

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MICHAEL A. WATSON, :

4 Petitioner :

5 v. : No. 06-571

6 UNITED STATES :

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8 Washington, D.C.

9 Tuesday, October 9, 2007

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11 The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States  
13 at 10: 05 a.m.

14 APPEARANCES:

15 KARL J. KOCH, ESQ., Baton Rouge, La.; on behalf of  
16 the Petitioner.

17 DEANNE E. MAYNARD, ESQ., Assistant to the Solicitor  
18 General, Department of Justice, Washington, D.C.; on  
19 behalf of the Respondent.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 06-571, Watson v. United States.

Mr. Koch.

ORAL ARGUMENT OF KARL J. KOCH

ON BEHALF OF THE PETITIONER

MR. KOCH: Mr. Chief Justice, and may it please the Court:

Mr. Watson's receipt of a firearm in exchange for drugs does not constitute the use of that firearm as the word "use" is employed by 18 U.S.C. Section 924(c)(1) for two principal reasons. First, applying the plain and ordinary meaning of the word "use," the receipt of a thing is not the use of that thing. There is no grammatically proper way to say that someone uses a firearm when all that person does is receive it.

Second, treating receipt as use under the statute conflicts with this Court's decision in Bailey v. United States, which held that use requires active employment. And I'll address those two points in turn.

JUSTICE GINSBURG: Would you address first whether receipt of the gun constitutes possession of the

1 gun?

2 MR. KOCH: Yes, ma'am. I believe receipt  
3 does constitute possession. However, of course,  
4 possession standing alone under this Court's decision in  
5 Bailey does not constitute use.

6 JUSTICE GINSBURG: But under the statute as  
7 amended, possession is also indictable.

8 MR. KOCH: Possession in furtherance of the  
9 offense is -- is -- would be indictable. That -- that  
10 was not charged in this particular case. And I would  
11 suggest that the -- that the circumstances of this case  
12 might not call that into -- into play simply because his  
13 possession really was -- was incidental, and it was  
14 following the conclusion of the drug transaction.

15 So I think -- I question whether the  
16 possession in furtherance would necessarily apply here.  
17 Of course, it was not charged.

18 CHIEF JUSTICE ROBERTS: Well, I'm not sure.  
19 I have the same question as Justice Ginsburg. It seems  
20 to me, absent some precedents which narrows this  
21 definition, that that would have been the way to charge  
22 your client. That's not what was charged; that's not  
23 the indictment; that's not what you're arguing. So I  
24 guess the question is more appropriate for the  
25 government.

1                   But, if, following Justice Ginsburg's  
2 question, this covers it, and it seems to me that it  
3 does, then we're not arguing about very much.

4                   MR. KOCH: I understand, Your Honor. My  
5 only point, again, would be, that recognizing that "in  
6 furtherance," at least by the authors of that language,  
7 would suggest it to mean something more than "in  
8 relation to,." I think the question could legitimately  
9 be asked in a -- in a transaction like this, where the  
10 possession basically is what he was attempting to  
11 achieve and did, in fact, achieve, but after the -- at  
12 the end transaction.

13                   I don't -- I can't answer whether or not,  
14 ultimately, that would be -- deemed to be in furtherance  
15 or not.

16                   CHIEF JUSTICE ROBERTS: Mr. Koch, let's say  
17 that the parties to the transaction are concerned about  
18 avoiding exposure under the money-laundering statute,  
19 and so they got together and said: All right, we are  
20 going to have this deal. What can we use besides money?  
21 And they say: Well, let's use guns, or let's use a gun.  
22 And the seller of the drugs says: Okay. I'm willing to  
23 use that.

24                   Isn't he using the gun in furtherance of the  
25 transaction?

1           MR. KOCH: I don't believe that the -- that,  
2 given what the -- what this Court has said in Bailey,  
3 that that would constitute active employment still. The  
4 --

5           CHIEF JUSTICE ROBERTS: It's being actively  
6 employed as the consideration in the sale.

7           MR. KOCH: However, the -- from the  
8 standpoint --

9           CHIEF JUSTICE ROBERTS: It's not being shot,  
10 but it's still being employed.

11           MR. KOCH: Yes, sir. From the standpoint of  
12 the -- of the seller -- from the standpoint of the drug  
13 seller, who's ultimately still doing nothing more with  
14 respect to the gun, I think the focus has to be on what  
15 are his activities? He hasn't even come into possession  
16 of it in the example that Your Honor has given.

17           CHIEF JUSTICE ROBERTS: But I think it would  
18 be a natural, grammatical construction to say he's  
19 willing to use the gun for the consideration.

20           MR. KOCH: Your Honor, I'm not certain that  
21 we would -- that we -- that it could be held in the  
22 absence even there of even possession -- whether or not  
23 that would be enough to constitute the use. That would  
24 be the first question that would occur to me. The --  
25 certainly grammatically, and dealing, of course, with

1 the facts of this case, grammatically the question on  
2 the table is: When interpreting 18 U.S.C. Section  
3 924(c)(1) giving it, as this Court held in Smith, its  
4 plain and ordinary meaning, the example that was used by  
5 the D.C. Circuit in United States v. Stewart, I thought,  
6 was appropriate, where -- the coffee shop example, where  
7 you have the -- the individual buying the coffee, and  
8 you have the cashier.

9           The -- the customer doesn't -- the customer  
10 comes in and pays with the dollar. The cashier accepts  
11 the dollar, but the cafeteria isn't using the dollar by  
12 receiving it as payment. It's just receiving it.  
13 Likewise, the customer isn't using the coffee through  
14 the act of receiving it. He's getting it.

15           JUSTICE ALITO: Well, if we look at this  
16 transaction, a guns-for-drugs transaction, is there --  
17 can you think of any good reason why Congress would want  
18 to prescribe a 5-year penalty for the person who hands  
19 over the gun, but not any penalty for the person who  
20 receives the gun and hands over the drugs?

21           MR. KOCH: I do think that there are  
22 distinctions between the two conducts, sir. First of  
23 all, certainly the person that -- that has the gun and  
24 is bringing it into that transaction I would suggest, as  
25 a practical matter presents a different type of risk.

1 He's got the gun. He's in control of it. He's going to  
2 decide when and if to hand it over and in what condition  
3 it would be when he hands it over, or not to hand it  
4 over at all. So that the --

5 JUSTICE ALITO: And so that the -- the risk  
6 is Congress was worried that somebody would go to a  
7 transaction like this with a gun originally intending to  
8 trade it for drugs and then when one person gets there,  
9 a person decides to shoot somebody with the gun?

10 MR. KOCH: I think --

11 JUSTICE ALITO: And that's why they would  
12 penalize one side of this transaction and not the other?

13 MR. KOCH: Well, assuming of course it would  
14 -- in Smith the Court held that that is a use within the  
15 term of the statute. I think that the -- looking at --  
16 this does not do violence to this Court's decision in  
17 Bailey. There still has to be some active employment.  
18 The person on the drug end of the transaction is --  
19 really has nothing to do with the gun, doesn't even  
20 possess the gun, which -- before the other party decides  
21 to hand it over.

22 JUSTICE GINSBURG: In Smith, the Court said  
23 that the reason that selling the gun in exchange for  
24 drugs -- what was dangerous about that was the potential  
25 for instantly converting the gun from currency to a



1 cannon. But here isn't that even all the more of  
2 concern because one who receives the gun can instantly  
3 turn it around and shoot the drug seller?

4 MR. KOCH: He could if the gun was handed  
5 over in a condition -- first of all, there -- were there  
6 bullets or not? That's going to be up to, at the first  
7 instance, whether he brings them or not, the gun seller.  
8 The gun seller can decide whether to hand it over --

9 JUSTICE GINSBURG: But it's the same on both  
10 sides. It seems to me in both cases there is a risk of  
11 using the gun. The one who comes in with the gun can  
12 use it; the one who receives the gun can use it.

13 MR. KOCH: I will -- I will grant Your Honor  
14 there's obviously risk presented by the presence of the  
15 gun potentially by either party. I would suggest that,  
16 as between the two parties, the fellow that shows up  
17 with the gun who's going to decide when and if to hand  
18 it over and in what condition, cocked, uncocked, loaded  
19 or unloaded, et cetera, is in somewhat more control.

20 All that being said, one still gets back to  
21 the central point, which is, regardless of Congress's  
22 purpose or desires here, they still chose words that had  
23 fairly common meanings, in this case "use." And very --  
24 it's grammatically impossible, I'd suggest, in the  
25 straightforward transaction and trade situation to

1 suggest that the guy that's receiving the gun is using  
2 it by receiving it, any more than the cashier is using  
3 the dollar that I pay for the cup of coffee with.

4 JUSTICE ALITO: If the person who hands over  
5 the gun is not a government agent or informant, is there  
6 any doubt that the person who hands over the drugs can  
7 be charged with using the -- the gun under 18 U.S.C.  
8 Section 2(b)? He causes -- the person who hands over  
9 the gun, to do something that is a crime.

10 MR. KOCH: I do think that there -- that's  
11 an issue that's been raised. I -- I question whether,  
12 when the underlying offense itself is the transaction  
13 and these are the only two parties, whether or not  
14 aiding and abetting liability would be intended to  
15 extend that far, any more than it would be, for example,  
16 to a drug purchaser being charged with aiding and  
17 abetting the distribution of drugs.

18 Certainly, given the severe penalties  
19 involved, I -- I'm a little uncomfortable with that  
20 being a usage of that statute or usage of the aiding and  
21 abetting statute. I also would point out that the  
22 overwhelming majority of these cases do involve police  
23 informants, practically all of them.

24 JUSTICE ALITO: Well, you're relying on the  
25 language of 924. If you look at the language of 2(b),

1 is there any doubt that this situation would fall  
2 squarely under it? "Whoever willfully causes an act to  
3 be done which if directly performed by him would be an  
4 offense against the United States is punishable as a  
5 principal."

6 MR. KOCH: That is what that statute says,  
7 sir. There is some jurisprudence, and I'm -- it may be  
8 older in nature -- that deals with two parties to a  
9 transaction and whether or not aiding and abetting  
10 liability can be used, again going back to my drug  
11 purchaser situation. And I question whether or not the  
12 -- the aiding and abetting statute can be used. It  
13 would basically, in the drug context, read out the  
14 possession statute. Every drug buyer could be charged  
15 with distribution as a principal under Section 2. The  
16 -- again, of course that's not charged here, and I've  
17 not -- I've not seen cases where that has been charged.

18 CHIEF JUSTICE ROBERTS: Subsection (b) is  
19 not charged in the indictment?

20 MR. KOCH: 18 U.S.C. Section 2 was what I  
21 understood the question to be, Judge. I apologize.

22 CHIEF JUSTICE ROBERTS: No. But that was  
23 not charged in the indictment?

24 MR. KOCH: No, sir.

25 CHIEF JUSTICE ROBERTS: Section 2(b)?

1 MR. KOCH: It was not.

2 Now, the -- the government's brief concedes  
3 it would not be natural to say that the customer in my  
4 example with the coffee used the coffee. Unless we're  
5 prepared to discard that standard usage of words and  
6 sacrifice it for the purpose that we believe Congress  
7 intended, then I think that the analysis really does  
8 stop there if one's reading the language of the statute  
9 and applying it.

10 JUSTICE GINSBURG: Mr. Koch, but the  
11 government answers that, a dollar for coffee, by saying  
12 it depends what question you ask. So if you ask was the  
13 coffee part of a beverage transaction, the answer would  
14 be of course yes.

15 MR. KOCH: One of the problems --

16 JUSTICE GINSBURG: This is a gun  
17 transaction.

18 MR. KOCH: Yes, ma'am. One of the problems  
19 I think that that raises that I see in different  
20 contexts with this is the different ways that the word  
21 "use" is used in an active or passive context. One  
22 might see two people to that transaction and ask, is a  
23 dollar being used in that transaction? And I think that  
24 we would all fairly say yes. But the focus in 924(c) is  
25 on that defendant: Did he use it? Just in the coffee

1 shop example, did the cashier use the dollar? Or in my  
2 example, did Mr. Watson use the firearm? And I think  
3 that that's -- that's the question that needs to be  
4 asked and when that question is asked in that format,  
5 then the answer I suggest is no.

6 JUSTICE GINSBURG: I don't remember whether  
7 you ask in your brief as an alternative argument for the  
8 overruling of Smith.

9 MR. KOCH: I did not raise that in the  
10 briefs, no, ma'am.

11 With regards to Bailey, which I think  
12 answers to a great extent some of the questions  
13 presented here, Bailey of course held that 924(c)(1)  
14 requires evidence sufficient to show an active  
15 employment of the firearm by the defendant. Mr. Watson  
16 here did not actively employ the firearm. Bailey  
17 narrowed the category of uses that fell within the  
18 statute. To quote Bailey, it said "It's undeniable the  
19 active employment reading of use restricts the scope of  
20 924(c)(1)." That's the jewel of that case. Bailey held  
21 that use requires active employment, not only in general  
22 but by the defendant.

23 More importantly perhaps to this case,  
24 Bailey held that possession alone is not use, and here  
25 Mr. Watson was trying to achieve possession, but -- and

1 ultimately when he did get possession, he had it  
2 instantaneously. So looking at it from a temporal  
3 standpoint, first he receives the gun. Before that  
4 point he doesn't have possession, so he doesn't even  
5 rise to the level of Bailey. After that point, all he  
6 did was possess it for an instant, still not enough, I'd  
7 suggest, to qualify as active employment or use under  
8 Bailey, the most recent definition that we have  
9 available.

10           There's an argument presented by the  
11 government that feeds off of Smith's use of 924(d) which  
12 I wanted to mention briefly. The -- and that is the --  
13 the importation of the definition of the term "use" from  
14 924(d), the forfeiture provision of the statute, into  
15 924(c).

16           In Smith, the Court held that there were  
17 predicate offenses for 924(d) in which the only way that  
18 the weapon could be used was in a non-weapon use, which  
19 is what the Court was concerned about in the Smith case,  
20 and therefore the Court found, looking at those  
21 predicate offenses that had non-weapon uses only, that  
22 therefore the term "use" as it's employed in 924(d) must  
23 include non-weapon use. That logic, however -- and  
24 that's the argument made by the government -- that  
25 doesn't translate into the situation we have here. It's

1 addressed, by the way, on page 9 of our reply brief in  
2 some detail. I'll talk about it briefly.

3 First of all, 924(d) is a forfeiture  
4 provision and the focus there necessarily is on the  
5 firearm, not on the defendant. The language in 924(d)  
6 is, quote, "any firearm or ammunition intended to be  
7 used in one of the predicate offenses." That's compared  
8 with 924(c), which states "any person who during and in  
9 relation to a drug trafficking crime uses or carries a  
10 firearm."

11 So you have firearm intended to be used on  
12 the one hand, versus a person who uses a firearm. One  
13 might say perhaps that in this transaction a firearm was  
14 used, but not -- that's a different thing from saying  
15 that Mr. Watson used the firearm. It's a passive versus  
16 active formulation.

17 JUSTICE GINSBURG: It has to be used by  
18 somebody, some human, and the human in this case is  
19 Mr. Watson.

20 MR. KOCH: Well, ma'am, I think under Smith  
21 the human that's using the firearm in the transaction is  
22 actually the person that came with the firearm to use it  
23 to purchase drugs. And as -- as Smith said that that  
24 was definitely a use, it wasn't even really contested in  
25 Smith. And so I -- and I'm not contesting for this case

1 obviously that that person that showed up with the gun  
2 is using the gun to get drugs.

3 JUSTICE SCALIA: Excuse me. It wasn't  
4 contested in Smith?

5 MR. KOCH: I beg your pardon, Judge. I  
6 meant that the Court, in its holding -- I recognize that  
7 it was contested. In its holding, the Court said that  
8 it tended to focus more on the question of whether or  
9 not a nonweapon use would -- would be required. But  
10 the -- certainly as between the two parties in this  
11 transaction, the guy that shows up with the gun trying  
12 to use it to get drugs is certainly making use of it in  
13 a way that, that recipient is not.

14 The -- in, in Smith, the Court reached the  
15 opinion it did about the meaning of the term "use" only  
16 because there were, there were predicate offenses in  
17 which the only uses available were nonweapons uses. By  
18 contrast, here the predicate offenses that are suggested  
19 to import this definition of "use," there aren't any  
20 predicate offenses in which the only way to commit the  
21 offense is through receipt.

22 I'll grant you that there are predicate  
23 offenses in which receipt is one of the ways in which  
24 the offense can be committed, but it's not the only way.  
25 And so that logical step can't be made, as it arguably



1 could have been in Smith.

2 And finally, unlike the situation in Smith,  
3 here we know that the predicate offenses can't be  
4 interpreted --

5 JUSTICE SCALIA: Excuse me. Go back over  
6 that.

7 MR. KOCH: Yes, sir.

8 JUSTICE SCALIA: Why couldn't it have been  
9 said in Smith that -- that trading it for drugs was not  
10 the only way in which the offense could have been  
11 committed? Couldn't the same thing have been said in  
12 Smith?

13 MR. KOCH: In Smith the argument, as I took  
14 it from the opinion, Justice, was that the -- when one  
15 looked at, at the predicates, there were several which  
16 had, according to the opinion, only nonweapon uses. So  
17 if, if it's used or intended to be used in committing  
18 one of those offenses and one looks at those offenses  
19 and there's only nonweapon uses, then so the argument  
20 goes, that means nonweapon uses are part of use.

21 JUSTICE SCALIA: So the issue in Smith was  
22 weapon versus nonweapon, and that's not what you're  
23 arguing here?

24 MR. KOCH: That's correct, sir.

25 JUSTICE SCALIA: The issue here is use

1 versus nonuse, active employment versus passive receipt?

2 MR. KOCH: Yes, sir.

3 JUSTICE SOUTER: Why isn't it -- why isn't  
4 your argument more directly that the issue here is -- is  
5 nonweapon use by A versus nonweapon use by B? You  
6 represent B and you say B wasn't the one who used it in  
7 a nonweapon sense?

8 MR. KOCH: I agree that certainly Mr. Watson  
9 didn't use it in any weapons sense. So if there is a  
10 use at all, it would be in a nonweapon sense.

11 JUSTICE SOUTER: And if you are right,  
12 that's the end of the case.

13 MR. KOCH: I understand, Your Honor. I  
14 understand what you're saying. I believe you're right.  
15 That is another way. It's not -- it's not the direction  
16 that we went, but that makes sense.

17 The -- what we focused on was use or not at  
18 the first instance. And Smith having decided that in  
19 that case use and defining it broadly to include a  
20 nonweapon use here, we're getting to the point where  
21 there's no use at all in the first place.

22 JUSTICE SOUTER: But you're not -- as you  
23 said before, you're not arguing for the overruling of  
24 Smith, and therefore, you concede that the other party  
25 to the transaction used the gun.

1 MR. KOCH: Yes, sir.

2 JUSTICE SOUTER: In a nonweapon sense.

3 MR. KOCH: Yes, sir.

4 JUSTICE SCALIA: I think you are making his  
5 argument. I think you're -- you're too humble, the  
6 argument you're making.

7 JUSTICE SOUTER: It's really not a bad one.  
8 I mean, you don't --

9 (Laughter.)

10 JUSTICE KENNEDY: But -- but what you're  
11 saying is that all Watson did was to receive the gun.  
12 But he agreed to accept the gun as payment.

13 MR. KOCH: Yes.

14 JUSTICE KENNEDY: It seems to me that in  
15 that sense he used a gun. It wasn't his gun yet, but he  
16 agreed that if the gun would be brought to the scene of  
17 the transaction, that he would accept receipt of it.

18 MR. KOCH: I would suggest, sir, that the  
19 agreement couldn't rise to the, to the level of active  
20 employment as that term is used in Bailey. In other  
21 words, at that point all he has done is make a statement  
22 that he'll accept something if it's offered. Whereas in  
23 Bailey --

24 JUSTICE KENNEDY: He says, you get a gun,  
25 you put it in your car, you come to my house, you bring

1 that gun with you, and I will give you drugs. I think  
2 in a sense he's using the gun. It's through the, the  
3 actions of another that he is doing it to be sure.

4 MR. KOCH: We -- I would take the position  
5 that he certainly, in a situation like that where he is,  
6 he is not possessing the gun, he is expressing his  
7 intentions or desires with respect to it. But he is not  
8 in a position to do anything more than that. I don't  
9 think that that fits within the definition of "use." I  
10 don't think that if I say that, that I'd like to buy  
11 your house and if you'll sell it to me, that I'm using  
12 the house.

13 JUSTICE KENNEDY: Perhaps. But it seems to  
14 me to unduly constrict the case to say that all he did  
15 was receive it. He did more than that. He agreed in  
16 advance.

17 MR. KOCH: It is correct that when he --  
18 that although he initially wanted to ask how much the  
19 gun was --

20 JUSTICE STEVENS: He agreed to let the other  
21 party to the transaction use a gun to pay for the drugs,  
22 the other party to make the use of the gun.

23 MR. KOCH: Factually what happened was that  
24 he wanted to buy a gun. And then the police officer,  
25 the undercover people said, well, instead of giving

1 money, we'll take drugs for it, which of course, brought  
2 us within the statute. That's the factual, particular  
3 factual circumstances here.

4 JUSTICE BREYER: What do you have besides  
5 the linguistic argument? I mean, when I start out, I  
6 can't think of a reason why Congress wouldn't want to  
7 penalize the buyer, not the seller. We are dealing with  
8 a statute that does catch your client, if they had only  
9 charged him with the right part. But no one in his  
10 right mind would ever rely on a ruling in your favor to  
11 actually engage in such a transaction, since it would  
12 violate the statute in 15 different ways. I exaggerate,  
13 but you see the point.

14 So you have a linguistic argument which  
15 people are -- you're right, I think, in saying it's  
16 awkward but not impossible. And, therefore, awkward but  
17 not impossible; we create an anomaly in the law. I  
18 can't think of a reason why to do it. So what else do  
19 you have?

20 MR. KOCH: Bailey. I have this Court's  
21 decision in Bailey, Your Honor, namely there that it  
22 can't just be a use. Even if we were to go ahead and  
23 hold our mouths and make that awkward formation and say  
24 what he did was a use, it's still not rising to the  
25 level as Bailey interpreted the term of active

1 employment.

2 JUSTICE SCALIA: And, of course, you could  
3 say the same thing about Bailey, I suppose. You know,  
4 What was there in Bailey except -- what was the term,  
5 linguistic -- nothing but a linguistic decision.

6 MR. KOCH: I guess ultimately --

7 JUSTICE SCALIA: Bailey doesn't make any  
8 more sense either from a policy standpoint.

9 MR. KOCH: I do think --

10 JUSTICE SCALIA: We sometimes we rely on  
11 linguistics, don't we?

12 MR. KOCH: Yes, sir.

13 JUSTICE BREYER: And sometimes we try to --

14 JUSTICE SCALIA: And sometimes the words of  
15 the statute.

16 MR. KOCH: I do think --

17 JUSTICE BREYER: I don't want to put you in  
18 a whipsaw here.

19 (Laughter.)

20 JUSTICE BREYER: Sometimes policy seems  
21 relevant, too, to figure out what Congress wanted.

22 But let me go back to the question I had,  
23 which is do you want to us overturn Smith? Are you  
24 asking that, because I could understand it more easily  
25 if you said, look, both sides of the transaction should

1 be treated alike, but they should be both outside the  
2 word "use."

3 MR. KOCH: I do not believe it's necessary  
4 for this Court to overrule Smith in order to rule for  
5 the Petitioner here, because of -- because of the  
6 differences, first of all linguistically; and secondly  
7 because of the reliance on Bailey.

8 JUSTICE GINSBURG: And in answer to my  
9 question, you said you were not urging the overruling of  
10 Smith?

11 MR. KOCH: That's correct. That being said,  
12 I think that there is, there are arguments that can be  
13 presented, they were presented in Smith, as to whether  
14 one could take one position or the other. But it  
15 doesn't, it doesn't do violence to Smith to hold for the  
16 Petitioner here.

17 Ultimately, when you look at the Bailey  
18 decision and at the facts of Bailey, and there you have  
19 people riding around with guns in the trunk of their  
20 car, and that's held not to be a use within the statute.

21 Well, here Watson didn't even do that. He  
22 never had the guns in the first place going into the  
23 transaction. So it seems to me if Bailey --

24 JUSTICE BREYER: But he receives the gun and  
25 it could have been loaded. And if it was loaded, you

1 receive a loaded gun, and you're there and you give the  
2 money for the gun and you have the gun and somebody  
3 comes up, maybe you'll shoot him. I mean, that seems  
4 like a risk.

5 MR. KOCH: Under Bailey, however, if all he  
6 did was receive the gun, hold it in his hand, Bailey  
7 says that's not enough, that's not a use. And, of  
8 course, those are the facts of this case.

9 JUSTICE KENNEDY: Suppose he received the  
10 gun, loaded it and said, well, now, let's renegotiate  
11 this transaction?

12 (Laughter.)

13 MR. KOCH: As Bailey -- as Bailey thought  
14 very clearly, if he then takes the gun and uses it to  
15 communicate a threat to the other party, then he is  
16 making a use. He is now actively employing it, in this  
17 case, as a threatening item.

18 JUSTICE KENNEDY: But he doesn't brandish  
19 it. He just, he puts it in his pocket and he says:  
20 Let's renegotiate this. What result? Could the  
21 government charge him?

22 MR. KOCH: Your Honor, I believe if the jury  
23 was to find in that factual scenario that that was --  
24 that he was, in fact, silently making reference to the  
25 gun, then I think that gets you within Bailey. There's



1 all kinds of things Mr. Watson could do beyond what the  
2 facts of this case are that would turn it, what he did,  
3 into active employment and use. But merely getting it  
4 and putting it -- and holding it, which are the facts in  
5 this record, doesn't -- doesn't rise to the level of use  
6 under Bailey.

7 JUSTICE BREYER: I thought Bailey involved a  
8 guy, he had the gun in a locked thing in the trunk of  
9 his car, which is a little different from holding it in  
10 your hand.

11 MR. KOCH: There were -- there were actually  
12 two, two different fact patterns in the consolidated.  
13 One had a gun that was locked up in another room, the  
14 other one had guns in the trunk, with expert testimony  
15 being that that was the typical method of drug dealers  
16 to protect their drugs and things.

17 JUSTICE GINSBURG: If he has a gun in his  
18 hand he is certainly carrying it.

19 MR. KOCH: He did have the gun in his hand  
20 then he would be carrying it under Muscarello and the  
21 other cases. That's correct. Yes, ma'am.

22 Recognizing again I just would point out  
23 that whatever condition Mr. Watson had the gun in and --  
24 in this record that's unloaded -- was the choice, not of  
25 Mr. Watson but of the people that brought him the gun.

1 In this clip fed gun it was up to him whether you give  
2 him a clip or not, without which the gun is useless,  
3 which in this case was the choice of the police officers  
4 as to how they were going to hand it to him.

5 MR. KOCH: I have no other -- nothing else,  
6 unless there's any questions.

7 CHIEF JUSTICE ROBERTS: Thank you, Mr. Koch.  
8 Ms. Maynard.

9 ORAL ARGUMENT OF DEANNE E. MAYNARD

10 ON BEHALF OF THE RESPONDENT

11 MS. MAYNARD: Mr. Chief Justice, and may it  
12 please the Court:

13 Petitioner used the firearm by accepting it  
14 in exchange for his drugs. In doing so Petitioner used  
15 it during and in relation to a drug trafficking crime.  
16 Although the situation in Smith was different, the  
17 principle of Smith is that use of a firearm as an item  
18 of trade or commerce -- specifically used as the medium  
19 of exchange -- is a use falling within the meaning of  
20 Section 924(C).

21 JUSTICE SOUTER: But that does not answer  
22 the question use by whom. As I understand it, we are  
23 not really arguing about whether the gun was used in the  
24 transaction; we are arguing about whether the defendant  
25 was the one who used it.

1 MS. MAYNARD: And the Petitioner did use it  
2 here, Your Honor. In agreeing to take it in exchange  
3 for a certain amount of his drugs --

4 JUSTICE SOUTER: Yes, but I mean, the  
5 problem you, it seems to me you've got that you can't  
6 totally paper over is that that's not usually the way we  
7 talk. I mean, if I buy a car, and pay money for it, I  
8 do not use the car in the transaction. It's what I have  
9 after the transaction is complete; and you, you got that  
10 kind of linguistic problem here, it seems to me.

11 MS. MAYNARD: If you buy the car, then you  
12 have used the car as an item of trade or commerce during  
13 or in relation to that commercial transaction. We don't  
14 usually talk that way but we do -- and one can --

15 JUSTICE SCALIA: It's enough to say we don't  
16 usually talk that way.

17 MS. MAYNARD: I don't think so, Your Honor.  
18 As long as --

19 JUSTICE SCALIA: That's the end of it. We  
20 don't talk that way. We don't say use a car when you  
21 buy a car.

22 MS. MAYNARD: Well here, Your Honor, it's  
23 important to put it into statutory context, of course,  
24 and the statutory context asks whether or not one has  
25 used the firearm during or in relation to a drug

1 trafficking crime, here a drug transaction. And I do --

2 JUSTICE SOUTER: It adds an additional  
3 element you have to prove but it doesn't answer the  
4 linguistic point.

5 MS. MAYNARD: I think one can employ use in  
6 a natural way to mean receipt in the way that Petitioner  
7 used the firearm here. The subway system uses tokens.

8 JUSTICE STEVENS: If you're on the other  
9 side of the transaction, it's perfectly natural to say I  
10 used the gun for the transaction. What is the converse  
11 sentence? I used the gun --

12 MS. MAYNARD: I used the gun as a medium of  
13 exchange to sell my drugs. Just in the same way that --

14 JUSTICE STEVENS: I didn't use the gun as a  
15 medium of exchange. I accepted the gun as a medium of  
16 exchange. He didn't use it until he got it.

17 MS. MAYNARD: I believe in any barter  
18 transaction, Your Honor, in particular, where one side  
19 has said as they negotiate it out, I will sell you this  
20 amount of drugs for this particular firearm, then both  
21 have used the gun as the medium of exchange --

22 CHIEF JUSTICE ROBERTS: So if you have --  
23 sorry.

24 JUSTICE STEVENS: But you don't have the  
25 simple sentence. I used the gun to pay for the drugs --

1 that's easy, but you don't have a simple countervailing  
2 sentence.

3 MS. MAYNARD: I --

4 JUSTICE KENNEDY: I suppose you could say we  
5 used the gun in order to complete the drug transaction.

6 MS. MAYNARD: And -- and the drug dealer  
7 used the gun as the medium of exchange to complete his  
8 drug sale, and I do think we do sometimes use "use" in  
9 that way, Justice Stevens. The subway system uses  
10 tokens. The metro system.

11 CHIEF JUSTICE ROBERTS: Well, let's say --  
12 let's say you have a duel, and each person in the duel  
13 needs to have a weapon. One person has a gun; the other  
14 person has the sword. Would you say the person with the  
15 sword is using the gun in the duel?

16 MS. MAYNARD: Well in a --

17 CHIEF JUSTICE ROBERTS: Because you can't  
18 have a duel without both people having weapons.

19 MS. MAYNARD: You would have certainly  
20 used --

21 CHIEF JUSTICE ROBERTS: You wouldn't say  
22 that the person --

23 MS. MAYNARD: -- the sword as weapon. There  
24 is no exchange there, Your Honor. Here it's crucial,  
25 because you have during your relation to a drug

1 trafficking crime, which here is the drug exchange, just  
2 like in Smith.

3 CHIEF JUSTICE ROBERTS: Each person in the  
4 drug exchange brings to the table what they've got. The  
5 one has the drugs; the other brings the gun. That  
6 doesn't mean that the person with the drugs is using the  
7 gun.

8 MS. MAYNARD: If he agrees to trade his  
9 drugs for the gun as the currency to close the drug  
10 transaction, I believe he has used the gun in the way  
11 that we normally use the word.

12 JUSTICE SOUTER: But the only way you can  
13 make that argument is to define the crime as consisting  
14 of the agreement as opposed to the consummated  
15 transaction.

16 MS. MAYNARD: No. I think the -- I think  
17 the crime is the taking of the firearm in exchange for  
18 the drugs.

19 JUSTICE SOUTER: Well, I thought you said a  
20 minute ago that he was using it because he agreed to  
21 accept it.

22 MS. MAYNARD: I think one could make the  
23 argument, Justice Souter, that an agreement alone is a  
24 use once, one agrees to use the gun as the medium of  
25 exchange to sell one's drugs. The Government is not

1 pressing that point here today and we don't, and the  
2 Court need not go that far because here Petitioner did  
3 receive the drugs, and the reason that possibly the  
4 agreement line goes too far is the rationale of this  
5 Court's decision in Smith where the Court pointed out  
6 that someone who makes a material misstatement in order  
7 to acquire a gun is clearly not using the gun, but the  
8 Court gave examples of receipt offenses in, in the  
9 forfeiture provisions in Section 924(D) where receipt of  
10 a firearm is a use under the statute.

11 JUSTICE SCALIA: Why -- why wouldn't making  
12 a material misstatement in order to obtain a gun  
13 constitute a use of the gun -- as much as it, the  
14 receipt of the gun constitutes a use of the gun here?  
15 What's the difference between the two situations?

16 MS. MAYNARD: I think one could make the  
17 argument, Your Honor, as I said, that making material  
18 statement. I'm saying the Court in Smith --

19 JUSTICE SCALIA: Not if you believe Smith.

20 MS. MAYNARD: I beg your pardon.

21 JUSTICE SCALIA: Not if you believe Smith.

22 MS. MAYNARD: Because -- and that's why the  
23 Government is drawing the line today at actual receipt,  
24 and that's - that's all that's involved in this case.  
25 The actual taking of the firearm where then you have all

1 the dangers present with which Congress was concerned,  
2 which is --

3 JUSTICE STEVENS: Yes but Justice Breyer  
4 made the very persuasive argument that it doesn't make  
5 sense to treat both sides of the transaction exactly the  
6 same; but isn't it the fact that in many drug  
7 transactions the buyer is not treated the same way as  
8 the seller? It's a crime to sell poison drugs but it  
9 may not be a crime to buy the poison drugs.

10 MS. MAYNARD: Well, there are two points in  
11 response to that, Your Honor. One is that if the buyer  
12 of drugs buys the distribution quantity, then we do  
13 often treat the buyer as a distributor under the  
14 distribution statute.

15 JUSTICE STEVENS: But generally speaking  
16 buyers and sellers are not always treated alike in the  
17 criminal law, are they?

18 MS. MAYNARD: When Congress -- no that's  
19 correct, Your Honor; but in those cases where Congress  
20 uses words, like it does in the distribution statute,  
21 that clearly targets one side or other of the  
22 transaction. But here what the Court is interpreting is  
23 the much broader word, "use," and we know from Section  
24 924(D)'s forfeiture provisions that Congress employed  
25 the word use broadly in Section 924(d) and used it to



1 include receipt crimes; and Smith cites several examples  
2 of receipt crimes that Smith believed was a use,  
3 including unlicensed receipt of a firearm from out of  
4 State, receipt of a stolen firearm and receipt of a  
5 firearm with an intent to commit a felony; and in  
6 context Congress clearly did use "use" broadly in  
7 Section 924(D). If -- if in response to their argument  
8 in Ponce, their argument about (D)(1), the forfeiture  
9 provisions in (D)(1) and D 3, I do think those  
10 provisions strongly support the Government's argument  
11 here.

12 JUSTICE SCALIA: Why? There's -- they refer  
13 to crimes in which there has been a receipt but there  
14 has also been a conveyance. Why do you focus on the  
15 receiver rather than the conveyer?

16 MS. MAYNARD: Because our reading, Justice  
17 Scalia, gives full effect to the provisions that  
18 Congress has carefully chosen to place in (D)(3) and the  
19 Petitioner's reading does not.

20 JUSTICE SCALIA: What are they?

21 MS. MAYNARD: And if I could explain it. In  
22 (D)(1) -- it's on page 8a of our brief, (D)(1)-- in  
23 924(D)(1) Congress provided two principal ways in which  
24 the Government can forfeit firearms. The first is if an  
25 offense is completed, the Government can forfeit a

1 firearm that is involved in or used in that offense.

2 JUSTICE SCALIA: Involved in -- that  
3 broadens that enormously, doesn't it?

4 MS. MAYNARD: Yes it does, Your Honor; but  
5 that actually strengthens my point.

6 CHIEF JUSTICE ROBERTS: It cuts the other  
7 way. Congress knows how to say involved in if it wants  
8 to reach that broadly, and it didn't do it under the  
9 provision in which -- pursuant to which Mr. Watson was  
10 indicted.

11 MS. MAYNARD: Well yes, Your Honor, but if  
12 you allow me to continue on, further on in (D)(1)  
13 Congress used a narrow subset of crimes some of which  
14 include receipt crimes where it only used the word use  
15 and that's the logic to this Court's decision in Smith  
16 and it applies equally here. Further down in (D)(1)  
17 Congress allowed the Government to forfeit firearms  
18 intended to be used in certain very specific listed  
19 crimes, and in other words to forfeit the firearms  
20 before the -- the crime actually is committed. Some of  
21 those crimes include -- receipt crimes -- include the  
22 very receipt crimes listed by this Court in Smith' and  
23 so given that Congress believed that the firearms  
24 intended to be used in purely receipt crimes were  
25 ultimately going to be used by the receipt, Congress

1 employed the term here very broadly including to receipt  
2 of a firearm.

3 JUSTICE SCALIA: It could be -- it could  
4 have -- it is intended to be used, not necessarily. As  
5 -- as your opponent pointed out, this section does not  
6 focus on the individual. It focuses on the firearm,  
7 simply for -- for confiscation of the firearm. And,  
8 therefore, it suffices if either side intended it to be  
9 used. It doesn't have to be the recipient who intended  
10 it to be used even though it's a receipt crime. It was  
11 intended to be used by the other side. Wouldn't that  
12 make sense?

13 MS. MAYNARD: I think if you were to  
14 interpret (d)(3) in that way, Your Honor, you would do  
15 great violence to what Congress intended. If I can  
16 point you to page 10-A of our brief in -- it's (d)(3)  
17 that sets forth very particularly the crimes that  
18 Congress thought the government should be able to  
19 forfeit firearms before the crime occurs.

20 JUSTICE SCALIA: What page is that?

21 MS. MAYNARD: It's on the government's gray  
22 brief, 10-A. In (e) of 922 -- this is 924. I'm sorry,  
23 924(d)(3)(E ). It includes any offense described in  
24 section -- and it lists several examples including  
25 922(n). And 922(n) is set forth in the government's

1 brief on page 2-A, which makes it a crime for someone  
2 under felony indictment to ship, transport, or receive a  
3 firearm.

4 Now, under Petitioner's reading they would  
5 say: Well, that's fine. That still has meaning. Under  
6 our reading of "use," the government can forfeit  
7 firearms that the person under felony indictment intends  
8 to ship or transport, but cannot forfeit firearms that  
9 the --

10 JUSTICE BREYER: This is what -- this is  
11 what is bothering me about your side of this case. I  
12 start thinking this is a total fluke. Normally, you  
13 would charge him under "possession in furtherance of,"  
14 which you didn't for reasons I don't know. Or he would  
15 be an accessory, which he isn't here because the other  
16 side was a government agent. So we've got a fluke.

17 Now, if I accept your linguistic approach, I  
18 don't know what I'm getting into. Imagine an artillery  
19 team. One loads the ammunition; the other pulls the  
20 trigger. We say the team used the ammunition, but the  
21 guy who pulled the trigger by himself didn't.

22 Think of a baseball team. The pitcher  
23 doesn't use the bat, but the team does.

24 Now, if I take your linguistic approach,  
25 where am I in respect to other statutes? But if I deny

1 your linguistic approach on the ground that it's  
2 unnatural to say "use" of the -- the individual used it,  
3 all I've done is create a fluke case because it will  
4 never come up again.

5 MS. MAYNARD: I don't think that it's --  
6 several responses, Your Honor. I don't think it's  
7 unnatural to use "use" to mean "receipt" when you're  
8 talking about using something as a medium of exchange  
9 during and in relation to a drug trafficking crime.  
10 Because, as I said before, company stores use script.  
11 American stores use dollars. French stores use euros.  
12 We can use the word "use" and then have to wait --

13 JUSTICE BREYER: But those are all examples  
14 that I used the gun to pay for the item. You don't use  
15 the word "use" when you're the seller. It doesn't fit.

16 MS. MAYNARD: No, Your Honor. I disagree.  
17 I think when a company store uses script, that means it  
18 accepts script as money from the company employees.

19 CHIEF JUSTICE ROBERTS: So if Congress  
20 passes a statute saying anyone who uses a gun in a crime  
21 of violence gets an additional sentence, the person who  
22 is shot is using the gun in a crime of violence?

23 MS. MAYNARD: You wouldn't have to go that  
24 far here, Your Honor, because the "use" here is use as a  
25 medium of exchange. So the court need go no further.

1 And that's another response to Justice Breyer. The  
2 Court need go no further than it did in Smith, which you  
3 -- it doesn't have to -- we have much more than receipt  
4 simpliciter here, Justice Breyer. We have the  
5 negotiated transaction where he received the firearms as  
6 the medium of exchange.

7 CHIEF JUSTICE ROBERTS: So is that a  
8 necessary element of the offense: That the transaction  
9 be negotiated in advance?

10 MS. MAYNARD: No, Your Honor, if you take it  
11 as the medium of exchange to sell your drugs. He  
12 doesn't dispute that he engaged in a drug trafficking  
13 crime, and he doesn't dispute that he took the gun as  
14 the currency to close that drug deal, and that is a use  
15 within the meaning -- within a natural meaning of "use,"  
16 if it is used as currency.

17 JUSTICE KENNEDY: Are you saying that the  
18 parties are viewed collectively so that in Justice  
19 Breyer's example the pitcher and the batter used a ball  
20 and a bat. Is that your position? And in this case the  
21 seller and the buyer used drugs and a gun.

22 MS. MAYNARD: In any bartering exchange,  
23 Justice Kennedy --

24 JUSTICE KENNEDY: Well, does that fit with  
25 the words of the statute, any person who --

1 MS. MAYNARD: Any person --

2 JUSTICE KENNEDY: Even though it's a  
3 collective enterprise, you can still focus on one of the  
4 parties and prevail. Is that your position?

5 MS. MAYNARD: Well, imagine -- imagine a  
6 statute that made it a crime to use United States  
7 currency during and in relation to a drug trafficking  
8 crime. A drug dealer who sold his drugs for cash would  
9 surely be in violation of that statute.

10 This is no different. The Court has already  
11 held that using the firearm as currency is a violation  
12 of the statute.

13 CHIEF JUSTICE ROBERTS: I don't think -- I  
14 don't see how your hypothetical advances the argument.  
15 I mean, I don't necessarily agree that someone who sells  
16 drugs for currency is using the currency in the  
17 transaction. They are accepting it. It is what they  
18 want. That's not the same as using it.

19 MS. MAYNARD: No, Your Honor. I think they  
20 are using it as the medium of exchange, which I think  
21 even under the sentence rationale in Smith -- such as --  
22 such as statutes, if you would say: Well, what's the  
23 normally intended use of United States currency? And  
24 that would be as the medium of exchange, and both  
25 parties would be --

1 CHIEF JUSTICE ROBERTS: Well, that's what  
2 weakens your hypothetical. It's not the normal use of  
3 a gun as a medium of exchange.

4 MS. MAYNARD: Yes, but the Court has already  
5 held that using a gun as the medium of exchange falls  
6 within the statute.

7 JUSTICE GINSBURG: May I ask --

8 CHIEF JUSTICE ROBERTS: It held that the  
9 person who does use the gun, which is the natural,  
10 grammatical construction, uses the firearm. That's  
11 quite a bit different than the question of whether  
12 someone who receives it as the consideration is using  
13 the firearm.

14 MS. MAYNARD: I think the rationale  
15 necessary to the holding in Smith, Your Honor, was that  
16 use of a gun as an item of trade or commerce,  
17 specifically as the medium of exchange, is the "use."  
18 And, in fact, Smith refers several times to an earlier  
19 D.C. Circuit decision in Harris, a per curiam, a public  
20 per curiam, in which two members of this Court were on  
21 the panel, that involved this very fact pattern, where  
22 the -- the --

23 JUSTICE STEVENS: Yes, but the argument in  
24 Justice O'Connor's opinion was largely linguistic. The  
25 natural use of the word "use" is to say: I used it to



1 pay for the gun -- I used it to pay for the drugs,  
2 rather. But you don't have a countervailing sentence  
3 that fits into anything in her opinion, and you haven't  
4 really answered his reliance on the -- on the other  
5 case, which requires active use.

6 MS. MAYNARD: I think in -- in Bailey, Your  
7 Honor, the Court required a use that makes the gun an  
8 operative factor, a use that changes the circumstances  
9 where both parties are aware the gun is being used.

10 This is a far cry from Bailey. This is not  
11 locked-up weapons where only one party is aware of their  
12 existence to protect the store of drugs. This gun was  
13 front and center, part and parcel, of the drug  
14 transaction. It was --

15 JUSTICE GINSBURG: It was -- Watson  
16 possessed the gun, would you agree with that, in  
17 furtherance of the transaction? Would you say that this  
18 case fits the statute, as amended, so it could have been  
19 charged as possession?

20 MS. MAYNARD: Yes, Your Honor. That's the  
21 government's position.

22 JUSTICE GINSBURG: Why was it -- why wasn't  
23 possession charged here?

24 MS. MAYNARD: I do not know the specific  
25 circumstances of the charging decision here, Justice

1 Ginsburg, but in the Fifth Circuit the law was already  
2 clear that this was a use. And, indeed, when Congress  
3 amended the statute post Bailey to expand this Court's  
4 understanding of the meaning of "use," there was no need  
5 to address this particular fact pattern because most of  
6 the circuits had been --

7 JUSTICE GINSBURG: But the prosecution would  
8 certainly want to assure the success of the argument;  
9 and if this is clearly possession, why wasn't possession  
10 charged? And does the Department of Justice give any  
11 guidance to prosecutors since the 1988 amendment on what  
12 to charge in these situations?

13 MS. MAYNARD: I don't know the answer to  
14 that, Your Honor. I don't know the answer to either of  
15 those questions, but I do know that we argued in our  
16 opposition to the cert petition that this question  
17 doesn't have much going-forward significance because of  
18 that new amendment.

19 JUSTICE SCALIA: Maybe they were doubtful  
20 about whether the "possession" thing applies here. I  
21 don't know. Possesses a firearm in furtherance of the  
22 crime -- I mean, the crime has been completed by the  
23 time the -- the person who is receiving the gun has  
24 possession of it.

25 MS. MAYNARD: I think it's part and parcel

1 --

2 JUSTICE SCALIA: It's hard to say it's in  
3 furtherance of the crime when the crime is over once he  
4 gets it. His possession is not in furtherance of the  
5 crime, it seems to me. It's the other person's  
6 possession that's in furtherance of the crime. He  
7 possesses it so he can turn it over, which is the crime.  
8 But I mean I'm just not all that sure that you have a  
9 hundred percent easy case on the possession point.

10 MS. MAYNARD: Well, the Petitioner agreed  
11 with you on that, Your Honor, but four circuits have  
12 agreed with the government. On the going-forward basis,  
13 we think we do have a good argument. Here, and in your  
14 hypothetical, imagine the situation where the gun is  
15 turned over first, and then the payment -- and then the  
16 drugs are traded. It would certainly seem that you  
17 possessed it in furtherance there.

18 I think it is possession in furtherance in  
19 -- in -- because it is the sine qua non of drug  
20 transactions. It's the very part and parcel of drug  
21 transactions. But it does -- this case does matter to  
22 the government because the government has prosecuted  
23 people properly, it thinks, under the "use" prong of  
24 the statute. Those people are -- currently stand  
25 convicted; and, as experience proves post-Bailey, if

1 this Court were to rule against the government here,  
2 that could have an effect on those people's current  
3 incarceration.

4 If I could get back to my 922(d) point, just  
5 to finish up, which is that --

6 CHIEF JUSTICE ROBERTS: Well, I just -- I  
7 don't understand the significance of the argument you  
8 just made. Are you saying that because some people  
9 might be let out of prison if we correctly construed the  
10 statute, we should read it your way?

11 MS. MAYNARD: No, Your Honor. Of course if  
12 the Court feels that these people are properly  
13 convicted, then, you know, they can pursue whatever  
14 remedies they may have.

15 CHIEF JUSTICE ROBERTS: So what was your  
16 point referring to the people who were convicted under  
17 this statute --under this construction of the statute?

18 MS. MAYNARD: That it -- that it is of  
19 ongoing importance to the government, even though as a  
20 prospective matter the government may be able to charge  
21 this conduct under possession and furtherance.

22 CHIEF JUSTICE ROBERTS: I thought the  
23 argument you made earlier was that this may not be of  
24 particular ongoing significance because of the  
25 amendment.

1 MS. MAYNARD: Right, Your Honor. From now  
2 on, the government could charge, if you rule against us  
3 in this case, we believe we can charge this conduct  
4 under possession and furtherance. However, my point is  
5 -- is that we nevertheless care about the result in this  
6 case. We believe that people in this situation have  
7 used a firearm as a medium of exchange during and in  
8 relation to a drug trafficking crime and stand properly  
9 convicted. It was only to make the point that the  
10 government does have an interest in how the Court rules  
11 in this case and that it's not meaningless to us which  
12 prong applies here.

13 Back to the 922(d)(4) point, the -- under  
14 Petitioner's reading, it would mean that the government  
15 can't forfeit firearms in a situation like someone under  
16 felony indictment ships or transports -- intends to ship  
17 or transform a firearm. Under Petitioner's reading the  
18 Government can forfeit that because they consider that  
19 to be active verbs, but under -- if the person under  
20 felony indictment simply intends to receive a firearm,  
21 the government would have to wait until that person  
22 receives the firearm in order to be able to forfeit it,  
23 and that is -- I suggest that no rational Congress would  
24 have meant that by referring to the provision.

25 They do point to -- well, if there -- if

1 there are no further questions, the government believes  
2 that this crime, this -- that the use of the gun in this  
3 manner is a crime, that there's no reason to believe  
4 that Congress would have wanted the defendant in Smith  
5 to stand convicted of this crime but to leave the drug  
6 dealer who ends up with the gun not with the punishment  
7 for this crime.

8 JUSTICE STEVENS: Something just occurred to  
9 me. When you distinguish the case, our unanimous  
10 opinion requiring active use, you said, well, that --  
11 that gun was in the trunk of a car so -- what if this  
12 gun had been in the trunk of the car also and the guy  
13 said, well, it's now -- that's your gun?

14 MS. MAYNARD: Whose trunk is it in, Your  
15 Honor?

16 JUSTICE STEVENS: Well, they just  
17 transferred ownership in exchange for drugs with -- by  
18 transferring title to a gun that was located in the --  
19 in the trunk of a car.

20 MS. MAYNARD: If he has constructive  
21 possession of it, Justice Stevens, and he's -- I believe  
22 he would have received it and that would be sufficient.

23 JUSTICE STEVENS: So it -- it was not  
24 sufficient in -- in Bailey in any case, but it would be  
25 sufficient here because it played a role in the

1 transaction?

2 MS. MAYNARD: Yes, Your Honor.

3 JUSTICE STEVENS: Thank you.

4 MS. MAYNARD: But -- I mean Bailey makes  
5 examples to things that would involve an active  
6 employment including reference to a gun that -- if the  
7 reference to a gun changes the circumstances of the  
8 underlying offense.

9 JUSTICE GINSBURG: But -- but Smith, in  
10 Smith, Justice O'Connor used the illustration turning  
11 currency into a cannon. You can't do that very well if  
12 the gun is in a car, in a locked trunk in a car on the  
13 street. You can't turn the currency, the gun, into a  
14 cannon.

15 MS. MAYNARD: That's true, Justice Ginsburg,  
16 and if the Court wanted to limit it to "use" means that  
17 you've actually taken possession of it because that --  
18 that's all the government is defending here. That's  
19 what happened in this case. That's what happens in most  
20 of the cases.

21 I -- I would also like to say in response to  
22 their point about the government sting, that if you look  
23 at the cases in the courts of appeals, there are many  
24 cases where -- that indicate these kinds of trades do  
25 happen in the real world absent government involvement.

1 For example, in the First Circuit's decision in Cotto,  
2 which is currently pending before the Court, the -- the  
3 person who ultimately came -- became the confidential  
4 informant -- before that the drug deal her sold to her  
5 drugs for guns on 20 separate occasions. So this does  
6 go on --

7 JUSTICE BREYER: Is -- is there any reason  
8 in such a case, if you lost this case, in the future  
9 could you not just charge, as Justice Alito said, that  
10 they're a principal in the possession by the seller?

11 MS. MAYNARD: We -- we believe --

12 JUSTICE BREYER: If the government is not  
13 involved? And if the government's involved on the other  
14 side, I guess you'd have to charge an attempt.

15 MS. MAYNARD: There is no attempt offense  
16 under Section 924(c), Justice Breyer. You can use a gun  
17 during and in relation to an attempted drug crime, but  
18 you can't attempt to use a gun.

19 The -- the government believes it could, on  
20 a going-forward basis, charge possession -- oh, you're  
21 asking me about whether we could charge aiding and  
22 abetting going forward. The -- the Seventh Circuit has  
23 suggested in Dick that that would be open to the  
24 government to charge. I think that -- and potentially,  
25 even though it wasn't in the indictment here, it could



1 be read into the indictment. But there are two possible  
2 issues: One that my colleague has pointed out, which is  
3 in some cases where Congress has criminalized one side  
4 of the transaction but not the other. And so that might  
5 be the situation here. The Court --

6 JUSTICE BREYER: And so your -- your  
7 practical argument then is that there has been  
8 considerable reliance on your interpretation to the  
9 extent that many people have been convicted under it.  
10 How many?

11 MS. MAYNARD: That I don't know, Your Honor.

12 JUSTICE BREYER: About? About? Have any  
13 rough idea?

14 MS. MAYNARD: I don't know, Your Honor, but  
15 there are six circuits on our side of the conflict and  
16 -- so it -- it -- I don't know.

17 If there are no further questions --

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 Ms. Maynard. Mr. Koch, you have 4 minute remaining.

20 REBUTTAL ARGUMENT BY KARL KOCH

21 ON BEHALF OF THE PETITIONER

22 MR. KOCH: Thank you, Your Honor.

23 As -- as I indicated before I don't think  
24 that it's necessary to overrule Smith to rule for the  
25 Petitioner, but if -- if consistency on both sides of

1 the transaction is desired and certainly something has  
2 to go, I would suggest it ought to be Smith because  
3 otherwise you're stuck with Bailey and with what I  
4 suggest are settled principles of statutory  
5 construction. The -- I think Smith takes -- takes it  
6 about as far as it could go, and you're having to make  
7 -- you have to make a number of linguistic compromises  
8 to get to the Smith result to begin with.

9           The -- with regard to the -- the charging as  
10 possession or furtherance or not, again it's not before  
11 us, it's not part of this case I would suggest that  
12 Mr. Watson possessed this firearm as a consequence of a  
13 drug transaction rather than in furtherance of a drug  
14 transaction.

15           I do think, and it's obvious from other  
16 statutes in the neighborhood, that Congress certainly  
17 knows how to say "receive" and "accept" and words of  
18 that nature, if it was its intent to -- to make the  
19 receipt of a weapon or bring that within the ambit of  
20 this -- of this particular statute.

21           I don't think it's enough to say, as my  
22 opponent does, use as a medium of exchange if it's a  
23 crime for example to use a forged instrument. The guy  
24 who accepts it doesn't use it, I don't think by any  
25 reasonable interpretation. So I think that that -- that

1 really stretches this farther than it should go.

2           Lastly, I would point out, and again this is  
3 in our brief around page 9, with respect to this 924(d)  
4 argument, one of the predicate offenses that's used in  
5 924(d) is 922(j), which includes language "it shall be  
6 unlawful for any person to receive, possess, conceal,  
7 store, barter, sell, or dispose of" et cetera. Well,  
8 "possess" is there in 922(j), yet we know from Bailey  
9 that "possess" in and of itself can't be a use. And  
10 that's just one of the reasons why that argument  
11 unfortunately falls apart when one is trying to import  
12 those definitions of use into this statute.

13           I have nothing further.

14           CHIEF JUSTICE ROBERTS: Thank you, Mr. Koch.  
15 The case is submitted.

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

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