No. 07-873

In the Supreme Court of the United States

ROBERTO DELGADO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner forfeited his claim that the district court should have instructed the jury on simple possession of cocaine by not briefing that issue in his opening appellate brief.

2. Whether the evidence was sufficient to show that petitioner carried a firearm "in relation to" a drug trafficking offense.

3. Whether the district court clearly erred in denying petitioner a two-level reduction in his Sentencing Guidelines range for acceptance of responsibility under Sentencing Guidelines § 3E1.1.

4. Whether the sentence imposed by the district court was reasonable.

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OPINION BELOW

The decision of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is reprinted in 250 Fed. Appx. 268.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 2007. A petition for rehearing was denied on November 7, 2007. The petition for a writ of certiorari was filed on December 28, 2007. 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 Florida, petitioner was convicted of possessing a firearm and ammunition after having previously been convicted of a felony, in

violation of 18 U.S.C. 922(g)(1) and 924(a)(2); possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(C) (Supp. V 2005); and carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i). He was sentenced to 360 months of imprisonment, to be followed by three years of supervised release. Pet. App. 7a-8a; 9:05-cr-80193-DTKH-1 Docket entry No. 29 (S.D. Fla. Feb. 23, 2006) (Superseding Indictment). The court of appeals affirmed. Pet. App. 1a-4a.

1. At about 9 p.m. on July 18, 2005, Deputy Daniel Morgado of the Palm Beach County Sheriff's Office observed a white Crown Victoria automobile exit a shopping plaza. 5/16/06 Tr. 136-140. The car's license-plate light was out and its windows were tinted a very dark color. *Id.* at 140-142. Deputy Morgado believed that the tinted windows were illegal because he could not see the driver of the automobile, or the driver's silhouette, through the windows. *Id.* at 141.[1]

Deputy Morgado activated the lights on his police car and stopped petitioner's vehicle. 5/16/06 Tr. 143-145. He approached the driver's side of the car and asked petitioner, who was the driver, for his license, registration, and proof of insurance. *Id.* at 146. Deputy Morgado repeated his document request several times before petitioner made any effort to comply, and petitioner produced his driver's license after several minutes. *Id.* at 146-147.

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[1] A subsequent check of the car's windows with a tint meter confirmed that the windows were unlawfully tinted, and Deputy Morgado therefore issued a citation to petitioner for having an inoperative license-plate light and for having illegal window tint. 5/16/06 Tr. 152, 176-177.

During this time, Deputy Morgado observed that petitioner's hands were shaking, that he had sweat on his forehead, and that he was moving his hands around the seat cushions of the car. At that point, Deputy Morgado asked petitioner to exit the vehicle. 5/16/06 Tr. 151-154. After several requests, petitioner reluctantly got out of his car with his hands behind him, while trying to keep his back to the vehicle. *Id.* at 154-155, 204-205. Deputy Morgado directed petitioner to the back of the vehicle, and, as petitioner turned to walk away, Deputy Morgado observed the butt of a handgun in petitioner's waistband. *Id.* at 155-156. Deputy Morgado seized the gun, which was a loaded semi-automatic with a round in the chamber. *Id.* at 156-159. Petitioner claimed to have a permit for the gun. *Id.* at 156.

After verifying that petitioner did not have a permit to carry a weapon, Deputy Morgado arrested him. 5/16/06 Tr. 166. A search of petitioner incident to the arrest revealed a loaded magazine and $228 in small bills. *Id.* at 162-163. The cash was organized so that bills of the same denomination were folded together, a common practice among street-level drug dealers called a "dealer's fold." *Id.* at 164-166. Deputy Morgado also searched petitioner's vehicle and discovered, in the center console, a shopping bag that contained a digital scale with cocaine residue on it, approximately 33 small baggies containing cocaine, approximately 50 to 60 empty baggies, and a plastic container with a white powdery substance that was not cocaine. *Id.* at 167-176; 5/17/06 Tr. 245, 248. The total weight of the cocaine was approximately 28.5 grams. *Id.* at 268-271, 278. Petitioner's fingerprints were discovered on the digital scale and one of the baggies. *Id.* at 289-297.

2. On February 23, 2006, a federal grand jury in the Southern District of Florida returned a five-count superseding indictment against petitioner, charging him with possession of a firearm and ammunition after having previously been convicted of a felony, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2) (Count 1); possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(C) (Supp. V 2005) (Count 2); carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i) (Count 3); making a false material statement to the district court, in violation of 18 U.S.C. 1623(a) (Count 4); and obstruction of justice, in violation of 18 U.S.C. 1503 (Count 5). Superseding Indictment 1-4.

On May 16, 2006, petitioner proceeded to trial on Counts 1 to 3 of the superseding indictment.[2] The government presented evidence that petitioner's conduct was consistent with an intent to distribute drugs, including the manner in which petitioner carried his money, the way the cocaine was packaged, the fact that petitioner was carrying a loaded gun, as well as his possession of a digital scale, an agent for cutting the drugs, and additional unused baggies. See 5/16/06 Tr. 136-177; 5/17/06 Tr. 235-236, 241-249. Government witnesses testified that the amount of the drugs (28.5 grams) and its street value (approximately $3000) were consistent with distribution, not personal use. *Id.* at 235, 242-247.

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[2] Before trial, the district court granted petitioner's motion to sever Counts 4 and 5, which charged him with lying under oath about his assets in order to obtain legal representation at public expense. After the trial, the district court granted the government's motion to dismiss Counts 4 and 5. See Superseding Indictment 2-4, Gov't C.A. Br. 2 & n.1.

Petitioner did not testify, and he presented no witnesses or other evidence suggesting that the drugs were for personal use. *Id.* at 342-352.

At the charge conference, petitioner requested that the district court instruct the jury on the lesser-included offense of simple possession of cocaine, in violation of 21 U.S.C. 844. Petitioner's counsel argued that although such an instruction was not "mandated" under Eleventh Circuit precedent, it was nonetheless "appropriate" given the facts of the case. 5/17/06 Tr. 368-369. The district court declined to give the requested instruction on the ground that the record contained no evidence suggesting that "this was for personal use as opposed to being distributed to others." *Id.* at 373.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-4a. As relevant here, the court declined to consider petitioner's argument that the district court erroneously denied his request for a jury instruction on the lesser-included offense of simple possession of cocaine. The court concluded that petitioner had forfeited that argument by raising it for the first time in his reply brief, noting that "[u]nder the law of this Circuit, an issue not raised in a party's initial appellate brief is considered waived, and the party is prohibited from raising the issue later in the appeal." Pet. App. 3a (quoting *United States* v. *Silvestri*, 409 F.3d 1311, 1338 n.18 (11th Cir.), cert. denied, 546 U.S. 1048 (2005)).

The court also rejected petitioner's argument that insufficient evidence supported his conviction for carrying a firearm "during and in relation to" a drug trafficking offense, concluding that "[t]he evidence suggested that the firearm at least had 'the potential of facilitating' the drug trafficking offense because it was loaded, close

to the cocaine, and readily accessible to [petitioner]." Pet. App. 2a-3a (quoting *United States* v. *Timmons*, 283 F.3d 1246, 1251 (11th Cir.), cert. denied, 537 U.S. 1004 (2002)).

The court of appeals rejected each of petitioner's sentencing claims. The court concluded that the trial court did not err in denying petitioner a two-level reduction in his Guidelines offense level for acceptance of responsibility "because [petitioner] put the government to its burden of proof both before and during trial." Pet. App. 3a (citing Sentencing Guidelines § 3E1.1 comment. (n.2); and *United States* v. *Smith*, 127 F.3d 987, 989 (11th Cir. 1997) (en banc)). Next, the court found that the district court was correct to classify petitioner as a career offender because his two prior offenses (which occurred in January 1995 and April 1995) were separated by an intervening arrest and thus counted as "unrelated" under Sentencing Guidelines § 4A1.2 comment. (n.2). Pet. App. 4a. The court further concluded that petitioner's 360-month sentence of imprisonment was reasonable, noting that "[t]he district court considered permissible sentencing factors, stated its reasons for the particular sentence on the record, and sentenced [petitioner] at the low end of the Guidelines range." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 6-12) that the district court erred in refusing to instruct the jury on the lesser-included offense of simple possession of cocaine. See 21 U.S.C. 844(a). That argument does not warrant this Court's review.

a. As an initial matter, the court of appeals declined to reach petitioner's claim that he was entitled to a lesser-included offense instruction, concluding that he

had forfeited that claim by failing to develop it in his opening brief on appeal. Pet. App. 3a. Petitioner does not challenge this conclusion, stating that he "made a brief mention of the issue in his initial brief under issue two, but concedes that there was no further expansion of this particular argument in the brief." Pet. 11. Nor does he contend that there is any conflict of authority on whether an issue not addressed in an appellant's opening brief can be deemed forfeited. In fact, other courts of appeals routinely invoke the rule applied here. See, *e.g.*, *United States* v. *Zannino*, 895 F.2d 1, 17 (1st Cir.), cert. denied, 494 U.S. 1082 (1990); *Cinel* v. *Connick*, 15 F.3d 1338, 1345 (5th Cir.), cert. denied, 513 U.S. 868 (1994); see also *United States* v. *Elder*, 90 F.3d 1110, 1118 (6th Cir.), cert. denied, 519 U.S. 1016, and 519 U.S. 1131 (1996).

Instead, petitioner argues that the lower court's application of this forfeiture rule denied him "due process" because the district court error "severely impaired [his] sole theory of defense, and thus the failure of the appellate court to address this issue on appeal is tantamount to not allowing [p]etitioner to appeal." Pet. 10. Contrary to petitioner's suggestion, he was not denied appellate review; the court of appeals considered (and rejected) several other challenges to his conviction and sentence. See Pet. App. 1a-2a (listing issues presented on appeal). In any event, as the Court has observed in other contexts, "the State certainly accords *due* process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982); see *Thomas* v. *Arn*, 474 U.S. 140, 155 (1985) (due process not violated by procedural rule conditioning the right to

appellate review of Magistrate Judge's report on the filing of objections).

b. Petitioner's factbound claim would not merit review even if the court of appeals had addressed it. A defendant is entitled to a jury instruction on a lesser-included offense only if the evidence is such that "a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater." *Schmuck* v. *United States*, 489 U.S. 705, 716 n.8 (1989); see *Keeble* v. *United States*, 412 U.S. 205, 208 (1973). In this case, the jury could not have rationally concluded that the drugs at issue were merely for personal use given that petitioner possessed a large quantity of drugs packaged in small baggies for resale, while simultaneously possessing $228 in a "dealer's fold," scales, cutting agent, unused empty baggies, and a loaded gun. See, *e.g.*, *United States* v. *Upton*, 512 F.3d 394, 403 (7th Cir.) (even though quantity of drugs seized was relatively small, simple possession instruction not warranted in light of other evidence demonstrating the defendant had a retail drug operation), petition for cert. pending on other grounds, No. 07-10234 (filed Mar. 31, 2008); cf. *United States* v. *Hernandez*, 476 F.3d 791, 799-800 (9th Cir.) (holding that lesser-included offense instruction should have been given where "the drugs were not individually cut or packaged for sale," and "the government produced no evidence that [the defendant] had precursor chemicals, glassware, cutting agents, scales, firearms or weapons, or other typical items associated with drug trafficking"), cert. denied, 128 S. Ct. 265 (2007).

2. Petitioner also renews his claim that the evidence was insufficient to support his conviction under 18 U.S.C. 924(c)(1)(A) for "carry[ing]" a firearm "during and in relation to" a drug trafficking offense. Pet. 4-5.

That statute imposes criminal liability on "any person who, during and in relation to any * * * drug trafficking crime * * * uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm." 18 U.S.C. 924(c)(1)(A). Petitioner does not deny that he carried a gun during a drug trafficking offense. Instead, he contends that the evidence did not permit the jury to conclude that he carried a firearm "in relation to" his drug trafficking. Pet. 5.

In *Smith* v. *United States*, 508 U.S. 223 (1993), this Court noted that "[t]he phrase 'in relation to' is expansive." *Id.* at 237. The Court explained that the phrase in Section 924(c)(1), "at a minimum, clarifies 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 237-238. "Instead, the gun at least must 'facilitat[e], or ha[ve] the potential of facilitating,' the drug trafficking offense." *Id*. at 238 (brackets in original) (quoting *United States* v. *Stewart*, 779 F.2d 538, 540 (9th Cir. 1985)).

In this case, petitioner was arrested with a loaded semi-automatic firearm tucked in his waistband while driving a car containing multiple small baggies of cocaine packaged for sale and small bills arranged in a "dealer's fold." 5/16/08 Tr. 155-156, 167-176. The government also presented expert testimony that drug dealers are often the victims of robberies and thus frequently keep firearms close by to protect themselves and their drugs, 5/17/08 Tr. 247, and that the type of firearm (and ammunition) at issue was known as a self-defense weapon because it was easy to conceal and very accurate. *Id*. at 308, 312. Given that evidence, the jury could infer that petitioner carried a concealed and

loaded weapon on his person in order to facilitate his drug trafficking. Other courts of appeals have found sufficient evidence of a Section 924(c)(1) violation on similar facts, and petitioner cites no contrary authority. See, *e.g.*, *United States* v. *Harris*, 477 F.3d 241, 244-245 (5th Cir.), cert. denied, 127 S. Ct. 2117 (2007); *United States* v. *Jackson*, 300 F.3d 740, 747-748 (7th Cir. 2002); *United States* v. *Gibbs*, 182 F.3d 408, 425 (6th Cir.), cert. denied, 528 U.S. 1051 (1999); *United States* v. *Williams*, 104 F.3d 213, 215 (8th Cir. 1997); *United States* v. *Barnhardt*, 93 F.3d 706, 710-711 (10th Cir. 1996).

Petitioner's reliance on *Bailey* v. *United States*, 516 U.S. 137 (1995), is misplaced. Petitioner cites *Bailey* for the proposition that "to sustain a conviction under * * * § 924(c)(1), the government must prove that the defendant actively employed the firearm during and in relation to the predicate crime." Pet. 5. But the "active employment" holding in *Bailey* defined the word "use" in Section 924(c)(1), not the word "carry" or the phrase "in relation to." See *Bailey*, 516 U.S. at 138-139. Likewise, in *Watson* v. *United States*, 128 S. Ct. 579 (2007), this Court addressed the scope of the word "use." See *id.* at 586 (holding that "a person does not 'use' a firearm under § 924(c)(1)(A) when he receives it in trade for drugs"). Neither *Bailey* nor *Watson* calls into question the holding of the court of appeals in this case, which concerns the "carry" prong of Section 924(c)(1)(A) and its "in relation to" requirement. Under this Court's decisions, petitioner, who had the firearm tucked in his waistband, was unquestionably carrying the firearm. *Muscarello* v. *United States*, 524 U.S. 125, 130 (1998) ("No one doubts that one who bears arms on his person 'carries a weapon.'"). And, as noted, the evidence sup-

ported the conclusion that the firearm facilitated the drug trafficking offense.

3. Petitioner contends (Pet. 12-14) that the district court clearly erred at sentencing in denying him a two-level reduction for acceptance of responsibility under Guidelines § 3E1.1. To receive an adjustment under Section 3E1.1, a defendant must "demonstrate [] acceptance of responsibility for his offense" by "truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct)." Sentencing Guidelines § 3E1.1(a) & comment. (n.1(a)). An application note to Section 3E1.1 states: "This adjustment is not intended to apply to a defendant who puts the Government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." *Id.* § 3E1.1 comment. (n.2).

Petitioner was not entitled to an adjustment for acceptance of responsibility. Although petitioner went to trial, he now claims that "it was undisputed that [petitioner] stipulated to the possession of the cocaine and the firearm and to being a convicted felon and only disputed his intent at trial." Pet. 14. That is not so. Petitioner did not stipulate to the possession of the cocaine or the firearm, and indeed suggested through cross-examination and in his closing argument that Deputy Morgado was lying about the circumstances of his arrest. 5/17/08 Tr. 391-406; see also *id.* at 391 (Petitioner's counsel arguing in closing that "[t]he question becomes if you believe what [Deputy] Morgado had to say and whether or not it was reasonable?"); *id.* at 409-410 (government responding in rebuttal to apparent suggestion

that Deputy Morgado has "manufactur[ed] this whole case"). Thus, the district court correctly concluded at petitioner's sentencing hearing that "[petitioner] * * * exercised his constitutional right to trial by jury, and he required the Government to prove every element of the case * * * with the exception of the fact that he was a convicted felon." 7/28/06 Tr. 48. Accordingly, petitioner's factbound challenge to the district court's decision not to reduce his Sentencing Guidelines' range for acceptance of responsibility does not merit further review.[3]

4. Finally, petitioner contends (Pet. 14-17) that the district court abused its discretion in not sentencing him below the advisory Guidelines range for his offense. See Pet. 16 (sentence of 360 months of imprisonment was "clearly unreasonable and overly excessive"); 7/31/06 Tr. 19 (district court concluding that "the Guidelines imprisonment range is a range of 360 months to life imprisonment"). In support of that claim, petitioner notes that his two prior felony convictions (which resulted in his "career offender" status) were in 1995, and he claims that he had made "progress" in "his family life, raising his children and employment," and that, at the time of these offenses, he was addicted to cocaine as a result of a car accident. Pet. 15.

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[3] Petitioner cites (Pet. 12) federal appellate decisions for the proposition that a defendant may demonstrate acceptance of responsibility if he goes to trial to preserve issues unrelated to factual guilt. See Sentencing Guidelines § 3E1.1 comment. (n.2) (noting that reduction for acceptance of responsibility may be available in "rare situations" where a defendant goes to trial, for example, "to assert and preserve issues that do not relate to factual guilt (*e.g.*, to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct)." Those authorities are irrelevant here, however, because petitioner contested his factual guilt at trial.

Petitioner made all of these arguments at a lengthy sentencing hearing, and the district court carefully considered them. See 7/28/06 Tr. 1-91; 7/31/06 Tr. 1-59. Nonetheless, noting the similarity between petitioner's 1995 arrest for carrying a concealed weapon and the offenses at issue here, the district court concluded that petitioner's criminal history category did not overstate his record. *Id.* at Tr. 17 (concluding, based on similarity in present and earlier offenses, that petitioner "has been an armed drug dealer for a long time"); see *id.* at 49 (prior offense "seems to be almost the mirror image of the crime for which [petitioner] is in court today"). In addition, the court rejected petitioner's claim that his convictions were the result of his car accident, concluding instead that petitioner "is a drug dealer who got into an accident." *Id.* at 52. Petitioner faults the court of appeals for failing to reweigh the relevant considerations and substitute its judgment for that of the district court, Pet. 16, but that was not the proper role for the appellate court. *Gall* v. *United States*, 128 S. Ct. 586, 597 (2007). The court of appeals correctly determined that petitioner's sentence was "reasonable," and petitioner identifies no reason for this Court to review this factbound determination.[4]

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[4] Although petitioner does not challenge his career-offender status on this ground, the government notes that the district court predicated that status on a prior conviction for carrying a concealed weapon. 07/31/06 Tr. 49-50. On April 21, 2008, this Court granted a writ of certiorari and vacated the judgment in *Archer* v. *United States*, No. 07-8394, which presented the question whether carrying a concealed firearm qualifies as a "crime of violence" under Sentencing Guidelines § 4B1.2, and remanded the case to the Eleventh Circuit for consideration in light of *Begay* v. *United States*, No. 06-11543 (Apr. 16, 2008). There is no need for similar action here, because petitioner did not present any such claim on appeal; indeed, he acknowledged in his appellate

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2008

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reply brief that "these two felonies [including the concealed-weapon offense] are 'crimes of violence' for purposes of the Guidelines." Pet. Reply Br. 12. Under such circumstances, the Eleventh Circuit would deem forfeited any claim that the concealed-weapon offense was not a "crime of violence." See, *e.g.*, *United States* v. *Levy*, 416 F.3d 1273, 1276-1280 (11th Cir.) (per curiam) (refusing, on remand from this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), to address a *Booker* claim because it had not been presented in the initial appellate brief), cert. denied, 546 U.S. 1011 (2005).