

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

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CAPTION: ROLAND J. BAILEY, Petitioner v.  
UNITED STATES and CANDISHA SUMMERITA  
ROBINSON, aka CANDYSHA ROBINSON,  
Petitioner v. UNITED STATES.

CASE NO: No. 94-7448, 94-7492

PLACE: Washington, D.C.

DATE: Monday, October 30, 1995

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IN THE SUPREME COURT OF THE UNITED STATES

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 ROLAND J. BAILEY, :  
 Petitioner :  
 v. : No. 94-7448  
 UNITED STATES :  
 and :  
 CANDISHA SUMMERITA ROBINSON, :  
 aka CANDYSHA ROBINSON, :  
 Petitioner :  
 v. : No. 94-7492  
 UNITED STATES :

- - - - -X

Washington, D.C.  
Monday, October 30, 1995

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

APPEARANCES:

ALAN E. UNTEREINER, ESQ., Washington, D.C.; on behalf of the Petitioners.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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1 PROCEEDINGS

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 94-7448, Roland J. Bailey v. United States,  
5 consolidated with Robinson v. United States.

6 Mr. Untereiner.

7 ORAL ARGUMENT OF ALAN E. UNTEREINER

8 ON BEHALF OF THE PETITIONERS

9 MR. UNTEREINER: Thank you, Mr. Chief Justice,  
10 and may it please the Court:

11 These consolidated cases present the question of  
12 what it means to use or carry a firearm both during and in  
13 relation to a predicate drug trafficking offense.

14 Section 925(c) of title 18 of the U.S. Code  
15 makes that conduct a crime punishable by stiff, mandatory  
16 minimum sentences ranging from 5 years to life  
17 imprisonment without release.

18 Petitioners Roland Bailey and Candisha Robinson  
19 were each convicted of violating section 924(c). Each was  
20 sentenced to 5 years imprisonment on that count. Their  
21 convictions were upheld by a narrowly divided D.C. Circuit  
22 sitting en banc.

23 The facts of the two cases, briefly stated,  
24 illustrate the broad reach given to section 924(c) by the  
25 court below. Candisha Robinson was convicted of using or



1 carrying a small firearm known as a Derringer during and  
2 in relation to the predicate offense of possession of  
3 cocaine with intent to distribute it.

4 Her section 924(c) conviction rested almost  
5 entirely on the fact that the Derringer was found unloaded  
6 and in a holster inside a locked footlocker in her bedroom  
7 closet. There was no evidence that Ms. Robinson ever  
8 touched the firearm, or that the firearm played any role  
9 in any sale of narcotics.

10 QUESTION: Mr. Untereiner, was -- are  
11 petitioners in either of these cases challenging the  
12 instructions on the law that were given?

13 MR. UNTEREINER: No, we are not, Your Honor.

14 QUESTION: So in both cases it amounts to a  
15 sufficiency of the evidence question for us?

16 MR. UNTEREINER: That's correct, Justice  
17 O'Connor.

18 QUESTION: And would you tell me what you think  
19 the word carry means? Apparently, in neither of these  
20 cases did the indictment or a jury have to decide whether  
21 a weapon was being carried.

22 MR. UNTEREINER: Your Honor, I believe the  
23 indictments --

24 QUESTION: In Bailey, did it?

25 MR. UNTEREINER: I believe the indictment

1 included uses or carries, and so did he instructions in  
2 this case.

3 We maintain that by carry, Congress meant to  
4 bear on one's person.

5 QUESTION: You don't think that under this  
6 statute that a gun could be carried in the trunk of a  
7 car --

8 MR. UNTEREINER: No, we don't --

9 QUESTION: -- for purposes of this statute?

10 MR. UNTEREINER: No, Your Honor. We believe  
11 that at most that would be transporting the weapon and, in  
12 fact, if you look at section 924(b), Congress included the  
13 word transport there, and we think there's a difference  
14 between carrying and transporting.

15 The only discussion of this in the lower court's  
16 opinion was in the dissent, and Judge Williams went  
17 through an analysis why that was, at most, transporting.

18 QUESTION: But if we agreed with you -- in the  
19 Bailey case, if we agreed with you on use, we'd have to  
20 remand, wouldn't we, because the lower court -- with the  
21 exception of the one dissenting opinion, the lower court  
22 didn't get into carrying.

23 MR. UNTEREINER: Your Honor, we think that the  
24 Court can and should reach the issue of what it means to  
25 carry --

1 QUESTION: Yes, but we'd be doing it in the  
2 first instance.

3 MR. UNTEREINER: You would be, Your Honor,  
4 that's correct, but we think the meaning is relatively  
5 clear, of the word carries, and this Court is fully  
6 capable of deciding what that means.

7 QUESTION: Except that this Court operates as a  
8 court of review and not first --

9 MR. UNTEREINER: Well, that's true, Your Honor.  
10 It's possible that the Court could remand that issue, but  
11 we think that the issue is presented in this case, and the  
12 Court could also decide it.

13 Moreover, what the Government really tries to do  
14 in this case is to ignore the word carry. I think the  
15 Government would like the Court to forget that the word  
16 carry is in the statute, and the reason for that is fairly  
17 simple, and that is that the Government's interpretation  
18 of the word use reads the word carry -- carries out of the  
19 statute.

20 According to the Government, whenever someone  
21 possesses a firearm so that it emboldens the possessor, or  
22 might be available for protection or security, that is a  
23 use, and we submit that whenever someone carries a  
24 firearm, the firearm is also available for use, and it  
25 also emboldens the person, so if the Government is right

1 that Congress meant, by use, what it says, there really  
2 would have been no need to include the word carries in the  
3 statute.

4 This Court has repeatedly said that statutes  
5 must be read so that every word is given some effect.

6 QUESTION: Well, Mr. Untereiner, what is your  
7 view as to the meaning of uses and the meaning of carries  
8 in that phrase?

9 MR. UNTEREINER: We suggest that the word use  
10 means, to actively employ to carry out the predicate  
11 offense. By active employment, we mean firing the weapon,  
12 discharging it, brandishing it, displaying it --

13 QUESTION: Well, how about our opinion in the --  
14 wasn't it in the Smith case where we said if you -- that  
15 you use a weapon if you barter it for some drugs?

16 MR. UNTEREINER: That's correct, Your Honor.  
17 That's -- that was this Court's holding in Smith.

18 We think that that holding is fully consistent  
19 with our definition of use.

20 In Smith, the Court held that trading a firearm  
21 during and in relation to the predicate offense of  
22 attempting to possess cocaine, trading a firearm for the  
23 cocaine was a use of the firearm, and we think that was an  
24 active employment to carry out the predicate offense.

25 QUESTION: Well, how about a strategic placement



1 of a firearm, having it right there so that the persons .  
2 with whom the defendant is dealing in the case of a drug  
3 sale has some notion of the power available to the  
4 defendant at that time?

5 MR. UNTEREINER: Well, Your Honor, I think --

6 QUESTION: Some kind of -- I don't know how to  
7 describe it better than a strategic placement of the  
8 weapon.

9 MR. UNTEREINER: I think if the weapon were  
10 placed in an open area, it would be displayed, and that  
11 would fall within the meaning of active employment as we  
12 understand it.

13 QUESTION: It doesn't have to be held in the  
14 hand.

15 MR. UNTEREINER: That's correct. That's  
16 correct.

17 But the Government makes much of placement. It  
18 says that possession plus placement should be enough to  
19 qualify as liability for use, and we think there are  
20 several problems with the placement theory. For one  
21 thing, I think that placement is a kind of preparatory  
22 conduct. It's preparation for use, it's not use.

23 Secondly, I think the Government would --

24 QUESTION: Lest there seem to be too much  
25 agreement between you and Justice O'Connor, your response

1 was, if it's strategically placed and visible it would be  
2 use, but let's say I had it in the drawer here, so it's  
3 not visible. I'm not carrying it. It's strategically  
4 placed. I can whip open the drawer and get to it. You  
5 would say that is not being used.

6 MR. UNTEREINER: That's right. Within the  
7 meaning of active -- our definition of use would not  
8 include that, Justice Scalia.

9 QUESTION: At least shown -- it has to be at  
10 least shown.

11 MR. UNTEREINER: That's correct, and the reason  
12 for that, if it's displayed, it's actually having an  
13 effect in carrying out the predicate offense, whereas if  
14 it's hidden somewhere, all it does is embolden the  
15 possessor, and emboldening, we submit, really doesn't add  
16 anything to possession.

17 QUESTION: You mean, you would say the same if  
18 this were a crack house with machine guns strategically  
19 placed, to use Justice O'Connor's phrase, at various  
20 points where they could be easily turned on anybody who  
21 was trying to get into the house?

22 MR. UNTEREINER: Justice Kennedy, if they were  
23 openly displayed in a crack house --

24 QUESTION: No, no, they're concealed, but  
25 they're --

1 MR. UNTEREINER: That would not be a use under  
2 our theory, that's correct.

3 I'd like to go back for a moment to this  
4 placement theory, because I think that there's another --

5 QUESTION: Well, I take it that the reason is  
6 you have to draw a line some point, and so you want to  
7 show that there was an actual, active employment, that it  
8 was being used.

9 Suppose in the crack house example they had two  
10 or three people go to man the machine guns to be at the  
11 ready. That wouldn't be a use?

12 MR. UNTEREINER: I'm sorry, I --

13 QUESTION: That they had two or three people  
14 manning the machine guns, but -- at least close by, but  
15 they were concealed.

16 MR. UNTEREINER: Well, it could be that they  
17 could be carried in some --

18 QUESTION: No, they're not carried, they're in a  
19 fixed place.

20 MR. UNTEREINER: And they're not being borne on  
21 that -- they're not on the person's person.

22 QUESTION: No.

23 MR. UNTEREINER: That would -- that's correct,  
24 that would not be a use under our theory.

25 QUESTION: And I suppose if you had agents

1 stationed around the room, all of whom were carrying  
2 firearms, prepared to use them, you would not be using  
3 firearms.

4 MR. UNTEREINER: There might be aiding and  
5 abetting liability under the carrying prong there, but  
6 there wouldn't be -- there wouldn't be a use.

7 QUESTION: What if your agents actually used the  
8 firearms, actually pointed --

9 MR. UNTEREINER: There might be aiding and  
10 abetting liability for use.

11 QUESTION: But you would not be using the  
12 firearm.

13 MR. UNTEREINER: No, that's correct.

14 QUESTION: Well, don't you concede, or isn't it  
15 at least consistent with your theory to concede that there  
16 can be an overlap between use and carry? Your claim is  
17 there's simply got to be a distinctive element in use as  
18 well. Use cannot totally -- or a distinctive element in  
19 carry, rather, that use cannot totally swallow up carry.

20 MR. UNTEREINER: That's correct --

21 QUESTION: There could be an overlap, and there  
22 could have been an overlap in Justice Scalia's example.

23 MR. UNTEREINER: Indeed, there is an overlap  
24 under our theory of the statute and under the Government's  
25 theory of the statute. I think both sides have to deal



1 with the fact that there is a substantial overlap in  
2 terms, but Justice --

3 QUESTION: Yours is not complete and the  
4 Government's is.

5 MR. UNTEREINER: That's correct, and the  
6 Government does not dispute the fact that its reading of  
7 use liability would render the word carries in the statute  
8 superfluous. The Government does not dispute that.  
9 Instead, it asks this Court to create an exception to that  
10 cardinal rule of statutory construction, and that  
11 exception --

12 QUESTION: But you, of course -- you also agree  
13 that the word use is not superfluous, that there are uses  
14 of the gun when it is not being carried.

15 MR. UNTEREINER: Certainly.

16 QUESTION: What are the -- what's the best  
17 example of that, in your view?

18 MR. UNTEREINER: Well, displaying a firearm  
19 could be a use, would be a use --

20 QUESTION: Displaying it without carrying it,  
21 though.

22 MR. UNTEREINER: That's correct. That's one.  
23 Referring to a firearm could, under some  
24 circumstances, could be a use.

25 QUESTION: Referring to it in the trunk of a

1 car?

2 MR. UNTEREINER: Possibly. If --

3 QUESTION: So in your view, use is broader than  
4 carry.

5 MR. UNTEREINER: No, Your Honor. We think that  
6 in general use is narrower than carry. That's what  
7 Congress -- that use means to actively deploy the weapon  
8 as an instrument of the predicate offense, and carry was  
9 intended to pick up a residual category of cases where the  
10 weapon was not actually deployed.

11 QUESTION: But I thought in your -- the  
12 hypothetical about the weapon being visibly displayed it  
13 wouldn't necessarily have to be on one's person. Perhaps  
14 it wouldn't be carried, but then it would be used.

15 MR. UNTEREINER: In that example it would be,  
16 Your Honor.

17 QUESTION: So then, that example, use would be  
18 broader than carry.

19 MR. UNTEREINER: Well, use --

20 QUESTION: It would include --

21 MR. UNTEREINER: Use will certainly cover things  
22 that carry --

23 QUESTION: That carry doesn't.

24 MR. UNTEREINER: -- doesn't cover. In Smith,  
25 this Court --

1 QUESTION: Your definition of carry is it's on  
2 your person, because you excluded having it in the trunk.  
3 Having it, say, in the seat next to you in the car  
4 wouldn't do.

5 MR. UNTEREINER: Well, we actually have two --  
6 we have an alternative definition of carries which is  
7 slightly broader, but nonetheless would not be a basis for  
8 upholding Bailey's conviction under carry.

9 QUESTION: But you want to concentrate here on  
10 use, as I understand it, and from what you've been saying,  
11 am I correct in gathering that use means, as you define  
12 it, something perceivable by another human on the  
13 premises?

14 MR. UNTEREINER: It's activity with the -- it's  
15 some kind of activity with the weapon that carries out --  
16 assists in carrying out the predicate offense.

17 QUESTION: In other words, a concealed weapon  
18 can't be seen, so you say that's carry but not use. Are  
19 you saying that use has to be something that another  
20 perceives?

21 You use the example of placement, not mere  
22 placement in a drawer, but visible placement.

23 MR. UNTEREINER: Well, I think that use  
24 liability would require that. Whether it would require  
25 that because the use wouldn't be in relation to the

1 predicate offense unless it actually helped to carry out  
2 the predicate offense, or whether --

3 QUESTION: Well, what if you blow someone's head  
4 off from behind. The person never sees you, but surely  
5 you've used a weapon.

6 MR. UNTEREINER: That's correct.

7 QUESTION: I suppose you'd say you could use a  
8 weapon without carrying it by having some remote -- remote  
9 mechanism of discharge. You could have a spring trap, or  
10 all sorts of ways, have the gun fired from the other side  
11 of the room, without your carrying it, right?

12 MR. UNTEREINER: That's correct. You could  
13 simply refer to a weapon that you have not immediately on  
14 your person, and that would be a use.

15 QUESTION: And what if you direct one of your  
16 goons to shoot the person? You're not carrying the gun,  
17 but one of your colleagues is and you say, shoot him. Are  
18 you using the firearm then?

19 MR. UNTEREINER: Well, you may be liable for  
20 aiding and abetting someone else's use, someone else's --

21 QUESTION: Might you also be, even under your  
22 theory be --

23 MR. UNTEREINER: It might be. It might be in  
24 some circumstances a use. If you have constructive --

25 QUESTION: If you direct its use by someone



1 else.

2 MR. UNTEREINER: If you have constructive  
3 possession of a weapon by -- and you have control over  
4 your accomplice, and you direct that it be used, that  
5 could be a use, I suppose.

6 I'd like to say a few words about section 924(d)  
7 as well. That's the forfeiture provision of section 924.

8 In Smith, this Court explained that the word use  
9 is fairly elastic, and must be understood in light of its  
10 context in the statute, and part of the context this Court  
11 looked at in Smith was the forfeiture provision, section  
12 924(d).

13 Now, that provision makes a distinction between  
14 guns that are used, those that are involved in, and  
15 those --

16 QUESTION: Where do we find section 924(d) in  
17 the papers?

18 MR. UNTEREINER: 924(d) is in our opening brief,  
19 the appendix, page 3a.

20 QUESTION: Thank you.

21 MR. UNTEREINER: Section 924(d) draws this  
22 distinction between firearms that are used, those that are  
23 involved in, and those that are merely intended to be  
24 used.

25 In Smith, this Court relied heavily, I think, on

1 this provision, because these words make cross-references  
2 to other crimes in which firearms are traded, and I think  
3 that was an important part of this Court's holding in  
4 Smith.

5 We suggest that this shows Congress knows full  
6 well that there's a difference between using a firearm and  
7 merely intending that the firearm be used, or involving a  
8 firearm in a predicate offense.

9 The Government's theory, however, would collapse  
10 that, and essentially is based on the premise that  
11 Congress doesn't know how to distinguish those things, and  
12 rather, when it says use, it includes all of those things.

13 I'd like to say a little bit also about the Rule  
14 of Lenity here.

15 QUESTION: Before you get to that,  
16 Mr. Untereiner, may I ask you how your definition, your  
17 active definition of use, fits in with one of the  
18 underlying crimes, and that's possession with intent to  
19 distribute, which is a passive crime, no activity  
20 involved, so how do you get an active use tied together  
21 with such an offense?

22 MR. UNTEREINER: Justice Ginsburg, it's quite  
23 possible, we think, that a firearm can be actively  
24 employed in a predicate offense of that kind. You can  
25 brandish a firearm to ward off a rival drug dealer who's

1 trying to take away the drugs, you could fire it, or you  
2 could brandish it at the police who are trying to arrest  
3 you, so it's quite possible that active employment goes  
4 together with even a passive drug crime such as possession  
5 with intent to distribute.

6 The Rule of Lenity is an important principle in  
7 this Court's jurisprudence. It says that when a statute  
8 is ambiguous, a conviction based on language that -- whose  
9 scope is uncertain should be reversed.

10 The rule serves a number of important purposes.  
11 It ensures that everyone has fair notice of what conduct  
12 constitutes a crime.

13 QUESTION: Do you think we followed that in  
14 Smith?

15 MR. UNTEREINER: The --

16 QUESTION: Do you think we follow that rule with  
17 respect to the phrase, use a firearm? That's an exception  
18 to it, isn't it?

19 MR. UNTEREINER: I think the majority in Smith  
20 concluded that the level of ambiguity was not sufficient  
21 to trigger the Rule of Lenity in Smith. I think the  
22 dissent had a good point that --

23 (Laughter.)

24 MR. UNTEREINER: That --

25 QUESTION: Well, I'm not sure it did.

1 (Laughter.)

2 MR. UNTEREINER: Well, I think in Smith, Your  
3 Honor, the Court was looking at the statute as a whole,  
4 and I think here again the language of section 924(d) was  
5 significant because of this distinction between -- well,  
6 the fact that that made cross-reference to crimes that  
7 clearly involved trading firearms, and I think that, and I  
8 think the Court, the majority in Smith was also somewhat  
9 troubled with the possibility that bludgeoning someone  
10 with a firearm might not be a use under the dissent's  
11 theory. Those considerations really --

12 QUESTION: Would it be in your view?

13 MR. UNTEREINER: Yes, it would, Your Honor.

14 QUESTION: You don't quarrel with the Smith  
15 holding at all, as I understand your brief.

16 MR. UNTEREINER: No, Your Honor, we don't ask --  
17 no. No, we don't think that -- we think Smith is fully  
18 consistent with our theory of active employment.

19 QUESTION: It may be, but with the argument  
20 you're making now, with the Rule of Lenity, was there any  
21 less ambiguity -- do you think there was less ambiguity in  
22 Smith than there was here?

23 MR. UNTEREINER: We do believe there was less,  
24 yes --

25 QUESTION: You do.



1 MR. UNTEREINER: -- because of the presence of  
2 subsection (d), the forfeiture provision, where the word  
3 use also appeared, and where Congress was making a cross-  
4 reference to crimes where a firearm was traded, and I  
5 think that the Court relied heavily on that in Smith, and  
6 that --

7 QUESTION: Well, as I understand your position,  
8 you agree that the trading of a firearm is an active use  
9 of the firearm.

10 MR. UNTEREINER: That's correct.

11 QUESTION: Sticking it in the trunk or some  
12 locked compartment where it's not used at all is not use  
13 within the meaning of the statute.

14 MR. UNTEREINER: That's correct.

15 QUESTION: You say use goes beyond carry, don't  
16 you?

17 MR. UNTEREINER: Yes.

18 QUESTION: Yes, well then, how do you explain,  
19 let's see, 5 -- it's on page 1a of the petitioner's  
20 appendix. (B) -- way at the bottom of the page. If a  
21 person sold, delivered, or otherwise transferred a handgun  
22 or ammunition to a juvenile knowing or having reasonable  
23 cause to know that the juvenile intended to carry or  
24 otherwise possess or discharge or otherwise use -- or  
25 otherwise use -- the handgun or ammunition.

1 MR. UNTEREINER: We think that that, the  
2 language that, Justice Scalia, you've just read strongly  
3 supports our position, because -- for a number of reasons.

4 Number 1, it shows that the phrase -- carry or  
5 otherwise possess shows that carry is a particular kind of  
6 possession, and that the only kind of possession that  
7 Congress has made a crime under 924 (c) is carrying,  
8 whereas the Government, I think, suggests that other kinds  
9 of possession would qualify as use under 924(c).

10 The second half of that, discharge or otherwise  
11 use, I think suggests under the various canons of  
12 construction that this Court otherwise applies that use is  
13 a -- that discharge is a kind of use, and it must be of  
14 the same kind, that the broader category, use, refers to a  
15 kind of employment of the weapon that discharge is an  
16 example of, and I think that's fully consistent with --  
17 indeed, I think it supports our active employment reading  
18 of the statute.

19 We'd like to also remind the Court that, when  
20 all is said and done, this case is really about a choice  
21 between two sentencing regimes. Under the Sentencing  
22 Guidelines, there's a two-level enhancement for possession  
23 of a firearm, so really, if the Court accepts our argument  
24 in this case, it doesn't mean that conduct like that  
25 involved in this case will go unpunished. It will go

1 punished, instead, under a two-level enhancement under the  
2 Sentencing Guidelines.

3 And as Justice Breyer explained in his McFadden  
4 dissent on the First Circuit, the Sentencing Guidelines  
5 reflect a more calibrated and nuanced and sophisticated  
6 approach to sentencing than --

7 QUESTION: Why should we prefer one to the other  
8 in making a decision in this case?

9 MR. UNTEREINER: Well, I think, Your Honor, that  
10 the Court should strive not to read use in 924(c) in a way  
11 that simply eradicates another provision of Federal law,  
12 namely, the two-level enhancement provision.

13 QUESTION: Well, that's an argument of statutory  
14 construction. I thought you were urging something more,  
15 that there's one sentencing regime would prevail if your  
16 client -- if you won, another if the Government won, and  
17 the one was just basically a better sentencing regime than  
18 the other. It doesn't seem to me that's our decision to  
19 make.

20 MR. UNTEREINER: Well, we think that the  
21 statutory construction argument is also available in that  
22 situation, and I guess that's the argument we're --

23 QUESTION: May I ask, you commented on Justice  
24 Breyer's opinion on the First Circuit. Do you think then-  
25 Judge Kennedy's opinion in the early case on the Ninth

1 Circuit supports you or is against you?

2 MR. UNTEREINER: I think that case is clearly  
3 distinguishable for two reasons, number 1, that was a case  
4 about carrying. A lot of the subsequent cases that cited  
5 that did not make that distinction, and seized on this  
6 later language in that opinion that talked about  
7 emboldening.

8 Number 2, the case was not about sufficiency of  
9 the evidence. If you read that case carefully, you'll see  
10 it was a case about an instructional error, and the court  
11 reversed because the instruction was deficient, so any  
12 statement in that case about the sufficiency of the  
13 evidence, I mean, there was some discussion in there, but  
14 it's not necessary to the outcome of that decision.

15 QUESTION: Well, if the firearm were traded,  
16 exactly as occurred in Smith, would that be use within the  
17 meaning of this statutory provision?

18 MR. UNTEREINER: Yes.

19 QUESTION: It would.

20 MR. UNTEREINER: A firearm traded as in Smith.

21 QUESTION: Yes.

22 MR. UNTEREINER: Yes, Your Honor.

23 QUESTION: That would be used, in your meaning.

24 MR. UNTEREINER: Yes, within the meaning of --  
25 yes. Under our definition, that would be a use of the

1 firearm.

2 QUESTION: Why?

3 MR. UNTEREINER: Because in -- because you  
4 are -- you -- it's activity with the weapon in such a way  
5 that you carry out the predicate offense.

6 The predicate offense in Smith was attempt to  
7 possess cocaine. That attempt was carried out by offering  
8 to trade what was in that case the machine gun for the  
9 drugs, so we think that falls squarely within our  
10 definition of the active employment.

11 If I may, I'd like to reserve the balance of my  
12 time for rebuttal.

13 QUESTION: Very well, Mr. Untereiner.

14 Mr. Dreeben, we'll hear from you.

15 ORAL ARGUMENT OF MICHAEL R. DREEBEN

16 ON BEHALF OF THE RESPONDENT

17 MR. DREEBEN: Mr. Chief Justice, and may it  
18 please the Court:

19 Our position is that a firearm is used within  
20 the meaning of section 924(c) when the defendant puts or  
21 keeps it in a place where it is available to protect  
22 himself during drug trafficking operations and to embolden  
23 him to commit that offense, and we believe that, applying  
24 that definition, the evidence was sufficient in both of  
25 these cases to support petitioners' convictions.



1 QUESTION: Is that an intentional part of the  
2 crime, and that we infer that intent from all the  
3 circumstances?

4 MR. DREEBEN: That's correct, Justice Kennedy.  
5 The jury was instructed that the use of the firearm had to  
6 be knowing and intentional, and the evidence in this case  
7 was sufficient for the jury to draw the inference that  
8 Roland Bailey had the 9 millimeter Smith & Wesson  
9 automatic pistol in his trunk to protect his possession of  
10 cocaine and the proceeds of that drug trafficking, and  
11 that Candisha Robinson had a Derringer in a locked foot  
12 locker in her apartment bedroom, where drugs were kept and  
13 from which drugs were dealt both on the day of the drug  
14 trafficking crime that was charged in the indictment and  
15 on the previous day.

16 So the jury could readily draw the inference  
17 that the defendant, or the defendant's agents perhaps, in  
18 Candisha Robinson's case, had put the firearm in that  
19 place so that it would be available if the need arose  
20 during the drug trafficking crime that was charged in  
21 section 924(c).

22 QUESTION: There was -- in Robinson's case, were  
23 the drugs that were part of the transaction taken out of  
24 that foot locker?

25 MR. DREEBEN: The jury could draw that

25

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1 inference, yes, because there was a drug transaction  
2 within about a half-an-hour of the execution of the search  
3 warrant, and after the search warrant was executed,  
4 cocaine was found, crack cocaine was found in the trunk in  
5 the bedroom, so the jury could -- and marked money from  
6 that transaction was also found in that trunk.

7 So the jury could readily infer that Candisha  
8 Robinson's agent, Parker, had gone to the trunk and had  
9 retrieved the cocaine from that place, and during that  
10 time had the gun available to him for the purpose of  
11 protecting him if the need arose.

12 QUESTION: Mr. Dreeben, you're not -- the  
13 Government's not making the argument, I take it, that  
14 having a gun in a locked trunk when the drug transaction  
15 is being completed is enough to constitute its use.

16 MR. DREEBEN: Well, neither -- Justice Scalia,  
17 neither of the violations in these cases involved the  
18 offense of distribution. They involved possession with  
19 intent to distribute.

20 QUESTION: All right.

21 MR. DREEBEN: So the crucial issue is whether  
22 the gun was available to the defendant for the purpose of  
23 protecting his possession --

24 QUESTION: His possession.

25 MR. DREEBEN: -- of the drugs. That's right.

1 QUESTION: Now, suppose I keep the drugs under  
2 my bed, and I have the gun in a locked trunk two rooms  
3 away, in a closet. Is that sufficient?

4 MR. DREEBEN: That may not be sufficient for the  
5 jury to draw the inference. Under the standard that was  
6 adopted by the D.C. Circuit in this case, two facts were  
7 required to be established before the jury could draw the  
8 inference.

9 First, the drugs and the gun had to be in  
10 reasonable proximity to each other. They had to be near  
11 to each other, so that there should be -- there could be a  
12 reasonable basis for the jury to conclude that the gun was  
13 in a place where it could serve the protective purpose,  
14 and second, it had to be accessible to the defendant when  
15 the defendant was handling the drugs or the drug proceeds,  
16 so that the jury could reasonably conclude that the  
17 defendant did, indeed, knowingly and intentionally put or  
18 keep the firearm there for the purpose of protecting his  
19 stash of drugs.

20 QUESTION: So in the case in which the drugs  
21 were kept in the locked trunk, and the trunk is in, let's  
22 say, the next room, your theory is that use is proven by  
23 the fact that at the time the drugs were put in the trunk,  
24 possessed in that sense, the handgun was handy and  
25 therefore was used. Your theory is not that it's being

1 used now, with the trunk locked in the next room and the  
2 gun in the trunk.

3 MR. DREEBEN: Well, I -- not necessarily. I  
4 think that the point is that the possession of cocaine  
5 with the intent to distribute it is a continuing offense.

6 QUESTION: Yes, but am I continuing to use the  
7 gun? On your theory -- I thought in your answer to the  
8 last question your theory was, well, the use occurred at  
9 the time the drugs were handled and put in the trunk, et  
10 cetera, because the gun was right there.

11 MR. DREEBEN: And at every time in which the  
12 defendant --

13 QUESTION: Okay, now --

14 MR. DREEBEN: -- goes to the trunk.

15 QUESTION: -- is the gun also being used after  
16 the trunk is locked with the gun in it and the drugs in  
17 it, and the dealer goes into the next room?

18 MR. DREEBEN: Possibly, but not necessarily.  
19 That certainly is not essential to our theory of the case,  
20 and nor is it essential --

21 QUESTION: You could give that away and still  
22 win.

23 MR. DREEBEN: Well, I think that the connotation  
24 of use that we're proposing at least embraces the  
25 availability of the firearm for protection --

1 QUESTION: Well, I thought the connotation of  
2 use you were proposing would have given a yes answer.  
3 Yes, he is still using the gun, even though it's in the  
4 next room with the trunk and the drugs, and the only  
5 reason I asked the question is, I thought your answer to  
6 an earlier question concentrated on the time when he, the  
7 drugs, and the gun were all together.

8 MR. DREEBEN: I think that's the time when it's  
9 clearest. Our theory of what the use --

10 QUESTION: But your theory is broader, and  
11 you're --

12 MR. DREEBEN: That's right. That's right.

13 QUESTION: -- claiming that even when he's in  
14 the next room --

15 MR. DREEBEN: That's right.

16 QUESTION: -- he's still using.

17 MR. DREEBEN: That's right, Justice Souter, we  
18 are, and because the use of the gun consists of two  
19 different purposes. First, it gives the drug dealer the  
20 security and the confidence to know that he can protect  
21 himself when he is actually on the site, accessing the  
22 drugs, near to them, protecting --

23 QUESTION: Well, true, but everybody who  
24 possesses a gun constructively, I suppose, has that  
25 same -- gains that same confidence.



1 MR. DREEBEN: I think that that --

2 QUESTION: Why do they use use -- why do they  
3 employ use, rather than possess?

4 MR. DREEBEN: Well, the evolution of the statute  
5 I think reflects that originally the word use was put in  
6 the statute to define one branch of liability which is  
7 probably narrower than the liability that's currently in  
8 the statute.

9 Originally, in 1968, the statute was written to  
10 prohibit the use of a firearm to commit any felony which  
11 can be prosecuted in Federal court, or carrying a gun  
12 unlawfully during a felony, and those were two very  
13 separate kinds of liability.

14 In 1984, Congress decided to merge those two  
15 forms of liability, and to delete the very specific  
16 qualifications that gave use and carry different  
17 connotations.

18 QUESTION: But they still have -- the statute  
19 still has the qualification that the use or the carrying  
20 must occur during and in relation to a drug trafficking  
21 crime, a specific crime.

22 MR. DREEBEN: That's absolutely correct.

23 QUESTION: Which seems -- maybe I'm missing your  
24 point. It seems to me that that qualification renders the  
25 statute just as specific in identifying, as it were, the

1 mode of use, or the mode of carrying, as the statute was  
2 before the amendment.

3 MR. DREEBEN: No, I don't think that it does.  
4 In fact, I think that the formulation that Congress chose,  
5 use or carry during and in relation to, is a very, very  
6 broad way of describing the nexus.

7 QUESTION: Well, that's broad --

8 MR. DREEBEN: That's right.

9 QUESTION: -- but the word crime is very  
10 specific.

11 MR. DREEBEN: Well, it is, and it depends on  
12 what the crime is, and if the crime is one that takes  
13 place only in a very brief span of time, such as assault  
14 on a bank teller with a deadly weapon, then indeed you  
15 have to find that the use is during that crime.

16 QUESTION: Well, let's concentrate on this  
17 crime. This is possession with intent to distribute,  
18 correct?

19 MR. DREEBEN: That's correct, Justice Ginsburg.

20 QUESTION: And can you explain to me what  
21 difference, if any, there is in using a firearm in  
22 relation to a possession with intent to distribute and  
23 possessing a firearm?

24 Did -- does -- are you treating the two as  
25 synonymous? You seem to be from the answers you've been

1 giving.

2 MR. DREEBEN: I think, Justice Ginsburg, that if  
3 the requirement is added, during and in relation to, then  
4 the verb possess would probably pick up the same scope of  
5 liability that we are describing, but that's -- it would  
6 not by itself, of course. Merely to possess a firearm is  
7 not prohibited under this statute, or punished.

8 QUESTION: So when Congress said use in relation  
9 to a drug trafficking offense --

10 MR. DREEBEN: That's right.

11 QUESTION: -- it would have achieved the same  
12 purpose if it had said possessed, so that the word use in  
13 your view is not narrower than the word possess would be  
14 in that context.

15 MR. DREEBEN: Well, it -- I mean, use I think  
16 requires more in and of itself than merely possession.  
17 Use requires at least --

18 QUESTION: Well, I'm connecting it to the words,  
19 in relation to.

20 MR. DREEBEN: That's right. That's right.

21 QUESTION: In other words, your view is,  
22 Congress could have picked either word. They would have  
23 accomplished the same thing.

24 MR. DREEBEN: That's pretty much correct,  
25 Justice Ginsburg. We think that by using the verb use,

1 Congress did pick a very broad verb, that in fact probably  
2 picks up more than possess in relation to the offense. It  
3 also picks up the kinds of uses that people think of as  
4 the paradigmatic uses of firearms.

5 QUESTION: Mr. Dreeben, is it possible that  
6 it's -- is it possible that it's impossible to use a  
7 firearm for or in connection with some of the felonies  
8 punishable under the Controlled Substances Act, the  
9 Controlled Substances Import and Export Act, or the  
10 Maritime Drug Law Enforcement Act?

11 MR. DREEBEN: Not that I'm aware of, Justice  
12 Scalia.

13 QUESTION: You think every single felony  
14 punishable under those acts can be --

15 MR. DREEBEN: I do, and I further think that the  
16 specific felony that we have at issue here, possession  
17 with intent to distribute, is one that Congress singled  
18 out for inclusion, because when it added drug trafficking  
19 crime to the statute in 1986, it spoke of manufacturing,  
20 distributing, or selling, I believe, verbs that left some  
21 courts -- at least it left a legal issue open to litigate  
22 about whether possession with intent to distribute was, in  
23 fact, covered.

24 In 1988, Congress amended the statute for the  
25 specific purpose of ensuring that possession with intent

1 to distribute was covered, and I don't think there can be  
2 any doubt any more that, under section 924(c), that  
3 Congress specifically intended that there be uses of  
4 firearms in connection with possession with intent to  
5 distribute offenses.

6 QUESTION: Mr. Dreeben, under your  
7 interpretation of use, which is quite broad, as you  
8 describe it, what does the word carry add in addition, or  
9 would every offense charged under the use prong, as you  
10 would define it, pick up the word carry as well,  
11 automatically?

12 MR. DREEBEN: I think it probably would, Justice  
13 O'Connor. I would not leave out some possibilities of  
14 different situations.

15 QUESTION: That's one reason why I question the  
16 Government's interpretation of the word use here.

17 MR. DREEBEN: Well, we have --

18 QUESTION: I would have thought that the words  
19 use and carry might refer to different things, and that  
20 use might be a word that envisions something more than  
21 mere possession, and I'm concerned that the Government is  
22 interpreting it so broadly that it swallows up the word  
23 carry, and swallows up the offense of possession of a  
24 weapon while committing a crime.

25 MR. DREEBEN: I think, Justice O'Connor, that



1 both sides in this case are grappling with the question of  
2 whether there is a distinction between the two offenses,  
3 and what it is.

4 In the reported cases, there really are not any  
5 examples that I can see where we could not have charged a  
6 use under our theory even if the defendant was carrying  
7 it.

8 Under their theory, I think you could always  
9 charge every offense as a carry, and there would be  
10 nothing additional that use would pick up, with the  
11 possible exception of the one example that I think proves  
12 our point. They concede that it would be a use of a  
13 firearm to refer to the firearm during and in relation to  
14 a drug trafficking offense.

15 But if that is a use of the firearm, I don't  
16 understand why it's also not a use of a firearm for a drug  
17 dealer to say to himself, or to a confederate, we can  
18 undertake this transaction with full confidence, because  
19 we can protect ourselves no matter what happens.

20 Surely they would agree that that is a use, if  
21 two defendants said that to each other. I don't see why  
22 it's not a use if one defendant says it to himself. The  
23 firearm serves the same purpose.

24 And that's not an unusual or a strained  
25 application of the word use in our language. Somebody

1 would readily say that they use a firearm to enable  
2 themselves to sleep at night by keeping it in their  
3 dresser drawer and having it available, or that they use a  
4 burglar alarm to protect their house.

5 QUESTION: Well, people do use the word that  
6 way, but perhaps that isn't how Congress used the word  
7 use, because it had a separate offense for possession, and  
8 a separate offense for transporting, and a separate term  
9 carry, and so we have to try to figure out what in the  
10 world Congress meant with this scheme.

11 MR. DREEBEN: I think I've tried to explain that  
12 the evolution of this statute shows why the normal  
13 presumption that the conjunction of two words must have  
14 different meanings shouldn't be rigorously applied in this  
15 case with the ultimate impact of defeating Congress'  
16 intent.

17 Originally, the use and carry liability under  
18 the statute did refer to quite different things. Use had  
19 to be use to commit the offense, which is more specific  
20 than the current statute, and carry only applied when a  
21 firearm was carried unlawfully.

22 When Congress amended the statute in 1984, it  
23 specifically took those restrictions off, and it merged  
24 the liability prong of the offense into use or carries,  
25 and it added the words, during and in relation to, to

1 describe the nexus, which is a very loose nexus, but I  
2 think the upshot --

3 QUESTION: But that nexus, it seems to me, is  
4 important.

5 You say some people sleep better if they have  
6 firearms. Assuming that's true, then I suppose that the  
7 71 percent of adults in rural America who have guns use  
8 guns for almost everything they do. If that gun -- in  
9 your sense of the word, if the gun is in the home, or the  
10 farmhouse, say, then they're using the gun for almost  
11 everything they're doing.

12 MR. DREEBEN: Well, I think --

13 QUESTION: It seems strange to me that Congress  
14 intended to pick that up, especially when it has the extra  
15 phrase, in relation to.

16 MR. DREEBEN: Well, the in relation to, I think,  
17 Justice Kennedy, makes clear that a gun owner who has --  
18 even if he is a drug dealer, if the gun has nothing to do  
19 with the drugs, isn't violating this statute.

20 There has to be some prepositive use. The  
21 juries in these cases were instructed that there had to be  
22 a knowing and intentional use of the firearm in relation  
23 to the drug trafficking --

24 QUESTION: Well, but on your theory the gun  
25 owner who happens to have the gun in his pocket is always

1 going to be using it in relation to as well as during the  
2 offense if he commits a drug offense --

3 MR. DREEBEN: If he commits an offense.

4 QUESTION: -- at that time. So it's quite true,  
5 you say on the one hand yes, the in-relation-to adds  
6 something, but on your theory it's always going to be  
7 added.

8 MR. DREEBEN: Well, it's going to be an issue  
9 for the jury to determine, and yes, Justice Souter, the  
10 jury could determine it.

11 QUESTION: You're always going to make the same  
12 argument and the jury is always going to be free to find,  
13 in fact, that he was comforted by having the gun there.

14 MR. DREEBEN: Or to reject the inference if they  
15 conclude that the gun had simply a coincidental  
16 relationship to the offense and really wasn't --

17 QUESTION: Is there testimony on this stuff? I  
18 mean, you have him -- did he take the stand and said yeah,  
19 I was really comforted by that, or I was not at all  
20 comforted by it? I mean --

21 MR. DREEBEN: No.

22 QUESTION: -- is this a real --

23 MR. DREEBEN: We don't think that it was  
24 necessary.

25 QUESTION: Is this a real legal issue? That is

1 the issue in the case, whether he is comforted by the  
2 possession, by the fact that the gun is in the house?

3 MR. DREEBEN: No. I think it is whether it  
4 enables him to carry out the offense, whether he's using  
5 it to have enough confidence --

6 QUESTION: Well, I can see that if you adopted  
7 your opponent's theory, whether he brandishes it, and so  
8 forth, but you're saying the mere fact that he has a gun  
9 in the house, a jury may find that that enables him to --  
10 he's using that in the possession of everything in the  
11 house.

12 MR. DREEBEN: Well, he's not charged with that,  
13 of course. He's charged with --

14 QUESTION: Well --

15 MR. DREEBEN: -- using the gun in relation to  
16 the drugs --

17 QUESTION: -- all he has to have is the gun and  
18 possessing drugs with intent to distribute, and the jury  
19 can find that he's using the gun in order to possess with  
20 the intent to distribute.

21 MR. DREEBEN: We don't think that it's essential  
22 that there be expert testimony, but there was expert  
23 testimony in this case that described the habits and  
24 patterns of drug dealers and the frequent association of  
25 firearms with them, and the point of Congress' enactment



1 of this statute --

2 QUESTION: Because they often use firearms.

3 MR. DREEBEN: That's because the firearms  
4 create --

5 QUESTION: In the real sense of use them.

6 MR. DREEBEN: Well, I think that this Court in  
7 Smith adopted the broadest reading of use that's  
8 consistent with dictionary definitions.

9 QUESTION: It was an active use, and you have  
10 suggested that one might say the gun that's hidden in my  
11 drawer, I use the gun for protection, but one might  
12 equally say about a gun that one has bought and never  
13 fired, I bought a gun but I've never used it, or I don't  
14 use it. Those are two uses of the word use.

15 If we have a Rule of Lenity and it's a criminal  
16 statute, why don't we pick the narrower one, the one that  
17 implies active use?

18 MR. DREEBEN: Well, I think for several reasons,  
19 Justice Ginsburg. First of all, the Rule of Lenity  
20 doesn't justify creating an ambiguity in a statute.

21 QUESTION: I just gave you two distinct uses.  
22 One is, it's in my drawer, I've never fired it, but I say,  
23 I use it for protection.

24 MR. DREEBEN: Well, I think the same distinction  
25 could have been drawn in the Smith case, and this Court

1 quite clearly recognized that the word use, as employed in  
2 section 924(c), had its natural, broad meaning without  
3 additional qualifiers that limited it, such as active use.  
4 Congress --

5 QUESTION: But that was an active use,  
6 Mr. Dreeben. To trade the gun for drugs is a form of  
7 active use, is it not?

8 MR. DREEBEN: It is true, Justice O'Connor, that  
9 it involved handling the firearm and trading it, but it is  
10 not the first use of a firearm that springs to mind, and I  
11 think the Court quite correctly recognized that it wasn't.

12 QUESTION: No, but --

13 QUESTION: Yes, but if the distinction is active  
14 versus passive, it was an active use to the extent we're  
15 concerned about that.

16 MR. DREEBEN: Well, I don't disagree with that,  
17 but I think --

18 QUESTION: So there was no ambiguity as among,  
19 or as between several active, possible active uses, but  
20 there still can be an ambiguity as between active and  
21 passive use.

22 MR. DREEBEN: Well, I think there could, but the  
23 way that the Court --

24 QUESTION: Well, if there could, then why  
25 shouldn't the Rule of Lenity apply as Justice Ginsburg

1 suggested?

2 MR. DREEBEN: Because the Court resolved the  
3 issue in Smith not by saying that this was an active use,  
4 and that's a requirement of the word, but by adopting the  
5 definition of the word use that one finds if one looks to  
6 dictionaries.

7 QUESTION: Well, perhaps we were imprecise, and  
8 perhaps Smith can be preserved without any difficulty if  
9 we simply now recognize that Smith was a choice between  
10 two active uses, and what we have here is a choice between  
11 active and passive.

12 MR. DREEBEN: Well, I don't think that that  
13 would be consistent with the rationale that Smith used in  
14 order to decide the case.

15 Smith relied on the fact that use entails more  
16 than paradigmatic uses of a gun, that it covers the  
17 natural dictionary meanings, and that it applies when  
18 English speakers can understand that the object is being  
19 put or employed for some purpose and in this case, all of  
20 those requirements are satisfied.

21 I contend that the petitioner's position here is  
22 analogous to the position that was taken by the defendant  
23 in Smith, that you should add words to the statute to  
24 limit what Congress has written, and that is not a reading  
25 of the statute --

1 QUESTION: May I ask you one question?

2 The thing that gives the statute its breadth is  
3 its coverage of passive use -- I mean, passive possession  
4 with ultimate intent to sell -- and I suppose under your  
5 theory anyone who has drugs in his or her home on a sort  
6 of permanent basis, intending to sell some from time to  
7 time, and who carries a gun when coming home at night, or  
8 in case somebody might be there to steal the drugs, would  
9 always be using the gun in connection with the  
10 transaction, which would seem to me to mean that if a  
11 person was in California, carrying the gun as he always  
12 carries his gun with him, and the drugs are at home in New  
13 York and found during a search pursuant to a warrant, he  
14 would be liable under the statute.

15 MR. DREEBEN: I think that he would clearly be  
16 liable under the carrying prong. Whether he would be  
17 liable under the use prong is a --

18 QUESTION: He would be carrying during the  
19 commission --

20 MR. DREEBEN: That's right.

21 QUESTION: -- of the offense back in New York.

22 MR. DREEBEN: That's right, and that may be --  
23 that is the example that I'm thinking of that may  
24 differentiate carrying liability from use liability.

25 In fact, in the reported cases that have

1 addressed the issue, I haven't seen any that are precisely  
2 like that, but if it's necessary for the Court to find a  
3 distinction between the two, I think your hypothetical,  
4 Justice Stevens, is precisely the distinction that I would  
5 suggest.

6 Again, I don't think that in the context of this  
7 statute the statute is best read as requiring that one  
8 looks for a hypothetical to distinguish the two, because  
9 Congress clearly had a broad objective in mind.

10 QUESTION: Well, Congress had a broad -- but  
11 Congress didn't say, although I suppose it could have, you  
12 know, anyone who possesses drugs and who, in addition,  
13 possesses a firearm, shall be punished with an additional  
14 penalty. I suppose it could say that, couldn't it?

15 MR. DREEBEN: They could have, and the  
16 Sentencing Guidelines have a provision --

17 QUESTION: That's not much further than what you  
18 say they've said.

19 MR. DREEBEN: Well, I think it bears a --

20 QUESTION: It can always go to the jury, right,  
21 virtually always. If you possess drugs and own a gun, it  
22 will get to the jury.

23 MR. DREEBEN: I think that it won't if there  
24 isn't any evidence of a conjunction between the two, but  
25 in the cases that we would bring where the gun is found



1 right with the drugs --

2 QUESTION: There's always a -- it's my gun, it's  
3 my drugs. That's a connection.

4 MR. DREEBEN: Well, without more facts, it's a  
5 little hard to say, but I would think that you're right,  
6 essentially most of these cases will go to the jury, and  
7 the reason they go to the jury is that the firearms are  
8 found in strategic places where they facilitate the  
9 offense, and they inject the very danger and hazards that  
10 guns have in these kinds of transactions that Congress  
11 wanted to prohibit, and that is why we have treated these  
12 cases as uses, as have all of the regional courts of  
13 appeals.

14 It would be strange to think that if this were  
15 an unnatural or somehow foreign way to use the word use,  
16 that it would have been adopted so widely in the courts of  
17 appeals.

18 QUESTION: Well --

19 QUESTION: Isn't it true -- let me just check  
20 about one other thing that runs through my mind. I gather  
21 the use or a possession must be proven beyond a reasonable  
22 doubt, the way this statute is now phrased.

23 MR. DREEBEN: That's correct.

24 QUESTION: And I think -- I suppose you would  
25 say that it wouldn't have to be. It could be -- you could

1 change the language of the statute a little bit and make  
2 this an enhancement factor, and it would only have to be  
3 proved by a preponderance of evidence then and you'd still  
4 get the 5-year mandatory.

5 MR. DREEBEN: Well, if that was a sentencing  
6 enhancement statute, it could be written that way, Justice  
7 Stevens.

8 QUESTION: Yes.

9 MR. DREEBEN: It's been long understood --

10 QUESTION: With the same breadth of coverage.

11 MR. DREEBEN: That's right. It's a separate  
12 offense, and all of the elements --

13 QUESTION: Yes.

14 MR. DREEBEN: -- have to be proved beyond a  
15 reasonable doubt.

16 QUESTION: Yes.

17 MR. DREEBEN: You have to prove that he engaged  
18 in a drug trafficking offense --

19 QUESTION: Yes.

20 MR. DREEBEN: -- and you have to prove that  
21 there was a use or carry, and you have to prove that the  
22 use or carry was during and in relation to the offense,  
23 and the jury was instructed on all of those elements here.

24 Now, the standard that petitioners offer for a  
25 sufficiency of the evidence review in this case would

1 require reviewing courts to go over a number of different  
2 factors and make their own judgments about whether the  
3 firearm that was found is consistent with the kinds that  
4 drug dealers might use, or whether there were a number of  
5 firearms found at the location, and would inject into the  
6 sufficiency of the evidence review process considerations  
7 that are normally foreign to that.

8           Reviewing courts normally leave it to the jury  
9 to draw the proper inference on the record once the legal  
10 standard is established and the evidence has been put  
11 before them.

12           QUESTION: I just want you to have a chance to  
13 answer the question I had, which is, what happened in 1984  
14 that is -- I take it -- the dictionary, at least to me,  
15 doesn't answer the question. It's -- you can have -- the  
16 person keeps his gun in the drawer the whole time and then  
17 sells it. He could say, used gun, never used.

18           MR. DREEBEN: That's right.

19           QUESTION: Right?

20           MR. DREEBEN: That's right.

21           QUESTION: And so it isn't going to tell us.  
22 That makes sense, unfortunately -- or fortunately, it  
23 makes sense, so the question is, what does it mean in this  
24 context, all right?

25           MR. DREEBEN: Well, I would add --

1           QUESTION: And you yourself say that prior to  
2 1984, what Congress had in mind was, you take the gun out  
3 and you pull the trigger. That's using it. Pointing it,  
4 that's using it -- hitting somebody over the head with it.  
5 We mean something active, otherwise we wouldn't have added  
6 the word carry.

7           Now, you say something happened in '84. Well,  
8 what they say happened, and they quote a lot of  
9 legislative history, they say what happened is, all that  
10 happened is they consolidated these provisions and, of  
11 course, they added this other gun, but it's perfectly --  
12 this other crime about possession. It's perfectly  
13 reasonable, in possessing with intent to distribute,  
14 sometimes a guy takes out a gun and points it.

15           So what is it that you think happened in '84 or  
16 '86 that in your view radically changed the meaning of the  
17 word use?

18           MR. DREEBEN: Well, our position is that the  
19 word use didn't change its meaning, but the word use takes  
20 its meaning from context, and in the original version of  
21 this statute, use was embedded in the phrase, used to  
22 commit any felony, and the connotation of used in that  
23 context may require a higher linkage or more prepositive  
24 use of the gun to actually carry out the crime.

25           In 1984, Congress deleted that qualification.

1 QUESTION: They deleted it, that's right. They  
2 say that that happened because that was grammatical, in  
3 context, and then they quote some legislative history,  
4 what people said at the time that suggested that when they  
5 defined carry, because they focused specifically on carry,  
6 so they had some stuff there that suggests that it wasn't  
7 intended to make a big difference, omitting those two  
8 words, to commit.

9 MR. DREEBEN: No, I --

10 QUESTION: They say no difference.

11 MR. DREEBEN: I don't think that --

12 QUESTION: I want to know what you -- I know you  
13 don't think that. I want to know what you say to back  
14 that up, your view.

15 MR. DREEBEN: Well, I don't think that there is  
16 any legislative history that specifically addresses the  
17 meaning of the term use and attempt to define it. What  
18 Congress addressed in the legislative history was the  
19 impact of deleting the words unlawfully from carries, and  
20 how that would broaden the liability for carrying --

21 QUESTION: Mr. Dreeben, who addressed it in the  
22 legislative history?

23 MR. DREEBEN: This was in a Senate report,  
24 Senate Report 225 --

25 QUESTION: Why don't you say what the Senate



1 committee addressed in the legislative history.

2 MR. DREEBEN: I stand corrected, Justice Scalia.  
3 The Senate committee gave several examples in the report  
4 of how it thought the new statute would work, particularly  
5 in conjunction with the main purpose of the overhaul,  
6 which was to reverse the results in this Court's decisions  
7 in United States v. Simpson and United States v. Basic,  
8 which prohibited the application of 924(c) when the  
9 underlying predicate felony had its own enhancement  
10 provision.

11 And in the course of discussing that change,  
12 Congress gave an example of how you could commit armed  
13 bank robbery and be subject also to the offense of using  
14 or carrying a firearm under section 924(c), and they added  
15 a footnote to make clear that even if you didn't do what  
16 is paradigmatically done to commit a bank robbery with a  
17 weapon, namely point it or shoot it, you could still be  
18 liable under the carrying prong, and the footnote -- the  
19 footnote then continues to explain that the carrying prong  
20 was broadened because the unlawfully aspect of the former  
21 branch of liability under that provision had been deleted.

22 None of that was devoted to determining what  
23 kinds of uses fell within the statute. The basic point of  
24 the footnote was to explain the ways in which the statute  
25 had been broadened, and the final sentence of the footnote

1 that I think you're referring to simply made clear that if  
2 there's no conjunction at all between the carrying of a  
3 firearm and the underlying offense, but it was just there  
4 coincidentally, then you're not liable at all, and I think  
5 read in context, that committee report doesn't shed much  
6 light at all on this issue.

7 What does shed light on the issue, I believe, is  
8 that when Congress amended the statute in 1984, it  
9 eliminated the qualifications on carrying liability,  
10 namely, unlawfully, and on using liability, namely, using  
11 to commit. They had given them different connotations.

12 And as for your hypothetical, Justice Breyer,  
13 about what it would mean if you put an ad in the paper and  
14 said, I'm selling a firearm, not used, that would also  
15 certainly be true if you had acquired the firearm because  
16 it had been bartered for drugs but it had been contained  
17 in shrink wrap.

18 The meaning of the word use in section 924(c) is  
19 a broader meaning than that which could be applied in some  
20 other context.

21 QUESTION: Could you comment on petitioner's  
22 argument with respect to subsection (d) of the statute,  
23 which uses the term, involved in or used?

24 MR. DREEBEN: Well, I think that the Smith  
25 opinion explained why Congress chose the broader form,

1 involved in, in that forfeiture provision. If you make  
2 false statements on an application to acquire a firearm  
3 license, the firearm is involved in that offense, although  
4 it wouldn't be used in the offense, I think, on anybody's  
5 understanding of that word, so the fact that there were  
6 broader and additional verbs that were put in the  
7 forfeiture provision really doesn't shed any light at all  
8 on the meaning of use.

9 QUESTION: Thank you, Mr. Dreeben.

10 MR. DREEBEN: Thank you.

11 QUESTION: Mr. Untereiner, you have 7 minutes  
12 remaining.

13 REBUTTAL ARGUMENT OF ALAN E. UNTEREINER

14 ON BEHALF OF THE PETITIONERS

15 MR. UNTEREINER: I think that Justice O'Connor  
16 put her finger on a critical flaw in the Government's  
17 theory in this case, and that is that its interpretation  
18 of use reads the word carries out of the statute. I think  
19 the Government conceded that, that under its theory the  
20 word carries has no independent meaning.

21 QUESTION: But aren't there a lot of statutes  
22 like that? I mean, that's, you know, a handy rule of  
23 construction, but it's not rigid.

24 I'm sure there are a lot of statutes, for  
25 example, that say kill or injure. No one shall kill or

1 injure. Maybe the Endangered Species Act says that. Now,  
2 it's very hard to kill something without injuring it.

3 MR. DREEBEN: There are statutes --

4 QUESTION: And so also it's, you know, it's hard  
5 to use it without carrying it, so it's just making clear  
6 that I don't only mean the big thing, kill, but even the  
7 less thing, injure. So also here you could say, I not  
8 only mean the big thing, use, I even mean the lesser  
9 thing, carry but not use. Justices talk that way  
10 sometimes, don't we?

11 MR. DREEBEN: Sometimes we talk that way and  
12 sometimes Congress talks that way. Under the Government's  
13 theory of how the statute evolved, however, that's not  
14 what this statute meant.

15 In other words -- and I think Justice Breyer's  
16 question pointed to this. The Government also concedes in  
17 this case that prior to 1984 use and carry had, as they  
18 put it, a fundamentally different meaning than it had  
19 after 1984.

20 That theory, we suggest, simply does not hold up  
21 if you look at the available evidence, and it's somewhat  
22 ironic, because the possession with intent -- well, the  
23 drug trafficking offenses were -- although they were  
24 included in the 1968 version of the statute, they were  
25 eliminated in 1984, and they were added back in 1986, and

1 possession with intent to distribute was added in 1988.

2 QUESTION: Mr. Untereiner, you agree with the  
3 active-passive distinction, I take it, that --

4 MR. UNTEREINER: That's correct. We say that  
5 active -- that use means active employment to carry out  
6 the predicate offense.

7 QUESTION: Now, if I have a gun lying passively  
8 on the table within a few feet from me, that is an active  
9 use, right?

10 MR. UNTEREINER: That is a -- it can --

11 QUESTION: But if I have a gun two rooms away  
12 lying passively on the table, or passively in the closet,  
13 that is inactive use.

14 MR. UNTEREINER: The issue is, what is the  
15 defendant doing, if anything, with the firearm, and in  
16 your first hypothetical, I think it could be said if the  
17 firearm is visible that the defendant is displaying --

18 QUESTION: I see.

19 MR. UNTEREINER: -- the firearm.

20 QUESTION: If it was in the drawer, though, you  
21 would say that is a passive use.

22 MR. UNTEREINER: That's correct. If there are  
23 no further questions, we would ask that these convictions  
24 be reversed.

25 CHIEF JUSTICE REHNQUIST: Thank you,



1 Mr. Untereiner.

2 The case is submitted.

3 (Whereupon, at 10:59 a.m., the case in the  
4 above-entitled matter was submitted.)

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## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of*

*The United States in the Matter of:  
ROLAND J. BAILEY, Petitioners v.  
UNITED STATES and CANDISHA SUMMERITA ROBINSON,  
aka CANDYSHA ROBINSON, Petitioner v.  
UNITED STATES.*

*CASE NO. : 94-7448, 94-7492*

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY Ann Marie Federico

(REPORTER)