America's War on Drugs and Guns: The Detriments of the Possession Standard in the Context of Mandatory Minimum Sentencing

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America's "War on Drugs" has resulted in federal legislation and sentencing guidelines that provide harsh penalties for crimes involving both drugs and guns. In particular, Title 18, Section 924(c)(1)(A) of the United States Code,[2] which applies specifically to guns in the context of drug-related offenses, establishes mandatory punishments, ranging from five years to ten years imprisonment, depending upon the defendant's use or possession of the firearm.[3] Congress amended Section 924 to include the term "possession" several years after the United States Supreme Court's decision in *Bailey v. United States*.[4] The United States Supreme Court interpreted the "use" requirement of Section 924 to mean "active employment" of a firearm during and in relation to a drug trafficking crime, and not mere possession.[5] Criticism arose immediately after the decision as various Congressmen derided the Supreme Court's "blunder" for giving undeserved benefits to "gun-toting thugs"[6] and compromising the "Justice Department's war against drugs."[7] In 1998, Congress amended Section 924(c)(1) to include "possession" of a firearm[8] and represents a watered-down version of the *Bailey* court's determination of what circumstances implicate the mandatory minimum sentences of the statute. The active employment standard of *Bailey* should be the prevailing standard for Section 924 cases because it imparts fairness to an already harsh system of sentencing.

In 1995, the Supreme Court decided *Bailey* and therein confronted the issue of whether the proximity and accessibility of a weapon is sufficient to satisfy the "use" provision of § 924(c)(1).[9] In reaching its decision, the Court reasoned that "use" means more than "mere possession of a firearm by a person who commits a drug offense."[10] Furthermore, the Court believed that if Congress "intended possession alone to trigger liability under [Section] 924(c)(1), it easily could have so provided," since it used the term "possess" in other gun-crime statutes to describe prohibited gun-related conduct.[11] The Court in *Bailey* believed that Congress chose the words "use" and "carry" as two distinct terms and not as a statutory redundancy.[12] After all, a broad meaning of "use" would simply swallow up any function of "carry," whereas a "more limited, active

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[2] 18 U.S.C. § 924(c)(1)(A) (2002).
[3] *Id.*
[4] 516 U.S. 137 (1995).
[5] *Id.* at 142-43.
[6] 143 CONG. REC. 764 (1997) (statement of Sen. Helms).
[7] Kristin Whiting, *The Aftermath of* Bailey v. United States*: Should Possession Replace Carry and Use Under 18 U.S.C. §924(c)(1)?*, 5 J.L. & POL'Y 679, 680 (1997).
[8] Criminal Use of Guns Act, Pub. L. No. 105-386, § 1, 112 Stat. 3469 (1998) (amending 18 U.S.C. § 924).
[9] 516 U.S. at 138-39.
[10] *Id.* at 143.
[11] *Id.*
[12] *Id.* at 145-46.

interpretation of 'use' preserves a meaningful role for 'carries' as an alternative basis for a charge."[13]

The Impact of *Bailey v. United States*

In five detailed pages of the *Bailey* opinion, the Court explained the meaning of "use" of a firearm and the nature of the government's burden of proof in a Section 924(c)(1) case.[14] This suggests not only the importance of the definition of "use" in this context, but also the importance of the prosecution performing its duty to prove the nature of the crime alleged. Although the Court does not comment upon the harsh nature of the mandatory minimum sentences that defendants receive under this statute, its focus upon the government's duties conveys a concern for procedural fairness, a concern that is especially heightened in the context of mandatory sentencing. The Court admitted that its "use" interpretation "restricts the scope of [Section] 924(c)(1)" and "cannot support the extended applications that prosecutors have sometimes placed on it, in order to penalize drug-trafficking offenders for firearms possession."[15] Nevertheless, the government "often has other means available to charge offenders who mix guns and drugs,"[16] including prosecution under the "carry" prong of Section 924(c)(1) or the enhancement of sentences under Federal Sentencing Guideline § 2D1.1.[17]

Under the previous and current versions of Section 924(c)(1), the carrying of a firearm "during and in relation to" a drug trafficking crime triggers the mandatory five-year prison sentence.[18] In *Muscarello v. United States*,[19] the Supreme Court held that "carry" extends to knowing possession and conveyance of a firearm, even when that firearm is not "on the person" of the defendant.[20] Thus, carrying a gun in the glove compartment or trunk of a car qualifies as "carrying" a firearm, provided that the defendant knows of its presence.[21] According to the Court, carry "implies personal agency and some degree of possession" and is narrower than the term "transport."[22] This meaning imposes a mandatory sentence upon someone who "brings a weapon with him (on his person or in his car) to the site of a drug sale."[23] Congress intended "use" and "carry" to "prevent prosecution where guns played no part in the crime," and added the phrase "in relation to" to "allay explicitly the concern that a person could be prosecuted for committing an entirely unrelated crime while in possession of a firearm."[24]

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[13] *Id.* at 146.
[14] *Id.* at 145-50.
[15] *Id.* at 150.
[16] *Id.*
[17] *Id.*
[18] 18 U.S.C. § 924(c)(1)(A) (2002).
[19] 524 U.S. 125 (1998).
[20] *Id.* at 126.
[21] *Id.* at 127.
[22] *Id.* at 134-35.
[23] *Id.* at 136.
[24] *Id.* at 137 (internal quotations and citations omitted).

When the Court decided *Bailey*, Section 924(c)(1) and Federal Sentencing Guideline Section 2D1.1(b)(1) stood as "independent provisions employing different standards."[25] Section 2D1.1(b)(1) provides for a two-level increase (in the offense level of the guideline range) when "a dangerous weapon . . . [or] firearm . . . was possessed" in connection with a drug crime.[26] In practical application, this meant that when a defendant who could not be (or was not) prosecuted under the active employment "use" standard of Section 924(c)(1), could still receive sentencing for having a weapon "unless it is clearly improbable that the weapon was connected with the offense."[27] *Bailey* insisted that "use" convictions required the prosecution to meet a higher burden—"inert presence," or storage of a firearm, without more, would not trigger Section 924(c)(1).[28]

The Bailey Backlash

The criticism stirred by the *Bailey* decision ultimately resulted in congressional redaction and amendment of Section 924(c)(1) in 1998.[29] Many critics in Congress and elsewhere found the Court's assessment of congressional intent "flawed" and considered it an "invitation" to amend the section.[30] Yet, instead of eliminating the "uses or carries" language altogether, Congress inserted "uses or carries a firearm, or who, in furtherance of any . . . [drug trafficking] crime possesses a firearm."[31] Thus, Section 924(c)(1), once distinct from Section 2D1.1(b)(1), now shares its language.[32]

Whether this change signifies that a similar standard to that of Section 2D1.1(b)(1) should now be applied to Section 924(c)(1)(A) "possession" analyses is unclear. "In furtherance" may well be satisfied where a defendant merely stores his weapon in his closet because it makes him feel secure and emboldens him to carry out his crimes.[33] The Court cautioned against this inference of relatedness on the basis of mere proximity when it noted that the presence of a gun at or near the site of a drug crime or its proceeds "would always, presumably, embolden or comfort the offender," because it is "available."[34] This standard, however, was not the proper one, the Court argued, because availability of the weapon is not enough to establish the active employment requirement of "use" and trigger the five-year sentence.[35] If Congress now intends for mere possession or availability to be the standard, it has virtually emasculated *Bailey* and has opened the door to increasingly attenuated connections between guns and drugs.

[25] United States v. Baker, No. 95-2122, 1996 WL 382264, at *3 (6th Cir. July 5, 1996).
[26] U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(b)(1) (2001).
[27] *Id.*
[28] 516 U.S. at 149.
[29] S. 191, 105th Cong. (1998).
[30] Whiting, *supra* note 7, at 689.
[31] S. 191, 105th Cong. (1998).
[32] U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(b)(1) (2001).
[33] 516 U.S. at 149.
[34] *Id.*
[35] *Id.*

The Ramifications of a "Possession" Standard

Since the Supreme Court has not reviewed the "possession" addition to Section 924(c)(1), the prevailing standard of connectedness between guns and drugs is unclear. Whether or not the Court could apply a narrow or broad meaning to "possession," the question inevitably arises as to what else Congress could have intended by adding "possession" to the dichotomy of "use" and "carry"—other than to overshadow them both and set a lower threshold to trigger minimum sentences. This type of prosecutorial burden would be met even if the weapon's presence "furthered" the crime in some nebulous way. The Court may find Congress' fashioning of the statute to include "possession" in "furtherance" of a crime persuasive, particularly since it arguably advances the congressional intent of Section 924(c)(1) upon which *Bailey* was decided. Assuming that the Court considers the "possession" standard valid and constitutional, it might reasonably lend its interpretation of guideline Section 2D1.1(b) to guns and drugs cases under Section 924(c)(1).

Several federal cases, decided prior to the 1998 amendment of Section 924(c)(1), illustrate the broad and harsh reach of a possession standard similar to guideline Section 2D1.1. In *United States v. Bermudez*,[36] police, during a search of the defendant's home, found a gun in the closet with drugs.[37] This finding constituted insufficient evidence of "use" under *Bailey*, but it was potentially sufficient for enhancement under a "possession" standard like Section 2D1.1.[38] Similarly, in *United States v. Jackson*,[39] a hand gun found in the living room between an arm rest and seat cushion, and crack cocaine found in a spare bedroom, would afford enough of a nexus to establish possession.[40] Even the presence of a gun in a residence where conversations regarding a drug conspiracy occurred is sufficient for "possession" under a Section 2D1.1 analysis, as demonstrated in *United States v. Hansley*.[41] Despite the defendant's disputation that the firearm was not at all related to the offense, the court found that the defendant did not establish that it was "clearly improbable" that the weapon was connected to his drug offense.[42]

Provided that an analysis similar to Section 2D1.1(b)(1) is applied by the Court to Section 924(c)(1), an improbability standard similar to that of guideline Section 2D1.1(b)(1) would provide more of a safeguard to defendants than would a blanket presumption of availability. An improbability consideration is consistent with the policy and purpose of both provisions to dissuade criminals from using guns and drugs together. According to the United States Sentencing Commission, who promulgates the federal sentencing guidelines, Section 2D1.1(b)(1) reflects its concern with "the increased danger

[36] 82 F.3d 548 (2d Cir. 1996).
[37] *Id.* at 550.
[38] *See id.*
[39] 103 F.3d 561 (7th Cir. 1996).
[40] *Id.* at 565-66.
[41] 54 F.3d 709 (11th Cir. 1995).
[42] *Id.* at 715-16.

of violence when drug traffickers possess weapons."[43] Not surprisingly, the same policy rationale was advanced by those in favor of broadening the triggering mechanism of Section 924(c)(1) and increasing its punishments.[44] Even though the defendant would likely shoulder the burden of proving the improbability of the connection between his weapon and the drug-trafficking offense, this would give him, at a minimum, a chance to prove the tenuousness of that connection.[45]

Yet, despite the apparent similarities of Section 2D1.1(b)(1) and Section 924(c)(1), the Court may choose to employ a different "possession" analysis that recognizes the inherent differences between a sentencing guideline and a mandatory sentencing statute. Whereas the former merely enhances the sentence of an underlying offense, the latter prescribes a sentence that runs consecutively to the underlying offense, is unaffected by the federal guidelines[46] and is beyond the scope of a judge's or a jury's discretion. Section 2D1.1(b)(1) frequently applies when Section 924(c)(1) does not, or when the defendant is re-sentenced after an acquittal under the statute.[47] This does not approach double jeopardy, since the government's burden for sentencing purposes is much lighter than it is for possession and conviction.[48] It, thus, would be anomalous for the Supreme Court to give "possession" in Section 924(c)(1) an interpretation with fewer safeguards to the defendant than it gives for sentencing enhancements. After all, the accused is afforded the "full panoply of constitutional safeguards ordinarily granted criminal defendants" during conviction under Section 924(c)(1), but those safeguards do not apply to sentencing.[49]

Four Supreme Court justices in a recent dissenting opinion involving the interpretation of Section 924(c)(1) emphasized the importance of constitutional safeguards for criminal defendants.[50] Their dissent focused upon whether or not "brandishing" a weapon constituted a separate offense under Section 924(c)(1) or merely a "sentencing factor," and their arguments overflow with concern for a criminal defendant's procedural and substantive rights within the American justice system.[51] The dissent argues that although the "legislature is free to decree, within constitutional limits, which facts are elements that constitute a crime," there is a necessary societal link

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[43] U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(b)(1) (2001).
[44] 143 CONG. REC. 764 (1997) (statement of Sen. Helms).
[45] *See* United States v. Hall, 46 F.3d 62, 63 (11th Cir. 1995); United States v. Cochran, 14 F.3d 1128, 1132 (6th Cir. 1994); United States v. Cantero, 995 F.2d 1407, 1412 (7th Cir. 1993); United States v. Corcimiglia, 967 F.2d 724, 728 (1st 1992); United States v. Roberts, 980 F.2d 645, 647 (10th Cir. 1992); United States v. Restrepo, 884 F.2d 1294, 1296 (9th Cir. 1989).
[46] *See* U.S. SENTENCING GUIDELINES MANUAL § 2K2.4(b)-(c) (2004), which provides the guideline sentences for 18 U.S.C. § 924(c) offenses. *See also* United States v. Howard, 998 F.2d 42, 48 (2d Cir. 1993) (explaining that when a sentence is imposed for violating § 924(c)(1) in conjunction with the sentence imposed for the underlying offense, specific offense characteristics for the possession, use, or discharge of a firearm are not to be applied with respect to the guideline for the underlying offense).
[47] *See* United States v. Duncan, 918 F.2d 647, 652 (6th Cir. 1990).
[48] *See id.*
[49] United States v. Conley, 92 F.3d 157, 166-67 (3d Cir. 1996) (quoting United States v. Martinez, 924 F.2d 209 (11th Cir. 1991)).
[50] Harris v. United States, 536 U.S. 545, 572-83 (2002) (Thomas, J., dissenting).
[51] *Id.*

between crime and punishment that warrants making the consequences (punishments) of an action clear to the accused.[52] Furthermore, "as a matter of common sense," writes the dissent, "an increased mandatory minimum sentence heightens the loss of liberty and represents the increased stigma society attaches to the offense. Consequently, facts that trigger an increased mandatory minimum sentence warrant constitutional safeguards."[53]

Thus, it seems only appropriate and consonant with the interests of justice to make sure that those same safeguards apply to the standard of review that the Supreme Court uses to determine the necessary connection between drugs and guns that warrants a mandatory sentence under Section 924(c)(1). The burden of proof upon the government to show the nexus between guns and drugs should be, at the very least, a requirement to show an active and relevant connection between the weapon and the offense.

A Policy Perspective: Inconsistent Mandatory Sentences

Section 924(c)(1), as amended, does not present much of an obstacle to a prosecutor's ability to obtain a conviction and mandatory sentence, and the prosecutor need not even utilize the other means at her disposal to do so. This reality is striking in comparison to the prosecutorial burdens in rape and murder cases, which are often cases that involve criminal defendants whose crimes were more heinous—but warranted shorter sentences—than those of drug and gun offenders. As Congressmen who opposed the 1998 amendment argued, the "unduly severe" nature of the mandatory minimum penalties simply does not comport with the penalties for other violent crimes.[54] For example, criminal sexual abuse, voluntary manslaughter, kidnapping, assault with intent to murder, and aggravated assault carry penalties of roughly six years, five years, four years, three-and-one-half years, and less than two years, respectively.[55] Yet, a defendant can receive between fifteen and thirty five years for possessing a gun in connection with a drug offense.[56] It "defies logic" to pass a law that results in some drug offenders receiving penalties that are six-to-seven times greater than the penalty for rape or voluntary manslaughter, when the drug offenders may not have caused any bodily injury.[57]

Mandatory federal sentencing statutes like Section 924(c)(1), as amended, also create a disparate impact upon society itself. This is particularly evident in the African-American community, where the "war on drugs" has done most of its damage.[58] According to Department of Justice statistics, at least eighty percent of all those persons arrested for drug offenses are African-American, even though African-Americans makes up only twelve percent of the nation's population.[59] The rigidity of mandatory sentencing

[52] *Id.* at 576.
[53] *Id.* at 578.
[54] H.R. REP. NO. 105-344, at 19 (1997).
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] Larry E. Walker, *Law and More Disorder! The Disparate Impact of Federally Mandatory Sentencing for Drug Related Offenses on the Black Community*, 10 J. SUFFOLK ACAD. L. 97, 98 (1995).
[59] *Id.*

warrants consideration of equal protection arguments for those persons most discriminatorily affected.[60]

This is not to propose that those guilty of drug offenses should not be penalized for their conduct, but it is to say that the sentences ought not be out of proportion to the danger the crimes present to society. Mandatory sentencing statutes like Section 924(c)(1) need safeguards to protect against the severity of the punishments and the disparate impact upon minorities. Section 924(c)(1) should employ a use standard that requires a legitimate connection between drugs and guns, and active employment of the weapon conforms more adequately to a system of justice that proposes to punish offenders in proportion to the dangerousness of the crime they commit.

[60] *See* Judge Arthur L. Burnett, Sr., *Permeation of Race, National Origin and Gender Issues from Initial Enforcement Contact Through Sentencing: The Need for Sensitivity, Equalitarianism and Vigilance in the Criminal Justice System*, 31 AM. CRIM. L. REV. 1153, 1172-75 (1994).