesn't mean trading a gun, does it?

6 MR. HUNGAR: Not necessarily, Your Honor, but it
7 can mean that. It depends on the circumstances.

8 QUESTION: Not necessarily or even commonly.

9 MR. HUNGAR: Again, if I -- if a burglar uses a
10 gun to break open a window in order to gain access to a
11 house, or if he uses the butt of his shotgun to smash open
12 a closet door in order to ransack its contents, he is --

13 QUESTION: But that isn't what -- you say using
14 a gun in common parlance means opening a door with it.

15 MR. HUNGAR: It can. I can certainly say I --
16 if I were the burglar who smashed open the closet door
17 with the gun and someone asked me how I smashed open the
18 closet door, I would say I used my gun. That's common
19 parlance. That's the way the word is ordinarily used in
20 that context, and there's nothing to suggest that Congress
21 intended a narrower definition. The literal --

22 QUESTION: So that in this case, if you used the
23 gun at home in order to grind the powder, you used the
24 butt of the gun, and then left the gun at home, that would
25 be the use of a gun in connection with a drug transaction?

1 MR. HUNGAR: Well, it depends on the crime being
2 charged.

3 QUESTION: This charge -- this statute.

4 MR. HUNGAR: The -- it depends on the predicate
5 offense that's being charged, whether it's a use in
6 relation to the predicate offense. Certainly there's no
7 question --

8 QUESTION: Under your interpretation of the
9 statute and under my hypothetical, would there be a
10 violation under this statute?

11 MR. HUNGAR: Well --

12 QUESTION: Would he be using the gun in a drug
13 -- for drug trafficking?

14 MR. HUNGAR: Well, there has to be a use in
15 relation to a specific drug trafficking crime. Certainly
16 the defendant has used the gun --

17 QUESTION: Well, at 10 o'clock in the morning,
18 he grinds the cocaine powder using the butt of the gun,
19 and at 11 o'clock in the morning, he takes the powder
20 that's so created and goes out and sells it. A violation
21 of this statute?

22 MR. HUNGAR: Well, again, Your Honor, it might
23 not be a violation of the statute depending on how you
24 construe the limitation of during.

25 QUESTION: Well, how --

1 MR. HUNGAR: It has to be during the commission
2 of the crime, and it depends on what the crime charged is.
3 If the crime is distribution of cocaine, which occurs at
4 11 o'clock, I don't think he has violated the statute.
5 But even if he has -- if the charge is possession of
6 cocaine with intent to distribute it, the presence of the
7 gun at the scene of the cocaine would permit a jury to
8 infer that he is, indeed, using it in relation to the
9 crime and is, therefore, guilty of the crime. But it
10 depends on the predicate drug crime being charged.

11 QUESTION: What if the barter arrangement was I
12 will mail you the gun in exchange for the drugs? Has he
13 used the gun within the meaning of the statute here?

14 MR. HUNGAR: Well, that's a more difficult
15 question, Your Honor, because many courts of appeals have
16 construed the use in relation to requirement to require
17 some proximity, some availability of the gun, and it's
18 unclear how that requirement would apply in this context,
19 but --

20 QUESTION: Well, what's your position on --

21 MR. HUNGAR: I think that you could certainly
22 have --

23 QUESTION: -- the meaning of the word in
24 relation to, and -- the words, rather?

25 MR. HUNGAR: I think that that would be a use in

1 relation to the crime, Your Honor.

2 And again, there's nothing surprising or absurd
3 about that result. Congress was concerned about the
4 involvement of firearms in criminal activity. And in
5 particular, when it amended the statute in 1986 to extend
6 the statute to drug trafficking crimes, the legislative
7 history indicates that Congress did so because of the
8 increasing proliferation of machine guns and other
9 dangerous weapons among drug trafficking criminals and
10 other criminals and the dangers that posed to law
11 enforcement officials and other members of society. And
12 it's entirely in keeping with that purpose to construe the
13 statute as we would.

14 QUESTION: I suppose if there was a drug dealer
15 who wasn't so much interested in money as collecting guns
16 to defend himself and his colleagues, he let it be known
17 that I am trading cocaine for guns. That certainly would
18 be using a gun?

19 MR. HUNGAR: If he were trading cocaine for
20 guns?

21 QUESTION: Yes.

22 MR. HUNGAR: And he were intending to -- he were
23 letting it be known to people --

24 QUESTION: Could you indict him who is -- who --
25 the cocaine dealer. Could you indict him under this

1 statute?

2 MR. HUNGAR: It depends. It's a more difficult
3 question because we might not -- depending on the
4 circumstances of the case, we might not say that the drug
5 seller --

6 QUESTION: He wants the gun and the gun -- and
7 he never would have entered into this drug transaction
8 unless he got the gun.

9 MR. HUNGAR: In that case, it probably would be
10 a violation of the statute. If the drug dealer had no
11 actual interest in obtaining the gun and the person with
12 the gun who was trying to buy the drugs volunteered this,
13 the drug dealer might not be using the gun in any sense of
14 the word, and therefore, the drug dealer might not be
15 himself liable, although he would probably be liable as an
16 aider and abetter even under that statute.

17 But again, that's not this case because in this
18 case it's perfectly clear that, as you said, the defendant
19 was actually using the gun in order to get drugs and,
20 therefore, was actually violating the statute.

21 QUESTION: Your answer to Justice O'Connor
22 suggests, I believe, that you would answer their
23 hypothetical about the pawn ticket by saying that's use of
24 a gun too.

25 MR. HUNGAR: I think that's right, Your Honor.

1 The pawn ticket is a particularly difficult one because a
2 pawn ticket, at least normally, does not in itself entail
3 the right to obtain a gun. So, you have to go pay money
4 for it. In a sense it's sort of like saying if you give
5 me the drugs, you can go to the store and buy a gun, and
6 I'm not sure that's that the use of a gun.

7 QUESTION: Maybe change the example to one
8 where he gave him a bill of sale to the gun.

9 MR. HUNGAR: Yes.

10 QUESTION: That would clearly be --

11 MR. HUNGAR: I think that would be. Again,
12 that's further from -- that's quite a distance from this
13 case because there's no question about constructive or
14 actual possession, as some of the courts of appeals have
15 acquired. The gun here was actually in the possession.

16 QUESTION: But it really would be use in the
17 same sense, consideration in an exchange for guns --

18 MR. HUNGAR: I think that's right, Your Honor.

19 QUESTION: -- for drugs.

20 MR. HUNGAR: And again, there's nothing absurd

21 --

22 QUESTION: That's not absurd. I'm not
23 suggesting that it's absurd, but that is the scope of your
24 position.

25 MR. HUNGAR: That's correct.

1 QUESTION: Yes.

2 MR. HUNGAR: Given the literal language that
3 Congress has used, we think that the statute should be
4 construed in accordance with that literal language, as the
5 original sponsor of the statute indicated, Congressman
6 Poff. The purpose of the statute was broader than what
7 petitioner has suggested. The purpose of the statute was
8 to persuade the man who was tempted to commit a Federal
9 felony to leave his gun at home. Congress didn't want
10 guns involved in the commission of felonies.

11 QUESTION: You see, the point of my hypothetical
12 was he could do that and leave his gun at home.

13 MR. HUNGAR: That's true, Your Honor, and again,
14 that might be a reason for a court concluding -- we don't
15 think it would be, but it might be a reason for a court
16 concluding in that hypothetical that it's absurd to
17 construe the statute that way. But this case doesn't
18 present that question. This case falls squarely at the
19 core of Congress' concern in adopting the statute.

20 Petitioner appears to concede that the use of a
21 firearm -- that the involvement of the firearm in this
22 case was in relation to the predicate drug offense, and we
23 agree that under any reasonable construction of the in
24 relation to requirement, it has been satisfied in this
25 case, despite the fact, as I said, that the Phelps court

1 in the Ninth Circuit reached the opposite conclusion.

2 QUESTION: So, did you think we're -- be
3 authorized in this case to say that it is in relation to?
4 That isn't the issue we took it on, is it?

5 MR. HUNGAR: Well, I believe the Court granted
6 certiorari to decide whether this constitutes a use in
7 relation to a drug trafficking crime, and we submit that
8 it is. But in order to uphold the conviction, the use has
9 -- in order for the conviction to be valid, the use has to
10 have been in relation to --

11 QUESTION: Well, the question presented is
12 whether the act of offering a firearm solely as an item of
13 barter in trade for drugs violates 1924(c) for use of a
14 firearm during and in relation to a drug trafficking
15 felony. So, you can say that certainly that question is
16 subsumed.

17 QUESTION: But you would like us to -- if you
18 win the case, you would like us also to overrule the Ninth
19 Circuit.

20 MR. HUNGAR: That would be nice, Your Honor, but
21 -- and I think, as the Chief Justice pointed out, in order
22 to answer the question presented as we would, necessarily
23 the Phelps decision has to be overruled.

24 In urging a narrower interpretation of section
25 924(c), petitioner in effect is asking this Court to

1 rewrite the plain language of the statute to construe the
2 term uses a firearm as if it read uses a firearm as a
3 weapon. In our view, the statutory text forecloses that
4 approach.

5 Congress specified the limitations it wanted to
6 impose on the scope of the statute. The use or carrying
7 of a firearm must be during the commission of the
8 predicate offense, and it must be in relation to the
9 predicate offense. Those two limitations do not include
10 the ones sought by petitioner. So, the obvious inference
11 is that Congress did not intend to adopt petitioner's
12 version of the statute.

13 As I was discussing earlier, petitioner argues
14 that our interpretation of the statute would render the
15 word carries as superfluous, but in fact, that's not
16 correct. If anything, it's petitioner's interpretation of
17 the statute that would render a word superfluous because
18 if petitioner is correct that the statute applies only to
19 actual physical uses of firearms as an offensive weapon,
20 it's difficult to see how one can actually use a firearm
21 as an offensive weapon without also carrying it. And so,
22 it's petitioner's interpretation of the statute that runs
23 afoul of the rule that statutes should not be construed in
24 order to render words superfluous.

25 If there are no further questions, I thank the

1 Court.

2 QUESTION: Thank you, Mr. Hungar.

3 Mr. Kollin, you have 2 minutes remaining.

4 REBUTTAL ARGUMENT OF GARY KOLLIN

5 ON BEHALF OF THE PETITIONER

6 MR. KOLLIN: As express words are placed in
7 statutes and have to be read in their context, like use or
8 carry, involved in, or used in, and not to make other
9 words superfluous, in these cases with use or carry or
10 involved in or used in, they are not mere iterations of
11 spanning out of different methods of commission of the
12 crimes, and we look at them in the normal parlance.

13 The bank robbery conspiracy. Yes, I would agree
14 that that is the facilitation of the commission of the
15 crime and the person -- other persons would be guilty
16 under the concept of 18 United States Code, subsection --
17 section 2 for aiding and abetting, just as the theory was
18 tried to be made in the Busic case.

19 I do not believe that the Government has been
20 able to establish any example where someone can carry
21 without using under its definition or the definitions
22 accepted by the majority of the lower courts. The problem
23 with regard to this definition is that it criminalizes the
24 fact that somebody may have drugs that are proximate to a
25 gun even where the guns are inoperable. There are

1 situations where guns were at remote locations where the
2 drug transactions weren't being committed.

3 This also -- this same definition of use in this
4 statute also accomplishes the law enforcement goal because
5 it still allows law enforcement to encourage the person to
6 leave the gun at home because if he is carrying the gun on
7 his way to committing the crime, he is still guilty under
8 the statute, and therefore is the same goal and same
9 purpose of the statute.

10 And the examples in the later 1984 statute --
11 the versions talk about the methods of using it and they
12 give examples by pointing it out in regard to the bank
13 teller and individuals of that nature.

14 CHIEF JUSTICE REHNQUIST: Okay, Mr. Kollin.
15 The case is submitted.

16 (Whereupon, at 11:57 a.m., the case in the
17 above-entitled matter was submitted.)

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