Volume 38
Number 1 *Fall 2003*

*pp.*65-108

Fall 2003

Let's Make a Deal. Liability for "Use of a Firearm" When Trading Drugs for Guns under 18 U.S.C. § 924(c)

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Notes

LET'S MAKE A DEAL. LIABILITY FOR "USE OF A FIREARM" WHEN TRADING DRUGS FOR GUNS UNDER 18 U.S.C. § 924(C)

"When I use a word . . . it means just what I choose it to mean neither more nor less."[1]

I. INTRODUCTION

Scenario 1: Joseph and Bill drove from Texas to California in order to buy cocaine.[2] Joseph brought his MAC-10 automatic machine gun with him, and the drug dealer they found expressed great interest in obtaining that gun. A friend of the drug dealer told the police of the transaction that was to take place between Joseph and the drug dealer. A police officer, posed as the drug dealer's partner, approached Joseph and asked him to sell the MAC-10. Instead of asking for money, Joseph decided he wanted to trade the gun for the cocaine. The officer left to get the cocaine, and Joseph was arrested, charged, and tried in the Ninth Circuit for using a firearm under 18 U.S.C. § 924(c)(1), which adds an additional sentence for using a firearm during a drug trafficking crime.

Scenario 2: John was a drug dealer in Philadelphia, Pennsylvania.[3] Bill was one of John's frequent customers and also an undercover police officer. On one occasion, Bill told John that he did not have money for the cocaine but could instead give John an assault rifle. Reluctantly, John agreed and traded the drugs for the gun. John was charged in the Third Circuit for using a firearm during a drug trafficking crime under 18 U.S.C. § 924(c)(1).

Scenario 3: James was a drug dealer in Washington, D.C. Scott, an undercover government agent, posed as a marijuana dealer and

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1 United States v. Sumler, 294 F.3d 579, 583 (3d Cir. 2002) (citing LEWIS CARROL, THROUGH THE LOOKING GLASS & WHAT ALICE FOUND THERE 124, *reprinted in* JOUNEYS IN WONDERLAND (Derrydale 1979)).

2 This Scenario is loosely based on the facts of *Smith v. United States*, 508 U.S. 223 (1993).

3 This Scenario is loosely based on the facts of *United States v. Sumler*, 294 F.3d 579 (3d Cir. 2002).

arranged a trade of marijuana for crack cocaine from James.[4] At the arranged date, Scott handed over ten pounds of marijuana and four guns to James, and James gave Scott five bags of crack cocaine. Officer Scott arrested James and he was charged with several offenses, including a § 924(c) offense of using a firearm during a drug trafficking crime. The D.C. Circuit overturned James' § 924(c) conviction because James did not use the gun during or in relation to a drug trafficking crime, but rather received it as payment.

How could John and James have received different treatment when the circumstances are nearly identical? The answer is simple: they are subject to the jurisdiction of different circuits of the United States Courts of Appeals, and the different circuits have reached two divergent conclusions regarding the word "use" under 18 U.S.C. § 924(c)(1), which enhances the penalty for using a firearm in a drug trafficking crime.[5] John and James' scenarios illustrate the issue involved in this Note—trading drugs for guns—whereas Joseph's scenario illustrates the types of cases the Supreme Court has definitively decided —trading guns to get drugs.[6]

The "use" element of the statute has been subject to various interpretations by the federal Courts of Appeals, yet it has only been interpreted by the Supreme Court of the United States in the context of Scenario 2, an exchange of guns for drugs.[7] There are distinct differences between an exchange of *guns for drugs* and an exchange of *drugs for guns*.[8] For example, the one who initially possesses the gun inherently has more bargaining power, namely, the ability to discharge the firearm; there is also the underlying complication of entrapment if a law enforcement

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4 This Scenario is loosely based on the facts of *United States v. Stewart*, 246 F.3d 728 (D.C. Cir. 2001).

5 See *infra* notes 38 and 83 for a list of the circuits and how they have decided the "use" prong of § 924(c)(1).

6 *See infra* Part II.C.

7 Smith v. United States, 508 U.S. 223 (1993) (6-3 decision) (holding that trading a gun for narcotics constitutes "use" of firearm within meaning of statute). *Smith*'s failure to resolve the conflict among the federal circuits in defining "use" under different factual situations is discussed *infra* Part IV.

8 When trading guns for drugs, the person who has the gun is in the better position to manipulate and threaten the other person involved in the transaction; on the other hand, when trading drugs for guns, the person who receives the gun is not in the dominant position, because he/she does not hold the power—the gun. The distinction is subtle, yet important with regards to certain situations where one party is an undercover agent who could possibly entrap the defendant. For a discussion of this situation see *United States v. Westmoreland*, 122 F.3d 431 (7th Cir. 1997).

officer is the one initiating the trade with the gun.[9] Although there are differences between the exchanges, this Note will focus only on the drugs for guns exchange. It will show that the latter situation cannot be construed as "use" because of the passive nature of the exchange of drugs for guns.[10]

The majority of the circuits have construed the term "use" broadly.[11] According to the majority, the mere presence of firearms at the scene of a drug arrest will be enough to satisfy the statute because (1) the weapons could be used to protect the trafficker's drugs, cash, or paraphernalia; and (2) given the possibility of use, the weapons have in fact been used to create a "drug fortress."[12] However, a minority of the circuits have interpreted the statute as requiring the government to prove the "ready access" of weapons, i.e., that the strategic placement of the weapons supports an inference that the defendant intended to use, or would have used, the firearm during the drug trafficking transaction.[13] Further, the intent to use a firearm may not be presumed from the mere fact that it was found in the same room as the drugs and related items.[14]

This Note will focus on the irreconcilable rationales applied by the courts of appeals to construe the "use" element of § 924(c)(1). Part II will show the legislative history of § 924(c)(1), a history of "use" interpretation, and the Supreme Court's interpretation of the statute.[15] Part III will discuss the circuit split regarding the interpretation of the "use" prong of the statute.[16] Part IV will then analyze the two conflicting Supreme Court decisions and the applications that the circuit courts of appeals have used, looking to statutory construction principles.[17] Part V will propose an amendment to the statute, which encompasses the proper canons of statutory interpretation and fairness, in order to remedy the ambiguities regarding the term "use" under § 924(c)(1).[18]

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9 *See supra* note 8.

10 *See infra* Part IV.

11 *See infra* Part III.A.

12 The First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits apply the "drug fortress" theory; the Second, Third, and D.C. Circuits apply the "ready access" approach. *See infra* Part II.C.

13 *See infra* Part II.C.

14 *See* United States v. Featherson, 949 F.2d 770 (5th Cir. 1991).

15 *See infra* Part II.

16 *See infra* Part III.

17 *See infra* Part IV.

18 *See infra* Part V.

II. BACKGROUND

Congress has a long history of regulating firearms.[19] The purpose of the firearm enhancement statute is not to regulate firearms, but to deter using a firearm when committing a felony.[20] This Part will discuss the legislative history of 18 U.S.C. § 924 and the general interpretation of "use" under § 924.

A. *Legislative History of 18 U.S.C. § 924(c)(1)*

The current version of 18 U.S.C. § 924(c)(1) is a result of several amendments over the past four decades responding to Congressional concern over drug-related crimes.[21] The provision was first adopted as part of the Gun Control Act of 1968.[22] The purpose of the Gun Control Act was to create a separate independent offense for illegally carrying or using a firearm during the commission of a felony.[23] For example, if a

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19 *See* JOHN R. LOTT, JR., MORE GUNS LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS 36-49 (2000) (discussing the history of gun control laws in the United States).

20 *See infra* note 23 and accompanying text.

21 The current version of 18 U.S.C § 924(c)(1) is:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime-
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> (i) be sentenced to a term of imprisonment of not less than 5 years;
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> (ii) if the firearm is brandished; be sentenced to a term of imprisonment of not less than 7 years; and
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> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. §924(c)(1)(A) (2000).

22 Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1223 (1968). This was actually a two-part law; the Omnibus Crime Control and Safe Streets Act of 1968 was the second part. Pub. L. No. 90-351 (1968). Both of these laws were passed as a response to the assassinations of Sen. Robert F. Kennedy and Dr. Martin Luther King, Jr., and were more comprehensive than all previous gun control laws. *See also* United States v. Rawlings, 821 F.2d 1543, 1545 n.6 (11th Cir. 1987) (citing United States v. Melville, 309 F. Supp. 774, 776 (S.D.N.Y. 1970)).

23 Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1223 (1968). In its final 1968 form, § 924(c) read:

defendant was convicted of two individual drug offenses, but only a single firearm was seized, each of the two drug offenses was a predicate for the § 924(c)(1) weapons conviction.[24] The Gun Control Act also imposed a mandatory minimum sentence of one year, with a maximum of ten years, for use of or carrying firearms during a felony.[25]

The Gun Control Act was enacted to deter crime and to "persuade the [criminal] to leave his gun at home."[26] However, the Gun Control Act does not contain committee reports or congressional hearings; therefore, the legislative history of the Act is limited only to the floor debate.[27] Mandatory sentencing gained support in Congress because of the increase in drug-related crimes and the rise in public frustration with

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(c) Whoever -

(1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or

(2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States, shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than five years nor more than 25 years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of such person or give him a probationary sentence.

Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1223, 1224 (1968).

24 *See* Michael J. Riordan, *Using a Firearm During and in Relations to a Drug Trafficking Crime: Defining the Elements of the Mandatory Sentencing Provision of 18 U.S.C. Section 924(c)(1)*, 30 DUQ. L. REV. 39, 54-55 (1990). Each of the drug sentences can be enhanced using the same single firearm. *Id.* This "double jeopardy" concept has since been repealed and it is no longer constitutional for one firearm violation to be used for multiple offenses for sentencing purposes. For a discussion of this, see David Cinotti, Gregory Jones & Scott Weidenfeller, *Double Jeopardy*, 90 GEO. L.J. 1528, n.1393 (2002).

25 Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1223 (1968).

26 114 CONG. REC. 22,231 (1968) (floor amendment proposed by Representative Poff). There were two differences between the Conference Committee's version and Representative Poff's version. First, the Conference Committee deleted the requirement that § 924(c) violations could not run concurrently. *Id.* Second, the Conference Committee did not preclude the court from granting probation or a suspended sentence to a first offender. *Id.* This difference led Representative Poff to speak and vote against the Conference Committee version of the statute. 114 CONG. REC. S30, 583-87 (1968).

27 Both the Supreme Court, in *Busic v. United States*, 446 U.S. 398, 405 (1980), and lower courts, in *United States v. Phelps*, 877 F.2d 31 (9th Cir. 1989) and *United States v. Moore*, 580 F.2d 360, 362 (9th Cir. 1978), have commented on the lack of legislative history of § 924(c)(1).

the judicial system.[28] The statute was first amended in 1984 as part of the Comprehensive Crime Control Act.[29] This amendment altered the Act to read: "Whoever, during and in relation to any *crime of violence . . . uses* or *carries* a firearm ... shall ... be sentenced to imprisonment for five years."[30] The Senate report provided examples of some "uses" of a firearm, such as brandishing, displaying, or flaunting.[31]

Interpreting what constituted a "crime of violence" proved to be difficult for the courts.[32] Therefore, in 1986, Congress again amended the statute.[33] In this amendment, which was part of the Firearms Owners' Protection Act, Congress removed "violence" and replaced it with "violence or drug trafficking crime."[34] It also inserted "drug trafficking crime" before the second sentence on using a firearm, to include those offenses specifically.[35] The 1986 amendment and subsequent amendments to § 924(c) further defined both "crime of violence" and

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28 *See* Alan Gilbert, *Supreme Court Review: Defining "Use" of a Firearm*, 87 J. CRIM. L. & CRIMINOLOGY 842, 844 (1997); *see also infra* Part II.C.

29 18 U.S.C. § 924(c)(1)-(2) (1984), *amended by* 18 U.S.C. 924(c)(1) (1994).

30 *Id.* (emphasis added).

31 S. REP. NO. 98-225, pt. 1, at 314 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3492 (stating that displaying a firearm, regardless of whether it was fired, constituted "use" under the statute). The Senate report also described the "carry" prong of the statute, in a footnote:

> Evidence that the defendant had a gun in his pocket but did not display it or refer to it, could nevertheless support a conviction for "carrying" a firearm in relations to the crime if from the circumstances or otherwise it could be found that the defendant intended to use the gun if a contingency arose or to make his escape .... Moreover, the requirement that the firearm's use or possession be "in relation to" the crime would preclude its application in a situation where its presence played no part in the crime, such as a gun carried in a pocket and never displayed or referred to in the course of a pugilistic barroom fight.

Id.

32 Gilbert, *supra* note 28, at 844 (stating that some courts did not interpret the statute to include drug trafficking as a crime of violence and some courts did interpret drug trafficking as a violent crime); *e.g.*, United States v. Jernigan, 612 F. Supp. 382 (E.D.N.C. 1985) (ruling that possession of cocaine with intent to distribute is not a crime of violence pursuant to § 924(c)(1)); United States v. Bushey, 617 F. Supp. 292 (D.Vt. 1985) (stating that the common combination of firearms and narcotics does not make narcotics distribution by its nature a violent crime).

33 Firearm Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 456-57 (1986).

34 Firearm Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 457 (1986). For a discussion of the 1986 amendment see Tiffany Becker, Note, *The "Active Employment" Standard: Much-Needed Clarification for Determining Liability for "Use" of a Weapon During the Commission of Drug-Related Crime*, 61 MO. L. REV. 1065, 1071 (1996).

35 Firearm Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 457 (1986).

"drug trafficking" for sentencing purposes.[36] Nevertheless, despite the confusion among the courts, Congress has never defined the word "use" as it relates to § 924(c).[37]

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[36] *See* 18 U.S.C. § 924(c)(1) (1994). For § 924(c)(1) purposes, a "drug trafficking crime" is defined as "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)." § 924(c)(2). Additionally, "crime of violence" in the context of § 924(c)(1) means "a felonious offense that involves substantial risk of physical force against a person or property, or attempted, threatened, or actual physical force against a person or property." § 924(c)(3). *See* Act of Nov. 13, 1998, Pub. L. No. 105-386, 112 Stat. 3469 (1998). The amendment replaced subsection (c) with the following:

> (c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime-
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.
>
> (B) If the firearm possessed by a person convicted of a violation of this subsection-
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> (i) is a short-barreled rifle, short-barreled shotgun, or a semi-automatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or
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> (ii) is a machine gun or a destructive device, or is equipped with a firearm silencer or a firearm muffler, the person shall be sentenced to a term of imprisonment not less than 30 years.

Id.

[37] The next amendment to § 924(c) came in 1988 as a part of the Anti-Drug Abuse Act of 1988, which again defined drug trafficking, and added "intent to distribute" as an offense and increased the penalty. Anti-Drug Abuse Act, Pub. L. No. 100-690, § 6212, 102 Stat. 4181, 4360, 4373-74 (1988). The penalty again increased in 1990 as part of the Crime Control Act of 1990. *See* Crime Control Act, Pub. L. No. 101-647, § 1101, 104 Stat. 4789, 4289 (1990).

In the latest amendment, Congress added possession of a firearm in furtherance of a felony as an offense. 18 U.S.C. § 924(c)(1) (2000). Congress added the term "possession" in order to broaden the application of the statute beyond the Supreme Court's prior interpretation of the "use" prong. *See* H.R. REP. NO. 105-386, 1(a)(1). In essence, however, the Supreme Court's broad interpretation of the "carry" prong in *Muscarello v. United States*, already extended the statute to permit punishment for mere possession of a firearm. *See* 524 U.S. 125, 128-29 (1998) (refusing to limit the interpretation of "carrying" a firearm to

weapons on the person and instead holding that when a defendant knowingly possesses firearms in a vehicle, he is "carrying" for § 924(c)(1) purposes). Yet, in enacting S. 191, Congress never discussed the *Muscarello* decision or the impact the decision had on the statute. *Cf.* H.R. REP. NO. 105-344, at 6 (stating that the amendment is a direct reaction to the *Bailey v. United States* decision); S. REP. NO. 98-225, at 312-13, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3490-91 (explaining that Congress devised the amendment to deal with the problems caused by the Supreme Court's decisions in *Busic*, 446 U.S. 398).

Congress did not discuss the *Muscarello* decision because the utilization of the possession standard was not a novel idea. Before the recent amendment, the circuit courts of appeal frequently applied differing theories of possession to the statute. *See* Jamilla Moore, *These are Drugs. These are Drugs Using Guns. Any Questions? An Analysis of the Diverse Applications of 18 U.S.C. 924(c)(1)*, 30 CAL. W. L. REV. 179, 183-93 (1993) (outlining the holdings of the circuits based on differing theories of possession); *see infra* Part III (discussing the varying circuit court opinions). The first of these theories is the drug fortress theory of possession, which convicts defendants under § 924(c) when firearms and narcotics are found on the same premises and the firearm is under the control of the defendant. *See, e.g.*, United States v. Critton, 43 F.3d 1089, 1096-97 (6th Cir. 1995) (discussing the fortress theory and holding that weapons are used or carried, for purposes of § 924(c), when it reasonably appears that weapons were in the defendant's actual or constructive possession and were used to protect drugs); United States v. McFadden, 13 F.3d 463, 465 (1st Cir. 1994) (finding that the presence of a firearm for protection created a drug fortress); United States v. Wilson, 884 F.2d 174, 177 (5th Cir. 1989) (recognizing the fortress theory where firearms were placed for ready use); United States v. Matra, 841 F.2d 837, 843 (8th Cir. 1988) (finding that firearms are used or carried "during and in relation to" the drug crime when they are intended to protect drugs or otherwise facilitate crime). The fortress theory is founded on the premise that when firearms are found in a "drug fortress," the guns are used or carried in relation to a drug trafficking crime because the guns were present to protect the drug traffickers. *See* Riordan, *supra* note 24, at 54 (explaining the fortress theory); *see also infra* note 44 and accompanying text. In essence, the firearms helped facilitate the commission of the crime because of the increased likelihood of successful completion of the crime. *See* Riordan, *supra* note 24, at 54 (arguing that the large amount of weapons and drugs usually found in fortress-type cases allows a court to infer that the firearms helped facilitate the crime). The present version of the statute makes a conviction under the fortress theory much simpler. *See infra* Part V.A.

Courts also applied the emboldening theory of possession to § 924(c), which requires proof that a nearby firearm emboldened the defendant to commit the drug trafficking crime. *See, e.g.*, United States v. Salazar, 66 F.3d 723, 728 (5th Cir. 1995) (finding that § 924(c)(1) is satisfied if a defendant used or carried a firearm to embolden himself, protect himself, or intimidate others); United States v. Stewart, 779 F.2d 538, 540 (9th Cir. 1985) (holding that there is a § 924(c)(1) violation if the circumstances show that the firearm had a role in the crime by emboldening the defendant). For more information on the cases applying the emboldening theory, see Jeffery Kesselman, Note, *Excuse Me, Are You "Using" That Gun? The United States Supreme Court Examines 18 U.S.C. 924(c)(1) in* Bailey v. United States, 30 CREIGHTON L. REV. 513, 526-44 (1997). Unlike the fortress theory, the firearm does not need to be near the drugs; the mere presence of a firearm is enough proof under the emboldening theory. *See generally* Thomas A. Clare, Note, Smith v. United States *and the Modern Interpretation of 18 U.S.C. 924(c): A Proposal to Amend the Federal Armed Offender Statute*, 69 NOTRE DAME L. REV. 815 (1994) (explaining the differences in the emboldening and drug fortress). Congress designed the latest amendment to apply to instances when a

B. The General Interpretation of "Use" Under § 924(c)(1) Prior to the Supreme Court Rulings

Prior to the Supreme Court's ruling, the term "use" had been interpreted in several different situations under § 924(c)(1).[38] In a 1988

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defendant was emboldened by the presence of a firearm. *See* 144 CONG. REC. S12, 671 (daily ed. Oct. 16, 1998) (statement of Senator DeWine).

Another theory of possession is known as the "proximity plus" theory. *See* Amy L. Eckert, Note, *Criminal Law – 18 U.S.C. § 924(c) – Narrow Interpretation of "Use" of a Firearm*, 64 TENN. L. REV. 515, 522 (1997). Under this theory, which is a passive use theory, the government must prove only that the gun did facilitate or could facilitate the underlying drug offense. *Id.* The focus is on the defendant's intent to use the firearm. *Id.*

Under the last theory of possession, several federal courts of appeal held that the gun must be immediately accessible in order to satisfy the carry requirement of § 924(c). *See, e.g.*, United States v. Foster, 133 F.3d 704, 708 (9th Cir. 1998) (finding that defendant "carries" a firearm in a car for § 924(c)(1) purposes only when the firearm is immediately accessible); United States v. Feliz-Cordero, 859 F.2d 250, 253 (2d Cir. 1988) (holding that when a firearm is immediately accessible this fulfills the "carrying" prong of § 924(c)(1)); see also *infra* note 42 and accompanying text for a discussion of the ready access doctrine as it relates to the "use" prong of § 924(c)(1). According to the Supreme Court in *Muscarello*, however, applying the immediate accessibility test to the "uses or carries" provisions of the statute ultimately undermines the congressional intent behind the statute. *See* 524 U.S. at 128 (finding that Congress did not intend the statute to be interpreted as requiring the application of the immediate accessibility test). Under the immediate accessibility test and the Supreme Court's holding in *Bailey*, a defendant who passively stores a firearm for later use cannot be considered either "using" or "carrying" a firearm for § 924(c) purposes. *See* Bailey v. United States, 516 U.S. 137, 149 (1995); *see also* United States v. Riascos-Suarez, 73 F.3d 616, 623 (6th Cir. 1996) (holding that a defendant must do more than merely possess or store a firearm to be convicted under § 924(c)(1)). The effect of the recent amendment on the immediate accessibility test remains to be seen because the amendment requires a firearm to be possessed "in furtherance of" a crime. *See generally* Act of Nov. 13, 1998, Pub. L. No. 105-386, 112 Stat. 3469; 144 CONG. REC. H533 (daily ed. Feb. 24, 1998) (statement of Rep. McCollum) (noting that the firearm must be possessed in furtherance of the crime, not merely possessed on the person of the defendant).

[38] Before the Supreme Court explicitly addressed the interpretation of the word "use" with regard to § 924(c)(1), Justice Clarence Thomas, while on the District of Columbia Circuit Court of Appeals, wrote that "use" in § 924(c)(1) is expansive. United States v. Long, 905 F.2d 1572, 1576-77 (D.C. Cir. 1990); *see also* United States v. Hager, 969 F.2d 883 (10th Cir. 1992) (an unloaded gun in a briefcase in a locked trunk was "used" as it may have provided coverage to a drug trafficking transaction); United States v. Featerson, 949 F.2d 770 (5th Cir. 1991) (gun concealed under mattress was "use" because it was accessible to protect drugs); United States v. Munoz-Fabela, 896 F.2d 908 (5th Cir. 1990) (for purposes of § 924(c)(1), the weapon need not be employed or brandished and can be hidden or unloaded); United States v. Anderson, 881 F.2d 1128 (D.C. Cir. 1989) (evidence connecting the defendant to a room in which guns were found along with other evidence permitting reasonable inference that the weapons were involved in drug trafficking was enough for a conviction under the statute); United States v. Meggett, 875 F.2d 24 (2d Cir. 1989) (possession of a gun, even if concealed, constitutes "use" under the statute if possession is an integral part of the offense and facilitates the commission of that offense); United States

Second Circuit case, *United States v. Feliz-Cordero*,[39] the court held that a search that revealed a loaded handgun in a dresser drawer in a bedroom, which also contained a small quantity of cocaine, cash, and drug records, did not establish that the defendant used the firearm "during or in relation to" a drug trafficking offense.[40] The court created a test in order for possession of a firearm to come within the "use" provision of § 924(c), known as the "ready access" doctrine.[41] The test required: (1) proof of a transaction in which the circumstances surrounding the presence of a firearm suggest that the possessor intended to have it available for possible use; or (2) the circumstances surrounding the presence of a firearm in a place where drug transactions take place suggested that it was strategically located so as to be quickly and easily available.[42]

As a result, the government had to show how the circumstances of a particular drug trafficking episode supported an inference that the defendant placed a specific weapon so that it would be readily accessible for use during the drug transaction. After *Feliz-Cordero*, the rule was modified in the Second Circuit so that the government did not have to show that the defendant actually carried the firearm, but simply that the defendant transported or conveyed the weapon, or had possession of it

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v. Robinson, 857 F.2d 1006 (5th Cir. 1988) (the discovery of seven guns plus ammunition was enough to conclude that the defendant "used" the guns to protect cocaine in the house); *Matra*, 841 F.2d 837 (the defendant's ready access to a loaded firearm in a house containing cocaine and a large amount of cash was enough for a conviction under the statute); United States v. Alvarado, 882 F.2d 645 (2d Cir. 1987) (the existence of loaded guns in an apartment also containing cocaine was enough to sustain a § 924(c)(1) conviction); United States v. LaGuardia, 774 F.2d 317 (8th Cir. 1985) (firearms found in an apartment with cocaine and cash established defendant's "use" of a firearm to commit a felony despite the absence of evidence of a drug sale or transaction); United States v. Chase, 692 F.2d 69 (9th Cir. 1982) (having a gun in a house after distributing cocaine is enough for a conviction under § 924); United States v. Mason, 658 F.2d 1263 (9th Cir. 1981) (even though the gun nearest to the defendant was holstered, a § 924 violation was found); United States v. Moore, 580 F.2d 360 (9th Cir. 1978) (a § 924 conviction for "use" of a firearm is proper when defendant was found with a gun concealed in the waistband of his pants as he prepared to engage in a bank robbery).

39 859 F.2d 250 (2d Cir. 1988).

40 *Id.* at 253-54.

41 *Id.* at 254.

42 *Id.* The Second and Third Circuits applied the "ready access" doctrine. *See generally* United States v. Medina, 944 F.2d 60 (2d Cir. 1991) (holding that a gun left on a bedroom dresser was "use" because it was strategically placed and readily available for use during a transaction that occurred in the living room); United States v. Theodoropoulos, 866 F.2d 587 (3d Cir. 1989) (holding that the presence, in plain view, of a loaded firearm evidenced the defendant's need for security and therefore constituted use).

in the sense that, at a given time, he had both the power and intention to exercise control over it.[43]

In contrast, a majority of the circuits employed the "drug fortress" theory to uphold § 924(c).[44] This theory applies in situations where

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[43] *See Megget*, 875 F.2d at 27 (discussing the modification and its effects).

[44] The First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits applied this "drug fortress" theory in applying § 924(c)(1)'s "use" requirement. *See generally* United States v. Nelson, 6 F.3d 1049 (4th Cir. 1993) (affirming the conviction where police found guns and drugs in the same room); United States v. Travis, 993 F.2d 1316 (8th Cir. 1993) (holding that a weapon found in locked glove compartment properly supported conviction of defendant who did not own the car or possess the key to the glove compartment); United States v. Dietz, 991 F.2d 443 (8th Cir. 1993); United States v. Jefferson, 974 F.2d 201 (D.C. Cir. 1992) (stating that use can be accomplished without actually employing the firearm); United States v. Castro-Lara, 970 F.2d 976 (1st Cir. 1992) (stating that conviction was proper where the defendant picked up drugs in a car with an unloaded gun and cash in the trunk); United States v. Torres-Medina, 935 F.2d 1047 (9th Cir. 1991) (stating that the "use" requirement was satisfied where a gun was found in a crawl-space below the house even though the defendant was a paraplegic and was unable to retrieve the weapon); United States v. Head, 927 F.2d 1361 (6th Cir. 1991) (finding that a shotgun found with crack cocaine in defendant's apartment was sufficient to constitute "use"); United States v. Parrish, 925 F.2d 1293 (10th Cir. 1991) (finding that a firearm located on a closet shelf above the defendant during an attempted drug transaction constituted "use"); United States v. Garrett, 903 F.2d 1105 (7th Cir. 1990) (affirming conviction where defendant entered driver's side of a car in which cocaine and a gun were found under the seat). The Second Circuit declines to address the "use" prong, relying on the "possession" and "carry" prongs to avoid the split in circuits. *See* United States v. Cox, 324 F.3d 77, 84 (2d Cir. 2003).

Some of these circuits also use the "emboldening theory" as well in order to find a § 924(c) violation. *See* Clare, *supra* note 37, at 844-45. In emboldening cases, the government may prove a § 924(c) violation by demonstrating that a perpetrator was "emboldened" to commit the predicate crime because a firearm was located nearby. *Id.* Most courts implementing the this theory have relied on then Circuit Court Judge Anthony Kennedy's opinion in *United States v. Stewart*, 779 F.2d 538 (9th Cir. 1985) for support. *See* Clark Cunningham & Charles Fillmore, *Using Common Sense: A Linguistic Perspective on Judicial Interpretation of "Use of a Firearm"*, 73 WASH. U. L.Q. 1159, 1193 (1995). For cases using Judge Kennedy's emboldening theory, see *Torres-Medina*, 935 F.2d at 1050 (stating that then-Judge Anthony Kennedy, in *Stewart*, established a principle which is widely accepted in the circuits, namely that "a firearm may play a role in the offense simply by emboldening the defendant to act."); United States v. Williams, 923 F.2d 1397, 1403 (10th Cir. 1990) (holding that the perpetrator had been emboldened by the presence of the firearm and thus violated § 924(c)); United States v. Vasquez, 909 F.2d 235, 239 (7th Cir. 1990) (stating that the Seventh Circuit has used then-Judge Kennedy's emboldening rationale to define "use" within § 924(c)).

If a firearm is in the possession or control of a person who commits an underlying crime as defined by the statute, and the circumstances show that the firearm facilitated or had a role in the crime, such as emboldening the person who had the opportunity or ability to display or discharge the weapon to protect himself or intimidate others, whether or not

weapons are not found on the person of the defendant but are found along with drugs, paraphernalia, or proceeds on the premises under the theory of constructive possession.[45] In essence, the fortress theory establishes that the mere presence of weapons on the premises where the defendant and the drugs are located constitutes a § 924(c) violation.[46] The theory is based on the notion that when numerous firearms are found in a heavily guarded and protected drug fortress, the guns are "used" in relation to drug trafficking because they provide necessary protection to the drug traffickers.[47] Thus, the defendants are found to be "using" the guns to facilitate their drug transactions, thereby creating a drug fortress.[48]

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such display or discharge occurred, then there is a violation of the statute. *Stewart*, 779 F.2d at 540.

[45] *See generally* Riordan, *supra* note 24.

[46] Moore, *supra* note 37, at 190; *see* United States v. McFadden, 13 F.3d 463, 465 (1st Cir. 1994) (holding that the presence of a firearm for protection created a drug fortress); United States v. Wilson, 884 F.2d 174, 177 (5th Cir. 1989) (recognizing the fortress theory); United States v. Matra, 841 F.2d 837, 842 (8th Cir. 1988) (discussing the fortress theory). For a complete discussion concerning the fortress theory, see Riordan, *supra* note 24, at 52-54.

[47] *See, e.g.*, United States v. Henry, 878 F.2d 937, 943-44 (6th Cir. 1989) (stating that if the firearms found on the premises "controlled or owned by a defendant and in his actual or constructive possession are to be used to protect the drugs or otherwise facilitate a drug transaction, then such firearms are used 'during and in relation to' a drug trafficking crime").

[48] An example of the "fortress theory" can be found in *Matra*, 841 F.2d 837. In *Matra*, officers executed a search warrant on the premises occupied by Wayne Matra. *Id.* at 838. Upon entering the premises, police found Matra at the top of a stairway, at which time they placed him under guard while they proceeded with the search. *Id.* In the kitchen and dining rooms, the police found a triple beam scale, numerous plastic bags, razor blades, and twenty-two rounds of 9-millimeter ammunition. *Id.* at 839. In one of the house's living rooms, the police discovered a .25 caliber pistol hidden under the cushions of a sofa and numerous boxes of ammunition. *Id.* In the other living room, police found a loaded .38 caliber pistol protruding from the zipper bag of an upright vacuum cleaner. *Id.*

On the upper floor of the home, officers discovered a .357 caliber semi-automatic pistol under the bedding of the south bedroom. *Id.* Another bedroom contained a loaded .223 caliber assault rifle and loaded submachine gun under the bed frame, a loaded 12-guage shotgun standing in an upright position in the corner, 565.2 grams of cocaine, $9,000 in cash, and a box of ammunition all located in a hole in the closet floor. *Id.* The estimated street value of the narcotics was between $140,000 and $200,000. *Id.* at 839 n.4. Following a bench trial in the United States District Court for the Western District of Missouri, the court convicted Matra of possession of cocaine with intent to distribute and of the use of a machine gun during and in relation to a drug trafficking offense under § 924(c). *Id.* at 839-40.

Matra appealed his § 924(c) conviction to the United States Circuit Court of Appeals for the Eighth Circuit, claiming insufficient evidence supported his conviction of "using" the firearm "during and in relation to" a drug trafficking offense. *Id.* at 840. In comparing

The District of Columbia Court of Appeals applied a modified drug fortress theory in *United States v. Long*.[49] In *Long*, a search revealed a pistol handle protruding from between the couch cushions in an apartment that was used for drug dealing.[50] Long visited that apartment approximately two or three times per week.[51] The court found:

> Even assuming that [Long] visited the apartment to carry out drug transactions, there is no evidence he exercised the degree of domination and control over the premises to support an inference of constructive possession over their contents .... Upholding the conviction of a defendant in the absence of any indicia of possession would stretch the meaning of "use" beyond the breaking point.[52]

The *Long* court articulated a test for determining the nexus between a defendant and weapon.[53] The defendant's actual or constructive possession of a firearm was to be indicated by one or more factors: (1) close proximity to the firearm, (2) possessory interest in the firearm (i.e.,

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Matra's house to a military installation, the Eighth Circuit concluded the house was a "fortress" because the weapons were "kept at the ready to protect a drug house, thereby safeguarding and facilitating illegal transactions." *Id.* at 842. Therefore, the court found that it would "defy both logic and common sense to conclude that Matra did not 'use' the machine gun within in the meaning of section 924(c)." *Id.* at 843.

49 905 F.2d 1572 (D.C. Cir. 1990).

50 *Id.* at 1575-76. The gun was found to be working, but unloaded. *Id.*

51 *Id.* Long was arrested along with his co-defendant Mayfield in Ms. Mayfield's apartment. *Id.* at 1575. During the search, the police found rock cocaine, a butane torch, a scale, large amounts of cash, powder cocaine, and a cutting agent for the cocaine. *Id.* The police found no other firearms except the one they found between the couch cushions, nor any ammunition. *Id.*

52 *Id.* at 1576-77 n.7. The government failed to show that Long had "used" the gun. *Id.* at 1576. He was arrested more than ten feet away from the gun's location and was emerging from behind a curtain that separated the one-bedroom apartment into two separate rooms. *Id.* There was no indication that Long was heading for the gun, or that he even knew it was in the apartment. *Id.* Long did not live at the premises where the gun was found. *Id.* The gun itself did not have any fingerprints on it, nor was it registered. *Id.* The mere fact that the gun was found in the same apartment as defendant Long is not enough to establish that Long either actively or constructively possessed or used the gun. *Id.*

53 *Id.* at 1578 (citing United States v. Anderson, 881 F.2d 1128 (D.C. Cir. 1989) (defendant lived in apartment and had keys to bedroom where weapon was found) and United States v. Evans, 888 F.2d 891 (D.C. Cir. 1989) (testimony that defendant brought guns with him from home state established past connection between defendant and weapon)).

ownership), or (3) dominion and control over the premises where the firearm was located.[54]

C. *The Supreme Court's Interpretation of "Use" Under § 924(c)*

The United States Supreme Court interpreted the word "use" in a 19th century case concerning a clothing import duty.[55] The Court held that when a citizen purchased clothing in a condition suitable for wearing and intended to wear such clothing, then "no one would hesitate to say that such wearing apparel was 'in actual use' by such person even though some of it might not have been actually put on."[56] One hundred and nine years later, the Court again encountered the word "use," but this time in the context of the "use" prong of § 924(c) in *Smith v. United States*.[57] The Court attempted to resolve a split in the circuits regarding whether the term "use" was to be interpreted broadly to bring guns used as barter in drug transactions within the statute.[58] In a six to three decision, the Court held that exchanging guns for drugs *did* constitute "use" under § 924(c).[59]

In the *Smith* case, Smith went from Tennessee to Florida to buy cocaine, which he planned to resell for a profit.[60] When meeting with an undercover officer, Smith offered to sell the officer a machine gun, but instead of asking for money, Smith asked for two ounces of cocaine.[61]

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54 *Id.*

55 Astor v. Merritt, 111 U.S. 202, 213 (1884). The petitioner, William Astor, sought an exemption from a duty for clothing which he had purchased overseas for his personal use, but had not yet worn. *Id.* at 203-04. Astor sought the exemption pursuant to a statute which exempted from duty all imported "wearing apparel in actual use." *Id.* at 203. After Astor paid the $1,880 duty to the collector for the State of New York, he brought suit in the Circuit Court of the United States for the Southern District of New York in order to recover the money. *Id.* at 202. The trial court held that the statute did not exempt Astor's purchases abroad because the clothing was not in actual use. *Id.* at 212.

56 *Id.* at 213.

57 508 U.S. 223, 225 (1993).

58 *See id.* at 227. *Compare* United States v. Harris, 959 F.2d 246, 262 (D.C. Cir. 1992) (per curium) (holding that the "use" requirement is broad enough to cover guns used as barter in drug deals because the introduction of guns into the crime scene, whether used for protection or as a medium of exchange, heightens the danger to society) *with* United States v. Phelps, 877 F.2d 28, 30 (9th Cir. 1989) (holding that trading a gun for drugs does not constitute use of a firearm under the statute since Congress directed the statute at people carrying a firearm as an offensive weapon for a specific criminal act).

59 *Smith*, 508 U.S. 223 (6-3 decision) (Scalia, J., dissenting).

60 *Id.* at 225.

61 *Id.* at 226. The firearm Smith offered to sell was a MAC-10, automatic assault weapon that can fire more than one thousand rounds per minute. *Id.* at 225.

The undercover officer told Smith he did not have the cocaine with him, but he would go get it.[62] Smith got impatient waiting and left the hotel with the machine gun.[63] Smith was then apprehended by the police and arrested.[64]

In *Smith*, the Court rejected the petitioner's contention that "use" only applied to using the firearm as a weapon and not for other uses, such as a type of currency.[65] Because "[t]he words 'as a weapon' appear nowhere in the statute," the Court did not interpret § 924(c) to be exclusive to only using a firearm as a weapon.[66] The Court looked outside of § 924(c) to aid in interpreting Congress' intent for the word "use."[67] Section 924(d) of the statute recognizes that firearms may be used as items of bartering.[68] The *Smith* Court reasoned that if a firearm could be "used" for bartering under § 924(d), then it could also be "used" for trade under § 924(c).[69] *Smith* clarified bartering guns for

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62 *Id.* at 226.

63 *Id.*

64 *Id.* When Smith was arrested he had a loaded nine millimeter handgun in his waistband. *Id.* A search of his van revealed not only the MAC-10 weapon, but also ammunition, a silencer, a MAC-11 machine gun, a loaded .45 caliber pistol, and a .22 caliber pistol, with a scope and silencer. *Id.*

65 *Id.* at 241 (affirming the Eleventh Circuit's judgment). To make its point, the majority turned a colorful analogy used by the dissent on its head. The dissent argued that when someone is asked, "Do you use a cane?" it is clear to the listener that the use of the cane is for walking. *Id.* at 242. (Scalia, J., dissenting). The majority cited the infamous caning of Senator Sumner in the United States Senate in 1856 as an example of how "using" a cane can go beyond merely using it to aid one in walking. *Id.* at 230.

66 *Id.* at 229.

67 *Id.* at 234 (looking to § 924(d), which deals with use of firearms, forfeiture of firearms, offenses in which guns might be used as offensive weapons, and instances where firearms is not used as a weapon but as an item of commerce). The majority also cited two sources in interpreting the ordinary meaning of "use." *Id.* at 231. The definitions include: "to convert to one's service" or "to employ," WEBSTER'S NEW INTERNATIONAL DICTIONARY OF ENGLISH LANGUAGE 2806 (2d ed. 1949); and "to make use of; to convert to one's service; to employ; to avail oneself of; to utilize; to carry out a purpose or action by means of," BLACKS LAW DICTIONARY 1541 (6th ed. 1990).

68 *See* 18 U.S.C. § 924(d)(1) (2000); *see also* Angela Collins, Note, *The Latest Amendment to 18 U.S.C. § 924(c): Congressional Reaction to the Supreme Court's Interpretation of the Statute*, 48 CATH. U. L. REV. 1319, 1332 n.68 (1999).

69 *Smith*, 508 U.S. at 234-36. For example, the Court stated that the statute's language "sweeps broadly, punishing any 'use' of a firearm, so long as the use is 'during and in relation to' a drug trafficking offense." *Id.* The Court stated that the phrase "in relation to" clarified that the presence or involvement of the firearm cannot be the result of accident or coincidence, but rather must have some purpose or effect with respect to the predicate offense. *Id.* at 238. The Court then broadly defined this requirement, stating that the firearm "at least must 'facilitate, or have the potential of facilitating' the drug trafficking offense." *Id.* (quoting United States v. Stewart, 779 F.2d 538, 539 (9th Cir. 1985)). Justice

drugs under § 924(c), but there was still confusion among the circuits over other "uses" of a firearm, including bartering drugs for guns.[70]

In *Bailey v. United States*,[71] the Supreme Court narrowed the interpretation of "use" under § 924(c).[72] The Court held that "use" meant "to actively employ" the firearm.[73] The issue in *Bailey* was whether a firearm could be used if it was in a locked trunk, in a zipped bag.[74] The *Bailey* Court reasoned that, since Congress specified separate charges over two distinctly different actions with a firearm, carry and use, the "use" prong could not "swallow up any significance for 'carry.'"[75] Based on the maxim of statutory construction that assumes

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Blackmun concurred in *Smith* in order to highlight the majority's interpretation of the "in relation to" language. *Id.* at 241. He interpreted the phrase to require more than mere furtherance or facilitation of the predicate crime. *Id.* (Blackmun, J., concurring). However, because Justice Blackmun agreed that a reasonable construction of the phrase includes trading a weapon for drugs, he felt it unnecessary to define the exact contours of the language under § 924(c)(1). *Id.* (Blackmun, J., concurring).

70 *Id.* at 225; *see* Bailey v United States, 516 U.S. 137, 142 (1995) (acknowledging the conflict between the circuits on the issue of "use" of a firearm).

71 516 U.S. 137 (1995).

72 *Id.* at 150.

73 *Id.* at 144. The Court also stated that if the gun is not disclosed or mentioned it is not "used" in the transaction because the other party was unaware it existed. *Id.* at 149. The Court also stated that "intent to use" is not "use" within the meaning of the statute. *Id.* at 150. The Court explained that the phrase "I use a gun to protect my home, but I've never had to use it - shows that in the first phrase "use" refers to an ongoing inactive function," and it determined that type of "use" would not fall within the statute. *Id.* at 148.

74 *Id.* at 145. Bailey was arrested after a traffic stop. *Id.* at 139. A large amount of drugs were found in his car. *Id.* In a search of the vehicle following Bailey's arrest, officers found a large amount of cash in the trunk and a bag containing a loaded nine-millimeter pistol. *Id.* Therefore, the prosecution charged Bailey for using and carrying a pistol in violation of § 924(c). *Id.* The Court rejected the multi-factor balancing test that had previously been used by the D.C. Circuit. *Id.* at 146; *see also supra* note 54 and accompanying text. In its place, the D.C. Circuit established an "accessibility and proximity" test that relies on two factors. *Bailey*, 516 U.S. at 145. First, the D.C. Circuit considered the proximity of the gun in relation to the drugs in the predicate offense. *Id.* Second, the D.C. Circuit considered the gun's accessibility to the defendant from the location of the drugs, drug paraphernalia, or drug proceeds. *Id.* The D.C. Circuit stated that mere possession of a firearm by someone who commits a drug offense does not constitute "use" for purposes of § 924(c). *Id.* at 149. However, even if the court had applied the "proximity and accessibility" test, the defendant had still used the firearm under § 924(c). *Id.* The D.C. Circuit held that Bailey had satisfied the test because "the gun was found in the same place as the cash." *Id.* at 146.

75 *Id.* at 148. Bailey argued for reversal on the strength of *United States v. Derr*, 990 F.2d 1330 (D.C. Cir. 1993), and *United States v. Bruce*, 939 F.2d 1053 (D.C. Cir. 1991). Both of these cases involved guns that were found in close proximity to drugs. *See Derr*, 990 F.2d 1330; *Bruce*, 939 F.2d 1053. In each case, the court held that while such evidence might sufficiently show an intention to use the gun in a future act of distribution, it was not sufficient to demonstrate "use" during and in relation to the predicate offense of possession

Congress chooses terms with independent definitions, the Court employed the active interpretation of "use" because to do otherwise would eliminate the "carry" prong's significance.[76] Also, the Court went to great lengths to state that *Smith* was not being overturned in any way.[77] The decision in *Bailey* has been applied retroactively, resulting in a number of overturned convictions.[78] Although there are no reliable

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with intent to distribute. *See Derr*, 990 F.2d 1330; *Bruce*, 939 F.2d 1053. The D.C. Court of Appeals distinguished the case at bar from *Derr* and *Bruce* on the grounds that those cases involved future drug distributions, whereas the present case involved Bailey's potential use of a gun in a transaction that had already occurred. United States v. Bailey, 995 F.2d 1113, 1118 (D.C. Cir. 1993). Although the carrying prong of the statute will not be addressed in this Note, the Senate has established that carrying a firearm can only be upheld if the defendant intended to use the firearm. *See generally* S. REP. NO. 98-225 (1998). "If 'carrying' only constitutes an intent to use, then 'use,' by implication, requires something more." Becker, *supra* note 34, at 1072.

[76] *Bailey*, 516 U.S. at 146. Many courts have recognized the significance of § 924(c)'s "carry" prong since the decision in *Bailey*. In instances where the evidence would be insufficient to show "use," many courts have upheld convictions based on the "carry" prong, or remanded the case for factual findings on this basis. *See* United States v. Range, 94 F.3d 614, 616 (11th Cir. 1996); United States v. Barnhardt, 93 F.3d 706, 710 (9th Cir. 1996) (upholding the conviction because in the course of the defendant's plea, he admitted to having carried the weapon); United States v. Melendez, 90 F.3d 18, 21 (2d Cir. 1996) (vacating conviction but remanding to determine applicability of "carry" prong); United States v. Ramirez-Ferrer, 82 F.3d 1149, 1154 (1st Cir. 1996) (upholding conviction pursuant to the carry prong where the firearm was carried on a boat); United States v. Hernandez, 80 F.3d 1253, 1258 (9th Cir. 1996); United States v. Manning, 79 F.3d 212, 216 (1st Cir. 1996) (upholding firearm conviction where there was ample evidence that defendant carried gun in a briefcase); United States v. Ferris, 77 F.3d 391, 395 (11th Cir. 1996); United States v. Riascos-Suarez, 73 F.3d 616, 623 (6th Cir. 1996); United States v. Morris, 929 F. Supp. 993, 1001 (S.D. Miss. 1996) (vacating defendant's conviction based on misleading jury instructions, but remanding for new trial pursuant to the "carry" prong of the statute); United States v. Canady, 920 F. Supp. 402, 405 (W.D.N.Y. 1996) (upholding defendant's conviction based on the "carry" prong).

[77] *Bailey*, 516 U.S. at 148. Although the Court emphasized it was not overturning *Smith*, the holding of *Bailey* narrows *Smith*'s scope to include only those instances in which the firearm was actively used. *Id.*

[78] Many convictions have been reversed based on insufficient evidence of use. *See, e.g.*, United States v. Guess, 203 F3d 1143 (9th Cir. 2000); United States v. Schmalzried, 152 F.3d 354 (5th Cir. 1998); United States v. Tolliver, 116 FG.3d 120 (5th Cir. 1997); United States v. Robinson, 96 F.3d 246, 251 (7th Cir. 1996); United States v. Rehkop, 96 F.3d 301, 306 (8th Cir. 1996); United States v. Welch, No. 95-3483, 1996 WL 557416, at *6 (6th Cir. Oct. 2, 1996); United States v. Simpson, 94 F.3d 275, 276 (10th Cir. 1996); United States v. Hawthorn, 94 F.3d 118, 122 (4th Cir. 1996); United States v. Catlett, No. 93-3189, 1996 WL 582435, at *1 (D.C. Cir. Oct. 11, 1996); United Sates v. Willett, 90 F.3d 404, 407 (9th Cir. 1996); United States v. Melendez, 90 F.3d 18, 21 (2d Cir. 1996); United States v. Garcia, 86 F.3d 394, 403 (5th Cir. 1996); United States v. Fennel, 77 F.3d 510, 510 (D.C. Cir. 1996); United States v. Jones, 74 F.3d 275, 276 (11th Cir. 1996); United States v. Valle, 72 F.3d 210, 217 (1st Cir. 1996). *But see also* United States v. Ulloa, 94 F.3d 949, 956 (5th Cir. 1996) (affirming defendant's conviction, holding that the *Bailey* decision did not change Fifth Circuit's law

figures on how many of those convictions have been reversed under *Bailey*, the decision touched off a wave of litigation in the lower federal courts.[79]

III. THE UNITED STATES CIRCUIT COURTS OF APPEAL'S INTERPRETATION OF THE "USE" PRONG UNDER § 924(C) - THE CIRCUIT SPLIT

In light of the decisions of *Bailey* and *Smith*, the federal circuit courts have still been inconsistent in interpreting "use" under § 924(c).[80] Active use of a firearm, such as brandishing, discharging, or trying to discharge clearly is "using" a firearm under the meaning of the statute.[81] Moreover, in *Bailey*, the Court affirmed that trading a gun for drugs did constitute "use."[82] However, in cases where the firearm has been used passively, specifically when the offender trades drugs in order to *receive* a gun, the circuits have differing interpretations of § 924(c).[83]

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as to whether bartering drugs for firearms constitutes "use" under the statute); United States v. Cannon, 88 F.3d 1495, 1509 (8th Cir. 1996) (upholding convictions where weapons were to be traded for drugs noting that the decision in *Bailey* does not reverse the decision in *Smith* which held barter to be a form of "use"); United States v. Rivas, 85 F.3d 193, 195 (5th Cir. 1996) (affirming defendant's conviction pursuant to plea of guilty); Ferrell v. United States, 963 F. Supp. 615 (E.D. Mich. 1997); United States v. Muriel, 919 F. Supp. 66, 69 (D.R.I. 1996) (holding defendant ineligible to withdraw guilty plea because of new clarification provided by *Bailey*). More than 10,000 persons were serving sentences under § 924(c) at the time of the *Bailey* decision. *See* Frank J. Murray, *Justices Overturn Convictions Based on New Gun Use Ruling*, WASH. TIMES, Dec. 12, 1995, at A4.

79 *Bailey* has been cited in more than 1700 cases in the lower federal courts, and *Bousley v. United States*, 523 U.S. 614, 616 (1998) (holding that *Bailey* could be applied retroactively) has been cited in approximately 600 cases. *See* Westlaw database search, KeyCite citing references to *Bailey*, from Dec. 6, 1995 to Sept. 15, 2002; Westlaw database search, KeyCite citing references to *Bousley*, from May 18, 1998 to Sept. 15, 2002.

80 For a summary of § 924(c) decisions, see *Bailey*, 516 U.S. at 142-44.

81 *See* Kesselman, *supra* note 37, at 527.

82 *See Bailey*, 516 U.S. at 148.

83 *See* United States v. Sumler, 294 F.3d 579 (3d Cir. 2002) (holding that a person who trades drugs for guns "uses" a firearm in relation to the meaning of the statute); United States v. Stewart, 246 F.3d 728 (D.C. Cir. 2001) (reversing conviction stating that defendant had not employed the gun when an exchange for a gun was made); United States v. Belcher, 201 F.3d 437 (4th Cir. 1999) (holding that because defendant actually actively bartered drugs for guns, that satisfies the "use" prong); United States v. Warwick, 167 F.3d 965 (6th Cir. 1999) (holding that passive receipt of a gun does not constitute "use" or the "active employment" standard); United States v. Woodruff, 131 F.3d 1238 (7th Cir. 1997) (holding that a drugs for guns trade did constitute "use" under § 924(c)); United States v. Westmoreland, 122 F.3d 431 (7th Cir. 1997) (holding that receiving a firearm in an exchange did not constitute "use"); United States v. Wilson, 115 F.3d 1185 (4th Cir. 1997) (holding that the defendant's negotiation of sale of firearm to informant who approached defendant for drugs did not support his conviction because the defendant neither bartered nor

A. The Majority Approach: The Third, Fifth, Eighth, and Ninth Circuits – Exchange of Drugs for Guns Is "Use" Despite Passive Nature of Act

The majority of the circuits that have addressed the issue of whether a trade of drugs for guns falls under the "use" provision of § 924(c) have ruled that it does, under the auspices of the Supreme Court's ruling in *Smith*. The Third Circuit, in *United States v. Sumler*,[84] recently concluded that bartering illegal drugs to procure a gun "constitutes use of a firearm in connection with drug trafficking and invokes the mandatory sentence provisions of 18 U.S.C. § 924."[85] The defendant sold crack-cocaine out of his house.[86] The defendant traded drugs in exchange for the gun from the co-defendant.[87] Because this was a case of first impression for the Third Circuit, the court looked at other circuits to determine how they ruled on the issue.[88] After evaluating the other circuits, the Third Circuit accepted the majority approach and held that "use" encompasses "barter" under the *Smith* holding; therefore, it makes no difference who initiates the bartering – it still constitutes "use" under § 924(c).[89]

In *United States v. Ulloa*,[90] the Fifth Circuit upheld the defendant's conviction based on § 924(c).[91] The defendant required payment in firearms for the drugs he sold.[92] The court stated that "by bartering

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exchanged the firearm for drugs, but was approached by informant to buy both the drugs and gun); United States v. Ramirez-Rangel, 103 F.3d 1501 (9th Cir. 1997) (holding that bartering which results in receiving a firearm constitutes "use"); United States v. Ulloa, 94 F.3d 949 (5th Cir. 1996) (upheld *Zuniga*, in light of *Bailey*); United States v. Cannon, 88 F.3d 1495 (8th Cir. 1996) (reasoning that an exchange of drugs for guns was no different than an exchange of guns for dugs); United States v. Harris, 39 F.3d 1262 (4th Cir. 1994) (holding that "use" includes trading drugs for guns); United States v. Zuniga, 18 F.3d 1254 (5th Cir. 1994) (holding that receiving guns for payment of drugs was "use" under § 924(c)).

84 294 F.3d 579 (3d Cir. 2002).

85 *Id.* at 580.

86 *Id.* at 581. One of the defendant's regular customers traded a gun for cocaine from a co-defendant. *Id.* The defendant then tried to purchase the gun from the co-defendant but was refused. *Id.*

87 *Id.* The government produced evidence that after Sumler obtained the gun, he used it to threaten a disgruntled drug customer and inhabitants of the house. *Id.* at 583.

88 *Id.* at 581-83.

89 *Id.* at 583. The court mentioned that although the *Westmoreland* court was concerned that a person receiving a payment is not using the payment, the fact that the Supreme Court stated in both *Smith* and *Bailey* that "use" means "barter" prevents the argument that the situation would not be "use" if reversed. *Id.*

90 94 F.3d 949 (5th Cir. 1996).

91 *Id.* at 950.

92 *Id.* at 950-51. In July, 1994, Ulloa asked Cubillos, an undercover officer who had previously declined Ulloa's offer to sell him drugs, if he knew anyone willing to exchange

drugs for firearms, defendant 'actively employed' the firearms, because they were an 'operative factor' in the drug trafficking offenses."[93]

In *United States v. Cannon*,[94] the defendant traded drugs and money for guns.[95] The Eighth Circuit rejected the argument that *Smith* did not control because it involved a trade of *drugs for guns*, not a trade of *guns for drugs*.[96] The court stated the situation was "a distinction without a difference .... [b]ecause selling cocaine base is as much a crime of drug trafficking as buying cocaine base, and '*use* certainly includes ... bartering,' [so] the *Smith* holding appl[ies]."[97]

The Ninth Circuit has also held that bartering drugs for guns constitutes "use."[98] In *United States v. Ramirez-Rangel*,[99] an undercover agent supplied a machine gun to trade Ramirez-Rangel for some drugs.[100] Although the court agreed that bartering constitutes "use," the

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firearms for drugs or money. *Id.* at 950. Cubillos notified the ATF and was instructed to wait for additional contact from Ulloa. *Id.* Prior to Ulloa approaching him again, Cubillos gave him photographs of several types of firearms in which Ulloa expressed interest. *Id.* at 950-51. Ulloa later told Cubillos that he wanted the machine guns in the photographs. *Id.* at 951. It was agreed that, in exchange for five MAC-10 machine guns, forty-eight to fifity M-16s, one Uzi, and eight Beretta nine millimeter pistols, Ulloa would provide $60,000 and two kilograms of cocaine. *Id.*

93 *Id.* at 956.

94 88 F.3d 1495 (8th Cir. 1996).

95 *Id.* at 1499-1501. Cannon told the undercover agent that she was interested in obtaining some firearms because she and the co-defendant had had drugs stolen from them in the past and they wished to protect themselves and their business. *Id.* at 1499. Cannon told the agent she was interested in five handguns and told the agent that she would supply him with cocaine if he would get her the guns. *Id.* At a later meeting, the agent brought ten firearms with him for Cannon to inspect. *Id.* They agreed, after some discussion, to exchange three handguns, a MAC-10 machine gun, and $4,600 for three ounces of cocaine base. *Id.* at 1500.

96 *Id.* at 1509 (emphasis added).

97 *Id.* (citing Bailey v. United States, 516 U.S. 137, 148 (emphasis added)) (1995).

98 *See* United States v. Ramirez-Rangel, 103 F.3d 1501, 1506 (9th Cir. 1997).

99 103 F.3d 1501.

100 *Id.* at 1503. A confidential informant contacted the ATF and told them that he knew of two people who wanted to trade methamphetamines for machine guns and money. *Id.* at 1503. The agent had the informant arrange a meeting between the agent and the two defendants. *Id.* The defendants maintained that they spoke only Spanish and the transaction between them and the agent was conducted with very few words and hand signals. *Id.* Neither defendant used the English or Spanish word for machine gun, gun, firearm, rifle, etc., during the transaction. *Id.* At the designated meeting place for the exchange, the agent removed a duffle bag, containing two AK-47 machine guns, from his car and put it in the bed of the defendants' truck. *Id.* Ramirez-Rangel's co-defendant refused to see the contents of the bag, or to show the contents to Ramirez-Rangel. *Id.* Ramirez-Rangel gave the agent one pound of methamphetamines. *Id.* at 1504. After the

court had questions regarding the application of § 924(c)(1) in circumstances similar to the defendant's.[101] In this case, the police officer supplied the weapons and delivered them in a covered bag.[102] The court stated:

> If knowledge or intent of the defendants is utterly immaterial, then the government is free to put machine guns in the bag even if they were not bargained for, and thereby add 25 more years to the penalty imposed on the defendants with no additional culpability on their part.[103]

As a result, the court remanded the case on the defense of sentence entrapment.[104] The result of the majority approach is a possible entrapment problem that leaves criminals wondering what the statute encompasses.[105] Entrapment is just one of the issues that the minority circuits have concerns with regarding the passive use of a firearm as it relates to § 924(c)(1).

B. *The Minority View: The Sixth and D.C. Circuits' Interpretation of § 924(c) – Use Must Be Active When Using a Firearm*

A minority of the circuits that have addressed this issue do not find that a mere exchange of drugs for guns rises to the level of "use" under § 924(c). The Sixth Circuit, in *United States v. Warwick*,[106] found that accepting a firearm is a passive, not an active, use of a firearm, so *Smith* is not controlling.[107] Warwick contacted an undercover police officer, and tried to hire him to seriously injure two other individuals.[108] The officer agreed, but only if Warwick supplied him with the gun.[109] At their next meeting, Warwick offered to sell some marijuana to the officer

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drugs were exchanged, the agent handed Ramirez-Rangel the money he had asked for. *Id.* The defendants were subsequently arrested. *Id.*

101 *Id.* at 1506.

102 *Id.*

103 *Id.*

104 *Id.* at 1506-09. "Sentencing entrapment occurs when a defendant, although predisposed to commit a minor or lesser offense, is entrapped into committing a greater offense subject to greater punishment." *Id.* at 1506 (internal citations omitted).

105 *See supra* Part II.

106 167 F.3d 965 (6th Cir. 1999).

107 *Id.*; *see also* United States v. Layne, 192 F.3d 556 (6th Cir. 1999) (following *Warwick*).

108 *Warwick*, 167 F.3d at 967. Officer Lipscomb posed as a hit man and agreed to injure the individuals the defendant wanted. *Id.*

109 *Id.*

and proposed that they could be partners.[110] Warwick sold the officer marijuana on eight separate occasions, and on four of these occasions, Warwick used or carried a loaded firearm.[111]

The day Warwick was arrested, he asked the officer to pay him $600 for the marijuana.[112] The officer displayed a sawed off shotgun instead and asked for a trade.[113] Warwick agreed and took the shotgun as partial payment.[114] The court concluded that by only accepting the shotgun at the insistence of the undercover agent, Warwick did not actively employ the weapon because his conduct was "inherently passive."[115] The court distinguished *Warwick* from *Ulloa* and *Cannon*, because in those cases the defendants actively devised the plan for the exchange of drugs for guns.[116]

In the appeals court for the District of Columbia, there have been two notable cases involving § 924(c)(1).[117] In *United States v. Stewart*,[118] the court held that an individual who trades drugs in receipt of a gun does not "use" the firearm under the applicable statute.[119] In *Stewart*, the defendant sold crack cocaine on numerous occasions to undercover police officers.[120] During one transaction, Stewart inquired about purchasing some assault weapons from the officer.[121] Weeks later, the

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110 *Id.* at 968. At their previous meeting, in an attempt to convince Warwick that the undercover officer was not a police officer, the agent displayed some marijuana and cocaine to show that the undercover agent was a drug dealer. *Id.* at 967-68.

111 *Id.* at 968.

112 *Id.* at 969.

113 *Id.*

114 *Id.* The agreement was altered by the officer who offered the defendant the sawed-off shotgun and $500 in exchange for the marijuana. *Id.*

115 *Id.* at 976.

116 *Id.* The court stated that Warwick did not "use" or "actively employ" under the ordinary or natural meanings of the terms. *Id.*; *see also* United States v. Layne, 192 F.3d 556 (6th Cir. 1999) (following *Warwick*).

117 *See In re* Smith, 285 F.3d 6 (D.C. Cir. 2002); United States v. Stewart, 246 F.3d 728 (D.C. Cir. 2001).

118 246 F.3d 728 (D.C. Cir. 2001).

119 *Id.* at 733.

120 *Id.* at 729.

121 *Id.* During one transaction Stewart asked the undercover officers what they were doing over the weekend. *Id.* The officers told Stewart that they were "running guns," and after this statement, Stewart asked if he could get an AK-47 from them. *Id.* The officer said he would have to talk to his cousin who handled the guns. *Id.* Weeks later, Stewart brought up the gun purchase again during a drug transaction. *Id.* Stewart asked this time for two nine millimeter handguns for $500. *Id.*

transaction was complete.[122] The officers had agreed to give Stewart a bag of guns in exchange for money and crack cocaine.[123]

In its decision, the court relied on both *Bailey* and *Smith*.[124] In doing so, the court stated that *Smith* was a limited holding for the particular bartering instance involved in *Smith*, and not all exchanging situations.[125] The court also noted that *Bailey* adhered to the active meaning of "use"; therefore, neither decision, *Bailey* nor *Smith*, concluded that receiving a gun constitutes "use" of a gun.[126] For that reason, an individual who receives a gun does not "use" a gun in the ordinary meaning of the term.[127]

In the most recent D.C. Circuit case involving § 924(c)(1), the court reaffirmed *Stewart*'s holding in *In re Smith*.[128] The court, relying on *Bailey* and *Stewart*, overturned Smith's conviction by holding that an exchange of drugs for guns did not constitute "use" as required.[129] The minority approach appears most in line with the Supreme Court's interpretation of "use" as dictated in *Bailey*.[130]

C. The Seventh Circuit's Panel Split on Interpretation of "Use" with Regards to Trading Drugs for Guns

In 1997, two separate cases in the Seventh Circuit resulted in two different interpretations of "use."[131] In *United States v. Westmoreland*,[132] an agent of the Bureau of Alcohol, Tobacco and Firearms ("ATF"), posed as a drug dealer in order to infiltrate the defendant's gang.[133] He approached Westmoreland, a leader in the street gang, and arranged an exchange of marijuana and two guns for the gang's crack cocaine

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122 *Id.* After finalizing the details of the transaction, the undercover officers gave one of Stewart's co-conspirators $7,000 in exchange for some cocaine. *Id.*

123 *Id.* The officers took Stewart to another location to give him the guns. *Id.* Stewart was immediately arrested after receiving the guns. *Id.*

124 Id. at 731.

125 *Id.* at 731-32. Bartering is the act of trading or exchanging goods in lieu of money. *See* WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 122 (1989).

126 *Stewart*, 246 F.3d at 732.

127 *Id.*

128 285 F.3d 6 (D.C. Cir. 2002).

129 *Id.* at 7.

130 *See supra* notes 73-82 and accompanying text.

131 *See* United States v. Woodruff, 131 F.3d 1238 (7th Cir. 1997); United States v. Westmoreland, 122 F.3d 431 (7th Cir. 1997).

132 122 F.3d 431.

133 *Id.* at 432.

supply.[134] The Seventh Circuit reversed Westmoreland's conviction because it found § 924(c) inapplicable in a *guns for drugs* exchange.[135] The court, using the language in *Bailey*, found that although bartering did constitute "active employment" under *Smith*, it limited liability to one side of the exchange.[136] The court distinguished *Westmoreland* from *Smith* and reasoned that accepting the firearm as consideration was a passive use, whereas Smith already had the firearm and exchanged it for the drugs, which was an active use.[137] The court remarked that there is "no grammatically correct way to express that a person receiving a payment is thereby 'using' the payment."[138]

In *United States v. Woodruff*,[139] the Seventh Circuit, in the same year *Westmoreland* was decided, held that trading drugs for guns *was* "use" under § 924(c)(1).[140] Woodruff pleaded guilty to conspiracy to distribute cocaine and to a violation of § 924(c) prior to the Supreme Court's decision in *Bailey*.[141] He then petitioned to withdraw his plea, in light of the *Bailey* decision.[142] The *Woodruff* court upheld his conviction because Woodruff's co-conspirator's acts of acquiring the weapon through an exchange of drugs had been in furtherance of the conspiracy and reasonably foreseeable to Woodruff.[143] As a result, a different panel from the Seventh Circuit interpreted "use" to include the very types of acts that the *Westmoreland* court said § 924(c) did not reach. The Seventh Circuit has not been the only circuit to be in direct contradiction with itself—the Fourth Circuit also has a panel split on § 924(c)(1)'s interpretation.

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134 *Id.*

135 *Id.* at 436.

136 *Id.* at 435-36.

137 *Id.*

138 *Id.* at 435.

139 131 F.3d 1238 (7th Cir. 1997).

140 *Id.* at 1238 (emphasis added). This holding is in direct conflict with *Westmoreland*. *See Westmoreland*, 122 F.3d at 435.

141 *Woodruff*, 131 F.3d at 1239.

142 *Id.*

143 *Id.* at 1243. Woodruff's co-conspirator, Henry Bams, had acquired a gun by trading drugs for it. *Id.* at 1240. The court held that the *Pinkerton* rule of liability applied; therefore, Woodruff was liable for Bams' actions. *Id.* at 1243. The *Pinkerton* rule of liability for co-conspirators states that each co-conspirator is responsible for any reasonably foreseeable crime committed by a co-conspirator made in furtherance of the conspiracy. Pinkerton v. United States, 32 U.S. 640 (1946).

D. The Fourth Circuit's Panel Split on "Use" During Drugs and Guns Exchanges

In *United States v. Wilson*,[144] the defendant negotiated the sale of a firearm to a confidential informant.[145] The informant had gone to Wilson's home, on several different occasions at the urging of the police, in order to purchase marijuana.[146] On the day in question, the informant went to Wilson's home to purchase marijuana and a firearm.[147] The informant bought only the firearm.[148] Consequently, Wilson was sentenced to a 120-month imprisonment for the firearm violation.[149]

The Fourth Circuit overturned that portion of his sentence using the same rationale the Supreme Court used in *Smith*.[150] The court reasoned that, because *Smith* clarified that the firearm must "facilitate or have the potential of facilitating, the drug trafficking offense[,]" Wilson's sale of the firearm to the informant did not facilitate the drug sales, nor did it have the potential to do so.[151] The drug transaction and the firearm transaction can be looked at as two separate events. Therefore, the firearm did not facilitate the drug sale, mainly because the informant was at Wilson's house initially to buy drugs and then changed his mind and purchased the rifle.[152]

In contrast, in *United States v. Johnson*,[153] the Fourth Circuit, citing *Smith*, held that a firearm can be "used" to barter, even if the purpose of the drug transaction had not been completed.[154] In *Johnson*, the

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144 115 F.3d 1185 (4th Cir. 1997).

145 *Id.* at 1187.

146 *Id.*

147 *Id.* Earlier that day, the informant had approached Wilson to buy marijuana and Wilson offered both the drugs and a gun to Laughlin. *Id.* The informant only purchased the marijuana. *Id.* But upon learning that Wilson also dealt in firearms, the police, along with the ATF, sent the informant back to Wilson's apartment for the gun. *Id.* Wilson told the informant that his accomplice, Abner, had the guns. *Id.* Laughlin purchased the gun from Abner. *Id.* On the day in question, the police and ATF sent the informant back to Wilson's house in order to purchase marijuana. *Id.* Wilson indicated to the informant that he could get him "as much marijuana as [the informant] wanted." *Id.* Wilson also indicated that he could sell the informant a semiautomatic rifle. *Id.* The informant purchased only the rifle, not the marijuana. *Id.*

148 *Id.*

149 *Id.* at 1188.

150 *Id.*

151 *Id.* (quoting Smith v. United States, 508 U.S. 223, 238 (1993)).

152 *See* United States v. Wilson, 115 F.3d 1185 (4th Cir. 1997).

153 Nos. 95-5481, 95-5482 1997 WL 56903 (4th Cir. Feb. 12, 1997).

154 *Id.* at *4.

defendant conspired with a government informant to exchange money and drugs for a machine gun.[155] The court concluded that an attempt at bartering for a firearm with drugs did constitute "use" under § 924(c).[156] The inconsistent application of § 924(c) has, therefore, resulted in conflicting prosecutions and sentencing.

IV. ANALYSIS OF "USE" INTERPRETATIONS AND APPLICATIONS

In *Bailey v. United States*, the Court concluded that Congress intended that § 924(c)(1) reach only those situations where a defendant actively employs a firearm in an underlying crime of violence or drug trafficking, in which the firearm was instrumental in the crime.[157] By saying that the *Bailey* decision is consistent with the previous *Smith* decision, which explored the scope of the statute as it relates to bartering guns for drugs, the Court attempted to nullify the implication from *Smith* that the statute is overly broad, without admitting the errors of its interpretation in *Smith*.[158] Additionally, the Court's suggestion that prosecutors look to the broader "carry" prong of the statute invites prosecutors and lower courts to re-expand the scope of the statute to reach the very conduct that the *Bailey* court properly excluded.[159] Judicious statutory construction, however, should not yield punishment under the statute in situations where a gun is merely stored in proximity to a drug transaction or is on the receiving end of the barter transaction.[160]

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155 *Id.* at *3.

156 *Id.* at *3-4 (applying *Smith* and *United States v. Harris*, 39 F.3d 1262 (4th Cir. 1994) to reach the conclusion that a drugs for guns trade was "use"). In *Harris*, the co-defendant Boone had given another person drugs and some cash in order to get this other person to obtain a gun for him. 39 F.3d at 1269. It was Boone's contention that the drugs were payment for the service of obtaining the gun, not for the gun itself. *Id.* The court rejected this argument, citing *Smith*, and held that an exchange of guns for drugs was "use" of a firearm under the meaning of the statute. *Id.* The court upheld Boone's conviction, in light of the decision in *Bailey*, in *United States v. Boone*. No. 95-5505, 1996 WL 465842, at *1 (4th Cir. Aug. 16, 1996); *see also* United States v. Garnett, 243 F.3d 824, 832 (4th Cir. 2001) ("Undoubtedly, giving the gun [to a conspirator] and receiving cocaine base in return constitutes a 'trade,' and such circumstances can conclusively constitute 'use' during and in furtherance of a drug trafficking offense.").

157 Bailey v. United States, 516 U.S. 137, 145 (1995).

158 *See* Smith v. United States, 508 U.S. 223, 236 (1993) (implying that a broad interpretation of § 924(c)(1) would allow the statute to be used to convict those who use a gun for barter).

159 *See Bailey*, 516 U.S. at 145.

160 *See id.* at 146 (proposing that "carrying" be interpreted as keeping a gun hidden in defendant's clothing during a drug transaction).

A. Bailey versus Smith – Reconciling the Two Conflicting Opinions

The Supreme Court's decision in *Bailey* effectively narrowed the scope of § 924(c)(1) to prevent the statute's "use" prong from reaching the type of conduct that was defined by the D.C. Circuit's proximity and accessibility standard.[161] However, because the Court's decision in *Smith* implied that the statute could reach such conduct, it is not surprising that some of the courts of appeals defined "use" broadly.[162]

The *Bailey* Court argued that the broad language in *Smith* merely expanded the definition of "use" to include those situations where a firearm was actively employed in a capacity other than as a weapon.[163] Lower courts incorrectly inferred that the statute reached *any* conduct involving a firearm that facilitates a drug trafficking crime.[164] The language of the *Smith* decision suggests that the Court, in that case, defined "use" broadly, bringing conduct like that outlined in the D.C. Circuit's proximity and accessibility standard within the purview of the statute.[165]

Although the *Smith* opinion limited its holding to the narrow case of firearms used for barter in drug transactions, the language in the decision guided the lower courts to broadly construe the statute by strongly implying that the "use" requirement should be interpreted in such a fashion.[166] For example, the majority declared that "the word 'use' is 'expansive' and extends to situations where the gun is not actively employed."[167] Furthermore, the Court declared that the statute's language "sweeps broadly, punishing any 'use' of a firearm, so long as the use is 'during and in relation to' a drug trafficking offense."[168] The Court then broadly defined the requirement, stating that the firearm

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161 *See id.*

162 *Smith*, 508 U.S. at 223. The *Smith* Court held that the definition of "use" under §924(c)(1) was broad enough to reach guns used as barter in drug transactions. *Id.*

163 *Bailey*, 516 U.S. at 148.

164 *See id.*

165 *Smith*, 508 U.S. at 223.

166 *Id.*

167 *Id.* at 229 (citing United States v. Long, 905 F.2d 1572 (D.C. Cir. 1990)).

168 *Id.* The Court stated that the phrase "in relation to" clarified that the presence or involvement of the firearm cannot be the result of accident or coincidence, but rather must have some purpose or effect with respect to the predicate offense. *Id.* at 238.

must at least facilitate "or have the potential of facilitating" the drug offense.[169]

The broad definition of the "use" prong was strengthened by Justice Blackmun's concurrence in *Smith*.[170] Justice Blackmun believed that § 924(c)(1) required that a firearm do more than merely facilitate a crime of violence or drug trafficking in order to constitute use "in relation to" an offense.[171] The fact that Justice Blackmun highlighted this belief in a separate concurring opinion implies that the majority intended mere facilitation to constitute "use of a firearm" within the meaning of § 924(c)(1).[172]

The *Smith* Court's broad definition of "use" was further evidenced by Justice Scalia's dissent.[173] Justice Scalia wrote that by failing to narrow the definition of "use" in a meaningful fashion, the majority interpreted the term to mean "use for any purpose."[174] He then asserted that the majority's broad interpretation of § 924(c)(1) failed to adequately distinguish penalizing under the "use" prong of the statute from penalizing under the "carry" prong.[175]

The *Bailey* Court, by establishing a narrow definition of "use," not only limited *Smith*'s holding to its facts, but actually negated, albeit correctly, the *Smith* Court's expansive definition of "use."[176] Thus, although the decision in *Bailey* is consistent with the fact-specific holding in *Smith*, the *Bailey* Court's contention that *Smith*'s interpretation of "use"

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169 *Id.* (citing United States v. Stewart, 779 F.2d 538, 540 (9th Cir. 1985)).

170 *Id.* at 241 (Blackmun, J., concurring).

171 *Id.*

172 *Id.* (Blackmun, J., concurring).

173 *Id.* at 241-47 (Scalia, J., dissenting). Justices Stevens and Souter also joined in the dissent. *Id.* See *infra* Part III.B. for an analysis of Justice Scalia's dissent.

174 *Smith*, 508 U.S. at 246 (Scalia, J., dissenting). Responding to the dissent's argument, the majority denied expanding the phrase "using a firearm" to "use for any purpose whatever," but instead asserted that the term was broad enough to include using a firearm for trade and as a weapon. *Id.* at 236. The majority's contention that use did not mean "use for any purpose" loses credibility when read in the context of the rest of the decision, wherein the Court purported to punish any use of a firearm that facilitated or had the potential of facilitating an underlying drug trafficking offense. *Id.* at 241-47 (Scalia, J., dissenting).

175 *Id.* (Scalia, J., dissenting). Justice Scalia felt that interpreting "use" to mean "use as a weapon" would have narrowed the term's definition in a meaningful way, thereby producing a reasonable dichotomy between the two prongs of the statute. *Id.* at 245-46 (Scalia, J., dissenting).

176 *See* Bailey v. United States, 516 U.S. 137 (1995).

"adhered to an active meaning of the term" is an attempt to nullify the *Smith* Court's broad interpretation without admitting the faults of that interpretation. Instead, the *Bailey* Court should have been straightforward and explicitly stated its intention to veer away from *Smith*'s broad interpretation of "use," rather than forcing lower courts to infer the *Bailey* Court's true intention.

The fact that the *Bailey* decision was unanimously decided illustrates that the Court altered its reasoning since *Smith*. Justice Blackmun joined in the opinion, which signifies that the statute now requires more than evidence of mere facilitation of the predicate crime in order for a defendant's conduct to constitute "use" under the statute. Furthermore, Justice Scalia's agreement with the new interpretation illustrates that the "active employment" standard meaningfully narrowed the definition of "use" so as to adequately distinguish "using" a firearm from "carrying" a firearm.[177] In fact, Justice O'Connor expressly stated in *Bailey* that "a more limited, active interpretation of 'use' preserves a meaningful role for 'carries' as an alternative basis for a charge."[178] By using the same argument put forth by Justice Scalia in his dissent in *Smith*, Justice O'Connor provided even further evidence that the Court changed its position regarding the proper breadth of the scope of § 924(c)(1).[179]

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177 *See infra* text accompanying notes 180-211 (noting that Scalia's dissent in *Smith* articulates the difference between active use and passive use and the plain meaning of use is the active use or to use it as a weapon, not an commodity).

178 *Bailey*, 516 U.S. at 146.

179 *Compare Smith*, 508 U.S. at 245-46, *with Bailey*, 516 U.S. at 144 (speaking of the need to narrow the definition of "use" in order to provide a clear distinction between the two prongs of the statute). In the course of defining the scope of § 924(c)(1), the Court considered only the "use" prong of § 924(c)(1). *Bailey*, 516 U.S. at 147. However, the Court did point out that the government could employ the "carry" prong of the statute as an additional means with which to charge criminals who mix guns and drugs. *Id.* at 150. In doing so, the Court expressly stated that the "[t]he 'carry' prong of 924(c)(1) . . . brings some offenders who would not satisfy the 'use' prong within the reach of the statute." *Id.* Although the Court properly declined to define the scope of the "carry" prong, as the issue was not before the Court, its suggestion that prosecutors employ the "carry" prong of the statute could invite prosecutors and lower courts to once again expand the scope of § 924(c)(1) by defining "carry" broadly. *Id.* at 147. Although the "carry" prong of the statute should prohibit a broader range of conduct than the "use" prong, courts must still narrow the definition of "carry" in a way that differentiates § 924(c)(1) from other statutes that prohibit "possessing" and "intending to use" a firearm. *Id.* at 145-47. By allowing the "carry" prong to reach conduct that falls short of active employment, § 924(c)(1) will adequately distinguish between "using a firearm" and "carrying a firearm." On the other hand, by preventing the statute from reaching situations where the defendant merely stores a firearm near drugs, courts will assure that the definition of "carry" has meaning beyond

The Court does not appear to grasp the distinction between how a word *can* be used and how it *ordinarily* is used. It would be both reasonable and normal to say that a defendant "used" his MAC-10 in his drug trafficking offense by trading it for cocaine. It would also be reasonable and normal to say that he "used" it to scratch his head. It is unquestionably unreasonable and atypical to say simply "do not use firearms" when one means to prohibit selling or scratching with them. Nonetheless, both are "active employment" of a firearm, but both certainly are not how one ordinarily uses a firearm. Clearly, the statute should reach only such "uses" that a firearm is ordinarily used for, and that does not include trading.

B. *Scalia's Dissent and the Plain Meaning Rule*

Even though the majority and dissent in *Smith* agreed that in construing the language of a statute words should be given their "ordinary meaning," the two sides reached different conclusions on the construction of "use."[180] The difference in the opinions lay in their definitions of "ordinary meaning."[181] Justice Scalia began his dissent in *Smith* by honing in on 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."[182] He reached the conclusion that "[t]o use an instrumentality ordinarily means to use it for its intended purpose."[183] He concluded:

"possession" or "intent to use." *Id.* at 147. Adhering to these definitional limitations leaves little room for the courts to define "carrying a firearm" in accordance with its own meaning. *Id.* It remains to be seen how lower courts will define the "carry" prong of § 924(c)(1) or whether the "carry" prong will entirely swallow up and negate the narrow interpretation of § 924(c)(1) established by *Bailey*. *Id.*

180 *See* Perrin v. United States, 444 U.S. 37, 42 (1979) (cited by both the majority and dissent in *Smith*, 508 U.S. at 223, 243).

181 *Smith*, 508 U.S. at 229, 243.

182 *Id.* at 241 (citing Deal v. United States, 508 U.S. 129 (1993)). Justice Scalia uses the textualist approach to statutory interpretation. The textualist focuses on the plain meaning of the statute in order to determine its meaning. *See* Rebecca L. Spiro, *Federal Sentencing Guidelines and the Rehnquist Court: Theories of Statutory Interpretation*, 37 AM. CRIM. L. REV. 103, 105 (2000). According to textualists, the plain meaning of the statute trumps the legislative intent. *Id.* This is in opposition to the traditionalist approach which uses both the plain meaning and the legislative history of the statute, with emphasis on the legislative intent. *Id.* at 106.

183 *Smith*, 508 U.S. at 242. *See generally* WILLIAM ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION (1994) (discussing the principles of the plain meaning rule).

> [T]he 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.[184] . . . [I]t seems to me inconsequential that "the words 'as a weapon' appear nowhere in the statute," they are reasonably implicit. . . . [W]hen in section 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.[185]

In making this argument, Justice Scalia appears to be in agreement with the majority's view that "[t]he meaning of a word that appears ambiguous if viewed in isolation may become clear when the word is analyzed in light of the terms that surround it."[186]

The first tier of inquiry in any statutory analysis is an assessment of the statute's plain meaning.[187] In conducting such an analysis upon § 924(c), it is important to note that the word "use" poses "interpretational difficulties," because its meaning is largely derived from the context in which it is employed.[188] Indeed, it is a basic tenet of statutory construction that the meaning of a word must be deciphered from the context in which it is employed.[189] In the context of a § 924(c) violation, the term "use" appears to necessitate activity and a time-bound event facilitated by the presence of the firearm.[190] The plain meaning of "use" and the structure of § 924(c) support this proposition.[191]

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184 *Smith*, 508 U.S. at 242 n.1.

185 *Id.* at 244, 245 (citations omitted).

186 *Id.* at 229.

187 *Bailey*, 516 U.S. at 144-45; *see also* JAMES HURST, DEALING WITH STATUTES 56-65 (1982).

188 *Bailey*, 516 U.S. at 145; *see also* Cunningham & Fillmore, *supra* note 44 at 1175-78 (recognizing the generality of "use" and conducting a linguistic analysis of the word).

189 *See* Deal v. United States, 508 U.S. 129, 132 (1993).

190 *See* Cunningham & Fillmore, *supra* note 44, at 1186-89.

191 *See infra* notes 198-203 and accompanying text.

In *Bailey*, the Court noted that the word "use" has been variously defined as "to convert to one's service," "to employ," "to avail oneself of," and "to carry out a purpose or action by means of."[192] The Court then stated, "These various definitions of 'use' imply action and implementation."[193] It is certainly true that these various definitions support an "active definition" of "use," but, as the Court indicates, it is not accurate to proclaim that these definitions exclusively support the "active definition."[194] For example, one could certainly state that one "employed" a firearm for protection of his home, or that one "availed himself of" a firearm for protection of his home.[195] Additionally, the Supreme Court has defined "use" as "to derive service from," and the aforementioned "passive users" could certainly be said to "derive service from" their respective firearms.[196] Therefore, viewing the definition of "use" in isolation does not conclusively answer the question of how the word should be interpreted within § 924(c).[197]

While words may have various dictionary definitions, "all but one of the meanings is ordinarily eliminated by context."[198] Thus, the remainder of the statute must be examined in order to properly interpret the word "use" within § 924(c).[199] In the context of § 924(c), the "use" must occur "during and in relation to" the predicate crime.[200] Since the statute mandates that the "use" occur "during" the predicate crime, it is apparent that Congress envisioned a drug trafficking offense as a specific, time-bound event, during which the perpetrator "derived service from," "availed himself/herself of," or "employed" the firearm in question.[201] In passive use cases, the government is not required to identify any specific, time-bound event facilitated by the presence of the firearm; thus, the "use" is considered to be continuous.[202] This

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192 *Bailey*, 516 U.S. at 145; *see also supra* note 73.

193 *Bailey*, 516 U.S. at 145.

194 *Id.* at 138, 140.

195 *See* Bailey v. United States, 36 F.3d 114, 115 (1994); John Polich, Note, *The Ambiguity of Plain Meaning:* Smith v. United States *and the New Textualism*, 68 S. CAL. L. REV. 259, 280 (1994) (stating that the definition "to employ" interprets "use" as applying to any imaginable purpose).

196 *See* Smith v. United States, 508 U.S. 223, 229 (1993); *see also* Cunningham & Fillmore, *supra* note 44, at 1184.

197 *See* Deal v. United States, 508 U.S. 129, 132 (1993).

198 *See id.* at 131-32.

199 *See id.* at 132.

200 18 U.S.C. § 924(c)(1) (2000).

201 *See* Moore, *supra* note 37, at 197.

202 *See id.*

interpretation appears to be irreconcilable with the plain meaning of the statute which requires the "use" to occur during a time-bound event, or more precisely, "during and in relation to" the predicate crime.[203]

As an illustration of this principle, if the government were to allege that, "at the time of Bailey and Robinson's arrests, they were 'using' the guns to protect their drugs, their drug proceeds, and themselves," such a statement would be inaccurate.[204] The government could claim that the guns were "used for" protection, because the overall purpose of the guns was to provide protection to the drug dealers.[205] However, at the time of the perpetrators' arrests, the guns in question were inaccessible and served no instrumental role "during and in relation to" the predicate possession charge.[206] Therefore, even if it is syntactically correct to state that the guns were "used for" protection, they were not "used during and in relation to" the predicate crime, and, consequentially, the passive use theory should not prevail.[207]

Additional language within § 924(c) further indicates that the provision was not designed to punish "passive uses."[208] Section 924(c) punishes any individual who "uses or carries" a firearm "during and in relation" to the predicate crime.[209] In passive use cases, a perpetrator charged under § 924(c) is held to be continuously "using" the firearm because the weapon is in place "for protection" of the defendant's drug trafficking activities and serves to "embolden" the perpetrator.[210] If such a perpetrator is continuously "using" the firearm, the "carry" prong of

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203 *See id.* Moreover, the interpretation given to the word "use" by the United States Courts of Appeals misconstrues the phrase "during *and* in relation to" by interpreting it as "during *or* in relation to." *Id.*

204 *See infra* text accompanying notes 205-07. For a further examination of this principle, see *United States v. Bailey*, 995 F.2d 1113, 1114 (D.C. Cir. 1993) (Wald, J., dissenting).

205 *See* Cunningham & Fillmore, *supra* note 44, at 1184.

206 *See supra* notes 73-74.

207 *See* Moore, *supra* note 37, at 197. Although barter connotes that the guns are a form of currency, use of currency as an example is deceptive because we no longer live in a bartering economy. Transactions are generally based upon paper currency, which has no inherent value. The value of currency is in what it represents—a promise to pay. In most countries, there is no internal weighing of whether or not the currency itself is acceptable trade; rather, the internal weighing is of how much currency is an acceptable trade. In a guns-for-drugs/drugs-for-guns transaction, however, the parties also must weigh whether they want the guns or the drugs, in addition to whether the value of the goods is sufficient consideration.

208 *See infra* text accompanying notes 209-11.

209 *See* 18 U.S.C. § 924(c)(1) (1994).

210 *See supra* note 44 and accompanying text.

§ 924(c) is thereby eviscerated because the firearm "use" is omnipresent, leaving no independent conduct for the "carry" prong to punish.[211]

C. *Interpretation of § 924(c) Within the Federal Statutory Scheme*

Despite the lack of legislative history, however, it is arguable that the plain meaning of § 924(c) supports the application of the "use" prong to passive use cases.[212] In the 1984 version of § 924(c), it was clear that the conduct Congress intended to reach was violent crimes.[213] Obviously, this would not include passive uses, or uses where a defendant did not intend to use the firearm. When Congress added "passive crimes" to the list of predicate offenses constituting § 924(c) violations, one could argue that a passive interpretation of "use" was implicitly adopted.[214] In order to appropriately interpret § 924(c), however the entire federal criminal code must be examined.[215]

The entire structure of the federal criminal code supports the conclusion that the "use" prong of § 924(c) should not be applied to passive use cases.[216] Congress has created criminal statutes which penalize the "use," the "intended use," and the "possession" of firearms.[217] "As the somewhat hackneyed judicial aphorism goes," when Congress wants to punish individuals who "intend to use" or "possess" a firearm, that intention has been specifically expressed.[218] The problem

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211 *See* Bailey v. United States, 516 U.S. 137, 144 (1995). It has also been argued that this language indicates that Congress intended an active definition of "use" because the phrase "uses or carries," in common parlance means, "uses or even carries." Cunningham & Fillmore, *supra* note 44, at 1187-89. This means that the word "carry" is usually connected with situations involving less danger than those where the firearm is "used." *Id.* Thus, Congress sets up a "hierarchy of danger" which mandates that "use" refers exclusively to "eventive uses." *Id.*

212 *See supra* text accompanying note 207.

213 *See* Cindy Crane, L. Smith v. United States: *Enhanced Penalties for Using Guns as Barter in Drug Deals*, 20 J. CONTEMP. L. 295, 299 (1994).

214 Cunninham & Fillmore, *supra* note 44, at 1197.

215 *Bailey*, 516 U.S. at 144.

216 *See supra* text accompanying notes 212-15.

217 *See* 18 U.S.C. § 924(d)(1) (1994) (providing for the forfeiture of weapons "intended to be used" by the perpetrator during drug trafficking crimes); 18 U.S.C. § 922(g) (1994) (providing for a punishment for any felon who is in possession of a firearm); U.S. Sentencing Guidelines Manual 2D1.1(b)(1) (1993) (providing a two-level sentence enhancement for a drug offender who "possessed" a firearm). For example, Roland Bailey was convicted of possession of a firearm by a felon in violation of 18 U.S.C. § 922(g) (1994). United States v. Bailey, 995 F.2d 1113, 1114 (D.C. Cir. 1993).

218 United States v. McFadden, 13 F.3d 463, 467 (1st Cir. 1994) (Breyer, C.J., dissenting) (stating that when Congress wants to punish "possession" they expressly enumerate this

with broadly construing the term "use" is that such an interpretation does not uphold the distinction among the different degrees of culpability, but instead criminalizes "possession with the floating intent to use a firearm."[219] Thus, a broad interpretation may be illustrated with the following equation: "possession of a firearm" plus "the intent to actively use the firearm in the future" equals "present firearm use in violation of § 924(c)."[220] Because these are separate, distinct forms of conduct, each are unavailable to boot-strap one another in order to transform a perpetrator's conduct into a "use" in violation of § 924(c).[221] Plus, according to the current statutory language, the government need only prove "use" of a firearm, "carrying" of a firearm, or "possession" of a firearm, not all three.[222] Therefore, the "use" prong must be construed narrowly, otherwise the purpose of having the "carry" and "possession" prongs of § 924(c) are moot. If "use" can also mean possess or carry, why would Congress explicitly state "use"?[223]

Additional aspects of the federal criminal code's structure also confirm that § 924(c)'s "use" prong should not apply to passive use cases.[224] As one commentator has observed, each time within Title 18 that the term "use" appears to apply to "passive uses," the provision is one which absolves an individual from legal liability.[225] The only provision imposing criminal liability which could possibly lend itself to

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intention); see also the latest amendment to 18 U.S.C. § 924(c), which included the word "possession" implying that "use" is more than merely "possession" if Congress found it necessary to explicitly include "possession" in the statute. 18 U.S.C. § 924(c) (2000); *Bailey*, 516 U.S. at 144 (stating that when Congress wants to punish perpetrators who "intend to use" firearms, they expressly enumerate this intention).

219 *Bailey*, 516 U.S. at 143 (quoting Bailey v. United States, 36 F.3d 114, 121 (1994)).

220 *McFadden*, 13 F.3d at 468 (Breyer, C.J., dissenting).

221 *Bailey*, 516 U.S. at 143-44. The Court dismissed the theory previously used by several circuit courts which found that "possession with a floating intent to use" could constitute a § 924(c) violation. *Id.* The Court stated that "the District of Columbia's proximity and accessibility standard provides almost no limitation on the kind of possession that would be criminalized; in practice nearly every possession of a firearm engaged in drug trafficking would satisfy the standard, 'thereby erasing the line that the statutes, and the courts have tried to draw.'" *Id.* (quoting *McFadden*, 13 F.3d at 469 (Breyer, C.J., dissenting)); *see* United States v. Jones, 990 F.2d 1047, 1051 (8th Cir. 1993) (McMillian, J., dissenting) (stating that "Congress did not make it a crime to possess a gun with the intent to use it in relation to a drug trafficking crime") (quoting United States v. Bruce, 939 F.2d 1053, 1055 (D.C. Cir. 1991)).

222 *See supra* note 21 and accompanying text.

223 *See infra* notes 232-50 for a discussion of the rule of lenity and the role of the legislature.

224 *See infra* text accompanying notes 225-31.

225 *See* Cunningham & Fillmore, *supra* note 44, at 1183.

passive use interpretation is § 924(c), but even that is a stretch.[226] In § 924(c)(1) the word "use" is neither preceded nor followed by any modifying words.[227] Contrast that to § 924(d), which states "firearm . . . intended to be used" which can encompass passive uses such as bartering, trading, and receiving.[228] Using the Federal Sentencing Guidelines as a support, Justice Scalia was correct in concluding that §§ 924(c) and (d) can have different meanings for the word "use."[229]

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226 *See id.*

227 See *supra* note 21 for the complete text of § 924(c).

228 18 U.S.C. § 924(d) provides that:

> Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(l), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated there under, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1954 [26 U.S.C. §§ 1 et seq.] relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code [26 U.S.C. § 5845(a)], shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: *Provided*, That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

18 U.S.C. § 924(d)(1) (2002).

229 The Federal Sentencing Guidelines provide:

> a seven-point sentencing enhancement when a firearm is 'discharged' in the commission of a robbery and a six-point upward adjustment if the firearm is 'otherwise used;' the enhancement drops to five points if the gun is 'brandished, displayed or possessed' during the robbery. Under the majority's [in *Smith*] broad definition of "uses . . . a firearm,' Scalia argued, a robber would receive a heftier sentence for using a gun to pry open a cash register ('otherwise using it') than for brandishing it. By contrast, under Scalia's interpretation, the six-point adjustment would apply only if the robber used the gun as a weapon

Moreover, any time the word "use" is applicable to a passive use situation, it is modified by the word "for" to inform the reader that the default definition of "use" is no longer applicable.[230] Therefore, the entire structure of the federal criminal code precludes the application of § 924(c) to fact patterns such as *Bailey* and *Smith*, including trading drugs to get guns because of the passive nature of receiving a gun.[231]

D. The Rule of Lenity

The rule of lenity is one of the most important and widely used canons of criminal statutory construction.[232] The basic formulation of the rule is that "when there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant."[233] The Court identified two policy rationales behind the rule. First, people should have notice of the legal

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in a fashion short of firing, but more serious than brandishing, displaying, or merely possessing it.

See Polich, *supra* note 195, at 283-84.

230 *See* Cunningham & Fillmore, *supra* note 44, at 1183.

231 *See supra* text accompanying notes 212-29.

232 The rule of lenity can be traced back to a proposition in English criminal law known as the "benefit of clergy." Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U. TOL. L. REV. 511, 515 (2002). This rule relieved clergymen from criminal liability. *Id.* In the fourteenth century, the Parliament adopted the benefit of clergy to apply to secular as well as religious clerks. *Id.* English judges extended this to include all citizens who could read. *Id.* For a defendant, the benefit of the clergy took away the death penalty. *Id.* at 516. The rule of lenity, therefore was basically used in sentencing statutes. *Id.* The United States Supreme Court first used the rule of lenity in *United States v. Sheldon*, 15 U.S. 119 (1817). *Id.* But it was in *United States v. Wiltberger*, 18 U.S. 76 (1820), that the Court went into detail discussing the rule of lenity. *Id.*; *see also* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921 (1992) for a discussion of the canons of statutory interpretation, including the rule of lenity. *See generally* Sarah Newland, Note, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.-C.L. L. REV. 197 (1994).

233 United States v. Bass, 404 U.S. 336, 348 (1971); *see* Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CAL. L. REV. 509, 512 (1994) (defining ambiguity as "[a]n expression X is ambiguous if there are two predicates P and Q which look exactly like X, but which apply to different, though possibly overlapping, sets of objects, with the meaning of each predicate amounting to a different way of identifying objects as within or outside its extension"); *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 25-29 (1997); Lawrence M Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 58 (1998) (stating that the rule of lenity is a traditional rule that requires penal statutes to be interpreted in favor of criminal defendants in order to provide notice to defendants and to preserve the separation of powers).

response to certain acts.[234] Second, the legislatures and not the courts should define criminal activity.[235]

The rule of lenity has been the subject of a number of Supreme Court decisions. In *United States v. Wiltberger*,[236] the Court explained how and why the rule confines the judicial role:

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.... It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.[237]

The Court has affirmed the rule of lenity without any significant changes since the 1950s.[238] The modern line of rule of lenity decisions

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234 *See Bass*, 404 U.S. at 348 (citing McBoyle v. United States, 283 U.S. 25, 27 (1931)).

235 *See id.* The Court reiterated this in *Whalen v. United States*, 445 U.S. 684, 689 (1980), in which it stated that "within our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with Congress." Commentators differ on the issue of how much discretion judges should have in adding substance to ambiguous criminal statutes. *See* Spector *supra* note 232, at 535. When Congress designates an activity as criminal it is up to Congress, not the courts to "partition the criminal from the noncriminal." *Id.*; *see, e.g.*, Robert Batey, *Techniques of Strict Construction: Supreme Court and the Gun Control Act of 1968*, 13 AM. J. CRIM. L. 123 (1986) (discussing the separation of powers); John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985) (discussing same).

236 18 U.S. (5 Wheat.) 76 (1820).

237 *Id.* at 95-96.

238 *See* Moskal v. United States, 498 U.S. 103 (1990); Taylor v. United States, 495 U.S. 575 (1990); McNally v. United States, 483 U.S. 350 (1987); Dowling v. United States, 473 U.S. 207 (1985); LiParota v. United States, 471 U.S. 419 (1985); Dunn v. United States, 442 U.S. 100 (1979); United States v. Naftalin, 441 U.S. 768 (1979); United States v. U.S. Gypsum Co., 438 U.S. 422 (1978); United States v. Culbert, 435 U.S. 371 (1978); Huddleston v. United States, 415 U.S. 814 (1974); United States v. Bass, 404 U.S. 336 (1971); Rewis v. United States, 401 U.S. 808 (1971); Ladner v. United States, 358 U.S. 169 (1958); Bell v. United States, 349 U.S. 81 (1955).

began with *United States v. Universal C.I.T. Credit Corp.*,[239] in which the Court held that Congress had to speak in "clear and definite" language before the judiciary could choose the harsher of two alternative readings of a statute.[240]

The Supreme Court has also applied the rule of lenity specifically to criminal sentencing.[241] In *United States v. Bifulco*,[242] the Court stated that "this principle of statutory construction applies not only to interpretation of the substantive ambit of criminal prohibitions, but also to the penalties they impose."[243] In *United States v. R.L.C.*,[244] the Court clarified the *Bifulco* holding by stating that "lenity does not always require the 'narrowest' construction, and our cases have recognized that a broader construction may be permissible on the basis of nontextual factors that make clear the legislative intent where it is within the fair meaning of the statutory language."[245]

In *Moskal v. United States*,[246] the Supreme Court set forth a test to use the rule of lenity. Under the *Moskal* test, the rule of lenity applies when there is reasonable doubt as to what the scope of a statute is, after looking to the legislative history, plain meaning, and policy behind the statute.[247] When the Supreme Court construed the term "use" in the *Smith* case, it had to consider once again whether the rule of lenity applied to § 924(c)(1). Justice O'Connor, writing for the Court, rejected the rule of lenity, stating it did not apply because there were no ambiguities regarding the word "use."[248] Using the *Moskal* test, it is clear that the rule of lenity would apply to § 924(c).

The Court's decision in *Smith* inappropriately ignored the concerns raised by the rule of lenity in the penal context. The possibility of a

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239 344 U.S. 218 (1952).

240 *Id.* at 221-22.

241 With regards to criminal sentencing, the court has declared that the rule of lenity resolves doubts in enforcing penal statutes in favor of the lighter sentence. *See, e.g.*, Prince v. United States, 352 U.S. 322 (1957); Bell v. United States, 349 U.S. 81 (1955). The Supreme Court failed to use the rule of lenity and may have stated that the rule of lenity was inapplicable to § 924(c)(1) in *Smith*. Smith v. United States, 508 U.S. 223 (1993).

242 447 U.S. 381 (1980).

243 *Id.* at 387 (citing United States v. Batchelder, 442 U.S. 114, 121 (1979) and Simpson v. United States, 435 U.S. 6, 14-15 (1978)).

244 503 U.S. 291 (1992).

245 *Id.* at 306 n.6.

246 498 U.S. 103 (1990).

247 *Id.* at 108.

248 *See* Smith v. United States, 508 U.S. 223, 240-41 (1993).

plausible alternative reading and the questionable relevance of § 924(d) suggest that the congressional purpose and the statutory language were not as precisely defined as Justice O'Connor claimed.[249] Using the rule of lenity to support a more restrained interpretation of "use" would ensure that the defendant had fair warning of what conduct is prohibited and would support the expressed legislative purpose of § 924(c). Had the Court heeded principles of lenity as a background to its statutory analysis, it would have viewed the ambiguity of the language differently because the language is unclear and prior case law had not clearly defined "use" to encompass barter.

The vague language of the statute also raises separation of powers concerns in that Congress did not expressly punish barter under § 924(c). The Court's judicially active decision to punish barter used a general congressional purpose to stretch the plausible statutory meaning. The Court, therefore, should have invoked the rule of lenity, as suggested by Justice Scalia, to produce a more appropriate, common-sense result through a restrained reading of "use." Had it done so, it would have found it necessary to exclude the type of transactions Smith was involved in (a trade of guns for drugs) and those types of transactions addressed in this Note (a trade of drugs for guns) because the statute must be viewed in the light most favorable to the defendant.[250]

V. PROPOSED CHANGE TO § 924(C)(1)

Because it has been determined that § 924(c) has been interpreted incorrectly, this Part first proposes the proper way to interpret the statute, absent any legislative action to correct the faults of the language.[251] Next, this Part proposes an amendment to § 924(c) in order

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[249] Section 924(d) references primarily firearm trafficking offenses defined in § 922. *See* 18 U.S.C. § 924(d)(2000). Section 924(d) "provides for the confiscation of firearms that are 'used in' or involved in referenced offenses" and does not employ the term "use as firearm." *Smith*, 508 U.S. at 245-46. Section 924(c) in contrast, deals with the use of firearms in crimes of violence and drug trafficking crimes and requires actual use not intended use in order to penalize a defendant. *Id.* Therefore § 924(d) employs the term "use" differently, in a manner that should not control its meaning in § 924(c). *See* United States v. Bruce, 939 F.2d 1053, 1055 (D.C. Cir. 1991). Based on the ordinary meaning of "use" and the irrelevance of the § 924(d) definition, Justice Scalia found that whether "use" covers trade or barter is at least "eminently debatable," requiring finding for the petitioner under the rule of lenity. *Smith*, 508 U.S. at 245-46. Justice Scalia also noted that "use" is not a term of art that must be consistently employed. *Id.* at 245.

[250] *See* Jeffries, *supra* note 235, at 205-07 (discussing notice requirements for penal laws and stating that any vagueness should be resolved in favor of the defendant).

[251] *See infra* Part V.A.

to resolve the split in the circuits and provide defendants with proper notice of what is "use."[252]

A. The Plain Meaning Approach Should Be Used, Absent Legislative Change

In choosing an appropriate standard for construing § 924(c)(1), absent a change in the statute, the Court only needs to follow the most fundamental rule of statutory construction. When the "resolution of a question of federal law turns on a statute and the intention of Congress, the federal courts must look first to the statutory language, and then to the legislative history if the statutory language is unclear" or supports an interpretation which defies common sense.[253]

In § 924(c)(1) cases, binding federal courts to the plain meaning of "use" does not conflict with the dictates of common understanding. "Use" is "that enjoyment of property which consists in its employment, occupation, exercise or practice."[254] Rather than focusing on a presumed relationship between all weapons and drug trafficking activities, it is more consistent with the word's plain meaning to focus on whether there is a "concrete showing" that a § 924(c)(1) defendant intentionally positioned himself with a weapon, and drugs or drug implements, in such a manner as to enable himself to exercise dominion and control over *both* at the same time.[255]

Inferences drawn from the limited legislative history of the statute support a plain meaning approach.[256] "It is important to note that Congress did not make it a crime to possess a gun with the intent to use it in relation to a drug trafficking crime."[257] In the absence of amendments or a clear legislative history to the contrary, the use prong should only make it a crime to affirmatively use a gun in relation to a drug trafficking offense.[258]

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252 *See infra* Part V.B.

253 *See* Moore, *supra* note 37, at 198-99.

254 BLACK'S LAW DICTIONARY 801 (Abridged 5th ed. 1983); *see also* WEBSTER'S NEW COLLEGIATE DICTIONARY 1279 (1980).

255 *See* United States v. Bruce, 939 F.2d 1053, 1055 (D.C. Cir. 1991).

256 See *supra* Part II.A. for a discussion of the legislative history of § 924(c).

257 *Bruce*, 939 F.2d at 1055. Congress added the possession prong to the statute in 1998, presumable because of the impact *Bailey* had on convictions. *See* Angela LaBuda Collins, Note, *The Latest Amendment to 18 U.S.C. § 924(c): Congressional Reaction to the Supreme Court's Interpretation of the Statute*, 48 CATH. U. L. REV. 1319, 1323 (1999).

258 United States v. Hager, 969 F.2d 883, 889 (10th Cir. 1992).

Even using *Bailey*'s rationale, the broad interpretation of "use" is inconsistent with the reasoning in *Bailey*. The Court limited "use" to those instances in which the defendant shows the gun or threatens to use the gun.[259] Bartering guns for drugs is active employment of the gun because the defendant is in the position to use or threaten to use the gun, but the converse situation clearly does not fall within *Bailey*'s parameters. The defendant has no power over the gun, cannot threaten use of the gun, nor can the defendant actually *use* the gun. It obviously does not fall within the framework of the *Bailey* decision nor § 924(c)(1).

B. Proposed Amendment to § 924(c)(1)

The new version of § 924(c) should read as follows in order to eliminate the confusion in the circuits and to conform to the canons of statutory interpretation and policy fairness for a criminal defendant:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, *carries a firearm, or who, in furtherance of any such crime, uses a firearm as a weapon, or possess a firearm,* shall, in addition to the punishment provided for such crime of violence or drug trafficking crime . . . .[260]

By moving the term "use" after "in furtherance of" and adding "as a weapon," the statute provides the courts a clear-cut statute that leaves very little room for misinterpretation. This change would also eliminate the problem that is at the core of this Note—entrapment by a government official. This amendment clarifies what "use" is by adding the declaratory statement "as a weapon," which allows the government to find "use" of a firearm only when it is used as a weapon in furtherance of a crime, which is the same standard for possession. Therefore, "possession" and "use" can be both used interchangeably by the courts as long as it is in furtherance of the predicate crime. The

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259 Bailey v. United States, 516 U.S. 137, 149 (1995).

260 18 U.S.C. § 924(c)(1)(A) (2000) (author's contribution in italics).

"carry" prong, on the other hand, still stands on its own, and a defendant can be prosecuted under the "carry" prong so long as the carrying is done during and in relation to the predicate offense.

By categorizing possession and use with the "in furtherance of" standard, Congress must then adjust the penalty in order not to lessen the penalty for "using" a firearm. The penalties should be changed as follows:

> . . . in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished *or used in another way as a weapon besides discharging,* be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.
>
> (B) If the firearm possessed, *but not used as provided in subsection (A),* by a person convicted of a violation of this subsection
>
> is a short barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or
>
> is a machine gun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.[261]

VI. CONCLUSION

A broad interpretation of "use" in 18 U.S.C. § 924(c) would be unreasonable in light of the goals of the statute. The plain language of the statute and the legislative history provide no definitive answers as to

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[261] § 924(c)(1).

how the "use" element should be interpreted. Even the two Supreme Court cases interpreting "use" have demonstrated difficulty in interpreting the language of the statute. *Bailey* advances a requirement of active employment, rather than inert use—a requirement that is met when the gun is an operative factor, but that is lacking when the gun is used as consideration in a drug transaction.

After *Bailey*, it must be concluded that passively receiving a gun from an undercover agent in payment for drugs cannot constitute "use" under § 924(c). "Use" requires some active employment of the firearm by the defendant. No matter how one phrases the events in that type of transaction, the defendant is on the passive side of the bargain. He received the gun. He was paid with the gun. He accepted the gun. But in no sense did he actively "use" the gun. The only person actively employing the firearm in this type of transaction is the government agent. Of course, as O'Connor pointed out in *Smith*, a gun can immediately be converted from "currency to canon,"[262] but that situation is separate from the transaction itself. This application should also be extended to any case in which a defendant receives a gun as payment for drugs because the same principles apply. In no way does taking the transaction outside of the "use" prong negate the liability of the defendant; it is possible to convict a defendant under both the "carry" and the "possession" prongs. But, given the ambiguity of the term "use," the lack of legislative history of § 924(c), and the nature of the drugs for guns transaction, the courts should not interpret "use" broadly. The proposed amendment remedies the judicial interpretation inconsistencies along with providing fairness and notice to criminal defendants.

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262 *Smith*, 508 U.S. at 240.

* I would like to thank my parents for their endless support and guidance throughout the years.