No. 13-2764

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

United States of America,
Plaintiff-Appellee,

v.

Charles W. Pollock, Jr.,
Defendant-Appellant.

Appeal From The United States District Court
For the Central District of Illinois,
Case No. 11-CR-10082
The Honorable Judge James E. Shadid

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

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Disclosure Statement

I, the undersigned counsel for the Defendant-Appellant, Charles W. Pollock, Jr., furnish the following list in compliance with Fed. R. App. P. 26.1 and Cir. R. 26.1:

1. The full name of every party or amicus the attorney represents in the case: Charles W. Pollock, Jr.

2. This party is not a corporation.

3. The names of all law firms whose partners or associates are expected to appear for the party before this Court:

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STATEMENT OF REASONS FOR REHEARING

Rehearing is warranted for three reasons. First, the panel's decision is at odds with *Richardson v. United States*, 526 U.S. 813 (1999), and with its own prior precedent in *United States v. Griffin*, 684 F.3d 691 (7th Cir. 2012). The panel did not fully apply the Supreme Court's *Richardson* test in holding that a specific firearm is an element of § 922(g)(1). In doing so, the panel overlooked the heightened risk that juries will ignore specific facts when determining guilt, and the serious unfairness to defendants that results when a specific firearm is not treated as an element of the crime. Second, in reviewing Pollock's sentence, the panel failed to consider whether the alleged assault was relevant conduct and whether Pollock's sentence as a whole was substantively reasonable. Third, the panel did not apply the proper legal standard for the cross reference that the district court used at sentencing. Pollock therefore respectfully requests rehearing or rehearing en banc.

BACKGROUND

In July 2011 Charles Pollock's relationship with Kim Bowyer was nearing its end. (Sentencing Tr. 19, 62.) The 15-month relationship had grown increasingly tumultuous, and Bowyer accused Pollock of taking her from her home on July 16 and then sexually assaulting her. (Sentencing Tr. 24–27.) An Illinois jury acquitted him of all charges related to this incident. (App. A.27–28.)

Federal prosecutors charged Pollock with being a felon in possession of firearms and ammunition based on the same investigation. (R.14.) A second superseding

indictment alleged that he possessed nine different firearms and also added a third count of attempted witness tampering. (App. A.1.) The case went to trial, and the jury—over the defendant's objection—was given an instruction relating to the elements of § 922(g)(1). (App. A.4, A.10.) The instruction included as an element that "the defendant knowingly possessed a firearm," but did not tell the jury that it must unanimously find which of the nine different firearms Pollock possessed. (App. A.4.) The jury convicted Pollock on all three charges. (App. A.12.)

At sentencing, the government sought to enhance Pollock's sentence on the basis of the alleged sexual assault—of which Pollock had been acquitted in state court—by cross-referencing from the felon-in-possession sentencing guideline to the sexual abuse sentencing guideline. (App. A.15–19.) Bowyer testified as to her version of the events of July 16, 2011, (Sentencing Tr. 24–35), and Pollock testified as well, (Sentencing Tr. 66–73). Following the testimony, the district court applied the cross reference, calculated a sentencing range of 360–480 months, and sentenced Pollock to 240 months' imprisonment (120 months concurrently on each § 922(g)(1) count and 120 months consecutively on the attempted witness tampering). (App. A.35.)

A panel of this Court affirmed. (Panel Op. 19.) Relying on *United States v. Verrechia*, 196 F.3d 294 (1st Cir. 1999), the panel held that possessing a specific firearm is not an element of § 922(g)(1). (Panel Op. 6–7.) In addition, it reviewed this question for plain error, holding that Pollock's objection to the instruction below did not adequately preserve the issue for this Court's review. Specifically, the panel looked to nebulous comments from the record below to conclude that Pollock

actually was objecting only to the failure to grant a directed verdict and to the district court's instructing the jury *at all* on the firearm possession count (Panel Op. 5 and n.2.) With respect to sentencing, the panel held that the cross reference was proper because the gun possession was sufficiently "in connection with" the sexual assault, (Panel Op. 19), and that the district court's imposition of a 10-year consecutive sentence for attempted witness tampering was substantively reasonable (Panel Op. 15). The panel opinion did not discuss the overall substantive reasonableness of Pollock's 20-year sentence, nor did it address the issue of whether the sexual assault was relevant conduct.

DISCUSSION

I. Rehearing is warranted because the panel's decision conflicts with Supreme Court precedent in *Richardson v. United States* and does not adequately account for the language and history of § 922(g)(1).

The Supreme Court in *Richardson v. United States* reiterated two important principles in defining the test for determining the elements of an offense. First, defining criminal statutes too broadly can "cover up wide disagreement among the jurors about just what the defendant did, or did not, do" and aggravates the risk that, unless they are required to focus on specific factual details, juries will find that "where there is smoke there must be fire." 526 U.S. at 819 (1999). Second, it is unconstitutional to "permit juries to convict while disagreeing about means, at least where that definition risks serious unfairness." *Id.* at 820. The panel's decision runs afoul of both *Richardson* principles.

As a threshold matter, the panel erred in reviewing Pollock's claim using a

plain-error standard. Here, defense counsel objected to jury instruction 8A and later renewed his objection after the district court denied defense counsel's motion for directed verdict. (App. A.8, A.10.) The district court, the government, and defense counsel understood that defense counsel objected to jury instruction 8A. (App. A.10.) The panel itself acknowledged that Pollock had objected to the instruction and that the record did not reflect the precise basis of that objection. (Panel Op 4-5.) Therefore, the panel erred in adopting the government's speculative suggestion that the defense was only objecting to the district court's denial of his motion for a direct verdict, a nonsensical basis for objecting to a jury instruction. (Gov't Br. 29–32; Panel Op. 5, n.2), The panel also erred in relying on this Court's prior decision in *United States v. DiSantis*, 565 F.3d 354 (7th Cir. 2009) to attribute plain error to the jury-instruction issue. In *DiSantis* the nature of the defendant's objection actually changed between trial and appeal; the same cannot be said in this case and this Court should have reviewed the issue de novo.

A. The panel did not sufficiently account for *Richardson's* caution that jurors may simply assume that the defendant committed the crime and opt not to grapple with important factual details if not tasked with doing so as an element of the crime.

In a felon-in-possession case such as this one where: (1) the defendant was charged with possessing multiple firearms; (2) only one of those guns was seen by any witness and the prosecutor mislabeled that firearm throughout trial; (3) the jury already knew that the defendant was a convicted felon; and (4) the jury heard testimony from an ex-girlfriend that the defendant sometimes became "mean and angry" (App. B.9), there was a serious risk that the jury "avoid[ed] discussion of

specific factual details," assumed "where there [wa]s smoke there must be fire," and based its decision on the defendant's bad reputation instead of the specific facts of the case. *Richardson*, 526 U.S. at 819. The panel jettisoned *Richardson*'s test in favor of its own, one that focused solely on whether a disagreement about precisely which firearm the defendant possessed would result in convictions of unequal seriousness. (Panel Op. 7.) The panel failed to fully consider the *Richardson* test, its underlying reasoning, and the text, structure and legislative history of § 922(g)(1) and as a result, its analysis was incomplete and erroneous. Specifically, the panel erred in defining the term "any" in §922(g)(1) as precluding a finding of specificity. As noted in Appellant's brief, this Court and others have interpreted the use of the term "any" in other similar statutes as requiring the government to prove facts with specificity. For example, the perjury statute states in relevant part:

> Whoever under oath . . . in any proceeding . . . knowingly makes *any* false material declaration or makes or uses *any* other information, including *any* book, paper, document, record, recording, or other material, knowing the same to contain *any* false material declaration, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1623(a) (2006) (emphasis added). This Court has interpreted that language as requiring a jury be told that it must specifically find which (of "any") false declarations served as the basis of the conviction. *United States v. Fawley*, 137 F.3d 458, 462, 470 (7th Cir. 1998). In overturning the district court's instruction to the jury that it only needed to "unanimously agree that at least one of the answers given by the defendant as charged in the indictment was false," this Court held that the district court's instruction was "ineffective" and "misleading," and "eviscerate[d]

the defendant's due process right to a unanimous verdict." *Id.* at 471; *see also United States v. Holley*, 942 F.2d 916, 929 (5th Cir.1991) (holding that the district court's failure to give a specific unanimity instruction was reversible error in a perjury prosecution that alleged multiple false statements). The use of "any" in § 922(g)(1) is no different from the use of "any" in § 1623, and the panel should have interpreted the language of § 922(g)(1) similarly.

B. The panel ignored serious fairness concerns that result when a specific firearm is not an element under § 922(g)(1).

The panel also brushed aside the fairness concerns from *Richardson*, limiting its inquiry into fairness to whether excluding the specific firearm as an element of § 922(g)(1) impacted the seriousness of the conviction. (Panel Op. 7.) But the panel ignored other vital fairness considerations such as the ability to challenge a conviction on appeal, an especially important consideration when multiple firearms are listed in the indictment. As Pollock pointed out in his opening brief, "[i]f the government charged a single defendant with possession of twelve firearms, and each juror believed that the defendant possessed a different firearm, then the government would not have proved, beyond a reasonable doubt, that the defendant had violated § 922(g)(1). And without the requisite specificity, the defendant would have no recourse on appeal." (Br. 24) (citing *United States v. Buchmeier*, 255 F.3d 415, 428 (7th Cir. 2001) (recognizing a potential due process violation "where a defendant is convicted of one count of violating § 922(g)(1)" but "such a large number of firearms are listed in the count that the defendant's inability to know which firearms he was convicted of having possessed creates such a burden on that

defendant's ability to appeal his conviction that it would be problematic")).

C. The panel's decision conflicts with Seventh Circuit precedent in *United States v. Griffin*.

Not only does the panel's holding conflict with *Richardson*, it also is at odds with this Court's precedent. In *United States v. Griffin,* this Court recognized that juror unanimity was required. 684 F.3d at 694 (stating that "[b]ecause the [defendant's] felon-in-possession charge covered several firearms and sets of ammunition, the jurors were properly instructed that they *would need to agree unanimously* on Griffin's possession of one or more specific firearms or sets of ammunition to find him guilty.") (emphasis added). This Court stated that "[w]e must be specific about the firearms because the defendant was convicted of possessing only one firearm and two sets of ammunition" from an indictment that contained ten firearms and five sets of ammunition. *Id.* at 693. Here, like Griffin, Pollock was charged with possessing multiple firearms, but unlike Griffin, Pollock's conviction was not predicated on a unanimous verdict. Thus, unlike Griffin, Pollock cannot challenge the sufficiency of the evidence or the full effect of the government's prosecutorial misconduct because he does not know which gun or guns the jury found him guilty of possessing. The Court's reasoning from Griffin applies equally to Pollock; without telling the jury that it needed to unanimously decide which specific guns he possessed, Pollock's conviction was in error and this Court should grant rehearing or rehearing en banc.

II. The panel's failure to consider relevant conduct and the overall reasonableness of Pollock's sentence runs afoul of this circuit's precedent and requires rehearing.

Pollock's unaddressed sentencing arguments also require rehearing. As this Court's precedent makes clear, when a sentencing court considers uncharged and/or unconvicted conduct when imposing a sentence, it may only consider relevant conduct as defined in U.S. Sentencing Guidelines Manual § 1B1.3. *See, e.g.*, *United States v. Davison*, -- F.3d --, No. 14-1158, 2014 WL 3732915 at *1 (7th Cir. July 30, 2014). Similarly, sentences, when considered as a whole, must be substantively reasonable. *Gall v. United States*, 552 U.S. 38, 40 (2007). Pollock raised both relevant-conduct and substantive-reasonableness issues, yet the panel opinion did not address either. Accordingly, this Court should grant the petition for rehearing.

A. The panel opinion failed to enforce the government's waiver of the relevant-conduct argument.

Courts may take into account certain uncharged or acquitted conduct when sentencing a defendant, but the sentencing guidelines limit the breadth of what may be considered; only conduct that is "relevant" may be used a basis for sentencing. U.S. Sentencing Guidelines Manual § 1B1.3. Though relevant conduct encompasses a wide range of actions, this Court has explained that "there are limits to how far the provisions can be pushed." *United States v. Taylor*, 272 F.3d 980, 982 (7th Cir. 2001). Furthermore, relevant conduct "controls whether a cross-reference is appropriate." *Id.*

Here, Pollock argued that using the alleged sexual abuse to enhance his sentence for gun possession was improper because the alleged abuse was not relevant as defined in § 1B1.3. (Br. 45–46.) In addition, as Pollock noted in his reply brief, the government's failure to respond to this argument,[1] waived any contention it may have had that the conduct was relevant. (Reply Br. 15.) Despite this clearly framed issue that the government waived, the panel opinion does not even touch upon the threshold issue of relevant conduct.[2] Because only relevant conduct may be used for sentencing, the panel's failure to address the relevance of the alleged sexual assault contravenes circuit precedent, and thus warrants rehearing.

B. The panel opinion did not consider the substantive reasonableness of Pollock's whole sentence.

As the Supreme Court noted in *Gall*, courts of appeals reviewing sentences for substantive reasonableness must employ an abuse-of-discretion standard. *Gall*, 552 U.S. at 59–60. This standard requires that this Court ascertain whether the district court has properly justified the total penalty imposed. *See United States v. Washington*, 739 F.3d 1080, 1081 (7th Cir. 2014) (vacating a sentence because the district court failed to explain why a 97-month total sentence was appropriate).

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[1] At oral argument, the government acknowledged that it failed to respond to the relevant conduct argument in its brief. Oral Argument at 22:20, *United States v. Charles Pollock* (No. 13-2764), *available at* http://media.ca7.uscourts.gov/sound/2014/sk.13-2764.13-2764_04_08_2014.mp3.

[2] In addition to overlooking the reply brief's discussion of the government's relevant conduct waiver, the panel opinion also overlooks the fact that the reply brief specifies one of the § 3553(a) factors the district court failed to mention at sentencing. (Reply Br. 18) *contra* (Panel Op. 14) (suggesting that Pollock's 3553(a) argument "does not direct us to anything specific that the district court failed to consider").

Here, the panel failed to consider whether Pollock's 240-month sentence, as a whole, was reasonable. The opinion did discuss whether it was reasonable for the district court to impose a 10-year consecutive sentence for attempted witness tampering. (Panel Op. 15.) Pollock, however, was being sentenced on two other counts as well. Even if the attempted witness tampering sentence may have been reasonable in a vacuum, that was not the only issue before the Court. Rather, the real question was whether Pollock's 240-month sentence was reasonable in its entirety.

A within- or below-guidelines sentence is presumed to be reasonable. (Panel Op. 12.) However, this applies to the whole sentence, not to individual parts of it. Otherwise, there would be no way to review a sentence that might be reasonable in its particulars, but grossly unreasonable as a whole.

The reasonableness inquiry has significant implications for cases (such as this one) where the guidelines range is based on acquitted conduct. The guidelines range calculated by the district court in this case relied heavily on acquitted conduct. (Br. 12.) The reasonableness inquiry would likely change had that conduct not been considered. Instead of assessing a seemingly below-guidelines sentence, this Court would be assessing the reasonableness of a significantly above-guidelines sentence (i.e. one approximately 200 months above the high end of the guideline range). *Id.*[3]

[3] Such a situation is not farfetched. Pending before the Supreme Court is a certiorari petition challenging the constitutionality of using acquitted conduct in sentencing when that conduct is needed to render a sentence reasonable. *See* Petition for Certiorari at 3, *Jones v. United States*, (No. 13-10026). If the *Jones* petitioners prevail, this Court will be in the position of assessing whether Pollock's 240-month sentence would be reasonable even if the district court had not considered the acquitted sexual assault (or remanding for

Because the panel did not consider the reasonableness of the sentence as a whole, rehearing is warranted.

III. The panel applied the wrong test for the cross reference.

In dismissing Pollock's cross-reference challenge, the panel opinion holds first that rape is an act of violence and second that Pollock suggesting to Bowyer that they kill themselves "was sufficiently 'in connection with'" that violent act to apply the cross reference. (Panel Op. 19.) This holding, however, conflicts with the test required by the guidelines. Though § 2K2.1(c)(1) does say that a cross reference may be employed when a firearm is used or possessed "in connection with" another crime, Comment 14 further requires that the firearm facilitate (or potentially facilitate) the other offense. U.S. Sentencing Guidelines Manual § 2K2.1(c) & cmt.14. This language requires that the firearm have a relationship to a specifically enumerated offense. *See United States v. Tapia*, 610 F.3d 505, 512–13 (7th Cir. 2010).

Here, the court misapplied the test in two ways. Though the Court is correct that rape is an act of violence designed to "demean, dominate, and intimidate," (Panel Op. 19), the opinion does not cite any statute codifying such a crime. As such, rape as defined by the opinion is not an "offense" within the meaning of Comment 14. On a more basic level, the panel's use of the bare "in connection with" language neglects the facilitation test required by the guideline comments. Even if rape, as defined by

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resentencing based on an incorrect guidelines calculation). This Court would not be merely be assessing whether 10 years for attempted witness tampering alone is reasonable. In short, substantive reasonableness must turn on the sentence as whole.

the opinion, met the requirements of Comment 14, and even if the attempt to cover up that crime was "in connection with" the crime, a cover-up does not "facilitate" a crime that has already occurred and is in the past. Because "in connection with" is defined by the guidelines as turning on facilitation, only if the crime of conviction facilitated some other offense can the cross reference apply. Instead of applying this specific test, the panel opinion looked only at whether there was some general relationship between the firearm possession and the alleged abuse. Section 2K2.1(c) requires more. Accordingly, the panel misapplied the facilitation test under § 2K2.1(c) and rehearing is warranted.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant rehearing or rehearing *en banc* in this case.

Respectfully Submitted,

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Certificate of Compliance with Federal Rules of Appellate Procedure 32(a) and 40 and Seventh Circuit Rules 32 and 40

1. This petition complies with the type-volume limitation of Fed. R. App. 40(b) and Circuit Rule 40 because: this petition contains 13 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7(B)(iii).

2. This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32 because this petition has been prepared in a proportionally-spaced typeface using Microsoft Word, in 12-point Century Schoolbook font with footnotes in 11-point Century Schoolbook font.

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Dated: August 7, 2014

Certificate of Service

I, the undersigned, counsel for the Defendant-Appellant, Charles W. Pollock, Jr., hereby certify that I electronically filed this brief with the clerk of the Seventh Circuit Court of Appeals on August 7, 2014, which will send notice of the filing and the filing to counsel of record in the case.

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