CA No. 08-30475

UNITED STATES COURT OF APPEALS
FOR THE
NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM JOHN MAHAN,

Defendant-Appellant.

Appeal from the United States District Court

For the District of Oregon

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

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Whether the mere incidental receipt of a firearm as consideration for drugs is "possession in furtherance" of the drug trafficking offense that requires a mandatory-minimum consecutive sentence under 18 U.S.C. §924(c)(1)? ……. 1

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- This question is appropriate for rehearing *en banc* to maintain consistency with the Supreme Court's reasoning and mode of analysis in holding that mere receipt of a firearm is not "use" of the firearm "during and in relation to" the drug crime, *United States v. Watson*, 552 U.S. 74 (2007), and to achieve uniformity with the Court's rules of statutory construction.…….... 2

- Especially where the Panel recognized it expanded the scope of the offense beyond this Court's precedents, 586 F.3d at 1188, *en banc* review is appropriate to achieve uniformity with the reasoning and mode of analysis of earlier panel decisions. *See Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003)(*en banc*)…….. 3

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. WILLIAM JOHN MAHAN, Defendant-Appellant.	CA No. 08-30475

APPELLANT'S PETITION FOR REHEARING AND FOR REHEARING *EN BANC*

The Petitioner, William John Mahan, through his attorney Terri Wood, respectfully petitions the Court for rehearing and rehearing *en banc*, pursuant to FRAP 35 and 40, regarding the following question:

> Whether the mere incidental receipt of a firearm as consideration for drugs is "possession in furtherance" of the drug trafficking offense that requires a mandatory-minimum consecutive sentence under 18 U.S.C. §924(c)(1)?

By holding that such conduct invariably violates the statute, the Panel overlooked a material point of law: that the ordinary and natural meaning of the "possesses in furtherance" prong—as well as its contextual meaning and legislative history—is

the active, present-tense possession of the firearm *as a weapon* by the defendant to advance or promote his commission of the drug crime—not simple possession by receipt of a firearm incidental to completion of the crime. *United States v. Mahan*, 586 F.3d 1185 (9th Cir. 2009).[1]

Summary Of Reasons To Grant Rehearing *En Banc*

The Panel's opinion holding "that a defendant who accepts firearms in exchange for drugs possesses the firearms 'in furtherance of' a drug trafficking offense" is for publication, and addresses an issue of first impression in this Circuit. The question raised by this appeal is therefore of exceptional importance in determining the reach of a statute that imposes minimum-mandatory consecutive prison sentences of great magnitude.[2]

- This question is appropriate for rehearing *en banc* to maintain consistency with the Supreme Court's reasoning and mode of analysis in holding that mere receipt of a firearm is not "use" of the firearm "during and in relation to" the drug crime, *Watson v. United States*, 552 U.S. 74 (2007), and to achieve uniformity with the Court's rules of statutory construction.

[1] The Appendix includes a copy of the Panel's opinion.

[2] *Mahan* has been applied to a defendant who accepted firearms as partial payment for outstanding drug debts. *United States v. Anderson* (9th Cir. 12/21/09 Memorandum), copy in Appendix.

- Especially where the Panel recognized it expanded the scope of the offense beyond this Court's precedents, 586 F.3d at 1188, *en banc* review is appropriate to achieve uniformity with the reasoning and mode of analysis of earlier panel decisions. *See Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003)(*en banc*).
- The question is also of exceptional importance because the Panel's holding expands the harsh mandatory-minimum statute to cover relatively innocuous behavior outside the scope of conduct contemplated by Congress.[3]

Factual Background And Case Proceedings

For purposes of this Petition, the Panel's recitation of the factual background and case proceedings are an adequate summary in most respects:

> Late on the evening of November 30, 2005, Zane Isabell and Shawn Copley offered to sell several stolen firearms to William Mahan. Copley initially called his mother to gauge her interest in acquiring them; during this phone call, he ultimately spoke with Mahan, who was living with Copley's mother at the time. Based on Copley's conversation with Mahan, Copley and Isabell drove to his mother's house with the stolen firearms. After smoking some methamphetamine that Mahan supplied, the three left the house and went to a nearby shed, where Copley

[3] Brief for the United States, *Watson v. United States* (No. 06-571), p.27, available at www.abanet.org/publiced/preview/briefs/oct07.shtml#watson ("Nothing 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.").

> showed Mahan the guns. After viewing the firearms, Mahan agreed to buy them for a combination of 1/8 ounce of methamphetamine and approximately $700 in cash.
>
> Mahan was eventually arrested and charged on a three-count indictment. The final count charged him with possession of a firearm "in furtherance of" a drug trafficking offense in violation of 18 U.S.C. §924(c). Mahan's motion for acquittal was denied before closing argument. The jury convicted Mahan, who timely appeals.
>
> Mahan challenges the district court's decision to deny his motion for acquittal. In essence, we are confronted with a narrow question of law: whether a defendant who receives guns in exchange for drugs possesses those guns "in furtherance of" his drug trafficking offense within the meaning of 18 U.S.C. § 924(c). 586 F.3d at 1186-87.

Mahan's underlying drug offense was Possession of Methamphetamine with Intent to Distribute. Mahan delivered the drugs as payment to Copley and Isbell inside Copley's mother's house, while the guns remained outside the house, in the shed. The government offered no evidence or argument at trial that the guns were loaded at that time, or that Mahan remained in possession of methamphetamine with intent to distribute it after the transaction.

I. REHEARING *EN BANC* SHOULD BE GRANTED BECAUSE THE PANEL'S OPINION OVERLOOKS A MATERIAL POINT OF LAW AND *EN BANC* CONSIDERATION IS WARRANTED ON THIS QUESTION OF EXCEPTIONAL IMPORTANCE TO ACHIEVE CONSISTENCY WITH THIS CIRCUIT'S AND SUPREME COURT PRECEDENT INTERPRETING 18 U.S.C. §924(c).

A. The Plain Meaning Of "Possesses In Furtherance" Requires More Than Mere Receipt Of A Firearm In Exchange For Drugs.

18 U.S.C. §924(c)(1) requires a minimum-mandatory consecutive sentence for an individual "who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm or who, in furtherance of any such crime, possesses a firearm." Section 924(c)(1) constitutes a single offense that can be committed by the alternate means of uses, carries or possesses in furtherance. *United States v. Arreola*, 467 F.3d 1153, 1161 (9th Cir. 2006). Congress chose the active, present tense of all three verbs—use, carry or possess—in defining the conduct the statute prohibits. "Congress' use of a verb tense is significant in construing statutes." *United States v. Wilson*, 503 U.S. 329, 333 (1992). In everyday speech, just as "the first possessor is the one who 'uses' the gun in the trade," *Watson*, 552 U.S. at 584, the first possessor is the one who "possesses" the gun during the trade and until its completion.

The phrase "possesses a firearm" must be read in conjunction with its restrictive modifier, "in furtherance of" the underlying drug crime. This Circuit has uniformly interpreted the phrase "in furtherance" as it is commonly understood, to

mean to advance, promote, or help forward. *E.g., United States v. Krouse*, 370 F.3d 965, 966-67 (9th Cir. 2004); *United States v. Lopez*, 477 F.3d 1110, 1115 (9th Cir. 2007); *United States v. Hector*, 474 F.3d 1150, 1157 (9th Cir. 2007). Thus, the natural and ordinary meaning of "possesses in furtherance" has a temporal aspect, requiring that he who possesses a firearm do so to advance or move forward the commission of the underlying offense. *See also Arreola*, 467 F.3d at 1158-59 (recognizing Congress intended the "in furtherance of" requirement to encompass the "during and in relation to" standard, and to be "a slightly higher standard"); *but see Mahan*, 586 F.3d at 1189 n.3 (Mahan's "argument incorrectly interprets the phrase 'in furtherance of' to mean 'during.').

The Panel focused solely on the "in furtherance" modifier, and not its present-tense verb, "possesses." The Panel reasoned that a drug seller's willingness to accept a gun in trade advances the drug deal, "because without the gun—the 'currency' for the purchase—the drug sale would not take place." *Mahan*, 586 F.3d at 1186. However, the seller's willingness to accept a gun in trade occurs before the seller "possesses a firearm," 18 U.S.C. §924(c)(1). Using the Panel's reasoning, the buyer's willingness to offer his gun in trade likewise advances the drug deal, because without consideration, the sale would not occur. The buyer's willingness to part with his gun in trade *a fortiori* occurs while he "possesses a firearm." Thus, while the agreement to trade drugs for guns serves to advance the commission of

the crime by both parties, it is only the first possessor of the gun—in Mahan's case, the buyer—who "possesses a firearm" with the requisite intent to further the drug transaction.

The Panel's holding that possession which completes a drug offense—when the seller receives the gun in trade—is possession in furtherance, fails to give the ordinary and natural meaning to "possesses a firearm . . . in furtherance of" the commission of the underlying crime, and thus overlooks that material point of law, undermining its holding. *See Watson*, 552 U.S. at 79 ("With no statutory definition or definitive clue, the meaning of the verb 'uses' has to turn on the language as we normally speak it.").[4] To paraphrase *Watson*, a seller does not possess a buyer's consideration in advance of the sale's completion. 552 U.S. at 79 ("a seller does not 'use' a buyer's consideration").

B. The Statute's Construction Allowed By The Panel Departs From The Reasoning And Mode Of Analysis Of Earlier Panel Decisions Interpreting This Same Provision.

The Panel acknowledged that "all of this court's prior decisions interpreting this [prong of the] statute have done so in the context of a defendant who possessed a firearm near drugs," but concluded "neither the statute nor our prior cases limit it

[4] Once acquiring a firearm in trade, the seller "possesses a firearm" and is not immune from prosecution should he then intend it to further an on-going drug trafficking offense, such as conspiracy or possession with intent to deliver, in full accord with Ninth Circuit case law beginning with *Krouse.* That fact pattern is not presented by Mahan's case, nor addressed by the Panel's decision.

to such situations." *Mahan*, 586 F.3d at 1188. The Panel made no attempt to reconcile its holding that possession by passive receipt of a firearm incidental to completion of the drug crime suffices, with prior case law requiring the firearm be possessed to actively advance the crime. *See, e.g., Krouse,* 370 F.3d. at 967; *United States v. Rios*, 449 F.3d 1009, 1013 (9th Cir. 2006); *Arreola*, 467 F.3d at 1159; *United States v. Norwood*, 555 F.3d 1061, 1069 (9th Cir. 2009), *reversed on other grounds*, 130 S.Ct. 491. Prior case law faithfully tracked the statute's history in construing "possesses in furtherance" as Congress intended: that the firearm be possessed *as a weapon to further the drug crime*. *Id.* Serving as mere consideration amounts to nothing more than simple possession by the recipient, and falls short of the statute's intended reach.

The Panel also opined that " 'intended to be used' and 'in furtherance of' are different standards," contrary to this Court's decisions in *Rios*, 449 F.3d at 1012, and *United States v. Lopez*, 477 F.3d 1110, 1115 (9th Cir. 2007). *See Mahan*, 586 F.3d at 1188. In *Rios*, this Court examined the reasoning of *United States v. Mann*, 389 F.3d 869 (9th Cir. 2004), and *Krouse*, and concluded:

> Under these cases, 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.

See also Lopez, supra ("To establish that Lopez possessed the firearm 'in furtherance' of his drug crime, the Government must show that Lopez intended to use the firearm to promote or to facilitate his possession of cocaine with intent to distribute.").

Because the "in furtherance" language focuses on the intent of the defendant in possessing the firearm, *Krouse* at 967, and the defendant's intent must be for his firearm to further commission of the underlying drug crime, *Rios* at 1012, saying the government must prove possession coupled with an intent to use the firearm to promote the crime is simply another way of stating the "in furtherance" requirement—not a different standard. The Panel's finding of a distinction avoids discussion of the reasoning underlying *Watson*, that the recipient of a firearm used merely as consideration for his drugs does not thereby "use" the firearm in violation of §924(c). See 586 F.3d at 1187, and *cf.,* Appellant's Opening Brief, pages 24-30.

The Panel further determined that the firearms need not play an "emboldening role" in the possessor's commission of the drug crime, nor be within strategic reach of a dealer to protect his drugs or proceeds, to establish "possesses in furtherance." *Id.* at 1189-90; *cf. United States v. Thongsy*, 577 F.3d. 1036, 1042 (9th Cir. 2009)(rejecting government's claim that a firearm that merely "played a role" in the drug crime would necessarily be "in furtherance" of that crime); *United*

States v. Gonzalez, 528 F.3d 1207, 1213 (9th Cir. 2008)(holding that, where an armed border patrol agent possessed marijuana with intent to distribute and the firearm "emboldened" him, evidence was sufficient to convict the agent of possession of the firearm "in furtherance of" the crime); *Hector*, 474 F.3d at 1156-57.

Although not in direct conflict with the holdings of prior decisions in this Circuit interpreting the same statutory language, *en banc* review is needed to maintain uniformity with the reasoning of prior decisions that more than simple possession of a firearm by an individual who deals drugs is required to trigger the enhanced penalties of §924(c). *See, e.g., Mann*, 389 F.3d at 872-73*; Rios, supra.* The statute takes aim at gun-packing criminals who commit drug offenses, not at the criminal's means of acquiring the gun in the first place.[5] The Panel's concern over creating a circuit split—particularly when the arguments raised in Mahan's appeal were not addressed by sister circuits—should not overcome the need for answering this important question consistently with the prior decisions of this Circuit.

[5] Congress amended the statute post-*Bailey* in 1998 by adopting S.191, called "Throttling Criminal Use of Guns". See pages 13-15, *infra*.

C. In The Context Of The Holding In *Watson*, The Panel's Expansion Of §924(c) To Include Mere Receipt Of A Firearm Violates *Stare Decisis* By Failing To Follow Its Reasoning And Rationale.

Watson is the most recent decision of the Supreme Court that involves the same fact pattern as Mahan's case—trading drugs to gain possession of another's gun—and interprets the highly analogous "uses or carries" prong of the same statute. *See Arreloa*, 467 F.3d at 1159-60 (recognizing the two prongs of the statute are "difficult to distinguish conceptually," require similar evidence to prove, and "undoubtedly overlap"). At the very least, *Watson* provides the framework for analyzing the question in Mahan's case; this Court should not dismiss it as "shed[ding] no light on whether Mahan's conduct falls within the 'in furtherance of' prong of section 924(c)," *Mahan*, 586 F.3d at 1189.

Watson teaches us that "ordinary meaning and the conventions of English" trump arguments based on linguistic gymnastics or "policy-driven symmetry." 552 U.S. at 81-82. Arriving at the plain meaning of statutory language is not a matter of simply finding dictionary definitions to establish the common understanding of a word or phrase. The meaning "has to turn on the language as we normally speak it. . . . [the] everyday meaning [is] revealed in phraseology that strikes the ear as 'both reasonable and normal'." *Id.*, at 79 (citation omitted).

The plain meaning of "possesses a firearm . . . in furtherance" conveys 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. *See Arreola*, 467 F.3d at 1159 ("What the statute proscribes . . . is possessing a gun in furtherance of (with a particular purpose of advancing) the specified crime."). It is both reasonable and normal to say a person who trades his drugs for a gun does not possess the gun until the deal is done; and that the person possessing the gun with the purpose of advancing the drug deal is the one seeking to trade it for drugs. In regular speech, to further does not mean to finish, to advance does not mean to complete, to move forward does not mean to conclude. *See,* H.R. Rep. No. 105-344 (1997), 12 n.17 ("furtherance is not an obscure, technical word, but rather a commonplace word understood by an ordinary person as advancement or promotion."). *Smith v. United States,* 508 U.S. 223, 225-37 (1993), held that a drug buyer who trades his gun for drugs "uses" the firearm "during and in relation to" the underlying drug crime. It defies any common understanding of commerce to say the drug seller possesses the same firearm to advance the sale that the buyer is actively using to promote the sale to him. *Watson,* 552 U.S. at 79 ("a seller does not 'use' a buyer's consideration").

The Panel overlooked a material point of law by dismissing *Watson* and its plain-meaning methodology as being of no import. While addressing the plain meaning of "in furtherance," the Panel ignored the more important verb, "possesses," that "in furtherance" modifies. The Panel rested its holding on the

"matter of logic [that] a defendant's willingness to accept possession of a gun as consideration for some drugs he wishes to sell *does* 'promote or facilitate' that illegal sale," *Mahan*, 586 F.3d at 1188-89, when *Watson* requires that its holding rest instead on the language of the statute as we normally speak it.

A seller who possesses an item for the purpose of promoting 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 possesses a firearm that he offers in trade for drugs intends the gun to advance the drug deal, and may be prosecuted under the "possesses in furtherance" or "uses" prong, whereas defendants like Mahan, who merely receive the firearm in completion of the transaction, may not.

D. Where "Uses . . . During And In Relation To" And "Possesses . . . In Furtherance" Are Parallel Terms, The Context And History Of The Statute Demonstrates That More Than Mere Receipt Of A Firearm In Exchange For Drugs Is Required.

In 1998, Congress amended §924(c) in response to the Supreme Court's decision in *Bailey v. United States*, 516 U.S. 137 (1995). *Bailey* held that "uses" did not extend to simple possession of a firearm during and in relation to the underlying drug offense. 516 U.S. at 143 (requiring the government to show an *active employment* of the firearm by the defendant to show "uses"). *Bailey* overturned lower court decisions that had more broadly interpreted "uses" to

include possession of a firearm during the drug offense that in some way "facilitated" the crime, generally based on an "accessibility and proximity" test. H.R. Rep. No. 105-344 at 4 (1997)(House Report).

In the first draft of Senate Bill 191, which ultimately became law, the Senate added the term "possesses" to the existing version of §924 so that it read, "any person who, during and in relation to any . . . drug trafficking crime . . . uses, carries, or possesses a firearm" S.191 Version One, 105th Cong. (1997). In its bill, H.R. 424 Version One, 105th Cong. (1997), the House replaced the phrase "uses or carries" with "possesses" because "[t]he word 'possession' has a broader meaning than either 'uses' or 'carries,' thus reversing the restrictive effect of the *Bailey* decision." House Report at 6. Concerns over the statute being applied to persons who simply possessed firearms incidental to the commission of a drug crime were resolved by the "in furtherance" requirement.[6] The second version of the House bill added "in furtherance of" as a restrictive modifier of "possesses"; retained the "during and in relation to" requirement; and set forth three tiers of prohibited acts: possesses in furtherance, brandishes, or discharges a firearm.[7]

The House Report noted "the distinction between 'in furtherance of' and 'during and in relation to' is a subtle one, and may initially prove troublesome for

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[6] *See, e.g.*, Congressional Record—House, H533-34 (Feb. 24, 1998); Congressional Record—Senate, S12670-71 (Oct. 16, 1998).

[7] *See Arreola*, 467 F.3d at 1158-60 (thorough discussion of legislative history).

prosecutors. Nevertheless, the Committee believes that 'in furtherance of' is a slightly higher standard, and encompasses the 'during and relation to' language." Id. at 11. *See also United States v. Bailey*, 36 F.3d 106, 116 (D.C. Cir. 1994), *reversed on other grounds, Bailey, supra* (during an earlier version of §924(c), Congress considered and rejected "in furtherance of" in favor of the broader "during and in relation to," which did not require "conduct that actively advances the underlying predicate drug offense."). Moreover, Congress did not intend this new prong of the statute to apply to drug dealers who merely possessed firearms—without a specific factual showing beyond expert testimony that drug dealers often carry firearms to protect their drugs, money, and themselves. *Rios,* 449 F.3d at 1013-14.

Dissension existed over eliminating the "uses or carries . . . during and in relation to" because "in furtherance" was recognized as a higher burden. Congress compromised by amending S.191, which retained the "uses or carries" prong, to add the "in furtherance of" language to modify "possesses", and that bill was signed into law. Thus, both the context and history of the "possesses in furtherance" prong demonstrate that he who possesses the firearm must do so with the intent that it actively advances the underlying drug crime, functioning as a weapon—not a form of consideration. Establishing no more than simple possession by receipt in completion of the crime does not prove "possesses in furtherance."

E. Any Ambiguity Or Uncertainty In The Scope Of The Statute Must Be Resolved With Lenity.

At the very worst, there is ambiguity or uncertainty as to whether "possesses in furtherance" is established by mere receipt of a firearm at completion of the underlying drug crime. The Panel held Mahan violated the statute by receiving firearms in exchange for a user-quantity (3.5 grams) of methamphetamine. Mahan contended that a defendant must possess the firearm from the outset—or at least during—the drug crime, and with the intent to use it to further his commission of the crime. Conduct falling within the reach of this statute constitutes a substantive crime of violence that is in addition to the underlying drug crime, requiring a hefty mandatory-minimum consecutive sentence. In such circumstances, the rule of lenity favors Mahan's interpretation of §924(c). *See, e.g., United States v. Santos*, 128 S.Ct. 2020, 2025 (2008):

> The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead. (citations omitted).

F. No Reasoning From Other Circuits Warrants The Panel's Expansion Of The Reach Of This Statute To Incidental, Non-Violent Possession Of Firearms.

In reaching its decision, the Panel relied on cases from five other circuits where the courts either decided, or assumed without deciding, that a defendant who receives firearms in exchange for drugs possesses those firearms in furtherance of a drug trafficking offense. 586 F.3d at 1188. Only two circuits decided the issue in published opinions, *United States v. Frederick*, 406 F.3d 754 (6th Cir. 2005) and *United States v. Luke-Sanchez*, 483 F.3d 703 (10th Cir. 2007)(adopting the reasoning of *Frederick*). The Panel concluded:

> These cases demonstrate the common sense proposition that when one accepts a gun in exchange for drugs, the gun is an integral part of the drug sale because without the gun—the "currency" for the purchase—the drug sale would not take place. . . . When a defendant accepts a gun as payment for his drugs, his sale—and thus his crime—is incomplete until he receives possession of the firearm. We fail to see how possession that completes a drug trafficking offense is not possession "in furtherance of" a drug trafficking offense. 586 F.3d at 1188-89.

This substitution of a "common sense proposition" for the "reasonable and normal" meaning of the statute's language in common speech as instructed by *Watson* is an error that infects the Panel's decision, as previously asserted, and these pre-*Watson* decisions by the Sixth and Tenth Circuit.

Furthermore, the Panel's reliance on a "common sense proposition" at the core of its holding should be rejected, given this Circuit's prior decisions uniformly

rejecting the equally "common sense proposition" that drug dealers possess firearms to protect their drugs, money, and themselves, as sufficient to prove "possesses in furtherance." *E.g.*, *Rios,* 449 F.3d at 1013-14. There is no evidence to support the Panel's proposition that drug sales would not occur without guns received in exchange for drugs. The nature of the buyer's consideration—be it money, stolen property, services such as prostitution, or other drugs—is incidental to the drug deal; and simple possession by receipt does not mean "possesses in furtherance."

Conclusion

Based on the foregoing reasons, the Court should grant rehearing *en banc*, or the Panel should grant rehearing.

RESPECTFULLY SUBMITTED this 29th day of December, 2009.

/s/ Terri Wood
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Attorney for Defendant -Appellant

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. WILLIAM JOHN MAHAN, Defendant-Appellant.	CA No. 08-30475

BRIEF FORMAT CERTIFICATION
PURSUANT TO RULE 32(a)(7)(C) AND
NINTH CIRCUIT RULE 32-1

Pursuant to Ninth Circuit Rule 32(a)(7)(C), I certify that the Petition for Rehearing and Suggestion for Rehearing *En Banc* is proportionately spaced, has a typeface of 14 points or more, and contains 4192 words

DATED this 29th day of December, 2009.

/s/ Terri Wood
TERRI WOOD
Attorney for Defendant -Appellant

CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2009, I electronically filed the foregoing Petition for Rehearing and Suggestions for Rehearing *En Banc* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Terri Wood
TERRI WOOD
Attorney for Defendant -Appellant

APPENDIX

PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING *EN BANC*

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1. *United States v. Mahan,* 586 F.3d 1185 (9th Cir. 2009)

2. *United States v. Anderson,* Nos. 08-30469, 08-30470 (9th Cir. 12/21/09)(unpublished Memorandum)

586 F.3d 1185, 09 Cal. Daily Op. Serv. 13,815, 2009 Daily Journal D.A.R. 16,123
(Cite as: 586 F.3d 1185)

H

United States Court of Appeals,
Ninth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
William John MAHAN, Defendant-Appellant.
No. 08-30475.

Argued and Submitted Oct. 6, 2009.
Filed Nov. 16, 2009.

Background: Defendant was convicted in the United States District Court for the District of Oregon, Ann L. Aiken, J., of possession of firearm in furtherance of drug trafficking offense. Defendant appealed.

Holding: The Court of Appeals, O'Scannlain, Circuit Judge, held that defendant who received guns in exchange for drugs possessed those guns "in furtherance of" drug trafficking offense.

Affirmed.

West Headnotes

[1] Weapons 406 17(4)

406 Weapons
406k17 Criminal Prosecutions
406k17(4) k. Weight and sufficiency of evidence. Most Cited Cases
To support a charge of possession of firearm in furtherance of drug trafficking offense, the government can establish that a defendant has used a gun to promote or facilitate a crime if facts in evidence reveal a nexus between the guns discovered and the underlying offense. 18 U.S.C.A. § 924(c).

[2] Weapons 406 4

406 Weapons
406k4 k. Manufacture, sale, gift, loan, possession, or use. Most Cited Cases
Defendant who received guns in exchange for drugs possessed those guns "in furtherance of" his drug trafficking offense within meaning of statute prohibiting possession of a firearm in furtherance of drug trafficking offense; guns were integral part of drug sale because without the guns the drug sale would not have taken place. 18 U.S.C.A. § 924(c).

[3] Weapons 406 17(4)

406 Weapons
406k17 Criminal Prosecutions
406k17(4) k. Weight and sufficiency of evidence. Most Cited Cases
The determination of whether a defendant possessed firearms in furtherance of a drug offense turns on the intent of the defendant, and is generally fact specific, focusing on the evidence linking the firearm to the drug crime. 18 U.S.C.A. § 924(c).

[4] Weapons 406 4

406 Weapons
406k4 k. Manufacture, sale, gift, loan, possession, or use. Most Cited Cases
Statute prohibiting possession of a firearm in furtherance of drug trafficking offense does not require that the defendant possess the gun throughout the entirety of his drug deal; rather, it simply requires that whatever the specific nature of his gun possession, it further, advance or help forward the underlying drug sale. 18 U.S.C.A. § 924(c).
***1186** Terri Wood, of Eugene, OR, argued the cause for the defendant-appellant and filed the briefs.

Frank R. Papagini, Jr., Assistant United States Attorney for the District of Oregon, Eugene, OR, argued the cause for the appellee and filed the brief. Karin J. Immergut, United States Attorney for the District of Oregon, and Kelly A. Zusman, Assistant United States Attorney for the District of Oregon, were on the brief.

Appeal from the United States District Court for the District of Oregon, Ann L. Aiken, Chief District Judge, Presiding. D.C. No. 6:06-CR-60045-AA.

Before: DIARMUID F. O'SCANNLAIN and N. RANDY SMITH, Circuit Judges, and CHARLES R. WOLLE,[FN*] Senior District Judge.

586 F.3d 1185, 09 Cal. Daily Op. Serv. 13,815, 2009 Daily Journal D.A.R. 16,123
(Cite as: 586 F.3d 1185)

FN* The Honorable Charles R. Wolle, Senior United States District Judge for the Southern District of Iowa, sitting by designation.

O'SCANNLAIN, Circuit Judge:

We must decide whether an individual who trades drugs for guns possesses the firearms "in furtherance of" his drug trafficking offense.

I

A

Late on the evening of November 30, 2005, Zane Isabell and Shawn Copley offered to sell several stolen firearms to William Mahan. Copley initially called his mother to gauge her interest in acquiring them; during this phone call, he ultimately spoke with Mahan, who was living with Copley's mother at the time. Based on Copley's conversation with Mahan, Copley and Isabell drove to his mother's house with the stolen firearms. After smoking some methamphetamine that Mahan supplied, the three left the house and went to a nearby shed, where Copley showed Mahan the guns. After viewing the firearms, Mahan agreed to buy them for a combination of 1/8 ounce of methamphetamine and approximately $700 in cash.

***1187** B

Mahan was eventually arrested and charged on a three-count indictment. The final count charged him with possession of a firearm "in furtherance of" a drug trafficking offense in violation of 18 U.S.C. § 924(c). Mahan's motion for acquittal was denied before closing argument. The jury convicted Mahan, who timely appeals.[FN1]

FN1. Mahan's claim that the district court's sentence was improper is disposed of in a memorandum disposition filed concurrently with this opinion.

II

Mahan challenges the district court's decision to deny his motion for acquittal.[FN2] In essence, we are confronted with a narrow question of law: whether a defendant who receives guns in exchange for drugs possesses those guns "in furtherance of" his drug trafficking offense within the meaning of 18 U.S.C. § 924(c).

FN2. A motion for acquittal must be filed within seven days of a jury verdict. Fed.R.Crim.P. 29(c). Mahan did not file his motion until nine months after the jury verdict, and thus, it was untimely. However, because Mahan made a Rule 29(a) motion as to the sufficiency of the evidence (at the conclusion of the evidence adduced at trial), we review *de novo* the denial of a Rule 29 motion for acquittal. *United States v. Tisor*, 96 F.3d 370, 379 (9th Cir.1996).

A

Section 924(c)(1)(A) establishes minimum penalties for offenders who use firearms to commit drug trafficking offenses. It provides, in pertinent part:

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

(emphasis added).

[1] "[T]he natural meaning of 'in furtherance of' is 'furthering, advancing or helping forward.' " *United States v. Hector*, 474 F.3d 1150, 1157 (9th Cir.2007) (internal citations omitted). The government can establish that a defendant has used a gun to "promote or facilitate" a crime if "facts in evidence reveal a nexus between the guns discovered and the underlying offense." *United States v. Krouse*, 370 F.3d 965, 968 (9th Cir.2004). Mahan rather argues that, in order to obtain a conviction under the "in furtherance of" prong of section 924(c), "the government must show

that the defendant *intended to use* the firearm to promote or facilitate the drug crime." *United States v. Rios*, 449 F.3d 1009, 1012 (9th Cir.2006) (emphasis added).

This argument misreads *Rios*, where we applied the familiar "nexus" requirement to uphold the defendant's conviction. Although we described the government's burden as requiring proof of intent, we clarified that "[e]vidence of this intent is sufficient when facts in evidence reveal a nexus between the guns discovered and the underlying offense." *Id.* (internal quotation marks and citations omitted).

Moreover, the text of the statute clearly demonstrates that "in furtherance of" does not simply mean "intends to use." Section 924(d), the subsection following the one in issue, draws a distinction between firearms "used" in an offense and those "intended ***1188** to be used." 18 U.S.C. § 924(d)(1); *see also Bailey*, 516 U.S. at 146, 116 S.Ct. 501. Thus, we reject Mahan's attempt to recharacterize the meaning of "in furtherance of," and again reaffirm that "intended to be used" and "in furtherance of" are different standards. Given that the statute uses these two phrases in different contexts, there is no reason to interpret the two provisions as identical. Thus, Mahan's attempt to redefine the phrase "in furtherance of" is unpersuasive.

B

[2][3] The determination of whether a defendant possessed firearms in furtherance of a drug offense "turns on the intent of the defendant," and is generally fact specific, focusing on the evidence linking the firearm to the drug crime. *See Krouse*, 370 F.3d at 967. When guns are located within strategic reach of a dealer such that they can use the guns to protect their illicit trade or the proceeds thereof, then a defendant's possession would typically be characterized as "in furtherance of" the drug crime. *Compare id.* at 968 (holding that high-caliber firearms located within easy reach in a room containing drugs were possessed "in furtherance of" a drug offense), *with United States v. Mann*, 389 F.3d 869, 872-73 (9th Cir.2004) (holding that guns located within a locked safe in the defendant's truck were not possessed "in furtherance of" trafficking drugs located within a tent).

From these cases, Mahan attempts to glean the principle that a gun must be within close physical proximity to a drug trafficker or his drugs in order to be possessed "in furtherance of" the drug offense. Although all of this court's prior decisions interpreting this statute have done so in the context of a defendant who possessed a firearm near drugs, *see, e.g.*, *United States v. Lopez*, 477 F.3d 1110, 1115 (9th Cir.2007) (holding that the defendant violated section 924(c) when both drugs and firearms were within his reach when he was stopped by the police), neither the statute nor our prior cases limit it to such situations.

Five other courts of appeals have confronted cases factually similar to this one, and all have either decided or assumed without deciding that a defendant who, like Mahan, receives firearms in exchange for drugs possesses those firearms "in furtherance of" a drug trafficking offense. *See United States v. Sterling*, 555 F.3d 452, 458 (5th Cir.2009) ("We thus assume, without deciding, that bartering drugs for guns constitutes 'possession in furtherance' [of a drug trafficking offense.]"); *United States v. Dolliver*, 228 Fed.Appx. 2, 3 (1st Cir.2007) (holding that trading drugs for a gun is a violation of the "in furtherance of" prong of the statute); *United States v. Luke-Sanchez*, 483 F.3d 703, 706 (10th Cir.2007) (same); *United States v. Boyd*, 209 Fed.Appx. 285, 290 (4th Cir.2006) ("We conclude that accepting possession of firearms as payment for crack cocaine is possession in furtherance of a drug trafficking crime."); *United States v. Frederick*, 406 F.3d 754, 764 (6th Cir.2005) (holding that trading drugs for a firearm violates the "in furtherance of" prong of the statute).

These cases demonstrate the common sense proposition that when one accepts a gun in exchange for drugs, the gun is an integral part of the drug sale because without the gun-the "currency" for the purchase-the drug sale would not take place. As the Sixth Circuit observed:

> As a matter of logic, a defendant's willingness to accept possession of a gun as consideration for some drugs he wishes to sell *does* "promote or facilitate" that illegal sale. If the defendant did not accept possession of the gun, and instead insisted on being paid fully in cash for his drugs, some drug sales-and ***1189** therefore some drug trafficking crimes-would not take place.

Frederick, 406 F.3d at 764. When a defendant accepts a gun as payment for his drugs, his sale-and thus his crime-is incomplete until he receives possession of the firearm. We fail to see how possession that completes a drug trafficking offense is not possession "in furtherance of" a drug trafficking offense.

[4] Mahan cites no precedent, from this circuit or any other, for the proposition that accepting guns as payment for drugs does not constitute possession of firearms "in furtherance of" a drug trafficking offense. [FN3] In light of the unanimity and clarity of our sister circuits' precedent, we decline Mahan's invitation to create a circuit split, and hold that a defendant who accepts firearms in exchange for drugs possesses the firearms "in furtherance of" a drug trafficking offense.

> FN3. For these same reasons, we reject Mahan's claim that he did not possess the firearms "in furtherance of" his drug trafficking offense since he did not acquire possession of the firearms until the completion of his offense. This argument incorrectly interprets the phrase "in furtherance of" to mean "during." The statute does not require that the defendant possess the gun throughout the entirety of his drug deal; rather, it simply requires that whatever the specific nature of his gun possession, it "further[ ], advanc[e] or help[ ] forward" the underlying drug sale. *Hector*, 474 F.3d at 1157 (quoting *United States v. Castillo*, 406 F.3d 806, 814 (7th Cir.2005)).

III

Mahan offers several arguments to rebut our construction.

A

First, Mahan cites a pair of Supreme Court opinions. He compares *Watson v. United States*, 552 U.S. 74, 128 S.Ct. 579, 169 L.Ed.2d 472 (2007), where the Court held that a defendant does not "use" a gun when he receives it in trade for drugs, to *Smith v. United States*, 508 U.S. 223, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993), where the Court held that a defendant *does* use a gun if he trades it to "purchase" drugs. *Watson*, however, interpreted only section 924(c)'s "use" prong. The government did not charge Mahan under section 924(c)'s "use" prong, however. Instead, it charged him under section 924(c)'s "in furtherance of" prong. Therefore, *Watson*'s holding does not control. Indeed, *Watson* expressly declined to discuss whether receiving guns in exchange for drugs violates the "in furtherance of" prong of section 924(c). Thus, these Supreme Court decisions shed no light on whether Mahan's conduct falls within the "in furtherance of" prong of section 924(c).

B

Second, Mahan claims that his possession of the firearms was not "in furtherance of" his drug trafficking offense because they did not play an "emboldening role" in his offense. He argues that Congress amended the statute to include the "in furtherance of" prong to address a 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." 144 Cong. Rec. 26,608-09 (1998) (statement of Sen. DeWine).[FN4] This lone senator's statement, however, cannot overcome the plain language***1190** of the statute. To whatever extent the legislative history is relevant, the frequently cited House Judiciary Committee Report [FN5] states that in order to obtain a conviction under this prong of the statute, "[t]he government must clearly show that a firearm was possessed to advance or promote the commission of the underlying offense." H.R.Rep. No. 105-344, at 12 (1997). Thus, we deem Mahan's attempt to import additional elements into section 924(c) unpersuasive.

> FN4. Mahan also points to *United States v. Polanco*, 93 F.3d 555, 566-67 (9th Cir.1996), for the proposition that, in order to demonstrate that he possessed the firearms "in furtherance of" his drug trafficking crime, the government must prove that his use of a gun "emboldened" him to commit his offense. We decided *Polanco* two years before Congress amended section 924(c) to include the "in furtherance of" prong, so the case does not bear on the meaning of this phrase.

> FN5. This court, as well as other courts interpreting this portion of the statute, has fre-

> quently looked to the House Report accompanying the statute for guidance. *See* *Rios*, 449 F.3d at 1013 (quoting House Report 105-344); *see also* *United States v. Combs*, 369 F.3d 925, 932 (6th Cir.2004) (same).

IV

For the foregoing reasons, the district court's denial of Mahan's motion for acquittal is

AFFIRMED.

C.A.9 (Or.),2009.
U.S. v. Mahan
586 F.3d 1185, 09 Cal. Daily Op. Serv. 13,815, 2009 Daily Journal D.A.R. 16,123

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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. FRITZ ANDERSON, Defendant - Appellant.	Nos. 08-30469, 08-30470 D. Ct. No. 1:07-CR-00112-RFC-1, D. Ct. No. 1:07-CR-00015-RFC-1 MEMORANDUM [*]

Appeal from the United States District Court
for the District of Montana
Richard F. Cebull, District Judge, Presiding

Submitted December 8, 2009 [**]
Portland, Oregon

Before: FARRIS, D.W. NELSON, and BERZON, Circuit Judges.

Fritz Anderson was charged with 29 counts of drug trafficking in violation of 21 U.S.C. § 841 and one count of using, carrying or possessing a firearm in relation to drug trafficking in violation of 18 U.S.C. § 924(c). Anderson moved for

[*] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

[**] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

acquittal on the final count; the district court granted the motion as to using or carrying a firearm but denied the motion as to possessing a firearm in furtherance of a drug crime and let the count stand. The jury convicted Anderson on all thirty counts, and the court imposed a sentence of 40 years (480 months). Anderson timely appealed.

"[W]e review the district court's denial of a motion to acquit de novo." *United States v. Mosley*, 465 F.3d 412, 415 (9th Cir. 2006). "[A] defendant who accepts firearms in exchange for drugs possesses the firearms 'in furtherance of' a drug trafficking offense." *United States v. Mahan*, No. 08-30475, slip op. at 8 (9th Cir. Nov. 16, 2009). Because Anderson accepted firearms as partial payment for outstanding drug debts, he possessed those firearms in furtherance of his drug trafficking offenses, and the district court was correct to deny his motion to acquit.

The substantive reasonableness of a sentence is reviewed under an abuse of discretion standard. *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc). "For a non-Guidelines sentence, we are to 'give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance.'" *Id.* (quoting *Gall v. United States*, 552 U.S. 38, 51 (2007)). Nothing in the record suggests that Judge Cebull abused his discretion when he departed downward significantly, but not as far as Mr. Anderson would have preferred, from the guideline sentence.

AFFIRMED.