SUPREME COURT OF THE UNITED STATES

No. 91–8674

JOHN ANGUS SMITH, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 1, 1993]

JUSTICE SCALIA, with whom JUSTICE STEVENS and JUSTICE SOUTER join, dissenting.

Section 924(c)(1) mandates a sentence enhancement for any defendant who "during and in relation to any crime of violence or drug trafficking crime . . . uses . . . a firearm." 18 U. S. C. §924(c)(1). The Court begins its analysis by focusing upon the word "use" in this passage, and explaining that the dictionary definitions of that word are very broad. See *ante*, at 5. It is, however, a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal* v. *United States*, 508 U. S. ___, ___ (1993) (slip op., at 3). That is particularly true of a word as elastic as "use," whose meanings range all the way from "to partake of" (as in "he uses tobacco") to "to be wont or accustomed" (as in "he used to smoke tobacco"). See Webster's New International Dictionary 2806 (2d ed. 1939).

In the search for statutory meaning, we give nontechnical words and phrases their ordinary meaning. See *Chapman* v. *United States*, 500 U. S. ___, ___ (1991) (slip op., at 7); *Perrin* v. *United States*, 444 U. S. 37, 42 (1979); *Minor* v. *Mechanics Bank of Alexandria*, 1 Pet. 46, 64 (1828). To use an instrumentality ordinarily means to use it for its intended purpose. When someone asks "Do you use a cane?" he is not inquiring whether you have your grandfather's silver-handled walking-stick on display in the hall; he wants to know whether you *walk* with a

cane. Similarly, to speak of "using a firearm" is to speak of using it for its distinctive purpose, *i.e.*, as a weapon. To be sure, "one can use a firearm in a number of ways," *ante*, at 7, including as an article of exchange, just as one can "use" a cane as a hall decoration—but that is not the ordinary meaning of "using" the one or the other.[1] The Court does not appear to grasp the distinction between how a word *can be* used and how it *ordinarily is* used. It would, indeed, be "both reasonable and normal to say that petitioner `used' his MAC–10 in his drug trafficking offense by trading it for cocaine." *Ibid*. It would also be reasonable and normal to say that he "used" it to scratch his head. When one wishes to describe the action of employing the instrument of a firearm for such unusual purposes, "use" is assuredly a verb one could select. But that says nothing about whether the *ordinary* meaning of the phrase "uses a firearm" embraces such extraordinary employments. It is unquestionably *not* reasonable and normal, I think, to say simply "do not use firearms" when one means to prohibit selling or scratching with them.

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[1]The Court asserts that the "significant flaw" in this argument is that "to say that the ordinary meaning of `uses a firearm' *includes* using a firearm as a weapon" is quite different from saying that the ordinary meaning "also *excludes* any other use." *Ante*, at 6 (emphases in original). The two are indeed different—but it is precisely the latter that I assert to be true: The ordinary meaning of "uses a firearm" does *not* include using it as an article of commerce. I think it perfectly obvious, for example, that the objective falsity requirement for a perjury conviction would not be satisfied if a witness answered "no" to a prosecutor's inquiry whether he had ever "used a firearm," even though he had once sold his grandfather's Enfield rifle to a collector.

The normal usage is reflected, for example, in the United States Sentencing Guidelines, which provide for enhanced sentences when firearms are "discharged," "brandished, displayed, or possessed," or "otherwise used." See, *e.g.*, United States Sentencing Commission, Guidelines Manual §2B3.1(b)(2) (Nov. 1992). As to the latter term, the Guidelines say: "`Otherwise used' with reference to a dangerous weapon (including a firearm) means that the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or other dangerous weapon." USSG §1B1.1, comment., n. 1(g) (definitions). "Otherwise used" in this provision obviously means "otherwise used as a weapon."[2]

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[2]The Court says that it is "not persuaded that [its] construction of the phrase `uses . . . a firearm' will produce anomalous applications." *Ante*, at 9. But as proof it points only to the fact that §924(c)(1) fortuitously contains *other language*—the requirement that the use be "during and in relation to any crime of violence or drug trafficking crime"—that happens to prevent untoward results. *Ibid*. That language does not, in fact, prevent all untoward results: Though it excludes an enhanced penalty for the burglar who scratches his head with the barrel of a gun, it requires one for the burglar who happens to use a gun handle, rather than a rock, to break the window affording him entrance—hardly a distinction that ought to make a sentencing difference if the gun has no other connection to the crime. But in any event, an excuse that turns upon the language of §924(c)(1) is good only for that particular statute. The Court *cannot* avoid "anomalous applications" when it applies its anomalous meaning of "use a firearm" in other contexts—for example, the Guidelines provision just described in text.

In a vain attempt to show the contrary, it asserts

Given our rule that ordinary meaning governs, and given the ordinary meaning of "uses a firearm," it seems to me inconsequential that "the words `as a weapon' appear nowhere in the statute," *ante*, at 5; they are reasonably implicit. Petitioner is not, I think, seeking to introduce an "additional requirement" into the text, *ante*, at 6, but is simply construing the text according to its normal import.

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that the phrase "otherwise used" in the Guidelines means used for any other purpose at all (the Court's preferred meaning of "use a firearm"), *so long as it is more "culpable" than brandishing*. See *ante*, at 8. But whence does it derive that convenient limitation? It appears nowhere in the text—as well it should not, since the whole purpose of the Guidelines is to take out of the hands of individual judges determinations as to what is "more culpable" and "less culpable." The definition of "otherwise used" in the Guidelines merely says that it means "more than" brandishing and less than firing. The Court is confident that "scratching one's head" with a firearm is not "more than" brandishing it. See *ante*, at 9. I certainly agree—but only because the "more" use referred to is more use *as a weapon*. Reading the Guidelines as they are written (rather than importing the Court's *deus ex machina* of a culpability scale), and interpreting "use a firearm" in the strange fashion the Court does, produces, see *ante*, at 8, a full seven-point upward sentence adjustment for firing a gun at a storekeeper during a robbery; a mere five-point adjustment for pointing the gun at the storekeeper (which falls within the Guidelines' definition of "brandished," see USSG §1B1.1, comment., n. 1(c)); but an intermediate *six*–point adjustment for using the gun to pry open the cash register or prop open the door. Quite obviously ridiculous. When the Guidelines speak of "otherwise us[ing]" a firearm, they mean, in accordance with normal usage, otherwise "using" it as a weapon—for

The Court seeks to avoid this conclusion by referring to the next subsection of the statute, §924(d), which does not employ the phrase "uses a firearm," but provides for the confiscation of firearms that are "used in" referenced offenses which include the crimes of transferring, selling, or transporting firearms in interstate commerce. The Court concludes from this that *whenever* the term appears in this statute, "use" of a firearm must include nonweapon use. See *ante*, at 10–12. I do not agree. We are dealing here not with a technical word or an "artfully defined" legal term, compare *Dewsnup* v. *Timm*, 502 U. S. ___, ___ (1992) (SCALIA, J., dissenting) (slip op., at 2–4), but with common words that are, as I have suggested, inordinately sensitive to context. Just as adding the direct object "a firearm" to the verb "use" *narrows* the meaning of that verb (it can no longer mean "partake of"), so also adding the modifier "in the offense of transferring, selling, or transporting firearms" to the phrase "use a firearm" *expands* the meaning of that phrase (it then includes, as it previously would not, nonweapon use). But neither the narrowing nor the expansion should logically be thought to apply to *all* appearances of the affected word or phrase. Just as every appearance of the word "use" in the statute need not be given the narrow meaning that word acquires in the phrase "use a firearm," so also every appearance of the phrase "use a firearm" need not be given the expansive connotation that phrase acquires in the broader context "use a firearm in crimes such as unlawful sale of firearms." When, for example, the statute provides that its prohibition on certain transactions in firearms "shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes," 18 U. S. C. §§922(a)(5)

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example, placing the gun barrel in the mouth of the storekeeper to intimidate him.

(B), (b)(3)(B), I have no doubt that the "use" referred to is *only* use as a sporting *weapon*, and not the use of pawning the firearm to pay for a ski trip. Likewise when, in §924(c)(1), the phrase "uses . . . a firearm" is not employed in a context that necessarily envisions the unusual "use" of a firearm as a commodity, the normally understood meaning of the phrase should prevail.

Another consideration leads to the same conclusion: §924(c)(1) provides increased penalties not only for one who "uses" a firearm during and in relation to any crime of violence or drug trafficking crime, but also for one who "carries" a firearm in those circumstances. The interpretation I would give the language produces an eminently reasonable dichotomy between "using a firearm" (as a weapon) and "carrying a firearm" (which in the context "uses or carries a firearm" means carrying it in such manner as to be ready for use as a weapon). The Court's interpretation, by contrast, produces a strange dichotomy between "using a firearm for any purpose whatever, including barter," and "carrying a firearm."[3]

Finally, although the present prosecution was brought under the portion of §924(c)(1) pertaining to

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[3]The Court responds to this argument by abandoning all pretense of giving the phrase "uses a firearm" even a *permissible* meaning, much less its ordinary one. There is no problem, the Court says, because it is not contending that "uses a firearm" means "uses for *any* purpose," only that it means "uses as a weapon or for trade." See *ante*, at 12–13. Unfortunately, that is not one of the options that our mother-tongue makes available. "Uses a firearm" can be given a broad meaning ("uses for any purpose") or its more ordinary narrow meaning ("uses as a weapon"); but it can not possibly mean "uses as a weapon or for trade."

use of a firearm "during and in relation to any . . . drug trafficking crime," I think it significant that that portion is affiliated with the pre-existing provision pertaining to use of a firearm "during and in relation to any crime of violence," rather than with the firearm-trafficking offenses defined in §922 and referenced in §924(d). The word "use" in the "crime of violence" context has the unmistakable import of use as a weapon, and that import carries over, in my view, to the subsequently added phrase "or drug trafficking crime." Surely the word "use" means the same thing as to both, and surely the 1986 addition of "drug trafficking crime" would have been a peculiar way to *expand* its meaning (beyond "use as a weapon") for crimes of violence.

Even if the reader does not consider the issue to be as clear as I do, he must at least acknowledge, I think, that it is eminently debatable—and that is enough, under the rule of lenity, to require finding for the petitioner here. "At the very least, it may be said that the issue is subject to some doubt. Under these circumstances, we adhere to the familiar rule that, `where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.'" *Adamo Wrecking Co.* v. *United States*, 434 U. S. 275, 284–285 (1978), quoting *United States* v. *Bass*, 404 U. S.

336, 348 (1971).[4]

For the foregoing reasons, I respectfully dissent.

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[4]The Court contends that giving the language its ordinary meaning would frustrate the purpose of the statute, since a gun "can be converted instantaneously from currency to cannon," *ante*, at 17. Stretching language in order to write a more effective statute than Congress devised is not an exercise we should indulge in. But in any case, the ready ability to use a gun that is at hand as a weapon is perhaps one of the reasons the statute sanctions not only *using* a firearm, but *carrying* one. Here, however, the Government chose not to indict under that provision. See *ante*, at 4.