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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, -VS- WILLIAM JOHN MAHAN, Defendant	CR. No. 06-60045-01-AA MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR RECONSIDERATION OR, ALTERNATIVELY, MOTION FOR JUDGMENT OF ACQUITTAL ON COUNT 3

I. SUMMARY OF ARGUMENT.

The Ninth Circuit has interpreted the phrase "possession in furtherance" found in 18 U.S.C. §924(c) to require an "intent to use" the firearm to promote the drug trafficking crime. See cases cited in Section V, §§A, *infra*. *Watson v. United States*, 128 S.Ct. 579 (2007), held that a defendant who trades his

drugs for another's firearm does not "use" the firearm under §924(c). Therefore, a defendant does not, as a matter of law post-*Watson*, "intend to use" a firearm by receiving it in trade for his drugs; and evidence establishing nothing more than that type of exchange, beyond a reasonable doubt, is insufficient to prove a violation of the "possession in furtherance" prong of §924(c).

II. STATEMENT OF THE CASE.

As the case headed towards trial for certain, the Government obtained a Superseding Indictment charging Mr. Mahan with three crimes: Felon in Possession of numerous firearms, allegedly subject to the Armed Career Criminal Act (Count 1); Possession with Intent to Distribute Methamphetamine (Count 2); and (Count 3) that he "possessed, in furtherance of the drug trafficking crime set forth in Count 2," one or more of the same firearms set forth in Court 1. All Counts alleged the same operative dates.

The Government's trial memorandum included the following discussion of its view of the facts and the law concerning Count 3[1]:

"To establish a defendant possessed a firearm or firearms 'in furtherance' of a drug crime, the Government must prove the defendant intended to use the firearm to promote or to facilitate his possession of methamphetamine with intent to distribute it, but does not need to prove he actually used the firearm

[1] This Memorandum repeats only portions of that discussion deemed relevant herein; the Court may take judicial notice of the entire Trial Memorandum.

or firearms to advance his drug crime." Govt. Trial Memo, p. 21(citations to case law omitted).

"At trial, the Government intends to prove Defendant . . . paid Mr. Copley cash and an eight of an ounce of methamphetamine for the firearms stolen in the burglary."

"Defendant may move to dismiss Count 3 of the Superseding Indictment by arguing that it is not a violation of 18 U.S.C. §924(c) for a person to trade illicit drugs for firearms."

"Filing such a motion would be prudent because the courts of appeal disagree on whether trading drugs for a firearm constitutes 'use' of a firearm within the meaning of §924(c), and the Supreme Court has recently granted certiorari in *Watson v. United States*, 127 S.Ct. 1371 (Feb. 26, 2007), to resolve the circuit conflict."

"Nevertheless, such dismissal motion should be denied because the Ninth Circuit in *United States v. Ramirez-Rangel*, 103 F.3d 1501, 1506 (9th Cir. 1997), joined the majority of the circuits holding that trading drugs for firearms does violate the 'use' provision of 18 U.S.C. §924(c)." Govt. Trial Memo, pp. 23-24 (citations to case law on p.24, note 6, omitted).

The Government's Trial Memorandum then discussed how the same facts—that Mahan agreed to and did exchange his drugs as partial payment for the firearms—established that he possessed the firearms in furtherance of the drug trafficking crime. See pp. 26-29. "Because the Defendant furthered, advanced or helped forward his distribution of methamphetamine by negotiating

for, then receiving constructive or actual possession of the firearms, he violated the 'possession' provision of 18 U.S.C. §924(c)." Id., at p. 29.

On June 25, 2007, the defense took the Government's advice and filed a Motion to Dismiss Count 3, relying on the "circuit split" authorities cited in the Government's trial memorandum, and the grant of certiorari in *Watson*. Trial commenced the next day, with the Motion pending. On the last day of trial, after both parties had rested, but before closing argument, defense counsel asked the Court "to dismiss Count 3 based on the *Watson* case that's currently in front of the U.S. Supreme Court." The Court inquired if the Government had "anything to add," and hearing, "No, Your Honor," ruled: "That [motion] will be denied." Trial Transcript, Vol. IV, p. 592.

In its closing argument, the Government told the jury:

"Specifically in this case, the government's theory under the law provides that if one exchanges drugs for firearms or firearms for illicit drugs, that can be in the furtherance of a drug trafficking crime." Trial transcript, Vol. IV, p. 594. The prosecutor asked the jury that Mahan "be held responsible for taking those firearms and exchanging them for drugs." Id., p. 595. "[H]e accepted these guns and paid for it with some cash and some meth," Id., p. 598.

The defense argued that the Government's witnesses were not credible, such that their testimony—uncorroborated by any forensic evidence or the police ever finding firearms or ammunition in Mahan's possession—did not amount to proof beyond a reasonable doubt. The defense advanced no other theory to the jury as to why Mahan was not guilty of Count 3.

The jury found Mr. Mahan guilty as charged on all three counts on June 29, 2007. The defense filed no post-trial motions concerning the *Watson* issue.

While the case was pending sentencing, on November 20, 2007, the Court allowed Mr. Mahan's trial counsel to withdraw, and appointed current defense counsel.

The Supreme Court decided *Watson* on December 10, 2007, holding that a defendant who trades his drugs for a firearm does not "use" the firearm so as to constitute a violation of §924(c)'s "carry or use" prong. The Court made note of the Government's argument that a drug dealer who takes a firearm in exchange for his drugs will be subject to prosecution under the "possession" prong of §924(c); then stated: "This view may or may not prevail, and we do not speak to it today," 128 S.Ct. at 585-86.

Current defense counsel spoke with Mahan's trial counsel, Lynn Shepard, regarding the *Watson* decision, inquiring if the issue had been raised, since nothing was found upon review of the case file materials she had provided. Ms. Shepard thought she had raised the issue, but could not recall any specifics. Current counsel then reviewed electronically filed case records, including the Government's Trial Memorandum and Defendant's Motion To Dismiss Count 3, and ordered the trial transcripts, which were completed on January 31, 2008. After reviewing the trial transcripts, current defense counsel contacted the court reporter to inquire whether there was any earlier hearing on the Motion To Dismiss, other than what is set forth above, p. 592, Trial Transcript, and confirmed there was none. Concurrent with working on mitigation investigation

and sentencing issues in Mahan's case, and representing her other clients, defense counsel researched and drafted this Motion and Memorandum.

Sentencing is currently set for July 22, 2008.

III. THE COURT MAY RECONSIDER ITS DENIAL OF DEFENDANT'S MOTION FOR DISMISSAL/JUDGMENT OF ACQUITTAL AT ANY TIME PRIOR TO IMPOSITION OF SENTENCE.

The defense's written Motion To Dismiss Count 3, filed the day before trial, relied on the authorities cited in the Government's Trial Memorandum, but asked this Court to reach the opposite conclusion: that simply trading one's drugs for firearms could NOT, as a matter of law, constitute a violation of 18 U.S.C. §924(c), under either the "carry or use" prong or the "possessed in furtherance" prong. When the motion was heard at the conclusion of the evidence adduced at trial—although called a "motion to dismiss"—it was a motion for judgment of acquittal on Count 3, based on insufficient evidence, as a matter of law, to constitute a violation of §924(c). The motion was timely made, and denied by the Court.

A. THE LAW IN THE NINTH CIRCUIT.

In *Arizona v. Manypenny*, 672 F.2d 761, 765-66 (9th Cir. 1982), *cert. denied*, 459 U.S. 850, the Ninth Circuit held that district courts have inherent power to reconsider a timely motion for judgment of acquittal made during trial, premised on insufficiency of the evidence, when post-trial the court, which still retains jurisdiction of the case, decides that it erred in denying the motion.

In *Manypenny*, the district court reversed its earlier ruling in the course of ruling on other timely post-trial motions that advanced other theories for a new

trial or arrest of judgment. The Ninth Circuit rejected claims by Arizona that the district court lacked jurisdiction to reconsider its earlier ruling on the motion for judgment of acquittal, because the defense had failed to renew the motion within 7 days of the jury verdict as required by Rule 29, F.R.C.P. *Id.*, at 764-66.

This holding has been called into question by a later decision of the United States Supreme Court, *Carlisle v. United States*, 517 U.S. 416 (1996), but not expressly overruled.

B. RECONSIDERATION IS APPROPRIATE WHEN THERE IS AN INTERVENING CHANGE IN THE LAW BY THE UNITED STATES SUPREME COURT.

At the time this Court decided the Motion To Dismiss Count 3, there was little cause to give it any serious consideration, in light of *Ramirez-Rangel*, *supra*, and a majority of the Circuits holding that bartering drugs for firearms constituted "use" under §924(c). Furthermore, *Ramirez-Rangel* derived from the Supreme Court's holding in *Smith v. United States*, 508 U.S. 223, 239 (1993), "that a criminal who trades his firearm for drugs 'uses' it during and in relation to a drug trafficking offense". With this precedent, it surely seemed likely that *Watson* would resolve the circuit split in favor of the majority view.

Given the holding in *Watson*; its recognition of the split of opinion in *Smith*, 128 S.Ct. at 585; Justice Ginsburg's concurrence calling for *Smith* to be overruled, 128 S.Ct. at 586; *Watson's* disinclination to endorse, even in *dicta,* the Government's argument that barter cases fall squarely within the "possessed in furtherance" prong, 128 S.Ct. at 585-86; and the lack of any published decision by the Ninth Circuit adopting the Government's argument to date, this

Court's reconsideration of the legal sufficiency of the evidence in Mahan's case is appropriate.

IV. THE COURT MAY GRANT AN UNTIMELY MOTION FOR JUDGMENT OF ACQUITTAL MADE OR RENEWED POST-VERDICT, UPON A FINDING OF "EXCUSABLE NEGLECT."

Treating the instant, alternative Motion for Judgment of Acquittal as either a renewal of the motion by the defense at the close of the evidence, or a motion made now for the first time, the Federal Rules of Criminal Procedure do not bar this Court from reaching the merits. Rule 29(c), F.R.Cr.P., provides in pertinent part:

> Rule 29. Motion for a Judgment of Acquittal
> (c) After Jury Verdict or Discharge.
>
> (1) Time for a Motion. A defendant may move for a judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later.
>
> (2) Ruling on the Motion. If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.
>
> (3) No Prior Motion Required. A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.

The Advisory Committee Notes to the 2005 Amendments to this rule state: "[U]nder Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion within the specified time, the court may nonetheless consider that untimely motion if the court determines that the failure to file it on time was the result of excusable neglect."

Rule 45(b), F.R.Cr.P., provides:

> Rule 45
> (b) Extending Time.
>
> (1) In General. When an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made:
>
> (A) before the originally prescribed or previously extended time expires; or
>
> (B) after the time expires if the party failed to act because of excusable neglect.
>
> (2) Exception. The court may not extend the time to take any action under Rule 35, except as stated in that rule.

A. "EXCUSABLE NEGLECT" IS A LIBERAL STANDARD BASED UPON EQUITABLE FACTORS.

It is proper to look to civil case law in defining "excusable neglect" under the Federal Rules of Criminal Procedure. See, e.g., *United States v. Roberts*, 978 F.2d 17 (Ist Cir. 1992).

> Since Fed.R.Civ.P. 6(b)(2) uses language virtually identical to that of Fed.R.Crim.P. 45(b)(2), decisions construing the civil rule are instructive in determining what constitutes cause or excusable neglect under its criminal analogue. See Fed.R.Crim.P. 45 advisory committee note (1944) (explaining that because Criminal Rule 45 "is in substance the same as [Civil Rule 6] . . . matters covered by this rule should be regulated in the same manner for civil and criminal cases"); 3A Wright, *supra*, §751, at 92-93 (stating that Civil Rule 6 "may usefully be consulted in determining the meaning of [Criminal Rule 45]"). *Roberts*, 978 F.2d at 24.

Roberts noted that the Ninth Circuit, "in an analogous context, urged lower courts to "apply[ ] a liberal definition of 'excusable neglect' and suggested a broad range of factors that might properly be considered in attending to the task." *In re Magouirk*, 693 F.2d 948, 951 (9th Cir.1982) (discussing excusable neglect in connection with former Bankruptcy Rule 924). 978 F.2d. at 24, n.10.

Before the Supreme Court's ruling in *Pioneer Investment Services Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380 (1993), the courts of appeals were divided on how to interpret the phrase "excusable neglect," which appears in many statutes and rules as a basis for relief from a filing a deadline. Some courts of appeals limited recognition of "excusable neglect" to cases where the party seeking relief was impeded by circumstances beyond its control. Other courts of appeals were willing to excuse delays in good faith and that had not prejudiced the opposing parties or hampered the administration of the court. See *Id.* at 387 n. 3 (outlining the split).

In *Pioneer*, the Court repudiated the former, hard-line approach. "[T]he 'excusable neglect' standard," the Court held, "is not limited to situations where the failure to timely file is due to circumstances beyond the control of the filer." 507 U.S. at 391. The approach instead should be "an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Id.,* at 395. The Court set forth the following factors to be considered: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it

was within the reasonable control of the movant; and (4) whether the movant acted in good faith. *Id.*

In *Briones v. Rivera Hotel*, 116 F.3d 379, 382 n.2 (9th Cir. 1997), the Court recognized that the four factors enumerated in *Pioneer* "sets forth an equitable 'framework' for determining the question of excusable neglect in particular cases, and we will ordinarily examine all of the circumstances involved rather than holding that any single circumstance in isolation compels a particular result regardless of the other factors."

B. THE COURT SHOULD FIND "EXCUSABLE NEGLECT" AND REACH THE MERITS OF THE MOTION FOR JUDGMENT OF ACQUITTAL.

If the Government does not object to the Court's determination of this Motion on the merits as being untimely under Rule 29, the Court need not decide whether the delay is excusable neglect. *See, Eberhart v. United States*, 546 U.S. 12, 18-19 (2005)(explaining that Rule 29's time limits are "claims processing rules" that are waived unless the Government objects to a post-verdict motion for judgment of acquittal as untimely made).

Because the Government's position on this issue is unknown, the defense will make brief argument here, reserving the right to respond more fully if the Government objects to the Court reaching the merits.

First, the Government will not be prejudiced. Rule 29 has, since 1966, allowed the defense to move for judgment of acquittal post-verdict, even if it failed to make the motion at trial. "No legitimate interest of the government is intended to be prejudiced by permitting the court to direct an acquittal on a

post-verdict motion." Advisory Committee Notes, 1966 Amendments, Subdivision (c). The Government also will likely want to revise and supplement its earlier arguments against the defense Motion to Dismiss, given the decision in *Watson.*

Second, with the sentencing date in late July, there is ample time for the parties to fully brief the *Watson* issue, and for the Court to decide it, without adverse impact on the judicial proceedings.

Third, the reason for the delay arises primarily from the intervening Supreme Court decision in *Watson*, and by current defense counsel's need to become fully informed about Mr. Mahan's case and conduct research into the issues raised herein, in order to determine what, if any, motion to file in response to *Watson*, and to ensure that motion would be well-founded in the law. These factors were largely outside the control of the defense, other than the speed with which current defense counsel could review the trial transcripts obtained in early February 2008, and conduct the necessary research.

Fourth, because Mahan timely moved for dismissal of Count 3 at trial, the *Watson* issue is preserved for appellate review, even though his post-trial motion for judgment of acquittal is untimely filed. *United States v. Tisor,* 96 F.3d 370, 379-80 (9th Cir. 1996). It would benefit the Court of Appeals to have this Court's findings on the issue, particularly to the extent those findings turn on the evidence adduced at trial. It would also benefit both parties, in terms of their sentencing recommendations, to know this Court's opinion of whether the

minimum-mandatory 5-year consecutive sentence required by Count 3 is likely to stand.

V. THE EVIDENCE THAT MR. MAHAN TRADED HIS DRUGS FOR ANOTHER'S GUNS IS INSUFFICIENT AS A MATTER OF LAW TO PROVE THAT HE POSSESSED THOSE GUNS IN FURTHERANCE OF THE CRIME OF POSSESSION WITH INTENT TO DELIVER METHAMPHETAMINE, AS ALLEGED IN COUNT 3.

In ruling on a motion for judgment of acquittal based on insufficient evidence, the court must view the evidence in the light most favorable to the prosecution, requiring it to presume that the trier of fact resolved any conflicting inferences in favor of the prosecution. See, e.g., *United States v. Johnson*, 229 F.3d 891, 894 (9th Cir.2000).

For purposes of this Motion, the defense accepts the Government's statement of the facts as a succinct summary of the evidence adduced at trial:

"At trial, the Government intends to prove [Mahan] . . . paid Mr. Copley cash and an eighth of an ounce of methamphetamine for the firearms stolen in the burglary." Government's Trial Memorandum, p. 23.

"Specifically in this case, the government's theory under the law provides that if one exchanges drugs for firearms or firearms for illicit drugs, that can be in the furtherance of a drug trafficking crime." Trial transcript, Vol. IV, p. 594. The prosecutor asked the jury that Mahan "be held responsible for taking those firearms and exchanging them for drugs." Id., p. 595. "[H]e accepted these guns and paid for it with some cash and some meth," Id., p. 598.

The evidence at trial was that the firearms were unloaded, and there was no ammunition at hand, at the time Mahan took possession of the guns. The

Government asked the jury to hold him accountable for "taking [possession of] firearms and paying for them with drugs." Transcript at 597. For purposes of this Motion for Judgment of Acquittal, there is no dispute that Mahan possessed the firearms, nor that he gained possession by making partial payment through delivery of methamphetamine. The issue is whether "paying for [unloaded] firearms with drugs" is legally sufficient evidence to prove a violation of the "possession in furtherance" prong of §924(c), when the law is clear that simply possessing firearms while committing a drug trafficking crime is legally insufficient evidence. See cases discussed in §§A, *infra*, and *United States v. Monzon*, 429 F.3d 1268 (9th Cir. 2005)(government conceded on appeal that defendant's possession of over 200 grams of heroin found in his bedroom and a loaded handgun in his bed did not provide a factual basis to support guilty plea to a "possession in furtherance" charge).

A. NINTH CIRCUIT PRECEDENT HOLDS THAT "POSSESSION IN FURTHERANCE" REQUIRES POSSESSION OF A FIREARM WITH THE INTENT TO USE IT IN FURTHERANCE OF THE UNDERLYING DRUG CRIME.

"To establish a defendant possessed a firearm or firearms 'in furtherance' of a drug crime, the Government must prove the defendant intended to use the firearm to promote or to facilitate his possession of methamphetamine with intent to distribute it, but does not need to prove he actually used the firearm or firearms to advance his drug crime." Govt. Trial Memorandum, p. 21 (emphasis supplied), citing *United States v. Lopez*, 477 F.3d 1110, 1115 (9th Cir. 2007); *United States v Mann*, 389 F.3d 869, 879-80 (9th Cir. 2004); *United*

States v. Krouse, 370 F.3d 965, 967 (9th Cir. 2004). None of those cases involved the defendant exchanging his drugs for another's guns.

In *United States v. Rios*, 449 F.3d 1009 (9th Cir. 2006), the defendant challenged the sufficiency of the evidence to support his conviction for possession of a firearm in furtherance of a drug trafficking crime. The Ninth Circuit reversed his conviction. The Court explained: "Under these cases [*Mann* and *Krouse*], mere possession of a firearm by an individual convicted of a drug crime is not sufficient for a rational trier of fact to convict under §924(c)(1)(A). Instead, the government must show that the defendant intended to use the firearm to promote or facilitate the drug crime." 449 F.3d at 1012 (emphasis supplied).

Rios discussed the fact patterns in *Krouse* and *Mann*, noting that the outcome turned on whether the firearms and ammunition were "strategically located" and "easily accessible" to an area where drug activity occurred. *Id.*, at 1012-13. *Rios* then reviewed the legislative history of the "possession in furtherance" prong of §924(c), which was added, at least in part, from Congress's disapproval of *Bailey v. United States*, 516 U.S. 137 (1995), defining "use" to require "active employment" of a firearm. 516 U.S. at 148-50. The Ninth Circuit noted the legislative history made clear, however, that Congress did not intend this new prong of the statute to apply to drug dealers who possessed firearms—without a specific factual showing beyond expert testimony that drug dealers often carry firearms to protect their drugs, money and themselves. 449 F.3d at 1013-14.

Holding in favor of Rios, the Ninth Circuit found "[t]he record, however, in no way suggests that Rios intended to use the firearm to protect the conspiracy documents [drug records] or to intimidate others into staying away from the motel room," 449 F.3d 1009.

The defense has found no decision by the Ninth Circuit holding that a defendant's exchange of his drugs for another's firearm is sufficient to prove possession of the firearm in furtherance of the drug delivery. All of the Ninth Circuit cases under the "possession" prong of §924(c) have presented a fact pattern where the drug trafficker possessed his own firearm(s) during the time he was engaged in drug crimes, and the issue was whether the facts supported a conclusion that the defendant intended to use the firearm as a weapon—not an object of barter—even though he did not "actively employ" the firearm.

Further support for holding the "possession in furtherance" prong does not extend to a defendant who simply trades his drugs for guns comes from Ninth Circuit case law interpreting the firearm offenses Guideline enhancement for possession of a firearm "in connection with" another felony offense, U.S.S.G. §2K2.1(b)(5), renumbered in 2006 as subsection (b)(6). The Court has held that cases interpreting the "during and in relation to" requirement of §924(c) provide guidance for interpreting the "in connection with" requirement of this guideline. *United States v. Routon*, 25 F.3d 815, 818-819 (9th Cir. 1994).

As a result, "the prosecution will have to make a greater showing than a defendant's mere possession of a firearm." *Id.* The Government must show the defendant possessed the firearm "in a manner that permits an inference that it

facilitated or potentially facilitated—i.e., had some potential emboldening role—in a defendant's felonious conduct." *United States v. Polanco*, 93 F3d 555, 566-567 (9th Cir. 1996). The Court found no "potential emboldening role in a defendant's felonious conduct" where a defendant had continuing constructive possession of an unloaded hunting rifle while a fugitive for having failed to appear for sentencing. *United States v. Ellis*, 241 F.3d 1096, 1099-1100 (9th Cir. 2001).

The Government here acknowledges that the "in furtherance" requirement of §924(c)—that a defendant intend to use the firearm to advance or promote the criminal activity—is a different, and higher standard than the "during and in relation to" standard. Govt. Trial Memo, p. 28, quoting *United States v. Iiland*, 254 F.3d 1264, 1271 (10th Cir. 2001).

> Significantly, the House Report also states Congress' view that the "in furtherance of" requirement that accompanies "possession" "*is a slightly higher standard*" than the "during and in relation to" standard set out in the "use" and "carry" prongs, and therefore "encompasses the 'during and in relation to' language." Id. (emphasis added). Thus, if the facts do not establish that a firearm was possessed "during and in relation to" a drug crime, they will not satisfy the more stringent "in furtherance of" language. *Id.*

Thus, under Ninth Circuit precedent, absent evidence that Mahan's constructive possession of the unloaded firearms served to embolden him to intend to deliver his methamphetamine to pay for the guns,[2] he could not receive the guideline

[2] "Embolden" means "to make bold or bolder"; "bold" means "not hesitating or fearful in the face of actual or possible danger or rebuff." Webster's Encyclopedic Unabridged Dictionary of the English Language 235 (1996).

enhancement for possession of a firearm in connection with the drug offense, and therefore, would not meet the higher standard of possession "in furtherance of" required by §924(c). The Government made no such argument, and accordingly offered no such evidence, at trial.

The defense has found no reported decision by the Ninth Circuit where a defendant who traded his drugs for firearms was given the guideline enhancement based on "possession in connection with another felony offense." *Cf., United States v. Winfrey*, 2008 WL 399325 (9th Cir. 2/13/08)(unpublished opinion)(in case where defendant traded drugs for firearm, vacating guideline enhancement based on "use of firearm in connection with another felony offense," based on *Watson*, and remanding for district court to determine whether enhancement was appropriate under "possession in connection with").

In *United States v. Ramirez-Rangel*, 103 F.3d 1501 (9th Cir. 1997), the defendants agreed to trade methamphetamine for machine guns and cash; but undercover agents conducted the trade, and arrested the defendants on the spot. They were prosecuted under the "use" prong of §924(c). In rejecting a sufficiency of the evidence claim, the Ninth Circuit simply stated: "There is no question that bartering a firearm for drugs constitutes 'use' of the weapon 'in relation to [a] drug trafficking crime' within the meaning of section 924(c)(1)," citing *Smith v. United States*, 508 U.S. 223, 225-37 (1993) and *Bailey*.

The Government's theory in Mahan's case was, that by trading his methamphetamine for the firearms, Mahan intended to use the firearms to promote or facilitate his drug trafficking crime. The Government's position was

that Mahan's Motion To Dismiss Count 3 should be denied based on the authority of *Ramirez-Rangel*. Government's Trial Memorandum at p. 24. *Ramirez-Rangel* is the only Ninth Circuit §924(c) case found by the defense with the same fact pattern as in Mahan: the defendant trading his drugs for another's firearms. The Supreme Court abrogated *Ramirez-Rangel* in *Watson*.

B. *WATSON* HOLDS THAT "USE" OF A FIREARM UNDER §924(c) DOES NOT, AS A MATTER OF LAW, REACH A DEFENDANT WHO TRADES HIS DRUGS FOR ANOTHER'S FIREARM.

In *Watson*, the Supreme Court stated: "Given ordinary meaning and the conventions of English, we hold that a person does not 'use' a firearm under §924(c)(1)(A) when he receives it in trade for drugs." 128 S.Ct. at 586. In so holding, the Court did not overrule *Smith*, which held that a defendant who traded his firearm for drugs "used" the gun for purposes of §924(c). The Court, however, rejected the Government's argument that logic coupled with *Smith's* precedent compelled the opposite conclusion.

While mentioning the Government's argument that trading drugs for guns could generally be prosecuted under the "possession in furtherance" prong, *Watson* did not reveal an inclination to adopt that position in the future. 128 S.Ct. at 585-86. The Supreme Court has yet to decide a case defining the scope of this newest prong of the statute. However, *Watson* teaches us that using logic to stretch the ordinary meaning of words will not be upheld.

C. BECAUSE A DEFENDANT DOES NOT "USE" A FIREARM BY RECEIVING IT IN EXCHANGE FOR HIS DRUGS, A DEFENDANT DOES NOT, AS A MATTER OF LAW, "INTEND TO USE" A FIREARM BY RECEIVING IT IN EXCHANGE FOR HIS DRUGS.

The Ninth Circuit has interpreted the phrase "possession in furtherance" to require an "intent to use" the firearm to promote the drug crime. See cases cited in §§A, *supra*. *Watson* holds that trading drugs for firearms is not "use" of firearms. Therefore, a defendant does not, as a matter of law post-*Watson*, "intend to use" a firearm by receiving it in trade for his drugs; and evidence establishing nothing more than that exchange, beyond a reasonable doubt, is insufficient to prove a violation of the "possession in furtherance" prong of §924(c).

The defense argument is that simple, straightforward, and supported by both the legislative history and the plain meaning of the language used in the "possession in furtherance" prong.

The purpose of the 1998 amendment that added this prong was to "revers[e] the restrictive effect of the *Bailey* decision," by proscribing possession of a firearm that, while not sufficiently active to fall within *Bailey's* definition of "use," nevertheless furthered a drug trafficking crime. H.R. Rep. No. 344, 105th Cong., 1st Sess. 6 (1997). Congress intended the word "possession" to "have a broader meaning than either 'uses' or 'carries'," Ibid. The legislative history of the amendment indicates Congress was principally concerned with guns possessed in circumstances akin to those presented in *Bailey*. See, e.g., 144 Cong. Rec. 26 at 608-609 (1988) (statement of Sen.

DeWine) (noting that the amendment is "meant to embrace" the situation "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"). *See also, e.g., Polanco, supra* (firearm must play an emboldening role in the commission of the offense).

As the Government argued before the Supreme Court in *Watson*:

> [N]othing in the legislative history of the 1998 amendment reflects any specific congressional attention to Section 924(c)(1) offenses involving the bartering of a firearm.
>
> To the contrary, Congress had no need to address bartering. Congress sought to overturn the result in *Bailey*, not *Smith*. *Smith* had construed the "use" provision of Section 924(c)(1) to encompass use of a firearm as an item of barter or commerce, and *Bailey* had reaffirmed that holding. *Bailey*, 516 U.S. at 148 ("our decision today is not inconsistent with *Smith*"). And, as of the time of the 1998 amendment, the majority of lower courts to reach the question had held that it did not matter which side of the bartering transaction the defendant was on: taking a firearm in exchange for drugs constituted "use" of the firearm during and in relation to a drug trafficking crime within the meaning of Section 924(c)(1). See *United States v. Ramirez-Rangel* . . . . Brief for the United States, *Watson v. United States* (No. 06-571) 27, available at www.abanet.org/publiced/preview/briefs/oct07.shtml#watson

Thus, construing the "possession in furtherance" prong to reach defendants who cannot be prosecuted under the "use" prong, post-*Watson*, for trading their drugs for guns, is not required to give effect to Congressional intent in enacting the 1998 amendment.

The plain meaning of "possession in furtherance" connotes a temporal element where the firearm is possessed by, and easily accessible to, the defendant at the outset of the drug trafficking crime, not upon completion. To further means to give aid to or promote—to serve as an additional tool in the commission of the drug crime,[3] rather than as the fruits of the drug crime. Stated simply, in ordinary English, a person who trades his drugs for a gun doesn't possess the gun until the deal is done; possession at the finish is not possession in furtherance. *See also, United States v. Ceballo-Torres*, 218 F.3d 409, 412 (5th Cir. 2000):

> The dictionary defines "furtherance" as "[t]he act of furthering, advancing, or helping forward." Webster's II New College Dictionary 454 (1st ed.1995); The American Heritage Dictionary of the English Language, 534 (10th ed.1981). When would a gun further, advance, or help a drug trafficking? Five ways spring quickly to mind. First, an accessible gun provides defense against anyone who may attempt to rob the trafficker of his drugs or drug profits. Second, possessing a gun, and letting everyone know that you are armed, lessens the chances that a robbery will even be attempted. Third, having a gun accessible during a transaction provides protection in case a drug deal in the apartment turns sour. Fourth, the visible presence of a gun during the transaction may prevent the deal from turning sour in the first place. Fifth, having a gun may allow the drug trafficker to defend "turf," areas of the street from which lower level dealers operate for the trafficker. There may be other ways. But, in any event, the dictionary definition of "furtherance" clearly has relevant meaning in the context of this statute.

[3] One of the dictionary definitions of "further" is "additional; more," Webster's Encyclopedic Unabridged Dictionary of the English Language, 778 (1996).

Congress intended the "in furtherance" prong to be a higher standard than "during and in relation to." See authorities cited in §§A, *supra.* The plain meaning of that phrase likewise connotes a temporal element. The primary meaning of "during" is "throughout the entire time," Webster's New World Dictionary 186 (1995, paperback edition); "throughout the duration, continuance, or existence of," Webster's Encyclopedic Unabridged Dictionary of the English Language 608 (1996). In ordinary English, a person who agrees to trade his drugs for a gun gets the gun at the end of the trade, not during the trade.

The Government argued before the Supreme Court that Watson's conduct satisfied the statute because "[t]he drug dealer uses the firearm as a means to 'carry out a purpose or action,' namely, to close his drug deal." Brief for the United States, *Watson v. United States*, No. 06-571, p. 13. Likewise, the Government argued before this Court that "[t]he illicit drug transaction was not completed until after [Mahan] possessed his bargained for consideration, the firearms," and the firearms thereby furthered his drug trafficking crime. Govt. Trial Memo, pp. 28-29.

Mahan was not charged with possessing the firearms in furtherance of the crime of distributing methamphetamine; rather, Count 3 charges that he possessed the firearms in furtherance of possession of methamphetamine with intent to distribute. He committed the crime of possession of methamphetamine with intent to distribute when he offered to make partial payment for the guns with meth—before he took possession of the guns. The Government's theory

requires construing "in furtherance" to mean "to complete," rather than "to promote or advance." It puts the proverbial cart—the drug trafficking crime—before the proverbial horse—the possession of the firearm that should drive, promote, advance the drug crime "cart."

Watson teaches us that "ordinary meaning and the conventions of English" trump arguments based on linguistic gymnastics or "policy-driven symmetry." 128 S.Ct. at 585-86. In Mahan's case, the Government contended that he used the firearms to further or promote his sale of methamphetamine to the previous "owners" of the firearms, Copely and Isbell. But a seller who intends to use an item to promote a sale, possesses that item before starting the sale; at the very least, he does not receive the promotional item from the buyer when he closes the sale. Thus, so long as *Smith* remains good law, and *Watson* guides the statutory construction, a defendant who intends to trade his firearm for drugs, intends to "use" the firearm, and may be prosecuted under the "possession in furtherance" prong, whereas defendants, such as Mahan, who intend to trade their drugs for firearms, may not.

VI. CONCLUSION

For the reasons set forth above, this Court should either reconsider its earlier denial of the defense "Motion to Dismiss Count 3" at trial, or reach the merits of his current Motion for Judgment of Acquittal, and find there is insufficient evidence, as a matter of law, to support his conviction on that

count, based on the Supreme Court's intervening decision in *Watson,* and controlling Ninth Circuit precedent.

RESPECTFULLY SUBMITTED THIS 2nd day of April, 2008.

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