No.

In the Supreme Court of the United States

MICHAEL A. WATSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

DANIEL R. ORTIZ
University of Virginia School of Law Supreme Court Litigation Clinic
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

MARK T. STANCIL*
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

KARL J. KOCH
McGlynn, Glisson & Koch
340 Florida Street
Baton Rouge, LA 70801
(225) 344-3555

DAVID T. GOLDBERG
David T. Goldberg Law Office
99 Hudson Street, 8th Floor
New York, NY 10013
(212) 334-8813

**Counsel of Record*

QUESTION PRESENTED

18 U.S.C. § 924(c)(1)(A) criminalizes the "use" of a firearm during and in relation to a drug trafficking offense and imposes a mandatory consecutive sentence of at least five years' imprisonment. In *Bailey* v. *United States*, 516 U.S. 137 (1995), this Court held that "use" of a firearm under § 924(c) means "active employment." *Id.* at 144. The question presented in this case is:

Whether mere receipt of an unloaded firearm as payment for drugs constitutes "use" of the firearm during and in relation to a drug trafficking offense within the meaning of 18 U.S.C. § 924(c)(1)(A) and this Court's decision in *Bailey*.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the Fifth Circuit (App., *infra*, 1a-2a) is not reported but is available at 2006 WL 2061900. The district court's decision (App., *infra*, 3a-6a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

In pertinent part, 18 U.S.C. § 924(c)(1)(A) provides:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime * * * for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(D) further provides, in pertinent part:

> Notwithstanding any other provision of law—

* * * * *

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

STATEMENT

18 U.S.C. § 924(c)(1)(A) criminalizes the use of a firearm during and in relation to a drug transaction. The sole issue in this case is whether a defendant who receives a firearm, in exchange for drugs, "uses" that firearm in violation of 18 U.S.C. § 924(c)(1)(A).

This Court spoke to the reverse scenario in *Smith* v. *United States*, 508 U.S. 223 (1993). In that case, this Court held that where a defendant brings a firearm to a drug transaction and employs it to barter for drugs, he has "used" the firearm within the meaning of § 924(c)(1). Three Justices dissented, arguing that bartering with a firearm does not constitute "use" within that term's ordinary meaning. *Id.* at 241-244 (Scalia, J., dissenting). Two years later, in *Bailey* v. *United States*, 516 U.S. 137 (1995), this Court unanimously clarified that "use" of a firearm under § 924(c)(1) means the "*active employment* of the firearm by the defendant." *Id.* at 143. The *Bailey* Court held that "'use' must connote more than mere possession of a firearm by a person who commits a drug offense," and that the "inert presence of a firearm, without more, is not enough to trigger § 924(c)(1)." *Id.* at 143, 149.

The circuits are deeply divided as to whether one who *receives* a firearm in exchange for drugs "uses" that firearm in violation of § 924(c)(1)(A). Indeed, the government acknow-

ledged below "that there is a split in the circuits regarding this issue." Gov't C.A. Br. 17; see *id.* at 9 ("[S]ome other circuits have found that the receipt of a firearm during a transaction is not a 'use' under [§ 924(c)(1)(A)]."); see also *United States* v. *Montano*, 398 F.3d 1276, 1282-1284 (11th Cir. 2005) (*per curiam*); *United States* v. *Stewart*, 246 F.3d 728, 731–733 (D.C. Cir. 2001); *United States* v. *Warwick*, 167 F.3d 965, 975–976 (6th Cir. 1999); *United States* v. *Westmoreland*, 122 F.3d 431, 434–436 (7th Cir. 1997).

In its decision below, however, the Fifth Circuit confirmed that it sides with four other circuits that *do* treat mere receipt of a firearm as "use" under § 924(c)(1)(A). *United States* v. *Watson*, (App., *infra*, 1a-2a); see *United States* v. *Cotto*, 456 F.3d 25, 28-29 (1st Cir. 2006); *United States* v. *Sumler*, 294 F.3d 579, 580 (3d Cir. 2002); *United States* v. *Ramirez-Rangel*, 103 F.3d 1501, 1506, 1509 (9th Cir. 1997); *United States* v. *Cannon*, 88 F.3d 1495, 1508–1509 (8th Cir. 1996); see also *United States* v. *Ulloa*, 94 F.3d 949, 955–956 (5th Cir. 1996); *United States* v. *Zuniga*, 18 F.3d 1254 (5th Cir. 1994).

This conflict has important ramifications for prosecutors and defendants alike. In circuits following the Fifth Circuit's rule, mere receipt of a firearm in a drug transaction exposes a defendant to a mandatory minimum of five years' imprisonment to be served consecutively to any other sentence imposed. 18 U.S.C. § 924(c)(1)(A)(i), (c)(1)(D). In other circuits, however, the same conduct (assuming conviction for the underlying drug transaction) would result only in exposure to a two-level sentencing enhancement under the now-advisory United States Sentencing Guidelines. See U.S.S.G. § 2D1.1(b)(1).

A. The District Court Proceedings

Petitioner Michael A. Watson, a legally blind fifty-five-year-old man (PSR ¶ 66), sought to purchase a firearm in

order to protect himself and his property against robbery and theft. App., *infra*, 9a. In November 2004, petitioner and a government informant discussed petitioner's desire to buy a firearm. *Ibid.* When petitioner asked the informant the purchase price, the informant replied that he did not know a cash price. *Ibid.* Instead, the informant offered to introduce petitioner to an individual willing to provide petitioner with a firearm in exchange for drugs. *Ibid.*

On November 12, 2004, the informant brought the individual—in actuality an undercover government agent—to petitioner's home in Ascension Parish, Louisiana. Gov't C.A. Br. 5. The government agent provided petitioner with an unloaded pistol. In exchange, petitioner provided the undercover agent with twenty-four dosage units of oxycodone hydrochloride, also known as OxyContin. App., *infra*, 9a. Immediately upon conclusion of the transaction, agents arrested petitioner. *Ibid.*

Federal prosecutors brought a three-count indictment against petitioner in the United States District Court for the Middle District of Louisiana. The charges included distribution of a Schedule II controlled substance, in violation of 21 U.S.C. § 841(a)(1) (Count One); use of a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. § 924(c)(1)(A) (Count Two); and possession of firearms by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) (Count Three). App., *infra*, 7a. The parties ultimately entered into a plea agreement upon stipulated facts. *Id.* at 7a-11a. Under the terms of the agreement, petitioner pleaded guilty to all counts of the indictment, but he reserved the right to appeal whether, as a matter of law, the stipulated facts supported his conviction under Count Two for use of a firearm during and in relation to a drug trafficking offense. *Id.* at 7a-8a; 3/30/05 Tr. 32–33. Specifically, petitioner maintained the right to challenge whether mere receipt of a firearm in exchange for drugs constitutes "use" of the firearm with the meaning of § 924(c)(1)(A). App., *infra*, 7a.

The district court accepted the plea agreement. 3/30/05 Tr. 46. It held that, under Fifth Circuit law, the stipulated facts sufficed to support petitioner's conviction under all three counts of the indictment. *Ibid.* Accordingly, the district court accepted petitioner's guilty pleas, treating the guilty plea to Count Two for violation of § 924(c)(1)(A) as a conditional plea under Federal Rule of Criminal Procedure 11(a)(2). *Ibid.*; see Fed. R. Crim. P. 11(a)(2) ("With the consent of the court and the government, a defendant may enter a conditional plea of guilty or *nolo contendere*, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion.").

At sentencing, the district court found that petitioner qualified as a career offender under Sentencing Guidelines § 4B1.1(a), due to two prior felony convictions (both of which were more than 15 years old). PSR ¶¶ 50-51; 11/17/05 Tr. 14. Under the career offender Guidelines, the convictions on Counts One and Three would have resulted in a sentencing range of 151–188 months' imprisonment. PSR ¶ 84; see U.S.S.G. § 4B1.1(b)(B). Where the conviction includes a violation of § 924(c), however, the career offender Guidelines require a significantly higher minimum sentence. Accordingly, petitioner's conviction on Count Two increased the applicable Guidelines range to 262–327 months. PSR ¶ 85; see U.S.S.G. § 4B1.1(c)(3). Thus, petitioner's conviction under § 924(c)(1)(A) raised his minimum Guidelines sentence by 111 months. In its judgment entered November 29, 2005, the district court imposed concurrent sentences of 202 months on Count One and 120 months on Count Three. As to Count Two, the district court sentenced petitioner to the statutory minimum, a consecutive sentence of 60 months, producing an aggregate sentence of 262 months' imprisonment. App., *infra*, 6a.

B. The Court of Appeals' Decision

Petitioner timely appealed his conviction on Count Two. As contemplated by the plea agreement, the appeal raised the sole issue of whether mere receipt of a firearm was sufficient as a matter of law to support petitioner's conviction for use of a firearm during and in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1)(A). Pet. C.A. Br. 2. The Fifth Circuit affirmed petitioner's conviction based on circuit precedents established in *United States* v. *Ulloa*, 94 F.3d 949 (5th Cir. 1996), and *United States* v. *Zuniga*, 18 F.3d 1254 (5th Cir. 1994). App., *infra*, 2a.

The Fifth Circuit decided *Zuniga* before this Court's opinion in *Bailey* clarified the meaning of "use" under § 924(c)(1). In *Zuniga*, the defendants accepted multiple firearms in partial satisfaction of a debt arising from a heroin deal. On the basis of the defendants' receipt of the firearms in exchange for the drugs previously provided, a jury convicted defendants of "using" a firearm during and in relation to a drug trafficking crime, in violation of § 924(c)(1). On appeal, the Fifth Circuit affirmed the defendants' convictions, relying on this Court's opinion in *Smith*. While *Smith* specifically considered only a defendant's *active* trading of a firearm for drugs, the Fifth Circuit read the case to apply to the reverse situation of a defendant's receipt of a firearm in exchange for drugs. *Zuniga*, 18 F.3d at 1258.

Two years later (and after this Court's decision in *Bailey*), the Fifth Circuit revisited the issue. In *Ulloa*, the Fifth Circuit again held that a defendant's receipt of a firearm in exchange for drugs constituted "use" of a firearm during and in relation to a drug trafficking offense. Despite this Court's holding in *Bailey* that "§ 924(c)(1) requires evidence sufficient to show an *active employment* of the firearm by the defendant," 516 U.S. at 143, a divided panel of the Fifth Circuit reaffirmed *Zuniga* and ruled that mere receipt of a gun in a drug tran-

saction constituted "use" of a firearm during and in relation to a drug trafficking crime. *Ulloa*, 94 F.3d at 956.

Chief Judge Politz dissented. He distinguished bartering *with* a firearm, conduct that *Smith* and *Bailey* described as within 18 U.S.C. § 924(c)(1)(A), from bartering *for* a firearm. With respect to the latter, the dissent argued that the panel opinion misapplied *Bailey* and ignored its central holding: "*Bailey* clearly requires 'active employment' of the firearm. In the case at bar, however, the firearm was exclusively the passive object of [the defendant's] actions." *Ulloa*, 94 F.3d at 958. The dissent would have held that, without more, bartering for and receiving a firearm in exchange for drugs does not constitute "use" of a firearm during and in relation to a drug trafficking offense. *Ibid.*

In this case, as in *Zuniga* and *Ulloa*, petitioner merely received a gun as payment in a drug transaction. App., *infra*, 9a. Accordingly, the Fifth Circuit determined that it was bound by *Ulloa* and therefore affirmed petitioner's conviction. This petition followed.

REASONS FOR GRANTING THE PETITION

I. The Courts Of Appeals Are Divided As To Whether Receipt Of A Firearm In Exchange For Drugs Constitutes "Use" Within The Meaning Of 18 U.S.C. § 924(c)(1)(A)

As the government acknowledged below, "there is a split in the circuits" regarding whether an individual who receives a firearm in exchange for drugs "uses" that firearm within the meaning of 18 U.S.C. § 924(c)(1)(A). Gov't C.A. Br. 17. The First, Third, Fourth, Fifth, Eighth, and Ninth Circuits consider such receipt to be "use" under § 924(c)(1)(A). The Sixth, Seventh, Eleventh, and D.C. Circuits do not.

This Court addressed the meaning of "use" under 18 U.S.C. § 924(c)(1) in *Bailey* v. *United States*, 516 U.S. 137

(1995). *Bailey* held that "use" means "*active employment* of the firearm." *Id.* at 143. The Court emphasized that the term "use" must be given its "'ordinary or natural' meaning," which "impl[ies] action and implementation." *Id*. at 145. The Court rejected an interpretation of "use" that was "virtually synonymous with 'possession.'" *Id*. at 150.

Since *Bailey*, four circuits have held that mere receipt of a firearm in exchange for drugs is not "use" of the firearm under 18 U.S.C. § 924(c)(1)(A). Those courts have determined that receipt of a firearm is a passive act that does not meet the "active employment" requirement of *Bailey*. See *United States* v. *Montano*, 398 F.3d 1276, 1284 (11th Cir. 2005) ("[The defendant] did not violate § 924(c) by trading methamphetamine for firearms."); *United States* v. *Stewart*, 246 F.3d 728, 731 (D.C. Cir. 2001) ("[W]e cannot see how a defendant 'uses' a gun when he receives it during a drug transaction."); *United States* v. *Warwick*, 167 F.3d 965, 975 (6th Cir. 1999) ("[P]assive receipt of [a] shotgun * * * in exchange for marijuana did not constitute a 'use' of the firearm * * *."); *United States* v. *Westmoreland*, 122 F.3d 431, 435 (7th Cir. 1997) ("[P]assively receiving a gun * * * in payment for drugs cannot constitute a use * * *.").

The difference between trading drugs for a firearm and trading a firearm for drugs, those courts have further explained, is that the defendant "did not bargain *with* his firearm, he bartered drugs in order to obtain that firearm." *Montano*, 398 F.3d at 1283. Just as a person who "pays a cashier a dollar for a cup of coffee in the courthouse cafeteria" has not "used" the coffee, a person who "pays for a gun with drugs" has not "used" the firearm. *Stewart*, 246 F.3d at 731. Simply put, "[a] seller does not 'use' a buyer's consideration." *Westmoreland*, 122 F.3d at 436; see also *United States* v. *Patterson*, 215 F.3d 776, 783 (7th Cir. 2000) ("Using drugs as currency to buy guns does not 'use' the guns.").

Six circuit courts have reached the opposite conclusion, holding that receipt of a firearm in exchange for drugs does constitute "use" of the firearm within the meaning of 18 U.S.C. § 924(c)(1)(A). See *United States* v. *Cotto*, 456 F.3d 25 (1st Cir. 2006); *United States* v. *Sumler*, 294 F.3d 579, 583 (3rd Cir. 2002); *United States* v. *Ramirez-Rangel*, 103 F.3d 1501 (9th Cir. 1997); *United States* v. *Ulloa*, 94 F.3d 949, 956 (5th Cir. 1996); *United States* v. *Cannon*, 88 F.3d 1495 (8th Cir. 1996); *United States* v. *Harris*, 39 F.3d 1262 (4th Cir. 1994).

In the view of those courts, trading firearms for drugs and trading drugs for firearms "is a distinction without a difference," and thus, under *Smith* v. *United States*, 508 U.S. 223 (1993), both situations constitute "use" of the firearm under § 924(c)(1)(A). *Cannon*, 88 F.3d at 1509; see also *United States* v. *Weekes*, 2000 WL 750544, at *1 (9th Cir. 2000) (unpublished) (holding that the distinction between trading drugs for firearms and trading firearms for drugs was "meaningless"). The courts emphasize the decision in *Smith* and downplay *Bailey*'s more recent emphasis on the "ordinary or natural meaning" of "use." *Cannon*, 88 F.3d at 1508-1509; *Ramirez-Rangel*, 103 F.3d at 1506.

The First Circuit recently acknowledged the depth and currency of the split, observing that the position taken by the Sixth, Seventh, Eleventh, and D.C. Circuits is "not without merit," because it is "less natural" to say that receipt of a firearm is "use" of the firearm. *Cotto*, 456 F.3d at 28. Were it "writing on a blank slate," the First Circuit confessed, it "might well be inclined" to join those four circuits in holding that, "based on the most natural reading of the statute[, a defendant does] not 'use' the guns by bartering for them." *Ibid*.

The First Circuit held otherwise, however, because it felt constrained by *Smith*. See *Cotto*, 456 F.3d at 28 ("*Smith* controls here."). Like five other circuits, it held that nothing in *Bailey* "compels us to distinguish *Smith*" and its "broad

understanding of what it means for a firearm to be 'used.'" *Id*. at 28–29. To the extent those circuits squarely confront *Bailey*, they focus on this Court's mention of "bartering" as an example of "active employment." *Bailey*, 516 U.S. at 148. Those courts interpret that language in *Bailey* to mean that bartering drugs for a firearm actively employs the firearm, since, in that trade, the firearm is "'an operative factor in relation to the predicate offense.'" *Ulloa*, 94 F.3d at 956; see also *United States* v. *Rogers*, 150 F.3d 851, 858 (8th Cir. 1998).

* * *

In sum, in the First, Third, Fourth, Fifth, Eighth, and Ninth Circuits, an individual may be convicted of violating 18 U.S.C. § 924(c)(1)(A) based on the mere receipt of a firearm in exchange for drugs. The Sixth, Seventh, Eleventh, and D.C. Circuits have reached exactly the opposite conclusion. Thus, as the United States acknowledged below, this question has squarely and deeply divided the courts of appeals. This Court's intervention is necessary to resolve this split and to provide uniform guidance to defendants, prosecutors, and judges on this important issue.

II. The Fifth Circuit's Rule Conflicts With The Plain Meaning Of "Use" And This Court's Decision In *Bailey*

A. The Plain Meaning Of "Use" Does Not Include Mere Receipt Of A Firearm

This Court's intervention is also necessary to correct the fundamental misunderstanding that the term "use" includes mere receipt of a firearm in exchange for drugs. Where a statute does not define a particular term, interpretation starts with the term's ordinary meaning. *Smith*, 508 U.S. at 228 (citing *Perrin* v. *United States*, 444 U.S. 37, 42 (1979)). Under the ordinary meaning of "use," a firearm is not "used" whenever it is merely received in a drug transaction.

The standard dictionary definitions of use set forth in *Smith*, 508 U.S. at 228–229, do not encompass receipt of a firearm. For example, by receiving a firearm in exchange for drugs, the recipient has not "employed" the firearm or "derived service" from it. Cf. *id.* at 229 (explaining that a defendant who trades a gun for drugs has used the gun under § 924(c)(1) because he has "derived service" from the gun). The recipient has acquired and obtained the firearm, but in no sense has the recipient actually made use of the firearm.

As the Seventh Circuit explained, the plain meaning of the term "use" cannot bear the strained reading necessary to encompass mere receipt:

> If [the government agent] had paid for the gun with a $100 bill, we would not say that [the defendant] 'used' $100 in selling his gun to [the other party to a transaction]. A seller does not "use" a buyer's consideration. The only person actively employing the gun in this transaction is the government agent.

Westmoreland, 122 F.3d at 435–436. Indeed, even the Third Circuit, which ultimately misread *Smith* and *Bailey* to reach the opposite conclusion, recognized the logic of the Seventh Circuit's textual analysis: "The *Westmoreland* Court advanced a forceful argument in declaring 'there is no grammatically correct way to express that a person received a payment is thereby "using" the payment.'" *Sumler*, 294 F.3d at 583 (quoting *Westmoreland*, 122 F.3d at 435). Those courts that understand "use" of a firearm during and in relation to a drug trafficking crime to encompass bartering with drugs for a firearm have ignored the term's ordinary meaning.

B. The Fifth Circuit's Rule Conflicts With This Court's Decision In *Bailey*

1. The sharp conflict among the courts of appeals (*supra*, pp. 7-10) reflects their confusion in applying this Court's decision in *Bailey*. In that case, the defendants were convic-

ted of "use" of a firearm under § 924(c)(1) for possessing firearms in the vicinity of a drug trafficking offense. This Court unanimously reversed the convictions and demarcated the scope of the § 924(c)(1) use offense: "To sustain a conviction under the 'use' prong of § 924(c)(1), the Government must show that the defendant actively employed the firearm during and in relation to the predicate crime." 516 U.S. at 150. The Court explained that no active employment occurred if the purported use constituted some passive function performed by the firearm in the drug trafficking transaction. *Id.* at 148–149. Instead, active employment meant use of the firearm that "makes the firearm an operative factor in relation to the predicate offense." *Id.* at 143.

Despite that language, several courts of appeals have relied upon *Bailey* to justify interpreting § 924(c)(1)(A) to include mere receipt of a gun in exchange for drugs. Those courts have viewed as controlling *Bailey*'s inclusion of "bartering" on an illustrative list of conduct constituting active employment of a firearm. See *Cotto*, 456 F.3d at 29; *Sumler*, 294 F.3d at 582; *Ulloa*, 94 F.3d at 955; *Cannon*, 88 F.3d at 1509. To be sure, this Court stated in *Bailey* that "[t]he active-employment understanding of 'use' certainly includes brandishing, displaying, *bartering*, striking with, and, most obviously, firing or attempting to fire a firearm." 516 U.S. at 148 (emphasis added). But it is clear that those courts misunderstood this language to refer to both bartering *with* a firearm for drugs, the situation actually addressed in *Smith* and referred to in *Bailey*, and bartering with drugs *for* a firearm, the scenario presented here.

The inclusion of bartering on that list of examples of use immediately follows the Court's statement that *Bailey* did not abrogate the holding of *Smith*. *Bailey*, 516 U.S. at 148. In *Smith*, this Court held that a defendant who bartered *with* his firearm in exchange for drugs "used" the firearm within the meaning of § 924(c)(1): "By attempting to trade his MAC-10 for the drugs, [the defendant] 'used' or 'employed' it as an

item of barter to obtain cocaine; he 'derived service' from it because it was going to bring him the very drugs he sought." 508 U.S. at 229.[1]

In affirming the result in *Smith*, *Bailey* did not purport to hold that every instance of barter violated the statute; rather, read in context, *Bailey*'s illustrative list included only the conduct of bartering *with* a firearm. See *Stewart*, 246 F.3d at 732 ("The Supreme Court included 'bartering' in a list of examples of active employments that might fall within § 924(c)(1) definitions of 'use.' The Supreme Court did not purport to be encompassing every possible situation involving barter as a violation of the statute."). Moreover, elsewhere in *Bailey*, this Court made it clear that its mention of "bartering" referred to bartering *with* a firearm. See 516 U.S. at 146 ("Under the interpretation we enunciate today, a firearm can be used without being carried, *e.g.*, when an offender has a gun on display during a transaction, or barters *with* a firearm without handling it.") (emphasis added). Thus, those courts that treat *Bailey* as allowing § 924(c)(1)(A) to encompass bartering *for* a firearm by exchanging drugs fundamentally misread that decision.

Those courts also fail to appreciate *Bailey*'s rejection of inherently passive conduct (there, mere possession of a firearm) as constituting "use" within the meaning of § 924(c)(1)(A). As the Court explained, "[p]erhaps the non-active nature of this asserted 'use' is clearer if a synonym is used: storage." *Bailey*, 516 U.S. at 149. Likewise, in this case, the nonactive nature of the defendant's conduct becomes clear when "use" is replaced by a more accurate

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[1] In dissent, Justice Scalia, joined by Justices Stevens and Souter, lamented the majority's decision to stray from "our rule that ordinary meaning governs" by expansively interpreting "use a firearm" beyond its reasonably implicit meaning. *Smith*, 508 U.S. at 244. The dissent would instead have limited the meaning of use in § 924(c)(1) to use of the firearm for its intended purpose as a weapon. *Id.* at 242.

synonym: receipt. When a person receives a firearm in exchange for drugs, he has engaged in only passive conduct. He has not actively employed the firearm by receiving it, and, under *Bailey*, he has not used the firearm.[2]

2. Congress demonstrated its agreement with *Bailey*'s reasoning that "use" under § 924(c)(1)(A) includes only "active employment." Shortly after this Court's decision in *Bailey*, Congress amended the language of § 924(c)(1) to criminalize possession of a firearm "in furtherance" of a drug trafficking offense. Displeased with the result in *Bailey*, but apparently not with this Court's interpretation of the statutory term "use," Congress simply added the "possession in furtherance" prong to § 924(c)(1) to reach the type of conduct at issue in *Bailey* and similar cases—namely, "situations

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[2] This Court has in other circumstances recognized the distinction between active and passive conduct, choosing to characterize simple receipt as passive. In *McDonald* v. *Williams*, 174 U.S. 397 (1899), this Court considered whether bank shareholders' receipt of a dividend violated Revised Statutes § 5204, which provided that "[n]o association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital." Unbeknownst to the shareholders, the dividends paid to them in certain years came out of the bank's capital because the bank had failed to produce net profit in those years. The bank's receiver sued to recover the dividends from the shareholders under § 5204. In ruling for the shareholders, this Court interpreted § 5204 to require "some positive or affirmative act on the part of the shareholder." *Id*. at 406. In keeping with the "positive or affirmative act" required under § 5204, this Court held that Congress did not intend the statute "to include the case of the *passive receipt* of a dividend by a shareholder in the *bona fide* belief that the dividend was paid out of profits." *Ibid.* (emphasis added). *McDonald* provides an apt analogy to the drugs-for-gun transaction at issue in this case. Just as the Court characterized the stockholders' receipt of a dividend (received in exchange for their capital investment) as passive, a defendant's receipt of a firearm (as consideration for the drugs he provides) is likewise an inherently passive act.

where a defendant kept a firearm available to provide security for the transaction, its fruit or proceeds, or was otherwise emboldened by its presence in the commission of the offense." 144 Cong. Rec. S12670 at S12671 (statement of Sen. DeWine). The amendment did not purport to disturb *Bailey*'s holding that a defendant charged under the "use" prong of § 924 must "actively employ" the firearm in a drug trafficking offense.

Congress's decision not to disturb the "use" prong appears to have been deliberate. An early House version of the revised statute sought to excise the phrase "uses or carries" altogether and to replace that language with a tiered approach criminalizing possession, brandishing, or discharge of a firearm during and in relation to a crime of violence or drug trafficking crime. H.R. 424, 105th Cong. (1997). The Senate version, however, retained the "uses or carries" language and added new possession language. S. 191, 105th Cong. (1997); see also Angela LaBuda Collins, Note, *The Latest Amendment to 18 U.S.C. § 924(c): Congressional Reaction to the Supreme Court's Interpretation of the Statute*, 48 Cath. U. L. Rev. 1319 (1999). Congress ultimately agreed to compromise legislation retaining "use" as a separate category and adding a separate possession in furtherance offense, which passed both houses in October 1998. See Pub. L. 105-386, 112 Stat. 3469 (1998).

In the House, the new provision was justified as a way to punish "severely" those "criminals who carry guns while committing serious crimes." 144 Cong. Rec. H10329 (statement of Rep. McCollum). While praising the amendment as "a critical tool in our fight against gun-toting criminals," Representative McCollum cautioned that "this bill will not affect any person who merely possesses a firearm in the general vicinity of a crime." *Id.* at H10330.

In the Senate, proponents also hailed the passage of this legislation, which would "provide enhanced mandatory mini-

mum penalties for those criminals who *use* guns while trafficking in drugs." 144 Cong. Rec. S12670 (statement of Sen. DeWine) (emphasis added). As Senator DeWine explained, the 1998 amendment sought to address the issue of "constructive possession" of firearms. *Ibid.* Senator DeWine further explained the significance of the "in furtherance" standard. He noted that the addition of this modifier was intended to impose "a slightly higher standard that encompasses 'during and in relation to' language, by requiring an indication of helping forward, promote, or advance a crime." 144 Cong. Rec. S12671 (statement of Sen. DeWine).

This understanding is also reflected in the House Report that accompanied that chamber's version of the legislation. See H.R. Rep. No. 105-344. The House Judiciary Committee acknowledged the subtle distinction between the "during and in relation to" and "in furtherance of" standards, noting that the latter was "a slightly higher standard." *Id.* at 11. In the Committee's words, "[t]he Government must clearly show that a firearm was possessed to advance or promote the commission of the underlying offense. The mere presence of a firearm in an area where a criminal act occurs is not a sufficient basis for imposing this particular mandatory sentence." *Id.* at 12. In fact, according to the Committee Report, facts like those alleged in *Bailey* "may be insufficient to meet the 'in furtherance test.'" *Ibid.*

Thus, when Congress set about to address the result of *Bailey*, it did not purport to disturb this Court's definition of "use" as requiring active employment. To the contrary, Congress carefully avoided any suggestion that would transform the mere presence of a gun near a drug transaction into an offense carrying the stiff penalties mandated by § 924(c)(1)(A).

III. The Decision Below Presents A Recurring Issue Of National Significance

1. As evidenced by the depth of the split among the lower courts, this question has arisen repeatedly since *Bailey*. See *Cotto*, 456 F.3d 28; *Watson*, App., *infra*, 1a-2a; *Montano*, 398 F.3d at 1282-1284; *United States* v. *Short*, 55 Fed. App'x 183 (4th Cir. 2003) (unpublished); *Sumler*, 294 F.3d at 580; *Stewart*, 246 F.3d at 731-733; *Warwick*, 167 F.3d at 975-976; *Westmoreland*, 122 F.3d at 434-436; *Ramirez-Rangel*, 103 F.3d at 1506; *Ulloa*, 94 F.3d at 955-956; *Cannon*, 88 F.3d at 1508-1509; *Zuniga*, 18 F.3d at 1258; *United States* v. *Sanchez*, 2006 WL 472739 (D. Utah 2006) (unpublished); *United States* v. *Trotter*, 2005 WL 2239479 (D. Kan. 2005) (unpublished). Indeed, as the decision below and the First Circuit's recent decision in *Cotto* reveal, the issue is one of immediate and continuing concern in the lower courts.

The frequency with which this issue arises is not surprising. More than one out of every ten convictions of a federal drug offense involves a sentence enhanced for use of a firearm (be it under the Sentencing Guidelines or the mandatory 60-month consecutive minimum sentence required by § 924(c)). U.S. Dep't of Justice, Bureau of Justice Statistics, Federal Drug Offenders, 1999 with Trends 1984–99, at 10. Prosecutors may forgo or dismiss a § 924(c)(1)(A) enhancement in exchange for a negotiated guilty plea and Guidelines enhancement, see Memorandum from Att'y Gen. John Ashcroft to All Federal Prosecutors (Sept. 22, 2003), but the option to seek the sentencing enhancement mandated by a § 924(c) conviction is frequently available.

2. This issue is particularly significant because a conviction under § 924(c)(1)(A) subjects defendants to significant mandatory imprisonment that must be served consecutively to any other sentence imposed. See 18 U.S.C. § 924(c)(1)(A)(i), (c)(1)(D). As a result, in jurisdictions that recognize a drugs-for-gun transaction as "use" of a firearm

during and in relation to a drug trafficking offense, conviction under § 924(c)(1)(A) would compel the sentencing court to impose a minimum consecutive term of five years above and beyond the sentence imposed for the predicate drug trafficking offense. In contrast, in jurisdictions that do not equate mere receipt with use, a defendant convicted of the underlying drug trafficking crime would face at most a two-level enhancement in the base offense level under the Sentencing Guidelines. See U.S.S.G. § 2D1.1(b)(1). The consequences of such an enhancement are thus much less severe than the mandatory consecutive five-year minimum sentence resulting from a § 924(c)(1)(A) conviction, particularly since *United States* v. *Booker*, 543 U.S. 220 (2005), rendered the Guidelines only advisory.

The significance of a conviction under § 924(c)(1)(A) is even more pronounced where, as here, a defendant qualifies as a career offender under Sentencing Guidelines § 4B1.1(a).[3] For career offenders, a conviction under § 924(c)(1)(A) for trading drugs for a gun generally requires a minimum sentence of 262–327 months. See U.S.S.G. § 4B1.1(c)(2) (establishing the minimum sentence for a career offender conviction that includes using a firearm during and in relation to a drug trafficking offense). In petitioner's case, the impact of the § 924(c)(1)(A) conviction was particularly acute. As a career offender under Counts I and III of the indictment, the probation officer calculated that the Sentencing Guidelines recommended a sentence of 151–188 months. PSR ¶ 84.

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[3] Sentencing Guidelines § 4B1.1(a) provides the qualifications for sentencing as a career offender:

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

Sentencing Guidelines § 4B1.1(a).

With the addition of petitioner's § 924(c)(1)(A) conviction, however, the Guidelines recommended a sentence of 262–327 months, an increase in the minimum sentence of 111 months. Thus, had petitioner engaged in the exact same transaction in a jurisdiction that does not recognize mere receipt of a gun as "use" under § 924(c)(1)(A), his sentence could have been nearly ten years shorter.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DANIEL R. ORTIZ
University of Virginia School of Law Supreme Court Litigation Clinic
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

MARK T. STANCIL*
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

KARL J. KOCH
McGlynn, Glisson & Koch
340 Florida Street
Baton Rouge, LA 70801
(225) 344-3555

DAVID T. GOLDBERG
David T. Goldberg Law Office
99 Hudson Street, 8th Floor
New York, NY 10013
(212) 334-8813

**Counsel of Record*

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