No. 16-678

In the Supreme Court of the United States

MARION TINGMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court permissibly instructed the jury that, to convict petitioner of possessing a firearm "in furtherance of" a federal drug-trafficking crime, 18 U.S.C. 924(c)(1)(A), the jury must find that petitioner "purposely and voluntarily" possessed the firearm to "help[] forward, advance, or promote the commission of the drug trafficking crime."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-11a) is not published in the Federal Reporter but is reprinted at 642 Fed. Appx. 12.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 2016. A petition for rehearing was denied on August 23, 2016 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on November 18, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of conspiracy to distribute, or to possess with intent to distribute, powder and crack cocaine, in violation of 21 U.S.C.

846; and one count of possessing a firearm in furtherance of that drug-trafficking crime, in violation of 18 U.S.C. 924(c). The district court sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. 3a-11a.

1. From 2006 to 2011, petitioner led a drug distribution ring in which he and his associates purchased powder cocaine in New York City, cooked it into crack cocaine, and sold it in and around Monticello, New York, through a network of drug dealers. Pet. App. 5a. Petitioner and his co-conspirators used a house (called the "white house") in Monticello as their base of operations, where they processed, bagged, and sold the drugs to dealers and users. Gov't C.A. Br. 2, 4.

One of petitioner's confederates used drugs and cash to purchase a shotgun for the white house, where the co-conspirators kept it under a couch "for the purpose of protecting themselves, their drugs, and the drug proceeds." Pet. App. 5a; see *id.* at 6a; Gov't C.A. Br. 5. Petitioner directed that the barrel be sawed down because it was initially too big; handled the firearm; and knew where the shotgun was kept in the house. Gov't C.A. Br. 5.

2. A federal grand jury indicted petitioner on one drug-conspiracy charge under 21 U.S.C. 846, and one firearms charge under 18 U.S.C. 924(c). Superseding Indictment 1-2 (D. Ct. Doc. 161). The certiorari petition concerns only the Section 924(c) offense.

Section 924(c) provides, in pertinent part, that "any person 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, shall" be guilty of an of-

fense. 18 U.S.C. 924(c)(1)(A). The basic Section 924(c) offense therefore "is using or carrying a firearm during and in relation to a violent or drug trafficking crime, or possessing a firearm in furtherance of any such crime." *Dean* v. *United States*, 556 U.S. 568, 574 (2009); accord *Dean* v. *United States*, No. 15-9260 (Apr. 3, 2017), slip op. 2.

At trial, the government presented testimony from three co-conspirators who testified about petitioner's role in the drug-trafficking operation. Pet. App. 6a. Two of the co-conspirators testified that "the purpose of keeping the shotgun * * * was to protect the conspirators and their drug business." *Ibid.*

The district court subsequently instructed the jury on the elements of a Section 924(c) offense. 7/16/2013 Tr. (Tr.) 775-778. As relevant here, the court instructed that to prove possession of a firearm in furtherance of the drug-trafficking crime the government must prove beyond a reasonable doubt that petitioner "knowingly possessed a firearm in furtherance of the drug trafficking crime." Tr. 776. That showing, the court continued, requires proof that "[petitioner] had possession of the firearm," that "such possession was in furtherance of the drug trafficking crime," and that petitioner "possessed the firearm knowingly." Tr. 778. The court stated that, in this context, "[k]nowingly" means that petitioner "possessed the firearm purposely and voluntarily." *Ibid.* "The mere possession of a firearm at the scene of a crime," the court added, "is not sufficient." *Ibid.* The court instructed that possession of a firearm is "in furtherance of the drug trafficking crime" when the possession "helped forward, advance, or promote the commission of the drug trafficking crime." *Ibid.* Petitioner did not object to

the jury instruction, Pet. 22; see Pet. 2, and the jury found petitioner guilty on both counts, Tr. 791.

3. On appeal, petitioner again did not challenge the jury instructions. See Pet. C.A. Br. 8-24. Petitioner instead argued, *inter alia*, that the evidence was insufficient to prove that he possessed a firearm "in furtherance of" the drug conspiracy. *Id.* at 15-16. Petitioner focused on testimony by one of his co-conspirators that the shotgun was kept at the house to protect the drug traffickers. *Id.* at 15. Petitioner argued that such testimony only addressed "why [the co-conspirator] thought the gun was present" and that such "evidence of [the co-conspirator's] intent is not sufficient" because, "as the jury was instructed, the government was required 'to prove that [petitioner] had possession of the firearm and that such possession was in furtherance of the drug trafficking crime.'" *Ibid.* (quoting Tr. 778).

The court of appeals summarily affirmed in an unpublished order. Pet. App. 3a-11a. The court concluded, *inter alia*, that the evidence was sufficient to establish that petitioner possessed the shotgun "in furtherance of" his drug-trafficking conspiracy. *Id.* at 5a-6a. The court explained that two of petitioner's co-conspirators testified that "the purpose of keeping the shotgun at the white house was to protect the conspirators and their drug business" and that "the jury could reasonably infer that [petitioner] shared that understanding" so as to "satisf[y] the 'in furtherance of' requirement" of Section 924(c). *Id.* at 6a.

4. Petitioner filed a rehearing petition that argued for the first time that the jury instructions were defective because, in his view, Section 924(c) requires a finding that the defendant "possess[ed] the firearm with

the intent to further the drug trafficking offense, or for the purpose of furthering the drug trafficking offense." Pet. for Reh'g 8. Petitioner argued that the court of appeals here "appears never to have addressed this issue" of "[w]hat mens rea" is required to establish "the crime of possession of a firearm in furtherance of a drug trafficking crime" and that "the panel [in this case] overlooked" the issue. *Id.* at 1, 3. Petitioner also conceded that the court of appeals could review his new contention only for plain error. *Id.* at 12. The court of appeals denied rehearing. Pet. App. 2a.

ARGUMENT

Petitioner argues (Pet. 3-27) that (1) the district court's jury instructions erroneously failed to require the jury to find that petitioner intended his possession of a firearm to further his drug-trafficking offense and (2) the courts of appeals are divided on the question. The question that petitioner presents is not properly before this Court because the issue was neither pressed to, nor passed upon by, the panel that entered the court of appeals' judgment. Even if the issue were properly presented to this Court, no further review would be warranted. The district court did not err in instructing the jury on the requisite intent; no division of authority exists that might warrant certiorari; and this case would be a particularly poor vehicle for review because the jury instructions here may be reviewed only for plain error.

1. a. Section 924(c) provides, in pertinent part, that "any person 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, shall" be guilty of an offense. 18 U.S.C. 924(c)(1)(A). "[T]he adverbial

phrases in [this provision]—'in relation to' and 'in furtherance of'—modify their respective nearby verbs," such that Section 924(c) separately prohibits "using or carrying a firearm during and in relation to a violent or drug trafficking crime" and "possessing a firearm in furtherance of any such crime." *Dean* v. *United States*, 556 U.S. 568, 573-574 (2009). With respect to the use-or-carrying prohibition, this Court has "stated that the phrase 'in relation to' means 'that the firearm must have some *purpose or effect* with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence.'" *Id.* at 573 (quoting *Smith* v. *United States*, 508 U.S. 223, 238 (1993)) (emphasis added).

In this case, petitioner's conviction rests on Section 924(c)'s second, possession-in-furtherance prohibition. Petitioner argues (Pet. 3-4, 18) that the presumption that criminal provisions require mens rea and the phrase "in furtherance of" together require a finding that the defendant possessed a firearm with the intent —not just the effect—of furthering his drug conspiracy. "Such possession becomes unlawful," petitioner contends (Pet. 16), "only when coupled with a criminal intent, or with a purpose that Congress has outlawed." Petitioner concludes (Pet. 8-9, 20) that the district court's jury instructions were erroneous because they did not require the jury to find that "[petitioner] possessed a firearm with the intent to further the drug trafficking crime."

b. The instructional-error question that petitioner presents is not properly before this Court. Petitioner acknowledges (Pet. 2, 22) that he never objected to the district court's jury instructions and that his counsel then "overlooked" the issue on appeal. Not surpris-

ingly, the court of appeals' order accompanying its March 2016 judgment in this case does not address petitioner's current instructional challenge. See Pet. App. 4a-11a. For that reason alone, this Court's review is unwarranted. The Court's "traditional rule * * * precludes a grant of certiorari * * * when 'the question presented was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted).

Petitioner asserted his instructional challenge for the first time in a petition for rehearing that he filed *after* the panel entered the March 2016 judgment that this Court would review. See Pet. App. 4a; pp. 4-5, *supra*; cf. Sup. Ct. R. 13.3 (stating that the time to petition for a writ of certiorari "runs from the date of entry of the judgment or order sought to be reviewed," but if a timely rehearing petition is filed, the time "runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment"). While there may be circumstances in which raising an issue in a rehearing petition might suffice, the settled practice of the court below treated that belated assertion as coming too late. See *Bassick Mfg. Co*. v. *Adams Grease Gun Corp*., 54 F.2d 285 (2d Cir. 1931) (per curiam) ("[I]t is too late to present a question for the first time on a petition for rehearing."). The court of appeals in denying rehearing in August 2016 declined to exercise its own discretion to reconsider its earlier judgment. See Pet. App. 1a-2a.

The court of appeals possessed "discretion not to consider [such an] issue" that was "raised for the first time * * * in the petition for rehearing." *Agard* v. *Portuondo*, 159 F.3d 98, 99 (2d Cir. 1998) (denying rehearing on newly raised *Teague* issue); cf. *Portuondo* v. *Agard*, 529 U.S. 61 (2000) (reversing under-

lying judgment on non-*Teague* issues in same case). And "[i]t is well established" that "arguments raised for the first time on a petition for rehearing are deemed abandoned unless manifest injustice would otherwise result." *DeWeerth* v. *Baldinger*, 38 F.3d 1266, 1274 (2d Cir.), cert. denied, 513 U.S. 1001 (1994); see *Anderson* v. *Branen*, 27 F.3d 29, 30 (2d Cir. 1994) (per curiam) (citing cases). Cf. *United States* v. *Bouyea*, 152 F.3d 192, 195-196 (2d Cir. 1998) (per curiam) (declining to address jury-instruction challenge raised for the first time in a petition for rehearing), cert. denied, 528 U.S. 904 (1999).[1] Petitioner does not—and could not successfully—challenge the court of appeals' discretionary decision in August 2016 to deny rehearing without addressing petitioner's current contentions. Accordingly, the question petitioner now presents was neither properly pressed nor passed upon below.

Petitioner himself recognizes (Pet. 23) that this Court "is a court of final review, not first view." Accord, *e.g.*, *Expressions Hair Design* v. *Schneiderman*, No. 15-1391 (Mar. 29, 2017), slip op. 10; *Zivotofsky ex*

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[1] That practice reflects the normal rule on rehearing. See, *e.g.*, *Easley* v. *Reuss*, 532 F.3d 592, 593-594 (7th Cir. 2008) (per curiam) (citing cases from courts of appeals); *United States* v. *Hernandez-Gonzalez*, 405 F.3d 260, 261-262 (5th Cir.) (per curiam), cert. denied, 546 U.S. 890 (2005); see also, *e.g.*, *Johnson* v. *Mahoney*, 424 F.3d 83, 96 (1st Cir. 2005) (holding that "a party may not raise new and additional matters for the first time in a petition for rehearing") (citation omitted). As a result, courts of appeals routinely deem such belated arguments to be waived. See, *e.g.*, *Haas* v. *Peake*, 544 F.3d 1306, 1308 (Fed. Cir. 2008) (per curiam), cert. denied, 555 U.S. 1149 (2009); *Johnson* v. *Woodcock*, 444 F.3d 953, 954 n.2 (8th Cir.) (same), cert. denied, 549 U.S. 883 (2006); *Picazo* v. *Alameida*, 366 F.3d 971, 971-972 (9th Cir. 2004) (per curiam) (same).

rel. Zivotofsky v. *Clinton*, 566 U.S. 189, 201 (2012); *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Petitioner accordingly asks (Pet. 22-23) the Court to review only the instructional issue and to remand the distinct question of plain error because the court of appeals has "never addressed" whether petitioner could obtain relief on plain-error review. Cf. Pet. i (formulating a question presented that does not include a plain-error question). But petitioner failed to raise both the instructional and the plain-error issues until his petition for rehearing. See pp. 4-5, *supra*. Certiorari is equally unwarranted on both.

2. Even if petitioner had properly presented his instructional challenge in the court of appeals, this Court's review would not be warranted. Petitioner's argument is premised on his contention that "[t]he district court did not instruct the jury on the intent required to convict [him] of the possession-in-furtherance offense." Pet. 2-3; see Pet. 8-9. That premise is incorrect.

The district court instructed the jury that it must "make a finding" about petitioner's "state of mind" and that, to convict, the jury would have to determine that petitioner "possessed the firearm knowingly." Tr. 778. The court further instructed that "[k]nowingly" in this context means that petitioner "possessed the firearm *purposely* and voluntarily." *Ibid.* (emphasis added). A reasonable jury would have understood that instruction, consistent with the ordinary understanding of "purposely," to require a finding that petitioner possessed the shotgun "with a deliberate or an express purpose." *Webster's Third New International Dictionary* 1847 (2002) (defining "purposely"). A reasonable jury would have also logically understood that purpose to be reflected in the balance of the court's instructions. Those instructions

made clear that Section 924(c) required proof that petitioner "knowingly [*i.e.*, purposely and voluntarily] possessed a firearm in furtherance of the drug trafficking crime," Tr. 776, and that "[t]o possess a firearm in furtherance of [such a] crime means that the weapon helped forward, advance, or promote the commission of the drug trafficking crime," Tr. 778.

Petitioner's own brief in the court of appeals appears to recognize that the jury instructions required proof of petitioner's intent to possess the shotgun to further his drug crime. See p. 4, *supra* (discussing Pet. C.A. Br. 15). In that brief, petitioner argued that testimony addressing "*why* the shotgun was at the white house" was insufficient insofar as it merely indicated "why [petitioner's co-conspirator] thought the gun was present." Pet. C.A. Br. 15. That "evidence of [the *co-conspirator's*] *intent* [wa]s not sufficient," petitioner argued, because "*as the jury was instructed*, the government was required 'to prove that [*petitioner*] had possession of the firearm and that such possession was in furtherance of the drug trafficking crime.'" *Ibid.* (quoting Tr. 778) (emphases added).

Petitioner suggests (Pet. 20) that the instructions requiring "purposeful and voluntary possession" did not sufficiently communicate to the jury that it would have to find that petitioner possessed the shotgun with "intent to further the drug trafficking offense." But jury "instructions must be evaluated not in isolation but in the context of the entire charge," *Jones* v. *United States*, 527 U.S. 373, 391 (1999), and district courts have discretion in choosing the precise wording for their instructions. *United States* v. *Park*, 421 U.S. 658, 675 (1975) (reviewing formulation of a jury instruction for abuse of discretion and upholding instruction, even though "it would have

been better to give an instruction more precisely relating the legal issue to the facts of the case"). The district court's instructions requiring that the jury find petitioner "purposely" possessed the firearm in furtherance of a drug offense is sufficient in this context. And even petitioner does not allege a division of authority addressing whether such instructional language is erroneous, much less whether such purpose-focused instructions constitute plain error.

3. Petitioner nevertheless contends (Pet. 5-8) that review is warranted because, in his view, the courts of appeals are divided on whether the Section 924(c) offense of possessing of a firearm in furtherance of a drug-trafficking crime requires proof that the defendant possessed a firearm with intent to further the drug offense. According to petitioner, the Eighth, Ninth, and Tenth Circuits have recognized such an intent requirement, but the Second, Fifth, and Seventh Circuits (and other courts of appeals following the Fifth Circuit's lead) have not. Pet. 5 & n.2, 7 (comparing *United States* v. *Kent*, 531 F.3d 642 (8th Cir. 2008), *United States* v. *Krouse*, 370 F.3d 965 (9th Cir.), cert. denied, 543 U.S. 988 (2004), and *United States* v. *Basham*, 268 F.3d 1199 (10th Cir. 2001), cert. denied, 535 U.S. 945 (2002), with *United States* v. *Chavez*, 549 F.3d 119 (2d Cir. 2008), *United States* v. *Castillo*, 406 F.3d 806 (7th Cir. 2005), and *United States* v. *Ceballos-Torres*, 218 F.3d 409, amended, 226 F.3d 651 (5th Cir. 2000), cert. denied, 531 U.S. 1102 (2001)). No such conflict exists.

a. Petitioner cites no holding of any court of appeals that rejects the view a defendant must possess a firearm with intent to further the defendant's drug offense. In *Ceballos-Torres*, for instance, the Fifth Circuit concluded in the course of rejecting a challenge to the sufficiency of

the evidence that Section 924(c) requires proof that a defendant's "possession [of a firearm] actually furthered the drug trafficking offense" and is best understood as adopting "the dictionary definition of 'in furtherance.'" 218 F.3d at 414-415. But that conclusion does not reject the view that a defendant must possess a firearm with *intent* to further the predicate offense.

Similarly, nothing in the Second Circuit's *Chavez* decision rejects an intent requirement. *Chavez* itself recognized that because "[a] gun may * * * be possessed for any of a number of *purposes*," Section 924(c) requires the government to "establish the existence of a specific 'nexus' between the charged firearm and the [predicate offense]." 549 F.3d at 130 (emphasis added; citation omitted). *Chavez* then held that the trial evidence was sufficient to show that Chavez "possessed [a pistol] *for unlawful purposes*," namely, "for use in connection with [a] narcotics conspiracy" both "to provide security for [the] narcotics conspiracy operation" and to "protect Chavez" from "his drug suppliers." *Id.* at 131 (emphasis added).

Petitioner cites (Pet. 7-8) the Seventh Circuit's *Castillo* decision as illustrating a conflict of authority with the decisions that petitioner views as supporting his position (*e.g.*, *Basham* and *Krouse*). But *Castillo* expressly follows the decisions of its "sister circuits"—including *Ceballos-Torres*, *Krouse*, and *Basham*—which, the court explained, reached "fundamentally the same conclusion" about what Section 924(c)'s "'in furtherance of' language" requires. 406 F.3d at 813-814. In the course of rejecting Castillo's challenge to the sufficiency of the evidence, the court discussed the government's contention that the evidence established that Castillo possessed a shotgun in furtherance of his drug-trafficking offense because the evidence showed that he had "strategically placed" the shotgun

near his drug cache "*for the purpose* of protecting himself, his drugs, and his ongoing drug trafficking business." *Id.* at 816 (emphasis added; citation omitted). The court then itself agreed that the evidence was sufficient because it showed that "the shotgun was possessed [by Castillo] *to further* the possession and future distribution of [his] narcotics by being available to protect [him], his drugs and his drug trafficking business." *Id.* at 817 (emphasis added). Nothing in that analysis rejects the view that a defendant must possess a firearm with intent to further his drug offense.

b. Even the decisions that petitioner cites as recognizing such an intent requirement (see Pet. 7) provide him only weak support in dicta. In *Kent*, for instance, the Eighth Circuit upheld jury instructions that instructed that "[t]he phrase 'possess in furtherance of' means the firearm must have some *purpose or effect* with respect to [the drug offense]" and that the "firearm must facilitate or have the potential to facilitate the offense." 531 F.3d at 654 (emphasis added). The Eighth Circuit rejected Kent's contention that these instructions should have required proof that "the weapon was actually used to facilitate a drug offense." *Ibid.* In so holding, the court stated that Section 924(c)'s use of the phrase "'[i]n furtherance of' is * * * a requirement that the person possess the gun with the *intent* of advancing the crime." *Ibid.* But that statement was meant to drive home the point, made in the next sentence, that the instructions were not erroneous because Section 924(c) "authorizes conviction where the defendant intended the firearm to advance or further the crime, but it did not actually do so." *Ibid.*

Similarly, in *Krouse*, the Ninth Circuit stated that Section "924(c) turns on the intent of the defendant" because it "requires proof that the defendant possessed the weap-

on to promote or facilitate the underlying crime." 370 F.3d at 967. *Krouse* ultimately "h[e]ld that sufficient evidence supports a conviction under § 924(c) when facts in evidence reveal a nexus between the guns discovered and the underlying offense" and that the evidence did so because multiple firearms were discovered "within easy reach in a room containing a substantial quantity of drugs." *Id.* at 968. *Krouse* relied on decisions by the courts of appeals that petitioner believes reject his position, *ibid.*, including the Fifth Circuit's decision in *Ceballos-Torres*, which identified factors that *Krouse* concluded can help in evaluating whether the evidence is sufficient in certain categories of Section 924(c) cases, *id.* at 967-968.

Finally, in *Basham*, the Tenth Circuit upheld jury instructions that stated that a Section 924(c) conviction requires proof that the defendant "knowingly possessed a firearm in furtherance of the commission of [a drug trafficking crime]"; that "'in furtherance of' means for the purpose of assisting in, promoting, accomplishing, advancing, or achieving the goal or objective of the underlying offense"; and that a specific list of eight factors derived from *Ceballos-Torres* can "help in determining whether possession of a firearm furthers, advances, or helps forward a drug trafficking offense." 268 F.3d at 1206-1207 (citation omitted). The court rejected Basham's argument that the Fifth Circuit's *Ceballos-Torres* factors should not have been included in those instructions, concluding that they were "helpful factors that the jury could use." *Id.* at 1208. In addition, the court of appeals stated in passing that a defendant need not "use" a firearm in connection with his drug offense if "possession 'in furtherance of' is the intent of the drug trafficker." *Ibid.* The court had no occasion, however, to analyze the nature of any mens rea

requirement in Section 924(c) because the jury instructions themselves required proof that "Basham possessed the firearm involved for the purpose of [furthering] the goal or objective of the underlying offense" and the parties did not dispute that aspect of the instructions. See *ibid.*

Petitioner asserts that the Tenth Circuit in *Basham* "recognized the Circuit conflict" that petitioner asserts here because *Basham* noted "'some tension'" with the Fifth Circuit's decision in *Ceballos-Torres*. Pet. 8 (citation omitted). Petitioner, however, mistakenly takes *Basham*'s statement entirely out of context. *Basham* stated that "some tension [exists] between the opinion in *Ceballos-Torres* and [a 2001 Tenth Circuit decision]" for reasons that are unrelated to petitioner's asserted circuit conflict. See 268 F.3d at 1207. *Basham* thus explained that whereas *Ceballos-Torres* understood the 1998 amendment that added Section 924(c)'s possession-in-furtherance text as being "intended to broaden the reach of the statute in the wake of [this] Court's narrow construction of [Section 924(c)'s] 'use' and 'carry' language," the Tenth Circuit's 2001 decision viewed the amendment's "'in furtherance' requirement to [impose] an even higher standard than that required for the 'use' and 'carry' prongs." *Ibid.* Those two conclusions are not inconsistent, and the Tenth Circuit ultimately held that any "apparent difference" in the opinions did not require that it reject "the *Ceballos-Torres* factors as relevant and helpful to the jury in determining when possession of a firearm is 'in furtherance of' drug trafficking." *Id.* at 1208.

4. Review is unwarranted for the additional reason that petitioner's instructional challenge would be (at most) subject only to plain-error review because peti-

tioner failed to object to the instructions in district court. "[T]he burden of establishing entitlement to relief for plain error is on the defendant claiming it." *United States* v. *Dominguez Benitez*, 542 U.S. 74, 82 (2004). To establish a reversible plain error, petitioner must thus demonstrate that: (1) the district court erred; (2) its error is plain; (3) it affected petitioner's "substantial rights," which generally means that the error "affected the outcome of the district court proceedings"; and (4) it "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Marcus*, 560 U.S. 258, 262 (2010) (quoting *Puckett* v. *United States*, 556 U.S. 129, 135 (2009)). Even assuming an instructional error *arguendo*, petitioner fails to carry his burden of showing that he is entitled for relief.

First, the plain-error inquiry requires that any error be "clear" or "obvious," *United States* v. *Olano*, 507 U.S. 725, 734 (1993), and not "subject to reasonable dispute," *Puckett*, 556 U.S. at 135. Petitioner himself acknowledges that the district court's instructions established a mens rea requirement; he therefore contends that the particular instructions were insufficient. Pet. 20. As such, petitioner's assertion that any instructional "error is plain because all federal crimes have a *mens rea* requirement," Pet. 24, is insufficient. Indeed, petitioner has failed to point to any authoritative holding that establishes that the instructions in this case are clearly or obviously erroneous, and he has not established that any such error would have been beyond reasonable dispute at the time of his appeal to the Second Circuit.[2]

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[2] The Court in *Johnson* v. *United States*, 520 U.S. 461 (1997), held that the plainness of an error is determined at the time of

Second, any instructional error about petitioner's intent was harmless. Even if one accepts petitioner's view that the instructions did not sufficiently require a finding about his intent to further the drug conspiracy, the jury was still required to find that petitioner knew of the shotgun's proximity in the white house because the jury had to determine that he "possessed the firearm purposely and voluntarily." Tr. 778. And when one of petitioner's co-conspirators purchased the shotgun and brought it to the white house, petitioner instructed that co-conspirator to saw down the barrel

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appeal, even though the law at the time of trial was "settled" and clearly "contrary to the law at the time of appeal." *Id.* at 468. The Court had no occasion to consider further whether a defendant could establish the new legal rule in his own appeal because the relevant change of law resulted from a decision of this Court. The same was true in *Henderson* v. *United States*, 133 S. Ct. 1121 (2013), in which the Court noted its holding in *Johnson* and reasoned that a defendant should not be treated less favorably when the law at the time of trial was "unsettled" and this Court later clarifies the law before resolution of the defendant's appeal. *Id.* at 1127-1128.

Neither *Johnson* nor *Henderson* involved a situation in which a defendant seeks to clarify the law in his own case after defaulting at trial, and then to argue that the error was "clear" or "obvious." Indeed, in explaining why a defendant would have no incentive to withhold an objection in hope of benefitting from a future change in the law, *Henderson* explicitly limited its reasoning to cases in which, after a defendant failed to object at trial, "the law changes in the defendant's favor" and "the change comes after trial but before the appeal is decided." 133 S. Ct. at 1128-1129; *id.* at 1130 ("[T]he problem here arises only when there is a new rule of law, when the law was previously unsettled, and when the District Court reached a decision contrary to the subsequent rule."). The incentives for sandbagging are quite different if a defendant may use his appeal subject to plain-error review to effect a change in the law in his own case.

because it was too big. See Gov't C.A. Br. 5, 14. That itself fully demonstrates petitioner's understanding of the firearm's purpose in the house. See *ibid.*

Finally, any instructional error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. Once petitioner joined the drug-distribution conspiracy for which he was convicted, he became "responsible for the acts of his co-conspirators in pursuit of their common plot." *Smith* v. *United States*, 133 S. Ct. 714, 719 (2013) (citing *Pinkerton* v. *United States*, 328 U.S. 640, 646 (1946)). Petitioner and his co-conspirators thus each became "responsible for the acts of each other," even when they "divide[d] up the work." *Salinas* v. *United States*, 522 U.S. 52, 63-64 (1997). As a result, even if petitioner did not himself possess the shotgun with the intent to further their drug conspiracy, he would still have been criminally liable for a Section 924(c) violation because it was reasonably foreseeable that his co-conspirators possessed the shotgun in furtherance of the conspiracy and they, in fact, did so. See, *e.g.*, *United States* v. *Alvarez-Valenzuela*, 231 F.3d 1198, 1200 n.2, 1202-1203 (9th Cir. 2000) (upholding Section 924(c) conviction based on *Pinkerton* liability); see also Pet. App. 6a (discussing testimony of co-conspirators); Gov't C.A. Br. 14.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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